

## Article

# Procedural Posture and Social Choice

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I'll let you write the substance on a statute and you let me write the procedure, and I'll screw you every time.<sup>1</sup>

### INTRODUCTION

The way in which cases are litigated is important. When professors and lawyers read appellate cases, they always find out how the case got there—the procedural posture.<sup>2</sup> There's a practical reason for this: understanding how the rule stated might apply to future fact patterns depends on how the court understood the facts before it.<sup>3</sup> The implicit but often undiscussed corollary is that procedural posture can affect how cases are determined on appeal.<sup>4</sup> But why should posture matter? Appellate

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1. *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Regulations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) [hereinafter *Hearing*] (statement of Rep. John Dingell).

2. Indeed, before I attended law school more than twenty-five years ago, my boss/future partner lamented that casebooks of his day often edited posture out, which limited the ability to truly understand a case. That advice stayed with me, eventually leading to this Article.

3. Brigham A. Fordham, Laura G. Dooley & Ann E. Woodley, *When Torts Met Civil Procedure: A Curricular Coupling*, 67 J. LEGAL EDUC. 263, 274 (2017) (“In this complex landscape of facts, precedent, forum preferences, and unknown variables, students need to understand how the procedural posture affects the merits of a claim.”).

4. Carole D. Hafner & Donald H. Berman, *The Role of Context in Case-Based Legal Reasoning: Teleological, Temporal, and Procedural*, 10 A.I. & L. 19, 48 (2002) (“[W]e show that evaluating a precedent based on factual similarity

courts rarely provide reasons why outcomes should vary with the order and timing of proceedings. Similarly, practitioners' vague sense that posture matters provides little theory to aid an analytical understanding of the system. We know posture is important but, except for occasional anecdotes about cases going awry, we do not know how or why.

Social choice theory brings some meaning to the void, providing important theoretical texture to this ubiquitous part of the legal system. Everyone faces tradeoffs, and the way people choose outcomes is based on their set of preferences. Social choice theory studies how these individual preferences are aggregated to represent a set of societal preferences.<sup>5</sup> There are ways in which those preferences might aggregate, such as voting. But aggregation methods can be manipulated; the order of the voting—the *agenda*—can determine which preference wins the day.

This Article shows that litigation is a form of preference aggregation, and that procedural posture is a form of agenda control: the order and timing of how litigation preferences are aggregated into a single outcome will affect who wins the case. More important, this insight allows us to consider posture in ways we had not before. The payoff is both theoretical and practical. Theoretically, this understanding explains why it is that lawyers care about procedural posture and provides a new way for academics to explain it. Practically, this recognition allows for more careful planning of procedural rules with an eye toward who is controlling the final decision.

A robust literature explores agenda setting, but not with respect to litigation. About forty years ago, scholars latched onto agenda setting in law, but only in a limited way: legislative action. That literature debates how legislative bodies might manipulate the order in which proposals are heard to obtain a desired policy result.<sup>6</sup> Several scholars have even extended this to

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without considering its procedural posture can result in unpersuasive or even erroneous legal arguments.”).

5. Christian List, *Social Choice Theory*, STAN. ENCYC. PHIL. (Oct. 14, 2022), <https://plato.stanford.edu/entries/social-choice> [<https://perma.cc/MZ2S-8VWR>].

6. WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 152–56 (1982) (insert obligatory Star Trek joke here); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983); see Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 CALIF. L. REV. 1401, 1407–08 (2016) (explaining how constitutional design provides agenda control to increase

the choice of cases and decision making within the Supreme Court.<sup>7</sup> Some have argued that voter preference theory has no

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stability in governance); Jonathan Bendor & Terry M. Moe, *Agenda Control, Committee Capture, and the Dynamics of Institutional Politics*, 80 AM. POL. SCI. REV. 1187, 1188 (1986); Saul Levmore, *Public Choice Defended*, 72 U. CHI. L. REV. 777, 785 (2005); Jörg L. Spenkuch, B. Pablo Montagnes & Daniel B. Magleby, *Backward Induction in the Wild? Evidence from Sequential Voting in the US Senate*, 108 AM. ECON. REV. 1971, 1972 (2018); Bjørn Erik Rasch, *Insincere Voting Under the Successive Procedure*, 158 PUB. CHOICE 499, 509 (2014); William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 385 (1988); George Tsebelis, *Veto Players and Institutional Analysis*, 13 GOVERNANCE 441, 454 (2000); Thomas Schwartz, *Parliamentary Procedure: Principal Forms and Political Effects*, 136 PUB. CHOICE 353, 354 (2008). *But see* Randy T. Simmons & Ryan M. Yonk, *The Empty Intersection: Why So Little Public Choice in Political Science?*, 164 PUB. CHOICE 45, 46 (2015) (lamenting how few political scientists teach about public choice).

7. Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561, 563 (1977) (“Decision making by multi-judge appellate courts . . . display features that may make them vulnerable to similar [social choice] criticism.”); *see also* Vanessa Baird & Tonja Jacobi, *How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court*, 59 DUKE L.J. 183, 237 (2009) (presenting empirical study that supports theory that justices consider agenda setting when forming docket); Jim Chen, *The Mystery and the Mastery of the Judicial Power*, 59 MO. L. REV. 281, 297–99 (1994) (relying on Arrow’s theory—the proposition that no system of voting can satisfy the sometimes contradictory principles of democratic governance—to assert the Court’s “legal reasoning reflects nothing but ‘political choices’”); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 814–23 (1982) (asserting the Court is susceptible to the paradoxes of voting the same as any other voting group); Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1228 (1994) (arguing that appellate courts should not have expanded judicial review because they are subject to the same social choice flaws as legislatures); Michael I. Meyerson, *The Irrational Supreme Court*, 84 NEB. L. REV. 895, 906 (2006) (discussing ranked choice voting and its application to the Court); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 83 (1986) (“[W]e hope to convince the reader that the fact of group decision-making demands the attention of any serious and complete theory of adjudication.”); John B. Gates, *Supreme Court Voting and Realignment Issues: A Microlevel Analysis of Supreme Court Policy Making and Electoral Realignment*, 13 SOC. SCI. HIST. 255, 258–59 (1989) (discussing literature that featured cases “the Court procedurally decided against majority will”); David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743, 745–47 (1992) (discussing a hypothetical case involving the APA to show the basic voting matrix); David S. Cohen, *The Precedent-Based Voting Paradox*, 90 B.U. L. REV. 183, 202–03 (2010) (examining possible paradoxes arising from strategic Supreme Court Justice voting behavior); Timothy R. Johnson, James F. Spriggs II & Paul J. Wahlbeck, *Passing and Strategic Voting on the U.S. Supreme Court*, 39 LAW & SOC’Y REV. 349, 354 (2005) (discussing the stages of decision-making in the

place in appellate decision making.<sup>8</sup>

But nobody has explored how agenda setting might apply to the litigants in a case.<sup>9</sup> From who files the initial complaint (and where) through appellate decisions, litigants have many opportunities to shape the order that issues are heard to their advantage, and yet nobody has considered the social choice implications of litigation procedure. In the past forty (or perhaps more) years, only a single scholar has suggested, in passing, that theories of agenda control<sup>10</sup> may be relevant to non-appellate litigation procedures, and that article suggests that preference aggregation has no real place in the discussion.<sup>11</sup> This Article tackles that question head on by considering how agenda control affects trial litigation outcomes.

Litigation preference aggregation may have been ignored because litigation is different from the focus of prior commentary: legislatures and appellate courts. Unlike trial litigation, legislatures and reviewing courts involve members who are literally voting/agreeing on an outcome. Studying the results of legislative and appellate deliberations is key to understanding vote aggregation and agenda setting in those bodies, but the voting

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Court's process); Mark Tushnet, *Patterson and the Politics of the Judicial Process*, 1988 SUP. CT. REV. 43, 50–54 (arguing that the Justices can shape outcomes by controlling the agenda and the issues presented to the Court); Edward P. Schwartz, *Policy, Precedent, and Power: A Positive Theory of Supreme Court Decision-Making*, 8 J.L. ECON. & ORG. 219, 238 (1992) (arguing that a chief justice not voting with the majority in order to assign dissent was a form of agenda control); Lee Epstein & Olga Shvetsova, *Heresthetical Maneuvering on the US Supreme Court*, J. THEORETICAL POL. 93, 98 (2002) (proposing a model where the chief justice sets voting agenda to achieve preferred outcome).

8. Bruce Chapman, *The Rational and the Reasonable: Social Choice Theory and Adjudication*, 61 U. CHI. L. REV. 41, 42–43 (1994); Paul D. Carrington, *Adjudication as a Private Good: A Comment*, 8 J. LEGAL STUD. 303, 316–17 (1979).

9. Huq, *supra* note 6, at 1406 n.21 (surveying legal social choice literature, listing none that applies to litigation agenda control). To be fair, Levine & Plott, *supra* note 7, at 594–96, discuss juries as voters and two or three ways that jury voting order might be manipulated.

10. Namely, by citing either Levine & Plott, *supra* note 7, or RIKER, *supra* note 6.

11. Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1, 16 (2010) (discussing agenda control with respect to the court's choice of which threshold question to decide first, such as subject-matter versus personal jurisdiction: "In Condorcet's model, the decisional agent's preferences directly influence the 'outcome' . . . . By contrast, in the context of decisional sequencing, the judicial actor's preferences do not necessarily influence the outcome, but rather simply the manner in which the judge reaches that outcome.").

itself is fairly straightforward. In litigation, the closest analogue would be the jury. Indeed, some have considered voting methods in juries.<sup>12</sup> But litigation is different than a voting body—even as trial litigation prepares cases to be voted on by juries or appellate courts.

Litigation is different than the usual face-off between competing proposals in at least four ways. First, as noted, to the extent there are voters, the voters (that is, the jury members) are not the same as the litigating participants. Plaintiffs, defendants, and judges often queue up the case to be voted on by others.<sup>13</sup> In this sense, the agenda setting is separated from the voting.<sup>14</sup>

Second, sometimes the voters *are* the participants themselves, including the judge. In this sense, the role of trial judges is complicated. Judges decide non-jury cases; they can also take a case away from the jury by ruling on the law if the facts appear to be undisputed.<sup>15</sup> Also, for some types of appeals, judicial determinations are given deference and can withstand review even by a reviewing court with different preferences. Indeed, when one decision is clearly normatively correct, even the minority view can sway the others.<sup>16</sup> This Article will consider the role of trial judges as preference holders in the aggregation of preferences.

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12. *E.g.*, Levine & Plott, *supra* note 7, at 595–96 (discussing ordering of votes by juries and how special verdict forms are a way to constrain choices in voting).

13. Rutledge, *supra* note 11, at 18–19 (discussing role of parties and judge in setting agenda order).

14. Consider jury instructions, which are often negotiated among all parties and approved by the judge.

15. *E.g.*, FED. R. CIV. P. 56.

16. Janice Nadler, Julie R. Irwin, James H. Davis, Wing Tung Au, Paul Zarnoth, Adrian K. Rantilla & Kathleen Koesterer, *Order Effects in Individual and Group Policy Allocations*, 4 GRP. PROCESSES & INTERGROUP RELS. 99, 112 (2001); *cf.* Leora C. Dahl, C.A. Elizabeth Brimacombe & D. Stephen Lindsay, *Investigating Investigators: How Presentation Order Influences Participant–Investigators’ Interpretations of Eyewitness Identification and Alibi Evidence*, 33 LAW & HUM. BEHAV. 368, 373 (2009) (finding that investigators are more likely to believe in guilt when a suspect is positively identified but not when there is no identification). *But see* Manfred J. Holler, *Marquis de Condorcet and the Two-Dimensional Jury Model*, in LAW AND ECONOMICS IN EUROPE AND THE U.S.: THE LEGACY OF JUERGEN BACKHAUS 155, 157 (Alain Marciano & Giovanni Battista Ramello eds., 2016) (questioning whether increasing jury size leads to more correct decisions because the likelihood of reaching the correct decision may be too low for each individual juror).

The third difference between litigation and deliberative bodies is just that: litigation is not deliberative. While a jury might eventually vote,<sup>17</sup> the parties and court do not vote on an outcome, at least not in the sense that we normally think of it. Instead, the parties seek to achieve their self-interested preferences, and the judge has internal preferences that can vary, such as truth-seeking, reaching the normatively correct result, fairness, self-interest, and so forth.<sup>18</sup> That said, even in cases where the judge decides the dispute, there is a sort of vote.<sup>19</sup> The parties offer options to the court within the constraints set by the judge's and litigation system's rules (agenda setting), and the judge will be the deciding vote among the three actors (i.e., the plaintiff, the defendant, and the trial judge).<sup>20</sup> While a majority still wins, the parties do not know which preference the court might have among the variety that might be offered. The menu of preferences preserves the complexities of social choice theory even in this limited subgroup.<sup>21</sup>

Fourth, the weight and identity of other voters on the outcome differs in trial compared to appellate decision-making. The traditional view of a Supreme Court opinion is that the majority author has some agenda control for determining which citations to include in the opinion.<sup>22</sup> But that control is limited by the need to hold a majority, which means that other voter preferences may exert pressure on the final shape of the opinion, leading to more of a median voter outcome.<sup>23</sup> But trial court judges need not appease any of the parties in order to express their preferences; unlike appellate panels, their preferences may be truly independent of the other voters. This insight tells us that we might see less strategic voting among trial court judges. But

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17. Levine & Plott, *supra* note 7, at 594–96 (considering how juries might act as deliberative bodies).

18. Holler, *supra* note 16, at 157 (reviewing the literature discussing differences between preference aggregation and jury deliberation).

19. *Cf. id.* at 163–65 (describing court case as preferences by plaintiff and defendant presented to jury for vote).

20. In multi-party litigation, there may be even more options.

21. Holler, *supra* note 16, at 157 (“However, legal judgements [sic] are not always about finding or defining the truth. Often they are about what is good or bad, or what should be done and what should be omitted, and there are degrees of the goodness and badness of the alternatives to be judged.”).

22. Yonatan Lupu & James H. Fowler, *Strategic Citations to Precedent on the U.S. Supreme Court*, 42 J. LEGAL STUD. 151, 159 (2013).

23. *Id.* at 169.

there are limits to this insight. Trial opinions are subject to appellate review. As such, the court might strategically vote in such a way as to maximize the likelihood of affirmance on appeal, even if that vote does not coincide with the judge's true preferences.

This Article considers the complexities of procedural posture and social choice. Social choice and agenda control often evoke a sense of strategic behavior, but this Article provides examples of how the order of aggregation leads to particular outcomes—even by accident. The takeaway, then, is not that parties can manipulate the system to their advantage—something most people suspect already<sup>24</sup>—but rather that we can better understand how litigation works and improve the system if we pay attention to the different ways in which agenda control affects outcomes. Part I introduces the theory of voting preferences and agenda setting. Part II applies social choice theory to litigation. Part III provides examples of agenda control in action. Part IV examines lessons from the exercise.

## I. VOTING PREFERENCES AND AGENDA SETTING

Voting theories abound; they are nicely summarized by William H. Riker's seminal book *Liberalism Against Populism*.<sup>25</sup> Indeed, neoclassical microeconomics is a form of voting theory. Consumers have a choice between meat and potatoes and prefer one to the other. The item they choose to buy will depend on the respective prices of the items and the respective value consumers see in those items.<sup>26</sup> Society's preferences are the sum of individual preferences, and when prices change, more consumers will choose to buy more meat vis a vis potatoes and other alternatives—or less.<sup>27</sup>

The core social choice theory, then, attempts to aggregate each person's individual preferences into a single ordered set of preferences of the group. Thus “preferences” can have broad

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24. Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2051 (1989) (“History teaches that any American procedural model will be modified by the ingenuity of lawyers who have learned to manipulate the rules to the benefit of their clients.”).

25. RIKER, *supra* note 6; *cf.* Huq, *supra* note 6, at 1406 (describing Riker's contribution as an influential gloss on Arrow's work).

26. EMMA HUTCHISON, *PRINCIPLES OF MICROECONOMICS* 365 (2017).

27. *Id.* at 379.

meaning; essentially, any choice a person would make (regardless of motive) constitutes a preference. This is why it is called social *choice* theory—it is the study of choices society would make.

