Rehearing SUA Sponte in the U.S. Supreme Court: A Procedure for Judicial Policymaking

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I. INTRODUCTION

The Supreme Court has the discretion to select the cases that it will hear each term by granting writs of certiorari. This writ orders the various courts of appeals to certify the record in a case and send that case to the Supreme Court for review. In addition, after granting a writ of certiorari and hearing oral argument, the Court may upon its own motion (or *sua sponte*) request the litigants to reargue a case, commonly called rehearing. There are good reasons why the Court should and does request rehearing. This Note, however, addresses the one wrong reason—policymaking.

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1. Supreme Court Case Selections Act, Pub. L. No. 100-352, 102 Stat. 662 (1988); see *infra* notes 54-58 and accompanying text; see also G. CASPER & R. POSNER, THE WORKLOAD OF THE SUPREME COURT (1976) (elucidating the process of granting certiorari); Sup. Ct. R. 17.1 ("A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor.").


3. The use of the word "reargument" is often used interchangeably with the word "rehearing." "Reargument," however, generally refers to oral argument before the Court; "rehearing" encompasses not only "reargument," but also requests for written briefs and written submissions to questions from the bench.

4. The Supreme Court Rules guide the granting of petitions for rehearing. *See infra* notes 81-85 and accompanying text; see also Sup. Ct. R. 51.1; Degnan & Louisell, Rehearing in American Appellate Courts, 34 CAN. B. REV. 898, 901-02 (1956).

5. The Court can decide only "Cases" and "Controversies." U.S. CONST. art. III, § 2, cl. 1. As Justice Roberts, writing for a majority, so eloquently said:

There should be no misunderstanding as to the function of this court . . . . It is sometimes said that the Court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty, — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.
Through the interplay of the Court's discretion to grant writs of certiorari and request rehearing sua sponte, the Court may reach out and pick specific issues as well as cases. This interplay raises the specter of what has been called the "counter-majoritarian difficulty," which arises when the politically unaccountable Court intervenes in the political process. The memorandum opinion that requested reargument in Patterson v. McLean Credit Union brought to the forefront the question of whether the Court's inherent power to administer its docket—the foundation for its ability to rehear cases sua sponte—may be abused by an activist Court.

With the enactment of the Supreme Court Case Selections Act in 1988, the United States Supreme Court now has more discretion than ever to choose the cases that it reviews with the exception of direct ap-
peals from three-judge panels. Although this case selection discretion gives the Court the opportunity to seek out specific issues, the Court still must wait for an issue to be presented to it within the context of a case or controversy. As a result, the Court can address the policy decisions made by the politically accountable branches—Congress and the Executive—only when presented with legal challenges to those decisions. But the Court has the inherent ability to add an issue to a case already on its docket simply by requesting rehearing sua sponte, as the Court did in the Patterson case over vigorous dissents by four Justices. This Note will examine how the Supreme Court’s broad discretion to select cases and issues has changed the Court from a passive institution “with neither force nor will but merely judgment” to the influential arbiter of “whether the political solutions to major national problems devised by the legislative and executive branches [will] be allowed to proceed.”

After a brief history of the major congressional statutes enacted under Article III’s exceptions and regulations clause and a review of the historic justifications for the Court’s inherent sua sponte powers, this Note will scrutinize the necessity for the Court’s power to request rehearing sua sponte. It will then look at two cases in which the Court caused concern when it requested rehearing sua sponte. Last, it will critically examine the need to request rehearing sua sponte and the appropriateness of the Court’s use of this power. This Note concludes with the recommendation that Congress amend Supreme Court Rule 51, the rehearing rule, and specify only two instances when the Court may request rehearing sua sponte: (1) when the Court is equally divided; or (2) when it is reconstituted.


14. This Note will not address the opposite dimension of the problem with docket control where the Court chooses inaction and defers to the political process when judicial action is indicated. See, e.g., Gunther, The Subtle Vices of the Passive Virtues, 64 COLUM. L. REV. 1 (1964).


17. See text accompanying notes 36-55.

18. See text accompanying notes 56-78.

19. See text accompanying notes 79-97.

20. See text accompanying notes 98-161.

II. The United States Supreme Court’s Appellate Jurisdiction

The jurisdiction of the Supreme Court is both original and appellate, as defined in Article III of the Constitution. The Court’s original jurisdiction extends to all cases “affecting Ambassadors, other public Ministers, and Consuls,” and cases “in which a State shall be a party.” The Court’s appellate jurisdiction extends the federal judicial power to all other cases. It is the more important jurisdiction because it enables the Court to disregard the barrier of federalism and reach not only federal, but also state, cases and controversies. It is the appellate jurisdiction that the Constitution subjects to congressional regulation. Article III explicitly states that the appellate jurisdiction of the Supreme Court is conferred “with such exceptions and under such regulations as Congress shall make.”

22. U.S. CONST. art. III. Article III created the judicial branch of the United States tripartite structure of government and vested all of the judicial power, both original and appellate, in one “supreme Court” and “in such inferior Courts as the Congress may from time to time ordain and establish.”

23. 28 U.S.C. § 1251 (1988) governs the Court’s original jurisdiction and provides that the Supreme Court has exclusive jurisdiction of controversies between two or more states. See also Illinois v. Milwaukee, 406 U.S. 91, 98 (1972) (political subdivisions within states, such as cities, are not states for purposes of § 1251). Although § 1251 speaks of the Court’s original jurisdiction, the Court itself has said that “[t]he original jurisdiction of the Supreme Court is conferred not by Congress but by the Constitution itself. This jurisdiction is self-executing and needs no legislative implementation.” California v. Arizona, 440 U.S. 59, 65 (1979) (Court avoided the question of congressional power to limit Court’s original jurisdiction).

24. Article III extends this power to all Cases, in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; . . . [between a State and Citizens of another State] —between Citizens of different States —between Citizens of the same State claiming Lands under Grants of different States, [and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.] U.S. CONST. art. III, § 2, cl. 1. (Bracketed material refers to changes made by the Eleventh Amendment to the Constitution).


26. 28 U.S.C. § 1257 (1988) governs the routing of cases from the state courts to the Supreme Court. Prior to the Supreme Court Case Selections Act, a state case had a mandatory right of appeal to the Supreme Court if a state court found a federal law invalid or if a state court found valid a state law that was contested under a federal provision. In both of these cases, state law was pitted against federal law, and state verdicts in favor of the state law were presumed suspect. Congress, however, rejected this premise as unduly suspicious of the state courts, and rewrote § 1257 so that the Supreme Court has the discretion whether to review state court decisions no matter which way the state ruled in the case. See H.R. REP. NO. 660, 100th Cong., 2d Sess. 7, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 772.

27. The Constitution mandates the existence and contours of the Court’s original jurisdiction, with which Congress may not tamper. The Constitution, however, vests in Congress the power to make “exceptions and regulations” regarding the Court’s appellate jurisdiction. U.S. CONST. art. III.
gives plenary power to Congress to regulate the Supreme Court's jurisdiction, other clauses of the Constitution may implicitly limit Congress' ability to do so. Moreover, Congress may not be able to regulate the Court's appellate jurisdiction in a manner that is inconsistent with the Court's essential role in the constitutional plan.

