

BORROWED ROBES: COMPARATIVE INSIGHTS
ON *SUA SPONTE* AUTHORITY AND AFFIRMATIVE
DEFENSES

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Abstract

Affirmative defenses are usually the responsibility of litigants; however, U.S. courts increasingly address them sua sponte under the “Gorilla Rule,” stepping in when issues are so obvious that they are overlooked. If unchecked, such interventions risk turning judges into de facto lawmakers, moving away from their neutral role, while appellate guidance offers mixed signals that can leave lower courts uncertain. Lessons from continental civil-law systems, where proactive judicial involvement is common but carefully limited, show a clear way forward: courts can fill procedural and substantive gaps decisively without overstepping their bounds. This approach corrects procedural stagnation and safeguards party autonomy. This Article argues that adopting structured sua sponte authority in some cases can be crucial for raising affirmative defenses, rather than merely optional. When properly calibrated, judicial initiative transforms perceived overreach into a principled tool, enabling courts to address essential issues parties fail to raise, uphold fairness, and deliver justice efficiently—all while respecting the adversarial process and constitutional limits.

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INTRODUCTION

In the United States, judicial neutrality is a fundamental principle of the legal system.¹ Judges are typically expected to serve as impartial referees, allowing the parties involved to shape the legal issues and present the evidence. However, the sua sponte judicial action doctrine presents a notable exception to this passive role. This phrase translates to “of one’s own accord”² in Latin, and it empowers courts to act independently, without a request from any party.³ This power is employed in civil cases to uphold justice and public policy or to ensure judicial efficiency.⁴ Although not systematically used, it is essential in balancing judicial intervention and party control.⁵

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¹ See Daniel Berkowitz & Karen Clay, *The Effect of Judicial Independence on Courts: Evidence from the American States*, 35 J. LEGAL STUD. 399, 429 (2006); Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423 (2004). See also Mary Ziegler, *The History of Neutrality: Dobbs and the Social-Movement Politics of History and Tradition*, 133 YALE L.J. F. 161 (2023).

² *Sua Sponte*, BLACK’S LAW DICTIONARY (11th ed. 2019).

³ *Id.*

⁴ See, e.g., Mary R. Powell, *Oversimplifying a Fact-Intensive Procedure: Do Appellate Courts Possess the Authority to Raise Qualified Immunity Sua Sponte During the Pleading Stage?*, 58 CAL. W. L. REV. 195, 202–03 (2021).

⁵ See, e.g., Bradley Scott Shannon, *Some Concerns About Sua Sponte*, 73 OHIO ST. L.J. 27 (2012).

In U.S. civil proceedings, courts are primarily bound by the adversarial system, where the parties themselves define the scope of litigation.⁶ The *sua sponte* power permits courts to depart from this framework under certain circumstances, acting proactively to address issues such as jurisdiction, procedural errors, or the enforcement of critical public policies.⁷

In civil cases, procedural fairness is critical to ensuring justice is served.⁸ Under their *sua sponte* powers, courts can enforce procedural norms to prevent cases from proceeding in ways that undermine fairness.⁹ This includes missed deadlines, failure to serve necessary parties, or other procedural defects that may harm one party if left unchecked.¹⁰ Moreover, in *pro se* litigation, where individuals represent themselves without legal counsel, courts sometimes invoke their *sua sponte* powers more frequently to ensure the administration of justice.¹¹ Courts may dismiss legally baseless claims to prevent abuse of the judicial system by frivolous filings.¹² However, judges must balance this authority with the need to protect the access of all individuals to the judicial process, ensuring that self-represented litigants are not unfairly penalized for their lack of legal knowledge.¹³

While *sua sponte* judicial action serves to correct procedural flaws and uphold fundamental legal principles,¹⁴ its use is not without controversy. Critics argue that frequent judicial intervention undermines the adversarial nature of civil litigation, shifting too much power to the courts and potentially infringing on litigants' rights to control their cases.¹⁵ Judicial neutrality can be compromised if judges intervene

⁶ See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 127 (2d ed. 2019); see also MIRJAN R. DAMASKA, *EVIDENCE LAW ADRIFT* 2–4 (1997); see FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., *CIVIL PROCEDURE* 4–8 (Little, Brown & Co. 2d ed. 1977); Robert W. Millar, *The Formative Principles of Civil Procedure*, 18 U. ILL. L. REV. 1, 12 (1923).

⁷ Federal courts, for instance, can dismiss cases *sua sponte* if subject-matter jurisdiction is lacking, even if no party raises the issue. In *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006), the Supreme Court ruled that federal courts have an independent obligation to ensure they have jurisdiction before proceeding to the merits of a case. Indeed, one of the most well-established applications of *sua sponte* power is in the domain of jurisdiction. Under the federal court system, courts are constitutionally limited in their jurisdiction and must ensure they are empowered to hear a case. In *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 94–95 (1998), the Supreme Court emphasized that jurisdiction is a fundamental threshold issue that courts must examine, even if not contested by the parties. In this sense, *sua sponte* dismissal ensures that federal courts do not exceed their constitutionally delegated authority, protecting the structure of the judiciary and safeguarding proper litigative boundaries.

⁸ KEVIN BURKE & STEVE LEBEN, *PROCEDURAL FAIRNESS: A KEY INGREDIENT IN PUBLIC SATISFACTION* 6 (2007).

⁹ *Id.* at 7.

¹⁰ Shannon, *supra* note 5, at 33.

¹¹ *Id.*

¹² *Id.* at 31.

¹³ See Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1285 (2002); see also Lyn Entzeroth & Robert Bacharach, *Judicial Advocacy in Pro Se Litigation: A Return to Neutrality*, 42 IND. L. REV. 19 (2009).

¹⁴ Miller, *supra* note 13, at 1272.

¹⁵ Powell, *supra* note 4, at 213.

excessively or too aggressively, especially when they raise substantive legal issues that the parties themselves did not identify.¹⁶

As noted above, *sua sponte* powers are policy-wise designed to preserve judicial efficiency and uphold the court system's integrity.¹⁷ Without such power, courts might be forced to waste time and resources on matters lacking jurisdiction or where parties overlook fundamental procedural or substantive issues. However, courts must also recognize the limits of this power to avoid overstepping their role; courts will likely remain cautious in its application, particularly given the criticisms of judicial overreach.¹⁸ The *sua sponte* judicial power in U.S. civil proceedings thus reflects a specific aspect of judicial authority that allows courts to act independently to ensure that justice is administered correctly. While this power is most commonly invoked to address jurisdictional and procedural issues, it serves as a critical tool for maintaining the integrity of the legal system.¹⁹ Nevertheless, *sua sponte* authority must be carefully controlled to avoid infringing on the parties' rights and the adversarial nature of civil litigation.

This general overview has effectively demonstrated that U.S. civil courts have increasingly exercised their *sua sponte* powers. Even though, at first glance, using *sua sponte* powers in these situations may seem to contradict the fundamental principles of civil procedure regarding systematic consistency and the adversarial nature of American civil litigation.²⁰

However, courts intermittently employ these powers in district and appellate contexts without a clear, systematic rationale. While the justification typically given is the continuous pursuit of efficiency in civil justice, this kind of ambiguous discretion, often described as overly broad in legal scholarship,²¹ is particularly evident in controversial cases involving affirmative defenses not raised by the parties. In such instances, the court effectively steps into the role of the parties, bypassing

¹⁶ The U.S. Court of Appeals for the Fifth Circuit has noted that *sua sponte* dismissals may raise concerns about denying litigants their due process rights, particularly when such actions are taken without providing an opportunity to be heard. *United States v. Brace*, 145 F.3d 247, 267 (5th Cir. 1998). This highlights the need for courts to exercise restraint and ensure that litigants are given fair notice and a chance to address the issues before the court takes action on its own.

¹⁷ Powell, *supra* note 4, at 202–03.

¹⁸ See, e.g., Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. PA. J. CONST. L. 161, 168 (2011).

¹⁹ See, e.g., *Recusal of Federal District Court Judges and the "Supervisory Power" Doctrine*, 3 WM. MITCHELL L. REV. 165 (1977); see also Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937 (2022).

²⁰ See Miller, *supra* note 13, at 1264–69; Katherine A. MacFarlane, *Adversarial No More: How Sua Sponte Assertion of Affirmative Defenses to Habeas Wreaks Havoc on the Rules of Civil Procedure*, 91 OR. L. REV. 177, 192 (2012).

²¹ See generally Richard B. Spindle, *Judicial Discretion in Common Law Courts*, 4 WASH. & LEE L. REV. 143 (1947); Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383 (2007); Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 127, 128 (2018). With respect to *sua sponte* discretionary powers, see Rosemary Krimbel, *Rehearing Sua Sponte in the U.S. Supreme Court: A Procedure for Judicial Policymaking*, 65 CHI.-KENT L. REV. 919, 925 (1989).

their waiver of defenses such as *res judicata*, issue preclusion, and, in some lower courts, even the statute of limitations.²²

The fragmentation of the *sua sponte* power in U.S. civil courts suggests exploring a novel approach to guide the Article's inquiry. Specifically, to examine the concept of judicial powers as a critical component within the historical framework of the continental civil process.

The long-standing tradition of *ex officio* judicial powers in civil law systems is closely linked to the judge's recognized active role from the first hearing. Despite the initially divergent frameworks of civil adjudication, the increasingly proactive role of American judges²³ raises the question of whether the rationale behind these powers in continental legal history could lead to a different systematization of the American courts' unregulated use of *sua sponte* authority. This perspective, drawn from a distinct legal system, provides a valuable framework for reassessing the American system on this issue, which is often mistakenly seen as fundamentally opposed to the continental model.²⁴ Accordingly, this Article proposes a fresh approach to the judicial powers of the U.S. Supreme Court, suggesting a reordering of the current status quo and a reevaluation of existing cases.

Part I focuses on systematizing the current landscape of *sua sponte* judicial powers in civil courts. Part II undertakes the challenging task of determining whether any guidelines exist for exercising *sua sponte* judicial authority. Part III examines the historical evolution of *ex officio* powers in the continental codes of civil procedure, highlighting how this comparison can inform the American legal framework. Finally, Part IV seeks to reassess and reset the status quo of *sua sponte* judicial powers in U.S. civil courts, moving beyond the traditional arguments rooted in the adversarial system and concerns over excessive judicial discretion.

²² See *infra* Part I.

²³ See, e.g., Astrid Stadler, *The Multiple Roles of Judges and Attorneys in Modern Civil Litigation*, 27 HASTINGS INT'L & COMPAR. L. REV. 55, 56 (2003); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 823–24 (1985); Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. INT'L & COMPAR. L. REV. 1, 1–2 (2011); Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 442 (2010); Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709, 709–10 (2005); see also John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 529–30 (2012); Benjamin Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 419 (1960).

²⁴ See KAGAN, *supra* note 6, at 127; DAMASKA, *supra* note 6, at 105–07; JAMES, JR. & HAZARD, JR., *supra* note 6, at 4–8; Millar, *supra* note 6, at 102–15; see also Franklin Strier, *What Can the American Adversary System Learn from an Inquisitorial System of Justice*, 76 JUDICATURE 109 (1992).

I. SUA SPONTE JUDICIAL POWER IN THE U.S. (APPELLATE) COURTS:
THE INTRICATE LANDSCAPE

A. *Waiver, Forfeiture, and Plain Error. Premise on the Judicial Initiative in Affirmative Defenses.*

American civil litigation is based on the adversarial principle: parties identify issues for decision, while courts act as neutral arbiters.²⁵ However, in practice, federal courts sometimes deviate from this model by considering affirmative defenses that litigants failed to raise. Whether during trial or on appeal, courts occasionally invoke doctrines of waiver, forfeiture, and plain error to justify addressing such defenses *sua sponte*.²⁶ This Section aims to generally define how courts have used the plain error doctrine in civil appeals to revive forfeited defenses and how they have exercised *sua sponte* authority to raise defenses at both the trial and appellate levels.

The Supreme Court distinguishes waiver from forfeiture. In *Johnson v. Zerbst*, waiver was defined as the “intentional relinquishment or abandonment of a known right.”²⁷ By contrast, *United States v. Olano* explained that forfeiture is the “failure to make the timely assertion of a right.”²⁸ This distinction has real consequences: a waived defense is lost forever.²⁹ Courts cannot revive it. A forfeited defense might, in limited cases, be considered *sua sponte*, especially when critical systemic values are at stake.³⁰

The plain error rule, established in Federal Rule of Civil Procedure 51(d)(2) for jury instructions and adapted from Federal Rule of Criminal Procedure 52(b), permits appellate courts to correct unpreserved errors if: (1) there is an error; (2) the error is clear or obvious; (3) the error affects substantial rights; and (4) the error significantly impacts the fairness, integrity, or public reputation of judicial proceedings.³¹

Although primarily applied in criminal appeals, the plain error standard is occasionally used in civil cases, particularly when courts scrutinize affirmative defenses that parties have overlooked.³² The link

²⁵ Strier, *supra* note 24, at 109.

²⁶ See discussion *infra* Sections 1.3 & 2.1.

²⁷ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

²⁸ *United States v. Olano*, 507 U.S. 725, 733 (1993).

²⁹ See *id.*

³⁰ *Arizona v. California*, 530 U.S. 392, 412 (2000).

³¹ See *Olano*, 507 U.S. at 732–36. The modern articulation of plain error doctrine comes indeed from *United States v. Olano*, where the Supreme Court held that an appellate court may correct an unpreserved error if it is (i) error, (ii) plain, (iii) affects substantial rights, and (iv) “seriously affects the fairness, integrity or public reputation of judicial proceedings.” Although primarily developed in criminal law under Federal Rule of Criminal Procedure 52(b), the principle expresses a systemic concern for the legitimacy of judicial outcomes. See Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 20–22 (1994).

³² Meltzer, *supra* note 31, at 20–22.

between plain error review and affirmative defenses highlights a paradox in modern law. On the one hand, the principle of adversarial responsibility dictates that parties initiate lawsuits, and their omissions—particularly failing to assert affirmative defenses—are generally accepted as valid. On the other hand, courts sometimes act as a corrective authority: appellate courts may intervene to address injustices, even if these issues were not preserved in lower courts.

Trial courts sometimes raise affirmative defenses on their own initiative. In *Day v. McDonough*,³³ the Supreme Court held that a district court may dismiss a case sua sponte based on the statute of limitations, provided the petitioner is given notice and an opportunity to respond. In *Arizona v. California*,³⁴ the Court decided that courts can raise res judicata on their own in exceptional cases. These examples demonstrate a judicial willingness to raise defenses that enhance efficiency and finality, even if it results in fewer adversarial arguments.

Otherwise, appellate courts typically refrain from considering issues not raised in the lower court. As stated in *Hormel v. Helvering*,³⁵ appellate review is generally limited to questions presented to and decided by the trial court, which helps maintain the adversarial process and ensures thorough factual development during trial. However, there are exceptions. The plain error doctrine allows appellate review of issues not preserved for appeal when fairness or integrity might be compromised. In *Wood v. Milyard*,³⁶ the Court held that appellate courts cannot resurrect an affirmative defense that was intentionally waived, although forfeited defenses may sometimes be considered. Additionally, in *Edelman v. Jordan*,³⁷ the Court confirmed that Eleventh Amendment immunity can be raised at any stage, including on appeal.

This overview aims to clarify the purpose of this Article. It is clear the issue of sua sponte relief, including affirmative defenses, in both trial and appellate courts, remains contested and continuously evolving. Additionally, despite the explicit wording of Federal Rule of Civil Procedure 8(c) and the plain error doctrine for appellate courts, several exceptions and uncertainties exist across circuits. Key aspects of American civil litigation are at stake. First is adversarial integrity: permitting courts to raise defenses undermines party autonomy and strategic litigation decisions.³⁸ Second is systemic efficiency: judicial economy is promoted when repetitive or time-barred claims are dismissed early.³⁹ Third is fairness: plaintiffs who depend on a

³³ *Day v. McDonough*, 547 U.S. 198, 209–10 (2006).

³⁴ *Arizona*, 530 U.S. at 412.

³⁵ *Hormel v. Helvering*, 312 U.S. 552, 556–59 (1941).

³⁶ *Wood v. Milyard*, 566 U.S. 463, 472–73 (2012).

