On Appeal

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Rules Were Meant to be Changed

By Stephen R. McCullough

A significant overhaul of parts 5 and 5A of the Rules of the Supreme Court of Virginia goes into effect on July 1, 2010. Overall, the changes make the rules clearer, but the changes will certainly require some adaptation.

Below is a quick overview, with an emphasis on changes having the most practical impact on the practice of appellate law. Fans of extraordinary writs and other exotica will have to parse those rules unassisted. Unless otherwise noted, citation to the rules refers to the new rule.

What stays the same

First, the most significant deadlines stay the same. For example, the notice of appeal is still due in 30 days, Rule 5:9(a), Rule 5A:6(a). Second, the colors of briefs and appendices do not change: white for the appellant's opening brief, blue for the appellee's brief, the joint appendix cover is red, and so on. Rule 5:31; Rule 5A:24. Although some rule numbers are adjusted, the numbers stay the same for the most often quoted rules. Thus, the procedural default rule stays at 5:25 and 5A:18.

Changes to the rules for both the Supreme Court of Virginia and the Court of Appeals of Virginia

Motions in both courts will require counsel to certify that the other side has been informed of the filing of the motion and counsel must also state whether the other party consents or intends to file a response in opposition. Rule 5:4(a)(1); 5A:2(a)(1).

In making assignments of error, counsel will now be required, consistently current practice in the Court of Appeals of Virginia, to specify "[a]n exact reference to the page(s) of the transcript . . . or record where the alleged error has been preserved." Rule 5:17(c)(1); Rule 5A:20(C).

The rules now expressly permit citation to unpublished dispositions. If the opinion is not widely available, a copy must be attached to the brief. Rule 5:1(f); Rule 5A:1(f).

Previously, motions for extension of time, where permitted at all, required a showing of "some extraordinary occurrence or catastrophic circumstance which was unpredictable and unavoidable." *See* Current Rule 5:5(a); Rule 5A:3(a). The new rule more modestly asks for a showing of "good cause sufficient to excuse the delay." Rule 5:5(a); Rule 5A:3(a).

Rules 5:17(c)(1) and 5A:20(a) previously required that case citations in the petition for appeal include both the Virginia reports and the Southeastern Reporter. That requirement is now dropped from the text of the rule.

The old requirement that counsel use certified mail, with a required receipt, is now one of several options. As in federal practice, after July 1 mailings can sent via commercial carriers like UPS and FedEx. Rule 5:5(c); Rule 5A:3(d).

In a codification of existing practice, amicus briefs are now expressly permitted at any stage. Rule 5:30(a); 5A:23(a).

Another codification of existing practice is the prohibition on incorporating arguments by reference. Rule 5:26(g); Rule 5A:19(e).

For criminal cases, the rules now specifically cover Anders briefs, briefs that must be filed in criminal cases when the client wishes to appeal, but counsel is not aware of any meritorious issues. Rule 5:17(h); Rule 5A:12(h).

Changes specific to the Supreme Court of Virginia

Change your template: the "questions presented" requirement is gone. Assignments of error, of course, are still required, with the same fatal consequences if omitted. Rule 5:17(c).

The new rule discourages the inclusion of memoranda of law in the joint appendix. Rule 5:32(a)(2). Counsel now has the option of filing 10 paper copies and 10 PDF copies of the joint appendix on a CD-ROM instead of 15 paper copies. Rule 5:32(a)(3)(ii). Previously, if the parties could not agree on the contents, counsel for the appellant would file a designation

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Message from the Chair

The newsletter you're reading is the first of its kind. The VBA's newest section is launching a series of reports to its members to report on news, notes, practice pointers, and other matters of interest to those who practice in the appellate courts. This first issue will go out to all VBA members; if you'd like to continue receiving these in the future, just let the VBA staff know to add you to the section's roster.

For now, in addition to the several timely articles you'll find in this issue, there are plenty of appellate developments to report. For the first time in at least a generation, the Supreme Court has adopted a comprehensive set of revisions to Parts 5 and 5A of the Rules of Court, effective July 1, 2010. If you practice in the state appellate courts, you'll need to know about these changes for the first brief or motion you file after that date. Check Steve McCullough's article in this issue for a summary of some of the key changes.

If you're attending the VBA's summer program in Hot Springs, be sure to listen in on the program that the Appellate Practice Section is co-sponsoring; it's a hot-off-the-presses review of the most important decisions from the United States Supreme Court's October 2009 Term, which will conclude barely three weeks before the date of this program. The panel discussion will feature nationally-recognized experts in Supreme Court jurisprudence. If you want to know right away what this year's Iqbal will be, plan to be there from 2:00 to 3:30 on Friday, July 23.

Our section's plans for this year include co-sponsoring (with the State Bar's Appellate Practice Committee) the second Virginia Appellate Summit in the fall. This is a wonderful opportunity to interact with others who are interested in our craft, and maybe to rub elbows with an appellate jurist or two. We will, of course, offer CLE opportunities for those who attend. Down the road, we're contemplating putting together a Fourth Circuit practice manual and periodic CLE programs that focus on appellate issues.