#### A. SOCIAL CHOICE AND VOTING

Social choice analysis often involves voting because voting is a way people might express their choices. Of course, this gives rise to the study of strategic voting, where choices are expressed falsely to sway the final outcome.<sup>28</sup> However, absent mindreading, some sort of expressed choice is usually used, and voting is a shorthand way to refer to such expression even if people “vote with their feet” through action (like buying meat instead of potatoes).

The traditional voting preference conundrum taught to economists and others is Arrow’s Impossibility Theorem.<sup>29</sup> Stripped of some important but relatively uncontroversial assumptions,<sup>30</sup> the theory holds that where people have multiple preferences in ranked order, no single societal preference can ever reflect all individual preferences in the same order that would satisfy every individual.<sup>31</sup> The societal ordering of preferences will make somebody unhappy.

For a simple example, consider three family members, who each like three types of ice cream in order:<sup>32</sup>

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28. See generally Gary W. Cox & Matthew Soberg Shugart, *Strategic Voting Under Proportional Representation*, 12 J.L. ECON. & ORG. 299 (1996) (discussing strategic voting).

29. KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 46–60 (Yale University Press 3d ed. 2012) (1951) (introducing Arrow’s Impossibility Theorem). Arrow originally called it the “General Possibility Theorem,” but the paradox caused follow-on scholars to rename it. This book was one of the key works that led to Arrow’s Nobel Prize in Economics.

30. These assumptions will be discussed in more detail in the next section.

31. ARROW, *supra* note 29, at 46–60.

32. While I thought of the ice cream flavors on my own, it turns out that I am not the first (or even the second) person to think of it as an example. See, e.g., Stearns, *supra* note 7, at 1221–22 (using ice cream cake flavors as an example); Meyerson, *supra* note 7, at 903–04 (using ice cream flavors as an example).



	A	B	C
1	Vanilla	Chocolate	Strawberry
2	Strawberry	Vanilla	Chocolate
3	Chocolate	Strawberry	Vanilla

If A, B and C are arguing about which ice cream to buy for the family, under several different voting schemes, there is no winner. For example, if they perform a “Borda count”<sup>33</sup> and score the votes by preference (vanilla gets three points from A, two points from B, and one point from C), each flavor gets a total of six, resulting in a tie. Or, if we do Condorcet (pairwise) voting, then each flavor defeats the other two flavors exactly twice, as Condorcet himself noted in 1785.<sup>34</sup> This particular problem is called cyclic voting. In more complex systems, one can find that a majority or plurality system can award a win to a preference that is uniformly less preferred than others. For example, if forty people rank vanilla first, but sixty rank it third, vanilla may still win (because chocolate and strawberry are splitting the top votes of others for thirty percent each), despite the fact that a majority of people like a flavor other than vanilla.<sup>35</sup> A plurality system can reach this result while only requiring one vote—for the top choice. The plurality problem is solvable by runoffs, but the

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33. RIKER, *supra* note 6, at 81–82 (describing a Borda count); *see also* Ian McLean, *The Borda Count and Condorcet Principles: Three Medieval Applications*, 7 SOC. CHOICE & WELFARE 99, 102–106 (1990) (indicating that the Borda count did not actually originate with Borda).

34. MARIE JEAN ANTOINE NICOLAS DE CARITAT, MARQUIS DE CONDORCET, *ESSAI SUR L'APPLICATION DE L'ANALYSE À LA PROBABILITÉ DES DÉCISIONS RENDUES À LA PLURALITÉ DES VOIX* [*An Essay on the Application of Probability Theory to Plurality Decision-Making*] (1785), reprinted in CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY 120, 129 (Iain McLean & Fiona Hewitt eds. & trans., 1994); *see* Stearns, *supra* note 7, at 1221–23 (summarizing Condorcet’s paradox and the literature describing it). *See generally* Cheryl D. Block, *Truth and Probability—Ironies in the Evolution of Social Choice Theory*, 76 WASH. U. L.Q. 975 (1998), for a discussion about how Condorcet would likely not have been a social choice theorist today, and how most scholars (*mea culpa*) merely give him a footnote about vote cycling.

35. A good example of this phenomenon is Donald Trump’s electoral success while consistently having an approval rating below forty percent throughout his presidency. *E.g.*, Kathy Frankovic, *More Americans than Ever Before Disapprove of Joe Biden’s Performance as President*, YOUNGOV AM. (Sept. 8, 2021), <https://today.yougov.com/topics/politics/articles-reports/2021/09/08/more-americans-disapprove-joe-biden-poll> [<https://perma.cc/EAA7-MSQB>] (“Trump never got approval from much more than forty percent of Americans throughout his presidency.”).

choice of runoff might make a difference—whether all other candidates are eliminated at once, or whether only the lowest scoring candidate is eliminated in each round. Each of these voting methods might yield different group preferences *from the same set of individual preferences* under entirely reasonable conditions.<sup>36</sup>

But there are ways to solve the apparent inability to reach a consistent resolution—simply choose a method of voting that best suits a party's individual preference. For example, B (the family crybaby) may always get chocolate because A and C cannot stand to hear the whining. This is essentially a dictatorship.<sup>37</sup> The next section discusses one way in which individuals attempt to sway group preferences to match their individual preferences: agenda control.<sup>38</sup>

#### B. CONTROL THE AGENDA, CONTROL THE OUTCOME

A more nuanced, if not diabolical, way to resolve Arrow's paradox than dictatorship is through agenda control—ordering the vote to avoid conflicting outcomes.<sup>39</sup> In our ice cream example, A will want to control the vote, asking first whether vanilla or strawberry should be chosen. A says vanilla—its top rank, after all. C says strawberry, as that is its top rank. And B votes vanilla, which was not the top choice, but at least it is not the last choice.

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36. See, for example, PBS Infinite Series, *Voting Systems and the Condorcet Paradox*, YOUTUBE (June 15, 2017), <https://www.youtube.com/watch?v=HoAnYQZrNrQ>, for a helpful explanation of different voting systems and a realistic example showing different outcomes under each of those systems.

37. See ARROW, *supra* note 29, at 59 (discussing non-dictatorship as one assumption required in his voting theorem).

38. There are other ways, such as requiring unanimous consent. Block, *supra* note 34, at 978. Of course, requiring unanimous consent violates other assumptions of Arrow's theorem, and may simply mask unanimity anyway, as discussed below. See also Stearns, *supra* note 7, at 1232 (arguing that the importance of Arrow's theorem is understanding which assumptions fail, and how that affects operation and stability of the institution); Peter C. Fishburn, *Dimensions of Election Procedures: Analyses and Comparisons*, 15 THEORY & DECISION 371, 379 (1983) (listing twelve ways to control election outcomes, including agenda control).

39. RIKER, *supra* note 6, at 173 ("Much more interesting than mere physical control of the voter is control of the agenda in such a way that voters are constrained to vote as the manipulator wishes."). Another name for this is path dependence. See Easterbrook, *supra* note 7, at 817 (analyzing the impact of path dependence on the Supreme Court).

	A	B	C
1	Vanilla	<del>Chocolate</del>	Strawberry
2	Strawberry	Vanilla	<del>Chocolate</del>
3	<del>Chocolate</del>	Strawberry	Vanilla

In this agenda, which eliminates chocolate from the first vote, vanilla wins 2-1, but one can easily imagine a different outcome if B asked for a vote between chocolate and vanilla. In that case, chocolate would win 2-1.

The ability to manipulate preference outcomes by choosing the voting order can be generalized as agenda control theory.<sup>40</sup> Setting the agenda has two components. First, the agenda setter (often the leader, but not necessarily) sets the order of decision (presumably strategically, but not necessarily). In our example, A strategically sets a vote among two choices that leads to the vanilla selection. Second, the other participants can generate additional options that can change the strategic agenda. C, hoping to avoid last choice vanilla, may suggest that the vote should instead be between vanilla and chocolate, while hiding the true preference for strawberry. Or, C might suggest cookies and cream, which has enough elements of vanilla that A will put it on the agenda and enough elements of chocolate that B will vote for it.

It may seem like agenda control requires knowledge of each other voters' preferences.<sup>41</sup> This is loosely true for the strategic agenda setter, but not for the participants interested in the outcome. One experiment tested agenda control by giving participants preferences in the form of dollar amounts.<sup>42</sup> Participants knew only their own amounts, and not any others. Even so, when presented with carefully manipulated agendas, they voted for suboptimal outcomes multiple times.<sup>43</sup> These votes fell into three categories: select the highest payoff, avoid the worst outcome,

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40. See RIKER, *supra* note 6, at 169–95 (analyzing the impact of controlling the agenda).

41. See Bernard Grofman, *Public Choice, Civic Republicanism, and American Politics: Perspectives of a "Reasonable Choice" Modeler*, 71 TEX. L. REV. 1541, 1571 (1993) (arguing that nearly perfect knowledge is necessary to obtain perfect agenda control).

42. Charles R. Plott & Michael E. Levine, *A Model of Agenda Influence on Committee Decisions*, 68 AM. ECON. REV. 146, 152–55 (1978).

43. *Id.* at 156.

and select the highest expected value.<sup>44</sup> Regardless of the strategy used, the outcome was swayed by the agenda. Further, the results imply some flexibility in outcomes when the choices available to voters are not necessarily win or lose.

Another experiment found similar results. Rather than allowing the parties to construct their own agenda, participants considered five job applicants, discussed the applicants, and then selected from a limited choice of agenda options.<sup>45</sup> Participants choosing from a few options were not as successful as those who had free reign, but they were still successful in winning a vote for their preferred candidate more than fifty percent of the time, which is far greater than the twenty percent one would expect among five candidates with five selectors.<sup>46</sup>

This second model is closer to likely litigation outcomes; while there is some flexibility, neither parties nor the court have free reign to order affairs exactly as they might want. Thus, agenda setting need not rely on any assumptions of cyclic or other indeterminate voting. While there is a debate about whether cyclic voting is common or not,<sup>47</sup> analysis of agenda control does not rely on the existence of cyclic voting. Changing the order of voting can affect the outcome even if a voting method is otherwise stable.

## II. INTRODUCING AGENDA CONTROL AND LITIGATION

Ice cream obviously serves as a mere example; in practice, agenda control has a “capacious” meaning.<sup>48</sup> Essentially, any manipulation of the order or menu of choices used to aggregate preferences would be included. In litigation, this can take the form of many different types of procedural choices: the order in

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44. *Id.* at 155.

45. Mark F. Stasson, Tatsuya Kameda & James H. Davis, *A Model of Agenda Influences on Group Decisions*, 1 GRP. DYNAMICS: THEORY, RSCH. & PRAC. 316, 320 (1997).

46. *Id.*

47. See Block, *supra* note 34, at 986 (“Unfortunately, several theorists suggest that cyclical preference structures may be prevalent.”); see also Meyerson, *supra* note 7, at 904–05 (describing debate between Condorcet and Lewis Carroll about likelihood of cyclic preferences); Huq, *supra* note 6, at 1414 (citing the disagreement over the presence of cyclic voting in real-world institutions).

48. See Huq, *supra* note 6, at 1416 (“At a minimum, it captures a class of cases in which collective choice is required to begin or end with certain steps, and where the structure of a multistage aggregation rule determines outcomes. But it sweeps wider than this. Riker commented on the ‘significance, variety and pervasiveness’ of agenda-control instruments.”) (citation omitted).

which a court or jury rules on issues, the issues presented to the court in the first place, the methods used to decide issues, the order in which information is disclosed to each party by the other,<sup>49</sup> and even the order in which the parties argue the case.

Agenda control seamlessly applies to litigation. Indeed, Riker's first agenda setting example describes how Pliny the Younger manipulated the Roman Senate in a murder case.<sup>50</sup> Group A, the plurality, favored acquittal. Group B favored the death penalty. Group C favored banishment. Had Pliny ordered the proceeding to determine acquittal or conviction, the defendant would have surely been convicted, with the likely outcome of banishment during the second, punishment step. So, Pliny set forth all three options at once, expecting acquittal to win. Members of Groups B and C saw through this ruse and voted to convict, but the result was still banishment due to more strategic voting.

Pliny's tale illustrates two key points. First, agenda control in legal proceedings is real, and potentially impactful. Second, agenda control can fail, either through failure to control the agenda or through strategic voting of the participants.

Despite the litigation implications of Pliny, no one has yet explored how agenda control might apply to trial litigation. To date, commenters have focused on *inter*-case agenda control: how the ordering of issues in different cases before appellate courts affects how courts decide cases. For example, Plott & Levine, who published the first experiments in agenda control,<sup>51</sup> also published a companion law review article applying the experiments to legislative choice.<sup>52</sup> That article has been cited more than 100 times, a keystone of public choice theory. But none of those articles discuss how the theory might apply to litigation.

Others have considered the role of social choice and agenda setting in the development of the common law.<sup>53</sup> For example, one article cites agenda control as parallel to but different from

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49. See, e.g., *Strike 3 Holdings, LLC v. John Doe Subscriber Assigned IP Address 173.71.68.16*, No. 1-18-cv-2674, slip op. at \*3 (D.N.J. June 30, 2020) (holding that court's denial of early discovery request constitutes dispositive motion subject to appeal).

50. RIKER, *supra* note 6, at 173–74 (discussing ROBIN FARQUHARSON, *THEORY OF VOTING* (1969)). Riker adds details not available in the original.

51. Plott & Levine, *supra* note 42.

52. Levine & Plott, *supra* note 7.

53. E.g., Chapman, *supra* note 8, at 46 (stating that the common law is impacted by social choice theories).

the idea that a decision in one case will affect later decisions.<sup>54</sup> When considering *inter*-case aggregation, a world without agenda control would require that case outcomes result the same way no matter the order that cases are heard.<sup>55</sup> This is an interesting and thorny problem, but one that has been treated in the literature.

This Article is concerned with *intra*-case preference aggregation: how the ordering of events in a single litigation can affect the result of the dispute. With *intra*-case procedural posture, we are concerned with the outcome of a single case, and the ordering is not of prior dispositive decisions, but of procedural- and merits-based milestones that shape the final outcome.

The analysis here includes any part of a single case, whether based on the merits or not, within the scope of procedural posture. This might include the response to a complaint (and there are at least eight different ways to so respond);<sup>56</sup> how information is traded with the opposing parties (the U.S. and Germany, for example, have wildly different traditions); whether a case is stayed in favor of another proceeding;<sup>57</sup> who makes the determinations (judge or jury); and who hears appeals (is there a specialized appellate court?) and when (immediately or at the end of the case?). These—and so many other—procedural choices can have critically important consequences for the outcomes of cases under the very same set of substantive laws.<sup>58</sup> In short, trial litigation is a form of preference aggregation whose outcome

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54. Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CALIF. L. REV. 369, 400–02 (1984). Agendas are different from precedent only to a point. The Supreme Court, especially, could choose to hear only cases that satisfy a particular ordering of preferences—for example, incremental change versus large change. This is a form of agenda control.

55. See generally Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001) (arguing that *stare decisis* is a path-dependent process).

56. See FED. R. CIV. P. 12 (governing responsive pleadings).

57. See, e.g., *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 685–86 (7th Cir. 1987) (affirming stay of U.S. case while Belgian litigation proceeded to judgment); Saurabh Vishnubhakat, Arti K. Rai & Jay P. Kesan, *Strategic Decision Making in Dual PTAB and District Court Proceedings*, 31 BERKELEY TECH. L.J. 45, 80–81 (2016) (presenting data on litigation stays pending Patent Office administrative patent review). Review in the Patent Office uses a more lenient evidentiary standard to invalidate patents, and also does not impose liability to alleged infringers during review.

58. See Hafner & Berman, *supra* note 4, at 48–52 (showing how difference in posture changes outcomes on appeal with similar fact patterns).

can be influenced by the order in which the procedural aspects of the case unfold.

#### A. PREFERENCE AGGREGATION IN LITIGATION

As noted in the introduction to social choice, the theory often speaks of voters in terms of aggregating preferences. In short, each person with a preference states that preference, and the social choice problem is how to count those votes to represent the collective preferences of the group. But social choice need not be so limited. As noted in the introduction, an aggregation of societal preferences is subject to the challenges discussed in Part I.

