ARTICLES

Civil Procedure as the Regulation of Externalities: Toward a New Theory of Civil Litigation

Ronen Avraham† *& William H.J. Hubbard*††

Civil procedure serves a multitude of goals, from regulating the cost of fact gathering to dictating the rules of advocacy in court to promoting public participation in trials. To what extent can procedural design serve them all, or must rules sacrifice some interests to serve others? In this Article, we are the first to introduce a theory of procedural design that answers this question. We build upon the fundamental insight that the goals of civil procedure, as varied as they are, all occupy a common conceptual space—each addresses an externality, positive or negative, that litigation creates. This insight allows us to tie together distinct strands of scholarship on procedural design, develop a taxonomy of externalities that civil procedure addresses, and propose (sometimes radical) reforms that would allow procedure to serve more of its goals at once.

First, we show that the literature on procedural design has unraveled into three distinct strands. The first strand centers on the interest in reducing cost and delay in litigation. The second strand centers on the interests in limiting gamesmanship between the parties and improving court accuracy in decision-making. The third strand centers on the many related interests in the positive effects of procedure on society, such as developing legal precedent, deterring unwanted (primary) behavior, and so on.

Second, we tie together these strands of the literature by observing that each strand is focused on how procedure can address one type of externality. The first strand of the literature addresses what we call "system externalities"—the effects of actions on other cases in the same court or court system. The second strand addresses what we call "strategic externalities"—the effects of a party's actions on opposing parties in the same case. The third strand implicates external effects on society as a whole, which we call "public-goods externalities."

---

† Professor of Law, Tel Aviv University Faculty of Law; Lecturer, University of Texas at Austin School of Law.

†† Professor of Law, The University of Chicago Law School. We are grateful for comments from Lynn Baker, Bob Bone, Alon Klement, Shay Lavie, Jay Tidmarsh, Diego Zambrano, and participants at the Law Faculty Workshops at the University of Chicago, the University of Notre Dame, Tel Aviv University, and the University of Texas, as well as the ALEA Annual Meetings. We thank Ramon Feldbrin, Kathryn Garcia, Sakina Haji, Deanna Hall, Adam Picker, Jill Rogowski, and Kelly Yin for valuable research assistance. William Hubbard thanks the Paul H. Leffmann Fund and the Jerome F. Kutak Faculty Fund for research support. An earlier version of this Article was titled "Procedural Flexibility in Three Dimensions."

Third, and most ambitiously, we show that these three types of externalities give us a three-dimensional framework for procedural design. In this framework, we see how different aspects of procedure implicate one or another externality, or two or three at once. This, in turn, points the way toward opportunities to introduce procedural reforms tailored to types of externalities at issue. Our solutions range from surprising forms of judicial command and control (for example, the Supreme Court prohibiting parties from settling) to fees and subsidies (for example, a fund for judicially appointed neutral experts in important cases) to radical market-based reforms (for example, a cap-and-trade market in word limits for amicus briefs in the Supreme Court).

INTRODUCTION

What is civil procedure for? Scholars have long debated the goals of the civil procedure system.[1] Many interests spring to mind: facilitating fast and low-cost dispute resolution, enabling truth seeking at trial, tamping down gamesmanship and oppressive behavior between disputants, deterring unwanted (primary) behavior by potential defendants, facilitating the development of legal precedent, providing a public forum to aggrieved parties, increasing government transparency, encouraging democratic participation (through civil juries), and strengthening courts' legitimacy as an organ of the coercive power of the state.

It is uncontroversial that these interests both should and do motivate the design of civil procedure. But the proliferation of these undergirding interests presents two fundamental questions. First, which procedures actually advance any of these interests? Second, how can a coherent system of procedure accommodate multiple interests when they conflict?

For many specific procedural-design choices, answering the first question answers the second because interests align. For example, when the Federal Rules of Civil Procedure (Federal Rules) abolished the forms of action in 1938, this simplification of procedure reduced both the costs of pleading and opportunities for gamesmanship.[2] As another example, the norm that judges publicly announce major decisions in written orders both generates legal precedent and makes outcomes of court proceedings more transparent. And some specific design choices may serve one interest in isolation, with no adverse effect on other interests. That judges sit on elevated benches or wear black robes may reinforce the (perceived) legitimacy of the court, but those practices seem neutral with respect to other goals for civil litigation.

For many other aspects of procedure, answering these fundamental questions is not easy. For example, jury trials in civil cases can foster democratic participation in government processes,[3] and

---

[1] Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1333–34 nn.21–22 (2012).

[2] *See* Conley v. Gibson, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.").

[3] *See generally* Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697 (2014). *But see* George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F.

broad, party-driven discovery seeks to uncover the facts of underlying substantive claims.[4] But both inflate the cost of civil litigation and multiply opportunities for gamesmanship.[5] Thus, even if there is agreement about the descriptive question of which procedures promote which interests, there remains the normative question of how to select among design choices, each of which serves some values but disserves others. In these circumstances, debates about procedure seem to reduce to debates over whether to weigh some values more and other values less. Yet debates over first principles may be intractable.

Perhaps as a consequence, the literature on procedural design has unraveled into three distinct strands, each focusing on a particular subset of the values underlying civil procedure. The first contribution of this Article is to recognize this division in the literature—a taxonomy that we will argue will be useful in constructing a framework to bring the literature back together again. We introduce this basic taxonomy in Part I. The first strand, which has been a primary focus of judicial attention in recent years, centers on the interest in reducing cost and delay in litigation.[6] The second strand, which has been the primary focus of a theoretical law-and-economics literature, centers on the interests in limiting gamesmanship between the parties and improving court accuracy in decision-making.[7] The third strand, which represents by far the largest share of the academic literature, centers on various positive effects of procedure on society: the development of legal precedent, the public resolution of disputes of social significance, the deterrence of unwanted (primary) behavior, the

161, 184–86 ("The role of the civil jury as a democratic counterforce in cases implicating governmental power was trivial . . . suggesting that the occasions upon which civil juries are actually employed in a political role are very limited in our society.").

4 Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."); *see also* FED. R. CIV. P. 26 advisory committee's note to 1983 amendment.

5 *See, e.g.*, Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 357–58 (D. Md. 2008) (asserting the importance of cooperation in discovery but lamenting gamesmanship between parties); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 623–24 (1991) (addressing the use of peremptory strikes in voir dire on the basis of race); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 131–35 (1994) (addressing the use of peremptory strikes in voir dire on the basis of sex); Martin Van der Linden, *Bounded Rationality and the Choice of Jury Selection Procedures*, 61 J.L. & ECON. 711, 711 (2018).

6 *See infra* Part I.A.

7 *See infra* Part I.B.

transparent and legitimate exercise of government power, and democratic participation in the legal system.[8]

What is missing is a framework for reconciling potentially divergent interests when making choices about procedural design. Without such a framework, it is easy to assume that a procedural-design choice boils down to the question of prioritizing one value over another. For example, if we care more about reducing congestion in courts, we should encourage litigants to settle; but if we care more about producing precedents that will benefit society at large, we should do the opposite.

But are such trade-offs between interests inevitable? For rule makers, does the choice between one option and another boil down to a judgment about which interests to promote and which to sacrifice? In this Article, we argue that the answer is no. Rather, good procedural design seeks solutions that can simultaneously serve multiple interests. But there exists no conceptual framework to facilitate the search for such solutions.

Our goal in this Article is to develop a theory of procedural design that provides this framework. We begin by tying together the three strands of the procedural design literature. Part II presents this Article's first key insight, which is that each strand of the literature focuses on one type of externality. The concerns that animate civil procedure—from reducing cost and delay to promoting fair play and transparency to preserving the legitimacy of the courts—can all be understood as different types of positive and negative externalities.

Consider again the example of going to trial rather than settling. An individual party asks whether a trial improves the expected value of the suit (relative to settlement) and whether this improvement exceeds the expected costs. Missing from this calculation are the effects of the action on everyone else: the costs of trial to the opponent, the court, and the witnesses; the opportunity for civil participation through jury trial; the chance for a judicial order and appellate review that would generate legal precedent; or—what law-and-economics-oriented scholars will consider most important of all—the deterrence of socially undesirable (primary) behavior. All these costs and benefits of going to trial are "external" to the party's cost-benefit calculation. They are, in a word, externalities.

---

8 *See infra* Part I.C.

In the first strand of the literature, the interest in reducing cost and delay implicates external effects on other cases in the same court or court system. We call these external effects "system externalities." The problem in this context is that parties are thinking about their own cases but not other cases in the same court. (Analogies from other contexts include polluters not taking into account their effects on neighbors and drivers on a congested road not taking into account their contributions to other drivers' delays.)

In the second strand, the interests in avoiding the use of procedure as a cudgel implicate external effects on opposing parties in the same case. We call these external effects "strategic externalities." Here, the problem is not that parties are oblivious to their effect on other cases but the inverse: they are too keenly aware of the effects of their procedural moves on their own case. (An analogy outside the procedure context would be to a monopolist lobbying for expensive and unnecessary regulation so that potential competitors cannot afford to enter the industry. This is profit maximizing for the monopolist but costly and wasteful for competitors and consumers.)

And in the third strand, the numerous interests in legitimacy, norm creation, deterrence, democratic participation, and so on implicate external effects on society as a whole. We call these external effects "public-goods externalities." (An analogy might be to scientific innovation or artistic creation that generates ideas that others can freely copy.)

Regardless of the precise type of externality, all prescriptions for improving outcomes when faced with an externality boil down to the same essence: implement a policy that ensures that the party creating the externality will "internalize" the externality or, barring that, impose command-and-control regulation (i.e., mandates or prohibitions) to better align behavior that fails to account for the externality. If it is a negative externality, that means that actors must bear the costs that they are imposing on others. If it is a positive externality, then actors must gain the benefits that they are conferring on others. When both types of externalities occur simultaneously, actors might be required to bear some costs while gaining some benefits.

The externalities framework equips us with a single, unifying principle to guide judgments about procedural design. A key idea that we develop in this Article is that the interests at stake in each strand of the literature are not inherently opposed. Rather,

they each represent different "dimensions" of externalities—more of one externality doesn't necessarily mean less of the others.

This means that procedural-design choices do not necessarily have to trade off one externality against another (for example, reductions in court congestion need not come at a cost of reduced public goods). Some design choices can improve the status quo along one dimension without compromising on other dimensions. In this way, procedural design can point toward positive-sum reforms, regardless of the values at stake.