You aren't required to be a section member to attend either the program in Hot Springs or the summit, but please consider joining us; section dues are just $25 per year. You don't have to be an appellate practitioner to join. All you need is an interest in appellate practice, and a willingness to share some of your time with your colleagues. Your involvement can be as deep as you wish; as we all know, the more you put into something like this, the more you'll get out of it.

One last word about appellate practice itself: I have mused elsewhere that when you undertake to handle a trial, you have the opportunity to correct an injustice. When you take on an appeal, you can correct a thousand injustices, including many that won't arise until long after you're gone. When you address an appellate court, what you say and do *matters* to more than seven million people. If that idea intrigues you, come on aboard; we'll be happy to have you.

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The Appeal – The Newsletter of The Virginia Bar Association Appellate Practice Section Editor: Joseph R. Pope— Design by Kim Kovac. The Appellate Practice Section welcomes unsolicited articles, news and book reviews. Submissions should be sent by email to jpope@williamsmullen.com. The Appellate Practice Section reserves the right to edit, in collaboration with the author, or to decline to publish any submission.

Snyder v. Phelps: Issue Waiver and the Scope of Appellate Discretion

By Joseph R. Pope

The issue waiver doctrine, or procedural default rule, provides that courts will deem issues unveiled for the first time on appeal waived.[1] This "general rule"[2] further provides that appellate courts will not entertain issues omitted from the appellant's opening brief even if the parties argued the issue at trial.[3] According to one court, the rule is so embedded in federal appellate jurisprudence that courts "have invoked it with a near-religious fervor."[4] And to many, the rule animates the central tenet of the American adversarial system—that trained advocates will present their clients' case to impartial decision makers who will then decide the matter based on the facts and arguments submitted.[5] A Justice of the Supreme Court observed that the principle "is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one."[6] Accordingly, courts are discouraged from considering arguments not made by the parties and generally follow the "principle of party presentation,"[7] lest they be accused of engaging in so called "issue creation" or "*sua sponte* decision making."[8]

Yet, while the general rule provides that courts may only decide cases based on the facts and legal arguments presented by the parties, what are courts to do if parties, either intentionally or by mistake, fail to raise key issues or argue inapposite legal principles and doctrine? Shall the court proceed to resolve the parties' dispute based on an erroneous presentation of the law? Shall it decide a sweeping constitutional issue when a narrower non-constitutional ground is available? Shall it not consider an issue when doing so would work an injustice? In such circumstances, courts have proved their willingness to depart from the general rule and decide cases on grounds not raised or argued by the parties. Although the practice of departing from the general rule is often criticized, one judge extolled the practice as a hallmark of judicial greatness, saying "[d]espite much pretense to the contrary by judges and lawyers, it is one of the marks of the great judge to recast the issues in cases in his own image rather than to assume a passive, 'umpireal stance.'"[9] Moreover, recasting issues and deciding cases based on its own reasoning is consistent with the constitutional mandate inherent in Article III of the Constitution, which is that federal courts have the exclusive power and responsibility to "say what the law is."[10]

In fact, some of the Supreme Court's most eminent and influential cases were decided on grounds not advanced by the parties. For example, the Supreme Court in *Erie v. Tompkins*[11] overruled *Tyson v. Swift*[12] *sua sponte* and established the rule that federal courts in diversity cases must follow state common law. In *Mapp v. Ohio*,[13] without briefing or argument on the question, the Court overruled prior precedent and incorporated the Fourth Amendment exclusionary rule to the states via the Fourteenth Amendment. Similarly, in *Washington v. Davis*,[14] while the parties agreed that the Equal Protection Clause prohibited conduct having a racially disparate impact, the Court rejected this view and held that the Constitution bars only intentional discrimination. And, in *Romer v. Evans*,[15] the Court struck down an amendment to the Colorado state constitution that prevented the enactment of legal protections for gay people, relying on the arguments made by Professor Laurence Tribe in an amicus brief.[16]

The federal courts of appeal have followed a similar path. The Fifth Circuit in *Cousin v. Trans Union Corp.*,[17] held that in a case involving a punitive damages award in a defamation action, it had discretion to *sua sponte* consider whether the defendant had made willful misrepresentations. Similarly, in *National Assoc. of Social Workers v. Harwood*,[18] the court considered the question of whether the defendants were entitled to legislative immunity even though they neglected to raise the issue before the district court. The Fourth Circuit is no exception. For instance, the court in *Dickerson v. United States*,[19] *sua sponte* questioned whether 18 U.S.C. § 3501 abrogated *Miranda v. Arizona*,[20] despite the parties' refusal to brief and argue the question.

If anything, these examples demonstrate that despite sweeping rhetoric that the general rule of issue waiver is an inexorable command, its application is a matter of appellate court discretion. Yet, confusion arises because courts have failed to articulate or follow any consistent principle in exercising this discretion. The Fourth Circuit confronted this confused area of appellate jurisprudence in *Snyder v. Phelps*,[21] where a divided panel of the Fourth Circuit vigorously argued the question of whether or not to apply the issue waiver doctrine in a case presenting important First Amendment questions.

