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The Claim of Issue Creation on the U.S. Supreme Court

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We argue that a variant of the sua sponte *doctrine, namely, the practice disfavoring the creation of issues not raised in the legal record, is a norm with substantial consequences for the U.S. Supreme Court. Without it, justices would act considerably more like legislators, who are free to engage in "issue creation," and less like jurists, who must wait for issues to come to them. Yet, McGuire and Palmer claim that justices engage in issue creation in a "significant minority" of their cases. We dispute this finding because we think it is an artifact of the way McGuire and Palmer collected their data. Indeed, for virtually every case in which they found evidence of issue creation, we show that the issue was actually present in at least one of the litigants' briefs. This suggests that justices may be policy seekers, but they are not policy entrepreneurs; and that briefs filed by third parties (such as amici curiae) are generally not a source of important issues considered by the Court.*

In 1963, the U.S. Supreme Court received seven cases for review which, in one way or another, touched on the subject of capital punishment. In none of these petitions did attorneys raise questions concerning the constitutionality of the death penalty; rather, all the claims hinged on procedural matters (e.g., challenges to the voluntariness of defendants' confessions, and not to their sentences per se).[1] Yet, prior to the conference at which the Court would decide whether to hear these cases, Justice Arthur Goldberg circulated a memo informing the justices that he would raise this question: "Whether and under what circumstances, the imposition of the death penalty is proscribed by the Eighth and Fourteenth Amendments to the U.S. Constitution." He recognized that none of the attorneys briefed this issue; nonetheless, he felt the Court should consider the question because he was convinced that "evolving standards of decency ... now condemn as barbaric and inhumane the deliberate institutionalized taking of human life by the state." Most of the Goldberg's colleagues were startled by his memo, complaining that it went well beyond their authority, that to implement his plan, the Court would have to proceed *sua sponte* (on its own, without prompting or suggestion). In the end, the justices not only rejected the memo's suggestion but also refused to hear the cases.

This story, and many others we could tell, suggests that a particular variant of the *sua sponte* doctrine, namely, the practice disfavoring the creation of issues not raised in the record before the Court,[2] is a norm: It establishes expectations, both in and outside the Court, about the way justices should behave; it tends to generate informal sanctions from other justices when it is not followed; and knowledge of it is widely held by members of the legal community (see, generally, Knight 1992). Thus, we can speculate on why the majority of the Court was so taken aback by Goldberg's memo and why it took the action it did:[3] Because the memo deviated from a norm the justices had come to accept, they "sanctioned" Goldberg by rejecting his invitation to reconsider the constitutionality of capital punishment.[4]

Framed in this way, the norm disfavoring the creation of issues is just as important as other Court norms scholars have uncovered, including the Rule of Four (see Perry 1991), the norm favoring respect for precedent (see Knight and Epstein 1996; cf. Segal and Spaeth forthcoming), and the norm of consensus (see Walker, Epstein, and Dixon 1988). In fact, it may be even more important. For if the norm of *sua sponte* did not exist, the justices would be free to raise any issue they so desired in any given case, even if attorneys had not briefed that issue. The implications of such behavior are of no small consequence. Most important, justices would act a good deal more like members of Congress, who are free to engage in "issue creation," and less like jurists, who must wait for issues to come to them. Thus, we could imagine rational, policy-seeking justices attempting, as a matter of course, to engage in strategic agenda setting—even after cases have been accepted, briefed, and argued—in order to manipulate case outcomes, just as do members of Congress over legislative proposals (see, e.g., Calvert and Fenno 1994).

If the Court were to operate free from a norm

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[1] We adopt this discussion from Epstein and Kobylka 1992, 42–3.