Continuing the ice cream example, consider how we might determine America's favorite ice cream flavors (in order). One way to decide is to ask people to vote, as noted in Part I. But another way is to examine (or survey), what people buy when given a choice. If strawberry and vanilla cost the same, how many people will buy strawberry? What about chocolate? But what if chocolate ice cream is expensive in California due to delivery costs compared to vanilla, but much cheaper in Pennsylvania (where Hershey is located, after all). In that sense, the agenda for preference aggregation is being controlled by non-voters—the delivery mechanism.

This analogy helps shed light on how aggregation works in litigation. Sometimes, the voters are the same parties who set the agenda: the parties and the judge. Other times, the voters are a jury, and the parties/judge merely arrange the agenda such that the voters will decide on issues presented before them.

Judge decided cases are relatively straightforward, as discussed further below. The parties and the judge are all voters, and the result of the case is the aggregation of their preferences. In this sense, litigation aggregation is similar to appellate court aggregation, except (until now) nobody thought of the litigants as voters in a lawsuit.

With respect to a jury, however, the parties are attempting to impart their preferences onto the jury in the same way Pliny the Younger sought to manipulate the voting of the Roman Senate.<sup>59</sup> In one sense, we say that the preferences being aggregated are those of the voters (in this case, the jury), but that the parties and the judge will influence how the vote takes place.

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59. See *supra* note 50 and accompanying text.

This framework also shines a different light on pre-trial dispositive motions such as motions to dismiss and summary judgment motions. These motions are an attempt by the parties to control the agenda by forcing different voters, namely the parties/judge rather than the jury, to aggregate the preferences.

#### B. APPLYING SOCIAL CHOICE THEORY TO LITIGATION

Our ice cream example above illustrates Condorcet's vote cycling paradox, where there is no winner among the three flavors in preference voting. Economist Kenneth Arrow generalized this paradox in a social choice theorem that won him the Nobel Prize.<sup>60</sup> Arrow's Impossibility Theorem, as it is known, showed that under a particular set of assumptions, different voting rules could lead to a different outcome for each rule.<sup>61</sup> More specifically, Arrow's theorem posited that no system of pooling preferences could satisfy all five of the following assumptions at once:<sup>62</sup>

- 1) If everyone agrees on an option, then that option prevails;
- 2) There is no "dictator" whose views control the outcome in each case;
- 3) Every potential range of at least three preferences must be accommodated, such that no institution outlaws some of the preferences before a vote;
- 4) Each pair of options must be considered against each other independent of the other options;<sup>63</sup> and
- 5) Preferences are transitive—if the collective prefers the first choice over the second, and the second over the third, then it must prefer the first over the third.<sup>64</sup>

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60. *Kenneth J. Arrow*, NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/1972/arrow/facts> [<https://perma.cc/HH65-5FWW>].

61. ARROW, *supra* note 29, at 46–60.

62. *Id.* at 57. For a version in more plain English than Arrow's original work, see ERIC MASKIN & AMARTYA SEN, THE ARROW IMPOSSIBILITY THEOREM 33–35 (2014), and Huq, *supra* note 6, at 1412.

63. Consider how this particular assumption is tested in the debates about whether one should vote for third-party candidates in presidential elections. See Bernard C. Barmann, *Third-Party Candidates and Presidential Debates: A Proposal to Increase Voter Participation in National Elections*, 23 COLUM. J.L. & SOC. PROBS. 441, 444–45 (1990) (arguing that third parties change major party candidate behavior).

64. ARROW, *supra* note 29, at 24–31; see also Chen, *supra* note 7, at 298 (reciting Arrow's five conditions); Easterbrook, *supra* note 7, at 823 (same).



One can see how the ice cream flavor example maps these assumptions, and results in no group preference. To reach a group preference, we would have to violate one of these assumptions, whether it be dictatorship (one person picks the winning flavor) or reducing the number of options (holding a vote between two items first).<sup>65</sup>

But what about litigation? Arrow's theorem implies that no system of aggregating preferences can satisfy each of five basic assumptions. But can litigation satisfy any of them?<sup>66</sup> And if not, which assumptions are violated and how? Others have examined the Supreme Court and Congress,<sup>67</sup> but scholars have somewhat ignored how social choice theory might apply to trial court litigation. Understanding how each of Arrow's assumptions might apply in litigation can help explain how outcomes might be strategically manipulated by the parties, especially through the use of procedural agenda setting. This section explains each of Arrow's assumptions, and then discusses how they might apply in litigation. Most of the discussion relates to judge decided cases (whether nonjury or perjury trial), though sometimes these assumptions will be relevant during jury voting.

#### 1. If Everyone Agrees on an Option, That Option Prevails

Unanimity in litigation is fairly straightforward. When all of the parties prefer an outcome, they will settle the case to achieve that outcome. Thus, it might appear that any ongoing

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65. See ARROW, *supra* note 29, at 59 (“If there are at least three alternatives which the members of the society are free to order in any way, then every social welfare function satisfying [the other conditions] must be either imposed or dictatorial.”).

66. See Holler, *supra* note 16, at 158–59 (discussing potential assumption failures in jury voting, and assuming that Arrow correctly predicts that no social welfare function will apply).

67. See Chen, *supra* note 7, at 297–98 (reviewing literature of social choice theory and the Supreme Court); see also Stearns, *supra* note 7, at 1257–85 (analyzing Supreme Court cases through an “Arrowian” lens); Lewis A. Kornhauser, *Modeling Collegial Courts. II. Legal Doctrine*, 8 J.L. ECON. & ORG. 441, 442 (1992) (analyzing how path dependence impacts multi-judge courts and the development of legal doctrines); Kornhauser & Sager, *supra* note 7 (analyzing how social choice impacts multi-judge courts); Easterbrook, *supra* note 7 (arguing that social choice makes the Supreme Court inherently inconsistent); Huq, *supra* note 6 (analyzing how social choice impacts constitutional law); Meyerson, *supra* note 7 (discussing the impact of Arrow's social choice on the Supreme Court); Baird & Jacobi, *supra* note 7 (noting how Arrow's theorem impacts Supreme Court justice voting); Hathaway, *supra* note 55 (discussing how path dependence impacts the Supreme Court).

litigation must necessarily fail the unanimity assumption. After all, if the parties have different preferences, then there is no aggregated preference that is preferred by all.

This is not necessarily the case, however. Arrow's conclusion is that no system of aggregating preferences can simultaneously fulfill all of the assumptions. But that does not mean that stated differences in preferences (the litigation positions) are the only theoretical outcomes. After all, in most litigation both parties would probably be fine with an outcome in which both the plaintiff and the defendant are paid. All would prefer this outcome over one where nobody gets paid. Indeed, in our ice cream example, all parties might prefer one scoop of each flavor to simply choosing one flavor, and even the third flavor choice would be preferred by all over no ice cream at all. That all outcomes cannot be achieved practically does not violate unanimity. If the most preferred outcome were available to all, then litigants would choose it.<sup>68</sup>

Further, even if the court disagrees with a settlement, it may not violate this assumption. The court may often prefer an outcome different from that on which the parties will settle. Such differing preferences are rarely observed, but not unheard of.<sup>69</sup> But even if the court does prefer a different settlement, the unanimity assumption is not violated, *even if the court rejects the settlement*. This assumption only requires that a unanimous choice be selected if it is unanimous. If it is not unanimous, then whether a choice is selected or not may implicate other assumptions.

Then again, one should not be fooled by unanimity. For example, one commentator suggests that requiring a unanimous verdict in trials avoids a voting paradox.<sup>70</sup> But not necessarily.<sup>71</sup> Voting one way or another is not the only preference. There are also preferences for expediency and lack of conflict. For example, experiments show that a unanimous jury rule will often lead to

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68. Holler, *supra* note 16, at 165 (describing a litigation model in which second to present evidence has a benefit by knowing the first mover's preferences).

69. Geoff Mulvihill, *Judge Rejects Purdue Pharma's Sweeping Opioid Settlement*, ASSOCIATED PRESS NEWS (Dec. 16, 2021), <https://apnews.com/article/business-health-lawsuits-opioids-colleen-mcmahon-1e96ea41f783d8f5db0a024fbb304c1f> [<https://perma.cc/WA66-9HHZ>] (rejecting settlement of more than 10,000 cases).

70. Block, *supra* note 34, at 978.

71. Levine & Plott, *supra* note 7, at 595 (arguing that changing rules from a unanimous jury to majority-rule jury may change some outcomes).

lower damages awards than a majority rule damage award.<sup>72</sup> As a result, requiring unanimity may simply lead to an aggregation in which some people prefer the chosen outcome, some people want to stop being bullied, and some simply want to go home.

## 2. There Is No Dictator

Dictatorship is a critical theoretical issue for social choice theory and litigation. If the judge is a dictator, then the analysis is less interesting: the aggregated preference is the preference of the judge. This would violate one of Arrow's assumptions and end the inquiry before it begins.

But does the judge count as a dictator? Superficially, it might appear so—the judge often decides who wins at trial, after all. While the literature relating to social choice among trial judges is sparse,<sup>73</sup> substantial social choice literature accepts the assumption that appellate judges are not dictators.<sup>74</sup> But appellate judges are voting in groups of three or nine, and thus their individual preferences cannot dictate the outcome. Even so, trial judges are still somewhat constrained. The trial court's potential for being overturned on appeal provides an incentive not to sway too far from the law and facts; the appellate court becomes a phantom voter. In addition, because the parties typically present the judge with a menu of outcomes to choose from, the judge more often votes to accept one of the proffered preferences rather than imposing an alternative preference generated and held solely by the judge. In essence, the court votes along with the participants but does not do so unfettered.

Thus, judges participate in the process with their own preferences, even if that preference is to follow the law.<sup>75</sup> They are constrained by both the facts and the law. They may hold their

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72. *E.g.*, Meiring de Villiers, *A Legal and Policy Analysis of Bifurcated Litigation*, 2000 COLUM. BUS. L. REV. 153, 178 n.66 (citing JOHN GUINTEHER, *THE JURY IN AMERICA* 82 (1988) (finding that reaching a unanimous verdict on liability often requires compromise to lower damages)).

73. *But see* Richard A. Posner, *What Do Judges and Justices Maximize?—(The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 16–17 (1993) (arguing that judges have little power).

74. *See, e.g.*, Maxwell L. Stearns, *An Introduction to Social Choice* 70 (U. Md. Sch. L., Faculty Scholarship No. 702, 2009) (“While it is certainly true that not all Supreme Court justices or members of Congress have equal power in their respective institutions, as a formal matter, both institutions satisfy the nondictatorship criterion.”).

75. *See* Posner, *supra* note 73, at 13–15 (discussing utility function of judges).

own preferences (discussed in the next section), but they may not simply impose those preferences at will—at least not without the possibility of being overruled on appeal. Further, they may raise issues not raised by the parties *sua sponte*. If the court raises its own motion with an end in mind different from either of the parties, such a motion would imply dictatorship. But if the court's motion seeks input from the parties and considers the range of available outcomes to choose from, such a motion would reflect the trial judge as a mere participant in the process.

Furthermore, the presence of a jury limits the court's discretion even more because judges may only decide certain questions. For the remainder, the judge becomes an active participant in the agenda making to determine what and how the jury will decide.

As applied to litigation, then, judges are participants with preferences, but the judge's preferences can (sometimes) be the tipping vote,<sup>76</sup> no different than a parent who decides that child A's chocolate ice cream request sounds more delicious than child B's vanilla ice cream request but foregoes her true preference for rocky road. Usually, that deciding vote will occur when one of the parties has a similar preference as the judge (whether it is the court's first or lesser choice). Sometimes, though, the court may cast a deciding vote even when the judge's preference is the lowest among the parties (e.g., a court's dismissal for lack of subject matter jurisdiction when both parties want the case heard).<sup>77</sup> As this Article progresses, the role of the court will be of prime interest, and the analysis will consider the participant/dictator dichotomy.

### 3. There Must Be Three Preferences

It may seem odd to imagine three preferences among two parties in a litigation. However, most lawsuits may resolve with more than just a binary win/loss. Each party will often have more desirable and less desirable outcomes—that is, big wins and little wins.

Additionally, the judge in each case may have preferences. The judge may favor one of these many potential outcomes, but even a desire to reach the “right decision” or “make the case go away” is a preference.

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76. Carrington, *supra* note 8, at 316–17 (arguing that it is a mistake to think that judges can be “cajoled” into making certain rules through agenda setting).

77. Rutledge, *supra* note 11, at 18.

Further, judges have different abilities. Except for highly specialized courts (and even then, sometimes), judges are generalists that do not necessarily have knowledge or expertise to resolve each case.<sup>78</sup> As such, judges often look to the parties to educate the court about the legal and factual landscape. Judges use this background to make determinations that coincide with their understanding of that landscape, which involves individual preferences and abilities.<sup>79</sup>

Thus, most of the time parties will face three or more available outcomes. In those very rare circumstances when there are only two preferences, Arrow's assumptions would not apply, and social choice theory would have less to say. More realistically, though, when there are only two preferences stated it is because the parties are attempting to control the agenda by removing a less desirable preference from the list of options to make the choices seem starker.

Arrow's theorem only requires that two decision makers have three preferences among them. Thus, the court could be eliminated from the equation. This may not be the best way to conceptualize the process, however. First, as discussed above, the judge will surely have preferences. Second, by making the judge the decision maker but not a participant, this nearly explicitly violates the non-dictatorship assumption. And while some might favor that perspective because they view the judge as the dictator, the cramped view of judicial participation would then exclude any ability of the parties to shape the outcome. Given that agenda control can and does shape outcomes (including default ordering provided by court rules), the judge should be considered a voter rather than a dictator.

Finally, there may be cases in which there are more than three parties with preferences even with the judge excluded. There may be multiple defendants, and their conflicting stories would cause them to have different preferences.<sup>80</sup> There may

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78. See, e.g., Easterbrook, *supra* note 6, at 550 (discussing judicial abilities to interpret statutes).

79. Charles E. Clark, *The Limits of Judicial Objectivity*, 12 AM. U. L. REV. 1, 11–12 (1963) (noting that judges utilize both substantive knowledge and their “inner convictions” in fulfilling their duties).

80. See, e.g., Yasmin Khorram, *Elizabeth Holmes Plans to Claim at Trial Ex-Boyfriend and Theranos Business Partner Abused Her*, CNBC (Aug. 28, 2021), <https://www.cnbc.com/2021/08/28/elizabeth-holmes-plans-to-claim-at-trial-that-ex-boyfriend-and-theranos-business-partner-abused-her.html> [<https://perma.cc/J9NR-5Y63>] (citing claims that a co-defendant was a cause of wrongdoing as a reason for a separate trial).

also be cases with multiple plaintiffs, and if the defendant has limited resources, the plaintiffs may have differing preferences about recovery, though two unrelated claims cannot be combined.<sup>81</sup> At the limit, multiple plaintiffs can join a class action, which attempts to aggregate the preferences of many, many plaintiffs, most of whom are not even parties to the litigation. Here, too, the goals of the lawyer may be different from the preferences of each of the plaintiffs.<sup>82</sup> The preferences expressed through posture by the representative plaintiffs can bind even plaintiffs that separately bring claims later.<sup>83</sup>

#### 4. No Institutional Limits

The assumption of universality, or unrestricted domain, requires that preferences of any individual remain unconstrained by some outside force. This, too, has some special effects in litigation. In theory, litigants and judges are free to prefer any number of outcomes. In practice, litigants are bound by the law, and their preferences are bound by what the law will allow. The practicality need not be so limiting, however. Litigants frequently sue to obtain rights not previously found in law, and they sometimes win.<sup>84</sup> Even if such requests for relief are not made in good faith, litigants may seek preferences that the law does not allow; that the judge might find them frivolous is merely a matter of different preferences for how the law might apply to outcomes.<sup>85</sup> In short, in the United States at least, the First Amendment generally bars prior restraint,<sup>86</sup> which means that litigants are not bound by any law that limits their expression of preferences. Whether litigants act strategically by only seeking preferences that are realistic will be discussed in a further section.

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81. *Snyder v. Harris*, 394 U.S. 332, 338–40 (1969) (discussing limits of joined claims).

82. *See, e.g., In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949–50 (9th Cir. 2011) (vacating a class action settlement due to unfairly large fees in comparison to class recovery).

83. *See, e.g., Soffer v. R.J. Reynolds Tobacco Co.*, 187 So.3d 1219, 1221–22 (Fla. 2016) (considering whether later plaintiffs may claim punitive damages based on failure of class representatives to plead such damages).