Part III introduces this Article's second and more important main insight—how procedure attempts to regulate externalities is intimately bound up with how procedure allocates discretion and flexibility among participants in the system. Not all cases are alike, and thus not all cases generate the same types or amount of externalities. Yet it is impossible for rule makers to write procedural rules perfectly tailored to each individual case. Thus, when rule makers create a system of procedural rules tailored to the typical case, recognizing that a one-size-fits-all system will create inefficiencies, they build procedural flexibility into the system. By giving judges or even the parties themselves discretion to modify the defaults in the rules, a well-designed system grants flexibility that better tailors procedure to the idiosyncratic needs of individual cases.

But modifications to procedural defaults (either by parties or by the judge) carry with them not only potential benefits but also potential costs. As noted above, the interests that procedural design tries to promote all involve some form of externality. What this means is that parties or even judges who exercise flexibility based on their own sense of what is best for them will not necessarily make choices that align with what is best for everyone—i.e., what promotes positive externalities (like civic participation) and suppresses negative externalities (like court congestion). Thus, any normative theory of civil procedure must account for when, how, and to whom rule makers should give discretion to deviate from the default rules.

This, in turn, requires an understanding of what options rule makers have for adding flexibility to procedure. Fortunately, there is already a well-developed literature on procedural flexibility. The simplest approach to procedural flexibility is to conceptualize it as a binary, on/off decision about whether parties can modify the default civil procedure rules. Flexibility means that

parties, through mutual agreement, can opt out of procedural defaults. Lack of flexibility means that procedures are fixed by rule or at least subject to modification only by the judge.

Procedural flexibility takes many forms, not all of which had previously been widely recognized.[9] In earlier work, we showed in detail how civil procedure spans a spectrum of forms of flexibility involving varying amounts of discretion by parties, judges, or both.[10] We observed that rules sometimes allow a single party to unilaterally opt into or out of a default, and sometimes rules require agreement among the parties and the judge. More provocatively, we went beyond discussing bargaining over civil procedure rights between participants in a single case by considering trading, buying, or selling procedures across cases. We argued that courts could—and sometimes already do!—allocate things like jury trials, class-counsel assignments, and access to mass settlements through mechanisms not unlike barters, auctions, or prices. After all, procedure can be understood as a set of rules for allocating entitlements (to file motions, to obtain discovery, to conduct a jury trial, to appeal a judgment) to parties. Markets, auctions, user fees, Pigouvian taxes, and subsidies are all familiar (and often highly effective) methods of allocating entitlements to serve various societal objectives.

Recognizing this descriptive reality, in Part IV we take up the normative question of what kinds of procedural flexibility are optimal—in other words, if there is a spectrum of procedural flexibility, where on that spectrum should any given type of procedure be?

To this end, our first insight (that three types of externalities motivate procedural design) informs our second (that flexibility is a key tool for procedural design due to its ability to make parties internalize the harms and benefits they cause third parties). Indeed, more than a hundred years of economics literature has explored how mechanisms for allocating entitlements (barter,

---

[9] Sometimes procedure is inflexible—there is a rule, and no one in any given case can change it. The best-known inflexible rules are probably those governing the subject matter jurisdiction of U.S. courts. Sometimes the judge has discretion to apply the rule or not to apply it. For example, a judge may grant (or not) a new trial after a jury verdict, and this is within the judge's discretion and may be done with or without motion from a party. FED. R. CIV. P. 59(d). Other times the rule is merely a default rule that explicitly allows the parties to agree to a different rule. For example, parties have broad discretion to modify default limits on discovery by mutual agreement. FED. R. CIV. P. 29. For a review of the literature on procedural flexibility, see Ronen Avraham & William H.J. Hubbard, *The Spectrum of Procedural Flexibility*, 87 U. CHI. L. REV. 883, 901–10 (2020).

[10] *See* Avraham & Hubbard, *supra* note 9, at 901–10.

cap-and-trade, auctions, Pigouvian taxes, subsidies) can be used to regulate externalities, such as pollution or road congestion.[11] It is evident that not all externalities require the same remedies. We will argue that, for some types of procedure, court-regulated markets may improve upon the status quo, but we reject the idea that markets or flexibility are desirable in general.

To be more specific, each strand of the existing literature corresponds to a bundle of externalities that imposes costs and benefits on a different group, and thus we tailor our proposals accordingly. The first strand deals with cost, delay, congestion—what we're calling "system externalities." Once framed in this way, we think that it becomes clear that the right approach to reducing these externalities is to make parties take account of the costs that their choices impose on the court system. We call this the "internalization solution"—unlinking the parties from their specific case so that they bear the costs of delay felt by the whole system. (The analogy here is to a tax on, or a cap-and-trade system for, carbon emissions.) Many times, the best mechanisms to address system externalities are market solutions.

To take a simple example, consider all the rules and motion practice devoted to page limits for briefs and time limits for hearings. One might imagine a novel way to approach this problem, such as cap-and-trade mechanisms. Such a system for pages and minutes would require parties who want to exceed their default number of pages or minutes to buy credits for those excess amounts from other parties (in the same case or in other cases) who will use less than the default amount. Such a change would doubly improve the use of courts' time hearing motions and reading briefs. First, parties would be more likely to forgo borderline arguments since they now need to pay for the time and space to make them. Second, courts wouldn't have to spend their time hearing and deciding motions for extensions of page limits or additional hearing dates. That time and space would be allocated through supply and demand rather than costly command-and-control judicial deliberation.

The second strand deals with the social waste from gamesmanship—what we're calling "strategic externalities." Here, we want to bind the fates of the parties more tightly together. We call this the "tethering" solution—linking a party's own payoffs to the

---

[11] *Cf. infra* Part IV.A.

payoffs of their opponent. For example, if our concern is about sophisticated lawyers using broad discovery requests to impose costs on their opponents, one solution may be cost sharing, in which each party pays part of the other party's costs of responding to discovery. (The analogy here would be to a rule requiring the monopolist to pay for any lobbying by competitors up to the amount that the monopolist spent on lobbying.)

The third strand collects interests in legitimacy, norm creation, deterrence, democratic participation, and so on—what we're calling "public-goods externalities." Here, we think that the obvious approach is simply to subsidize or mandate the relevant conduct. Notably, this is already the case in practice to some degree.

As an example, in socially important cases that could produce major precedents, the judicial system should encourage and perhaps even subsidize the costs that parties have to bear in order for the court to hear expert witnesses who may aid the court in reaching a more accurate decision. (An analogy here is to government grants in support of science and the arts.) To be clear, we do not take a position on which interests or values should or should not be given higher priority. We take as given the values identified in the extant literature and seek to build our proposals upon them.

Having constructed the normative framework, we then turn in Part V to the question of potential policy prescriptions. Lawyers and economists have long studied a range of policies that can regulate externalities in ways that alleviate their harms (or capture their benefits) with the fewest side effects. Once we recognize that procedure regulates externalities, we can import proven regulatory policies from other domains. These policies include relatively familiar regulatory moves (such as taxes, fees, and subsidies) and more exotic moves (such as auctions and tradable credits for procedural entitlements).

For example, no subject within civil procedure currently raises more questions about rulemaking and procedural design than multidistrict litigation (MDL). In the course of managing sprawling consolidated pretrial proceedings in hundreds or thousands of distinct cases, MDL judges—in concert with enterprising plaintiff-side and defense-side attorneys—have aggressively innovated with procedures, leading one pair of commentators to describe MDLs as "something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather*

movies."[12] Observers have begun to lament the costs—in the currencies of transparency, norm creation, accountability, and legitimacy—of the sweepingly discretionary and unsupervised power of MDL judges.[13] Yet it is hard to deny that the rise of MDLs has leveraged the benefits—in terms of cost, speed, and access to justice—of massive case aggregation.[14] Procedural flexibility in MDLs has reached the point that, as a practical matter, important features of individual case control (such as attorney representation, pleading, discovery, and even trial) are reallocated across cases.[15] How should we trade off the benefits of flexibility afforded in MDLs with the benefits of formality afforded by more uniformly applied rules—or is there a trade-off at all? Can we have both? As we explain in Part V, we see MDLs as implicating system externalities (and potentially strategic externalities) that are best addressed through market-based allocation mechanisms. These mechanisms make feasible an approach to MDL procedure that offers, on the one hand, greater transparency and accountability than the existing regime of ad hoc discretion and bargaining and, on the other hand, further improvements in the efficiency of case management of aggregate litigation.

As we seek to show in this Article, our framework can help both courts at the local level and policy makers at the more global level improve the performance of the legal ecosystem. Courts or even individual judges can benefit from the simple framework of thinking about the three types of externalities generated by procedure when they assess how, when, and which motions, requests, and parties' agreements should be accommodated by the law. And our framework can guide courts and policy makers in interpreting the current rules of civil procedure on questions of judicial control versus flexibility.

---

12 Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 111 (2015).

13 *E.g.*, *id.* at 140–42; Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1687–91 (2017); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 78–84 (2015); *see also* Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 4–5 (2021) ("MDL's particular mode of centralization—from its anti-federalist stance to its insistence that each proceeding is too unique to be confined by the transsubstantive Federal Rules—chafes at almost every aspect of procedure's traditional rules and values.").

14 Jay Tidmarsh & Daniela Peinado Welsh, *The Future of Multidistrict Litigation*, 51 CONN. L. REV. 769, 789 (2019) ("Multidistrict litigation resolves transferred cases at a fraction of the cost of individual litigation.").

15 Avraham & Hubbard, *supra* note 9, at 936–42.

To be sure, individual judges (who see and attempt to control strategic externalities in everyday litigation) are not necessarily well positioned to deal with system externalities or public-goods externalities. But court administrators and chief judges could nonetheless implement policies, through local rules, that address these externalities in a more self-aware and deliberate way. Examples might include rules requiring a party to compensate the other party for motions that generate strategic externalities (such as extra discovery requests) or rules replacing a single filing fee at the outset of a case with à la carte court fees for individual motions that contribute to system externalities (such as motions for extensions, for extra brief pages, and the like).

At the more global level, our framework can help legislatures design novel reforms that can reduce litigation cost, increase tailoring of procedure to parties' needs, reduce court congestion, and improve the various positive outcomes the law can generate, such as deterrence and distributional equity. By broadening our design choices, which include novel bottom-up, market-based solutions, we can identify opportunities for win-win reforms that improve one externality without necessarily worsening any other externalities. For example, our framework can help legislators implement more ambitious and complex possibilities, such as tradable credits for procedure; it can inform them on how and when to establish administrative compensation schemes to combat system externalities; and it can guide them on how to reform the Federal Arbitration Act[16] (FAA) to better sort which cases should stay in the legal system and which cases should be systematically channeled out.

Importantly, our framework provides an analytical tool for studying the entire ecosystem of dispute resolution, not just court procedure. When we discuss our framework, our examples include forms of dispute resolution beyond courts, such as compensation funds and arbitration. Our framework works both at the inter- and intraprocedural levels: it can be used to compare procedural systems, not just to evaluate procedures within any given system. We therefore hope to impact both global reforms implemented by state or federal governments as well as local reforms implemented by judges or chief judges.