[2] Other variants of the *sua sponte* doctrine obligate a court to act, rather than prohibit a court from acting, "on its own." Most of these pertain to trial courts, such as the duty to conduct *sua sponte* inquiries into defendants' competence to stand trial (see Owel 1994), but a few implicate appellate courts (e.g., if such courts believe that they do not have jurisdiction to hear a particular dispute, they are obliged to so rule even if no party raised the issue). Here we focus exclusively on the variant preventing a court from acting without prompting, the norm disfavoring the creation of issues.

[3] Of course, there are other possible explanations, such as the Court's unwillingness to involve itself in a highly controversial issue area in the wake of *Brown* v. *Board of Education* (1954) (see Gray and Stanley 1989, 330).

[4] The Goldberg memo also shores up an important point about norms: Individual violations of them will occasionally occur. We take this up later in the article.

disfavoring issue creation, then other implications are easy enough to develop,[5] but the general point is simple: Without the norm the Court would no longer resemble a legal body in the way that scholars, attorneys, and jurists (not to mention Article III of the U.S. Constitution) contemplate such fora. One may even argue that a more-than-occasional deviation from this variant of *sua sponte* would undermine the Court's legitimacy. This follows from the fact that the legal community has come to believe that the legitimate judicial function involves review of the issues before it, not the creation of new issues (see, e.g., Llewellyn 1960). Thus, that community might reject as normatively illegitimate Court decisions that regularly and systematically create or "discover" issues (see, generally, Knight and Epstein forthcoming). As one scholar put it, "when the parties choose issues, there is little opportunity for judges to pursue their own agendas and, as a consequence, the proceedings are not only fairer, but are perceived to be fairer" (Krimbel 1989, 943). But, if the Court *departs* from this practice, it

> raises questions as to the impartiality of [its] actions, and such speculation tarnishes the Court's legitimacy. Litigant control of the issues is important to satisfy not only the parties, but society as well. . . . When the Court [discovers] issues that the litigants have not presented the Court erodes its credibility and trespasses on the soul of the adversarial system (p. 943).

Yet, in their 1995 *American Political Science Review* article, McGuire and Palmer—in a larger study on issue suppression and creation—claim to provide evidence of such a departure: In 18 of the 160 cases in their sample, the justices created issues that attorneys did not brief. As they put it (p. 699),

> in a significant minority of cases, the members of the Court provide authoritative answers to questions that have not been asked. . . . Such expansion . . . of questions is not at all inconsequential because "via the manipulation of issues, the Supreme Court is exercising a role in the American political system for which it is generally not held accountable."

This claim not only suggests that the norm disfavoring issue creation fails to have the force that the legal community assumes but also that it is not a norm at all. Rather, in McGuire and Palmer's account, it is a "social practice" from which the justices feel free to deviate on a relatively regular basis.

In what follows, we take issue with McGuire and Palmer's finding, for we think it is an artifact of the way they collected their data. And, perhaps not so surprisingly, our results support this intuition: For virtually every case in which McGuire and Palmer found evidence of issue creation, we show that the issue was actually present in at least one of the attorneys' briefs. This leads us to conclude that the traditional view is correct: The practice disfavoring the creation of issues is, in fact, a norm; and it is one of several institutions that separates courts from legislators. That is, justices may be policy seekers, as so much of the literature characterizes them (see, e.g., Segal and Spaeth 1993), but they are not policy entrepreneurs, as are members of Congress or as McGuire and Palmer's account implies.

A REEVALUATION OF THE MCGUIRE AND PALMER DATA COLLECTION SCHEME

In reaching the conclusion that the Court occasionally creates or "discovers" issues, McGuire and Palmer compared the syllabi in the *U.S. Reports* (for orally argued cases decided during the 1988 term) with the "Questions Presented" in the briefs submitted on the merits by the parties. They claim that this approach enables scholars to assess the two forms of issue discovery: "(1) the justices may rule on an issue completely unique to a case . . . or (2) the justices may specifically answer a question presented at a level of generalization greater than is necessary to cover that question" (p. 700).