The dialectical exchange between the members of the *Snyder* panel illustrates concretely the public and institutional debate over the proper use of issue waiver and, by extension, the proper role of the federal appellate courts. Using the *Snyder* polemic as context, this article will explore briefly the competing visions of federal appellate court discretion underlying the debate between the *Snyder* majority and concurrence. As the case illustrates, these visions conflict when courts attempt to serve as impartial and passive decisionmakers on the one hand, while dispensing with their constitutional obligation to articulate and craft a consistent body of law on the other. The article concludes that important considerations of accuracy, judicial independence, and consistency militate in favor of the appellate courts' practice of exercising discretion to raise issues and frame cases in "their own image." Furthermore, there is little validity to arguments that appellate courts impermissibly expand their power by deviating from the party presentation principle; in fact, the practice often serves to restrict judicial power. Nonetheless, while it is prudent for federal appellate courts to exercise discretion and raise issues *sua sponte*, it is equally important that courts exercise this discretion in limited instances where important questions are involved to preserve the core interests reflected in the party presentation principle—litigant and societal respect and acceptance of decisions rendered by the courts.

The Snyder Majority: Issue Waiver as a Mandatory Doctrine

In *Snyder*, the Fourth Circuit considered the propriety of a jury verdict rendered against Fred Phelps and members of the Westboro Baptist Church.[22] Snyder filed the case after the defendants held a protest during his son's funeral—Snyder's son was a Marine Lance Corporal who lost his life in Iraq.[23] The verdict was based on three state law torts: invasion of provacy by intrusion upon seclusion, intentional infliction of emotional distress and civil conspiracy.[24] At the trial, the defendeants pressed several defenses, including that the First Amendment of the Constitution categorically protected their speech.[25]

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On appeal, the defendants primarily advanced their First Amendment claims, but also raised several other grounds for reversal, including that the district court lacked personal and subject matter jurisdiction; that Snyder had no privacy right in his son's funeral; that the punitive damages award violated due process; that the jury was biased; that the district court made prejudicial evidentiary errors at trial; that the civil conspiracy verdict was inconsistent with state law; and that Maryland's statutory cap on compensatory damages applied to the damages award.[26] The defendants did not argue, however, that the jury verdict was based on insufficient evidence, but an amicus brief did raise and argue the issue.[27]

A majority of the panel rejected all of the defendants' non-First Amendment claims and further ruled that by failing to raise the sufficiency of the evidence claim in their opening brief, the defendants had waived the claim on appeal. The court stated that it was of no consequence that the defendants had properly raised and litigated the sufficiency of the evidence question at trial and that amicus curiae had raised the issue in its brief.[28] The majority acknowledged that the Supreme Court did not adhere to a practice of strictly applying the rule, noting "that the Supreme Court has seen fit, in narrow and circumscribed circumstances of its own choosing" to address and dispose of issues not raised or argued by the parties, but it expressly declined to follow the Supreme Court's example—using language suggesting a view that discretion to depart from the general rule did not reside in the court of appeals.[29] Thus, despite the existence of an arguably colorable state law issue, the majority rigidly applied the issue waiver doctrine, saying "[b]ecause the Defendants have voluntarily waived any contention that the evidence is insufficient to support the verdict, we are obligated to grapple with and resolve the First Amendment issues[.]"[30]

To be sure, the view taken by the majority is consistent with the general rule governing issue waiver and further comports with the rationale that only litigants may frame the litigation as expressed by the party presentation principle. The Fourth Circuit has expressed the rule in mandatory terms on several occasions, such as in *Curry v. Beatrice Pocahontas Coal Co.*,[31] where the court stated that "[t]he normal rule of course is that failure to raise an issue for review in the prescribed manner constitutes a waiver."[32] In addition, the court in *Cavallo v. Star Enterprise*[33] explained that issues of fundamental fairness required a strict application of the rule. Specifically, it stated that by omitting an issue from its initial brief, the appellant had deprived the appellee of an opportunity to respond to its arguments and considering the newly raised issue "would be unfair to the appellee."[34] The language used by the court in *Cavallo* implies that due process interests are at stake and a strict application of the rule is justified on grounds that a party may be deprived of notice and a meaningful opportunity to be heard if a court decides a case on grounds not briefed.[35]

Additionally, interests of judicial efficiency and practical wisdom provide support for the general rule. Courts foster democratic and participatory values by allowing parties to fully participate in the adjudication of their case. Indeed, a litigant who feels he was provided a full and fair opportunity to litigate his claims is more likely to accept the results, favorable or not.[36] In addition, the rule provides parties an incentive to fully litigate their case and not strategically conceal legal arguments in hopes of catching their adversary off-guard. As one court reasoned, "it would not be quite cricket"[37] to decide a case on an issue a party raised at the eleventh hour because the opposing party may have been lulled into presenting his case differently. Furthermore, by forcing litigants to present all relevant legal issues and arguments, the rule increases the likelihood that a court will decide the case based on a fully developed record, thus encouraging a more complete and timely decision.