³⁷ *Edelman v. Jordan*, 415 U.S. 651, 677–78 (1974) (*Lapides v. Board of Regents U. Sys. Of Georgia*, 535 U.S. 613 (2002) (The Court ruled that the State's action joining the removal of this case to federal court waived its Eleventh Amendment immunity).

³⁸ Luke Ryan, *How the Party Presentation Rule Limits Judicial Discretion*, 4 ST. THOMAS J. COMPLEX LITIG. 1, 6–7 (2017).

³⁹ *Day v. McDonough*, 547 U.S. 198, 205–06 (2006).

defendant's silence face prejudice when courts raise defenses *sua sponte*.⁴⁰ Fourth, and more importantly, is predictability: circuit splits create uncertainty for litigants, encouraging forum shopping. The comparative view from a continental approach may therefore strengthen reform options. Clarifying the distinction between waiver and forfeiture, requiring notice and response, and limiting plain error in civil cases would promote consistency and fairness. Until such reforms are enacted, the appellate process remains troubled by what commentators call the "Gorilla Rule": the judiciary's discretionary power to raise defenses without invitation, altering litigation outcomes in unpredictable ways.

B. The "Gorilla Rule" and the Unquestioned Sua Sponte Relief from Jurisdictional Issues.

Reestablishing the status quo regarding *sua sponte* judicial powers in civil cases is a complex task. However, it is crucial to understand the complexity of the issue and address the fragmentation in court practices during the pretrial phase and at appellate courts in U.S. civil litigation. In other words, this Section aims to show how *sua sponte* powers—in relation to various waived affirmative defenses—are affected by the structure of the pretrial process and the framework of the appellate courts, and how these frameworks influence the limits of *sua sponte* powers. This approach highlights unresolved issues and might even raise new questions about the pretrial and appellate procedures outlined in the Federal Rules of Civil Procedure.

This Article proposes classifying *sua sponte* powers into two main categories: facts and motions. This distinction will be necessary when the Article shifts to the continental perspective, which may lead to a reassessment of the U.S. courts' *sua sponte* powers. In continental legal systems, there is a clear distinction between facts and motions, primarily due to the strong emphasis on alleged facts and their impact on judicial decisions.⁴¹ In contrast, motions in these systems tend to be procedural tools, largely reliant on the parties' initiative.⁴²

In exploring specific *sua sponte* powers that pertain to particular facts, especially those that the defendant should have presented as an affirmative defense, this Section addresses two pairs of issues, which might represent the most appropriate framework to understand the often-divided courts' approaches, including divisions between district and

⁴⁰ See Blake R. Hills, *Sua Sponte Dismissal: Is Efficiency More Important than Procedural Fairness?*, 89 UMKC L. REV. 243, 251 (2020).

⁴¹ Amos Gabrieli & Michal Alberstein, *Conflict Resolution Procedures within the Courtroom: Between the Adversarial and Inquisitorial Traditions*, 51 GA. J. INT'L & COMPAR. L. 87, 104–05 (2022).

⁴² See Strier, *supra* note 24, at 111.

appellate courts: first, the statute of limitations and qualified immunity, and second, the res judicata and issue preclusion issues.

Nonetheless, before approaching these questions, it is worth premising the core of the so-called “Gorilla Rule,” articulated by the Supreme Court in *Singleton v. Wulff*.⁴³ The phrase “Gorilla Rule” comes from the saying “the 800-pound gorilla in the room,” which suggests something so dominant that it cannot be overlooked, regardless of other parties’ intentions.⁴⁴ Legally, this “Gorilla” signifies a court’s right to tackle critical issues it finds too significant to ignore, even if the involved parties have not raised them.⁴⁵ When appellate courts exercise this authority, they can rule on cases based on principles or topics not addressed during the original trial or in the briefs.⁴⁶ The Gorilla Rule—as a deviation from an opposite, general rule⁴⁷—illustrates the tension between appellate courts’ responsibility to uphold justice and the constraints of the adversarial system. While sua sponte powers enable courts to address fundamental errors or legal issues, they can also challenge fairness and judicial neutrality. Thus, although vital, sua sponte powers must be applied cautiously to preserve public confidence and procedural integrity in U.S. civil litigation.⁴⁸

To begin with, the landscape—in which a statute of limitations issue might be raised sua sponte—must be divided into jurisdictional and non-jurisdictional matters raised by the courts in civil cases.

Indeed, the very origin of the sua sponte judicial powers is related to jurisdictional matters. In the U.S. civil litigation jurisprudence and scholarship, it is well-established that “jurisdiction is the primary issue for a court to raise sua sponte.”⁴⁹ While various jurisdictional issues, such

⁴³ See *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

⁴⁴ Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1023 n.* (1987).

⁴⁵ *Singleton* clearly stated that the Court would “announce no general rule” because “the matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals[.]” *Singleton*, 428 U.S. at 121. The expression is due to Martineau, *supra* note 44, at 1023 n.*, textually naming the rule set forth by *Singleton*, 428 U.S. at 121.

⁴⁶ See Martineau, *supra* note 44, at 1061 (“[A]ppellate courts, like gorillas, are subject to few restraints except those that are self-imposed”); see also Ronald J. Offenkrantz & Aaron S. Lichter, *Sua Sponte Actions in the Appellate Courts: The “Gorilla Rule” Revisited*, 17 J. APP. PRAC. & PROCESS 113, 115 (2016).

⁴⁷ The American appellate court system is structured around the British legacy of the writ of error approach, aligning with the adversarial party representation model. Under this model, parties are responsible for advancing legal arguments and generally must preserve these arguments or defenses to raise them on appeal. The American legal framework is based on the idea that parties, primarily when represented by competent counsel, are best suited to advocate for their interests and to present the facts and arguments supporting their entitlement to relief. See Offenkrantz & Lichter, *supra* note 46, at 118; see also *United States v. Sineneng-Smith*, 590 U.S. 371, 375–76 (2020); *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring).

⁴⁸ See Michael E. Beyda, Note, *Affirmative Immunity: A Litigation-Based Approach to Curb Appellate Courts’ Raising Qualified Immunity Sua Sponte*, 89 FORDHAM L. REV. 2693, 2707–13 (2022).

⁴⁹ See, e.g., *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 896 (1991) (stating that a subject matter jurisdiction defect must be noticed by the court sua sponte at any point in litigation); see also Hills, *supra* note 40, at 258; see also Miller, *supra* note 13, at 1280; Martineau, *supra* note

as capacity and standing, are typically raised sua sponte by the pretrial judge,⁵⁰ it is worth highlighting that general policy considerations have consistently formed the basis of jurisprudence and scholarly opinion on all jurisdictional matters. These considerations stem from what is referred to as the “Gorilla Rule.”⁵¹ When the Supreme Court first addressed the general issue of sua sponte powers of the Court of Appeals, it ruled that the Court of Appeals may raise an issue for the first time if “injustice might otherwise result.”⁵² This hefty clause allows the consideration that jurisdictional matters can be raised sua sponte because courts are responsible for determining whether they possess the necessary authority to hear a case at any stage of litigation. This power is essential for maintaining the judicial system’s integrity, ensuring that courts act within the scope of their constitutional and statutory mandates.⁵³ Sua sponte jurisdictional review also impacts procedural efficiency. While it can result in a case being dismissed after significant time and resources have been spent on litigation, it is necessary to avoid invalid judgments issued by a court lacking subject-matter jurisdiction. The court cannot proceed at all in any cause without proper jurisdiction.⁵⁴

C. Statute of Limitations and Qualified Immunity

The statute of limitations is a critical aspect of civil litigation, serving as a defense mechanism to prevent the prosecution of stale claims. When courts raise this issue sua sponte, they often do so to uphold judicial economy and fairness, particularly in cases where the defense has been overlooked by the parties involved. While somewhat contentious, this practice highlights the importance of maintaining procedural safeguards

44, at 1047; Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477, 499–502 (1958).

⁵⁰ See Miller, *supra* note 13, at 1280 n.133 (collecting specific cases). It is worth remembering *Boeing Co. v. Van Gemert*, 444 U.S. 472, 488 n.4 (1980) (citing *Judice v. Vail*, 430 U.S. 327, 331 (1977) (stating that the court is obligated to raise standing sua sponte)).

⁵¹ *United States v. Olano*, 507 U.S. 725, 731–33 (1993).

⁵² See *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (citing *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

⁵³ One of the leading cases addressing a court’s ability to act sua sponte in jurisdictional matters is *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). In *Arbaugh*, the Supreme Court reaffirmed that federal courts must determine whether they have subject matter jurisdiction in a case, even if neither party has raised the issue. *Id.* at 514. The Court noted that “subject-matter jurisdiction, because it involves a court’s power to hear a case, can never be forfeited or waived.” *Id.* Therefore, if a federal court lacks jurisdiction, it must dismiss the case, regardless of how far the litigation has advanced. See also *Henderson ex. rel. Henderson v. Shinseki*, 562 U.S. 428 (2011) (reiterating that courts could raise jurisdictional defects sua sponte at any stage of the proceedings). The Court held that because subject matter jurisdiction goes to the heart of a court’s authority to act, courts must ensure they are within their jurisdictional bounds. *Id.* at 434–35. Even if neither party raises the issue, the court must dismiss cases lacking jurisdiction. See *id.*

⁵⁴ See *Steel Co. v. Citizens for a Better Env’t.*, 523 U.S. 83, 94 (1998) (emphasizing that “without jurisdiction, the court cannot proceed at all in any cause.”).

and ensuring that litigation is conducted within reasonable temporal constraints.⁵⁵

U.S. courts can raise the statute of limitations *sua sponte* in certain circumstances. The power to do so depends on the specific court and the type of case. While courts are more inclined to raise the statute of limitations *sua sponte* in habeas corpus cases,⁵⁶ they do so sparingly in civil contexts where public policy considerations—such as the finality of litigation as an efficiency outcome—are involved. Beyond habeas corpus cases, the landscape of the *sua sponte* assertions by courts in civil cases is fragmented.

In light of the court's *sua sponte* power in jurisdictional matters, this Section now examines the statute of limitations, which is considered a non-jurisdictional issue. Logically, the statute of limitations comes into play later in the case's progression, addressing the timeliness of a claim only after the court has established its jurisdiction over the merits.⁵⁷ Unlike a purely jurisdictional matter, the statute of limitations is explicitly an affirmative defense under Federal Rule of Civil Procedure 8(c).⁵⁸ Thus, the primary issue concerns the court's overlapping *sua sponte* authority in cases where a defendant fails to raise the statute of limitations in its answer. The statute of limitations is crucial for defining general principles related to *sua sponte* judicial powers, given the unique nature of this defense and other instances in which courts have exercised such powers.

It is worth starting from the uncertain rulings by courts in civil cases. Although the prevailing trend denies *sua sponte* relief for the statute of limitations, the issue has been questioned. Indeed, the statute of limitations is a crucial defense that bars claims brought after an expired legally prescribed period. Typically, the defendant is responsible for

⁵⁵ See, e.g., Tyler T. Ochoa & Andrew Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L. J. 453, 504 (1997).

⁵⁶ See *McDonough*, Day v. McDonough, 547 U.S. 198, 205–06 (2006). This is one of the most significant cases where the U.S. Supreme Court ruled that a federal court could raise the statute of limitations *sua sponte* in a habeas corpus case, even if the state had not raised it as a defense. *Id.* at 206, 209–10. The Court emphasized that judges have discretion to increase the statute of limitations in the interest of justice, particularly in cases involving habeas petitions. *Id.* at 210. See also *Wood v. Milyard*, 566 U.S. 463 (2012) (the Supreme Court reaffirmed that federal courts could raise the statute of limitations *sua sponte* in habeas cases but noted that courts should not do so when the state deliberately chooses to waive the defense.) This case clarifies the limits on courts' discretion to raise the issue unprompted. These cases demonstrate the significant circumstances under which U.S. courts can raise the statute of limitations *sua sponte*, especially in areas like habeas corpus, where justice and procedural integrity are vital concerns. See also *Granberry v. Greer*, 481 U.S. 129 (1987) (*superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, as recognized in *Rockwell v. Yukins*, 217 F.3d 421 (6th Cir. 2000)). This case also touches on habeas corpus petitions. It allowed the appellate courts to consider procedural bars, such as the statute of limitations, even when the parties had not raised them at earlier stages. *Id.* at 133–35. Although the case primarily dealt with the exhaustion of state remedies, its reasoning has been extended to the statute of limitations. *But see MacFarlane*, *supra* note 20, at 201 (arguing that *sua sponte* assertion of affirmative defenses to habeas petitions undermines the Federal Rules of Civil Procedure).

⁵⁷ See, e.g., *McDonough*, 547 U.S. at 205.

⁵⁸ FED. R. CIV. P. 8(c)(1).

raising the statute of limitations as an affirmative defense.⁵⁹ As noted above, under Rule 8(c) of the Federal Rule of Civil Procedure, the statute of limitations must generally be pleaded as an affirmative defense by the defendant. However, in some cases, courts have raised the issue of the statute of limitations sua sponte, typically when the issue is evident from the face of the pleadings or other filings and when no factual dispute about the time elapsed exists.⁶⁰

Two cases show this specific landscape. In *Arizona v. California*, the Supreme Court recognized the court's power to raise a statute of limitations defense sua sponte in the context of sovereign immunity—and occasionally qualified immunity—and equitable concerns.⁶¹ The case concerned whether specific claims could proceed despite a precise time bar. Although the context was unique, the case underlined that courts could sometimes intervene when a legal bar is apparent, even if the parties do not raise it.⁶²

In *Eriline Co. S.A. v. Johnson*, the Fourth Circuit illustrated when a court may appropriately raise the statute of limitations sua sponte in civil litigation.⁶³ In *Eriline*, the appellate court vacated and remanded the district court decision, which had sua sponte raised the statute of limitations in a securities fraud litigation and accordingly dismissed the case. The court noted that although the statute of limitations is usually an affirmative defense, a district court may, under certain circumstances, raise a statute of limitations defense sua sponte.

Specifically, *Eriline* first addressed the nature and the treatment of the affirmative defense by stating that the statute of limitations is an affirmative defense, meaning that the defendant generally bears the burden of affirmatively pleading its existence.⁶⁴ Where a defendant has failed to raise a statute of limitations defense in its answer, the defense is usually waived.⁶⁵

Moreover, *Eriline* affirms that “[a]s a defense waivable by the inaction of a party, the statute of limitations bears the hallmarks of our adversarial system of justice, a system in which the parties are obliged to present facts and legal arguments before a neutral and relatively passive decisionmaker.”⁶⁶

⁵⁹ *Id.*

⁶⁰ *See, e.g., Arizona v. California*, 460 U.S. 605, 624–25 (1983).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 650, 657 (4th Cir. 2006).

⁶⁴ *See* FED. R. CIV. P. 8(c); *Dean v. Pilgrim's Pride Corp.*, 395 F.3d 471, 474 (4th Cir. 2005) (“The raising of the statute of limitations . . . constitutes an affirmative defense”).

⁶⁵ *See Eriline*, 440 F.3d at 653–54; *see also Peterson v. Air Line Pilots Ass'n, Int'l*, 759 F.2d 1161, 1164 (4th Cir. 1985).

⁶⁶ *Eriline*, 440 F.3d at 654; *see United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) (“The rule that points not argued will not be considered 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”). And because it “erod[es] the principle of party presentation so basic to our system of adjudication,” the Supreme Court has cautioned that sua sponte consideration of a statute of limitations defense should be done sparingly by the trial

Even if the amicus suggested some precedents on the sua sponte relief of the statute of limitations as an affirmative defense, these cases relied upon “a district court’s ‘inherent power’” to dismiss a case sua sponte.⁶⁷ “Those decisions, however, do not address a district court’s power to raise affirmative defenses on its own, but rather a district court’s power to protect important institutional interests of the court.”⁶⁸

Eriline’s arguments have significantly impacted the court’s sua sponte authority regarding the statute of limitations. Indeed, *Eriline* set apart two very different circumstances by explaining that:

certain affirmative defenses implicate important institutional interests of the court and may sometimes be properly raised and considered sua sponte. For example, the affirmative defense of res judicata—which serves not only “the defendant’s interest in avoiding the burden of twice defending a suit,” but also the important judicial interest in avoiding resolution of an issue that the court has already decided—may, in “special circumstances,” be raised sua sponte.⁶⁹

Conclusively, *Eriline* vacated the case, affirming that the specific subject matter—as mentioned, a federal securities claim—did not warrant any significance in terms of sua sponte relief of the statute of limitations because:

[a]ny interest that a court generally possesses in the enforcement of a statute of limitations defense pales in significance compared to those interests implicated by failure to prosecute, abuse of process, and res judicata. And such an interest ordinarily falls short of that necessary to outweigh the benefits derived from adhering to the adversarial process and requiring that a defendant either raise the defense of statute of limitations or waive its protection.⁷⁰

courts, even in those narrow circumstances where it is authorized. *Arizona v. California*, 530 U.S. 392, 412–13 (2000).