Despite these broad constitutional and systemic limits, Congress has never granted to the Supreme Court all the power provided by Article III. The Court has acknowledged that it understands the affirmatively descriptive of its appellate jurisdiction to negate all other

III, § 2. While the Supreme Court has never definitively answered the question of how complete the scope of congressional authority is under the Exceptions Clause, it is generally considered to be broad. See Anderson, The Power of Congress to Limit the Appellate Jurisdiction of the Supreme Court, 1981 DET. C.L. REV. 753; see also C. Hughes, The Supreme Court of the United States 24-25 (1928); see generally D. Currie, supra note 5.

The Supreme Court did address the scope of congressional control of the Court's appellate jurisdiction in Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868), which arose when Congress removed the Court's appellate jurisdiction in habeas corpus cases. McCardle had appealed a denial of a writ of habeas corpus in a case that arose under the Reconstruction statutes, and Congress, fearing that the Court would invalidate much of the Reconstruction legislation, did not want the Court to hear the case. The Court held that Congress had the power to make such an exception. In dicta, however, the Court said that it still had the power to issue original writs of habeas corpus, and therefore, Congress' action did not totally remove the Court's jurisdiction to reach the Reconstruction statutes. Id. at 515 (referring to Ex parte McCardle, 73 (6 Wall.) 318, 324 (1867)). Although this case is often cited for the proposition that Congress has full control of the Court's appellate jurisdiction, more recent literature suggests that Congress cannot destroy as in McCardle the essential role of the Court by limiting access to constitutional cases that involve the supremacy of federal law. See Sager, Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 HARV. L. REV. 17, 42-68 (1981); see also Merry, Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis, 47 MINN. L. REV. 53 (1962) (proposing that exceptions clause applies to questions of fact and not to questions of law).


29. This "Essential Functions" doctrine, proposed by Leonard Ratner in two major articles, states that Congress may not interfere with the Court's function of providing a uniform interpretation of federal law and policing state courts' enforcement of federal law. See Ratner, Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction, 27 VILL. L. REV. 929 (1982); Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. PA. L. REV. 157 (1960); see also Sager, Constitutional Limitations on Congress's Authority to Regulate the Jurisdiction of the Federal Courts, 95 HARV. L. REV. 17 (1981).

Another implicit constraint on Congress' power to restrict the Court's appellate jurisdiction is the doctrine of separation of powers. It is often argued that the implicit doctrine of Separation of Powers also limits Congress' ability to regulate the Court's jurisdiction. For instance, Congress could not use its Exception Clause power to demand that the Court act in an unconstitutional way. See United States v. Klein, 80 U.S. (13 Wall.) 128, 146-48 (1871) (holding unconstitutional a congressional attempt to prescribe a rule of decision regarding effect of a pardon).

jurisdiction that Congress does not affirmatively grant.  

A. Congressional Regulation of the Supreme Court’s Appellate Jurisdiction

Congress first regulated the Supreme Court’s appellate jurisdiction in the Judiciary Act of 1789. The Act gave appellate jurisdiction to the Supreme Court by writ of error, which mandated that the Court review cases for supposed errors of law, and Congress limited review of state court decisions to those cases in which the decision was against a federal claimant. Because the Act was contemporary to the Constitution itself, many scholars view it as an authoritative source of the original understanding of the Supreme Court’s role in our government. Furthermore, the Act was a successful compromise between the Federalists, who wanted a broad, sweeping judiciary, and the Anti-Federalists, who

31. In Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868), the Court said:

[The judicial act was an exercise of the power given by the Constitution to Congress “of making exceptions to the appellate jurisdiction of the Supreme Court.” “They have described affirmatively,” said the court, “its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it.”

The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

Id. at 513 (quoting Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810) (Marshall, C.J.)).

32. The first order of business in the First Session of the First Congress was Senate Bill No. I, which became the Judiciary Act of 1789. The Act infused Article III with substance and detailed those ingredients necessary for the “due process of law” that the Bill of Rights guaranteed. Act of Sept. 24, 1789, 1 Stat. 73 (1789). For an excellent history of the debates which led to the Judiciary Act, see Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 HARV. L. REV. 49 (1923).

33. Section 25 of the Judiciary Act of 1789 reads:

And be it further enacted, that a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error . . . .

Judiciary Act, ch. 20, § 25, 1 Stat. 73, 85-86 (1789).

34. The Constitution was signed September 17, 1787. Nine states were needed for ratification, and the necessary ninth state, New Hampshire, approved the Constitution in June 1788. In 1790, Rhode Island became the last of the original thirteen states to ratify the new Constitution. The Bill of Rights, the first ten amendments, was added to the Constitution in 1791. Congress enacted the Judiciary Act in 1789, soon after ratification gave it the power to so do.
wanted a federal judiciary of limited, minimal power. The Court's appellate jurisdiction remained confined under this Act for eighty-six years.

Nearly one hundred years later, Congress expanded the Court's appellate jurisdiction in the Act of March 3, 1875, which for the first time conferred on the federal courts general federal question jurisdiction. This grant of jurisdiction allowed the Supreme Court to review all cases "arising under" the Constitution, laws or treaties of the United States. Prior to the Act, the majority of cases came before the Court on the basis of diversity of citizenship, which offered a federal forum to litigants who feared local prejudice if their cases were heard before a state court.

As the country grew, so did the Supreme Court's docket, and the Court found it increasingly difficult to keep up with its workload. To alleviate the crush of cases, Congress introduced a discretionary element into the Supreme Court's appellate jurisdiction in the Circuit Court of Appeals Act of 1891, which instituted the use of the writ of certiorari and created the circuit courts of appeals. The writ of certiorari allowed the Court, for the first time, the discretion to choose which cases it would hear and, consequently, which cases it would not hear. Prior to this Act, every litigant in a federal forum had a right to appeal her case all the way to the Supreme Court, and many did so. Although after the Act of 1891 a litigant retained the ability to appeal as a matter of right, that appeal was now to the circuit court, and not normally to the Supreme Court. The circuit courts of appeals eased the Supreme Court's docket, and the

35. Warren, supra note 32, at 53-54.
36. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470. This Act, among other things, extended the Supreme Court's appellate jurisdiction to all cases which arose under the Constitution, laws, or treaties of the United States. G. Casper & R. Posner, supra note 1, at 17. The Act added tremendously to the business of the Supreme Court when the Court vastly expanded the definition of "arising under" in its construction of the Act in Pacific Railroad Removal Cases, 115 U.S. 1 (1885). The Court's construction of the Act allowed any suit against the federally chartered Pacific Railroad to "arise under" the laws of the United States. Id. at 11. Negligence suits against the Pacific Railroad deluged the Court and put pressure on the Court's docket. This pressure led to the Judiciary Act of 1891. See F. Frankfurter & J. Landis, supra note 9, at 69-78.
37. A unanimous Supreme Court recently defined "arising under" as "only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983).
39. 28 U.S.C. § 1332(a) (1988) parrots the language of the Constitution and grants federal jurisdiction in "controversies ... between — (1) citizens of different states; (2) citizens of a State and citizens or subjects of a foreign state."
40. Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891); see also Durham v. United States, 401 U.S. 481, 483 (1971) (appeals are a matter of right, while Supreme Court's certiorari decisions are wholly discretionary); F. Frankfurter & J. Landis, supra note 9, at 69; 2 C. Warren, The Supreme Court in United States History 727-28 (1947). See generally Hanus, Certiorari and Policy-Making in English History, 12 Am. J. Legal Hist. 63 (1968) (discussing the writ of certiorari as an English docket control device).
number of appeals to the circuit courts grew. Appeals as a matter of right still remained for many classes of cases. Because many litigants continued to exercise this right of appeal to the Supreme Court, the Court again fell behind in its workload.