84. *See, e.g., Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (holding that same-sex couples have the right to marry).

85. FED. R. CIV. P. 11.

86. *See generally* Thomas R. Litwack, *The Doctrine of Prior Restraint*, 12 HARV. C.R.-C.L. L. REV. 519, 520 (1977) (noting the Supreme Court's hostility towards "governmental action which directly and completely bars information from reaching the public").

## 5. Independent Pairwise Consideration

The requirement that alternatives be independent is an important one. In its simplest form, this assumption means that if society prefers A to B, then the introduction of C will not change the relationship between A and B. With respect to litigation, it appears this assumption would hold. Using the example that all parties would prefer to be paid over no party being paid, it is unlikely that adding the option that only one of the parties gets paid will shift anyone's preferences.

There are, of course, exceptions. Most notably, where all participants prefer one option to the others, one party may stop preferring it if an externality is introduced. One simple externality is the violation of the law or the creation of bad precedent: the judge may not prefer both parties being paid if doing so would cause the decision to depart from a statute or create a new rule that might have negative effects in the future. In these cases, the preferences are not independent; adding an option changes how the judge views the original options. More cynically, elected and politically appointed judges may take on the preferences of the electorate, and thus have non-independent preferences for various choices.<sup>87</sup>

Lack of independence need not be limited to judicial preferences, however. For example, in a divorce, all parties might prefer everyone getting paid to nobody getting paid. But the addition of an option whereby one party gets paid and the other does not might change how the parties view the options. Given this new option, a vindictive spouse may prefer nobody getting paid than only the ex-spouse getting paid. This seems irrational,<sup>88</sup> but that is the point: this assumption fails when a new option causes parties to choose differently as between the others.

## 6. Transitive Preferences

Transitiveness means that the same ranking of preferences will occur, no matter the order or type of vote. This is a critical assumption of Arrow's proof. A more preferred outcome should always defeat a less preferred outcome. A lack of transitiveness means that agenda control can change the outcome. This, of

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87. See, e.g., Adam Liptak, *Judges Who Are Elected Like Politicians Tend to Act Like Them*, N.Y. TIMES (Oct. 3, 2016), <https://www.nytimes.com/2016/10/04/us/politics/judges-election-john-roberts.html> [<https://perma.cc/2J6W-PQ88>].

88. From an economics point of view, it may not be irrational at all. The personal utility of vindictiveness may outweigh the utility of money to a divorcing party.

course, is the reason for studying agenda control, but it means something more than that. When the order affects outcome, it leads to path dependence—the notion that outcomes are dictated not by preference, but by strategy.<sup>89</sup>

One consequence of non-transitivity is that the sequence in which litigants present multiple cases to the courts can affect outcomes as well.<sup>90</sup> As noted above, the court's preferences will be shaped, at least in part, by the state of the law at the time. While not bound to these preferences, most courts will attempt to stay within the bounds of the law (and in cases of appellate precedent must do so—or distinguish the facts).<sup>91</sup> As a result, when each case is resolved, it will affect the preferences of the next case.<sup>92</sup> This is slightly outside the scope of this Article, but it is an important observation, nonetheless.

To the extent that prior law governs procedural posture, then the order of hearing issues will be affected in the future. For example, in *Rockwell Graphics Systems v. DEV Industries, Inc.*, Judge Posner notes that the issue of reasonable precautions to protect information in trade secret cases will almost never be resolvable on summary judgment.<sup>93</sup> Reasonableness, after all, depends on a weighing of the facts in each case.<sup>94</sup> Once announced, one would expect to see fewer cases dismissing trade secret claims on summary judgment—indeed, even fewer motions for summary judgment at all.<sup>95</sup> Thus, the announced rule

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89. Hathaway, *supra* note 55, at 618, (quoting KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 120 (2d ed. 1963)).

90. *Id.* at 645.

91. *Id.* (discussing importance of *stare decisis*).

92. *Id.* *But see* Adi Leibovitch, *Relative Judgments*, 45 J. LEGAL STUD. 281, 281 (2016) (suggesting that judges decide cases based on how they are “ranked in comparison to the other cases”); Adi Leibovitch, *Punishing on a Curve*, 111 NW. U. L. REV. 1205, 1205 (2017) (finding that prior cases have a perverse effect, causing judges to sentence more or less harshly based on other cases).

93. 925 F.2d 174, 179 (7th Cir. 1991) (“But only in an extreme case can what is a ‘reasonable’ precaution be determined on a motion for summary judgment . . .”).

94. *Id.* (“[T]he answer depends on a balancing of costs and benefits that will vary from case to case and so require estimation and measurement by persons knowledgeable in the particular field of endeavor involved.”).

95. David S. Almeling, Darin W. Snyder, Michael Sapoznikow, Whitney E. McCollum & Jill Weader, *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 GONZ. L. REV. 291, 323–24 (2009) (“Interestingly, courts were historically somewhat less likely to find this element satisfied . . . than modern courts . . .”). This study found that more than sixty percent of summary judgment motions did not even address the issue. *Id.* at 319.



in one case affected the parties' ability to set the agenda (and control the outcome) in future cases. Is this a violation of transitivity? The answer is unclear. The inability to shape the agenda does not tell us whether the outcome would have been different. On the other hand, it probably violates the assumption. Fewer summary judgment motions for the defendant likely (a) prolong litigation, increasing costs and leading to more settlements, and/or (b) lead to more plaintiff wins before a jury in cases where a court may have dismissed the case early.<sup>96</sup> An important limitation to agenda control is that participants can only manipulate the agenda so much. They cannot achieve an outcome outside of the preference set.<sup>97</sup> In other words, the ordering merely allows for the selection of one preference over the others but does not allow for the selection of preferences which nobody holds.

The transitivity assumption is the one most associated with cyclic voting—or Condorcet's paradox—as discussed in our ice cream example above.<sup>98</sup> The fact that no flavor can obtain a majority over the others violates the transitivity assumption in that example. Critics of Arrow's theorem posit that we almost never see cyclic voting,<sup>99</sup> and thus this assumption for voting systems is too strong. They alternatively argue that the independence of pairwise preferences assumption is too strong because most voters consider three candidates together, rather than independently. The resolution of this conundrum is unnecessary for this Article. The role of posture as an agenda setting mechanism affects how we view these assumptions, but if one were to concede that the assumptions were too strong, then posture would still have the same role to play in how we view agenda setting.

### C. AGENDA SETTING AND SOCIAL CHOICE

Each of Arrow's assumptions may be violated by agenda setting. Most simply, unanimity might not be achievable if the issues are presented in such a way that the parties are unable to

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96. This is not necessarily because plaintiffs' cases were worse, but because there is only one direction to move; only defendant wins are removed from the potential outcomes, while defendant losses would go to trial in any event.

97. Hathaway, *supra* note 55, at 621.

98. See *supra* note 32 and accompanying text.

99. *But see* WILLIAM V. GEHRLEIN & DOMINIQUE LEPELLEY, VOTING PARADOXES AND GROUP COHERENCE: THE CONDORCET EFFICIENCY OF VOTING RULES 1, 13–14 (P.K. Pattanaik & K. Suzumura eds., 2011) (discussing numerous empirical studies of cyclical voting, finding sporadic evidence of Condorcet's paradox).

agree on an outcome even if they might have otherwise done so. In some rare cases the only agreeable solution may be illegal. Illegality also serves to limit the domain of preferences. Some preferences may not be allowed by law, and a party (or the judge) may thus limit the order of voting by removing the disallowed options from the table. Then again, illegality and domain limitation may just mean that two parties (one litigant and a judge) do not prefer the illegal outcome. But if two parties prefer an outcome and the judge disallows it,<sup>100</sup> then that essentially violates the dictatorship assumption. One party is exerting veto power over the preferences of the other two, and even if the judge does not exert a separate outcome preference, the dictatorship limits the domain and changes the order of decision-making.

Changing procedural posture can also violate the independence of irrelevant alternatives assumption. When a party proposes an interim outcome that changes how participants view other options, the alternatives are no longer independent. One example of this, albeit fictional, appears in the Michael Connelly book, *The Law of Innocence*.<sup>101</sup> In the book, the defendant seeks a speedy trial and is out on bail.<sup>102</sup> The prosecutor then recharges the crime to one in which bail is automatically denied *and* that resets the speedy trial clock.<sup>103</sup> The prosecutor obviously favors both bail denial and clock resetting, while the defendant favors bail and speed.<sup>104</sup> But the court could not change the fact of the recharge or bail denial, and so it removed the independence.<sup>105</sup> To the defendant, the judge offered either no bail or a clock reset, but not both.<sup>106</sup> The defendant ultimately chose no bail.<sup>107</sup> The prosecutor objected, and the court offered the same choice: let the defendant free on bail or have a quick trial date.<sup>108</sup> Much to the surprise of onlookers, the prosecutor withdrew its objection and allowed the speedy trial.<sup>109</sup> By reordering the alternatives and making them dependent on each other, the judge manipulated the agenda to achieve an outcome that was

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100. See, e.g., Mulvihill, *supra* note 69.

101. MICHAEL CONNELLY, *THE LAW OF INNOCENCE* (2020).

102. *Id.* at 84.

103. *Id.* at 213–14.

104. *Id.*

105. *Id.* at 234–35.

106. *Id.*

107. *Id.*

108. *Id.* at 236.

109. *Id.* at 237.

otherwise not preferred by either party (or perhaps even by the judge). Bundling options is one form of agenda control.<sup>110</sup> The agenda setter combines multiple options to force a decision, violating at the very least Arrow's independence assumption.

There are limits to how litigation might represent the aggregation of societal preferences. The most important limitation is the limited number of participants. Only the parties and the judge express their preferences and have them aggregated in a resolution. Societal aggregation is limited even further because the judge must participate in all voting, but the parties only participate in those matters of salience to them, and many of those matters will not be disputes (let alone litigated disputes). As discussed, even when the parties all agree and the litigation terminates, this is still a form of preference aggregation. Even so, the decision to bring a matter to court is a form of agenda setting. Among all the options in the world, the parties (or at least one of them) involves the judge in the vote. And the preferences among all the parties involved may not match societal preferences at all. Indeed, by resolving the dispute, the parties may thwart societal preferences.<sup>111</sup> Thus, most of what we can glean from social choice theory will be participant preference aggregation rather than societal preference aggregation.

### III. AGENDA CONTROL IN ACTION

Parties to a litigation—including the judge—attempt to control the agenda to affect the outcome in myriad ways.<sup>112</sup> Pliny the Younger realized, for example, that separating determination of guilt from determination of punishment can affect which crimes, if any, a jury may hold a defendant accountable for.<sup>113</sup> This can be generalized: the parties and court wrangle to present the case to the jury in a particular way: by controlling how the case is presented to the jury, the outcome of jury voting can be

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110. Gennaro Amendola, Luigi Marengo & Simona Settepanella, *Decidability and Manipulability in Social Choice* 5 (Lab'y Econ & Mgmt., Working Paper No. 11/2012, 2012).

111. See, e.g., Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869, 869 (1999) (noting how successful litigants may limit law's capacity for social change).

112. Rutledge, *supra* note 11, at 17 (discussing the role parties to litigation play in "shaping the agenda").

113. See *supra* note 50 and accompanying text.

controlled despite differing jury preferences.<sup>114</sup> Focus on the jury (which has received the limited attention of scholars in this area) also misses how the preferences of the court may affect outcomes before the trial even reaches the jury. This part reveals several ways that agenda control is important.

#### A. SEPARATING AND ORDERING VOTING

While criminal cases routinely separate punishment from guilt to avoid Pliny the Younger's problem, most civil cases do not. Thus, parties in civil cases will often move to bifurcate the proceedings, to ensure that the jury does not hear evidence about damages until after it has judged liability.<sup>115</sup> Even then, the requesting party is strategic.<sup>116</sup> If compensatory damages are small but punitive damages are high (for example, in cases involving momentary humiliation), the plaintiff may want to keep evidence of damages away from the jury until after liability is determined.<sup>117</sup> At that point, the plaintiff would seek high punitive damages. On the other hand, in cases where liability is hotly disputed, a large corporate defendant may want punitive damages to be heard in a second phase, so that the jury does not find liability upon hearing how much money the defendant has to spare.<sup>118</sup> The concern is that juries might be more willing to give money to a defendant when a rich, faceless corporation is paying.

Bifurcated damages progression is but one of many different ways that the agenda might be controlled. The progression can also be generalized. Consider a judge giving instructions to a

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114. Holler, *supra* note 16, at 163–65 (presenting model of agenda control by parties to result in differing juror outcomes based on presentation order). Holler does not focus on how the parties might affect the order of presentation, nor the role of the court in determining such an order, which is the primary social choice question discussed here.

115. David L. Tobin, *To B . . . or Not to B . . . : "B . . ." Means Bifurcation*, 74 FLA. BAR J. 14, 14 (2000) (discussing both the frequency and strategic advantages of bifurcation).

116. Levine & Plott, *supra* note 7, at 594 (discussing bifurcation as agenda control).

117. Nadler et al., *supra* note 16, at 111 (describing experiment in which ordering decisions from small to large led to larger dollar valuations than other ordering). *But cf.* Dennis H. Nagao & James H. Davis, *The Effects of Prior Experience on Mock Juror Case Judgments*, 43 SOC. PSYCH. Q. 190, 196 (1980) (finding that mock jurors were less likely to convict on more serious rape charge after convicting on less serious vandalism charge). Nagao and Davis still found that the agenda control made a difference, just not in the ways that the conventional wisdom might suggest.

118. Levine & Plott, *supra* note 7, at 594–95.

jury,<sup>119</sup> not just about damages. The instructions themselves form the agenda given by the leader.<sup>120</sup> The litigants provide alternatives, not only in the form of proposed jury instructions, but also in the form of evidence presented and proffered interpretations of that evidence. While the judge's jury instructions are less likely to be strategic, the litigants' alternatives (from which the judge often chooses) are intended to guide the jury to a desired conclusion.<sup>121</sup>

Bifurcation does more than change the order of a vote; it separates two votes in time and in the process changes the order in which the finder of fact hears evidence. When the damages determination is made after the liability determination, evidence of damages is usually withheld as evidence until liability is established. This can have the effect of prolonging a case even if there are nominal damages<sup>122</sup> that would otherwise lead to a settlement; prolonging the case can help to force a larger settlement in the same way a delay will, as discussed below.

But changing the order of voting may be more broadly applied to actually reversing<sup>123</sup> the order in which items are heard.<sup>124</sup> For an example of how changing the order of hearing can affect outcomes, consider a recent study about obviousness decisions in the Court of Appeals for the Federal Circuit.<sup>125</sup> The study found that, after a landmark Supreme Court ruling that

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119. RIKER, *supra* note 6, at 169 (“For a body as ad hoc as a jury, the judge instructs, setting limits to the agenda . . .”).

120. Levine & Plott, *supra* note 7, at 594 (discussing agenda setting in jury deliberations).

121. See, e.g., Robert Woll, Note, *The Death Penalty and Federalism: Eighth Amendment Constraints on the Allocation of State Decisionmaking Power*, 35 STAN. L. REV. 787, 809 (1983) (noting agenda control might be used to influence outcomes in death penalty jury cases).

122. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) (holding that a case for nominal damages may go forward if liability is established).

123. “Reversing” is a loaded word, of course, because it implies there is a correct order. However, to the extent that there are rules or other norms that govern order, then changing the order questions are answered may reverse the order of voting. More generally, though, reversing can simply mean that the order is different from case to case.

124. James H. Davis, R. Scott Tindale, Dennis H. Nagao, Verlin B. Hinsz & Bret Robertson, *Order Effects in Multiple Decisions by Groups: A Demonstration with Mock Juries and Trial Procedures*, 47 J. PERSONALITY & SOC. PSYCH. 1003, 1007 (1984) (finding that the order in which evidence of unrelated crimes were heard affected the likelihood of a guilty verdict); Nagao & Davis, *supra* note 117.