⁶⁷ See Brief of Profs. of Civ. Proc. & Fed. Cts. as Amici Curiae Supporting Petitioner, *Hamner v. Burls*, 141 S. Ct. 611 (2020) (No. 19-1291) [hereinafter Brief of Professors] (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962); *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 461–62 (4th Cir. 1993)).

⁶⁸ *Eriline*, 440 F.3d at 654.

⁶⁹ *Id.* at 655 (citing *Arizona*, 530 U.S. at 412–13); see discussion *infra* Section 1.4; see also *Doe v. Pfrommer*, 148 F.3d 73, 80 (2d Cir. 1998) (concluding that policy of “avoiding relitigation” justified sua sponte consideration of defense of collateral estoppel).

⁷⁰ *Eriline*, 440 F.3d at 655.

Eriline contends that the case presented before the court did not involve public policy principles, as seen in matters like habeas corpus, immunity, or res judicata. As a result, the specific conditions that allow bypassing the failure to raise an affirmative defense were not applicable. Consequently, there was no shift from the adversarial model to a semi-inquisitorial one, which would otherwise grant courts a generalized sua sponte power, even without the proper and explicit assertion of an affirmative defense.⁷¹

Suppose *Eriline* represents the milestone in sua sponte relief of the statute of limitations. In that case, it is worth emphasizing several other cases and precedents that shed further light on the questioned issue of sua sponte relief of the statute of limitations. Among many, *Lassiter v. City of Philadelphia*⁷² reveals a particular relevance. This case was about an ordinary litigation claim and approached the sua sponte affirmative defense relief differently, stating that “the District Court had the authority to raise the statute of limitations issue during the Rule 16 conference.”⁷³ In particular, *Lassiter* denied the arguments raised by *Eriline* against the sua sponte relief of the statute of limitations by affirming that “[t]he parties had engaged in protracted litigation before the trial judges raised the statute of limitations issue. . . . (eighteen months).”⁷⁴ Furthermore, *Lassiter* stated that in the *Eriline* case, “[b]ecause of the length of time and extensive litigation in those cases, the courts determined that the statute of limitations defense had been waived under Rule 8(c); consequently, it was improper for the district courts to have raised the statute of limitations question sua sponte.”⁷⁵ *Lassiter* also highlighted that in the *Eriline* case “the district court not only raised the statute of limitations defense; it also issued a sua sponte ruling on it. . . . (sua sponte dismissal of ‘the Complaint in its entirety’).”⁷⁶

The significance of *Lassiter* is due to the crucial role played by the pretrial conference in sua sponte relief of the statute of limitations and not to the essential circumstance that “the District Court raised the statute of limitations problem during the Rule 16 conference, it acted only in response to appropriate motions by the defendant.”⁷⁷ The significance

⁷¹ *Id.* at 656–57.

⁷² *Lassiter v. City of Philadelphia*, 716 F.3d 53, 55 (3d Cir. 2013). The issues discussed in this case included “(1) [w]hether, in an ordinary civil case, Federal Rule of Civil Procedure 16 gives a District Court carte blanche to raise, sua sponte, the affirmative defense of statute of limitations, where the defense was apparent on the face of the plaintiff’s complaint but the defendants had failed to plead it in their Answer and admitted to the Court that they had ‘missed it’; and (2) whether Federal Rule of Civil Procedure 8(c)(1) and the principle of party presentation that it embodies, preclude a District Court in an ordinary civil case from raising, sua sponte, a forfeited affirmative defense and granting the defendant leave to file an Amended Answer.” *Lassiter v. City of Philadelphia*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/lassiter-v-city-of-philadelphia> [<https://perma.cc/G4ET-WHS4>] (last visited Dec. 22, 2025).

⁷³ *Lassiter*, 716 F.3d at 55.

⁷⁴ *Id.* at 56 (citing *Eriline*, 440 F.3d at 650–51).

⁷⁵ *Id.* (citing *Eriline*, 440 F.3d at 653–54).

⁷⁶ *Id.* (quoting *Eriline*, 440 F.3d at 651).

⁷⁷ *Id.*

devoted to the pretrial conference in giving the judge a more active role⁷⁸ and providing the plaintiff with an opportunity to respond to the sua sponte relief has determined the conclusion of the proper exercise of this power in an affirmative defense, such as the statute of limitations waived by the defendant's answer.

Numerous divergent arguments underlie this case, and they will be crucial in the following Sections of the Article. Significantly, preventing the waste of judicial resources was definitively the scope of *Lassiter*, and this kind of argument will be essential in approaching the external (continental) view on the topic.

Nevertheless, the sua sponte relief of an affirmative defense is questioned when examining a different affirmative defense, such as qualified immunity. For instance, in *Hamner v. Burls*,⁷⁹ the Supreme Court even denied the petition for certiorari, where the question presented was “whether qualified immunity is an affirmative defense that state actors must assert, as nine U.S. Courts of Appeals hold, or whether federal appellate courts may raise the defense sua sponte, as three U.S. Courts of Appeals hold[.]”⁸⁰ However, the court had previously granted the motion for a brief of amici curiae in support of the petitioner, which suggested several arguments against the sua sponte relief of qualified immunity as an affirmative defense of the statute of limitations waived by the defendant.

Unlike *Lassiter*, which asserted that judges could grant sua sponte relief regarding the statute of limitations up until the pretrial conference in ordinary litigation cases, Hamner's petition for certiorari included various arguments from amici curiae opposing sua sponte powers, even in cases on qualified immunity, traditionally admitted by courts as an exercise of sua sponte power.⁸¹ In sum, the amici curiae, after having assessed that “qualified immunity is an affirmative defense that defendants themselves must invoke and plead,”⁸² rapidly advance the main argument against the sua sponte relief:

⁷⁸ See *id.* at 55 (quoting *Phillips v. Allegheny Cnty.*, 869 F.2d 234, 239 (3d Cir. 1989) (“Rule 16 of the Federal Rules of Civil Procedure contemplates that a trial court should assume an ‘active managerial role’ in the litigation process to expedite the efficient disposition of a case.”)). “[T]he rule was drafted to ‘clarify and confirm the court’s power to identify the litigable issues . . . in the hope of promoting efficiency and conserving judicial resources by identifying the real issues prior to trial, thereby saving time and expense for everyone.’” *Id.* (quoting FED. R. CIV. P. 16 advisory committee’s notes to 1983 amend., subdiv. (c)) (citing *Meadow Gold Prods. Co. v. Wright*, 278 F.2d 867 (D.C. Cir. 1960)) (emphasis added).

⁷⁹ *Hamner v. Burls*, 937 F.3d 1171 (8th Cir. 2019).

⁸⁰ *Hamner v. Burls*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/hamner-v-burls/> [<https://perma.cc/G5MY-MSF4>] (last visited Dec. 22, 2025); see, e.g., *Dean v. Blumenthal*, 577 F.3d 60, 67 n.6 (2d Cir. 2009) (exercising sua sponte discretion to evaluate qualified immunity claim even though it was raised for the first time on appeal); *Graves v. City of Coeur D’Alene*, 339 F.3d 828, 845–46, 845 n.23 (9th Cir. 2003).

⁸¹ See *Arizona v. California*, 530 U.S. 392 (2000); see Brief of Professors, *supra* note 67, at 4–7.

⁸² Brief of Professors, *supra* note 67, at 2.

A court's *sua sponte* invocation of an affirmative defense violates the central tenets of the adversarial model: that courts act as passive and neutral decisionmakers, reviewing only the legal and factual disputes presented for adjudication by the parties. It also circumvents rules governing waiver and forfeiture of non-jurisdictional affirmative defenses on appeal, transforming the appellate courts into courts of first view rather than courts of review. That the affirmative defense invoked in this case was qualified immunity—a judicially-imposed restriction on statutorily-authorized civil rights actions—makes the *sua sponte* invocation a particularly problematic expansion of the judiciary's role.⁸³

Furthermore, the violation of the adversary system was so crucial that the amici curiae stated that “[a]llowing courts to invoke non-jurisdictional affirmative defenses *sua sponte* also impermissibly gives courts ‘*carte blanche* to depart from the principle of party presentation basic to our adversary system.’”⁸⁴

Amici curiae also pointed out another essential argument. Indeed, *Hamner* presented a different and questioned issue about *sua sponte* relief of the statute of limitations, even though focusing only on qualified immunity as a waived affirmative defense. Specifically, the brief addressed the appellate court's first-time consideration of a forfeited or waived qualified immunity defense: “Even forfeited non-jurisdictional affirmative defenses—those not pressed below because of mere inadvertence—may be ‘resurrect[ed]’ by a reviewing court only ‘in a small number of narrow, carefully defined contexts,’ and, even then, only in ‘exceptional’ cases.”⁸⁵ For purposes of this Article, however, there is an interesting argument well related to the circumstance that the *sua sponte* power was raised for the first time by the appellate court. The amici curiae argued:

Permitting appellate courts to consider waived and forfeited non-jurisdictional defenses also promotes gamesmanship, encouraging defendants to seek a merits adjudication from the trial court and, if they fail to get traction, to suggest the defense on appeal as a fallback strategy. It also “invite[s] strategic use” of late-asserted affirmative defenses as a dilatory

⁸³ *Id.* at 3.

⁸⁴ *Id.* at 6–7 (quoting *Wood v. Milyard*, 566 U.S. 463, 472 (2012)).

⁸⁵ *Id.* at 8 (quoting *Maalouf v. Islamic Republic of Iran*, 923 F.3d 1095, 1109 (D.C. Cir. 2019) (discussing *Wood*, 566 U.S. at 471; *Arizona*, 530 U.S. at 412–13; *Day v. McDonough*, 547 U.S. 198 (2006); *Granberry v. Greer*, 481 U.S. 129 (1987))).

tactic “by defendants who stand to benefit from the delay.”⁸⁶

This argument is strictly connected to the recognition that “whether [qualified] immunity has been established depends on facts peculiarly within the knowledge and control of the defendant,”⁸⁷ and the reasoning seems quite different compared to the statute of limitations. The latter defense is merely a matter of calculating elapsed time related to the specific rule provided for the claim brought to the court; accordingly, it needs no particular discovery to defeat the defense even if raised *sua sponte*. Indeed, these examples demonstrate that numerous arguments could be raised for or against the *sua sponte* powers regarding a specific but divergent affirmative defense, provoking an uncertain set of jurisprudential rules without a systematic context.

Conclusively, while the amici curiae recognized that the Supreme Court admitted the *sua sponte* relief of qualified immunity in appellate courts,⁸⁸ they strongly disagreed, as many other courts eloquently did.⁸⁹ Specifically, they argued that “an appellate court’s consideration of a forfeited or waived qualified immunity defense weakens important procedural constraints on appellate review.”⁹⁰ Mainly focusing on the appellate review, the amici curiae did not agree with the consideration by which “[t]he primary justification for the minority rule permitting *sua sponte* consideration of qualified immunity defenses on appeal is that divergence from norms would be more efficient in the case upon review.”⁹¹ Indeed, they replied that “the far more efficient procedure is to allow defendants to choose whether to assert their waivable affirmative defenses below. ‘Over the long term,’ holding parties to the consequences of their forfeiture or waiver will encourage consolidation of arguments before district and appellate courts.”⁹²

⁸⁶ Brief of Professors, *supra* note 67, at 9 (quoting *Guzman-Rivera v. Rivera-Cruz*, 98 F.3d 664, 668 (1st Cir. 1996)).

⁸⁷ *Id.* at 10 (quoting *Gomez v. Toledo*, 446 U.S. 635, 640–41 (1980)). In particular, amici curiae noted that the Eighth Circuit’s *sua sponte* invocation of qualified immunity deprived Mr. Hamner of the ability to seek leave to replead or conduct discovery to unearth evidence that defeats the defense, such as records showing that Defendants violated the law knowingly or purposefully. *Id.* at 9–10.

⁸⁸ *See id.* at 12 (citing *Wyatt v. Cole*, 504 U.S. 158, 170 (1992)).

⁸⁹ *See id.* (quoting *Ziglar v. Abassi*, 582 U.S. 120, 160 (2017) (Thomas, J., concurring)) (affirming that the court “should not substitute [its] own policy preferences for the mandates of Congress by exceeding the doctrine’s common law origins”). “When appellate courts invoke the defense *sua sponte*, even after the litigant’s waiver or forfeiture, such rulings take the judicially created qualified immunity defense far beyond its common law precedent.” *Id.*

⁹⁰ *Id.* at 8.

⁹¹ *Id.* at 13.

⁹² *Id.* (quoting *Leyse v. Bank of Am. Nat. Ass’n*, 804 F.3d 316, 322 (3d Cir. 2015)); *see* *E. Coast Test Prep LLC v. Allnurses.com, Inc.*, No. CV 15-3705 (JRT/JSM), 2016 WL 5109137, at * 3 (D. Minn. Sep. 19, 2016); Powell, *supra* note 4, at 212–16.

D. *Res Judicata and Issue Preclusion*

Conversely, courts can undoubtedly raise the affirmative defenses of res judicata and the related issue preclusion effects sua sponte. In the U.S. judicial system, the doctrines of res judicata (claim preclusion) and issue preclusion protect the finality of judgments, prevent inconsistent outcomes, and promote judicial efficiency.⁹³ These doctrines generally bar the same claim or issue from being relitigated once adjudicated. Defendants must raise these as affirmative defenses under Federal Rule of Civil Procedure 8(c). However, courts can raise res judicata or issue preclusion sua sponte.

Courts are inclined to apply preclusion doctrines sua sponte to conserve judicial resources and prevent the issuance of inconsistent judgments. In *Arizona v. California*,⁹⁴ the Supreme Court underscored the significance of res judicata in ensuring the finality and respect for judicial determinations. Although the case did not involve sua sponte preclusion, it highlighted that applying preclusion principles aids in avoiding the “harassment of the defendant by successive actions” and fosters the stability of judgments.⁹⁵ Consequently, courts may regard the sua sponte application as prudent when a claim or issue has been resolved, particularly when relitigating would squander resources and contravene established decisions.

Numerous federal circuits have acknowledged specific cases where courts may invoke res judicata sua sponte. In *Gleash v. Yuswak*,⁹⁶ the Seventh Circuit affirmed a district court’s ruling to apply res judicata sua sponte in dismissing a pro se prisoner’s complaint. *Gleash* underscored the court’s jurisdiction to dismiss the complaint on these grounds, referencing the necessity to prevent repetitive claims that squander judicial resources.⁹⁷ In this case, the court exercised res judicata sua sponte to circumvent redundant litigation, as prior judgments precluded the plaintiff’s claims.

⁹³ The literature on the essence and scope of res judicata and issue preclusion is massive. *See, e.g.*, ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE (Press 2001); JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE 616 (6th ed. 2021); DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 34 (2001); Kevin M. Clermont, *Res Judicata as Requisite for Justice*, 68 RUTGERS L. REV. 1067, 1069–76 (2016); Cesare Cavallini & Emanuele Ariano, *Issue Preclusion Out of the U.S. (?) The Evolution of the Italian Doctrine of Res Judicata in Comparative Context*, 31 IND. INT’L & COMPAR. L. REV. 1, 5 (2021).

⁹⁴ *Arizona v. California*, 530 U.S. 392, 406–07 (2000).

⁹⁵ *See id.* at 412 (noting that the principles underlying *res judicata* include “the defendant’s interest in avoiding the burdens of twice defending a suit”); *id.* at 424–25 (Rehnquist, J., concurring) (observing that *res judicata* ensures “certainty of . . . rights” and serves “strong interest[s] of finality”).