By the beginning of the twentieth century, the steady expansion of litigation on social and economic legislation caused burgeoning demands on the Supreme Court's appellate jurisdiction. It was clear that a new judiciary act was necessary and, at the time, the Court was led by Chief Justice William Howard Taft, who was not only an adept leader, but an astute politician as well. Taft led the movement for the Court's institutional independence, and he was responsible for the passage of the Judiciary Act of 1925, which gave the Supreme Court effective control over its own docket. Chief Justice Taft, an expert administrator, pushed for judicial reform and drafted the Act of 1925. The 1925 Act reduced the number of appeals as a matter of right and replaced automatic access to the Supreme Court with discretionary review by writ of certiorari, allowing the Supreme Court to refuse to hear many of the requests for appellate review. This Act, with little modification over the years, governed access to the Supreme Court until the Supreme Court

41. Taft, The Jurisdiction of the Supreme Court under the Act of February 13, 1925, 35 Yale L.J. 1, 2 (1925) ("Speaking generally, [the circuit courts] were always abreast of their docket, and their activity soon removed the 'hump' in the docket of the Supreme Court.").

42. Some commentators believe that the crushing demand upon the Court's docket was a result of the Court's "propensity to declare social and economic legislation unconstitutional." G. Casper & R. Posner, supra note 1, at 18; see R. Stern & E. Gressman, Supreme Court Practice 41 (5th ed. 1978); Rice, How the Supreme Court Mill is Working, 56 Am. U.L. Rev. 763 (1922) (including docket statistics from 1916 to 1921).

43. William H. Taft has been the only person to serve both as President of the United States and as Chief Justice of the Supreme Court.


45. The Judiciary Act of 1925 permitted the Court to dispose of less important and less worthy cases by simply denying certiorari. See Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 575 (1972); G. Casper & R. Posner, supra note 1, at 20, Table 2.6; see also F. Frankfurter & J. Landis, supra note 9, at 258 ("In marking the boundaries of the Court's jurisdiction its broad categories must be supplemented by ample discretion, permitting review by the Supreme Court in the individual case which reveals a claim fit for decision by the tribunal of last resort.").

46. According to Taft's biographer, Chief Justice Taft said of the Court's appellate jurisdiction: It was vital, he said in opening his drive for the Judges' bill, that cases before the Court be reduced without limiting the function of pronouncing "the last word on every important issue under the Constitution and the statutes of the United States." A supreme court, on the other hand, should not be a tribunal obligated to weigh justice among contesting parties. "They have had all they have a right to claim," Taft said, "when they have had two courts in which to have adjudicated their controversy." 2 H. Pringle, The Life and Times of William Howard Taft 997-98 (1939) (footnote omitted).

Case Selection Act of 1988.48

On June 27, 1988, Congress passed the Supreme Court Case Selections Act,49 which eliminated, with the exception of direct appeals from three-judge panels,50 all of the Supreme Court's mandatory appellate jurisdiction. The Act governs the routing of cases from the lower federal courts to the Supreme Court,51 allowing the Supreme Court total discretion to choose which cases come before it. Accordingly, the only way for a litigant to have his case heard in the Supreme Court is for the Supreme Court itself to grant the litigant's request for certiorari. The case-selection process, therefore, is immensely important on a practical level because the first issue which the Court now addresses is whether it should decide a case on the merits and involve itself in a confrontation with Congress or the Executive Branch. Moreover, case selection permits the Court to determine its level of involvement in state and local governmental issues by deciding whether to hear appeals from the various state courts. This case-selection discretion enhances the Court's inherent power as a judiciary.

B. The Supreme Court's Inherent Power

The Supreme Court's power to administer justice is not simply the power to apply the law to the facts of a case, but also the power to achieve equitable results under the law due to the Constitution's merger of law and equity52 in the federal judicial power.53 Under English law, upon which the Framers drew in establishing the federal judicial power,

49. Id.
51. The Supreme Court Case Selections Act allows a litigant to petition the Supreme Court for certiorari once the district court has entered a final judgment. Therefore, a litigant may file an appeal in the court of appeals and petition the Supreme Court for certiorari on the same day. The Act allows the Supreme Court to grant or deny certiorari "before or after" the court of appeals renders judgment. 28 U.S.C. § 1254(1) (1988). For legislative history and purpose of the Act, see H.R. REP. NO. 660, 100th Cong., 2d Sess. at 7, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 772. See Boskey & Gresman, supra note 12; see also Amar, A Neo-federalist view of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U.L. REV. 205 (1985) (Article III creates two tiers of federal jurisdiction—one for mandatory federal questions and a second for discretionary jurisdiction. Amar argues that Congress regulates only the discretionary tier.).
52. There is no satisfactory way of defining "equity." The gist of equity, however, is that a liberal interpretation of legislative words will be used, if necessary in a particular case, to achieve a just result. See A. Ross, ON LAW AND JUSTICE 283-84 (1958).
the equity courts were completely independent of the law courts. The Lord Chancellor of England headed the equity courts, which dispensed justice in cases that did not fit within the rigid formulas of the common-law system. While equity courts dispensed "justice" on an individual basis depending upon the facts in each case, the common-law courts were constrained by the doctrine of precedent, which prescribed that a particular decision can be "justified" only if it is deducible from a prior decision. As Blackstone noted, equity exists for circumstances "wherein the law, by reason of its universality, is deficient." The Framers merged the English Courts of Chancery's equity with the written common-law system of precedent, allowing all cases to travel through the same system whether they request equitable relief or application of common-law precedent. The distinction between the two systems is preserved, however, because a case must fall "within the traditional scope of equity as historically evolved in the English Court of Chancery" before equitable relief will be granted. Equity, unlike written common law, is a pliable concept, and consequently, the judicial branch under our Constitution plays a discretionary role when applying equitable concepts to achieve just results.

This equitable power, or discretion, could be abused if not for an organizational structure that constrains its use, and the Supreme Court's rules provide this structure. Section 17 of the Judiciary Act of 1789 conferred inherent power to make necessary rules "for the orderly conducting [of] business" upon all federal courts, including the

54. Various theories abound regarding the beginnings of the two court systems in England, but records clearly establish both an equity court and a common-law court system as early as the fourteenth century in England. See Adams, supra note 53, at 87-89.
55. Glenn & Redden, supra note 53, at 760-61.
57. 1 W. BLACKSTONE, COMMENTARIES *62.
58. See Mississippi Mills v. Cohn, 150 U.S. 202, 205 (1893) ("The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses . . . ."); H. MAINE, POPULAR GOVERNMENT 218 (1886) (the "Federal Judicature established by the American Constitution as a whole . . . had its roots in the Past, and most of their beginnings must be sought in England."); Note, 2 HARV. L. REV. 382, 383 (1889) ("[P]olitical institutions, like living organisms, are as a rule developed from earlier institutions by a process of selecting and adopting those features which experience has proven to be best adapted to the needs of the political environment . . . ."); see generally Adams, supra note 53; Glenn & Redden, supra note 53.
60. Law here is used in the positivist sense—a written code that determines the attachment of rights to individuals during their interaction in a governed society without regard for the law's moral content. See H.L.A. HART, THE CONCEPT OF LAW 181-89 (1961).
63. Section 17 of the Judiciary Act of 1789 reads:
Supreme Court; and the Process Act Amendment of 1793\textsuperscript{64} made clear that this power was limited so as not to be contrary to the laws of the United States.\textsuperscript{65} Before the Supreme Court could decide its first case, it had to inform the litigants of its procedures. One of the first rules that the Supreme Court wrote, regarding the administration of its docket, described the management of its business as analogous to the English equity courts:

The Chief Justice, in answer to the motion of the Attorney General, made yesterday, informs him and the bar, that this court consider the practice of the courts of king's bench, and of chancery, in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary.\textsuperscript{66}

Since our country has a common-law system, following English procedure made practical sense and, as the need arose, the Court developed other rules using English equity court procedures as guidelines, one of which was the equity procedure of "rehearing."