125. Ryan T. Holte & Ted Sichelman, *Cycles of Obviousness*, 105 IOWA L. REV. 107 (2019).

avored defendants, the percentage of cases decided on summary judgment changed very little (forty-three percent to forty-five percent).<sup>126</sup> And the outcomes of those cases at the summary judgment stage changed very little. But on appeal, a much larger percentage of appellate decisions were appeals from summary judgment rulings (twenty-two percent to thirty-one percent).<sup>127</sup> The number of appeals from bench trial verdicts also increased.<sup>128</sup> The authors do not explain why parties appealed more, but it stands to reason that more district courts ruled in favor of defendants. The authors control for procedural posture in their empirical analysis because they were interested in decisions at the Federal Circuit level.<sup>129</sup> It is clear that defendants obtained some sort of advantage by a move toward summary judgment and away from jury trials.<sup>130</sup>

## B. TIMING

Sometimes, simply timing when a matter gets heard can be a form of agenda setting.<sup>131</sup> For example, a party may want a decision to be heard early because more resources will be available to consider it.<sup>132</sup> A party with complex claims may prefer earlier or specific procedures in which there is more opportunity to parse the claims carefully (e.g., not a jury). On the other hand, simply delaying adjudication may be a form of agenda setting.<sup>133</sup> The old saying goes, “Justice delayed is justice denied,” but this might apply to defendants as much as plaintiffs. For example, many believe that patent plaintiffs file in specific districts because those districts take longer to reach resolution.<sup>134</sup> This is true even though the outcomes may not actually be worse once

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126. *Id.* at 148.

127. *Id.*

128. *Id.*

129. *Id.* at 152.

130. *Id.* (controlling for technology type in model 11 reveals a ten percent increase in obviousness finding on summary judgment).

131. *Cf.* *Frasch v. Peguese*, 414 F.3d 518, 523–24 (4th Cir. 2005) (holding that timing of appeal versus relief from failure to file appeal will affect order of proceedings).

132. James J. Anton & Dennis Yao, *Delay as Agenda Setting* 20 (Econ. Rsch. Initiatives at Duke (ERID), Working Paper No. 135, 2012).

133. *Id.*

134. *See generally* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 243 (2016) (noting that, in 2014, over a quarter of patent infringement suits were filed in the Eastern District of Texas).

adjudicated on the merits.<sup>135</sup> In theory, the delays are intended to force settlements for less than litigation costs, and if litigation costs increase due to delay, all the better.<sup>136</sup> But delay can also help the defendant if the posture of the case allows for more time for a defendant to work out alternatives before an inevitable loss.<sup>137</sup>

### C. THRESHOLDS

Each of the examples so far implies that the parties get their day in court in the first place.<sup>138</sup> But another form of agenda control is limiting the ability of a party to make a claim at all.<sup>139</sup> For a practical example, consider Title VII's requirement that only companies with fifteen or more employees are subject to some of its anti-discrimination rules.<sup>140</sup> For many years, this was considered jurisdictional, meaning that federal courts could not even hear the case if the employer had fourteen or fewer employees.<sup>141</sup> Not until 2006 (some 35 years after passage) did the Supreme Court settle a circuit split to unanimously decide that the employee count is not jurisdictional, but instead merely another part of the cause of action.<sup>142</sup>

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135. Colleen V. Chien & Michael Risch, *Recalibrating Patent Venue*, 77 MD. L. REV. 47, 65 (2017).

136. Dennis Crouch, *Am I My Server Rack?: Do Edge Nodes Satisfy the Venue Rules?*, PATENTLY-O (Feb. 5, 2019), <https://patentlyo.com/patent/2019/02/server-nodes-satisfy.html> [<https://perma.cc/G2KS-MATU>] (describing a case that settled while appeal about venue was pending).

137. James Blumstein, *Jim Blumstein on Why the Procedural Posture of King v. Burwell Might Matter*, VOLOKH CONSPIRACY (June 24, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/24/jim-blumstein-on-why-the-procedural-posture-of-king-v-burwell-might-matter> [<https://perma.cc/6J93-3JLC>] (explaining how the reversal of a granted motion to dismiss does not end a case, but instead sends it back for further proceedings that will take time even if the plaintiff will eventually win).

138. Ahmed E. Taha, *Data and Selection Bias: A Case Study*, 75 UMKC L. REV. 171, 172 (2006) (describing the class of cases that never make it to court in the first place).

139. *Hubbard v. Haley*, 262 F.3d 1194, 1197–98 (11th Cir. 2001) (enforcing a Congressional rule that requires each individual prisoner to pay a filing fee prior to suing for poor prison conditions).

140. 42 U.S.C. § 2000e(b)(2).

141. *Hassell v. Harmon Foods, Inc.*, 454 F.2d 199, 199 (6th Cir. 1972).

142. *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006).

The procedural posture implications for the threshold rule difference are manifold.<sup>143</sup> A non-jurisdictional rule allows federal courts to hear supplemental state law claims at the same time, rather than requiring that they be heard in state court.<sup>144</sup> The rule also affects whether the court may (must) raise the issue or if it can be waived.<sup>145</sup> Most important, the difference changes the burden of production and how any factual disputes are resolved.<sup>146</sup> For example, if the parties dispute whether an employer has 15 employees, a jury might resolve the question instead of a court. The deference given to that factual finding on appeal changes as well. In short, the rules for making the agenda affected substantive outcomes.

A slightly different example is the rule that copyright owners cannot sue for infringement until they obtain a copyright registration.<sup>147</sup> Circuits split on this question for many years. Some required that the registration certificate be obtained from the Copyright Office to qualify. Others merely required that the owner apply for a registration prior to filing suit, and that the registration could be received afterward.<sup>148</sup> The difference in these two rules could have significant consequences. First, it takes time—sometimes months—for the Copyright Office to issue a registration.<sup>149</sup> But the Copyright Office also has an expe-

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143. Jeffrey A. Mandell, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. CHI. L. REV. 1047, 1054 (2005) (“The procedural posture under which a court construes the minimum employee threshold has substantial consequences.”).

144. *Id.*

145. *Id.*

146. *Id.* at 1055.

147. 17 U.S.C. § 411; *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 886 (2019). Copyright law provides copyright ownership at the moment an original work of expression is fixed in a tangible medium but does not allow the owner to sue until the copyrighted work is registered.

148. Tarla S. Atwell, Note, *Timing Means Everything! The Eleventh Circuit Adopts the Registration Approach’s Interpretation of 411(A) in Fourth Estate Public Benefit v. Wall-Street.Com*, 12 J. MARSHALL L.J. 59, 67–69 (2018–2019) (detailing the circuit split).

149. *Registration Processing Times*, U.S. COPYRIGHT OFF. (Apr. 1, 2022), <https://www.copyright.gov/registration/docs/processing-times-faqs.pdf> [<https://perma.cc/HDY6-A2KP>] (showing a 1.6-month average delay for online submissions and a 9.5-month average delay for mail in deposit submissions, with the caveat that mail was slowed during pandemic).



dited process that costs significantly more to obtain the registration quickly.<sup>150</sup> As a result, the process might delay adjudication for any plaintiff that has trouble paying the expedited fee (which is likely to be the type of plaintiff that did not register the work in the first place). The different result goes further than money, however. Copyright owners who need an immediate injunction would be simply out of luck; relief would be unavailable at any price. As a result, the procedural threshold can change the substantive outcome. In 2019, the Supreme Court settled the split: a copyright registration must be received before a plaintiff may file suit.<sup>151</sup>

Another quasi-threshold question involves bankruptcy stays. Once a debtor files for bankruptcy, most actions against the debtor are stayed.<sup>152</sup> This stay does not apply to government actions.<sup>153</sup> However, there is a threshold at which a government action becomes a debt collection action and no longer exempt from the stay. Once a judgment becomes final and the government is attempting to collect the debt, then the action is no longer considered “governmental,” and attempts to collect must be stayed.<sup>154</sup> As a result, the threshold question of whether a case may go forward (and potentially how much may be recovered) depends on the posture of the case at the time of bankruptcy. Debtors might better serve themselves by taking a default judgment than keeping a case open before filing for bankruptcy.

Yet another threshold question appears in constitutional law. Whether a court considers a statute unconstitutional can depend on whether the analysis is facial (that is, disallowed in all respects) or as-applied (that is, only disallowed when applied to a particular subgroup).<sup>155</sup> The question can have enormous bearing on the outcome. As-applied challenges typically result in

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150. *CCB Handbook: Expedited Registration*, COPYRIGHT CLAIMS BD. (June 16, 2022), <https://ccb.gov/handbook/Expedited-Registration.pdf> [<https://perma.cc/7HQB-WC6G>].

151. *Fourth Est. Pub. Benefit Corp.*, 139 S. Ct. at 886. There was a drop in cases filed after 2019, but there are alternative explanations (such as the pandemic) that could provide confounding explanations.

152. 11 U.S.C. § 362(a).

153. 11 U.S.C. § 362(b)(4).

154. Patrick M. Birney & Andrew A. DePeau, *Unharnessing the Governmental-Unit Stay Exception*: SEC v. Miller, 35 AM. BANKR. INST. J. 24, 25 (2016).

155. *Doe v. State*, 808 S.E.2d 807, 813 (S.C. 2017) (describing difference between facial and as-applied challenges).

much narrower relief for the challenger.<sup>156</sup> A challenged statute may continue in force against most people, except a very few.<sup>157</sup> At its limit, this extends to questions of standing; some people may not be in a position to challenge the statute at all if they cannot show any specific harms from it.<sup>158</sup> This has led legislatures to consider how a statute might be enforced and challenged when writing the statute.<sup>159</sup>

More generally, there may be conflicts in the order in which a court hears threshold questions. This typically occurs when the plaintiff is going to lose anyway, and the only question is on which basis, such as lack of subject matter jurisdiction over the claim, lack of personal jurisdiction over the defendant, or lack of venue over the dispute. Getting the decision order correct matters, as the court's reason for dismissing a case may create precedent in future cases on that topic.<sup>160</sup> But if the court lacked some other sort of jurisdiction—most notably subject matter jurisdiction—then that precedent may lack validity because the court did not have power to hear the case in the first place.<sup>161</sup> From an agenda control standpoint, each of the participants has some control over how the case will proceed (and what precedent might be set) by selecting which threshold(s) to argue (for defendants) and decide (for judges). While the plaintiff is likely to lose in each case where the appropriate threshold matters, the selection might still extend determinations that will increase settlement chances.<sup>162</sup> For example, rather than dismissing for

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156. *Differences Between Facial and as-Applied Challenges to the Constitutionality of a Statute*, BONALAW (citing *United States v. Treasury Emps.*, 513 U.S. 454, 477–78 (1995)), <https://www.bonalaw.com/insights/legal-resources/differences-between-facial-and-as-applied-challenges-to-the-constitutionality-of-a-statute> [<https://perma.cc/WS2A-KE3T>].

157. See *Free Speech Coal., Inc. v. Att'y Gen.*, 974 F.3d 408, 423, 428 (3d Cir. 2019) (holding that a statute regarding sexually explicit material applies to everyone except those who undoubtedly resemble adults).

158. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992) (“[T]he party seeking review must himself have suffered injury.”).

159. *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 530 (2021) (considering an anti-abortion statute that gives only private citizens the right to enforce, making challenges difficult); *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2139 (2016) (affirming the validity of statute that makes certain administrative judge decisions unreviewable by courts).

160. Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 40 (2001); see also Rutledge, *supra* note 11, at 3 (discussing similar choices faced by courts).

161. Idleman, *supra* note 160.

162. Rutledge, *supra* note 11, at 4, 16.

lack of personal jurisdiction at the outset, the court might find subject matter jurisdiction and then allow discovery to allow the plaintiff to prove personal jurisdiction.<sup>163</sup> Or, the defendant may choose to waive personal jurisdiction defenses, but the court may sua sponte raise subject matter jurisdiction concerns, which cannot be waived.<sup>164</sup>

#### D. FILING ORDER

Filing first controls the agenda. Indeed, someone must file in the first place, or there will be no agenda that leads to a result.<sup>165</sup> The first filing party has several advantages that can sway the outcome. First, the first filer is treated as plaintiff. Plaintiffs get to present their case first and get the last word before the jury.<sup>166</sup> Second, plaintiffs are often perceived to have an advantage as the aggrieved party.<sup>167</sup> Third, and often most important, the first filer may choose the venue. This can provide a variety of benefits, including local juries (and judge), preferred law (if it differs by state), and lower litigation costs (coupled with potentially higher costs for the opponent). Scholars have long studied venue selection as a distinct advantage,<sup>168</sup> which is discussed in more detail in the next subsection.

As a result, two parties with claims may race to the courthouse to be the first plaintiff. This race does not even require both parties to have an affirmative grievance. A potential defendant may file a suit for declaratory relief, asking courts to settle a dispute before the plaintiff can file suit.<sup>169</sup> Filing for declaratory relief can provide all of the same advantages—the potential defendant’s aggressive posture allows it to go first and can appear as if it is managing its affairs rather than shirking from responsibility. Further, filing first can secure venue for the

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163. *Id.* at 3–4.

164. *Subject Matter Jurisdiction*, LEGAL INFO. INST. (June 2017), [https://www.law.cornell.edu/wex/subject\\_matter\\_jurisdiction](https://www.law.cornell.edu/wex/subject_matter_jurisdiction) [<https://perma.cc/WK2L-PMCA>].

165. Rutledge, *supra* note 11, at 17.

166. *Overview of a Trial*, CIV. L. SELF-HELP CTR., <http://www.civillawselfhelpcenter.org/self-help/lawsuits-for-money/trial-stage-your-day-in-court/249-overview-of-a-trial> [<https://perma.cc/R7G6-QJFL>].

167. *Benefits of Being a Plaintiff*, ROTHMAN L. FIRM (Sept. 3, 2021), <https://www.rothmanlawyer.com/benefits-of-being-a-plaintiff> [<https://perma.cc/7UQJ-E39U>].

168. Klerman & Reilly, *supra* note 134; Chien & Risch, *supra* note 135.

169. 28 U.S.C. § 2201; CAL. CIV. PROC. CODE § 1060 (West 2003).

would-be defendant.<sup>170</sup> Data on declaratory relief in patent cases shows that, when the case goes to trial, a party who filed for declaratory relief wins substantially more often than a party who was sued by the patent owner.<sup>171</sup>

When each party files a lawsuit, resulting in two cases, courts typically allow the first to file a case to be the plaintiff<sup>172</sup> unless there is a statute or other rule that forbids such a filing.<sup>173</sup> Background rules about who may file and where are meant to restrict agenda control. Some parties are entitled to the benefits of filing first while others are not.

#### E. FORUM SELECTION

As discussed above, a party can control the outcome by filing in a preferred location. This extends generally to conflicts of laws, which are rife with agenda setting issues. States have rules about which laws apply based on the type of suit, where the parties are located, and where the harm took place.<sup>174</sup> The parties can agree to the choice of law of a given state, but even that does not end the inquiry. Many states' choice of law rules will disregard such agreements if there is some policy reason why the case should be heard under local law.<sup>175</sup> Indeed, courts may look to the *foreign* law and decide that the foreign law would actually apply the law where the case is being heard.<sup>176</sup> To counteract this, parties will then agree to the choice of a particular state's

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170. Erin Coe, *Accused Infringers Rethink Declaratory Judgment Strategies*, LAW360 (Nov. 25, 2015), <https://www.law360.com/articles/730120/accused-infringers-rethink-declaratory-judgment-strategies> [https://perma.cc/P9W2-7WHJ]; Chester S. Chuang, *Offensive Venue: The Curious Use of Declaratory Judgment to Forum Shop in Patent Litigation*, 80 GEO. WASH. L. REV. 1066, 1067–69 (2012).

171. Data from LexMachina (on file with author), available at [https://perma.cc/K7SK-ZKUF].

172. Michael Cavendish, *Understanding the First-to-File Rule and Its Anticipatory Suit Exception*, 75 FLA. BAR J. 24, 24 (2001).

173. See 28 U.S.C. § 1400(b) (stating that any civil action for patent infringement may be brought in the judicial district where the defendant resides); TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1517 (2017) (limiting where patent infringement actions may be filed).

174. Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 191–203 (2000).

175. *In re Facebook Biometric Info. Priv. Litig.*, 185 F. Supp. 3d 1155, 1168–69 (N.D. Cal. 2016) (rejecting contractual choice of law provision).