---

[16] Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended in scattered sections of 9 U.S.C.).

I. LITERATURE REVIEW: THREE STRANDS

As mentioned, the literature on procedural design has split into three separate strands that focus on different values underlying civil procedure.

A. Cost and Delay

The first strand focuses on the interest in reducing cost and delay and its concomitant benefits for access to justice. Scholarship in this area tends to focus on court congestion and efficiencies from aggregation.[17] This literature, written by both scholars and judges, explores procedures that have been developed to enable courts to respond to docket pressure through large-scale consolidation of cases (such as through the MDL process), greater judicial assertiveness in pushing cases toward settlement or bench trials rather than jury trials, and greater use of procedural devices such as summary judgment.[18] It also deals with, for example, how judges should respond to requests that would increase court congestion and taxpayer expense.[19]

B. Gamesmanship

The second strand focuses on the interest in suppressing gamesmanship and its concomitant distortion of the truth-seeking function of procedure. This literature builds on the basic premise

---

[17] For literature on court congestion, see generally, for example, Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599 (2016); George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527 (1989). *But see* Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1102–11 (2012) (using empirical data to argue that litigation is not excessively costly or slow).

[18] *See generally* Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter-Century of Summary Judgement Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861 (2007); Patrick E. Higginbotham, *Thoughts About Professor Resnik's Paper*, 148 U. PA. L. REV. 2197 (2000); Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821 (2018). For suggestions for how to reduce court congestion, see generally, for example, Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165; Michael L. Seigel, *Pragmatism Applied: Imagining a Solution to the Problem of Court Congestion*, 22 HOFSTRA L. REV. 567 (1994); Julius H. Miner, *Court Congestion: A New Approach*, 45 A.B.A. J. 1265 (1959).

[19] *See generally* Bone, *supra* note 1; Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461 (2007). Professor George Priest observed that changes to procedure or judicial management meant to reduce delay will disincentivize rapid settlement. This observation indirectly connects concerns about cost and delay with the strategic externalities that we discuss next. Priest, *supra* note 17, at 557.

that parties are adversaries and therefore have incentives to impose superfluous costs on each other (like threatening to go to trial) in order to gain strategic advantage.[20] For example, part of this literature examines whether plaintiffs can extract settlements from defendants even when their claims have little or no merit.[21] Much of the literature centers on cost allocation during discovery.[22] Professors Robert Cooter and Daniel Rubinfeld, for instance, advocate cost shifting to reduce discovery abuse without arbitrarily limiting open-ended discovery,[23] and Professor Martin Redish advocates cost-shifting to handle e-discovery's unique costs and opportunities for gamesmanship.[24] Professors H. Allen Blair and W. Mark Weidemaier both find that, although many parties choose not to contract about procedure with each other, there are large potential gains to be realized with private control.[25] Other literature focuses on the role of judges and procedural rules in controlling parties' strategic behavior[26] and specifically on limiting strategic flexibility—such as banning settlements in class actions[27]—or even, as Professor Owen Fiss

---

[20] *See generally* Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869 (1990). Parties can even intentionally create externalities to increase their bargaining power in settlement negotiations. *See* Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1649–53 (2011).

[21] *See generally* William H.J. Hubbard, *Sinking Costs to Force or Deter Settlement*, 32 J.L. ECON. & ORG. 545 (2016). *See also* Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 979 (1998) ("[P]arties settle lawsuits based on tactics and expenses as much as—if not more than—their predictions of how a judge would apply law to fact."); Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1, 10 (1996) ("Whether the plaintiff has a credible threat or not depends . . . on the relationship between the following parameters: the expected judgment, the plaintiff's litigation costs, the defendant's litigation costs, and the way in which the parties' costs are spread throughout the litigation process.").

[22] *See generally* Benjamin Spencer, *Rationalizing Cost Allocation in Civil Discovery*, 34 REV. LITIG. 769 (2015); Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773 (2011).

[23] Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 458–59 (1994).

[24] Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 608–15 (2001).

[25] H. Allen Blair, *Promise and Peril: Doctrinally Permissible Options for Calibrating Procedure Through Contract*, 95 NEB. L. REV. 787, 802–13 (2017); W. Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 WASH. & LEE L. REV. 1865, 1875–81 (2015).

[26] *See, e.g.*, Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1996–2001 (2007); Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. REV. 199, 214–21 (1994).

[27] *See generally* David Rosenberg & Steven Shavell, *A Solution to the Problem of Nuisance Suits: The Option to Have the Court Bar Settlement*, 26 INT'L REV. L. & ECON. 42 (2006).

advocates, discouraging settlements in all litigation.[28] We build on these insights, which show the power of procedural flexibility (or inflexibility) to regulate the externalities generated by litigation. While these earlier works emphasize the benefits of restraining flexibility for the parties, one of the benefits of our theory is that it reveals the counterintuitive idea that procedure can control strategic behavior by *expanding* procedural options for parties.

C. Societal Values

The third strand focuses on a bundle of interests related to the effect of the court system on society, such as norm creation through precedent and legitimation of the court system.[29] This literature addresses the allocation of discretion between the judge and the parties to a case, and its object is to identify the optimal scope of private contracting over the state-provided default procedure.[30] This literature treats civil procedure as a top-down system that identifies the set of procedures that cannot be altered by parties. These are the aspects of procedure that are central to the role

---

[28] *See generally* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). *See also* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2642–47 (1995) (expanding on and offering a critical view of Fiss's *Against Settlement*).

[29] *See* Bone, *supra* note 1, at 1378–80.

[30] For some of the literature on the social costs of privatized procedure, see generally David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985 (2017); Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491 (2016); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015); Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521 (2006). *See also* Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 729 (2011):

> [T]he rise of ex ante procedural contracts permit[ting] parties to adjust substantive obligations and expected liability . . . has the capacity to reshape not only the role of the private right of action between contracting parties but also the broad swath of statutory, constitutional, and common law obligations that rely upon it as a primary mechanism of enforcement.

that courts play in society through dispute resolution, norm creation,[31] democratic participation,[32] court legitimacy,[33] distributive justice, and optimal deterrence incentives for future parties.[34]

II. UNIFYING PRINCIPLE: PROCEDURAL VALUES AS EXTERNALITIES, POSITIVE AND NEGATIVE

Professor Steve Shavell famously exposed the fundamental divergence between the private and social motives to use the legal system by identifying the negative and positive externalities involved in the decision to bring a lawsuit.[35] Because private parties are primarily concerned with their self-centered benefits and costs when dealing with the legal system, they ignore costs and benefits that they impose on their counterparties and the legal system as a whole. Yet this does not mean that judges are necessarily better positioned than parties to exercise choices in litigation. Judicial decisions, too, have external effects far beyond a judge's own courtroom or docket.

Building upon Shavell's work, we start this Part by identifying three different types of externalities: system externalities, strategic externalities, and public-goods externalities. These three types of externalities match the three types of costs discussed above. We then explicate how these externalities can help us understand civil procedural design and help us develop new solutions to old problems.

---

[31] *See generally* Elizabeth Earle Beske, *Rethinking the Nonprecedential Opinion*, 65 UCLA L. REV. 808 (2018).

[32] *See generally* Hans et al., *supra* note 3.

[33] *See generally* Daniel S. Nagin & Cody W. Telep, *Procedural Justice and Legal Compliance*, 13 ANN. REV. L. & SOC. SCI. 5 (2017); Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211 (2012); Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767 (2017).

[34] *See generally* Bone, *supra* note 1; Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475 (2013); Moffitt, *supra* note 19; Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005); Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994) (arguing that accuracy is a public good since it increases deterrence).

[35] Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 581–86 (1997).

A. System Externalities

There are three types of negative external social costs associated with running a legal system that fall under the rubric of system externalities: "Congestion costs" are costs that an action imposes on the court docket (and therefore the judge and other litigants). An intuitive example involves a court scheduling an additional hearing. Even if both parties agree that more hearing time is desirable, the new hearing affects the court's docket and delays hearings in every other case. Not surprisingly given the effect on the court's docket, the judge's approval is required, but we will argue that requiring judicial approval is not the only way to control congestion costs.

"Spillover costs" are costs that parties or judges impose on *other* courts. This includes when the action is transferred or removed to a different court in the same jurisdiction, a different jurisdiction, or even from a state court to a federal one. Whereas trial judges might be pretty good at controlling their own congestion costs, they do not have the same incentive to control spillover costs. In the example above of a request for an additional hearing, the judge internalizes at least part of the external costs associated with congestion in their docket, whereas in a request to transfer a case to another court, the judge does not suffer the spillover costs on other courts. The framework we develop shows how spillover costs can be better controlled.

"Third-party costs" are the costs imposed on third parties, such as witnesses. Since witnesses (other than expert witnesses) are not compensated for their time, there are no optimal incentives to avoid overburdening them. A simple solution might be to compensate the witnesses for their time, but if that raises concerns with access to justice or the like, other means of correcting this externality should be considered. As we shall show, our framework will demonstrate new ways to control third-party costs.

B. Strategic Externalities

Strategic externalities are externalities that parties impose on each other. When a party requests a deposition of the other party or requests a broad range of documents, this serves the goal of gathering evidence in the case, but every increment of discovery also increases costs for the other party. And for some types of requests, the costs fall asymmetrically on the responding party. Given that parties are adversaries, one would predict that parties

would attempt to impose costs on their opponents to push them toward a favorable settlement. Similarly, parties might refuse to reduce costs (e.g., not stipulating to fewer depositions) just to make litigation too expensive for the other side.

Sometimes judges can control this strategic externality. Other times, parties can solve this problem by agreement if they find a mutually advantageous way to allocate costs between themselves. Yet bargaining might be very expensive or might fail entirely. As we shall show, our theoretical framework opens up new ways to control strategic externalities.

C. Public-Goods Externalities

Public-goods externalities include the unique contributions to the common good of litigations and trials over other forms of dispute resolution, such as arbitration. Litigation not only resolves disputes, but also fosters public values: norm creation, democratic participation, court legitimacy, and optimal deterrence incentives for future parties. We do not debate the relative significance of each of these aspects. We simply bundle them under the rubric of public-goods externalities because these are all contributions that the court system makes to the common good beyond the private benefits it provides to parties. In other words, these benefits of litigation are a positive externality because parties in a civil action bear most of the costs of creating these benefits (for example, legal research and argument) while capturing only their pro rata share of the benefits to the system as a whole.[36]

The civil justice system has several features that address litigation's public-goods externalities by incentivizing lawyers to bring cases: subsidized court fees, enforceability of contingency fee contracts, one-way fee shifting in favor of plaintiffs, and court-awarded fees to class counsel in class action settlements.[37] Yet any time that a judge or the parties agree to forgo full-blown litigation—most obviously, by settling—they save time and expense for themselves but reduce the positive externalities generated by litigation and trial. As we shall show, our theoretical framework identifies new possibilities for promoting public-goods externalities.