The English equity courts developed the doctrine of rehearing in response to a need for review of their decisions.\textsuperscript{67} Unlike the law courts from which a litigant could appeal to a higher court, the equity courts of the Chancellor used the device of "rehearing" because there was no higher body to hear appeals when the Chancellor erred.\textsuperscript{68} Rehearing allowed the Chancellor to reconsider a decision and correct and revise a previously expressed opinion before finality occurred.\textsuperscript{69} When the highest law court ruled in a case, a litigant could request a writ of error,

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\textit{And be it further enacted,} That all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law; and shall have power to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonments, at the discretion of said courts, all contempts of authority in any cause or hearing before the same; and to make and establish all necessary rules for the orderly conducting [sic] business in the said courts, provided such rules are not repugnant to the laws of the United States.

Judiciary Act, ch. 20, § 17, 1 Stat. 73, 83 (1789) (footnotes omitted and emphasis added).
\end{quote}

\textsuperscript{64}. 1 Stat. 333 (1793).
\textsuperscript{65}. \textit{Id. at} 335. This amendment read:
\begin{quote}
[It shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts . . . as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings.]
\end{quote}

\textsuperscript{66}. 5 U.S. (1 Cranch) xvi (Aug. 8, 1791). This rule, in one form or another, governed the Court until 1954. The last codification of this rule was in 1931: "This court considers the former practice of the courts of king's bench and of chancery, in England, as affording outlines for the practice of this court in matters not covered by its rules or decisions, or the laws of Congress." \textit{Sup. Ct. R. 5}, 286 U.S. 596 (1932).
\textsuperscript{67}. Degnan & Louisell, \textit{supra} note 4, at 904.
\textsuperscript{68}. \textit{Id. at} 903. It has been said that one of the procedures of equity which was superior to law was the rehearing process. \textit{See} 9 W.S. Holsworthy, \textit{A History of English Law} 372-73 (1926).
\textsuperscript{69}. Degnan & Louisell, \textit{supra} note 4, at 904.
which allowed another decision in the case only upon a showing of clear error in the former decision. By contrast, in the equity courts there was no need to show error of any kind before a rehearing would be granted. Rather, a litigant simply had to show need, and the Chancellor could grant a rehearing in order to dispense the most "just" justice possible. For basically the same reason—that there was nowhere to appeal its decisions—the Supreme Court allowed litigants to request rehearing.

The Supreme Court rehears cases because it is the highest court in the federal system—and for the particular litigants involved, a Supreme Court error can be corrected only by rehearing. As Justice Jackson described the Court: "We are not final because we are infallible, but we are infallible only because we are final." The theory underlying the Supreme Court's power to rehear cases is that as a court of last resort it must have a means by which it can admit and correct its misjudgment, and a court which is final must also be deliberate and thorough. The decision to rehear a case is an equitable decision with the goal of attaining justice for the particular litigants involved, which is precisely what a legal system is supposed to do. Although concepts of justice cannot be formed into rigid rules for a court to apply, rules can be written that will enable litigants to request an equitable decision, such as a rehearing. The procedures of the Supreme Court regarding a litigant's application for rehearing are found in the Supreme Court Rules.

III. REHEARING IN THE UNITED STATES SUPREME COURT

Supreme Court Rule 51 governs litigants' requests for rehearings of any judgment or decision of the Court. Rule 51.1 governs requests for

70. Id.
71. Of course, there is always legislative veto of a Supreme Court decision, but such process takes much time and, usually, does not aid the particular litigants in the original lawsuit.
73. Degnan & Louisell, supra note 4, at 907.
75. A petition for rehearing of any judgment or decision other than one on a petition for writ of certiorari, shall be filed within 25 days after the judgment or decision, unless the time is shortened or enlarged by the Court or a Justice. Forty copies, produced in conformity with Rule 33, must be filed (except where the party is proceeding in forma pauperis under Rule 46), accompanied by proof of service as prescribed by Rule 28. Such petition must briefly and distinctly state its grounds. Counsel must certify that the petition is presented in good faith and not for delay; one copy of the certificate shall bear the manuscript signature of counsel. A petition for rehearing is not subject to oral argument, and
rehearing of a decision on the merits, and Rule 51.2\textsuperscript{76} governs requests for rehearing of a denial of petition for certiorari. Under both Rule 51.1 and 51.2 at least one of the Justices who agree to the rehearing must have previously joined in the majority decision sought to be reheard. Both sections also require that counsel certify that her request for rehearing is made in "good faith and not for delay."\textsuperscript{77} Under Rule 51.2 the grounds for rehearing are limited, and a litigant must show either intervening circumstances or "other substantial grounds" before rehearing of a writ for certiorari will be considered.\textsuperscript{78} On the other hand, Rule 51.1 does not require specific or substantial grounds for a rehearing of the Court's decision on the merits. Rather, as in rehearing in equity courts, if a litigant persuades the Court that the Court has possibly erred, the Court will grant rehearing.\textsuperscript{79}

While decisions to grant rehearing upon denials of certiorari do occur, they are of little interest because Rule 51.2 spells out exactly what the grounds are for rehearing, and a litigant may not apply for a rehearing of a denial of certiorari unless those specific grounds are present.\textsuperscript{80} Rule 51.1 decisions, however, which grant rehearing after the Court has rendered a decision, are of great interest because they often elucidate the Court's decisionmaking process and admit error or substantial change in the circumstances of the law.

Of even more interest are cases where the Court itself has requested rehearing \textit{sua sponte} after hearing oral arguments in a case, but \textit{before} rendering its decision. It is this aspect of rehearing that is not governed by Supreme Court Rule 51 or any other rule. On the contrary, the

\begin{itemize}
\item \textsuperscript{76} Sup. Ct. R. 51.1.
\item \textsuperscript{77} Sup. Ct. R. 51.2.
\item \textsuperscript{78} Sup. Ct. R. 51.1 & 51.2.
\item \textsuperscript{79} Degnan & Louisell, supra note 4, at 909. The authors list numerous reasons why courts will \textit{not} grant a rehearing. These include the addition of a new legal theory or new legal argument that the litigant did not earlier argue; consideration of issues not raised at trial; and the unsupported claim that "more argument" would be useful. \textit{Id.} at 910; \textit{see generally} Cook, \textit{The Rehearing Evil}, 14 Iowa L. Rev. 36 (1928).
\item \textsuperscript{80} The Court's decision to rehear a denial of a request for certiorari is not the subject of this paper.
\end{itemize}
Supreme Court can request rehearing *sua sponte* for the same reasons that it asserts the power of judicial review—because according to the Court it is the judiciary's "province and duty" to do so.\(^81\)

The most famous assertion of the Court's inherent power as "necessary" to the judicial department occurred in 1803 in *Marbury v. Madison*,\(^82\) where the Court enunciated the power of judicial review as "emphatically the province and duty of the judicial department."\(^83\) Neither Congress, nor any Supreme Court Rule, regulates the power of judicial review. It is grounded in the Court's inherent power as a judiciary and supported by the systemic argument that the Court's role in the constitutional plan is to maintain the supremacy of the Constitution.