⁹⁶ *Gleash v. Yuswak*, 308 F.3d 758, 759–60 (7th Cir. 2002).

⁹⁷ *See id.* at 761 (“It was sensible to stop the suit immediately [on preclusion grounds], saving time and money for everyone concerned”).

Similarly, in *Holloway v. Brush*,⁹⁸ the Sixth Circuit determined that a district court possesses the inherent authority to dismiss a claim on the grounds of issue preclusion sua sponte, particularly when such action promotes judicial efficiency. The court articulated that in instances with explicit prior judgments, it is in the court's best interest to proactively dismiss claims barred by preclusion doctrines, conserving judicial resources and preserving the integrity of the judicial process.⁹⁹

While courts can apply preclusion doctrines sua sponte, they must exercise caution to uphold fairness and procedural due process. The adversarial nature of the U.S. system generally places responsibility for raising defenses on the parties themselves. In *Kontrick v. Ryan*,¹⁰⁰ the Supreme Court underscored procedural fairness by recognizing that sua sponte applications should not disregard a party's right to receive notice and the opportunity to respond.

In *Headwaters Inc. v. U.S. Forest Service*,¹⁰¹ the Ninth Circuit highlighted that when a court raises res judicata or issue preclusion sua sponte, it should provide notice and an opportunity for parties to address the issue. Failure to do so may compromise parties' due process rights and potentially offer grounds for appeal.¹⁰² Courts, therefore, may only raise preclusion sua sponte where a prior judgment is unequivocal and parties have fully litigated the issue.

Consequently, it is evident how markedly distinct the sua sponte courts' approach to res judicata as an affirmative defense is from the preceding cases. The doctrines of res judicata and issue preclusion play a crucial role in ensuring judicial efficiency, finality, and consistency.¹⁰³ Federal courts have demonstrated a willingness to apply these doctrines sua sponte, particularly when they prevent unnecessary duplication and uphold prior judgments.¹⁰⁴ Nonetheless, courts respect the adversarial system and typically permit parties to address any preclusion issues that arise sua sponte.¹⁰⁵ Consequently, while courts may invoke preclusion sua sponte to expedite litigation and reinforce prior decisions, they prioritize procedural fairness, thereby preserving the efficiency and integrity of the judicial process.

II. FINDING THE SUA SPONTE POWER GUIDELINES

Analyzing case law and the key arguments that underpin judicial decisions reveals a need for a more conceptual analysis. This method

⁹⁸ See *Holloway v. Brush*, 220 F.3d 767, 778 (6th Cir. 2000).

⁹⁹ *Id.*

¹⁰⁰ See *Kontrick v. Ryan*, 540 U.S. 443, 451–59 (2004).

¹⁰¹ See *Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1055–56 (9th Cir. 2005).

¹⁰² *Id.*

¹⁰³ *Id.* at 1051–52, 1055–57.

¹⁰⁴ See, e.g., *Arizona v. California*, 530 U.S. 392, 412 (2000).

¹⁰⁵ *Headwaters*, 399 F.3d at 1055.

seeks to uncover, whenever feasible, the foundational principles that empower the court to introduce sua sponte affirmative defenses not raised by the defendant. The aim is to explore methods for introducing affirmative defenses sua sponte, assess their impacts, and juxtapose this strategy with civil procedure rules in continental law while reconsidering the authority of U.S. courts to proceed sua sponte.

A. The Courts' Too-Discretionary Powers in Acting Sua Sponte: What About Affirmative Defenses?

One can observe that the courts' sua sponte power to raise affirmative defenses depends on the specific nature of the facts qualified by law as affirmative defenses and on the stage at which the court acts independently despite the defendant's lack of defenses. The often-divided opinions of courts on these sua sponte powers, however, betray an unbridled discretionary power in setting the specific case;¹⁰⁶ this preliminary outcome is certainly not satisfying, especially when one considers that the general principles and constitutional values involved place stress on the framework and the scope of the Federal Rules of Civil Procedure.

For now, this Section defers discussion of the most common argument against sua sponte relief of affirmative defenses: its contrast with the Anglo-American adversarial system.¹⁰⁷ On the one hand, it is clear from the traditional American justice model, which has long been lawyer-dominated and recognizes a passive role for judges, that decisions are primarily based on the evidence provided by the parties and their conclusions regarding facts and discovery. While this argument is indeed significant, it should be evaluated critically, considering whether the adversarial model, as initially designed, still aligns with the rigorous framework of civil litigation. This perspective would require recognizing that the evolving litigation landscape is founded on different principles, as public interests are not always sometimes considered in a purely adversarial system.

Based on this premise, many courts' objections regarding their sua sponte powers relate to the nature and function of appellate review, intertwining the structural frameworks of appellate courts with their authority to review cases.¹⁰⁸ Thus, it is sometimes hard to distinguish arguments on appellate courts' powers in reviewing the district court's

¹⁰⁶ See, e.g., Miller, *supra* note 13, at 1287 n.167–69 (surveying divided approaches among federal courts regarding sua sponte consideration of affirmative defenses).

¹⁰⁷ This argument is regularly supported by the cases analyzed in the previous chapter of this Article. For instance, the contrast to the adversarial model is emphasized by the amici curiae in *Hamner v. Burls*. Brief of Professors, *supra* note 67, at 3.

¹⁰⁸ See, e.g., Brief of Professors, *supra* note 67, at 3 (“It also circumvents rules governing waiver and forfeiture of non-jurisdictional affirmative defenses on appeal, transforming the appellate courts into courts of first view rather than courts of review.”).

adjudication from the arguments specifically advanced to justify the (denied) power to raise sua sponte affirmative defenses and generally to raise new issues (even by the parties) waived in the district court process.¹⁰⁹

This point is related to another essential point: it concerns the limits of the sua sponte relief of affirmative defenses, known as the waiver doctrine (general rule),¹¹⁰ which contrasts with the Gorilla Rule (expressly conceived for appellate courts), introducing more uncertainty than clarity in the regulatory framework.¹¹¹

The waiver doctrine influences the parties' rights, claims, and defenses in U.S. civil cases. This doctrine is rooted in a key principle: parties can forgo specific rights, whether explicitly or implicitly, when they do not assert them promptly or adequately.¹¹² Waiver promotes efficiency and finality in legal proceedings, preventing parties from introducing issues later in the process.¹¹³ Consequently, it encourages judicial economy and fairness toward opposing parties. In procedural settings, courts require parties to raise procedural defenses, such as jurisdictional issues or venue challenges, early in the litigation process.¹¹⁴ The Federal Rules of Civil Procedure stipulate that certain defenses must be asserted in a party's initial responsive pleading; otherwise, they will be deemed waived. For example, Federal Rule of Civil Procedure 12(h) outlines the requirements for waiving defenses, such as lack of personal jurisdiction and improper venue, if not addressed in a timely manner.¹¹⁵ This rule prevents parties from postponing objections for strategic purposes, fostering a more efficient litigation process and reducing unnecessary delays.

Though the waiver doctrine aims to ensure fairness and efficiency, it is not without limits. Courts can decline to enforce a waiver if doing so would cause injustice or if the right at stake is fundamental and affects the court's authority, such as subject matter jurisdiction.¹¹⁶ As noted above, subject matter jurisdiction cannot typically be waived, which means that a court must dismiss a case lacking this jurisdiction, regardless of whether the parties involved raise the issue.

In summary, the waiver doctrine in U.S. civil cases is a key principle that fosters fairness and procedural efficiency.¹¹⁷ It encourages parties to participate actively and responsibly in litigation, ensuring that issues are resolved as they arise and that the legal process flows without disruption. Although courts have the authority to prevent waiver in instances of

¹⁰⁹ See, e.g., Miller, *supra* note 13, at 1264.

¹¹⁰ *Id.* at 1264–65, 1265 n.46.

¹¹¹ *Id.* at 1279.

¹¹² *Id.* at 1265.

¹¹³ *Id.* at 1267 n.59.

¹¹⁴ FED. R. CIV. P. 12(b).

¹¹⁵ FED. R. CIV. P. 12(h).

¹¹⁶ See, e.g., Singleton v. Wulff, 428 U.S. 106, 121 (1976) (quoting Hormel v. Helvering, 312 U.S. 552, 557 (1941)).

¹¹⁷ Miller, *supra* note 13, at 1267; Martineau, *supra* note 44, at 1030–31.

injustice (Gorilla Rule),¹¹⁸ the primary role of this doctrine is to reconcile the parties' rights with the necessity for an orderly and efficient judicial system (general rule).

Nonetheless, one can observe that, on the one hand, the main argument used by appellate courts to justify the waiver doctrine (as a general rule) is related to the function of the same court, which is procedurally oriented. As *Singleton* stated, "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."¹¹⁹ On the other hand, many exceptions are justified by appellate courts for very different reasons, put together by the discretionary power in raising a new issue sua sponte to avoid a too general sense of "injustice" in the decision.

At first glance, the combined arguments of appellate courts' function and the waiver doctrine as a general rule (perfectly coherent with each other) should not justify the exceptions, especially when the law does not explicitly provide them but are instead led by a discretionary evaluation of the appellate court on a case-by-case basis. On the contrary, the Gorilla Rule is applied several times, but arguments seem randomly adjusted, as emphasized below.

Indeed, this remark is supported by the sua sponte relief of the statute of limitations established in *Lassiter*,¹²⁰ where appellate court constraints are inapplicable. Therefore, the sua sponte relief of affirmative defenses, such as the statute of limitations, is allowed even if the defendant waived it in the answer, as long as it takes place during the pretrial conference.¹²¹

While *Lassiter* confirms that sua sponte relief of an affirmative defense, such as the statute of limitations, is available during the pretrial phase, it also demonstrates that the judge's sua sponte actions pertain to the structure and function of the appellate court, including the limits of judicial review.

The outcome appears ambiguous; on the one hand, it is generally (though not always) appropriate for the appellate court to deny sua sponte actions, while on the other hand, such actions may be permissible despite the nature of an affirmative defense raised independently by the judge. During the process, the judicial discretionary powers of the court increase. This involves establishing exceptions to the general rule in

¹¹⁸ See *Miller*, *supra* note 13, at 1280–87 (citing several cases in which appellate courts raised sua sponte issues waived by the parties in district court proceedings).

¹¹⁹ See *Singleton* 428 U.S. at 120 (expressly stating, "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below"); see also *Miller*, *supra* note 13, at 1256 n.46 (quoting *Martineau*, *supra* note 44, at 1023, 1044) ("It is a long-standing rule that, to be reviewable on appeal, a claim or issue must have been 'pressed or passed upon below.' The reason for such a rule is obvious: '[analyzing] the facts of a particular [issue] without the benefit of a full record or lower court determination is not a sensible exercise.' A claim or issue is 'pressed or passed upon below' when it fairly appears in the record as having been raised or decided.").

¹²⁰ See *Lassiter v. City of Philadelphia*, 716 F.3d 53, 57 (3d Cir. 2013).

¹²¹ *Id.* at 56–58 (emphasizing that early identification of an affirmative defense during a Rule 16 conference does not violate waiver principles where the plaintiff is afforded notice and an opportunity to respond); see also FED. R. CIV. P. 16(c)(2)(A) (PARATHETICAL NEEDED).

appellate courts and allowing *sua sponte* actions related to the statute of limitations during the pretrial phase, such as defenses that primarily serve the defendant's interests but have been waived in the answer. The landscape appears more complex as courts discretionally recognize that other types of affirmative defenses, such as *res judicata* and issue preclusion, can also be raised *sua sponte* by appellate courts.¹²² This recognition stems from the public's interest in judicial economy and conserving resources by avoiding duplicate proceedings, transcending the nature of the defense as an affirmative defense waived by the parties.¹²³

The prevailing impression is that guidelines for determining *sua sponte* actions undertaken by the courts are solely related to the discretionary authority of (appellate) judges to supersede the explicit provisions delineated in Federal Rule of Civil Procedure 8(c). This applies irrespective of whether the judge autonomously raises a waived affirmative defense during either the pretrial phase or the appellate process, regardless of the nature of the judicial review and the variations in the facts raised by the judge.

Considering this impression from a continental scholar's perspective, the initial point is that a specific federal rule allows defendants to present different facts to challenge the plausibility of the plaintiff's claims. The affirmative defense does not contest the truth of the facts supporting the plaintiff's claim; instead, it provides contrasting facts to demonstrate the pleading's failure to state a claim.¹²⁴ Therefore, the primary interpretation of this federal rule should be that no exceptions to the rule should be allowed. Two main arguments support this first consideration. First, exceptions, regardless of what is reasonable and sustainable, contradict Federal Rule of Civil Procedure 8(c), which explicitly requires defendants to plead affirmative defenses.¹²⁵ Furthermore, granting discretionary power to the court should not permit this apparent overlap. Second, the classical argument, often used to deny the *sua sponte* powers to raise affirmative defenses,¹²⁶ contrasts the *sua sponte* actions of courts with the role of the adversarial model, which is a prerogative of the

¹²² See *Arizona v. California*, 530 U.S. 392, 412–13 (2000). (recognizing that *res judicata* may be raised *sua sponte* in “special circumstances” to protect judicial resources); see also *Erie Telecomm., Inc. v. City of Erie*, 853 F.2d 1084, 1089 n.10 (3d Cir. 1988) (PARATHETICAL NEEDED).

¹²³ See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting) (“This result is fully consistent with the policies underlying *res judicata*: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste.”).

¹²⁴ See CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5 FED. PRAC. & PROCEDURE § 1270 (4th ed. 1969). Affirmative defense – In general, affirmative defenses were initially established as “common law plea by way of confession and avoidance,” which can avoid the “plaintiff's otherwise the valid cause of action.” See also BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING § 166, 197–99 (3d ed. 1923) (PARATHETICAL NEEDED).

¹²⁵ See FED. R. CIV. P. 8(c).

¹²⁶ See, e.g., *Greenlaw v. United States*, 538 F.3d 830 (2008) (explaining the party-presentation principle underlying the Anglo-American adversarial system).

Anglo-American system. This leading but general argument should have prevented the application of the same Gorilla Rule, which refers to the unchecked discretionary power of the courts.

However, the reality of *sua sponte* actions by courts has developed differently. Although the argument regarding the adversarial model often aims to deny the active role of judges in independently assessing facts, as previously observed, this approach is too simplistic to effectively argue that many cases with vastly different facts involve affirmative defenses. This grants excessive discretion to appellate courts in any *sua sponte* review of affirmative defenses that the defendant has waived. This directly conflicts with the established nature and regulations surrounding affirmative defenses, as historically outlined by the Federal Rules of Civil Procedure, which predate the principles of the adversarial model.

From a strict reasoning standpoint, Federal Rule of Civil Procedure 8(c) should not permit exceptions, regardless of whether an exception conflicts with the framework and purpose of the adversarial model.

Conversely, numerous exceptions exist, and the pattern of *sua sponte* action is further complicated by the *sua sponte* decisions to dismiss the claim, which frequently overlap and need clarification with the relief the courts deal with regarding waived affirmative defenses.

B. Raising or Deciding Issues Sua Sponte by Courts?

Raising an issue does not mean deciding it; it simply considers the issue and might invite arguments from the parties. However, courts acting *sua sponte* not only raise waived affirmative defenses independently, but they also move toward making decisions based on that relief.¹²⁷ This should not be confused with the Federal Rules of Civil Procedure provisions that regulate a judge's initiative for specific motions. Indeed, Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) provide a framework for dismissing cases based on lack of subject matter jurisdiction¹²⁸ or failure to state a claim upon which relief can be granted,¹²⁹ respectively.

Otherwise, deciding *sua sponte* to raise an issue as an affirmative defense implies that the court chooses the facts raised on its own, even if the party waived them, and uses them as a baseline for deciding the case, often by promoting the motion independently. However, selecting and

¹²⁷ See *Wood v. Milyard*, 566 U.S. 463, 472–73 (2012) (synthesizing prior cases addressing courts' *sua sponte* consideration of affirmative defenses and distinguishing between merely raising an issue and deciding it).

¹²⁸ See *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 89–90 (1998) (distinguishing subject-matter jurisdiction dismissals from dismissals due to lack of merit of a federal claim).