---

[36] *See* Rex E. Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?*, 34 CATH. U. L. REV. 267, 274–76 (1985).

[37] Of course, these measures are often crude and are not necessarily tailored to the value of the public goods created.

* * *

Now that these externalities have been identified, our theoretical framework helps crystalize how they work in tandem by making the various trade-offs explicit. It then enables us to innovate with procedural design.

III. PROCEDURAL FLEXIBILITY AS A TOOL FOR PROCEDURAL DESIGN

A. The Spectrum of Procedural Flexibility

In a recent article, we introduced the spectrum of procedural flexibility—a tool to visualize the range of ways in which procedural rules do (or don't) permit participants in litigation to modify the rules, either by unilateral decision, mutual agreement, or some other transaction.[38] The spectrum will be essential to our analysis herein, as it will be the main tool with which we will introduce novel ways to solve difficulties and dilemmas that plagued legal procedure for decades. We thus begin this part by exploring the full length of the spectrum.

Figure 1 illustrates the different ways that control over flexibility can be allocated among the judge and parties in any given case. Moving left on the line moves one toward more command and control by the judge while moving right on the line takes one toward more freedom allotted to parties to modify the default civil procedure rules. While most academic and judicial discussions of procedural flexibility focus on the role of party agreement and judicial discretion, these are only a subset of the forms of flexibility that one encounters (or might encounter).

FIGURE 1: A SPECTRUM OF CONTROL AMONG JUDGE AND PARTIES

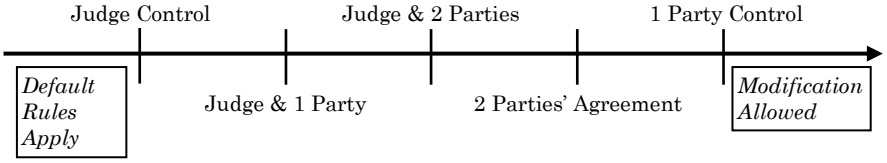
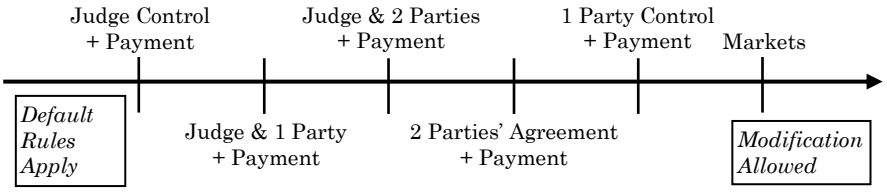


Figure 2 builds on Figure 1 and presents the full spectrum of procedural flexibility, which incorporates payments (fees, subsidies, and transfers) for exercising flexibility. Sometimes parties may act unilaterally—but only upon paying a fee to the court or

[38] Avraham & Hubbard, *supra* note 9, at 900–10.

compensating the other party (for ease of presentation we sometimes do not distinguish between them and call both fees and compensation "payments"). Other times unilateral action is subsidized.[39] More exotic is the idea that fees (or subsidies) might be imposed in addition to a requirement that the parties reach agreement to alter a default or in addition to seeking judicial approval. Even more exotic is the idea that parties do not have to trade their civil procedure rights in barter but rather can use money payments to smooth transactions.[40] For example, we can imagine that for some procedures, the law could allow a party to unilaterally deviate from the default only so long as it fully compensates the other party (and, if appropriate, the court) for the burden it imposes on them. Rather than negotiating an agreement to flex procedure, a party unilaterally flexes the procedure but pays for doing so. Thus, for example, a plaintiff may exercise their option to take more depositions provided that they pay the defendant a predetermined price and the court system a predetermined fee.[41]

FIGURE 2: FULL SPECTRUM WITH PAYMENTS AS AN OPTION



Most exotic of all are "market-based" forms of flexibility. Other forms of flexibility are limited to the participants in a given case. Default procedures are set on a per-case basis (for example, each civil action in federal court gives each party an entitlement to ten depositions and one appeal as a default)[42] and allow parties partial flexibility to negotiate around those defaults (up or down

---

[39] The initiation of a civil action is itself an example of this, insofar as it is within the discretion of the plaintiff, conditional on paying a fee—but at a cost that is subsidized relative to the cost of operating the court system. Other examples from current practice are rare but do exist. *See, e.g.*, FED. R. CIV. P. 30(b)(3) (allowing a party to unilaterally designate a method of recording a deposition but requiring that party to pay for the method chosen).

[40] Avraham & Hubbard, *supra* note 9, at 918

[41] *Id.* at 916–22.

[42] FED. R. CIV. P. 30(a)(2)(A)(i); FED. R. CIV. P. 31(a)(2)(A)(i); FED. R. APP. P. 3(a)(1).

from ten depositions, but only down from one appeal).[43] A "market" in procedure, in contrast, sets quantities at the system level, allowing flexibility in procedure across cases. For example, the federal courts could give every party the entitlement to take two depositions and make those entitlements fully tradable—parties that wanted to take more depositions could buy them from parties who didn't need to take any, even parties in a different case.

Because the notion of markets in procedural entitlements may seem radical, even absurd, we discuss how market-based procedural design might work and why it could be useful in addressing the externalities that procedure attempts to address.[44]

B. Markets, Prices, and Auctions: Addressing Externalities Through Procedural Flexibility

The idea of trading procedural entitlements across cases is utterly alien to civil litigation (and professional legal ethics), but trading entitlements is familiar in the field of environmental-protection policy. Pollution is a classic example of a negative system externality: polluters reap the rewards of polluting activity but bear only a fraction of the costs imposed on the environment. Cap-and-trade is a celebrated solution for this problem. By capping the quantity of permits to emit a pollutant, the regulatory system reduces the impact of emissions; by allowing potential polluters to sell their permits, the system rewards producers that reduce their emissions while forcing high-emissions producers to

---

[43] An interesting case study on the impetus toward flexibility rather than one-size-fits-all, mandatory rules is the federal courts' treatment of interlocutory appeals. The judicially created collateral order doctrine declares entire categories of district court decisions to be appealable—or not appealable—on an interlocutory basis. In contrast, the statutory provision for interlocutory appeals of most types of district court decisions, 28 U.S.C. § 1292(b), vests discretion in both the district court judge (who can simply decline to enter the findings required by the statute) and the appellate court in deciding whether to hear an interlocutory appeal. The Supreme Court has explicitly recognized the value of tailoring appealability to the features of individual cases in its decisions restricting the application of the collateral order doctrine in favor of alternatives such as § 1292(b): "[R]ulings adverse to the privilege vary in their significance; some may be momentous, but others are more mundane. Section 1292(b) appeals, mandamus, and appeals from contempt citations facilitate immediate review of some of the more consequential attorney-client privilege rulings." Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 112 (2009) (rejecting the application of the collateral order doctrine to decisions denying attorney-client privilege, and noting that the categorical treatment of all such decisions as collateral orders would prevent appellate courts from filtering out relatively unimportant appeals).

[44] For a recent work that attempts to demystify the idea of markets in procedure, see generally Avraham & Hubbard, *supra* note 9.

pay more.[45] Cap-and-trade is behind one of the great success stories of environmental regulation, the dramatic reduction of acid-rain-causing sulfur dioxide and nitrogen oxides in North America over a twelve-year period (which was three years ahead of schedule) at a fraction of the projected cost to industry.[46]

Given the judicial system's current failure to effectively solve congestion issues and other manifestations of system externalities, we argue that not only are market-based approaches to procedure a conceptual possibility—they are potentially an attractive possibility. Rather than the Federal Rules setting various defaults for discovery, forcing judges to rule on all manner of requests for extensions and exceptions to the Rules or relying on parties agreeing to modify procedure, we could imagine a regime for allocating procedural entitlements (from page limits to the right to file an appeal) through market processes. Initial endowments could be distributed either through cap-and-trade (think greenhouse emission credits) or by auction (think broadband spectrum). Either way, these endowments would then be freely tradable on a secondary market. A plaintiff in an antitrust case could purchase higher page limits for briefing from a defendant in a tort action. A defendant seeking to conduct additional depositions could buy the rights of another defendant—or from a procedure broker (if such businesses arise), a nonparty who buys from parties who no longer need their procedural endowment and finds interested buyers. A party seeking to make a second appeal might even be able to purchase that right from a party willing to forgo any appeal. And, to the extent that we are worried about excessive trading of procedures, the courts could regulate the market to make purchases more expensive.

Markets are important because they provide a systemic solution for a systemic problem. Indeed, there is a long-standing disconnect in debates about procedural reform. The problems (or alleged problems) that occupy the attention of advocates and policy makers are things like court congestion, delay, and expense: problems at the *systemic* level that critics allege burden courts as a whole,[47] deny access to justice to plaintiffs as a class,[48] and impose

---

45 Gabriel Chan, Robert Stavins, Robert Stowe & Richard Sweeney, *The SO_2 Allowance-Trading System and the Clean Air Act Amendments of 1990: Reflections on 20 Years of Policy Innovation*, 65 NAT'L TAX J. 419, 424–26, 431–32 (2012).

46 *Id.*

47 *See* Priest, *supra* note 17, at 544–48.

48 *See* Marrero, *supra* note 17, at 1624–25.

unjustified costs on defendants in general.[49] Yet the policy tools under consideration almost inevitably are tools that operate at the individual-case level. For example, Federal Rules amendments announce that judges should have more discretion[50]—or less discretion[51]—to manage discovery or regulate party conduct; that parties should cooperate more;[52] or that they should file fewer motions.[53]

Of course, such an approach is logical. The court system operates quite literally on a case-by-case basis. Reforms to how individual cases are litigated will, in the aggregate, affect systemic performance. Nonetheless, there is a fundamental mismatch between means and ends when courts manage procedural flexibility and attempt to combat systemic problems on a case-by-case basis. This arises because systemic problems, like court congestion, are caused by externalities—parties in a given case are doing what is individually optimal but has negative effects on the judge or parties in other cases. Case-by-case responses to externalities in litigation are doomed to frustration for at least three reasons:

First, and most obviously, addressing a problem like court congestion on a case-by-case basis requires parties and judges to figure out how to scale back litigation activity to account for the effects of their case on the overall level of court congestion. It is simply unrealistic to think that parties and judges in individual cases have the information or motivation to even begin such a calculation.