The first time that the Court requested rehearing *sua sponte* was in the 1819 case of *Bullard v. Bell*.\(^84\) In *Bullard*, the attorneys had argued the case in the absence of one of the Justices, Mr. Justice Todd.\(^85\) The Court continued the case and directed reargument because the Justices who were present at the original argument were equally divided in opinion, and counsel had consented to the Court's request for reargument.\(^86\)

The Court elucidated its power to request rehearing *sua sponte* in the 1852 case of *Brown v. Aspden*,\(^87\) in which a lower court decision had been affirmed by an equally divided Supreme Court with eight members presiding. Because of the even split, the plaintiff filed a petition for a rehearing. The Court held that affirmation by an equally divided Court was not grounds for granting reargument.\(^88\) In response to the plaintiff's reference to rehearing in the English Courts of Chancery, the Court took the opportunity to expound upon the differences between rehearing in the English Chancery courts of original jurisdiction and in the Supreme Court sitting as an appellate tribunal. The Court held that a litigant's request for rehearing would be limited to the time "after judgment is entered, provided the order for reargument is entered at the same term."\(^89\) The Court reasoned that this rule would avoid the rehearing

\(^{81}\) The essence of Chief Justice Marshall's argument for the creation of judicial review in *Marbury v. Madison* is found in the oft-quoted sentence: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803).
\(^{82}\) *Id.* at 137.
\(^{83}\) *Id.* at 177.
\(^{84}\) 18 U.S. (5 Wheat) vii (1819).
\(^{85}\) *Id.*
\(^{86}\) *Id.*
\(^{87}\) 55 U.S. (14 How.) 25 (1852).
\(^{88}\) *Id.* at 28.
\(^{89}\) *Id.* at 26; see also Public Schools v. Walker, 76 U.S. (9 Wall.) 603, 604 (1870) (citing *Brown v. Aspden*, the Court denied litigants' request for rehearing because no member of the Court who concurred in the judgment desired a reargument).
problem in England where cases dragged on for several years.

Chief Justice Taney then announced the Court's own power to request rehearing when necessary:

[T]his court may and would call for a re-argument, where doubts are entertained which it is supposed may be removed by further discussion at the bar . . . . But the rule of the court is this: that no re-argument will be heard in any case after judgement is entered, unless some member of the court who concurred in the judgment afterwards doubts the correctness of his opinion, and desires a further argument on the subject. And when that happens, the court will, of its own accord, apprise the counsel of its wishes, and designate the points on which it desires to hear them.90

Taney clearly stated that the Court could and would request rehearing without the consent of counsel whenever the Court deemed rehearing necessary. Thus, the Court asserted that the right to request rehearing *sua sponte* was inherent in the Court's duty to see that justice is done, and this duty expired at the end of each term.

The Court expounded on this "term rule" in 1881 in *Bronson v. Schulten*,91 where it noted that at common law a court had no power to vacate or modify a judgment after the expiration of the term in which the judgment had been rendered. There were two exceptions to the "term rule" that allowed the Court to correct errors after the term's expiration—where errors were in form or were purely clerical.92 The Supreme Court recognized that it had the power during a term to modify any judgment rendered during that term93 and, thus, proceeded to incorporate the term rule as part of its judicial power over its judgments.

The extent to which one agrees with the Court's right to request rehearing *sua sponte* determines the faith one has in the Court's ability to constrain itself to use its equitable powers to serve the ends of justice. The debate, however, may be moot since the Court has asserted this power for well over one hundred years.

IV. TWO CASES OF ACTIVIST REHEARING *SUA SPONTE*: THE WARREN COURT AND THE RENQUIST COURT94

Congress can regulate the Court's *sua sponte* power due to Congress’
control of Supreme Court procedures, which includes the Supreme Court Rules. But Congress has never addressed the matter of rehearing sua sponte. Perhaps Congress may never have to address this issue. In the Warren Court decision, United States v. Ohio Power Co., and the recent Rehnquist Court memorandum decision, Patterson v. McLean Credit Union, vigorous dissents were filed and the legal community focused attention on the Court's actions. The two cases have precedential value, however, and lay a foundation on which a future activist Supreme Court could take advantage.

A. United States v. Ohio Power Co.

In United States v. Ohio Power Co., the Supreme Court requested rehearing sua sponte more than a year after final judgment was entered. The Ohio Power case concerned Ohio Power Company's early escape from tax liability, an advantage that companies which brought their tax appeals later did not escape. Ohio Power Company sued to recover an alleged overpayment of taxes—a tax refund—under section 124(f) of the Internal Revenue Code of 1939. Section 124(f) allowed accelerated amortization of the cost of constructing wartime facilities. The War Production Board (WPB) had to certify that the construction cost was necessary in the interest of national defense. The WPB certified only part of Ohio Power's costs as "necessary," and Ohio Power sued for certification of all of its costs. The United States Court of Claims entered judgment in favor of Ohio Power Company, and the government appealed. The Supreme Court denied certiorari on October 17, 1955, and on December 5, 1955 the Court denied the government's petition for a rehearing on the government's request for certiorari. On May 28, 1956, the Court denied the government's motion for leave to file a second petition for rehearing. Nevertheless, on June 11, 1956, the Court vacated sua sponte its order of December 5, 1955 and requested rehearing so that the case would be disposed of in a manner consistent with two other cases in


96. Because of the fuss caused by its request in Patterson v. McLean Credit Union, it may be a long time before the Court requests rehearing sua sponte. See infra note 10 and accompanying text.


100. Id. at 99 (Harlan, J., dissenting).


which the Court had granted certiorari.\footnote{104} In those two cases, the Court denied full-cost amortization to National Lead Company and Allen-Bradley Company. The Court gave two reasons for its resurrection sua sponte of the Ohio Power case: that the rehearing would ensure the "interests of justice" and "uniformity in the application of the principles announced in the two companion cases."\footnote{106}

In granting the rehearing \textit{sua sponte} in Ohio Power, the Court ignored Supreme Court Rule 58, the 1955 counterpart to today's Rule 51, which governed petitions for rehearing. Rule 58 permitted the filing of petitions for rehearing by unsuccessful litigants within twenty-five days of the denial of a petition for certiorari or after the entry of an adverse judgment or order.\footnote{107} The literal language of paragraph 4 of Rule 58 precluded petitions for rehearing after the twenty-five day limit: "Consecutive petitions for rehearing, and petitions for rehearing that are out of time under this rule, will not be received."\footnote{108} Instead of basing its decision to rehear the Ohio Power case on any interpretation of Rule 58, the Court based its decision upon the Court's inherent power over its own judgment,\footnote{109} known as the "term rule."\footnote{110}

Congress, in an attempt to abolish the Supreme Court's judicially created "term rule," added provision 28 U.S.C. section 452 to the 1948 recodification of the Judicial Code. The wording of section 452 was adopted verbatim from Federal Rule of Civil Procedure 6(c), which had abolished the "term rule" in the federal district courts.\footnote{111} It seemed,


107. \textit{Id.} at 101 n.7 (Harlan, J., dissenting, with whom Frankfurter, J., and Burton, J., join). Out-of-time petitions are those petitions which are filed past the deadline for filing. The deadline for requesting rehearing is 25 days after final judgment, and the Court requested rehearing \textit{sua sponte} in the case over a year after final judgment. \textit{See Sup. Ct. R.} 51.4: "Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this Rule, will not be received." \textit{But cf. Sup. Ct. R.} 51.1 (allowing 25 days after final judgment unless the time is shortened or enlarged by the Court or a Justice).