¹²⁹ Although these rules outline procedures for parties to raise such issues, courts may also initiate dismissals *sua sponte* in certain circumstances. For example, in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), the Supreme Court emphasized that a complaint must provide more than mere "labels and conclusions" to state a plausible claim. This is a baseline for *sua sponte* dismissals under Rule 12(b)(6).

deciding a new issue sua sponte involves significantly different considerations, ultimately implicating the adversarial model and due process.

Stepping back, it is essential to remember that the main argument against sua sponte relief for an affirmative defense waived by a party is its contrast to the adversarial model and its historical importance in American civil litigation. The appropriate time to do so is during the decision-making phase of litigation.

On one hand, if the contrast to the adversarial model were a decisive argument, there would be no exceptions to the general rule. The system should align with that model, avoiding any sua sponte actions by the judge. Conversely, several courts have permitted the use of case-by-case discretionary power,¹³⁰ often resulting in conflicting jurisprudence.

On the other hand, the difference between raising an issue and deciding a new issue sua sponte is often subtle. While a conceptual distinction exists, the more significant problem occurs when the court frequently decides issues on its initiative, effectively shaping the outcome of the case. However, it should be noted that, even from this perspective, relying on the adversarial model in most relevant cases is unnecessary and, to some extent, inaccurate. Defining the interplay between sua sponte dismissal (deciding a new issue independently raised) and due process of law is crucial. This Article emphasizes this matter of interpretation first, since the due process of law in civil proceedings is often viewed as a result of the adversarial system.

Prominent scholars argue that the adversarial model supports due process by creating a system where each party can present their case and respond to the other side's arguments.¹³¹ The principles of due process, in turn, define the limits of this adversarial process. This system ensures that all parties are properly informed of proceedings, have the opportunity to gather and present evidence, and are protected against arbitrary or unfair actions by the judge or the opposing party.¹³² The rights to confront and cross-examine witnesses, along with the right to legal counsel, further demonstrate how adversarial procedures strengthen the principles of due process.¹³³ To summarize, both the adversarial model

¹³⁰ See *Erline Co. S.A. v. Johnson*, 440 F.3d 648, 655–57 (4th Cir. 2006) (holding that although statute-of-limitations defenses are ordinarily waived if not raised, district courts may consider them sua sponte only in narrow contexts—such as habeas and in forma pauperis proceedings—where courts have a statutory duty to screen filings); see also *Fratus v. DeLand*, 49 F.3d 673, 675–76 (10th Cir. 1995) (holding that sua sponte dismissal based on an affirmative defense is permissible only where the defense is “patently clear from the face of the complaint” or “rooted in adequately developed facts”).

¹³¹ See Lon L. Fuller & Kenneth Winston, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 383–84 (1978) (stating that the adjudication process loses integrity when the decisionmaker forms theories and conducts factual inquiries, thereby undermining counsel's ability to advocate through evidence and arguments).

¹³² See Fuller & Winston, *supra* note 131, at 383–84.

¹³³ See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) (contrasting the American adversarial system with the inquisitorial model of Germany; providing important insights regarding the connection between due process and adversarial

and due process support fairness. The adversarial model offers the procedural framework for resolving disputes, while at the same time, due process ensures that these procedures adhere to constitutional fairness standards, allowing all parties to present their cases and be heard.

However, considering sua sponte powers as an exceptional court tool for deciding cases, the role of due process and its impact is essential and unavoidable, as several court decisions have underlined for decades. For instance, in *Stanley v. Illinois*,¹³⁴ the Supreme Court affirmed that courts must allow the parties to respond in any case where the court decides to address or dismiss the issue sua sponte, stating that the “Constitution recognizes higher values than speed and efficiency.” Failing to do so would constitute a violation of due process.¹³⁵

From an alternative standpoint, it has been contended that the opportunity to be heard before dismissal infringes upon the principles of procedural justice, which is defined as the principle that the legal system must be fair and must be perceived as fair.¹³⁶ Procedural justice is fundamentally understood as a principal outcome of the adversarial system, constituting an essential aspect of due process. Hence, it has been underlined that the adversary system is built on the premise that allowing litigants to address the court on dispositive issues both “increases the accuracy of the decision” and “increases the parties’ sense that the court’s process and result are fair.”¹³⁷

Given these considerations, the court’s sua sponte powers remain uncertain and fragmentary. The Gorilla Rule and the associated discretionary powers vested in the courts starkly contrast the adversarial system that constitutes the foundation of U.S. civil litigation. It is not unexpected that, in most instances where district courts assert and adjudicate *sua sponte* affirmative defenses, appellate courts only accept this authority if it pertains to the Gorilla Rule. Concurrently, the principles underpinning the Gorilla Rule exhibit a certain fragility.¹³⁸ This rule encompasses numerous exceptions that frequently do not contribute to forming a broadly acceptable or effective microsystem for mitigating the prevalence of “gorillas” in the room.

practices in the United States; and contending that, despite its shortcomings, the adversarial model is essential for ensuring procedural fairness in American due process); see also Judith Resnik, *Due Process: A Public Dimension*, 39 FLA. L. REV. 405 (1987) (exploring due process as a public good and arguing that the adversarial system is essential for making judicial proceedings transparent and accessible while strengthening litigants’ due process rights).

¹³⁴ *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

¹³⁵ See Hills, *supra* note 40, at 245–46; see also, in the same terms, *Richards v. Jefferson Cnty.*, 517 U.S. 793, 804 (1996); *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 461–63 (2000).

¹³⁶ See Hills, *supra* note 40, at 262–63 (quoting Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26 (2007); Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 283 (2002), which states that “societal acceptance of courts’ decisions because the losing party will feel that he has not been given a fair opportunity to present his case when he had neither notice of, nor the chance to present, arguments on the issue that the court found determinative.”).

¹³⁷ See Miller, *supra* note 13, at 1260.

¹³⁸ Martineau, *supra* note 44, at 1034; see Offenkrantz & Lichter, *supra* note 46, at 113–15.

The Gorilla Rule and the adversarial model contradict each other. Conversely, due process and procedural justice empower the courts to refrain from independently introducing or resolving new issues.¹³⁹ In some instances, the Gorilla Rule allows for the introduction or resolution of affirmative defenses that the parties have waived.¹⁴⁰ This uncertainty regarding a vital element of civil litigation rules and judicial conduct calls for a more comprehensive perspective to explain why a few gorillas may eventually be present in the room.

In this regard, an alternative viewpoint, guided explicitly by the continental approach, may assist in reevaluating the U.S. courts' *sua sponte* powers. This perspective could offer a reassessment of the contemporary significance of the adversarial system, the relationship between *sua sponte* authority and affirmative defenses, and the assurances of due process and procedural fairness.

III. THE CONTINENTAL APPROACH TO *SUA SPONTE* COURTS' ACTING

From a continental perspective, it is crucial to address the problems arising from the *sua sponte* actions of civil courts and compare these with the American system discussed previously. Examining judges' *sua sponte* authority in continental systems necessitates precise terminology and consistency in the underlying principles, as these ideas are usually evaluated and approached within the American framework.

At the introductory level of this Part, the reader needs to understand the general pattern of the continental view concerning the matter at stake. Simultaneously, this Article examines the Italian perspective, influenced by recent reforms similar to those in the American civil justice system;¹⁴¹ thus, it serves as a more suitable model for comparison and mutual evaluation.

It is important to highlight that Italian and other continental legal systems recognize judges' *sua sponte* actions. They do this by implementing specific provisions that define the court's functions and the responsibilities of the involved parties. This key difference reflects a fundamental distinction between the continental and American systems. This Article will first explore the factors that contribute to this diversity.

A. Defining the Sua Sponte Court's Operating Rules in the History of the Continental System

¹³⁹ See Offenkrantz & Lichter, *supra* note 46, at 113.

¹⁴⁰ See Miller, *supra* note 13, at 1280–87.

¹⁴¹ See Cesare Cavallini & Stefania Cirillo, *The Americanization of the Italian Civil Proceedings?*, 57 N.Y.U. J. INT'L L. & POL. 7, 52 (2025).

In transitioning to the Italian legal system, it is essential to highlight a fundamental principle established in Article 112 of the Italian Code of Civil Procedure (“I-CCP”) which states, “[t]he judge shall decide upon all the claims and within its limits; *he shall not sua sponte decide upon objections which may be raised only by the parties.*” (emphasis added).¹⁴² To understand this rule, which indeed is one of the milestones of the continental civil process regulations across civil law systems,¹⁴³ one must examine the background; in particular, one must clarify the origin of the rule, as the preparatory works of the ministerial committee conceived it at that time (1940), and finally how the rule works within the civil proceedings framework. This examination is necessary because of the partial mistake usually made about the dichotomy between the adversarial and inquisitorial systems, which traditionally, even sometimes erroneously, affects the main difference between Anglo-American and continental systems.

First, it is necessary to clearly outline the framework of continental civil proceedings as a non-inquisitorial model, despite this model often being seen as contrasting with the Anglo-American adversarial model.¹⁴⁴ Regarding the reasoning behind the Italian rule, clarifying how the initial stage of continental civil proceedings should be viewed as non-inquisitorial is essential. The initial phase involves presenting facts and evidence, including documentation and witness testimonies.¹⁴⁵ Additionally, it emphasizes explicitly the rationale underlying Article 112 of the I-CCP. This phase should be regarded primarily as adversarial, as only the parties may present facts and information to substantiate their claims and defenses. Therefore, judges cannot independently introduce facts and possess only limited authority to request specific evidence, which can only be exercised based on facts presented by the parties involved.¹⁴⁶

¹⁴² See SIMONA GROSSI & MARIA CRISTINA PAGNI, COMMENTARY ON THE ITALIAN CODE OF CIVIL PROCEDURE 158 (2010). It is worth noting that the term “objections” used by these authors has the same meaning as the affirmative defenses in the U.S. system; for instance, it can be used for the statute of limitations and *res judicata* in both systems.

¹⁴³ See Courtland H. Peterson, *An Introduction to the History of Continental Civil Procedure*, 41 U. COLO. L. REV. 61, 65 (1968) (describing the principle of party presentation as a foundational feature of continental civil procedure, under which courts are restricted to deciding the controversy framed by the parties).

¹⁴⁴ See generally Cesare Cavallini & Stefania Cirillo, *Reducing Disparities in Civil Procedure Systems: Towards a Global Semi-Adversarial Model*, 34 FLA. J. INT’L L., 99, 104–110 (2022) (comparing continental civil procedure with the Anglo-American adversarial model to challenge the inquisitorial characterization). The dichotomy was also rooted in the most prestigious literature. See generally Benjamin Kaplan et al., *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193, 1193–268 (1958) (describing German civil procedure as “markedly different” from American practice).

¹⁴⁵ See Amos Gabrieli & Michal Alberstein, *Conflict Resolution Procedures Within the Courtroom: Between the Adversarial and Inquisitorial Traditions*, 51 GA. J. INT’L & COMPAR. L. 87, 100 (2022).

¹⁴⁶ See Strier, *supra* note 24, at 111. A more detailed explanation of the set of rules governing the introductory phase of the Italian and German civil proceedings may be found in Cavallini & Cirillo, *supra* note 144, at 106–07, 106 n.33.

The results of this framework regarding the introduction of civil proceedings are similar to those in the American system. The most notable and shared outcome is that, even within the continental systems, the power to present factual evidence substantiating claims and defenses belongs exclusively to the parties. Moreover, the judge must refrain from intervening in defining the factual parameters of the lawsuit. Thus, the rationale behind Article 112 of the I-CCP is more understandable to an American observer. In other words, the discourse surrounding *sua sponte* actions enacted by Italian courts does not necessarily entail the endorsement of an inquisitorial model of civil proceedings. While a rule permits *sua sponte* interventions by the judge, it is predicated upon the assumption that the concerned party has exclusively presented the factual circumstances necessitating such *sua sponte* relief.¹⁴⁷

This important normative and systematic consideration also explains what *sua sponte* acting by Italian courts means. Raising an issue of fact, which must be alleged by a party, whether plaintiff or defendant, automatically involves deciding the issue: in other words, raising the normative effects of the issue of fact *sua sponte* means deciding the case correctly on that issue.¹⁴⁸

Unlike American law, continental provisions, especially those in Italy, establish a legislative distinction. Article 112 of the I-CCP expressly states that courts must not rule on issues that are exclusively reserved for the parties (which can be compared to U.S. affirmative defenses).¹⁴⁹ This provision is explicit and differs from the American system. It recognizes that the court has the authority to derive normative significance from the parties' presented facts.¹⁵⁰ Conversely, it determines that certain facts only take on normative weight for the court's decision if the parties raise them in a timely manner.¹⁵¹

This provision, Article 112 of the I-CCP, has a disputed history regarding its establishment. The long path that led to the definitive text of that rule reveals how it was conceived after a long-debated discussion within the preliminary works of the Code of Civil Procedure, then promulgated in 1942.¹⁵² The value of the dispositive principle requires exclusive party activity in proposing claims and alleging facts. As stated in Article 112 of the I-CCP, the outcome has been an open rule that avoids

¹⁴⁷ See Cavallini & Cirillo, *supra* note 144, at 109.

¹⁴⁸ GROSSI & PAGNI, *supra* note 142, at 158. It textually emerges from art. 112 I-CCP, when it unavoidably states that the judge must decide on the claim brought to the court and on every issue questioned, reserved to the parties, or raised *sua sponte* by the same judge. *Id.*

¹⁴⁹ GROSSI & PAGNI, *supra* note 142, at 158.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 158–59.

¹⁵² See CESARE CAVALLINI, ECCEZIONE RILEVABILE D'UFFICIO E STRUTTURA DEL PROCESSO 11–14 (2003) (distilling the main points of the ATTI DELLA COMMISSIONE DELLE ASSEMBLEE LEGISLATIVE, 44–45 (1940), which examined the policy regarding the limitations on the dispositive principle (as it pertains to and aligns with Anglo-American law in establishing a party-governed process), including whether the court's *sua sponte* actions should be treated as a general rule or an exceptional legal provision).

explicit restriction by the law of the affirmative defenses, such as the statute of limitations.¹⁵³

In this context, Article 112 of the I-CCP serves as a guiding principle where the legislature selects a civil process model that requires parties to define the limits of the judge's decisions. While this model cannot be classified strictly as adversarial, it also does not embody an inquisitorial process, primarily because the judge adopts a more proactive role recognized from the initial stages of litigation.¹⁵⁴ However, in defending the parties' dominion over the litigation's boundaries, the forward-looking aspect of this rule has been the explicit provision that *sua sponte* actions by courts are permitted by law. Even in the original intention of the rule, it was not a general rule but was devoted to specific legal regulations (such as the current Civil Code provision on the contract's nullity and several procedural issues, such as the jurisdiction and the standing to sue).

At a broader level, since the advent of the codification era initiated by the 1806 Napoleonic Code, the continental system of civil justice has systematically excluded inquisitorial powers. Civil proceedings are structured within a framework that grants the parties exclusive authority to assert claims and present material facts.¹⁵⁵ Even in a system that is mistakenly characterized as inquisitorial, the onus for identifying legal issues, formulating legal arguments, and submitting material facts for adjudication predominantly resides with the attorneys representing the parties.¹⁵⁶ Moreover, the civil procedural laws governing the Italian and German systems explicitly prohibit judges from introducing facts *sua sponte*.¹⁵⁷

¹⁵³ See Codice di procedura civile [C.p.c.] [Code of Civil Procedure] art. 112 (It.).

¹⁵⁴ See HERBERT J. LIEBESNY, *FOREIGN LEGAL SYSTEMS: A COMPARATIVE ANALYSIS* 15 (4th ed. 1981); JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 32 (2d ed., 1969); see also Strier, *supra* note 24, at 109 (that affirms that the key-signals of an inquisitorial system are:

[the] reliance on official documentation, a scientific paradigm for truth-seeking, no juries but a career judiciary trained specifically for the bench rather than the U.S. model of selecting judges from the ranks of practicing attorneys, nonpartisan state-controlled procedure, rigid state regulation of the legal process, and activist judges who intervene to ensure a solution based on the merits of the case);

see also Cavallini & Cirillo, *Reducing Disparities in Civil Procedural Systems*, *supra* note 144, at 107–10.