Second, even though judges are constantly and adversely affected by court congestion, they lack sufficient incentives to reduce it. The effort of a single judge to reduce court congestion is itself a positive externality; it redounds to the benefit of all, while the costly effort is borne entirely by the individual judge.

Third, and more subtly, if we are concerned about modifications to procedure having negative effects on the court and third parties, then judicial oversight of procedure on a case-by-case basis means that judges must consider the systemic effects of procedural flexibility in every case. But judges doing this is itself a burden on the system!

---

49 *See id.* at 1605–06.

50 *See* FED. R. CIV. P. 16 advisory committee's note to 2015 amendment; FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

51 *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

52 *See* FED. R. CIV. P. 1 advisory committee's note to 2015 amendment.

53 *See* FED. R. CIV. P. 11 advisory committee's note to 1983 amendment.

Markets could potentially address some of the misalignments that arise under current procedure, which relies heavily on mutual agreement by the parties for flexibility in case management and discovery. First, and most obviously, neither parties nor courts currently have incentives to adjust their behavior in individual cases to account for adverse effects on court congestion. A pricing mechanism can account for the systemic cost of congestion by making parties pay for more procedure. Second, under current rules, a party that needs to deviate from procedural defaults but faces an uncooperative, stonewalling opponent cannot turn elsewhere to bargain for more or different procedures. In a market where procedures are tradable across cases, however, parties will not be beholden to their (stubborn) opponents. This will reduce gamesmanship and holdup behavior. Markets replace the bilateral monopoly between the parties with a multiparty, competitive environment that reduces strategic externalities. Third, and relatedly, under current procedure, the only recourse to a party facing a stonewalling opponent is to seek an order from a court. This increases the burden on judges and congests courts. With markets, courts would have less need to review procedure-modifying contracts for one-sidedness or unconscionability. Parties will be able to obtain their preferred bundle of procedures in a competitive, open market.

Further, although market-based approaches would impose epistemic challenges on regulators—who would have to assign prices or set aggregate quantity limits on procedures—we believe that these challenges can be overcome. In particular, a cap-and-trade approach that sets aggregate quantities creates a lighter epistemic burden than setting prices or fees for procedures directly (and it may be more politically palatable too). The current number of appeals or jury trials or depositions is a measurable quantity. Rule makers need only make judgments about whether to increase, decrease, or leave unchanged the aggregate, status quo quantity.

To be sure, any attempt to regulate total quantities or prices for procedural rights is a fraught undertaking. As noted above, the normative underpinnings of procedure are highly diverse and hotly contested, and any attempt at regulation by cap-and-trade or auction would only sharpen these debates. By focusing on aggregate targets for quantities (such as total numbers of motions) rather than prices, our proposed approaches may invite less controversy than explicit taxes and fees for procedure. But we recognize

that framing the solution in terms of quantities rather than prices only goes so far. Still, our view is that normative debates about the exact justifications and rationales for procedure need not be resolved in order to implement our proposals. There are likely many aspects of procedure where some consensus exists. For example, it may be uncontroversial to set lower targets for the aggregate number of motions for reconsideration.[54]

Of course, our proposals need not reduce aggregate quantities of procedural entitlements. The move that is least likely to be controversial is to maintain the status quo in the aggregate. Even if the aggregate cap (of motions, depositions, or whatever) is identical to the status quo, the ability of parties to reallocate procedures across cases will address the concerns about strategic holdup and the judicial-decision-making burden noted above.

We recognize that designing markets in procedure would be an extremely complex task. For example, establishing a cap-and-trade system requires answering the question of how (and, specifically, to whom) to allocate the initial endowments of procedure. The obvious answer is simply to give everyone who files a lawsuit a pro rata bundle of procedural entitlements. But conditioning an endowment of tradable procedural rights on participation in litigation might create incentives to increase activity levels: some parties might file collusive lawsuits whose only purpose is to obtain and then sell the procedural rights that come with the suit. We believe that this concern is manageable—after all, filing a lawsuit is not free, and filing a frivolous suit is sanctionable—but there are also alternatives to cap-and-trade for creating a market, such as a "universal endowment of procedural rights."[55]

We have shown, in a prior article, that a different way to allocate procedures is by auction. This would treat the capped amount of procedure not as credits to be allocated to individuals but as a public resource to be auctioned off. The auction process, plus a freely trading secondary market, would ensure that procedures would be available to all litigants at prices that would force

---

[54] *See* Avraham & Hubbard, *supra* note 9, at 929.

[55] By that we mean to endow every citizen with an allocation of procedural rights, either to use in the event of litigation or to sell. Although this seems far-fetched, our previous paper noted that one could imagine a world in which well-developed, low-transaction-cost markets for procedural rights exist such that every person who has no interest in litigation can cash in their annual, decadal, or even lifetime endowment at an online store. *See id.* at 927–28. But this scenario involves a lot of shuffling around of rights among hundreds of millions of people, most of whom will never directly use the court system.

them to account for their impact on the system as a whole. Accordingly, litigants would purchase the procedure only when it would be cost justified to do so.[56]

The auction system avoids the problem of allocating initial endowments and the possibility of inviting gamesmanship. The challenge for the auction approach, however, is ensuring that the distributional effects of the system are progressive rather than regressive. An auction of procedural entitlements would offer distributional benefits if, for example, the revenue from the auction permits a reduction in filing fees or improved subsidies for low-income plaintiffs. Further, as a practical matter, the cases that demand the greatest share of the courts' time and involve the greatest procedural complexity are not cases brought by impecunious plaintiffs—they can't afford to litigate that way anyway—but by large corporations and powerful, well-heeled plaintiffs' firms. As with cap-and-trade, the costs of pricing procedural rights will be borne by those who can better afford it (and who already exercise the lion's share of such rights); unlike cap-and-trade, the auction method does not create a potential incentive to file bogus suits solely to cash in on the procedural endowments that come with it.[57]

In other words, the costs of paying for additional procedure in a market-based system would be disproportionately borne by wealthy and sophisticated litigants—the same litigants that consume a disproportionate amount of court time today but who do not have to pay extra for the extra attention that they receive. And the revenue raised can be used to subsidize plaintiffs with few resources or fund claims that serve the public interest. In this way, market-based solutions to systemic or strategic externalities can, in turn, provide funding for subsidy-based solutions to public-goods externalities.[58] We explore these possibilities below as we elaborate on how procedural flexibility can address different externalities across different cases and procedures.

---

[56] *Id.* at 928–29.

[57] One could also imagine that it would facilitate the development of procedural brokers, market makers who buy up huge blocks of rights and resell them at the retail level for litigants as they need them, further reducing the epistemic and transaction costs of more efficiently allocating procedures to cases. *See id.* at 928.

[58] *Id.* at 948.

* * *

The spectrum of procedural flexibility provides a toolkit for solving the externality problems we have identified. We may slide along this scale to find the best fit for each case or procedural device, with the goal of identifying the degree of party and judicial control and the payment mechanism that best addresses the externalities created by those procedures. With this toolkit in hand, we now turn to our framework for matching the externalities with the forms of flexibility that best address them.

IV. A THREE-DIMENSIONAL FRAMEWORK FOR PROCEDURAL DESIGN

Our most ambitious step is bringing together the three strands of the literature into a single unified theoretical framework that can produce a new understanding of the legal terrain. To do this, we leverage the fact that each strand of the literature corresponds to a focus on a different type of externality, as we identified in Part II. Our analysis proceeds in three steps.

First, in Part IV.A, we discuss how different forms of procedural flexibility are better suited to address different types of externalities. For example, public-goods externalities are often (but not always) well suited for command-and-control regulation—i.e., rules limiting discretion (if any) to the judge—while system externalities may be amenable to market-based solutions, such as pay-per-use or even tradable credits for procedures.

Next, in Part IV.B, we construct a three-dimensional graphical model—literally a cube—for visualizing how the three types of externalities can interact in the context of a particular type of procedure or type of case. The key idea here is that the interests at stake in each strand of the literature are not diametrically opposed. Rather, they each represent different dimensions of externalities—more of one externality doesn't necessarily mean less of the others. This means that some questions in procedure may not seriously implicate *any* of the externalities that motivate procedural design, while other questions may implicate *all* of them.

We illustrate this by treating each type of externality—system, strategic, and public-goods—as a distinct axis or dimension in three-dimensional space. We can then locate a particular type of procedure or type of case in this 3D space, depending on which externalities are at stake. For example, the question of whether judicial decisions should be made public or revealed only to the

parties has major implications for the public-goods quality of litigation but may have relatively small impacts on system externalities like the length of court proceedings or on strategic externalities like parties using procedure to run up opponents' costs.[59]

Finally, in Part IV.C, we use the cube to identify the best choices for procedural flexibility depending on the combination of types of externalities involved. To continue the example from above, if the question is publicity of judicial decisions, the degree of flexibility should reflect the fact that the public-goods externality is large, while the other externalities may be modest. As we will argue, judicial control—inflexibility—may be the best response to this externality. This is, of course, what we observe in practice—judges decide, often upon parties' requests, whether their decision will become public. In this example, our theory agrees with practice. In other instances, such as some forms of discovery, our theory will point to a radical departure from current practice—such as adhering to market-based or pay-per-use mechanisms.

After constructing the cube and discussing its implications for procedural design, we then turn in Part V to (very tentatively) consider further potential policy implications of our analysis.

A. Different Forms of Flexibility Address Different Types of Externalities

Let's begin by taking the types of externalities one at a time and matching them to the forms of procedural flexibility that will tend to be best suited to address them. (In the next Section, we will then consider the externalities together.) For each type of externality, we will consider examples at both the "case level" (what kinds of cases will involve this type of externality) and at the "procedure level" (what kinds of procedures will implicate this type of externality).

Once we recognize that the concerns that animate procedural design represent different types of externalities, we see that the considerations that go into questions of procedural design are familiar ones. First, giving an actor control over the choice of procedure allows that actor to protect his interests, and excluding an actor from control over procedure means that those with control

[59] Of course, in some cases, whether the decision of the court is public may well drive parties' strategy, generating strategic externalities and even system externalities.

can externalize costs onto him. For example, giving judges discretion over procedure allows judges to account for system externalities (especially congestion and third-party costs) among cases in their courtrooms, to protect weak parties from negative strategic externalities imposed on them, and to protect the public from being denied the public-goods externalities embedded in good precedent. However, it does not protect the wider court system from judges externalizing spillover costs from their courts to others.

Second, including more actors in agreeing upon procedure raises the transaction costs associated with bargaining (for parties) and decision-making (for judges). Procedural flexibility that involves the parties and judges reaching agreement maximizes transaction costs. Thus, externalities with diffuse, system-wide effects can be addressed at lower cost through market-based regulatory approaches, such as cap-and-trade, cap-and-auction, or Pigouvian fees.