109. "This policy finds expression in the manner in which we have exercised our power over our own judgments, both in civil and criminal cases." United States v. Ohio Power Co., 353 U.S. 98, 99 (1957).

110. \textit{See supra} notes 88, 90-91 and accompanying text; \textit{see also R. STERN & E. GRESSMAN, supra} note 42, at 781.

111. "The purpose of this amendment is to prevent reliance upon the continued existence of a
therefore, that section 452 countermanded the Supreme Court’s “term rule.” The Court, however, continued to grant out-of-time rehearings.112

In the period between the passage of section 452 in 1948 and the Ohio Power decision in 1956, the Court granted out-of-time petitions for rehearing nine times in violation of the legislative intent of section 452. In five of the out-of-time cases, the Court continued the use of the “term rule,”113 while in the following four cases, as in Ohio Power, the Court invoked its inherent power to contravene Congress’ regulatory scheme.114

In Remmer v. United States,115 a criminal case, the Court granted an out-of-time petition for rehearing because the Court had decided an intervening case.116 Originally, the Court had remanded Remmer for further proceedings,117 but because the intervening decision would allow Remmer to return eventually to the Court on certiorari, the Court allowed rehearing to avoid the delay and expense of further proceedings. Likewise, in Achilli v. United States,118 another criminal case, the Court vacated a November 19, 1956 denial of certiorari, granted an out-of-time petition for rehearing, and granted certiorari.119 The Court limited the grant of certiorari, however, to the question of whether the petitioner could be prosecuted and sentenced under a section of the Internal Revenue Code of 1939. Achilli was identical to Remmer in that the petitioner raised the same question before the district court on remand from the


113. See cases cited supra note 111.


116. In the rehearing, the Court remanded Remmer for reconsideration in light of the Court’s decision in Holland v. United States, 348 U.S. 121 (1954).


118. 353 U.S. 373 (1957).

119. Achilli, 352 U.S. at 1023.
court of appeals after the Supreme Court denied his writ of certiorari. Achilli then successfully petitioned for certiorari from the district court’s new decision.\textsuperscript{120}

In \textit{Florida ex rel. Hawkins v. Board of Control},\textsuperscript{121} a race discrimination case, the Court vacated a May 24, 1954 denial of certiorari, granted an out-of-time petition for rehearing, and granted certiorari.\textsuperscript{122} The Court had originally denied certiorari and remanded the case to the Florida Supreme Court to be reconsidered in light of the Supreme Court’s decision in the \textit{Segregation Cases},\textsuperscript{123} which were decided one week earlier on May 17, 1954. The Court vacated and granted certiorari ten months later because the Florida Supreme Court was delaying in implementing the admission of a black to a state law school despite the Supreme Court’s mandate to do so.\textsuperscript{124}

And finally, to correct a simple clerical error, which is an allowable ground for rehearing even in a common-law court, the Court in \textit{Boudoin v. Lykes Bros. S.S.},\textsuperscript{125} recalled a judgment that had been returned to the district court for further proceedings and remanded the case to the court of appeals instead.\textsuperscript{126}

The \textit{Ohio Power} case, on the other hand, was not a criminal case, did not involve racial discrimination, did not expedite continuing litigation, nor was any clerical error made in the Court’s previous disposition of the case. Moreover, the issue involved in \textit{Ohio Power} was not a continuing issue because the statute, Internal Revenue Code section 124(f), under which the case was brought, had expired in 1945.\textsuperscript{127} Nonetheless, the Supreme Court vacated its previous orders in \textit{Ohio Power} and requested rehearing \textit{sua sponte} in the “interests of justice.” The Court, however, never explained exactly what interests of justice demanded the ignoring of Congress’ clear intent in section 452 to abolish the term rule.

\textsuperscript{121} 350 U.S. 413 (1956).
\textsuperscript{122} \textit{Id.} The litigant’s request for certiorari was denied at 342 U.S. 877 (1951), and that decision was recalled and vacated at 347 U.S. 971 (1954).
\textsuperscript{124} Florida ex rel. Hawkins v. Board of Control, 350 U.S. 413 (1956).
\textsuperscript{125} 350 U.S. 811 (1955).
\textsuperscript{126} \textit{Id.} \textit{See also} United States v. Ohio Power Co., 353 U.S. 98, 107 (1957) (Harlan, J., dissenting, with whom Frankfurter, J., and Burton, J., join) (\textit{Boudoin} concerned correction of error in Court’s own mandate).
B. Patterson v. McLean Credit Union

The Rehnquist Court's memorandum decision in *Patterson v. McLean Credit Union* involved the important issue of whether private racial discrimination is remediable under 42 U.S.C. section 1981. In *Patterson*, the Court requested *sua sponte* the parties to brief and argue the question of whether the Court's previous interpretation of section 1981 in *Runyon v. McCrary* should be reconsidered. Yet, neither party had previously raised the issue of *Runyon*'s reconsideration. In *Runyon*, the Court had outlawed racial discrimination in private school admissions, following the precedent of *Jones v. Mayer*, which outlawed private racial discrimination in the sale and rental of housing.

In *Jones*, a real estate developer had refused to sell property to blacks. Jones, a black, sued. The issue was whether private racial discrimination was remedial under 42 U.S.C. section 1982, a companion statute to section 1981. The Court held that the legislative history of section 1982 clearly showed that the act was intended to apply to private as well as public racial discrimination. Prior to the Court's interpretation of section 1982 in *Jones*, the statute had been an unenforced promise of racial freedom. After *Jones*, section 1982 became a formidable weapon for protection of civil rights whether the alleged discrimination was private in nature or involved "state action." Thus, the "state ac-
tion" limitation was no longer a precedent to civil rights actions.

In Runyon v. McCrary, two black children, through their parents, brought suit against a private school under 42 U.S.C. section 1981 because they had been denied admission on the basis of their race. In deciding whether section 1981 prohibited private racial discrimination, the Court considered whether it had properly construed section 1981's companion statute, section 1982, in Jones when it extended liability for racial discrimination to the making and enforcing of private contracts. The Court held that both section 1981 and section 1982 reached purely private acts of racial discrimination. In a concurring opinion in Runyon, Justice Stevens stated that the stability that would result from following the Jones precedent outweighed the argument that Jones was wrongly decided.

In Patterson v. McLean Credit Union, a black employee of the credit union sued under section 1981 alleging racial discrimination in a private employment setting. The Supreme Court granted certiorari to consider whether racial "harassment" was remediable under section 1981. After oral argument, the Court requested sua sponte that the parties brief and argue an additional question: "Whether or not the interpretation of 42 U.S.C. section 1981 adopted by this Court in Runyon v. McCrary should be reconsidered?"

Although four Justices dissented in two separate dissents from the Court's sua sponte request for reargument, neither dissent focused on the procedure of requesting reargument, but rather on the lack of grounds for requesting reargument. The original issue in the Patterson case was whether to extend the Court's interpretation of section 1981, which already prohibited discrimination in private employment contracts, to cases of racial harassment in the workplace. The Court, however, chose a different issue for rehearing, stating in its per curiam opinion that it had "decided, in light of the difficulties posed by petitioner's argument...

rights. The Court had reasoned that the thirteenth amendment did not give Congress the power to tamper with private, social rights. See also The Civil Rights Cases, 109 U.S. 3, 22 (1883).