Certainly, the *Snyder* majority's ruling is not without precedential and policy support, as it promotes the party participation principle and the adversary model of adjudication. But, as "[a] foolish consistency is the hobgoblin of little minds,"[38] so is the mechanical application of a rule of law the incubus of inequitable and imprudent results. As demonstrated by Snyder, in reviewing the case as presented by the parties and bypassing a narrow and ordinary state law issue, the majority may have unnecessarily decided a broad and complex First Amendment question; thus violating an important canon of constitutional jurisprudence designed to limit judicial encroachment upon democratic interests.[39]

The *Snyder* Concurrence: Issue Waiver as a Discretionary Principle

In his concurrence, Judge Shedd argued that the majority erred by proceeding to the First Amendment question when the trial court's decision could be reversed on grounds that the plaintiff failed to offer sufficient evidence to support his state law claims at trial.[40] He pointed out that "[u]nder the doctrine of constitutional avoidance, we are to avoid constitutional determinations when other grounds exist for the disposition of the case."[41] In his view, the waiver doctrine must yield to this prudential doctrine of constitutional interpretation. And he pointedly disagreed with the majority's ruling that the general rule of issue waiver is absolute, stating that "[o]ur judicial power to decide a case is not limited by the arguments and actions of the parties."[42]

This flexible reasoning reflects the greater weight of authority and a sounder view of federal appellate court power. Indeed, the Supreme Court has expressly declared that the courts of appeal possess the authority to resolve questions not presented by the parties, as well as issues raised for the first time on appeal.[43] While declining to announce a general rule to define the scope of this discretion, the Court has said that, "[c]ertainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt or where injustice might otherwise result."[44] Signaling its recognition of a broader authority, it further noted that "[t]hese examples are not intended to be exclusive."[45]

Fourth Circuit precedent demonstrates that the court has recognized and applied this power. For instance, the court stated, "in very limited circumstances we may consider [an issue raised for the first time on appeal] if the error is "plain" and our refusal to consider it would result in a miscarriage of justice."[46] And in another case the court said, "[t]he normal rule of course is that failure to raise an issue for review in the prescribed manner constitutes a waiver. But the rule is not an absolute one and review may proceed (even completely *sua sponte*) when the equities require."[47] Furthermore, in *Dickerson v. United States*, a case concerning whether a defendant's statement to the police should be suppressed, the Fourth Circuit *sua sponte* considered whether a federal statute enacted in 1968, 18 U.S.C. § 3501, overruled *Miranda* and established a more lenient standard for the admission of confessions. For three decades, the federal government had a policy of not relying on the statute because it viewed the provision as unconstitutional and thus argued only that the defendant's confession should be admitted into evidence because the defendant waived his *Miranda* rights before confessing to the crime. Despite the government's refusal to argue the issue, the Fourth Circuit *sua sponte* raised the question and found that § 3501 was constitutional and had displaced *Miranda*.[48]

The existence of judicial discretion to frame and decide cases on its own terms is a necessary dimension of the federal appellate court's responsibility to "say what the law is." While Article III of the Constitution fails to explicitly define the precise role of the judiciary, several principles derived from the article support the exercise of judicial power to craft cases in a way contrary to how they were presented by the parties. Since *Marbury v. Madison*,[49] and the advent of modern judicial review, an essential function of the federal judiciary has been to announce publicly not only the winner of a particular case, but also the meaning of the law as

applied to that case, which in turn provides guidance to the public on how the law will apply in future cases.

In those cases where the parties fail to accurately and completely describe applicable legal doctrine or abandon a viable argument presented before the trial court, the court's duty to follow the party presentation principle collides with its duty to announce an accurate uncolored rule of law. Indeed, as judicial decisions are objective statements describing the meaning of law, and not statements concerning the subjective view of the law taken by litigants, courts must be able to *sua sponte* take notice of issues and legal principles either mistakenly or intentionally omitted by the parties. As one commentator aptly noted: "If litigants could constrain courts through their own truncated or inaccurate depictions of the meaning of statutes, constitutional provisions, and the like, they could effectively wrest this task away from the courts, putting federal judges in the impoverished role of picking and choosing from among the litigants' interpretations of the law, rather than their own."[50]

Additionally, Article III's requirement that courts decide only actual cases or controversies may be violated in the absence of judicial discretion to consider issues not raised by the parties. A judge of the Court of Appeals for the District of Columbia Circuit recognized this danger in *Independent Insurance Agents of America, Inc. v. Clarke*:[51]

I think it most apparent that federal courts do possess [the power to raise issues sua sponte*]. The alternative is that the parties could force a federal court to render an advisory opinion. What the dissenters in effect argue is that the parties can stipulate to the state of underlying law; frame a law suit, assuming that stipulation; and obtain from the court a ruling as to what the otherwise dispositive law would be if the stipulated case were in fact the law. Indeed, that is precisely what would have occurred in this case had the panel not, sua sponte, raised the question . . . .*[52]