Several flaws, in our view, exist in this scheme—flaws that may be sufficient to undermine the McGuire and Palmer claim that the Court creates issues in a "significant minority" of its cases. The first deficiency is straightforward enough: Comparing syllabi with questions is akin to mixing apples and oranges. Syllabi, while synopses, provide the highlights of the key points contained in the Court's opinion or judgment. In direct contrast, "Questions Presented" should, under the Court's own rules, "express concisely . . . the circumstances of the case, *without unnecessary detail*. The questions should be *short* and should not be argumentative or repetitive" (emphasis added). Table 1, which displays the questions and the syllabus in one of McGuire and Palmer's issue-creation cases (*Barnard* v. *Thorstenn* [1989]), vividly illustrates this distinction. As we can see, attorneys in *Barnard* followed the Court's admonition that questions should be concise, while the Court reporter took the opposite tack in the syllabus, summarizing virtually all the key points. More generally, for those cases in which McGuire and Palmer found issue creation, the ratio of points raised in the syllabi to "Questions Presented" is more than 2:1.[6] Surely, these data, not to

[5] For example, we know from the congressional literature that legislators seek to make good policy and to gain reelection but, in so doing, they face considerable uncertainty about the substantive and political ramifications of alternative courses of action. Interest groups, by lobbying and mustering grassroots pressure, provide valuable information on the views of organized and intense constituents (see, e.g., Hansen 1991) and about the policy consequences of their actions, thereby reducing risk for legislators (Krehbiel 1991).

In a legal world unconstrained by a norm disfavoring the creation of issues, justices would face similar uncertainty—not about their constituents but about the actions their colleagues might take and about the political, economic, and social ramifications of their decisions. Yet, the results might be different from what occurs in Congress; that is, we might predict a decline in the importance of attorneys and interest groups, rather than an increase in their value to the justices. To see why, consider a world in which justices could transform a case in which attorneys raised First Amendment claims into one involving search and seizure or privacy or capital punishment, and so on. In such a world, attorneys, interest groups, and other "lobbyists" would have difficulty identifying even the proximate grounds on which the Court would decide the case. And, even if they could, they would be unable to load up their submissions with the range of possible issues in light of Court rules limiting the length of briefs. Of course, justices—realizing that attorneys were not in a position to provide them with useful information—might simply disregard written submissions.

[6] The total number of "Questions Presented" in the 18 cases was 40 (mean = 2.2 questions per case); the total number of points (issues)

TABLE 1. A Comparison of the Syllabus (Excerpted Version) and Questions Presented in *Barnard* v. *Thorstenn* (1989)

Syllabus in *U.S. Reports* (excerpted)	Question in Petitioners' Brief	Question in Respondents' Brief
1. The Court will not exercise its supervisory power in this case, since both the nature of the District Court and the reach of its residency requirements implicate interests beyond the federal system. 2. Rule 56(b)'s residency requirements violate the Privileges and Immunities Clause, since none of the justifications offered in support of the requirements are sufficient to meet petitioners' burden of demonstrating that the discrimination against nonresidents is warranted by a substantial objective and bears a close or substantial relation to such an objective. a. Petitioners' contention that the geographical isolation of the Virgin Islands, together with irregular airline and telephone service with the mainland, make it difficult for nonresidents to attend court proceedings held with little advance notice, is an insufficient justification. b. The District Court's finding that the delay caused by trying to accommodate the schedules of nonresident attorneys would increase the massive caseload under which that court suffers is an insufficient justification. c. Petitioners' claim that delays in the publication of local law require exclusion of nonresidents because they will be unable to maintain an adequate level of professional competence is unpersuasive. d. The contention that the Virgin Islands Bar Association does not have the resources and personnel for adequate supervision of the ethics of a nationwide bar membership is not a sufficient justification, since increased membership brings increased dues revenue, which presumably will be adequate to pay for any additional administrative burdens. e. Also unavailing is petitioners' argument that the residency requirements are necessary to a strict and fair application of Local Rule 16, which requires each active bar member to be available to accept appointments to appear on behalf of indigent criminal defendants, and which is interpreted by the District Court to require that only the appointed attorney may appear on behalf of the defendant.	Whether the decision in *Frazier* v. *Heebe*, 107 S.Ct. 2607 (1987), prohibits a federal court in the unincorporated territory of the U.S. Virgin Islands from requiring residency as a requisite for the practice of law?	Was the court of appeals correct in invalidating a district court rule requiring that lawyers reside in the Virgin Islands in order to be licensed to practice law here?