138. The school stated upon inquiry that it was not integrated, and it accepted only members of the Caucasian race. Runyon v. McCrary, 427 U.S. 160, 165 (1976).

139. Id. at 170-72.

140. Id.

141. Id. at 190-91 (Stevens, J., concurring).

142. 805 F.2d 1143 (4th Cir. 1986).


145. Id. at 619 (Blackmun, J., dissenting with whom Brennan, J., Marshall, J., and Stevens, J., join); Id. at 621 (Stevens, J., dissenting with whom Brennan, J., Marshall, J., and Blackmun, J., join).

146. 805 F.2d 1143 (4th Cir. 1986).
for a fundamental extension of liability under 42 U.S.C. section 1981, to consider whether Runyon should be overruled." Though the Court went on to support the proposition that former precedent can be overruled or modified, nowhere in the majority opinion did the Court explain what "difficulties" the petitioner's argument posed that demanded a reconsideration of Runyon.

The Court's action was particularly puzzling because Runyon had been decided in accord with congressional action taken after the Court decided the Jones case. The Senate responded to the Jones decision in 1972, and debated amending section 1981 to expressly preclude recovery in cases of employment discrimination. Such action would have made Title VII of the 1964 Civil Rights Act the exclusive remedy for employment discrimination. The Senate declined to amend section 1981 because "every protection that the law has in its purview" should be used to protect victims of employment discrimination. The House of Representatives, which previously had criticized the Jones decision, accepted the Senate's decision. Therefore, both Houses of Congress agreed with the Supreme Court's interpretation in Jones that section 1981 applied to employment discrimination even before the Court decided Runyon in 1976. Moreover, in Runyon, following Congress' lead, the Court went a step further and extended section 1981 to all private contracts. Nevertheless, in the face of congressional intent to end racial discrimination, the Supreme Court requested sua sponte the litigants in Patterson to address whether Runyon should be overruled.

On June 15, 1989, the Court rendered its final decision in Patterson. Although the Court expressly stated that "[s]ome Members of this Court believe that Runyon was decided incorrectly," the Court concluded that Runyon should not be overruled. Justice Kennedy, writing for the majority, based the Court's refusal to overrule Runyon on considerations of stare decisis. The Court further said that stare decisis precluded overruling prior precedent, and "the burden borne by the

147. Patterson, 485 U.S. at 617 (emphasis in the original).
148. Id. at 618.
149. See 118 Cong. Rec. 3371, 3372 (1972).
151. 427 U.S. at 168.
154. Id. at 2370. The Court also declined to extend section 1981 to racial harassment reasoning that "conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations" was not remediable under 42 U.S.C. § 1981. Id. at 2369.
155. Id. at 2370.
party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction." The Court, however, never addressed the fact that it had requested reargument sua sponte on whether to overrule Runyon, and that the parties had not presented that issue. In fact, the Court never discussed its reasons, or the "difficulties" that led it to request rehearing sua sponte.

V. ANALYSIS OF THE COURT'S USE OF REHEARING SUA SPONTE

The most fundamental social, economic, philosophical, and political questions reach the Supreme Court in the form of lawsuits. As Alexis de Tocqueville astutely observed over one hundred years ago:

[F]ew laws can escape the searching analysis of the judicial power for any length of time, for there are few that are not prejudicial to some private interest or other, and none that may not be brought before a court of justice by the choice of parties or by the necessity of the case.

Indeed, the Court hears only a small proportion of the thousands of cases that request Supreme Court review. Which cases the Court chooses to decide indicates its policies and priorities as well as the extent of its influence upon the political discourse both in our government and among citizens. Despite this considerable discretion, the Court is still limited to the cases and issues which the litigants choose to present. This limitation assures that an activist Court may not reach out and decide just any issue of its choice. In other words, even an activist Court must bide its time waiting for the "perfect" case.

This control of the issues by the litigants is central to our adversarial system of law. The Constitution embodies the adversarial system in section two of Article III which extends the judicial power to all "Cases" or "Controversies." It does not extend the power to all "issues of interest to the Justices." In addition to this constitutional constraint on the Court's jurisdiction, the Court has created rules of self-restraint, including the doctrine of advisory opinions, ripeness, standing, and mootness. Both the constitutional limitation of case or controversy and the

156. Id.
158. A. DE TOQUEVILLE, DEMOCRACY IN AMERICA 106 (P. Bradley ed. 1945) (H. Reeve Text as revised by F. Bowen 1862) (discussing the "immense political influence" of the United States judiciary).
159. See G. CASPER & R. POSNER, supra note 1.
160. U.S. CONST. art. III, § 2, cl. 1; see text supra note 24.
161. See ex parte Baez, 177 U.S. 378, 390 (1900) ("Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies.")
judicially created doctrines comport with the Court's duty to avoid constitutional questions unless necessary.\textsuperscript{162}

Since the presentation of issues and arguments to the Court are the litigants' responsibility, rehearing requests should also be their responsibility. The Court should be limited to very specific grounds before it can request rehearing upon its own motion. It is the litigants' responsibility to point to the Court's error and request rehearing in cases where the Court has misunderstood specific facts or where the Court has overlooked binding authority. In either of these situations, it will be obvious to the litigants that the Court has erred, and likewise, the litigants will know to request rehearing.

Had the litigants requested reargument in \textit{Patterson} to consider the \textit{Runyon} issue, the Court could have granted the request with little fanfare. The litigants, however, did not raise the \textit{Runyon} issue.\textsuperscript{163} This lack of litigant initiative troubled the dissenting Justices, one of whom stated: "the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review."\textsuperscript{164}

By rehearing \textit{sua sponte}, the Court can accelerate the "sooner or later" timing of an issue's arrival and, thereby, evade the Constitution's jurisdictional constraints. Thus, the Court can address either issues that have not been decided by a politically accountable body or, worse, issues that have been decided by political representatives. The latter set of issues gives the Court the opportunity to invalidate legislative enactments \textit{without anyone requesting that they do so}. Both actions raise the countermajoritarian difficulty and possibly violate the Constitution's case or controversy limitation.

The greater problem with unrestricted \textit{sua sponte} rehearing is the possibility that the procedure will be used by an activist Court or Justice to further a personal agenda.\textsuperscript{165} Justice Kennedy's statement in \textit{Patter-
son that "some Members of this Court believe that Runyon was decided incorrectly" could support the argument that the Rehnquist Court has such an agenda regarding civil rights. Such argument, however, is mere speculation. The real problem with unregulated sua sponte rehearing is that the Court is perceived as having a personal agenda whether it does in fact have one or not.

When the parties choose the issues, there is little opportunity for judges to pursue their own agendas and, as a consequence, the proceedings are not only fairer, but are perceived as fairer.167 As Justice Blackmun said in his dissent to the Patterson memorandum decision that requested rehearing sua sponte:

I am at a loss to understand the motivation of five Members of this Court to reconsider an interpretation of a civil rights statute that so clearly reflects our society's earnest commitment to ending racial discrimination, and in which Congress so evidently has acquiesced. I can find no justification for the bare majority's apparent eagerness to consider rewriting well-established law.168

Such commentary, especially from a member of the Court, raises questions as to the impartiality of the Court's actions, and such speculation tarnishes the Court's legitimacy. Litigant control of the issues is important to satisfy not only the parties, but society as well. As stated by the Supreme Court: "[J]ustice must satisfy the appearance of justice."169 When the Court solicits issues that the litigants have not presented, the Court erodes its credibility and trespasses on the soul of the adversarial system.