In its review of the case, the Supreme Court agreed with this position saying, "[t]he contrary conclusion would permit litigants, by agreeing on the legal issue presented, to extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory."[53]

The practice is also justified as a means of protecting the integrity of the courts and their independence. It is important that the courts not cede their authority as independent decision makers to parties whose litigation agenda may be in conflict with the court's responsibility to provide an accurate and narrowly tailored articulation of the law. For instance, a party may decline to argue a particular line of legal reasoning because of a political agenda. An example of this is *Gonzales v. Carhart*,[54] where the Planned Parenthood Federation of America chose not to argue that the federal statute at issue was an unconstitutional regulation of interstate commerce, even though several justices indicated they were receptive to the argument, presumably because the organization supported a broad interpretation of Congress's commerce power.[55] Special interest groups, as well as state and federal governments, will often avoid citing and relying on legal doctrines they dislike or lines of precedent they hope will be overturned. In these instances, courts should have the discretion to consider issues and arguments not presented by the parties, because otherwise litigants will gain control over an essential judicial function.

What is more, litigants may seek to use the courts as vehicles to make maximalist constitutional declarations that promote countermajoritarian values. Courts generally favor incremental and measured steps to sweeping declarations of constitutional norms because broadly worded opinions undermine legislative processes, lead to unintended consequences, and put in place rigid rules that provide little flexibility for deciding future cases. Adherents of this minimalist judicial philosophy advocate a modest role for the courts out of a belief that the majority of public policy decisions should be made by the political branches of government.[56] Some litigants, however, mistrust the political branches and turn to the courts seeking opinions that will define the scope of their constitutional rights in the broadest possible terms.

Because their goal may be to have a court issue a sweeping constitutional ruling to further their views, these litigants have an incentive to omit arguments based on narrower, less controversial, grounds. The constitutional avoidance doctrine counsels against allowing litigants to frame their case in this manner. The doctrine reflects a prudential institutional practice implemented by the federal judiciary to refrain from making broad constitutional pronouncements that place the courts in conflict with democratic institutions. Litigants, however, often do not share the judiciary's interest in avoiding such conflicts, and may turn to the courts to bypass democratic processes.[57] As appellate litigation has become as much about setting precedent and guiding policy as actually deciding individual disputes, courts should have the discretion to reach beyond the arguments made by the parties to narrow the scope of their decisions and avoid unnecessary constitutional rulings that strike down legislative actions.

The Snyder concurrence embraced this rationale in arguing that the court should look to whether a decision could be reached on state grounds before proceeding to the First Amendment issue advanced by the defendants. Surely, it is not unreasonable to suspect that the defendants in *Snyder*—many of whom are attorneys and have a far reaching political and social agenda—may have intentionally omitted certain arguments on appeal in hopes of inducing the Fourth Circuit into rendering a broad First Amendment ruling. A ruling they could use not only as a shield to avoid liability in the instant case, but also as a sword to strike down state and federal statutes that might limit their ability to protest military funerals in the future.[58] Accordingly, it is wise for courts to possess and exercise discretion to go beyond the four corners of the litigant's briefs, otherwise litigants may be encouraged to manipulate the court's interpretive function and force courts to decide sweeping constitutional questions when a more conservative and less divisive methodology is available.

Defining the Scope of Appellate Discretion to Disregard the General Rule

As the *Snyder* majority found, federal courts generally follow the praxis of ignoring issues not raised by the parties, however, the underlying duty of federal courts to accurately pronounce objective rules of law based on actual controversies and to avoid unnecessary constitutional decisions, militate against the majority's holding that courts are "obligated" to strictly apply the issue waiver doctrine. While it is unwise to restrict courts to deciding cases based strictly on the issues and legal arguments of the parties, it is equally unwise for courts to exercise discretion carte blanche and ignore completely the party participation principle. And it is the indeterminate phrasing of the exception that often leads to confusion of the bounds of appellate discretion. In the Fourth Circuit, for example, the court has said that it may only depart from the party presentation principle when "the equities require" or when "refusal to consider [the

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question] would result in a miscarriage of justice." While the Supreme Court has expressed its unwillingness to state a specific rule, the decisions of other courts of appeal provide some clarity on the appropriate scope of discretion.

Courts have uniformly ruled that they may depart from the general rule to examine subject matter jurisdiction and standing, as these questions concern the court's capacity to hear a case.[59] Courts have also departed from the general rule when the issue is purely legal in nature, and lends itself to satisfactory resolution on the existing record without further development of the facts.[60] Issue creation may also be warranted when questions of "constitutional magnitude"[61] are involved—this would include instances where the doctrine of constitutional avoidance would apply.[62] Courts may also s*ua sponte* decide to reexamine a precedent or doctrine so deeply entrenched in the law that a litigant might not think to challenge it.[63] A court may also ignore the rule when the omitted argument is "highly persuasive, a circumstance that often inclines a court to entertain a pivotal argument for the first time on appeal, particularly when declining to reach the omitted argument threatens a miscarriage of justice."[64] Federal courts also look to whether consideration of an omitted issue will prejudice the appellee and deprive him of an opportunity to respond, as well as whether the appellant's omission was entirely inadvertent rather than deliberate.[65] Lastly, courts will consider omitted issues of great public importance. These are questions touching upon policies such as federalism, comity, and respect for the independence of democratic institutions.[66]

These rulings provide some guidance on the bounds of appellate discretion to create issues and depart from the party participation principle. Many of these cases point out; however, that discretion to depart from the general rule is highly circumscribed and warranted only in extraordinary circumstances. Otherwise, courts may be left open to allegations that they have created issues and crafted rulings to accord with their personal preferences and political views.