mention the Court's own rules, suggest that we ought to consider issues raised in the balance of briefs before reaching any strong conclusions about the existence (or lack) of the norm disfavoring issue creation. In other words, one could hardly claim that the Court was discovering issues if those very issues were located in other sections of the brief.

The second flaw, or at least a potential flaw, concerns the scope of McGuire and Palmer's search for issues: They limited their data collection to petitioners' and respondents' briefs on the merits, whereas the Court receives many other submissions, including reply briefs and briefs amicus curiae. Recent research (Spriggs and Wahlbeck 1995) highlights the problem with the McGuire and Palmer strategy as it pertains to amici curiae: In nearly 16% of all cases, do "friends of the Court" present arguments not found in any other brief.[7] Surely, if some party—third or otherwise—raises an issue, then that issue is part of the legal record before the Court. Accordingly, it would not violate the norm of *sua sponte* for the justices to consider it; after all, the norm only constrains the Court from reaching issues "on its own, without prompting or suggestion." The same logic would hold with even greater force for reply briefs.

ANOTHER LOOK AT ISSUE CREATION

These concerns about McGuire and Palmer's data collection strategy guided our research. We began by obtaining the syllabi in the 18 cases in which McGuire and Palmer claimed that the Court "discovered" issues, that is, violated the norm disfavoring issue creation.[8] As the Appendix shows, the syllabi contained 91 points (including subpoints) or "issues" collectively addressed by the opinions in the 18 cases. Next, we invoked the

raised in the syllabi was 91 (mean = 5.1 syllabi points per case). To compute the figures for the briefs, we took the average number of questions raised by the parties to the case.

[7] McGuire and Palmer recognize that amici curiae do, in fact, raise arguments not contained in the parties' briefs; indeed, they recount the classic story of the ACLU's role in *Mapp* v. *Ohio* (1961). Yet, for reasons that are unclear, they chose to ignore amici.

[8] We thank Kevin McGuire for providing us with a list of these cases.

McGuire and Palmer procedure by comparing the points listed in the syllabi with the "Questions Presented" in the briefs of the parties.

For those points not found in the "Questions Presented," we departed from the McGuire and Palmer strategy and examined the body of the briefs. From there, we turned to amicus curiae submissions for any remaining points. As our discussion above suggests, this revised procedure allows for a more accurate account of issue creation than does the McGuire and Palmer approach. For, if an issue is raised in the body of a brief (even if it is not a "Question Presented"), we can hardly say that the Court is engaging in issue creation. Less clear, perhaps, are cases in which the issues arise only in amicus briefs, but this distinction does not affect our results, as we shall see.

Before turning to our findings, however, three caveats about our research procedure are in order. First, as noted earlier, we (as did McGuire and Palmer 1995, 700) considered only those issues presented in the case syllabi. Needless to say, Supreme Court opinions, which can be more than 100 pages in length, might well contain issues that are not summarized in the syllabi. Thus, neither our design nor McGuire and Palmer's can tell us whether the Court brings up minor or secondary issues on its own; rather, we can only determine whether the *major* issues decided by the Court derive from the parties' briefs. Even so, there are clear advantages to relying on the syllabi, not the least of which is that they provide reliable roadmaps to Court decisions. In other words, while two independent scholars examining the contents of a decision might disagree over whether the opinion writer raised a particular issue, no such dissentience can occur over the points listed in the syllabus.