¹⁵⁵ Cavallini & Cirillo, *supra* note 144, at 108.

¹⁵⁶ *Id.*

¹⁵⁷ It corresponds to the principles provided by Article 111, Section II of the Italian Constitution, and Section 97, Paragraph 1 of the German Constitution. See Costituzione Italiana [Constitution Of The Italian Republic], Art. 111.2 (It.) (“All court trials shall be conducted with adversary proceedings and parties shall be entitled to equal conditions before a third-party and impartial judge.”); see GRUNDGESETZ [GG] [CONSTITUTION], S IX, art. 97.1 (Ger.) (“Judges shall be independent and subject only to the law”); see Cavallini & Cirillo, *supra* note 144, at 108; see MIRJAN R. DAMAŠKA, *EVIDENCE LAW ADRIFT* 105–08 (1997); see also Burkhard Bastuck &

The comparative approach to courts' *sua sponte* power in raising and deciding factual issues claimed by the parties demonstrates that the often-misleading division between adversarial and inquisitorial models is a historical misconception and an inaccurate perspective on organizing this topic.

Conversely, this initial attempt to analyze a different pattern, as seen in the continental model, shows that the typical framework of each system does not mandate the court's activity and authority to invoke the normative effects of facts alleged by the parties, compelling the judge to render decisions on them. This topic is independent of the civil proceedings model historically adopted by Western legal tradition. It offers different systematic and policy foundations that continental and Anglo-American systems can share. Before reassessing the American view on the topic, it is necessary to clarify the recent developments of *sua sponte* actions by courts in Italian jurisprudence and legislation, particularly regarding the attention paid to due process.

B. *Sua Sponte Operating Rules in Italian Appellate Courts*

The rules for *sua sponte* raising and deciding new issues are even more significant when considered by continental appellate courts, especially given their development through the continuous reforms of the code of civil procedure, especially in the Italian context.

Firstly, the long history of the provision set by Article 345, paragraph 2 of the I-CCP, is worth mentioning.¹⁵⁸ This rule, as it is today, went through a substantial reform in the 1990s that overruled the previous text and related provisions.¹⁵⁹ This rule now recognizes that Courts of Appeal have the power to raise an issue of fact for the first time only if the fact can be classified as one whose normative effects also operate *sua sponte*.¹⁶⁰ In other words, what Italian law defines as an affirmative defense must not be raised in the appellate process. However, this rule must be applied precisely. Allowing *sua sponte* relief for new factual issues in appellate courts requires a clear understanding of the procedural

Burkard Gopfert, *Admission and Presentation of Evidence in Germany*, 16 LOY. L.A. INT'L & COMPAR. L. REV. 609, 610 (1994).

¹⁵⁸ C.p.c. art. 345 (It.), translated in GROSSI & PAGNI, *supra* note 142, at 289 ("In the appeal proceedings, new claims shall not be filed and, if filed, shall be declared inadmissible by the judge, *sua sponte*").

¹⁵⁹ See the reform established in Italy by L. n. 353/1990, which was guided by the policy and the mainstream of reducing the length of the civil proceedings. See Legge 26 novembre 1990, n.353 (It.). One of the most crucial points of this reform was appropriately changing the structure and the technical framework of the appellate courts, either the Court of Appeal or the Court of Cassation. Art. 345 I-CCP was reformed, impeding parties from introducing new claims and facts that could have been introduced in the first instance. See also Cesare Cavallini, *L'eccezione "Nuova" Rilevabile D'ufficio nel Giudizio D'appello Riformato [The "New" Exception That Can be Raised in Reformed Appellate Proceedings]*, 69 RIV. DIR. PROC. 588 (2014) (It.) (offering a general overview and a specific interpretation of the rule after two decades).

¹⁶⁰ C.p.c. art. 345; see GROSSI & PAGNI, *supra* note 142, at 289.

stage at which the parties introduce the facts. This consideration is significant because it addresses the overall framework of civil litigation and the specific design of the appellate process, which involves differing values and policies of civil justice.

The interpretation of Article 345, paragraph 2, of the I-CCP has evolved quickly, resulting in a comprehensive but limited understanding of the *sua sponte* powers held by judges in the courts of appeal. As a result, the Italian Supreme Court supports the main aim of the policy-driven reforms initiated in 1990 and the subsequent reforms that focus on speeding up the attainment of *res judicata* as defined in Italy about judicial review by appellate courts.¹⁶¹ Over the last two decades, the Italian Supreme Court has often interpreted the continued role of *sua sponte* power to raise and decide normative effects of facts not considered by the first-instance adjudication over the last two decades. To be concise regarding the main focus of this Article, the Court of Appeal's *sua sponte* powers to raise new facts stem from constitutional policy values appropriately pursued by the law. The decisions underline this, stating that this (provided) power has to be generally considered as seeking "the value of the just adjudication."¹⁶² In other words, the Italian Supreme Court, when interpreting Article 345, paragraph 2 of the I-CCP, upholds the value of justice in its decisions. This allows the Court of Appeal to raise and decide on a fact that was never presented—or ruled upon—in the first instance, as long as the legal effects of that fact are not exclusively reserved for the party benefiting from it—as with the U.S. affirmative defenses, and it can influence the dispute and often reverse the appealed decision.

Nonetheless, even if the case is raised *sua sponte* in the Court of Appeal for the first time, the facts must already have been established and proven during the first-instance proceedings. The aspiration for a reasonable duration of proceedings and for the prompt establishment of *res judicata* leads the Supreme Court to affirm that Article 345, paragraph 2 of the I-CCP does not allow the introduction of a new fact for the first time on appeal.¹⁶³ This prohibition applies both to the judge, as it would violate the dispositive principle that dominates continental litigation, and to the parties, particularly to the party who brought the appeal, as the party could have introduced the fact in a timely manner (at

¹⁶¹ See GROSSI & PAGNI, *supra* note 142, at 280; see C.p.c. art. 345 (stating that "[t]he judgment that may no longer be challenged by motion for the assessment of venue, appeal, motion before Court of Cassation, or motion for a new trial for reasons under Article 395, nos. 4 and 5 ICCP, shall be considered as final").

¹⁶² See Cass., sez. un., 7 maggio 2013, n. 10531 (It.); see also several pronouncements in the same direction: Cass. civ., sez. un., 12 dicembre 2014, n. 26242–26243 (It.); Cass. civ. [Court of Cassation], sez. un., 31 ottobre 2018, n. 27998 (It.); Cass. civ., sez. III, 6 maggio 2020, n. 8525 (It.); Cass. civ., sez. un., 1 settembre 2021, n. 23721 (It.); Cass. civ., sez. III, 23 febbraio 2024, no. 4867 (It.).

¹⁶³ Cass. civ., sez. III, 6 maggio 2020, n. 8525 (It.).

the early stage of the first-instance proceeding). Such a fact would require submitting new evidence, which is inadmissible in that context.¹⁶⁴

The Court of Appeal's powers to raise and decide a fact *sua sponte* do not apply to introduce that fact for the first time in second-instance proceedings.¹⁶⁵ Instead, they pertain to recognizing the legal effects of that fact, which must have been introduced and evident in the records of the first-instance proceedings.¹⁶⁶ In this reasoning, the Supreme Court's jurisprudence strikes a wise balance between being "just" and "speedy," ensuring the decision is effective and grounded in material truth while maintaining civil proceedings' efficiency and the parties' self-responsibility. This approach is neither inquisitorial nor adversarial in the traditional sense.

The power to *sua sponte* raise facts for the first time that already belong to the proceedings can occur—always balancing the justice of the decision and the speed of forming *res judicata*—even during civil proceedings before the Supreme Court of Cassation. Article 384, paragraph 3 of the I-CCP, indeed, provides that:

When the Court [of Cassation] deems that an issue raised, *sua sponte*, should constitute the basis of its decision, it reserves its decision and, by decree, assigns to the public prosecutor and counsel a time limit—of not less than 20 days and not more than 60 days—running from the communication of the decree, to file observations on the same issue with the clerk office.¹⁶⁷

Although the Supreme Court rarely exercises this power, this provision, introduced by the 1990 Reform, clearly signifies how the *sua sponte* powers in raising and deciding facts, whose effects are not precluded by an affirmative defense, constitute a clear intent of civil procedure law to pursue the material truth of the case's decision. The balance with a speedy *res judicata* effect, after having raised and decided the issue of fact *sua sponte*, is achieved through the power to decide the case on the merits directly if the decision does not need further factual allegations or evidence.¹⁶⁸

¹⁶⁴ C.p.c. art. 345 (It.), *translated* in GROSSI & PAGNI, *supra* note 142, at 290 ("New evidence, including new documents, is not allowed, unless where it is indispensable for the decision of the case or the party party proves that he could not offer such evidence or exhibit the new document in the first instance proceeding due to circumstances beyond his control.").

¹⁶⁵ Cass. civ., sez. III, 6 maggio 2020, n. 8525 (It.).

¹⁶⁶ Cass., sez. un., 7 maggio 2013, n. 10531 (It.).

¹⁶⁷ C.p.c. art. 384 (It.), *translated* in GROSSI & PAGNI, *supra* note 142, at 311.

¹⁶⁸ *Id.* ("When the Court [of Cassation] grants the motion, it reverses the judgment and remands the case to another judge, who shall comply with the principle of law and, in any event, to what has been stated by the Court of Cassation. *When additional assessments of facts are not necessary, the court decides the case on the merits.*" (emphasis added)).

Most importantly, Article 384, paragraph 3, of the I-CCP explicitly states that once the Supreme Court *sua sponte* raises an issue of fact or law, it must ensure compliance with the principle of adversarial proceedings—the right to be heard.¹⁶⁹ To this end, the Court must establish additional, although brief, time limits for the parties to express their positions, thereby avoiding a surprise decision. The attention to the universal principle of due process established in the 1990s regarding the Supreme Court’s exceptional proceedings is now a general rule following the 2009 and 2022 civil justice reforms.¹⁷⁰

The Italian system clearly defines the *sua sponte* powers of appellate courts, which serve as a form of judicial review for first-instance adjudications. Procedural constraints regarding factual allegations aim to achieve efficiency and speed in civil proceedings while achieving *res judicata*. These constraints should always uphold the fairness of the process and judgment. This necessitates respect for the parties’ right to be heard before a decision on independently raised issues, which is often essential for final adjudication.

C. Courts’ Generalized *Sua Sponte* Power and Due Process. *Precautions and Clarifications*

As noted above, Article 112 of the I-CCP was policy-driven. However, the context in which this rule was established was dramatically different from the current pattern of civil litigation in Italy, Europe, and worldwide.¹⁷¹ The context surrounding the creation of this rule involved the debate over whether civil procedural law should be considered a branch of public law or private law.¹⁷² This distinction has been a topic of discussion for many decades, but it has not produced significant practical or academic benefits. According to Article 112 of the I-CCP, courts have been granted the considerable authority to independently raise and adjudicate the normative effects of facts presented by the

¹⁶⁹ C.p.c. art. 384 (It.) translated in GROSSI & PAGNI, *supra* note 142, at 310–11.

¹⁷⁰ See C.p.c. art. 101 (It. 2009), translated by GROSSI & PAGNI, *supra* note 142, at 151, which states that “If the judge intends to ground the decision on an issue assessed by him, *sua sponte*, he reserves his decision, assigning to the parties, under penalty of nullity, a time limit of not less than 20 days, and not more than 40 days running from the communication, to deposit with the clerk office briefs containing observations on the same issue”. The 2022 version is even more extensive. See C.p.c. art. 101 (It.) My translation is, “The judge ensures compliance with the principle of adversarial proceedings and, when determining that a violation has caused a breach of the right to defense, takes appropriate measures. If the judge intends to base the decision on an issue raised *ex officio*, they defer the decision and set, under penalty of nullity, a deadline of no less than twenty days and no more than forty days from the notification for the parties to file written submissions in the court registry containing observations on the same issue.”

¹⁷¹ See CAVALLINI, *supra* note 152, at 12.

¹⁷² See, e.g., GIANFRANCO STANCO, IL PROCESSO CIVILE IN ITALIA E LA DICOTOMIA TRA DIRITTO PUBBLICO E DIRITTO PRIVATO, <https://www.judicium.it/wp-content/uploads/2021/12/G.-Stanco-1.pdf> (last visited Dec. 21, 2025) [<https://perma.cc/9DBP-29T6>].

parties.¹⁷³ This provision acknowledges the court's inherent power within the Italian (and broader continental) civil justice systems.

Article 112 of the I-CCP leaves the question of whether a fact alleged by the parties has an effect only if explicitly raised by the party who benefits or if it can be considered independently by the judge in deciding the case.¹⁷⁴ For decades, jurisprudence and academic literature have provided complex interpretations, considering the original purpose of the rule, which does not explicitly define the nature of civil justice regulation, between private and public in orientation.¹⁷⁵ The first relevant change in addressing the open question left by Article 112 of the I-CCP was the overruling by the Supreme Court of Cassation regarding the burdensome penalty clause typically attached to contracts. The Supreme Court of Cassation established the judge's power to raise, *sua sponte*, an unfair, one-sided clause regardless of any specific objection from the party seeking payment. This is necessary to protect the general interest of the (private) legal system by setting limits on contractual autonomy that deserve protection.¹⁷⁶

This declaration not only dismantled the existing framework but also marked the foundation of a new line of reasoning by the Supreme Court concerning the necessity to conclusively resolve the dichotomy left ambiguous by Article 112 of the I-CCP. By establishing that Article 112 of the I-CCP is a white rule,¹⁷⁷ the Supreme Court has delivered a simplified statement. The law must expressly provide the parties, primarily the defendant, with the procedural right to invoke specific normative effects of an alleged fact for the case's judgment. Furthermore, this exclusive right must involve specific facts that could have been raised in a separate process and claim, as they are specifically aimed at creating, modifying, or resolving the particular right involved in the action. For example, the resolution is a remedy for breach of contract or invalidity as a remedy for fraud in contracting. In addition to the specific provisions set by the law, any facts that emerge and are proven during the process and alleged by the parties in a timely manner can be raised *sua sponte* and decided as essential arguments in the adjudication.¹⁷⁸

In the Italian system, *sua sponte* relief has become the general rule. The reasons that support this new but clear rule are similar to the primary reason justifying the *sua sponte* exceptional power for appellate courts under U.S. law: avoiding patent injustice in the decision.¹⁷⁹ The interplay between the (in)justice of the case decisions and the increasing role of

¹⁷³ C.p.c. art. 112 (It.), translated in GROSSI & PAGNI, *supra* note 142, at 158–59.

¹⁷⁴ See CAVALLINI, *supra* note 152, at 14.

¹⁷⁵ See generally CAVALLINI, *supra* note 152 (describing debate favoring broader *sua sponte* judicial power to raise dispositive facts, primarily in the appellate courts).

¹⁷⁶ See Cass., sez. un., 13 settembre 2005, n. 18128 (It.); see also Cass. Civ., sez. III, 4 ottobre 2013, n. 22747 (It.).

¹⁷⁷ See Cass., sez. un., 27 luglio 2005, n. 15661 (It.) (regarding the *sua sponte* relief of a fact that can interrupt the statute of limitations period).

¹⁷⁸ See Cass. civ., sez. VI, 13 gennaio 2012, n. 409 (It.).

¹⁷⁹ See discussion *supra* Section 2.

sua sponte raising and deciding issues of fact waived by the parties during the litigation process reveals a clear, policy-driven, and constitutionally-oriented interpretation by the Supreme Court. This interpretation prioritizes the achievement of material truth through adjudication over other constitutional values, such as the need for a reasonably quick decision, as recent trends in the Italian Constitutional Court jurisprudence and convergent doctrines have manifestly indicated.¹⁸⁰ Therefore, sua sponte activities by courts in the Italian and continental systems should be seen as more than a display of the mistakenly identified inquisitorial model of the civil procedure framework. On the contrary, they aim to achieve effective adjudication of cases, minimizing the gap between what is stated in the decision—procedural truth—and what occurred in reality—material truth—as much as possible.