Conclusion

Consistent application of the general rule of issue waiver remains the norm in our adversarial system, as the rule fosters important and worthwhile systemic ends. The general rule may not be dismissed as an insignificant technicality or a trap for the indolent, as the rule animates our adversarial system and promotes fairness and judicial economy. Nevertheless, the *Snyder* majority's formulation of the rule as an inexorable command and its decision that the important policies inherent in the constitutional avoidance doctrine must yield to the general rule of issue waiver is inapposite to the greater weight of Supreme Court and Fourth Circuit precedent and the general policies effectuated by the existence of an exception to the general rule.

The concurrence correctly identified that the court possessed the authority to consider issues not raised by the parties and its argument that the court should have considered an issue not raised by the parties in an effort to avoid a ruling on constitutional grounds is convincing. Indeed, such discretion permits the federal appellate courts to perform their essential functions as both arbiters of disputes and objective interpreters of law. Nonetheless, while appellate courts possess discretion to reach issues not argued, such discretion should be affirmatively exercised only in extraordinary cases where the equities preponderate in favor of such a step.

Notes

1) *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Lytle v. Household Mfg., Inc*., 494 U.S. 545, 552, n. 3, (1990) ("Applying our analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion").
2) Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 Vand. L. Rev. 1023, 1028 (1987).
3) *See, e.g., Cavallo v. Star Enter*., 100 F.3d 1150, 1152 n. 2 (4th Cir. 1996).
4) *Nat'l Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 627 (1st Cir. 1995).
5) *See* Adam A. Milani & Michael R. Smith, P*laying God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 Tenn. L. Rev. 245, 247 (2002).
6) *Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., concurring).
7) *Greenlaw v. United States*, 128 S. Ct. 2559, 2564 (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.").
8) *See* Milani et al., *supra* note 5, at 247-48.
9) Richard A. Posner, *Cardozo: A Study in Reputation* 144 (1990).
10) *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
11) 304 U.S. 64 (1938).
12) 47 U.S. 1 (1842).
13) 367 U.S. 643 (1961).
14) 426 U.S. 229 (1976).
15) 517 U.S. 620 (1996).
16) Amanda Frost, *The Limits of Advocacy*, 59 Duke L.J. 447, 465 (2009).
17) 246 F.3d 359 (5th Cir. 2001).
18) 69 F.3d 622 (1st Cir. 1995).
19) 166 F.3d 667 (4th Cir. 1999), *rev'd on other grounds*, 528 U.S. 428 (2000). Some scholars strongly criticized the Fourth Circuit for raising the statute sua sponte. Erwin Chemerinsky, *The Court should Have Remained Silent: Why the Court Erred in Deciding Dickerson v. United States*, 149 U. Pa. L. Rev. 287, 292 (2000) ("The courts exceeded the appropriate judicial role in raising a major constitutional issue not presented by the parties . . . . ").
20) 384 U.S. 436 (1966).
21) 580 F.3d 206 (2009).
22) I*d.* at 210.
23) *Id.*at 211.
24) *Id.*at 210.
25) *Id.*at 212-13.
26) *Id*. at 216.
27) *Id.* The Thomas Jefferson Center for the Protection for Free Expression raised the issue in its amicus curiae brief.
28) *Id.*at 216-17.
29) *Id.* at 217.
30) *Id*.
31) 67 F.3d 517 (4th Cir. 1995).
32) *Id*. at 522 n. 8.
33) 100 F.3d 1150 (4th Cir. 1996)
34) *Id*. at 1152 n. 2.
35) *See also* Barry A. Miller, S*ua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 San Diego L. Rev. 1253 (2002).
36) *See Jefferson Fourteenth Assocs. v. Wometco de Puerto Rico, Inc.*, 695 F.2d 524, 527 (11th Cir. 1983) ("Even if its claim ultimately has no merit, a party who brings a claim in good faith has a due process right to litigate that claim . . . . The order . . . *sua sponte* dismissing the case failed to give Wometco its due process rights to file a written response, present its arguments at a hearing, and amend its complaint."); Frost, supra note 12, at 459.
37) *Principal Mut. Life Ins. Co. v. Charter Barclay Hosp., Inc.*, 81 F.3d 53, 56 (7th Cir. 1996).
38) Ralph Waldo Emerson, S*elf Reliance, in Essays: First Series* (1841).
39) This article takes no view on whether the court should have reversed the district court based on insufficiency of the evidence. It only suggests that the court should have at least considered the question before moving to the First Amendment issues.
40) *Snyder,* 580 F.3d at 228 (Shedd, J. concurring in judgment).
41) *Id*. at 227. The doctrine of constitutional avoidance was introduced by Justice Brandeis in his concurring opinion in *Ashwander v. Tennessee Valley Authority.*, 297 U.S. 288 (1936). There, Justice Brandeis said, "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Id.* at 347.
42) *Snyder*, 580 F.3d at 227.
43) *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).
44) *Id.*
45) *Id*. at n. 8.
46) *Stewart v. Hal*l, 770 F.2d 1267, 1271 (4th Cir. 1985).
47) *Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 522 n. 8 (4th Cir. 1995).
48) The Supreme Court appointed an amicus to argue the Fourth Circuit's position, and reversed finding that *Miranda* could not be overruled by legislative action. *Dickerson v. United States*, 530 U.S. 428, 438 (2000).
49) 5 U.S. (1 Cranch) 137 (1803); See Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 Cal. L. Rev. 1, 5 (2003) ("Marbury not only represents the fountain-