Second, we repeat the warning from footnote 2 that the doctrine of *sua sponte* applies in reverse when it comes to questions of jurisdiction and standing. The Court has an affirmative obligation to resolve such questions even if they are not raised by litigants. This poses few problems with regard to jurisdiction, for the parties' briefs—as a matter of course—address the Court's ability to hear cases.

Finally, although coding the data (that is, comparing syllabi points with the contents of written briefs) requires some judgment, most cases are clear enough to be beyond any controversy. Where our results might engender debate, we justify our conclusions in the Appendix. This was an especially necessary step for those cases in which dissenting or concurring justices claimed that a particular issue was not properly before the Court. As our notes to the Appendix suggest, we found ample evidence in the briefs themselves to refute such claims, suggesting that the dissenting or concurring justice may have had substantive reasons for making them.

RESULTS

Following our research strategy, we begin by comparing points raised in the syllabi with the questions listed in the parties' briefs. Our findings, displayed in Table 2, indicate that 44% of the 91 issues raised in the syllabi were present in the "Questions Presented." Also note that for three of the cases in which McGuire and Palmer alleged issue creation, a replication of their approach indicates that this was not the case. In other words, for nearly 17% of the cases all the points in the syllabi appear in the "Questions Presented."

TABLE 2. Location of Issues in Briefs

Location of Issue Raised in the Syllabus	Cumulation of Issues %	Issues N	Cases %	Cases N
Question sections of merits briefs filed by the parties	44.0	40	16.7	3
Other sections of merits briefs filed by the parties	97.8	89	88.9	16
Reply briefs filed by the parties	98.9	90	94.4	17
Amicus Curiae briefs	98.9	90	94.4	17

Note: The total number of issues (points in the syllabi) is 91; the total number of cases is 18. So, of the 91 total issues raised in the syllabi, 44% (40 of the 91) showed up in the question section of the briefs; for 3 of the 18 cases (16.7%) all the issues in the syllabi appeared in the question section.

For those syllabi points that we could not locate in the questions, we turned to the balance of the parties' main briefs. As Table 2 shows, this procedure unearthed the vast majority of issues raised in the syllabi (97.8%), and it covered 16 of the 18 cases. For the remaining two points and two cases we examined the reply briefs filed by the parties. From these, we were able to cover one of the two syllabi points and one of the two cases (see Table 2).

That left us with the following point, listed in the syllabus to *City of Richmond* v. *J. A. Croson Co.* (1989):

> The "evidence" relied upon by JUSTICE MARSHALL's dissent, the city's history of school desegregation and numerous congressional reports, does little to define the scope of any injury to minority contractors in the city or the necessary remedy, and could justify a preference of any size or duration.

Since this issue implicates a dissenting opinion filed in the case, it is understandable why we were unable to locate it in any of the submissions, including our last source—briefs amicus curiae.

DISCUSSION

The results of our reanalysis of the McGuire and Palmer study are easy enough to summarize: With one highly explicable exception, the parties raised all the points covered in the syllabi. Thus, at least for the cases included in McGuire and Palmer's sample, the Court virtually never created a major issue that was not part of the existing record.[9]

On that note, we could end our analysis of the claim of issue creation on the U.S. Supreme Court. But our investigation, we believe, tells us much more about the

[9] Still, it is worth noting, petitioners and respondents do not always *fully* brief all the issues decided by the Court; and, occasionally, even the justices disagree over whether an issue was fully briefed. For more on these points, see the Appendix.

formulation of Court opinions. First, our study provides evidence, albeit of a limited nature, to refute the proposition that amicus curiae briefs contribute to the development of the law by raising key issues unaddressed by the parties (see, e.g., Cortner 1975; Epstein and Kobylka 1992). To be sure, we do not, and cannot, take issue with Spriggs and Wahlbeck's (1995) study showing that amici raise *unique* arguments. But, based on our results, we can say that it is the rare case in which amici raise *important* arguments (i.e., arguments highlighted in the syllabi) that the parties themselves fail to raise. Indeed, in our study, this never occurred.