If raising and deciding sua sponte issues of facts—either gathered by the parties or in any way revealed by the evidence—is to be pursued in the name of an effective and just decision, the precaution to not surprise parties by a decision grounded on an essential fact raised and decided independently by the court is needed, which involves due process. Additionally, the judge's proactive role in sua sponte actions throughout the litigation process—while honoring the parties' responsibility to establish the factual foundation of the lawsuit—has been affirmed initially by the Supreme Court of Cassation and subsequently by distinct civil procedure law provisions.¹⁸¹ This encompasses the judge's obligation to adjourn proceedings, permitting parties to consider the implications of the facts presented by the judge before deciding the case.¹⁸² This point must be clarified, and further consideration is needed in the more general context and development of Italian civil justice and its policy-driven reforms, which balance effectiveness and efficiency.

The starting points are twofold: the oldest provision (1990) was conceived for the sua sponte actions of the Court of Cassation itself (referring to Article 384, paragraph 3 of the I-CCP),¹⁸³ and the newer provision (2009), which is generally applicable, is set forth by Article 101, paragraph 2 of the I-CCP.¹⁸⁴ In fact, while the second provision makes the first provision—previously applicable specifically to the Supreme Court's sua sponte actions—generally applicable, it has established that raising and deciding sua sponte an issue of fact without prompting prior debate between parties constitutes a formally null adjudication. This specific sanction concerning the invalidity of the decision, which was taken without prior discussion between the parties on the issue raised sua sponte by the courts, may seem reasonable and

¹⁸⁰ See, e.g., Corte cost., 26 novembre 2020, n. 253 (It.); see also Cesare Cavallini, *La Durata Ragionevole del Processo Civile [The Reasonable Duration of Civil Proceedings]*, 76 RIV. DIR. PROC. 825 (2021) (It.).

¹⁸¹ Cass., sez. un., 7 maggio 2013, n. 10531 (It.).

¹⁸² Cass. civ., sez. un., 12 dicembre 2014, n. 26242–26243 (It.).

¹⁸³ See *supra* note 165 and accompanying text.

¹⁸⁴ See *supra* note 171 and accompanying text.

aligned with the Italian and continental constitutional framework of due process.¹⁸⁵ This outcome has resulted from a long-debated issue within jurisprudence and doctrine.¹⁸⁶ However, before the 2009 reform, there was no agreement on the consequences of the adjudication by surprise when the court decided the case on an issue raised *sua sponte* that had not been previously discussed between the parties.

The jurisprudential and doctrinal discussion about the implications of a decision based on factual and legal matters without prior consultation between the parties has been substantial. This primarily concerns the interplay between the formal invalidity of the adjudication and its substantive justice in the case. In particular, the main problem before the 2009 reform was the sanction of adjudication nullity in cases of due process violations regarding the right to be heard.¹⁸⁷ It was questioned before the 2022 reform because the law expressly provides the regime of procedural nullity based on the absence of formal requirements for specific parties' acts and courts' statements.¹⁸⁸ However, due to insights from scholarly analysis, the legislature finally improved Article 101 of the I-CCP, which traditionally provides the right to be heard as a general principle in deciding claims brought to the court.¹⁸⁹ The second paragraph added by the 2009 reform, clarified the provision explicitly set for the *sua sponte* activity by the Court of Cassation and established the nullity of adjudications on an issue raised *sua sponte* without prior discussion between the parties.¹⁹⁰ The 2022 reform has confirmed the provision established by the 2009 reform, and the Court of Cassation is currently interpreting it with full respect for due process.¹⁹¹

¹⁸⁵ Art. 111 COST. (It.) (“Jurisdiction shall be implemented through due process regulated by law.”), https://www.senato.it/sites/default/files/repository/Costituzione_INGLESE.pdf [<https://perma.cc/W94S-NZRZ>]. It is important to note that the Italian constitution stands out because it incorporates the translation of “due process of law” in its constitutional framework. See Cesare Cavallini, *Global Civil Justice*, 14 NOTRE DAME J. INT’L & COMPAR. L. 1, 7–13 (2024) (offering a broader view on the due process of law provisions).

¹⁸⁶ See CAVALLINI, *supra* note 152, at 11–14.

¹⁸⁷ See GROSSI & PAGNI, *supra* note 142, at 151, 151 n.273 (discussing the “principle of parties’ equal opportunity to defense” under Article 101 and “nullities deriving from the breach of this principle,” while noting the 2009 addition of the second paragraph).

¹⁸⁸ See C.p.c. art. 156 (It.), translated in GROSSI & PAGNI, *supra* note 142, at 164 (“The nullity of acts of the proceeding due to the nonobservance of forms provided for those acts shall not be stated if the nullity is not provided by the applicable law provisions”); see, e.g., Cass. Civ., sez. II, 27 luglio 2005, n. 15705 (It.) (arguing the relevance of this provision and holding that a judgment based on a *sua sponte* issue raised without prior debate was not null because, at the time, no specific statute mandated nullity for such a violation). It is essential to mention Cass. Civ., sez. un., 13 settembre 2005, n. 18128 (It.), regarding the excessively burdensome penalty clause raised *sua sponte* by the court. The court decided to reduce the clause’s amount independently without prompting a prior response from the parties after raising the issue of unconscionability.

¹⁸⁹ See GROSSI & PAGNI, *supra* note 142, at 151 n.273.

¹⁹⁰ Maria Teresa D’Urso, *Le sentenze “A Sorpresa” O Della “Terza Via”* [“Surprise” or “Third Way” Judgments], 2 RIVISTA DELLA CORTE DEI CONTI [JOURNAL OF THE COURT OF AUDITORS] 70, 76 (2022).

¹⁹¹ See Cass. civ., sez. III, 28 giugno 2018, n. 17053 (It.); Cass. civ., sez. VI, 6 luglio 2020, n. 13902 (It.); Cass. civ., sez. un., 25 novembre 2021, n. 36596 (It.) (expressly discussing the nullity of the final adjudication).

In conclusion, Italian law, a continental law inspired by the civil law tradition and dogmatic tendencies, establishes several clear rules for regulating courts' *sua sponte* activity. First, the law expressly provides for the *sua sponte* activity of raising and deciding issues of fact.¹⁹² Several precautions surround this general provision. To begin with, the distinction between normative effects of facts alleged by the parties can bind the judge only if raised by a party or through *sua sponte* actions by the courts which govern the case, as generally provided in the rule set by Article 112 of the I-CCP.¹⁹³ This means that without a specific provision, the court can *sua sponte* raise and decide on any fact. It also means that the judge does not have the power to raise a fact that the law has previously designated as being left to the parties' initiative; in other words, it is an affirmative defense.

According to the general rule regarding *sua sponte* actions by courts, the final regulation is essential for respecting due process. It also provides nullity as a strict sanction for decisions that violate the requirement of prior discussion between the parties about the applicable normative effects of facts independently raised by the courts at every stage of civil proceedings.

IV. PROPOSAL FOR A REASSESSMENT

Does the nature of *sua sponte* court actions in the continental legal landscape suggest a different approach to evaluation in the U.S.? A positive answer is probably too optimistic, but it is reasonable to consider it for several reasons. First, the ongoing reference to the adversarial framework of the U.S. civil justice system, which originates from many decisions by appellate courts, may seem unhelpful or imprecise. Indeed, the reference to the adversarial model implies that judges play a passive role in deciding issues of fact presented by the parties and their lawyers, in contrast to the so-called inquisitorial model traditionally associated with the continental systems.¹⁹⁴ In that case, it reveals a clear misrepresentation of the reality in civil justice and procedural systems.

In this context, the contrast between the adversarial and inquisitorial systems is overstated. In continental legal systems, the clear allowance for courts to act on their own initiative to raise and decide issues of fact does not alter the traditional framework of civil proceedings in those countries.¹⁹⁵ As noted above, courts act *sua sponte* based solely on the facts alleged by the parties. Such facts may be raised in appellate courts

¹⁹² See C.p.c. art. 112 (It.), translated in GROSSI & PAGNI, *supra* note 142, at 158 (stating that the judge "shall not *sua sponte* decide upon objections which may be raised only by the parties").

¹⁹³ See CAVALLINI, *supra* note 152, at 13.

¹⁹⁴ See Brief of Professors, *supra* note 67, at 4–5.

¹⁹⁵ See CAVALLINI, *supra* note 152, at 12 (discussing how the judge's power to pronounce *sua sponte* is systematically linked to the impediment established by the legislature to the exercise of a well-determined procedural power of the parties, reflecting fundamental procedural policy).

if they stem from the allegations and evidence presented within the timeframe allotted, which pertains to the initial trial stage.¹⁹⁶ Moreover, if relying on the adversarial model could hinder or prevent a court's sua sponte action, it would suffice to avoid raising the issue, thus allowing courts not to act sua sponte on defenses waived by the parties. In other words, the issue would be moot.

In contrast, the issue exists and has existed for a long time. Therefore, some insights might make the reconsideration of sua sponte authority in the U.S. more understandable, albeit modestly and with awareness of the limitations of such a comparative approach.

A. *Overcoming Adversarial Model: Policies and Values at Stake*

It should not be surprising that the primary reasons supporting the court's sua sponte action, regardless of the nature of the issue raised and decided, are relatively common in both systems. Indeed, avoiding patently unjust adjudication supports the Gorilla Rule by enabling U.S. courts to evaluate cases on a discretionary, case-by-case basis, bridging the gaps in defenses for interested parties.¹⁹⁷ The sua sponte actions of the court are not viewed by *Singleton* as conflicting with the parties' role as owners of the process, so the traditional view of the adversary system is seen as the best framework for ascertaining the truth, while still admitting sua sponte activity when properly applied.¹⁹⁸

Hence, arguments against a court's sua sponte decision that raises factual issues are inherently inconsistent if they merely refer to a violation of the adversarial system. There are two reasons for this: first, sua sponte actions increase the efficiency of the adversary process, as shown by independently addressing the lack of subject-matter jurisdiction or standing.¹⁹⁹ Second, comparative—and global—outcomes support the reasonableness of the previous consideration, as continental systems, which explicitly allow sua sponte actions by courts, are based on parties' presentations.²⁰⁰ Although labeled as inquisitorial, continental systems fundamentally realize the same U.S. framework of party governance in a case.²⁰¹

¹⁹⁶ See C.p.c. art. 345 (It.), translated in GROSSI & PAGNI, *supra* note 142, at 289–90 (explaining that “[n]ew evidence . . . is not allowed, unless where it is indispensable for the decision . . . or the party proves that he could not offer such evidence . . . in the first instance proceeding due to circumstances beyond his control”).

¹⁹⁷ See *Singleton*, 428 U.S. at 121 (quoting *Hormel*, 312 U.S. at 557); see also Shannon, *supra* note 5, at 32–34; Amanda Frost, *The limits of Advocacy*, 59 DUKE L.J. 447, 463, 501 (2009).

¹⁹⁸ See Frost, *supra* note 197, at 499–503; see also Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 3–4 (2011).

¹⁹⁹ See Frost, *supra* note 197, at 461–63.

²⁰⁰ See, e.g., GROSSI & PAGNI, *supra* note 142, at 158 (explaining that, under the Italian Code of Civil Procedure Article 112, the judge must decide “upon the claims and objections raised by the parties,” thus grounding the decision in the parties’ presentations).

²⁰¹ See Cavallini & Cirillo, *supra* note 144, at 143–51 (discussing the shared semi-adversarial model of civil justice emerging from various changes and reforms in both systems).

Both systems have significantly converged in narrowing the gap between procedural and material truth. Sua sponte actions have been pivotal in both systems, even though their application and regulation vary under procedural law. The increasing aspiration for just adjudication, as highlighted by Rule 1 of the Federal Rules of Civil Procedure and mirrored in the efficacy of judicial practices outlined in Articles 24 and 111 of the Italian Constitution, has prompted a more proactive role for judges in the U.S. system. This shift has also led to a rise in sua sponte actions in continental court systems, as noted regarding the generalized sua sponte relief granted by courts in the absence of specific provisions to the contrary.

The convergence of these civil justice systems emphasizes the importance of credible outcomes in a transforming society that seeks a balance between effectiveness and efficiency in resolving disputes. The legendary managing judges of the U.S. courts have opened the door to a different vision and interpretation of the adversarial model, conceived through the writers' original lens.²⁰² This includes a reduced reliance on the trial phase and a growing tendency towards alternative methods for deciding cases.²⁰³

This transformation has sparked discussions about its implications for the foundational principles of the adversarial system. While managerial judging aims to improve judicial efficiency, it raises concerns about maintaining impartiality and balancing power between the parties. Judges' proactive role in case management may blur the lines between adjudication and administration, potentially impacting the perceived fairness of adversarial proceedings. This evolution addresses practical challenges within the legal system, but it demands careful consideration

²⁰² See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 373 (1982) (describing managerial judging as involving judges actively managing cases to boost efficiency and minimize delays, using proactive strategies that go beyond standard adjudication, while noting fairness and due process concerns). Managerial judging and *sua sponte* actions are closely linked in the judicial process. Managerial judging involves judges actively managing cases to boost efficiency and minimize delays, using proactive strategies that go beyond standard adjudication. Conversely, *sua sponte* actions occur when a court independently addresses matters without any request from the parties involved. Managerial judging also involves *sua sponte* actions. For example, a judge might *sua sponte* raise procedural issues to expedite case resolution, which aligns with the objectives of managerial judging and the pursued policy for a just adjudication.

Therefore, judges engaged in managerial judging may utilize *sua sponte* actions not only to expedite proceedings. For example, a judge might raise procedural issues or dismiss unmeritorious claims to speed up case resolution and raise issues of facts waived by the parties to pursue the trajectory toward a just, effective, and efficient dispute resolution.

However, as noted above, these proactive approaches can raise concerns about fairness and due process. See Steven Baicker-McKee, *Reconceptualizing Managerial Judges*, 65 AM. U. L. REV. 353, 384–93 (2015) (addressing various concerns of managerial judging); see also Shannon, *supra* note 5, at 34 (warning that *sua sponte* actions should be carefully exercised to fit within the limits of managerial judging, and noting the “substantial deficiencies” that judges possess regarding individual cases).

²⁰³ See generally Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 12 (2006); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 464 (2004); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012).

of its impact on judicial impartiality and the core principles of U.S. adversarial justice. Consequently, the adversarial model often used by appellate courts to reject sua sponte relief, which the parties waive, should be detached.

This Article does not suggest that the practice of courts independently raising and resolving issues of fact that parties have waived is, in principle, consistent with the American civil justice system. However, a comparative approach to the continental system may provide further insights into the nature and scope of affirmative defenses when raised independently.

B. What's Wrong with Raising Sua Sponte Waived Affirmative Defenses?

The key to understanding the *sua sponte* actions by courts in the Italian system is the different rules governing Italian affirmative defenses. Paradoxically, Italian rules seem more adversarial than those in the U.S. due to the absence of rules.²⁰⁴

As stated, Federal Rule of Civil Procedure 8(c) establishes several facts as affirmative defenses.²⁰⁵ The rule is interpreted as mandatory,²⁰⁶ and in this sense, there is no difference from the Italian system, where explicit provisions exist, for instance, regarding the statute of limitations. The difference is that the Italian system lacks a rule describing what affirmative defenses are or are not.²⁰⁷ Beyond specific facts designated as affirmative defenses, the general rule in Italy resembles the Gorilla Rule, which is strongly interpreted to mean that every fact can produce normative effects for the judge in deciding the case, even sua sponte.

This framework undermines the discussion about sua sponte actions by U.S. courts. These involve sua sponte raising and deciding issues of fact that are, by law, affirmative defenses. If this framework is one of the causes of the adversarial model's contrasting arguments by courts, it presents a contradiction, regardless of the system from which it might arise. Indeed, there is no alternative: if Federal Rule of Civil Procedure 8 makes sense, it must be enforced. The procedural core of the affirmative defense is that it is in the exclusive possession of the defendant and includes the original admission of the facts alleged by the plaintiff.²⁰⁸

²⁰⁴ See, e.g., C.p.c. art. 112 (It.), translated in GROSSI & PAGNI, *supra* note 142, at 158 (enforcing a strict party-presentation rule).

²⁰⁵ FED. R. CIV. P. 8(c).

²⁰⁶ Jones v. Bock, 549 U.S. 199, 212 (2007).

²⁰⁷ Simona Grossi, *A Comparative Analysis Between Italian Civil Proceedings and American Civil Proceedings Before Federal Courts*, 20 IND. INT'L & COMPAR. L. REV. 213, 220 n.30 (2010).