head of judicial review, but also furnishes the canonical statement of the necessary and appropriate role of courts in the constitutional scheme.").
50) Frost, *supra* note 16, at 472.
51) 965 F.2d 1077 (D.C. Cir. 1992), *rev'd on other grounds sub nom. U.S. Nat. Bank of Oregon v. Independent. Ins. Agents of America, Inc.*, 508 U.S. 439 (1993).
52) *Id.* at 1078 (Sentelle, J., concurring).
53) I*ndependent. Ins. Agents of America, Inc.*, 508 U.S. at 447.
54) 127 S. Ct. 1610 (2007).
55) *See id.* at 1640 (Thomas, J. concurring) ("I also note that whether the Act constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it.").
56) *See generally* Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999).
57) *See* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 Colum. L. Rev. 1189 (2006).
58) The Defendants have been involved in litigation relating to their protests throughout the country. *See, e.g., Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir. 2008); *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008). Additionally, forty states and the federal government have enacted legislation addressing funeral picketing. See Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. Kan. L. Rev. 575, 576 (2007).
59) *See* Erwin Chemerinsky, *Federal Jurisdiction* 258 (3d ed. 1999); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992).
60) See *United States v. La Guardia*, 902 F.2d 1010, 1013 (1st Cir. 1990).
61) *Id.*
62) *See Amoco Oil Co. v. United States*, 234 F.3d 1374, 1378 (3d Cir. 1980).
63) S*ee Hartmann v. Prudential Ins. Co. of Am.*, 9 F.3d 1207, 1215 (7th Cir. 1993).
64) *See United States v. Krynicki*, 689 F.2d 289, 291-92 (1st Cir. 1982).
65) *See Nat'l Assoc. of Social Workers*, 69 F.3d 622, 628 (1st Cir. 1995).
66) See *Cincinnati Indem. Co. v. A&K Constr. Co*, 542 F.3d 623, 625 (8th Cir. 2008) (raising abstention *sua sponte*); Nair v. Oakland County Cmty. Mental Health Auth., 443 F.3d 461, 474 (6th Cir. 2006) (raising sovereign immunity sua sponte); Scherer v. Equitable Life Assurance Soc'y, 347 F.3d 394, 398 n.4 (2d Cir. 2003) (noting that "a court is free to raise [res judicata] sua sponte"); *Stone v. City and County of San Francisco*, 968 F.2d 850, 855 (9th Cir. 1992).

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Rule Changes

Continued from cover

within 15 days of issuing the certificate of the clerk, and counsel for the appellee then had 10 days to file a separate designation. *See* Current Rule 5:32(d). Under the new rule, counsel for the appellee gets an extra 5 days, i.e. a total of 15 days, to make a joint designation. *See* Current Rule 5:32(b)(1). In other words, both sides now have 15 days to file a designation. Also, under the old rule, counsel had to provide three copies of the appendix. Rule 5:32(b) (citing Rule 5:26(d)). Now only two copies must be provided to opposing counsel. Rule 5:32(a)(3).

One new and significant change involves multiparty cases. Rule 5:8A permits an appeal from a partial final judgment in such cases, provided a trial court enters an order expressly labeled "partial final judgment" and makes the findings required by the rule.

The rules permit the option of using either a word count or a page limitation for briefs. *See, e.g.*, Rule 5:17(f) (35 pages or 6,125 words for a petition for appeal); Rule 5:18(b) (25 pages or 4,375 words for a brief in opposition). If a word count is used, counsel must certify that the word limitations are being observed. Rule 5:1(d).

Changes specific to the Court of Appeals of Virginia

Change your template alert: questions presented are now a thing of the past. Like the Supreme Court of Virginia, the Court of Appeals will require assignments of error and, like the Supreme Court of Virginia, failure to make them will result in dismissal of the appeal. Rule 5A:12(c)(1).