176. *Id.* at 1155 (determining that Illinois would apply Illinois law in California venued case).

law “without regard to [the] conflict of law provision[.]”<sup>177</sup> of that state.<sup>178</sup> This maneuvering is a form of agenda setting—constraining the legal options (the preferences) available to the parties and the judge in making a decision. But the complications do not end there. Choice of law typically only applies to substantive law, not procedural law, and so a forum’s procedures may have a bearing on the outcome that is different than the choice of law. For example, one might sue in California under a contract that requires the law of Ohio to be applied. California has an anti-SLAPP<sup>179</sup> statute, which requires early, pre-discovery determination of the merits of certain types of cases that touch on petitioning or free speech. But perhaps Ohio would not enforce the Ohio choice of law under its rules.<sup>180</sup> The plaintiff then has an agenda setting decision to make: file in Ohio to avoid anti-SLAPP but be subject to California law, or file in California to be subject to Ohio law but face anti-SLAPP. The decision could affect the outcome of the case.

Furthermore, a party might choose a particular forum because it believes that forum’s judges will order the agenda in a preferable way.<sup>181</sup> Indeed, the judges of that forum might make their preferences known so as to attract litigants.<sup>182</sup> Congress may well use its power to limit which forums can hear cases, in order to offset the effects of this type of agenda setting.<sup>183</sup>

Franchise agreements are another instance when filing first can change results. While franchise agreements often have a forum selection clause, many states have laws that regulate

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177. *Id.* at 1164.

178. *Crawford Pro. Drugs v. CVS Caremark Corp.*, 748 F.3d 249, 257–59 (5th Cir. 2014) (enforcing contractual provision).

179. SLAPP suit stands for “Strategic Lawsuit Against Public Participation.” Anti-SLAPP statutes are intended to squelch lawsuits that are themselves targeted at First Amendment rights to speech and petition. Shannon Janowski & Charles Hogle, *SLAPPING Back: Recent Legal Challenges to the Application of Anti-SLAPP Laws*, ABA (Mar. 16, 2022), [https://www.americanbar.org/groups/communications\\_law/publications/communications\\_lawyer/2022-winter/slapping-back-recent-legal-challenges-the-application-state-antislapp-laws](https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2022-winter/slapping-back-recent-legal-challenges-the-application-state-antislapp-laws) [<https://perma.cc/MGA4-V53R>].

180. *Schulke Radio Prods., Ltd. v. Midwestern Broad. Co.*, 453 N.E.2d 683, 685–86 (Ohio 1983) (describing when courts of Ohio should and should not enforce a contractual choice of law provision).

181. Chien & Risch, *supra* note 135, at 65–68.

182. Klerman & Reilly, *supra* note 134, at 247.

183. *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1517 (2017) (interpreting Patent Act to limit forum to particular locations).

whether such selection agreements are void. But the statutory language differs in each state, and courts will often apply the language of the state in which they are sitting.<sup>184</sup> As a result, setting the agenda—in this case, who files first and where—makes a difference.

#### F. SETTLEMENT

The availability and type of settlement can play an important role in outcomes.<sup>185</sup> For example, barring settlement altogether can shift control of the agenda from the plaintiff to the defendant because the plaintiff cannot use delay tactics or cost increasing tactics to force a settlement while the defendant has the advantage of only having to win one aspect of the case. This is especially true in cases with unrepresented interests because being unable to settle would force the parties to consider unrepresented interested parties.<sup>186</sup>

But policy might fall short of a bar while still affecting the agenda. Consider the new rule for settling class actions, in which courts are explicitly required to consider whether settlements unfairly favor plaintiffs' counsel over class members.<sup>187</sup> A rule requiring a particular procedure, namely close consideration of settlements, may alter results even though the procedure does not require any particular outcome.<sup>188</sup> Similarly, detailed procedures for the determination of death penalty verdicts might lead to different judgments under similar evidence.<sup>189</sup> Environmental legislation is much the same. Most environmental statutes do not require any particular result with respect to environmental

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184. See generally John M. Doroghazi & David J. Norman, *What's Left to Litigate About Forum Selection Clauses?* *Atlantic Marine Turns Four*, 36 *FRANCHISE L.J.* 581, 588–90 (2017) (providing an overview of courts applying the law of their states).

185. See generally Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1076–78 (1984) (arguing that indigent plaintiffs are at an inherent disadvantage in settlement).

186. See, e.g., Alfred M. Mamlet, *Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits*, 33 *EMORY L.J.* 685, 723 (1984).

187. *Briseno v. Henderson*, 998 F.3d 1014, 1022–23 (9th Cir. 2021) (discussing “the newly revised Rule 23(e)(2)”).

188. See *id.* (rejecting a settlement because the district court failed to closely scrutinize the fee arrangement).

189. Woll, *supra* note 121, at 809–10.

studies.<sup>190</sup> Instead, the statutes merely require an accounting for environmental effects to be considered.<sup>191</sup> Parties routinely do battle over whether studies were proper or complete, even while knowing that the results of such studies will likely not change the outcome of any particular development plan, but may simply delay development during further study.<sup>192</sup> This is the ultimate example of agenda control—simply performing the procedure is one of the only ways environmentalists can “win” any victory, and so they use it to their full advantage.<sup>193</sup>

In another example, in bankruptcy negotiations, senior creditors are normally favored.<sup>194</sup> However, company management controls the bankruptcy negotiation agenda and often does so to extract value from the senior creditors for the junior ones.<sup>195</sup>

These are all different ways that the type and availability of settlements might affect the agenda.

#### G. CLAIM MANIPULATION

The inclusion of related and unrelated claims is another form of agenda control.<sup>196</sup> Prosecutorial charging determinations illustrate one of the most straightforward applications of agenda

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190. See *National Environmental Policy Act Review Process*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> [<https://perma.cc/P3ZA-WDEY>] (describing environmental impact statement process).

191. See, e.g., 42 U.S.C. § 4370m-6.

192. See Paul G. Kent & John A. Pendergrass, *Has NEPA Become a Dead Issue? Preliminary Results of a Comprehensive Study of NEPA Litigation*, 5 TEMP. ENV'T L. & TECH. J. 11, 13 (1986) (presenting data on types of NEPA claims).

193. See generally Richard J. Pierce, Jr., *Making Sense of Procedural Injury*, 62 ADMIN. L. REV. 1, 7–8 (2010) (discussing how procedural injury can affect outcomes).

194. Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 CHAP. L. REV. 43, 49 (2000).

195. *Id.*; see also Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 VA. L. REV. 155, 192 (1989) (noting that a debtor's exclusive right to propose reorganization plan provides leverage in negotiations); Robert E. Scott, *Through Bankruptcy with the Creditors' Bargain Heuristic*, 53 U. CHI. L. REV. 690, 698 n.31 (1986) (explaining that because company management has the exclusive right to propose Chapter 11 reorganization plans, existing management has leverage to deny certain creditors the full value of their claims).

196. Rutledge, *supra* note 11, at 17 (describing the choice between filing a negligence or strict liability action in tort).

control. Prosecutors can control the agenda both at charging to force settlement and at trial to affect jury voting.<sup>197</sup>

At charging, prosecutors might include all available charges, including those that are a stretch.<sup>198</sup> This might include more severe charges, which can increase sentences through tougher minimums or multiple less severe charges, which can increase risk of conviction as well as sentences through consecutive sentencing or enhancements.<sup>199</sup> Including these additional charges might change the outcome by leaving defendants no choice but to accept a plea bargain (or by forcing acceptance of a harsher penalty).

More important, the prosecutor may sometimes drop charges before jury deliberation. This form of agenda control is intended to eliminate plausible but unpreferred (to the prosecutor) outcomes from the voting.<sup>200</sup> For example, if a murder was committed that might have been intentional or not, the prosecutor might charge voluntary manslaughter (killing in the heat of passion), second-degree murder (intentional killing without premeditation), or first-degree murder (premeditation). If the evidence makes it clear that the killing was intentional and not in passion but premeditation is unclear, the prosecutor might drop the second-degree murder charge. The jury is left with either premeditated murder or heat of passion and will likely choose premeditated murder. The prosecutor is taking a risk—that the jury would rather convict on shaky premeditation evidence than

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197. See Block, *supra* note 34, at 978–79 (discussing how decision making that involves multiple choices “will not always reveal the true decision of a decision-making body,” and referencing a jury considering three possible criminal charges as an example).

198. See H.S. Kelly, *The Relation of Manslaughter to Murder*, 6 CENT. L.J. 183, 186 (1878) (discussing jury dynamics for compromise when multiple possible charges are presented).

199. Billy Binion, *Rogel Aguilera-Mederos Rejected a Plea Deal. So He Got 110 Years in Prison.*, REASON (Dec. 22, 2021), <https://reason.com/2021/12/22/rogel-aguilera-mederos-rejected-a-plea-deal-so-he-got-110-years-in-prison> [<https://perma.cc/8F9K-LH2R>] (“Called the ‘trial penalty,’ prosecutors are known to pile on superfluous charges and threaten astronomical prison time unless the defendant agrees to plead guilty and save them the trouble of a trial. Should the defendant insist on his innocence, and should a jury disagree, he will likely receive a *much* more severe sentence for the same actions. The only difference is that he invoked his Sixth Amendment right.”).

200. See Catherine L. Carpenter, *The All-or-Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?*, 26 AM. J. CRIM. L. 257, 258–63 (1999) (discussing the All-or-Nothing Doctrine and the Doctrine of Lesser-Included Offenses).



acquitted because none of the charges match.<sup>201</sup> But in taking that risk, the prosecutor has increased the chances of a harsher conviction.<sup>202</sup>

This is not the only way to control the agenda. For example, instead of manipulating the levels of charges, the prosecutor may pack the indictment with as many different charges as possible. Jurors may be more likely to convict when there are multiple charges rather than one, *even when instructed to consider evidence of each charge independently*.<sup>203</sup>

#### H. ACCESS TO JUSTICE

Posture can also affect outcome because it can affect who is entitled to access the legal system in the first place. There are a variety of ways the system might do so.

First, filing fees may be used as a bar. The Supreme Court has at various times used different rules to determine which litigants may be relieved of the requirement to pay court filing fees.<sup>204</sup> As a result, the agenda may be ordered in such a way that the indigent party's preferences are never accepted. Indeed, if the filing fee is for divorce,<sup>205</sup> then neither of the parties will obtain their preferences, a true paradox.

Second, availability of attorneys' fees may affect access. For example, state supported attorneys' fees can also affect outcomes. Indigent defendants are entitled to counsel in cases seeking to terminate parental rights.<sup>206</sup> But indigent plaintiffs seeking to enforce parental rights are not so entitled.<sup>207</sup> Similarly, parents seeking child support obtain significant enforcement aid

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201. See James B. Haddad, *Allocation of Burdens in Murder-Voluntary Manslaughter Cases: An Affirmative Defense Approach*, 59 CHI. KENT L. REV. 23, 38 (1982) (describing charging decisions and risks associated with them).

202. *Id.*

203. See Edith Greene & Elizabeth F. Loftus, *When Crimes Are Joined at Trial*, 9 LAW & HUM. BEHAV. 193, 197–98 (1985) (describing results of mock trial experiments using actual trial testimony). Interestingly, the study found no difference in guilt probabilities when the order of charges was changed, nor when the order of instructions was changed (i.e., instructions before the evidence versus after). *Id.* at 204.

204. Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1159.

205. *Id.* at 1158.

206. Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 15 TEMP. POL. & C.R. L. REV. 635, 644–47 (2006).

207. *Id.*

from the state,<sup>208</sup> but parents seeking to limit child support (for example claiming non-parentage) receive no aid.<sup>209</sup> This extends to criminal defendants, who are entitled to counsel if they cannot afford it,<sup>210</sup> but not to parties who are subject to immigration enforcement targets,<sup>211</sup> even if they are American citizens. Having counsel is critical to the outcome of cases.<sup>212</sup> A system that organizes the litigation agenda such that one party has counsel but other similarly situated parties do not will affect the outcome of each case.

A third form of access to justice is whether a jury decides the claim. Jury voting has been discussed throughout this Article, but there are rules about when a jury may/must be empaneled. Though guaranteed by the Seventh Amendment, the party desiring a jury trial must request one at the time of filing the complaint or waive the right.<sup>213</sup> However, either party may request the jury trial, binding both parties.<sup>214</sup> Parties may also waive jury trials as early as the time of a contract.<sup>215</sup> Choosing when to try a case to a jury is another form of agenda control.

A fourth access to justice issue is the ability to file a class action complaint.<sup>216</sup> Class actions are a way that many plaintiffs with small claims can join together to obtain relief for a large

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208. See e.g., Lynn Aves, *Minnesota's Child Support Laws: An Overview*, MINN. HOUSE RSCH. DEP'T (Nov. 2015), <https://www.leg.mn.gov/docs/2015/other/151342.pdf> [<https://perma.cc/G7M7-D6YD>].

209. Case Note, *Paternity—The Right of an Indigent Putative Father to Counsel in a Paternity Action*—Hepfel v. Bashaw, 279 N.W.2d 342 (Minn. 1979), 6 WM. MITCHELL L. REV. 208, 212 (1980) (explaining that in most jurisdictions, the putative father does not have a right to counsel).

210. Gideon v. Wainwright, 372 U.S. 335 (1963).

211. Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 28, 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court> [<https://perma.cc/7A6F-VLAT>].

212. Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51, 69–70 (2010) (performing meta-analysis of studies comprising more than 70,000 litigated cases).

213. FED. R. CIV. P. 38.

214. See Int'l Trademark Ass'n, *Procedural Matters*, 96 TRADEMARK REP. 201, 221 (2006) (recounting how a defendant's election of jury trial inured to the benefit of plaintiff who failed to request a jury).

215. Neil Shouse, *Waiving My Right to a Jury Trial—Is It a Good Idea?*, SHOUSE CAL. L. GRP. (Jan. 6, 2021), <https://www.shouselaw.com/waiving-my-right-to-a-jury-trial-is-it-a-good-idea> [<https://perma.cc/Q59U-AQS8>] (discussing contractual jury waiver).

216. See FED. R. CIV. P. 23.

class of harmed parties (and to effectuate change for potential future victims).<sup>217</sup> But procedural rules may limit the ability for a class action to achieve those goals. For example, the Supreme Court has held that contractual arbitration clauses may bar class action lawsuits and even class action arbitrations,<sup>218</sup> leaving each individual to arbitrate what often amount to be tiny claims individually.<sup>219</sup> The class action bar is not limited to arbitration, though. Immigration law, for example, disallows appeals until final administrative action.<sup>220</sup> Final administrative action, in turn, may require an individual administrative appeal. As a result, the only way for an immigration detainee to assert a right to counsel is to do so in the immigration court, appeal, and then make such a challenge individually on appeal.<sup>221</sup> Thus, the procedure effectively barred a class without having to do so explicitly, leading to a lack of substantive result for tens of thousands of children in the immigration system.<sup>222</sup>

## I. PRE-TRIAL ORDERING

Parties (including the court) can control outcomes through either strategic or happenstance pre-trial ordering, including summary judgment motion practice and bifurcation of trial issues. This is an extension of the bifurcation of liability and damages discussed above, but more generalized.<sup>223</sup>

### 1. Merits (Non-Damages) Bifurcation

Consider the Supreme Court's recent *Google LLC v. Oracle Am., Inc.* decision.<sup>224</sup> To develop the Android smartphone software, Google wanted to allow developers to reuse their source code written in the Java language.<sup>225</sup> To do so, Google had to

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217. *See id.*

218. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351–52 (2011).

219. Tiny claims aggregate, obviously. If a company routinely charged a non-existent \$1 tax from each of its customers, none of them would have an incentive to arbitrate, even if the company reaped millions of dollars of fake tax collected.

220. 8 U.S.C. § 1252(b)(9).

221. *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029–31 (9th Cir. 2016).

222. *C.J.L.G. v. Barr*, 923 F.3d 622, 630, 632 (9th Cir. 2019) (Paez, J., concurring) (noting around 20,000 to 30,000 new cases per year, with as many as seventy-five percent unrepresented by counsel, and noting that only a single case had made it to the point of appeal in the Ninth Circuit before *C.J.L.G.* to assert a right to counsel).

223. *See supra* Part III.A.

224. 141 S. Ct. 1183 (2021).