²⁰⁸ See FED. R. CIV. P. 8(c); Jones, 549 U.S. at 212; see also WRIGHT & MILLER, *supra* note 124, at § 1271.

However, this latter aspect has faded over time.²⁰⁹ On the contrary, allowing discretionary power for courts to raise an affirmative defense waived by the defendant—a practice that often occurs in trial and appellate courts²¹⁰—means, first and foremost, that Federal Rule of Civil Procedure 8(c) becomes unenforceable. It falls under the judge’s unbridled power on a case-by-case basis.

However, aside from the inconsistent role of the adversarial model in critiquing *sua sponte* powers by courts, the continental system, as eloquently described by the Italian model, raises concerns about the excessive discretionary power of judges to independently introduce and decide on an affirmative defense that the parties have waived. The main problem, also stemming from a comparative perspective, is that several affirmative defenses listed in Federal Rule of Civil Procedure 8(c) should have been excluded over time. There are significant differences among various affirmative defenses in terms of judicial economy, truth-seeking, and public policies pursued through civil litigation. For example, defenses like the statute of limitations and *res judicata* or *estoppel* serve different purposes than subject-matter jurisdiction or standing to sue, which in turn differ from arbitration, award, or the statute of frauds. In this context, the Gorilla Rule becomes a contradiction in some ways, but it also reveals the real issue at stake.

Thus, a potential reassessment needs to address Federal Rule of Civil Procedure 8(c), as it has become ambiguous following numerous circuit statements, which, despite conflicting with each other, have delivered interpretations that are literally contrary to the rule. In this regard, the Gorilla Rule addresses the issue, although the usual reliance on the court’s discretionary power increases uncertainty in these cases rather than

²⁰⁹ For instance, providing *res judicata* as the affirmative defense does not involve an admission of the pleading. On the contrary, *res judicata* is a negative (procedural) fact that excludes, by definition, the existence (and not only the plausibility) of the facts stating the plaintiff’s (exact) claim.

²¹⁰ *Muhammad-Ali v. Final Call, Inc.*, 832 F.3d 755, 763 (7th Cir. 2016) (quoting *Walker v. Thompson*, 288 F.3d 1005, 1009–10 (7th Cir. 2002)) (“A court generally may raise an affirmative defense *sua sponte* only if ‘the existence of a valid affirmative defense is so plain from the face of the complaint that the suit can be regarded as frivolous.’”); *see, e.g.*, *Wood v. Milyard*, 566 U.S. 463, 470 (2012) (“We...hold, in response to [whether a court of appeals has the authority to address the timeliness of a habeas petition on the court’s own initiative] . . . that courts of appeals, like district courts, have the authority—though not the obligation—to raise a forfeited timeliness defense on their own initiative”).

resolving the problems.²¹¹ Indeed, Judge Easterbrook, in *York Ctr. Park Dist. v. Krilich*,²¹² states:

Legal rules committing decisions to judicial discretion suppose that the court will have, and give, sound reasons for proceeding one way rather than the other. “We must not invite the exercise of judicial impressionism. Discretion may be, but ‘methodized by analogy, disciplined by system.’ Discretion without a criterion for its exercise is the authorization of arbitrariness.”

The continental approach is an unconventional yet useful tool. A revised U.S. approach should clearly consider a few key factors. To fix issues in the current interpretation of the U.S. civil justice system, courts’ sua sponte powers must become more predictable. Specifically, limiting judicial discretion in allowing sua sponte powers to raise and decide issues of fact waived by the parties is beneficial. The first step is to modify part of Federal Rule of Civil Procedure 8(c) to remove defenses based on facts that courts can generally independently raise. This approach partly aligns with continental rules, improving clarity about other facts retained as affirmative defenses.

Yet, the discretionary power to disregard the nature and function of affirmative defenses is fundamentally wrong and inappropriate, resulting in unpredictable sua sponte authority. All jurisdictional issues of fact—including comity, abstention, and sovereign immunity in cases involving state governments²¹³—*res judicata*, and issue preclusion should be explicitly provided as facts whose normative effects can grant a motion to dismiss the claim. These effects are beyond the parties’ ability to waive as defenses because they serve the public good by ensuring the procedural legality of the process, thereby preventing the waste of public resources and the duplication of litigation, either fully or partially. The

²¹¹ See Miller, *supra* note 13, at 1287–88 (affirming that “In summary, apart from questions of jurisdiction, courts are more likely to raise an issue sua sponte if they think a case is really important or if the judges really want to reach a particular result. This, of course, poses dangers, depending on the political views and restraint of the judges”); see also, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 n.15 (1981) (implying the Court possesses the discretion to overlook procedural norms and address matters that would typically be considered waived whenever it deems it suitable to do so); see also Martineau, *supra* note 44, at 1023–24, 1058; ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE: FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES* 344 & 346 (7th ed. 1993) (affirming that “exception from the normal rule is not circumscribed by any particular formula, and that it reflects the Court’s discretionary authority to dispose of cases in what it determines to be the most sensible and reasonable way.”).

²¹² *York Ctr. Park Dist. v. Krilich*, 40 F.3d 205, 209 (7th Cir. 1994) (quoting *Brown v. Allen*, 344 U.S. 443, 496 (1953) (Frankfurter, J.), *overruled by*, *Townsend v. Sain*, 372 U.S. 293 (1963); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 139, 141 (1921)) (as quoted in Miller, *supra* note 13, at 1288 n.171).

²¹³ See Miller, *supra* note 13, at 1281 nn.134–36 (quoting several cases involving questions of comity, abstention, or sovereign immunity).

explicit provision should also have a counter-effect: the facts retained in Federal Rule of Civil Procedure 8(c), initially provided as affirmative defenses, must remain affirmative defenses and cannot be raised *sua sponte*. Respecting the law formally guarantees citizens a uniform and equal application of the law, relying on the self-responsibility of the parties to introduce facts and not waive them. Finally, according to the most consolidated jurisprudence, this approach aligns well with the adversary system, as it avoids unbridled discretionary powers by courts on a case-by-case basis.

Undoubtedly, other issues could affect the nature and function of matters raised and decided *sua sponte* beyond those already mentioned. The potential existence of a rule or amendment to Federal Rule of Civil Procedure 8(c) that grants courts *sua sponte* powers might serve as a guideline for other cases involving matters of public concern. The court's discretion should be "methodized by analogy, disciplined by system," as Judge Easterbrook precisely states.²¹⁴

This approach may indicate a significant shift from the past. It is recognized that there is resistance to changing the law, and when it does happen, it is the outcome of a lengthy debate and legislative process. The suggested reassessment should involve legislative action; otherwise, it perpetuates the courts' overly discretionary approach to a topic that requires certainty for parties and guidelines for judges.

C. *The Natural Right to Be Heard*

Arguing for a specific provision about issues of fact that courts can raise *sua sponte* neutralizes the judge's overly discretionary powers in determining the justification for deciding *sua sponte* on a particular issue never presented by the parties. A specific provision is supported by the recent affirmation by Justice Ruth Ginsburg in *United States v. Sineneng-Smith*, in which she stated: "[t]he party presentation principle is supple, not ironclad. There are no doubt circumstances in which a modest initiating role for a court is appropriate."²¹⁵ While this sentence appears to limit the *sua sponte* actions of courts to extraordinary cases, it was delivered in a specific instance where the Court of Appeals violated the right to be heard and the fundamental principle of equal participation of parties in the decision-making process.²¹⁶ Justice Ginsburg's opinion highlights the close connection between due process—with the right to

²¹⁴ Miller, *supra* note 13, at 1288. It is the questioned case of qualified immunity or, in general, constitutional violations. See discussion *supra* Section 2.

²¹⁵ *United States v. Sineneng-Smith*, 590 U.S. 376 (2020) Although the case concerns a criminal matter, the affirmation must be regarded as a general principle. This principle reminds us of the adversarial model, which is the foundation of the American legal system. Still, it allows for *sua sponte* actions in exceptional cases, subject to the court's discretionary evaluation. See below in the text for further precautions regarding the interplay and significance of the right to be heard.

²¹⁶ See *id.* at 374–75, 379–80.

be heard as its leading principle—and the adversarial system. The right to be heard embodies the essence of the adversarial process, where parties present their facts and arguments.²¹⁷ While this connection is traditionally understood within the U.S. procedural system, a broader analysis influenced by the continental pattern reveals a different way of reasoning that can be adapted, arguably, to a revised interpretation of U.S. law.

Indeed, raising *sua sponte* an issue of fact based on the alleged facts and proofs—mostly documentary—provided by the parties ultimately means that the courts decide the case—often entirely—on that issue. From this perspective, there is no difference between U.S. and Italian law; invoking the adversarial or inquisitorial model does not explain the courts' independent activity to ensure just adjudication of the case.

The model's dichotomy is also not essential to arguing that the right to be heard should be preserved as the primary outcome of due process. Whether the adversarial model is one of the distinguishing tools of the American civil justice system, as discussed above, this model is not helpful in correctly and entirely defining the limits of *sua sponte*, overly discretionary application by courts, even resulting in many contrasting decisions by circuits. The same reasoning may be applied to due process and the right to be heard, with perhaps more substantial justification. There are no significant differences between Anglo-American civil justice systems and continental ones concerning the indispensable role of the right to be heard as a fundamental aspect of due process.²¹⁸ Once the *sua sponte* actions by courts were acknowledged, the right to be heard became a natural consequence of the constitutional requirement that parties must have the opportunity to discuss the issues raised by the judge before the case is adjudicated.²¹⁹ Granting the right to be heard when an issue of fact is raised does not mean reverting to adversarial litigation. It simply means the judge must inform the parties of the issue and encourage them to discuss it.²²⁰

The absence of a provision in the U.S. legal system that directly addresses the limits of *sua sponte* actions by judges undermines the right to be heard in the adversarial justice model. However, reassessing this topic should take a different approach. It should start with an explicit provision that distinguishes the waiver doctrine from independently raised issues while allowing parties to discuss these issues, respecting due process, and making adjudication fairer and more just. This issue

²¹⁷ Brief of Professors, *supra* note 67, at 3; Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 8–14 (2006).

²¹⁸ See, e.g., Cavallini, *Global Civil Justice*, *supra* note 185, at 10. It is so, even if continental rules are more explicit in providing the right to be heard as a primary requirement of due process, either at the constitutional level or the ordinary level of the legislature.

²¹⁹ See Miller, *supra* note 13, at 1260–97.

²²⁰ See C.p.c. art. 171 (It.) (providing a general rule regarding the judicial duty to indicate issues *sua sponte* and the right to be heard by parties as a necessary procedural consequence of the judicial relief).

extends beyond the adversarial model; it occurs within all court systems and requires rationalization within a global context.

II. CONCLUSION

Revisiting *sua sponte* actions by American judges requires an examination of the core principles outlined in the Federal Rules of Civil Procedure, especially Rule 8(c), which deals with affirmative defenses and their inconsistent enforcement by courts. The variation in circuit decisions and notable concerns about due process in cases of *sua sponte* relief have raised questions about avoiding surprises for parties during decision-making, leading to a reassessment of this issue. This reevaluation has been approached externally by comparing it with continental systems like the Italian legal framework. This approach offers two important benefits. First, on a broad and academic level, it fosters a renewed focus on comparative studies, emphasizing their role as vital tools for interpretation and law-making within domestic law. Second, it requires reassessing traditional views of civil justice systems, which may help reduce some of their often-exaggerated differences.

Arguing for a desirable new rule involves evaluating whether courts can raise specific facts *sua sponte*, distinguishing them from affirmative defenses as currently designated, despite the often inconsistent treatment across courts. This requires clarifying the courts' authority, which is presently practiced inconsistently across circuits. Furthermore, the proposed approach highlights the need to revise the understanding of the adversarial model as a fundamental aspect of Anglo-American legal systems. Courts have frequently used the adversarial system to deny, for example, *sua sponte* relief of a statute of limitations defense.²²¹ Therefore, the suggested reevaluation should not rely solely on the U.S. justice model but should respect the waiver doctrine established by law.

On the contrary, a specific provision on facts that can be raised *sua sponte*, motivated by the public policies pursued by the civil process, would not contradict the adversary system but would be a necessary adjustment of this model to achieve just decisions independently of the parties' activity. The advantages could be tangible: fewer circuit splits and less discretionary power by courts in determining and justifying the application of the Gorilla Rule. The adversarial model remains unaffected, even when it is considered appropriate to grant the right to be heard before the judge decides on an issue raised independently. Due process applies globally, irrespective of the justice model, whenever the judge takes actions *sua sponte*.

This Article comprehensively explores the relationship between courts' *sua sponte* powers and judicial activism, a critical component of

²²¹ See MacFarlane, *supra* note 20, at 190–91.

Anglo-American legal systems.²²² The comparative perspective distinctly emphasizes the potential for a legislative solution to tackle the intricate and often interconnected problems arising from the courts' extensive practice of active judging. Moreover, the legislative task may balance, from time to time, what has frequently been described as natural activist judging, including procedural judicial activism.²²³ The exercise of sua sponte powers can intersect with judicial activism when judges take proactive steps to address broader legal principles or societal issues in their rulings.²²⁴ This may result in outcomes that reflect judicial policy preferences rather than strict interpretations of the law. This Article's comparative and broader perspective blurs the lines between interpretation and legislation, raising concerns about judicial overreach and accountability.

The interplay between judicial activism and sua sponte powers is particularly evident in civil litigation. Judges may invoke sua sponte powers to address systemic injustices or procedural irregularities that might otherwise go unchallenged by litigants. For instance, in civil cases, judges might proactively consider constitutional implications or broader social consequences when making decisions.²²⁵ This can lead to outcomes reflecting an activist approach while utilizing procedural mechanisms designed to uphold justice.

This dynamic, however, prompts critical inquiries into the role of judges as neutral arbiters rather than active players in shaping law and policy.²²⁶ While some argue that judicial activism is crucial for achieving justice, others caution that it may erode public trust in the judiciary by appearing partisan or ideologically motivated.²²⁷ The relationship between judicial activism and sua sponte powers in U.S. civil cases represents a delicate balance between upholding established legal standards and responding to societal demands. Although judicial activism

²²² The literature on this topic is massive. *See, e.g.*, Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752 n.1 (2007) (explicitly quoting Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 CALIF. L. REV. 1441, 1442 (2004)); Rebecca L. Brown, *Activism Is Not a Four-Letter Word*, 73 U. COLO. L. REV. 1257, 1273 (2002) (emphasizing a positive sense instead, in terms of "a way for a Court to live up to its obligation to serve as citadel of the public justice").

²²³ *See* Goutam U. Jois, *Pearson, Iqbal, and Procedural Judicial Activism*, 37 FLA. ST. U. L. REV. 901 (2010). Avoiding judicial legislation as a form of extreme judicial activism is correctly highlighted in *United States v. Wade*, 388 U.S. 218, 249–50 (1967) (Black, J., dissenting). Justice Black wrote, "I would feel that we are deciding what the Constitution is, not from what it says, but from what we think it would have been wise for the Framers to put in it. That, to me, would be 'judicial activism' at its worst." In this specific regard, *see also* Cesare Cavallini, *The Law through the King: U.S. (Procedural) Judicial Activism from a European Perspective*, 59 AKRON L. REV. (forthcoming 2025) (manuscript at 114–15) (on file with the University of Louisville Law Review).

²²⁴ *See* Arthur D. Hellman, *Judicial Activism: The Good, the Bad, and the Ugly*, 21 MISS. C. L. REV. 253, 253–54 (2002).

²²⁵ *Id.*

²²⁶ *See* Ryan D. Doerfler & Samuel Moyn, *After Courts: Democratizing Statutory Law*, 123 MICH. L. REV. 867, 869–72 (2025).

²²⁷ *Id.*; Hellman, *supra* note 224, at 259–63.

is crucial in promoting justice and safeguarding rights,²²⁸ its connection with sua sponte powers requires a thoughtful assessment of judicial roles and duties. As courts engage with these intricate dynamics, continuous discussion about their consequences will be vital for understanding the changing interplay between jurisprudence and legislation in the U.S.

²²⁸ Brown, *supra* note 222, at 1271–73.