As we argue below, these considerations mean that, at least in general, markets in procedure do well with system externalities. As will seem intuitive to most economists, we will argue that market-based mechanisms permit a better allocation of judicial resources than any attempt by judges to optimally manage, one at a time, hundreds of thousands of individual cases. But markets require more nuance when considering strategic externalities and public-goods externalities, which often depend on case-specific factors rather than system-wide conditions. This explains why, in an era of market-based regulation, the approaches we identify still seem unintuitive.

1. System externalities.

First, consider system externalities. This type of externality includes the effects of a case on cost, congestion, delay, and the like for third parties and the court system as a whole. At the case level, cases most likely to affect system externalities would include complex mass litigation and class actions—cases that involve extensive motion practice and judicial involvement (but which can also generate economies of scale through aggregation of claims). At the procedure level, any procedure that provides for motion practice and hearings has the potential to burden the court, and therefore increase congestion and delay in the entire system. Parties have an incentive to file motions when they expect to gain from a favorable ruling, notwithstanding any negative effect this has on the court's ability to give justice to other

parties in other cases. Like a traffic jam on a busy highway, every driver has a reason to be driving, but every driver wishes that the other drivers weren't on the road.

As noted above in Part II.A, system externalities are not limited to congestion externalities. Even if judges and parties perfectly accounted for the congestion costs of procedure within their individual courts and cases, there are still spillover effects on other courts and third-party effects on persons not even in court. An example of the former is a court that reduces congestion on its docket by dismissing cases for lack of jurisdiction, improper venue, or forum non conveniens. Congestion isn't eliminated so much as moved elsewhere. An example of the latter is third-party discovery. A deposition of a nonparty may be very valuable to the parties, but it is nothing but a burden on the deponent. If the parties do not compensate the deponent, then they do not internalize that cost.

These externalities are not unlike externalities familiar to economists and policymakers in other contexts. And like externalities in other contexts—traffic, pollution, and so on—they involve harms that are largely fungible. In terms of the system externality at issue, it doesn't matter which cars are on the road, just the total number of cars on the road. It doesn't matter who is emitting carbon dioxide into the atmosphere, just the total carbon footprint. And it doesn't matter which cases have hearings, just the total amount of court time consumed.[60]

For these reasons, market-based solutions or prices are optimal policy responses to system externalities. Just as a cap-and-trade system for sulfur emissions essentially eliminated acid rain in North America (and is being used in some jurisdictions for carbon emissions),[61] we might imagine that a cap-and-trade system for the total amount of court time in hearings or the total number of pages of filings would reduce system externalities: parties who "hog" court time would be forced to pay for it while parties who use less court time would be monetarily rewarded. Alternatively, just as toll lanes are a solution for traffic congestion, activities that increase system externalities should be priced with fees to disincentivize their use (on the margin).

---

[60] As we will see later, the nature of cases becomes important when we deal with public-goods externalities.

[61] *See, e.g.*, *Cap-and-Trade Program*, CAL. AIR RES. BD., https://perma.cc/M4JH-NUKD.

Notably, these suggestions are radical relative to current rules, which focus on proactive judicial oversight and case management to ensure that cases do not drag on or consume excessive court time.[62] In our view, this solution is paradoxical: If the problem is that the excessive devotion of court time and attention to problematic cases leads to cost and delay, how can the solution be for the court to devote more time and attention to those cases? Existing rules and exhortations from judges and rule makers[63] for better case management and party cooperation do not work because they *cannot* work. What is needed are forms of procedural flexibility that address the misalignment of incentives caused by the system externality.

2. Strategic externalities.

Second, consider strategic externalities. This type of externality includes the deliberate imposition of costs on a party opponent for the purpose of gaining strategic advantage in litigation. At the case level, this occurs when the case itself is the weapon (think of SLAPP suits).[64] More germane to procedural design, at the procedure level, strategic externalities arise in contexts such as party discovery, where a discovery request is made not with the goal of uncovering facts but simply to pressure the other side into settlement to avoid the costs of responding.

The externalities from gamesmanship are both easier and harder to address than system externalities. They are easier because they do not extend beyond the individual case. In this respect, they do not require system-wide solutions because the impact of the externality is at the case level, not the court level. But they are harder because the harms are not fungible in the same way as system externalities. A one-hour hearing in one case versus another case is an hour of the judge's time either way. But a broad discovery request in one case may reflect the strategic imposition of costs while in another case it may be uncontroversially appropriate.

---

62 *See* FED. R. CIV. P. 26 advisory committee's note.

63 *See id.*; Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 357–63 (D. Md. 2008) (discussing problems associated with abusive discovery).

64 *See generally* Robert Abrams, *Strategic Lawsuits Against Public Participation (SLAPP)*, 7 PACE ENV'T L. REV. 33 (1989); Nina Golden, *SLAPP Down: The Use (and Abuse) of Anti-SLAPP Motions to Strike*, 12 RUTGERS J.L. & PUB. POL'Y 426 (2015). *See also* Gilson, *supra* note 20, at 875–76 (analyzing the use of "litigation not to vindicate a substantive legal right, but as a strategic device to secure a business advantage by imposing costs on the other party").

Parties' control is an obvious way to make sure that one party cannot unilaterally impose costs on its adversary. This is why very few deviations from the default civil procedure rules can be done unilaterally. As long as the parties are both equally rational, sophisticated, and resourced, parties' control might be enough. In contrast, any asymmetry along these dimensions might call for either judicial control to protect the weak party or the use of price mechanisms to prevent the strong party from raising his rival's costs to make him surrender the case.

How can we use the price mechanism to address strategic externalities? The goal in addressing strategic externalities is, as with any externality, to internalize the costs imposed. We distinguish between three levels of externalities. For small strategic externalities, we think that fixed compensation can work. If a party wants two more pages for its briefs, the strategic externality is quite small, and a fixed compensation to the other party (which could be set in a government-provided menu) might be enough for the purpose of internalization.[65]

For midlevel strategic externalities, our suggestion is what we call "tethering"—tying together the fortunes of both parties so that imposing unnecessary costs on an adversary is self-defeating. For example, some scholars have proposed—and some courts have experimented with the idea—that the requesting party in discovery must compensate the producing party for its costs of production beyond a certain threshold.[66] Here, the compensation might not be fixed but rather based on the party's actual costs.[67]

Lastly, when the strategic externalities are large, *judicial control*—either separate from or together with the use of pricing—is a viable option. But caution is warranted here: to the extent

---

65 Of course, a fixed fee to the government might be needed to compensate for the system externality too.

66 *See* Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 341–43 (E.D. Pa. 2012) (requiring the requesting party to pay for costs of additional discovery after extensive discovery had already taken place); Lawson v. Spirit Aerosystems, Inc., No. 18-1100, 2020 WL 3288058, at *10–13 (D. Kan. June 18, 2020) (shifting costs of additional discovery to requesting party after review revealed that additional discovery was redundant with prior productions).

67 As before, a fee might be needed to reimburse the government for system externalities. Note that the distributive effects of the expense of this proposal to requesting parties are not a reason to reject it. Maldistribution of resources in the civil justice system is itself a public-goods externality and can be addressed through subsidies. Poor parties could receive lump-sum credits for the cost of discovery (and those who do not or cannot use them can sell those credits on the market). But a tethering solution increases the marginal cost of additional discovery, which should disincentivize impositional discovery by the rich and poor alike.

that judicial supervision of party gamesmanship becomes a burden on courts, this would replace a strategic externality with a system externality. Below, we show how our theory of civil procedure can deal with simultaneous externalities.

Current approaches to strategic externalities are not entirely out of step with our analysis here. As noted above, some courts have undertaken active judicial supervision of cases to ward off strategic behavior, and a few courts have even experimented with "tethering" by requiring the party imposing costs to also compensate (in part) for those costs. In the main, however, courts largely take a hands-off approach to discovery and many other party-driven aspects of strategic litigation. Our analysis, therefore, is an invitation to consider more creative alternatives to address strategic externalities.

3. Public-goods externalities.

Third, consider public-goods externalities. As we've explained, this type of externality implicates the impact of the courts on society as a whole through legal precedents that clarify the law, provide future actors with certainty regarding the legally expected behavior, legitimize the authority of the civil justice system, and so on. At the case level, a case implicating public-goods externalities would be, for example, a suit raising a novel legal question of general importance. At the procedure level, we might think of matters that implicate court legitimacy but that individual parties don't have a stake in, such as judges wearing black robes.[68]

These externalities are the hardest to address through party control over procedure. By their nature, public-goods externalities affect the court system as a whole and, even beyond that, society as a whole. As a consequence, we cannot expect one or both parties to fully account for these benefits, even if each party fully internalizes the costs and benefits of their actions on the other parties, the judge, or the court system as a whole. This is the key feature of public-goods externalities that procedural design must account for. The first lesson in this context, therefore, is that unilateral action, agreement between the parties, or even agreement

[68] More generally, the formalized rituals of judicial hearings and trials can be understood as serving the public-goods interest in the legitimacy and authority of courts. The fact that arbitration is usually specifically designed to do away with these elements of court procedure reflects its suitability for resolution of disputes that concern only the parties before it.

among the parties and the judge will be inadequate to address the externality. If parties are to be involved in exercising flexibility, there must be fees or subsidies attached to align their incentives with the public interest. For example, if parties prefer that the decision be unpublished or that their settlement (approved by the court) remain secret, they might have to compensate the court for the system externalities, the treasury for the lost public-goods externalities, or some combination of the two.

Although it can be argued that all cases create public goods to some extent, some public-goods externalities are particular to individual cases. For example, most cases do not raise legal questions that will give rise to new precedent, but some will. For these types of externalities, fixed subsidies or one-size-fits-all mandates will not work well. In this context, judicial control may be necessary, so the judge should have discretion to flex into or out of a procedure based on the presence or absence of the public-goods externality.[69]

For example, if a case is a good vehicle for setting valuable precedent, we might imagine a rule that encourages amici curiae to provide the judge with as many good legal arguments on both sides as possible. We can even imagine a rule that says that the judge can overrule the parties and have control over whether the case can settle.