225. *Id.* at 1190.

write “declarations” that mimicked Oracle’s Java declarations, such as *int min(int x, int y)* to find the minimum of two integers named *x* and *y*.<sup>226</sup> Google rewrote its own code to implement the actual function (which might look like *if x < y, return x else return y*).<sup>227</sup> The core of the dispute was whether Google could use the declarations in this fashion, or whether it was copyright infringement.<sup>228</sup>

There were at least four possible outcomes, three of which favored Google. First, the court might rule that the declaring code was not the subject of copyright because its expressiveness was driven by its functionality, a hotly contested proposition that split the Supreme Court evenly the last time it was considered.<sup>229</sup> Second, the court might instruct the jury to consider infringement, but to “filter out” any functionality when making a comparison.<sup>230</sup> Third, the court might have the jury determine whether the use was fair. And fourth, the jury might disregard each of the first three defenses and find that the reuse was infringement.

But the district court did not consider the choices in that order. Instead, the court sent the infringement question to the jury and reserved the copyrightability question for later.<sup>231</sup> As a result, the jury did not receive detailed instructions about how to filter out functional material.<sup>232</sup> Not surprisingly, the jury found infringement.<sup>233</sup> After all, Google had copied all of the declarations exactly; it had argued that it was required to do so to maintain compatibility.<sup>234</sup> Perhaps because the jury did not hear jury instructions on the importance of filtering, it hung on the question of fair use. After the infringement finding by the jury,

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226. Oracle Am., Inc. v. Google Inc., 872 F. Supp. 2d 974, 979–81 (N.D. Cal. 2012).

227. *Id.* at 981.

228. *Oracle*, 141 S. Ct. at 1190.

229. Lotus Dev. Corp. v. Borland Int’l, Inc., 516 U.S. 233 (1996).

230. *Oracle*, 872 F. Supp. 2d at 988–89.

231. *Id.* at 975.

232. *Id.* (“For their task of determining infringement and fair use, the jury was told it should take for granted that the structure, sequence and organization of the 37 API packages as a whole *was* copyrightable.”).

233. *Id.* at 976.

234. Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1205 (2021).

the district court held that the declaring code was uncopyrightable, that infringement was therefore not supported by the facts before the jury, and that the fair use issue was thus moot.<sup>235</sup>

This is where agenda control enters the picture. The district court's ordering left the Federal Circuit with a very different question than it would have had if filtering were before the jury. On appeal, the only question before the court was whether the declaring code could be copyrightable—as noted, a very divisive issue.<sup>236</sup> If the code was found copyrightable, then Google was stuck with an infringement judgment by the jury. Had the jury considered filtration and found for Google, the appeal may have taken on a quite different pallor because ruling that a work is uncopyrightable is a much harsher sentence than ruling that the work is noninfringed in a particular circumstance.

The Federal Circuit ruled that the code was copyrightable,<sup>237</sup> and the case continued for several more years, first in a fair use trial (that Google won),<sup>238</sup> then in an appeal reversing the jury's decision and favoring Oracle,<sup>239</sup> and finally a Supreme Court decision in which the Court was presented with two questions: was the declaring code copyrightable, and was there fair use?<sup>240</sup> Despite the best efforts of amici,<sup>241</sup> the posture of the case eliminated one of the ways—potentially even the best way—to resolve the case, namely whether filtering precluded infringement. Once the district court ordered the case in the particular way it did, one of the options was removed from the table at trial and in several subsequent appeals. And the copyrightability question remains divisive: the Court refused to decide copyrightability, instead determining that Google's use was fair.<sup>242</sup>

Another example from the IP area is *Bilski v. Kappos*,<sup>243</sup> a patentable subject matter case. Before *Bilski*, courts very rarely ruled on patentable subject matter because patents that failed

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235. *Oracle*, 872 F. Supp. 2d at 1002.

236. *See supra* notes 225–28 and accompanying text.

237. *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339 (Fed. Cir. 2014).

238. *Oracle Am., Inc. v. Google Inc.*, No. C 10-03561, 2016 WL 5393938 (N.D. Cal. 2016).

239. *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179 (Fed. Cir. 2018).

240. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021).

241. *See* Brief of Michael Risch as Amicus Curiae in Support of Petitioner, *Oracle*, 141 S. Ct. 1183 (arguing that filtration was proper approach but that procedural posture limited the ability to properly consider the case).

242. *Oracle*, 141 S. Ct. at 1190.

243. 561 U.S. 593 (2010).

patentable subject matter usually had many other failings.<sup>244</sup> But the Patent and Trademark Office wanted guidance on the patentable subject matter question. To obtain this guidance, it rejected Bilski's patent on patentable subject matter grounds and no other.<sup>245</sup> The appellate board within the Patent Office affirmed on the same basis.<sup>246</sup> This constrained the parties to arguing about patentable subject matter on appeal, and Bilski lost because the patent claimed only an abstract idea.<sup>247</sup>

Bilski would have likely preferred the opportunity to argue the other merits of the patent in an effort to sway the court that the patent was not abstract, but without those merits on the table, the focus of argument precluded those efforts. The Patent Office was able to effectively control the agenda in this way because it was not only a party on appeal, but it was also an early judge. The first stage for filing for a patent is *ex parte*: the inventor must convince the Patent Office to grant the patent without an opposing interested party. But if it denies the patent, the Patent Office becomes a party to the appeal—but the agenda on appeal is shaped by what the Patent Office did in the prior stage. This is the best of all worlds for a litigant—the absolute power to shape the appeal. But the power works both ways. Only denied patents may be appealed. If the inventor convinces the patent examiner to grant any claims, a patent issues on those claims and nobody appeals.<sup>248</sup> In that sense, the inventor shapes the agenda; by accepting patents on any allowed claims, it can effectively lock out a third party (the court) from expressing a preference on the patent.

## 2. Early Determinations

Timing can allow parties to obtain sufficient evidence to prove their case or otherwise proceed. For example, enforcement of subpoenas requires a much lower standard of evidence than a party needs to survive summary judgment.<sup>249</sup> This is seen in copyright cases where plaintiffs seek user information from internet

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244. See generally Michael Risch, *Everything is Patentable*, 75 TENN. L. REV. 591 (2008).

245. Michael Risch, *Forward to the Past*, 2010 CATO SUP. CT. REV. 333, 335–36.

246. *Id.*

247. *Bilski*, 561 U.S. at 612–13.

248. There may be later challenges to the patent.

249. JASON R. BENT & RAMONA R. PAETZOLD, *THE STATISTICS OF DISCRIMINATION: USING STATISTICAL EVIDENCE IN EMPLOYMENT DISCRIMINATION*

service providers to unmask unknown infringers, courts will require some showing of likely success, but not a showing that there is no dispute about the liability.<sup>250</sup> Similarly, only limited evidence might be necessary to show commonality to certify a class, even if that evidence would not be enough to win a case.<sup>251</sup>

Timing will also affect who expresses preferences, and under what standard. Early determinations, such as summary judgment, allow the court to resolve legal questions where there is no dispute on factual issues.<sup>252</sup> Early determinations typically require the court to interpret all facts in favor of the non-moving party, and then determine if there is liability on those facts.<sup>253</sup> Relatedly, if insufficient evidence has been presented, the court may issue judgment as a matter of law after the plaintiff finishes presenting evidence,<sup>254</sup> thus saving the defendant the time, effort and cost of presenting a case. Each of these allows the judge's preference to be substituted for the jury's in the final determination. The court's ability to control the agenda extends to changing whether it has a vote on the final merits.

Early determinations—and more importantly their reversals on appeal—can have important but sometimes confusing effects on how to understand appellate case outcomes because an overruled early determination only means that the facts *could* support the opposite final judgment and not that they *must* support the opposite final judgment.<sup>255</sup> For a concrete example, consider *Metallurgical Industries, Inc. v. Fourtek, Inc.*,<sup>256</sup> a case

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CASES § 2:11, Westlaw (database updated Oct. 2022) (“[T]he court held that a statistical analysis that clearly would have been insufficient to prove discrimination was nevertheless sufficient to meet the much lower evidentiary standard for enforcing a subpoena.”).

250. *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 119 (2d Cir. 2010) (requiring concrete prima facie showing before enforcing subpoena).

251. *BENT & PAETZOLD*, *supra* note 249.

252. FED. R. CIV. P. 56 (providing rules for summary judgment in federal court).

253. *See, e.g., Scott v. Harris*, 550 U.S. 372, 378 (2007) (stating the rule, but crediting videotape evidence that contradicted the non-moving party's version of events).

254. FED. R. CIV. P. 50.

255. This is similar to the problem discussed by Hafner & Berman, *supra* note 4, at 48. Except here, the problem is that the court grants deference to the fact-finder before trial, not after, *supra* note 4, at 48. This concern gives rise to the lament described in the introduction that casebooks often do an inadequate job of explaining which facts *may* support a judgment versus which facts *must* support a judgment.

256. 790 F.2d 1195 (5th Cir. 1986).

used for many years in a leading intellectual property textbook.<sup>257</sup> In *Fourtek*, the trial court granted a directed verdict to defendants after the close of the plaintiff's case, ruling that the plaintiff did not show the existence of a trade secret.<sup>258</sup> One issue involved disclosures by plaintiff to third-parties without a confidentiality agreement, which the defendant argued destroyed the secrecy.<sup>259</sup> The procedural posture mattered. Because the case was heard on appeal of a directed verdict the appellate court was required to give favorable inferences to the appealing party.<sup>260</sup> If the appeal were after final verdict by the fact finder, then the appellate court would have construed all facts in favor of the winning appellee.<sup>261</sup>

The precedential complication cabins the holding in *Fourtek*. Students (and lay observers) may misread the case as holding that limited, non-confidential disclosure will *never* destroy a trade secret. But the procedural posture means that all the case really holds is that where there is a limited, non-confidential disclosure, the fact finder must decide whether the trade secret still exists.<sup>262</sup>

The *Fourtek* example illuminates a few social choice implications. First, it illustrates how a defendant may control the agenda by moving for early determination that disposes of a case. Second, the appellate holding, though not absolute, still allows plaintiffs to better control the agenda by pushing determinations to trial. This gives them a settlement advantage in addition to more chances to convince a jury. Third, the case

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257. 1 PETER S. MENELL, MARK A. LEMLEY, ROBERT P. MERGES & SHYAMKRISHNA BALGANESH, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE*: 2021 52 (2021).

258. *Fourtek*, 790 F.2d at 1198. Directed verdicts are now called judgments as a matter of law. FED. R. CIV. P. 50.

259. *Fourtek*, 790 F.2d at 1200.

260. *Id.* at 1200–01 (“Whether a disclosure is limited is an issue the resolution of which depends on weighing many facts. The inferences from those facts, construed favorably to *Metallurgical . . .*”) (emphasis added).

261. Joseph J. Ortego & Evan H. Krinick, *Decision by Equally Divided Pennsylvania Supreme Court in Favor of Lenders Demonstrates Importance of Maintaining Aggressive Posture Once Litigation Begins*, 115 *BANKING L.J.* 272, 272 (1998) (arguing that parties should always aggressively litigate, because wins at trial may be upheld on appeal for many reasons, including an equally divided appellate court).

262. See, e.g., Nelson Lund, *Heller and Second Amendment Precedent*, 13 *LEWIS & CLARK L. REV.* 335, 340 (2009) (describing example of Supreme Court misreading precedent that incorrectly accepted facts on motion to dismiss as true).



illustrates the different ways that the court may control the agenda. It may slow the case down by granting early relief, even if that relief is reversed on appeal. It may also express a preference and resolve the case if an appellate court agrees that the undisputed facts truly do not require a trial. Additionally, if the court is the fact finder, it may bide its time and then make the same ruling it would have on early determination, but this time the preference will receive deference on appeal.

However, such early decisions are not necessarily bad. For example, sometimes a district court dismisses a complaint based on the alleged wrongdoing (and no evidence).<sup>263</sup> An appellate court must generally accept the facts of such complaint that are at all plausible as true.<sup>264</sup> When an appellate court reverses a district court dismissal, similar to *Fourtek*, it sets the outer bounds of activity that—if proven—might lead to liability. This posture serves two purposes: it provides guidance to non-parties for future behavior while also affording the defendant the opportunity to show that it is not guilty of the alleged behavior.<sup>265</sup> From an agenda control point of view, the trial judge's initial dismissal reveals an ambiguous preference. Either the judge really does not prefer that the activity be considered wrongful, or the judge believes that the alleged facts are unlikely to be proven but desires appellate guidance in case they are.

### 3. Empirical Evidence and the Limits of Pretrial Ordering

Evidence shows that when a case is decided can matter as much as or more than the decision itself. For example, the longer cases go, the less likely appellate courts are to reverse earlier,

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263. FED. R. CIV. P. 12(b)(6).

264. *Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009).

265. E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1406 (2005) (“[M]any opinions turn on the procedural posture of the case. To the extent that the Supreme Court has reversed Chancery dismissals of cases with prejudice at the pleading stage, the Supreme Court establishes a precedent based on well-pleaded but sometimes extreme allegations. This may facilitate the development of an important genre of Delaware decision making. That is, an opinion that raises questions or teaches without imposing liability may provide guidance to the corporate world to conform to best practices without the downside of actually imposing personal liability.”).

non-merit related decisions, such as jurisdiction.<sup>266</sup> Further, perhaps surprisingly given the favorable review standard for early determinations, cases decided before trial are appealed far less often than those cases tried by a jury or a judge.<sup>267</sup> Here, too, there may be some self-selection. Less meritorious cases may be those less likely to reach a trial, and as such less likely to warrant the costs of an appeal.

But this cannot be the entire answer; the order that a case is heard does not always change case outcomes. For example, one empirical study considered the Supreme Court's creation of affirmative defense in hostile workplace discrimination suits.<sup>268</sup> It found that, as many feared, the creation of the affirmative defense led to many more rulings on summary judgment—primarily defense rulings.<sup>269</sup> But the study also found that the relative breakdown of winners in the trial court did not change much, and appellate courts seemed more likely to reverse verdicts favoring employers.<sup>270</sup> In short, the affirmative defense changed the ordering of decisions to reach verdicts sooner, but did not change the overall aggregation of preferences among the participants in the system.

Only 2.7% of appeals of non-tried judgments in favor of defendants are reversed.<sup>271</sup> This implies that not every early determination relates to a meritless claim by the plaintiff, but many do. Furthermore, the ordering is not distributed evenly.<sup>272</sup> As one might expect, most appeals from non-trial judgments are by plaintiffs (who lost) and not by defendants (who won).<sup>273</sup> Because of the dynamics of proof, defendants usually prefer to order the agenda for an early determination, and when they are successful at doing so, they win.<sup>274</sup> This, too, is not definitive, because at-

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266. Shay Lavie, *Are Judges Tied to the Past? Evidence from Jurisdiction Cases*, 2015 REVISTA FORUMUL JUDECATORILOR 19, 29.

267. Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 664 (2004).

268. David J. Walsh, *Small Change: An Empirical Analysis of the Effect of Supreme Court Precedents on Federal Appeals Court Decisions in Sexual Harassment Cases, 1993–2005*, 30 BERKELEY J. EMP. & LAB. L. 461 (2009).

269. *Id.* at 484 tbl.1.

270. *Id.* at 485 tbl.2.

271. Eisenberg, *supra* note 267, at 671 tbl.3.

272. *Id.* at 666.

273. *Id.*

274. *See supra* Part III.I.2.

tempts that fail—a denied motion for summary judgment, for example—are not appealable.<sup>275</sup> In that sense, defendants must order hearings to give as many bites at the apple as possible.<sup>276</sup> Case posture then provides that the plaintiff must win a series of votes all the way through trial, while the defendant can lose every vote except the last one (or any one in between).<sup>277</sup> Because appellate courts will let most factual findings stand, even if they would disagree, it is important for both parties to structure the agenda in such a way that factual findings favor them.<sup>278</sup>

Some evidence of agenda setting appears in studies of litigation behavior. For example, one study<sup>279</sup> considers five different procedural postures in trade secret cases (e.g., summary judgment, temporary restraining order, preliminary injunction) and finds that the moving party wins a surprising percentage of the time.<sup>280</sup> In other words, the moving party has ordered the agenda in order to obtain a winning outcome (potentially for the entire case). This evidence is not definitive, however, for two reasons. First, preliminary posture may not necessarily lead to winning the entire case, though it often does. Second, there could be self-selection bias. In other words, parties may only bring motions they believe they can win, and thus we would expect to see the moving party win. Even so, this is still a form of agenda setting. The question is whether the particular posture leads to a different outcome than if the parties litigated in a different order. A study of cross-motions might better answer that concern, though even then both moving parties might lose any given motion and the case would proceed.