Unlike the new Supreme Court of Virginia rule, which provides counsel with a choice between a page limit and a word count, the Court of Appeals will rely on word counts exclusively. *See, e.g.*, Rule 5A:12(e) (petition for appeal limited to 12,300 words); Rule 5A:13(b)(1) (brief in opposition limited to 8,800 words); Rule 5A:15(b)(3) (petition for rehearing limited to 5,300 words). Counsel must certify compliance with these word counts. Rule 5A:1(d). The body of the brief is what matters for the word count: tables and certificates are excluded. *Id.*

Also, an extension of time of the briefing deadlines can now be requested after the fact, provided it is filed "no later than 10 days after the expiration of the deadline." Rule 5A:19(b)(4).

Despite some harmonization of rules between the Court of Appeals and the Supreme Court, the font size still differs. For the Court of Appeals, it stays at a minimum 12 point font, Rule 5A:4, whereas the Supreme Court of Virginia requires 14 point font. Rule 5:6(a)(2).

Finally, a new rule permits the Court of Appeals to order a settlement conference. Rule 5A:37. A party can opt out of the settlement conference, but must file an objection in writing specifying the ground of the objection. Rule 5A:37(a).

Stephen R. McCullough is Senior Appellate Counsel with the Office of the Attroney General in Richmond.

I'm So Confused

By J.R. Zepkin

In *Super Fresh Food Markets of Virginia, Inc. v. Ruffin 263 Va. 555* (2002), the Supreme Court of Virginia explained when the 21 day period under Rule 1:1 starts and when it may be extended. This is important for appellate practitioners because the mechanics of determining the beginning of the 30 day period for filing a Notice of Appeal to either appellate court is the same. Super Fresh had its appeal dismissed for failing to file a Notice of Appeal on time. The core issue in *Super Fresh*, and in a number earlier cases, was when is an order a final judgment, engaging the beginning of the 21 (and 30 day) periods.

In *Super Fresh*, the Supreme Court held that if it is a final order, than the running of the 21 day clock (and inferentially, the 30-day clock) can be interrupted in **only** three ways: modification, vacation or suspension. Any other method, such as a later order reserving jurisdiction over the case is not effective.

The court delineated an easy to understand rule for determining if the order you're interested in is a final order. Justice Koontz wrote for the court:

[W]hen a trial court enters an order , or decree, in which a judgment is rendered for a party, unless that order expressly provides that the court retains jurisdiction to reconsider the judgment or address other matters still pending in the action before it, the order renders a final judgment and the twenty-one day time period prescribed by Rule 1:1 begins to run.

If a circuit court renders judgment for a party and there is nothing in the order to suggest that the court is retaining jurisdiction, the 21-day period, **as well as the 30-day period for filing a Notice of Appeal**, will begin to run. The only way either time clock can be interrupted is by the trial judge, within the 21 day period, modifying, vacating or suspending that order. No other mode will work.

The holding in *City of Suffolk v. Lummis Gin Company*, 278 Va. 270 (2009), in an opinion again by Justice Koontz, raises questions about *Super Fresh*'s reliability.

An issue in *Lummis* was a dispute over whether a motion for a non suit was for a first [of right] or a second non suit. The judge entered an order on February 12, 2008 granting the City's motion for a non suit without prejudice and the same order further recited "this suit shall remain on the docket for the Court to determine issues concerning attorneys' fees, costs and expense incurred by the Baker heirs." The defendants contended it was a second non suit and that the court was thus empowered to award these expenses as a condition of granting the non suit.

The judge later held a hearing and ultimately on September 09, 2008, entered an order finding that it was a second non suit and awarded the various costs sought. The City appealed. The Supreme Court held that the February 02, 2008 order was a final judgment and that after 21 days from its entry, the trial court no longer had any authority to make an award. The Supreme Court cited an earlier case, *James v. James* 263 Va. 474 (2002) for its holding in Lummis that an order granting a non suit is a final Rule 1:1 order, even if there were pending motions for consideration by the court.

While the *Lummis* opinion cites *Super Fresh*, it does not explain why the February 02, 2008 order in *Lummis* was a final order when the judge included **in that order** that the matter was to remain on the court's docket for the court to decide other issues that were pending.

We are left with the question: how did the *Lummis* February 08, 2008 order fail to "expressly provide[ ] that the court retains jurisdiction to reconsider the judgment or address other matters still pending in the action before it," under *Super Fresh*, rendering it a non final order. One suggestion offered is that the only way to prevent the order from being a final Rule 1:1 order is to use the express language in *Super Fresh* that the court retains jurisdiction to reconsider the judgment or address other matters still pending in the action before the court. Alternatively, one could avoid this sinkhole by asking the court to suspend the order until further notice of the court.

Unless one of our readers has an explanation that reconciles the *Super Fresh* and *Lummis* cases, it appears that our period of clarity has taken a walk. Remaining questions that I can think of are: (i) will only the language quoted above from *Super Fresh*, "...retains jurisdiction to reconsider...." operate to prevent the order from being a final judgment; (ii) does the Lummis holding apply only to non suit orders; and (iii) is the SCV backing off from the language in *Super Fresh*?

J.R. Zepkin was a General District Court judge from 1973 to 2003. Now retired, he has been a lecturer at the William & Mary Law School from 1974 to present.

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