Taken on its face, this result leaves us with many questions about amici participation on the merits of cases. Consider but one, emanating from Caldeira and Wright's (1988) research on amicus briefs filed on certiorari. Based on predictions congressional scholars developed from signaling games and the informational role of interest groups (e.g., Krehbiel 1991, Wright 1990, 1995; see also our footnote 5), Caldeira and Wright posit that amicus briefs filed on certiorari reduce the Court's uncertainty about the importance of cases—a prediction that their data support. In the aftermath of their study, some have argued that scholars ought to apply a similar logic to amicus briefs filed on the merits: They may lessen uncertainty over the importance of decisions for nonlitigants, the consequences of holdings for various constituencies, the feasibility of implementation, and so forth (see, e.g., Caldeira and Epstein 1994). But since our study, as limited as it is, finds that amici arguments largely replicate those of the parties on the *key* points, we wonder whether this is as fruitful an avenue of research as it was for certiorari decisions. At the very least, scholars might ask whether our results hold up against larger samples and, if so, why such an apparent difference exists between the effect of briefs filed on certiorari and those filed at the plenary review stage.[10]

A second set of implications of our study, of course, centers on the norm disfavoring the creation of issues. Most obviously, we question the claim implicit in McGuire and Palmer's study, namely, violation of the norm occurs in a nontrivial number of cases. At least among important issues (again, those summarized in the syllabi), our findings lead to quite a different conclusion: Justices evince behavior that is consistent with the existence of this variant of the *sua sponte* doctrine. At the same time, however, we would be wrong to suggest that violations of the norm never occur. We have already recounted the story of Goldberg and his death penalty memo, and in conducting this research we came upon yet another—the McGuire and Palmer "issue creation" case of *Patterson* v. *McDean Credit Union* (1988). The Court granted certiorari in *Patterson* to consider whether 42 U.S.C. §1981 provides a remedy for racial harassment (*Patterson* 1987, 814). Yet, after oral arguments, the justices requested attorneys to brief a question which no party or amicus curiae had raised: "Whether or not the interpretation of 42 U.S.C. §1981 adopted by this Court in *Runyon* v. *McCrary* should be reconsidered" (*Patterson* 1988, 617). To some legal scholars (e.g., Cook 1928; Degnan and Louisell 1956; Krimbel 1989), this kind of request is a clear violation of the *sua sponte* norm: When courts ask for reargument on matters the parties did not raise, they engage in issue creation.

While we are sympathetic to this claim, two factors dampen our enthusiasm. For one thing, if the Court did not respect the norm disfavoring the creation of issues, then it merely would have reconsidered *Runyon* without asking for reargument; in other words, if the Court could discover issues, it could surely reexamine past cases *sua sponte*. Seen in this way, the *Patterson* order may lend further support for the existence of the norm of *sua sponte*, rather than ammunition to refute it. Second, the request for reargument in *Patterson* elicited, not unlike the Goldberg memo, a highly negative response: Four justices dissented, asserting that "neither the parties nor the Solicitor General [as an amicus curiae] have argued that *Runyon* should be reconsidered" (*Patterson* 1988, 617); newspapers and magazines took aim at the Court's majority (see, e.g., Jacoby and McDaniel 1988); legal scholars deemed the order an example of brute activism (see, e.g., Krimbel 1989); and, at the end of the day, the Court did not overrule *Runyon*. Of course, we do not claim that the decision to retain *Runyon* was causally connected to the overwhelmingly negative reaction to the reargument order; yet, because of the "fuss" following the request in *Patterson*, legal scholars have speculated that "it may be a long time before the Court requests rehearing *sua sponte*" (Krimbel 1989, 933).