Subsidies and judicial control can be combined, such as by giving judges discretion to award subsidies to cases raising important legal issues. For example, when courts identify a case with a significant public interest component, they could provide more pages for the briefs, more oral argument time, funding for attorney fees, waiver of court fees, funding for expert witnesses, and even the right to a second appeal.[70]

B. Externalities in Three Dimensions

Now that we have discussed each type of externality in isolation, we bring them together, as we did before, by discussing them

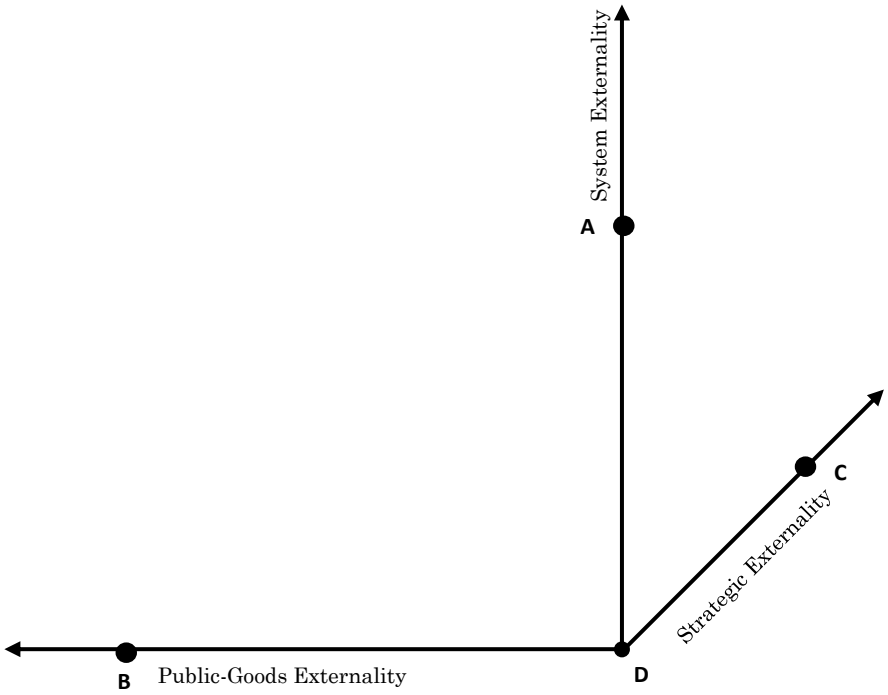
---

[69] We recognize that even judges' incentives are not ideal in this context because they do not internalize the larger public benefit. But to the extent that public goods are idiosyncratic to certain cases, we believe that judges' incentives are better aligned than parties' incentives to correctly identify those cases with the distinctive public-goods value.

[70] Subsidizing expert witnesses or having discretion to grant a free second (or third) appeal are unfamiliar policy options in the United States, but these policies are codified law in Israel for cases involving the public interest. *See infra* note 78 and accompanying text.

both at the case level and at the procedure level. Our key claim here is that the externalities are not opposites, such that procedures with more of one type would have less of the others. Rather, each type of externality runs along a separate dimension, such that any given case or any given procedure could have more or less of each externality. We illustrate this with a three-dimensional representation of the three externalities in Figure 3. Each arrow represents increasing externalities in a given dimension. The farther one goes along an arrow, the greater the risk of significant externalities and the greater the need for procedural design to address that externality.

FIGURE 3: THE THREE DIMENSIONS



Point A in Figure 3 represents a situation with large system externalities but little gamesmanship or societal significance. We can think of this as a factually complex but legally uninteresting task for the court. But we need not limit ourselves to court settings. When there are large system externalities but few concerns about gamesmanship or the production of public goods, alternatives to court may be optimal. Courts have elaborate procedures

to control party behavior (i.e., gamesmanship) and generate precedent and public proceedings (i.e., public goods), but these can come with cost and delay (i.e., system externalities). Alternatives to courts, such as statutory schemes like workers' compensation or victim-compensation funds, can operate with streamlined procedures to reduce costs when strategic and public-goods externalities are not at stake. Perhaps the purest example of a procedure at Point A is the September 11th Victim Compensation Fund of 2001,[71] a statutory scheme created by Congress in the wake of the September 11 attacks to provide government-funded compensation to the victims of the attacks in lieu of litigation. In this context, there was little concern about gamesmanship (given that the victims were an identifiable group) and few public-goods externalities (given that the wrongdoers—Al Qaeda—were beyond the reach of civil process, making deterrence irrelevant). But calculating individual damages would be expensive, and litigation against deep-pocketed potential defendants (such as United Airlines and American Airlines) would be complex and highly uncertain.

Point B describes a scenario with large public-goods externalities and little or no system or strategic externalities. The scenario implicates legal questions of broad interest but is otherwise simple and has few opportunities for gamesmanship. Many issues in civil procedure that are resolved by the Supreme Court fall into this category. A simple example of this is rules governing the calculation of filing deadlines in federal court. While some deadlines are easy to calculate, complexities sometimes arise that require judicial interpretation. The Supreme Court, for example, has sought to clarify when a late-filed amendment to a pleading "relates back" to the original pleading so that it is timely.[72] What is important is that all parties have a clear rule. Litigation over the rule isn't particularly complex or strategic; rather, the parties simply need an answer.[73]

---

71 Pub. L. No. 107-42, § 401, 114 Stat. 230 (codified at 49 U.S.C. § 40101).

72 *See* Schiavone v. Fortune, 477 U.S. 21, 30–32 (1986); Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 548–54 (2010).

73 This situation arises outside the procedural context as well. An example of this is *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202 (1938), the very first case to apply *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)—in fact, just one week after *Erie* was decided. The issue in *Ruhlin* involved the interpretation of the "incontestability clause" that was present in many life- and disability-insurance contracts that New York Life had issued. The defendant New York Life prevailed on appeal, and the plaintiff Ruhlin petitioned for certiorari, citing a circuit split. New York Life, notably, did not oppose the petition. *Ruhlin*, 304 U.S. at 205. More important to the insurance company than winning the case, it would seem, was having the Supreme Court announce a clear rule for all the federal courts.

Point C describes a scenario with large strategic externalities and little or no public-goods or system externalities. We can think of this as a simple—but big-money or otherwise contentious—dispute (either an entire case or a specific issue within a case) of no societal importance but which creates opportunities for gamesmanship. Perhaps the best example for Point C is a contentious family law dispute, such as an acrimonious divorce proceeding that doesn't involve extensive hearing time or otherwise clog the courts but that does involve impositional discovery requests, harassing motion practice, or the like.

Importantly, each type of externality, and thus each arrow, points in a different direction. Point D is at the base of each arrow, and we can think of it as the origin in a three-dimensional space defined by three axes. Point D represents a distinctive set of litigation scenarios: those with few externalities of any type. At the case level, some entire categories of cases might fit here, such as small-claims proceedings in specialized courts with simplified proceedings or routine arbitrations among repeat-play commercial actors. At the procedure level, this could include routine aspects of procedure, such as scheduling the order of witnesses or issuing interrogatories.

Notably, small-claims court and commercial arbitration are both known for their informality and flexibility of procedure.[74] This is not only the current state of practice but also exactly what our framework would suggest. When all three types of externalities are low, there is no need to worry about misalignment between party interests and larger systemic or societal interests. Whatever works best for the parties or the arbiter should be allowed because the only goal here is dispute resolution between the parties. In this context, therefore, so long as the disputed issue or even the entire case is not socially important and deviations from the procedural rules cause no externalities, it makes sense for *party control* to be the order of the day; the law is merely a default. That is why arbitrators don't wear black robes and small-claims courts don't publish their opinions.

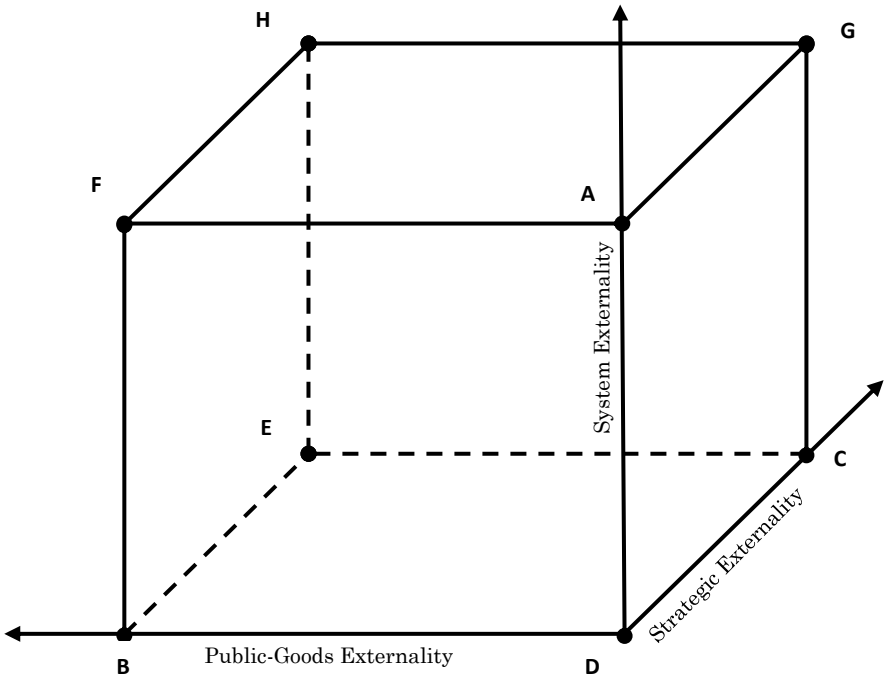
Of course, not all disputes or procedural issues fit neatly into only one type of externality (or none at all). Indeed, what makes procedural design so challenging is precisely that distinct interests—sometimes many distinct interests—are all implicated by

---

[74] Eric H. Steele, *The Historical Context of Small Claims Courts*, 1981 AM. BAR FOUND. RSCH. J. 293, 336–37; Leslie G. Kosmin, *The Small Claims Court Dilemma*, 13 HOUS. L. REV. 934, 955 (1976).

the same procedure. For example, high-stakes, complex factual issues tend to involve broad and expensive discovery (and thus potentially impositional discovery requests) and extensive motion practice (some of which may be driven by strategic externalities rather than the merits of the claim), both of which also require time-consuming judicial supervision, causing system externalities. Our three-dimensional space provides a canvas on which we can visualize all the different possible combinations of externalities working at the same time. Figure 4 builds on Figure 3 and presents the cube—a way of locating any procedural issue in a conceptual space based on the types of externalities it implicates.

FIGURE 4: THE CUBE



Point E describes a scenario with large public-goods externalities and large strategic externalities but few system externalities. This is a dispute that is simple but raises important issues and, despite its simplicity, can give rise to gamesmanship—perhaps because the stakes are high or because there is a resource imbalance between the parties. At the case level, we could imagine a facial challenge to the constitutionality of a law where there are no factual issues and the legal issues are straightforward but where the parties play games with forum shopping or amicus

briefs. At the procedure level, we might think of some issues that implicate court legitimacy but can be gamed by the parties, such as requests that the court rely only on affidavits, requests to limit the number of witnesses, requests to have no cross-examination of witnesses, or even requests that the court flip a coin to resolve some issues (all of which reduce system externalities). These may seem unlikely in current practice, but consider confidential settlements: these deprive the action of transparency and the possibility of norm creation, and they may also implicate concerns about parties using confidentiality to impose costs on (or extract money from) their counterparts.