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275. *See id.*

276. Catherine Albiston, *The Rule of Law and the Litigation Process*, in *IN LITIGATION: DO THE HAVES STILL COME OUT AHEAD?* 168, 189 (Herbert M. Kritzer & Susan S. Silbey eds., 2003) (showing that defendants in Family Medical Leave Act actions are much more likely to win in various early-stage dispositive motions).

277. Harry T. Edwards & Linda Elliott, *Beware of Numbers (and Unsupported Claims of Judicial Bias)*, 80 WASH. U. L.Q. 723, 723–24 (2002) (explaining that defendants are more likely to win appeals of jury trials because of prior unappealable legal issues).

278. Hafner & Berman, *supra* note 4, at 51 (describing a case study of opposing appellate opinions based on similar facts due to upheld trial court findings).

279. Almeling et al., *supra* note 95.

280. *Id.* at 317 (showing results for each posture). For example, the defendant won on a motion to dismiss forty percent of the time, a shocking amount given that the plaintiffs have full control over the complaint, which the court must accept as true.

## IV. WHAT CAN WE LEARN?

Viewing posture through a social choice lens allows us to better evaluate and implement procedural rules. That is, we know that agenda control can affect the outcome, so those who design the agenda setting rules can be cognizant of how their choices might affect outcomes.<sup>281</sup> While there are some normative takeaways, the primary benefit of the social choice lens is better understanding the process and learning from that knowledge as new proposals are evaluated.<sup>282</sup>

Understanding the role of social choice theory can bring benefits in a variety of areas. First, it provides a new tool to critique the system, one that can reveal previously unexplained systematic problems. Second, it adds to our understanding of social choice theory, expanding the notion of agenda control beyond simply vote ordering to a variety of ways that agendas might be influenced. Third, it brings renewed and sharpened focus on how procedural rules are implemented, allowing for more thoughtful systemic design. Fourth, it affects how we understand the role of appeals and their outcomes. And fifth, applying theory in this new way helps identify the cause of not just systemic problems, but also particular problems in particular cases—allowing observers to understand how important any given outcome should be.

Though we may recognize the role of agenda setting, this does not mean that we can or should eliminate it.<sup>283</sup> This is not to say that the shortcomings of such control should be ignored.<sup>284</sup> Rather, they should be studied and improved if possible. But the operative question is always whether some other system will be better or whether tweaks are all that is necessary.

## A. A CRITICAL EYE

The primary normative lesson of agenda control is that the result of the litigation process may not reflect a true aggregation

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281. Richard D. McKelvey, *A Theory of Optimal Agenda Design*, 27 *MGMT. SCI.* 303, 304 (1981) (presenting a model designed to result in an agenda that leads to an optimal outcome).

282. Stearns, *supra* note 7, at 1228.

283. Levmore, *supra* note 6, at 785 (“[I]t might be nice if our democracy did not give an agenda setter special power . . . . But all democratic systems have their problems, and a system that exhibits these scratches might still be vastly superior to a nondemocratic system.”).

284. Idleman, *supra* note 160, at 98 (noting some changes in decision-making order lack normative validity, even if they are expedient).

of preferences. Riker makes this clear in his seminal book, “Since we cannot know whether manipulation has occurred, the truth and meaning of all outcomes is thereby rendered dubious. . . . Manipulated outcomes are meaningless because they are manipulated, and unmanipulated outcomes are meaningless because they cannot be distinguished from manipulated one.”<sup>285</sup>

Riker’s pronouncement may be a little overstated, but the general insight affects how we should view the purported truth-seeking mission of litigation.<sup>286</sup> If, as social choice theory predicts, the posture of the case can change the outcome, then litigation results cannot be trusted as the aggregation of the “best” preferences, even if one were inclined to believe that the judge always preferred the best result.

This critique of litigation is different than a traditional charge of biased participants or even of a biased system. Instead, a perfectly functioning system with unbiased participants and no strategic behavior could still lead to outcomes disfavored by all of the participants merely through the order of the process. Armed with this view of the process, critical race theorists and other legal realists can examine litigation with a new tool. This prior example of rules governing who is entitled to state supported attorneys’ fees in family law disputes gives some color to this tool.<sup>287</sup> These procedural rules are on their face quite neutral but might have significant effects on outcome that affect parties of particular ethnic or economic backgrounds.<sup>288</sup>

#### B. AGENDA CONTROL IS EXPANSIVE

Applying agenda control theory to procedural posture rather than just voting reveals many other ways that agenda control can affect the aggregation of preferences—even in voting systems.

While litigants surely order issues for final decision determination in a variety of ways, this Article provides several other methods of control. For example, timing or location of the voting can affect settlements or even substantive decisions.<sup>289</sup>

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285. RIKER, *supra* note 6, at 236–37.

286. *See, e.g.*, Levine & Plott, *supra* note 7, at 595 (suggesting that a unanimous jury requirement will lead to different outcomes than a majority rule jury requirement).

287. *See supra* Part III.H.

288. *Id.*

289. *See supra* Part III.B.

These insights uncover new truths about non-litigation voting. Applying the types of agenda control discussed in this Article to political voting, we can see how changing early voting rules or closing precincts—two hot-button voting rights issues—are merely a form of agenda control in social choice theory.<sup>290</sup>

Broadly speaking, then, this Article reveals a new frontier for social-choice theorists interested in voting and elections. Rather than focusing only on the candidates on the ballot, they might start focusing on how the very process of voting can effectively constrain choices, even if not through direct candidate manipulation.

### C. DESIGNING OPTIMAL PROCEDURE

Designing procedural rules that optimize outcomes assumes that designers know what optimal outcomes are, and it is unclear that they (or anyone else) can answer important questions.<sup>291</sup> For some, expedience is optimal. For others, truth seeking rules govern. And for still more, fairness and full hearing are paramount. Whether each of these goals can be accommodated in the same system is an open question, but it seems unlikely.

The answer, though, may be counterintuitive. A knee-jerk suggestion might be to ensure that the court sets the procedural agenda because the parties each have an interest in tweaking the outcome. But judges have preferences, too, and under a social choice theory analysis judicial preferences matter.<sup>292</sup> It is unclear why the judge should be able to dictate the outcome of every case through agenda setting. Indeed, doing so violates one of Arrow's assumptions about preference aggregation.<sup>293</sup> While the court may eventually have to express a preference by ruling on a case, this is not so in every case (such as jury trials), and there is no reason why the judge should be able to decide the type of ruling issued (expansive or narrow, for example).

An alternative is to use the same procedures every time, but that might systematically weigh in favor of one of the parties in

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290. Cf. Grant M. Hayden, *Some Implications of Arrow's Theorem for Voting Rights*, 47 STAN. L. REV. 295, 314–15 (1995) (describing vote dilution in the Voting Rights Act as a form of agenda control). This is the only article that appears in Westlaw's Journals and Law Review database in response to the search advanced: "agenda control" /25 "voting rights act".

291. Stearns, *supra* note 7, at 1222.

292. See *supra* Part I.

293. ARROW, *supra* note 29.

each case. Indeed, some of the examples discussed here show exactly that: when the procedures are changed a certain way, one party may be favored.<sup>294</sup>

Another alternative would allow the parties to negotiate the procedures of the case. Something akin to this happens in case management conferences today,<sup>295</sup> where the court decides when discovery starts and ends, how many and what motions will be heard, sets the order and deadlines for motions, limits the number of filings, and otherwise sets the course of the trial in consultation with the parties. Despite this negotiation, courts usually allow the parties to submit whatever papers they want in whatever order they want, to a limit.<sup>296</sup> The opposite solution is to allow a neutral third party to determine the best procedure. This might be optimal, if there were some way to measure the fairness.

An additional solution might be to avoid the agenda altogether and cycle through all the options before concluding a case. This would ensure that if there truly is one preference, then the procedural posture is not defining the outcome. If, on the other hand, multiple procedural cycles lead to different winners, the parties and the court would have to find another way to resolve the case because there is no single best preference. This solution is practically unpalatable—but even distaste for repetitive procedures is illuminating. It means that expedience is important, and truth-seeking is not necessarily the most desired end. That, alone, is a worthy result of the posture as social choice thought experiment. There are other options, of course, such as allowing the parties the least amount of control, but this allows another party with independent preferences (the judge) to control the outcome through the order. Even a fixed ordering will not work, as the facts of each case will yield different results from the same ordering.<sup>297</sup>

Finally, there may be no optimal outcome. If voting paradoxes are a reality, then the most that one can hope for is pretty

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294. See, e.g., Davis et al., *supra* note 124.

295. Levine & Plott, *supra* note 7, at 596 (postulating that a judge may eliminate issues from the agenda in a pretrial conference).

296. Joseph V. Schaeffer, *Don't Forget Your Local Rules!*, ABA (Jan. 31, 2020), <https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2020/dont-forget-your-local-rules> [perma.cc/969E-VH9H] (discussing various limits placed by local rules).

297. See *supra* Part I.A.

good procedure.<sup>298</sup> That is, there may be no way to aggregate all social preferences in a way that is stable and, at some point, the participants (including the judge) may see a second-best outcome.<sup>299</sup> Knowing that this is the best that can be achieved is a valuable in itself for system design and operation. In fact, it may explain why the system operates as it does. For example, giving weight to factual findings rather than re-trying them at the appellate level.<sup>300</sup> Reevaluation of the facts could lead to cyclical outcomes on appeal—something to be avoided.

#### D. RETHINKING APPEALS

Social choice theory in procedural posture also has implications in how we consider appeals. Some commentators argue that original meaning is impossible in statutory interpretation because agenda control hides the actual intent of the group.<sup>301</sup> Extending this to procedural posture, it means that appellate courts should be wary of the procedure used to dispose of the case on appeal. To the extent that agenda control may have led to a particular outcome, the appellate court should interrogate how well the result represents the final preferences of the parties below as opposed to an artifact of the order in which the preferences were considered.<sup>302</sup>

Indeed, many of our appellate rules point in the opposite direction. For example, in any appeal of a jury or bench verdict, the appellate court assumes that all factual disputes were resolved in favor of the winner, even if it means that similar fact patterns result in opposite outcomes on appeal because different trials led to different factual determinations.<sup>303</sup> This assumption is pure fiction under the social choice spotlight. More likely, the

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298. With apologies to PGP. *Pretty Good Privacy*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Pretty\\_Good\\_Privacy](https://en.wikipedia.org/wiki/Pretty_Good_Privacy) [perma.cc/Y63R-JG2C].

299. Huq, *supra* note 6, at 1417 (noting inability to always aggregate social preferences in constitutional cases, instead calling the system a “pretty good truth tracker”).

300. Hafner & Berman, *supra* note 4, at 51–52.

301. Easterbrook, *supra* note 6, at 548.

302. Some rules already do this, such as the limitation on issues that can be considered in interlocutory appeals. *See, e.g.*, *Robinson v. Miller*, 802 F. App’x 741, 747 (4th Cir. 2020) (“In this interlocutory posture, though, our review is limited . . .”).

303. Hafner & Berman, *supra* note 4, at 51–52.



outcome is the result of compromises, shadings, and agenda control.<sup>304</sup> This means two things. First, appellate decisions often do not reflect the nature of facts on the ground.<sup>305</sup> Second, controlling the agenda to win a jury or bench trial greatly favors the winner in future steps, notwithstanding how close the decision may have been for the parties (and judge) in the prior step.

Additionally, following trial rules themselves may lead to inaccuracies by design. Rulemaking bodies may set their policy preferences in the form of rules to follow, knowing that adherence to the rule will lead to over- and under-inclusive outcomes.<sup>306</sup> This intuition motivates the quote by John Dingell that opens this Article: the lawmaker that sets the policy will “screw you every time.”<sup>307</sup> In other words, the rules of civil procedure list some of the steps the parties must take in order, such as service of process and initial disclosures, because those steps serve underlying policy goals of litigation. But other steps are not prescribed in order, though the existence of the rule serves other policies, such as quicker disposal of a case on summary judgment. In another example, requiring reporting of harassment to find an employer liable can bar recovery to employees when the employer makes it difficult to report.<sup>308</sup> Understanding how procedural posture is a form of social choice allows us to more closely inspect these procedural rules for their policy endpoints and their effect on how they might affect the outcome of litigation whether by design or accident.

#### E. PINPOINTING FAILURE

Understanding how social choice theory applies to procedural posture allows more generalized gripes about the litigation system to be particularized. That is, like the sudden death football overtime rules that give an advantage to the winner of the

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304. *Cf. id.* at 53 (developing complex model of predicting new case outcomes based on holdings and procedural posture of prior cases).

305. Emily Hoerner & Rick Tulsy, *Pattern of Misstated Facts Found in Opinions of Renowned U.S. Judge Easterbrook*, INJUSTICE WATCH (Apr. 4, 2017), <https://www.injusticewatch.org/projects/2017/pattern-of-misstated-facts-found-in-probe-of-renowned-federal-judges-opinions> [perma.cc/DSJ3-VGTY] (detailing alleged misstatements of the record in appellate opinions).

306. Easterbrook, *supra* note 6, at 546.

307. *See Hearing*, *supra* note 1.

308. Zev J. Eigen, David S. Sherwyn & Nicholas F. Menillo, *When Rules Are Made to Be Broken*, 109 NW. U. L. REV. 109, 165 (2015) (empirically studying results of sexual harassment rules).

coin toss,<sup>309</sup> litigation procedural rules might give one party an advantage. But rather than complaining that “any nine-year-old in a playground pick-up game would recognize” the unfairness,<sup>310</sup> social choice theory allows for analytical analysis of the failure.

For example, for judicial expediency some judges limit plaintiffs to few patent claims (out of potentially hundreds).<sup>311</sup> Plaintiffs claim this is unfair, but why? Using social choice, one might argue that limiting the number of claims is a constraint on the number of options available to vote on. If the winning option is removed from consideration, then it can never obtain sufficient support. This is a form of agenda control designed to limit the ability of one side to win. The (social choice) response is that this is not really constraining choices. Rather, five patent claims offer twenty or more preferences (infringement or not, valid or not). This Article does not purport to provide an answer to this debate; the goal is to identify the arguments for a reasoned consideration of how procedure might affect outcome.

#### CONCLUSION

Appellate courts, particularly federal ones, receive outsized attention in the literature. This is rightly so, as their outcomes can affect many, including nonlitigants. But the vast majority of cases never reach an appellate decision, and even fewer are tried in the federal system. Those cases matter, too. This Article considers the one thing that ties all of trial court litigation together—they must follow some set of procedures.

This Article shows how the court system uses procedure to bring order to the conflicting hopes and desires of all of its participants. At the end of the day, the system yields an outcome, one that may or may not reflect the accumulation of those desires. This Article also explains why the result may not reflect

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309. David Post, *The Overtime Quandary*, REASON (Jan. 25, 2022), <https://reason.com/volokh/2022/01/25/the-overtime-quandary> [perma.cc/FX74-HQNP] (“The toss of a coin should not have that kind of impact on the outcome of a game . . .”).

310. *Id.*

311. *In re Katz Interactive Call Processing Pat.*, 639 F.3d 1303, 1312 (Fed. Cir. 2011) (affirming limit on asserted patent claims); Stuart R. Hemphill, *Mandated Simplification of Patent Litigation—Judicial Trends and a New Model Order*, DORSEY & WHITNEY LLP (July 29, 2013), <https://www.dorsey.com/en/newsresources/publications/2013/07/mandated-simplification-of-patent-litigation-ju> [perma.cc/5Z4S-FNNQ].

the preferences of the participants. Procedural posture is a way the parties can (even unknowingly) change the outcome of litigation.

In doing so, the Article makes several contributions. First, it theorizes litigation as preference aggregation in social choice theory and provides an application of Arrow's core assumptions to litigation. Second, it introduces the concept of procedural posture as agenda control, providing examples of different types of agenda setting and how those types might affect the outcome of a given case. Third, it suggests ways that this new theory will be helpful from systemic, individualistic, and policy-setting perspectives. With this in mind, litigators, judges, and policymakers can adjust behavior to achieve private and social goals.