Thus, we end where we began: It is no great mystery why Goldberg's memo so disturbed his colleagues or why the *Patterson* order so troubled the legal community. In both instances, justices were perceived as attempting to violate the norm disfavoring the creation of issues. While occasional deviations from the norm are not unexpected, regular and systematic departures should be rare. Since this prediction holds, as our study demonstrates, at least one important distinction between legislators and justices remains firmly intact.

[10] Certainly, it is possible that the Court might be influenced by evidence, presented in amicus curiae briefs, of the political, economic, or social consequences for a particular "constituency" but would think it inappropriate to issue legal decisions explicitly based on those consequences. The general point, though, is the same one we raised in the text: Our research strongly suggests the need for more systematic study of amicus curiae briefs filed on the merits of cases.

APPENDIX

TABLE A-1. Coding of McGuire and Palmer's 18 "Issue-Creation" Cases

Case/ Syllabus Issue	Where Can Syllabus Issue Be Found?			
	Appellant/Petitioner Brief		Appellee/Respondent Brief	
	Question Section	Elsewhere	Question Section	Elsewhere
87-107 *Patterson*				
1.[a]	Question 1 (reargument)			
2.	Question 1			
2a.		pp. 20–1		
2b.				pp. 8–9
2c.				p. 22
3.	Question 2			
3a.		p. 39		
3b.		p. 93		
87-154 *DeShaney*				
1.	Question 2			
1a.[b]	Question 2			
1b.		p. 11		
1c.		p. 9		
87-470 *Fort Wayne*				
2.[c]			Questions 2 and 3	
2a.			Question 1	
2b.	Question 4			
3.	Question 1			
87-614 *Sappenfield*				
1.[d]		p. 2		
2.	Question 1B			
2a.	Question 1			
2b.			Question 8	
2c.	Question 2			
2d.[e]	Question 3			
87-996 *Coit*				
1.	Question 1			
1a.		p. 7		
1b.		p. 7		
1c.		pp. 23–4		
2.				p. 17
2a.			Question 2	
2b.				p. 15
2c.				p. 14
87-998 *Richmond*				
1.			Question 1D	
1a.			Question 1C	
1b.			Question 1B	
1c.				
1d.				p. 29
2.			Question 2	
87-1022 *NYC Board*				
1.	Question 1			
1a.	Question 1			
1b.	Question 2			
1c.		p. 23		
87-1160 *Duquesne*				
1.[f]		p. 2		
2.	Question 1			
2a.	Question 2			
2b.			Question 2	
2c.			Questions 4 and 5	
2d.			Question 7	

continued

TABLE A-1. Continued

Case/ Syllabus Issue	Where Can Syllabus Issue Be Found?			
	Appellant/Petitioner Brief		Appellee/Respondent Brief	
	Question Section	Elsewhere	Question Section	Elsewhere
87-1346 *Bonito Boats*				
1.		p. 16		
1a.		p. 16		
1b.		p. 12		
1c.	Question 1			
1d.		p. 3 (reply brief)		
87-1372 *Argentine*				
1.	Question 2			
1a.		p. 12		
1b.		p. 22		
1c.	Question 2			
1d.				p. 16
1e.	Question 3			
1f.[g]			Question 3	
1g.				p. 16
87-1428 *Lorance*				
1.			Question 1	
87-1848 *Dallas*				
1.	Question 1			
2.[h]		p. 5		
87-1939 *Barnard*				
1.		p. 8		
2.		p. 31		
2a.		pp. 10–1		
2b.		p. 12		
2c.		p. 9		
2d.		p. 14		
2e.		p. 14		
87-2008 *Virgin Islands*				
1.		p. 8		
2.		p. 31		
2a.		pp. 10–1		
2b.		p. 12		
2c.		p. 9		
2d.		p. 14		
2e.		p. 14		
88-317 *Duckworth*				
1.			Question 1	
1a.	Question 1			
1b.				p. 6
1c.				p. 7
1d.				p. 6
88-357 *Maleng*				
1.	Question 1			
88-556 *Browning*				
1.	Question 1			
1a.		p. 17		
1b.		p. 7		
2.		p. 27		
3.		p. 48		
88-782 *Justice*				
1.		p. 10		
1a.	Question 1			
1b.		p. 9		
1c.				pp. 9–10