Because the Court decides constitutional issues, which affect us all, society's confidence in the Court's ability to render impartial and reasoned decisions is as important as the decisions themselves. As a result of the tremendous power with which Congress has imbued the Court, it is vital that decisions of the Court be perceived as legitimate. Damage to the legal system may be caused by "frequent or sudden reversals of direction that may appear to have been occasioned by nothing more significant than a change in the identity of this Court's personnel."170

The sua sponte requests for rehearing in Ohio Power and Patterson tarnished the image of the Court as a neutral arbiter of our country's

168. 485 U.S. at 621 (Blackmun, J., dissenting).
170. Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147, 153 (1981) (In a concurrence, Justice Stevens reiterated the preference for stability.).
problems. Both requests were trivial. As Justice Harlan noted in his Ohio Power dissent:

There is nothing to distinguish [this case] from any other suit for a money judgment in which a conflict turns up long after certiorari and rehearing have been denied. The most that can be said in justification of the Court’s action is that otherwise Ohio Power would not have to pay taxes which Allen-Bradley and National Lead must pay as a result of the much later decisions in their cases.\textsuperscript{171}

And after all the uproar that the Patterson memorandum decision caused,\textsuperscript{172} the Court in its final decision stated: "Whether Runyon’s interpretation of § 1981 . . . is right or wrong as an original matter, it is certain that it is not inconsistent with the prevailing sense of justice in this country."\textsuperscript{173}

A potentially more serious problem with the Ohio Power and the Patterson memorandum decisions is that they remain “on the books.” The Court may use both decisions as support for a future attempt to reach out and pick a specific issue. The precedential value of the opinions will outlast the fuss surrounding them. A future decision may overrule or extend the final decisions in both cases, but it is improbable that the Court can change the decisions requesting rehearing \textit{sua sponte}. Arguments against the constitutional use of \textit{sua sponte} rehearing may appear in law review articles and in congressional committees, but there is no way a litigant could raise the issue to the Court. Thus, only Congress can remedy the situation before it changes from a potential problem into an actual problem.

Constitutional cases before the Supreme Court are important to people other than the parties to the dispute,\textsuperscript{174} and the Court’s decision to deliberate further and rehear oral arguments is justifiable when the litigants request rehearing on grounds that the Court has made an error in fact or law. Rehearing, however, may not be justifiable when the Court itself requests rehearing \textit{sua sponte}.

Occasionally, the Court has requested reargument before it has reached a decision because of an equally divided Court\textsuperscript{175} or a reconsti-

\textsuperscript{172} Amicus briefs were filed by the 47 states; the District of Columbia; Guam; the Virgin Islands; 66 Senators; 118 Congressmen; the American Bar Association; the New York City Bar Association; New York County Lawyers Association; the Lawyers’ Committee for Civil Rights under Law; and over 100 other organizations. Briefs in opposition included the Washington Legal Foundation; 8 Congressmen; 3 Senators; the Center for Civil Rights; and the Equal Employment Advisory Council. See Reidinger, Runyon Under the Gun, 74 A.B.A. J. 78, 80 (Nov. 1988); Eskridge, Interpreting Legislative Inaction, 87 Mich. L. Rev. 67, 68 n.8 (1988).
\textsuperscript{173} Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2371 (1989).
\textsuperscript{174} Degnan & Louisell, \textit{supra} note 4, at 911.
\textsuperscript{175} C. Hughes, \textit{supra} note 27, at 70-71.
tuted Court. An equally divided Court is one in which one or more
Justices were not present for oral argument and the remaining even
number of Justices are equally divided on an issue. A reconstituted
Court, on the other hand, is one in which the composition of the Court
membership has changed during the time a case is pending in the Court.
This happens if a new Justice replaces a retiring or deceased Justice be-
tween oral argument and final decision in a case. The Court may re-
quest reargument if the Court believes that the new Justice will be able to
break a deadlock or change the outcome of the decision.

The Patterson case involved a reconstituted Court and possibly an
equally divided Court. Patterson was originally argued February 29,
1988. The Court’s request for reargument was made in a memoran-
dum decision dated April 25, 1988, with the Court hearing reargu-
ment on October 12, 1988. Between the original argument and the
reargument, Justice Anthony Kennedy was appointed to the Court to
replace retiring Justice Lewis Powell. Therefore, the Court that heard
reargument was a reconstituted Court. In addition, it may have been an
equally divided Court in that between Justice Powell’s retirement and
Justice Kennedy’s appointment, an eight member Court existed. In the
Patterson memorandum opinion that requested reargument, four Justices
dissented. The per curiam majority, therefore, included Justice Ken-
nedy. Consequently, the Court may also have been equally divided
after the original oral argument in Patterson.

However, the Patterson litigants and the legal community do not
know if the Court relied upon either of these legitimate reasons when it
requested reargument, and this leaves the Court open to the criticism
that it sought out the Runyon issue for activist reasons. Thus, it is im-
portant not only that the Court be confined to specific grounds when
requesting rehearing sua sponte, but also that the Court state the grounds

176. Degnan & Louisell, supra note 4, at 899, 913.
177. C. Hughes, supra note 27, at 70-71; Degnan & Louisell, supra note 4, at 912 n.37.
178. Degnan & Louisell, supra note 4, at 913.
179. Id.
183. President Ronald Reagan appointed Judge Anthony M. Kennedy of the United States
Court of Appeals for the Ninth Circuit on November 23, 1987, and the Senate unanimously con-
firmed him on February 3, 1988. See also TRB, The Fifth Man, supra note 10.
184. One dissent by Justice Stevens in which Justices Blackmun, Brennan, and Marshall joined,
and one dissent by Justice Blackmun in which Justices Stevens, Brennan, and Marshall joined.
185. The majority also included Chief Justice Rehnquist and Justices White, O’Connor, and
Scalia.
upon which it is requesting the rehearing. Only in this way will the public's confidence in the Court remain untarnished.

VI. CONCLUSION

The Court's image as a fair and impartial arbiter of contemporary issues calls for limited use of the Court's ability to request rehearing sua sponte. Consequently, Congress should limit the Court's use of sua sponte rehearing to two circumstances: (1) where the Court is equally divided upon an issue, and (2) where the Court's membership has been reconstituted after oral argument and before published decision. In both of these circumstances, the litigants would have no way of knowing the numeric division in the Court or whether their case had been decided before the Court's membership changed. In the case of an even split during the decisionmaking process, the Court itself may need a rehearing to clarify the disputed issues, and this need of the Court would be unknown to the litigants before a decision is rendered. The same reasoning applies to a reconstituted Court as the timing of the actual decision is unknown to the litigants and may occur weeks or months before the opinion is written and published. Sua sponte requests for rehearing by the Court should be used sparingly and regulated by written rules to preserve the Court's image. Moreover, the Court, as a matter of policy, should state upon which of the two grounds it is requesting rehearing sua sponte.

Because of the countermajoritarian difficulty of allowing the Court to request rehearing upon its own motion, Supreme Court Rule 51 should be amended to expressly allow the Court to request rehearing sua sponte for only two reasons: (1) where the Court is equally divided upon an issue, and (2) where the Court's membership has been reconstituted after oral argument and before published decision.

186. The 5-4 decisions that the Court has rendered in the last few years raise doubt among the legal community as to the length of tenure of these decisions. See Glennon, supra note 93; Howard, supra note 93.