Note: The coding procedure was to attempt to locate the syllabus point in the question section of the appellant/petitioner brief. If located, coding ends; if not, attempt to locate the syllabus point in the question section of the appellee/respondent brief. If located, coding ends; if not, attempt to locate the syllabus point in the balance of the appellant/petitioner brief. If located, coding ends; if not, attempt to locate the syllabus point in the balance of the appellee/respondent brief. If located, coding ends; if not, attempt to locate the syllabus point in appellant/petitioner reply brief. If located, coding ends; if not, attempt to locate the syllabus point in appellee/respondent reply brief. If located, coding ends; if not, attempt to locate the syllabus point in a brief *amicus curiae*.

continued

TABLE A-1. Continued

[a]See p. 849 of this article.
[b]In his dissent, Justice Brennan claimed that the majority decided the Due Process Clause "creates no general right to basic governmental services" (1989, 203). He then correctly noted that this question was not briefed on the merits. To Brennan's charge of issue creation, we offer three responses. First, we note that the syllabus did not raise this point, dealing instead with the more specific question of protective services, which the litigants clearly raised in their briefs Second, Brennan's statement does not appear to characterize precisely what the majority decided. The majority wrote that "the Due Process Clause" generally confers no affirmative right to governmental aid" (1989, 196). This, we believe, is less sweeping than Brennan's pronouncement. Finally, the majority's claim (whether raising a major issue or not) appears almost verbatim on page 12 of the respondent's brief ("The Court has . . . repeatedly held that the Constitution does not provide an affirmative right to governmental aid.").
[c]Point 1 pertained only to the companion case 87–614, as did points 2c and 2d.
[d]The syllabus discussed jurisdictional problems under 28 U.S.C. 1257. The petitioner explicitly claimed jurisdiction under that section (and, thus, meets our requirements) but did not elaborate. Elaboration aside, the Court did not create the issue.
[e]Point 3 pertained only to the companion case, 87–470.
[f]The syllabus discussed a jurisdictional question raised, but not elaborated upon, in the petitioner's brief. Adding to the controversy, the majority opinion noted it was responding affirmatively to the jurisdictional question even though that question was not "discussed" in the briefs. Again, though, the Court did not create the issue; the petitioner clearly raised it first.
[g]Justice Blackmun's concurring opinion did not reach the question of whether any of the FSIA's exceptions to foreign sovereign immunity apply to this case because the court of appeals did not decide it—a point the majority disputed (1989, 439, fn. 6). Blackmun further claimed that the issue "did not receive full briefing" (1989, 443). The comment, however, suggests that the issue was in fact briefed, and that is the case (e.g., Petitioner's Brief, pp. 5, 9). Moreover, as the syllabus noted, it was the district court which initially determined that "none of the exceptions enumerated in the FSIA applies to the facts of this case." Thus, under the circumstances, it would be rather difficult to claim that issue was not part of the legal record.
[h]This case involved a municipal statute that restricted admittance to certain dance halls to persons aged 14 through 18. In a footnote to his concurring opinion, Justice Stevens claimed that the equal protection argument raised by the majority was not briefed before the Court. This is not quite correct. The petitioner, after arguing that there was no First Amendment right of association involved, claimed that the age limit met the appropriate standard of review: rational basis. The brief further argued that even under a strict scrutiny standard a compelling state interest was served. This, of course, is the classic language of an equal protection argument. The respondent replied that the petitioner made "no serious equal protection argument" (Petitioner Reply Brief, p. 3). Whether the argument was serious or not, the Court did not create the issue.

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