Point F describes a scenario with large public-goods externalities and large system externalities but few strategic externalities. This is a dispute that is complex and raises socially important issues but, despite these factors, doesn't involve much gamesmanship. At the case level, we might think of a case that is factually simple, but which raises very sensitive and novel legal issues, such that public-goods externalities are high and (for the very same reason) the burden on the court is high. For example, constitutional-tort test cases—especially if the government is the defendant and strategic externalities are therefore expected to be relatively low—may fit the mold here. At the procedure level, judicial opinion writing might fit into this category. Judicial opinions are a source of public-goods externalities—they are how lawyers and the public are informed about the law by courts—but they are also a time-consuming part of a judge's work.

Point G describes a scenario with large system externalities and large strategic externalities but few public-goods externalities. This is a dispute that is complex and subject to gamesmanship but doesn't implicate legal precedent. At the case level, we expect that most complex litigation (including class actions and MDL) is going to fall in this category. Highly contentious—even if not complex—cases can further involve the imposition of high costs on the parties and the courts. Some complex family law and trust law court battles typify this category. Imagine estranged family members disputing a large estate and related trusts after a wealthy family member dies. Like the simple but acrimonious divorce example for Point C, the proceedings here involve strategic externalities as the parties attempt to wear each other down with discovery and motion practice. But unlike the divorce example, the complex trusts and estates context requires that the court

interpret a dense web of legal documents, appoint special masters, and conduct an accounting of trust assets, all of which generate large system externalities. At the procedure level, an example would be judge-time-intensive motions—like summary judgment motions or sanctions motions—especially if these require the judge to hand down a written opinion.

Point H describes a scenario where all types of externalities are substantial. Precedent or other public goods are at stake, the case is highly complex and burdensome on the court system, and the parties have occasion for gamesmanship. At the case level, you have blockbuster, cutting-edge class actions, MDLs, and impact litigation (which, by its nature, has broad social importance, high stakes, and high-intensity lawyering). At the procedure level, consider jury trials. They serve many public values, but jury trials are expensive and a playground for gamesmanship by sophisticated lawyers.

By locating a given issue within the cube, we gain insight into how procedural design can be used to address the externalities that are relevant to that issue. We now turn to this.

C. Procedural Design in Three Dimensions

In Part IV.A, we discussed how each type of externality called for a potential mix of forms of procedural flexibility that were suited to the scope of the externality—for strategic, within one case; for system, across cases; and for public-goods, extending beyond the courts. And in Part IV.B, we noted how different types of cases—and different procedures within cases—can implicate zero, one, two, or all three types of externalities. This raises the question: If different types of externalities call for different types of procedural flexibility, how does one decide what form of flexibility, if any, applies to scenarios involving two or three types of externalities? The challenge here is to identify a form of flexibility that is appropriate for the relevant externalities. So, for example, if judicial control is appropriate at Point B (public-goods externality only) and at Point C (strategic externality only), then we would deem it appropriate at Point E (public-goods and strategic externality).

For some points in the cube, this is straightforward. For Point E, as just noted, judicial control is well suited for many public-goods and strategic externalities. Solutions reliant on prices or subsidies are tricky here because the public-good aspect points toward subsidies but the strategic aspect points toward prices and

taxes. Nonetheless, pricing and subsidies may be appropriate. For example, amicus curiae briefs may be valuable in a case involving an important legal issue, but a court may be concerned about parties evading limits on the length of briefs by recruiting additional amici in order to file multiple briefs with related arguments. Judicial control (simply refusing to accept additional amici) is one option, but requiring parties to pay a fee to the court or to compensate their opponents in order to raise the limits on amici is an option too. The fees would net out both the desire to subsidize amici in order to increase the quality of the judicial process (public-goods externality) and the need to disincentivize excess briefing (system externality). The compensation will cause the party paying for the amici support to internalize the strategic externality it potentially imposes on the other party by evading limits on briefs' lengths.

Likewise, for Point G, both system and strategic externalities are amenable to market-based regulation that forces parties to internalize the costs that their actions impose on others. Although judicial control is well suited for strategic externalities, it is not well suited for system externalities—remember that addressing system externalities, almost by definition, requires efforts to reduce judicial involvement.

But what if our prescriptions for different externalities point in entirely different directions? This occurs where system and public-goods externalities are both substantial—at Points F and H on the cube in Figure 4. In some respects, these externalities can both be managed with price-based mechanisms, even though the externalities point in different directions (fees versus subsidies). For example, should filing fees for a complaint in a civil action be positive or negative? From a public-goods perspective, there may be value to incentivizing litigation. But from a system-externalities perspective, additional filings add to court congestion. In principle, these countervailing considerations can be netted out. (The status quo, which involves a partial subsidy for case filing, may reflect such a balancing.) One could take the same approach to procedures that apply generally across cases that implicate both public goods and court congestion, such as hearing time or jury trials, and require that parties requesting those procedures pay the court system a reduced fee while fully compensating their opponents.

But the difficulty here comes from public goods that depend on the circumstances of the case—test cases for precedent, class

actions of broad social significance, or the like. These cases generate large positive externalities to the legal system and society but also consume court attention and resources. The net benefits of judicial attention to these cases cannot be priced ex ante because they depend on the case. Some precedents are more important than others. Consequently, we must rely on ad hoc judgments, by judges, about whether a given case merits extra attention due to its importance. In other words, the form of flexibility that is likely most appropriate here is judicial control, if even to determine whether specific cases should be subsidized by the state.

Nonetheless, we hasten to add that from the perspective of a rule maker (who must ask what solutions will work for the court system as a whole), the difficult questions at the intersection of large public-goods externalities and large system externalities are narrow in scope. This is because most cases simply don't have particularly large implications for society. Even among complex litigation, MDLs, and class actions, most are of concern almost exclusively to the parties, class members, and lawyers.

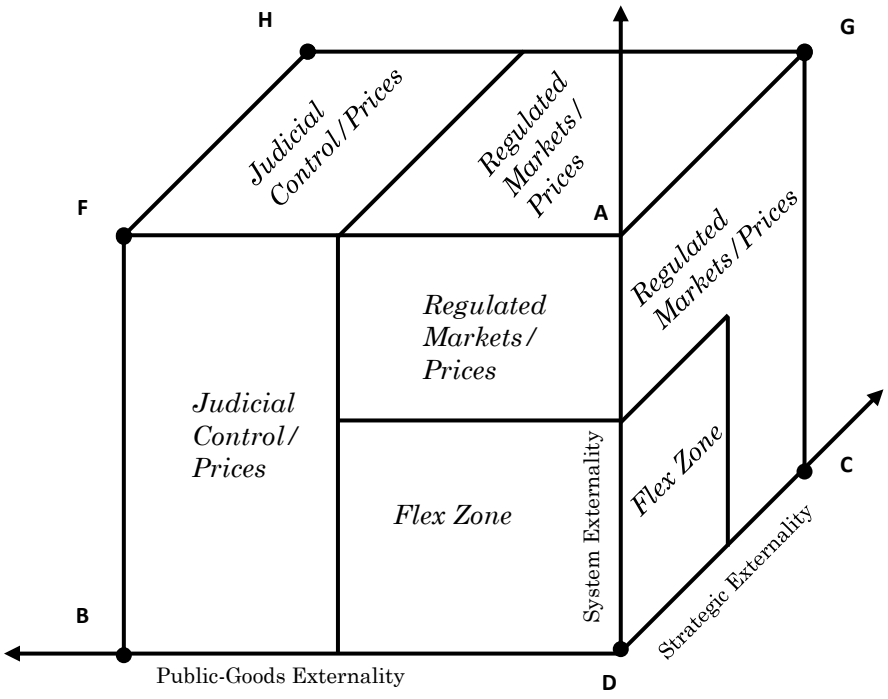
We have now identified—admittedly, at only a high level of abstraction so far—preferred forms of procedural flexibility for cases and procedures depending on which externalities they implicate (i.e., where they fall in the cube in Figure 4). What we see is that when public-goods externalities are large (the region bounded by Points B, E, F, and H), party control or market-based mechanisms may be useful for some procedures, while for others procedural flexibility should be limited to judicial control. Such judicial control would not, however, be limited to what we are used to (accepting or rejecting motions) but may include judges awarding compensation between parties, waiving filing fees, or even awarding ad hoc subsidies.

When public-goods externalities are not paramount, however, markets and prices—although not often used in current practice—are well suited to address system externalities and strategic externalities (Points A, C, and G). And when no externalities are large (Point D), there is no need to constrain procedural flexibility or introduce market-based solutions. Within any given case, parties should have flexibility to alter procedure by agreement.

Figure 5 summarizes our conclusions from this Part. The "flex zone" represents the area where party control dominates. It is where all types of externalities are small or medium. The entire

region of the cube where the public-goods externality is high requires judicial control—rather than party flexibility—although pricing (including negative prices, i.e., subsidies) may be an option for regulating party choices (such as filing suit) that affect public goods. When system externalities or gamesmanship are primary concerns, however, our analysis recommends consideration of more innovative approaches—some mix of markets and prices could be employed.

FIGURE 5: PROCEDURAL FLEXIBILITY AS A FUNCTION OF EXTERNALITIES IN CIVIL PROCEDURE



To be clear, these "zones" are merely generalizations to organize ideas about the relationships between externalities and forms of procedural flexibility. When we leave the realm of abstraction and enter the realm of concrete policy and specific procedures, much more nuance is required. For specific procedures, flexibility (not inflexibility) may be appropriate even when public goods are paramount. Conversely, judicial control rather than markets may be best to address certain system externalities. The devil, as is usually the case, is in the details. But, as we are not afraid of the devil (!), we therefore devote the remainder of this

Article to beginning a conversation about specific procedures or practices and how our analysis can inform policy choices on the ground. We use our cube as a general starting point but then prescribe remedies based on the nuanced reality of specific issues in civil procedure. As we will show in Part V, current practice sometimes reflects a sound, implicit understanding of how procedural flexibility can address externalities in procedure. Other times, our suggestion is that innovating with markets or other novel mechanisms may offer a path forward for addressing dilemmas of procedural design.

V. POTENTIAL POLICY IMPLICATIONS

We emphasize that our theory of procedure is not merely normative but also prescriptive: it can speak to concrete policy choices embodied in specific rules of procedure. In this Part, we consider a handful of specific examples of real-world procedural rules. We did not choose those examples randomly but rather chose those over which there are active debates. We use three main examples to show how our framework can simplify or harmonize the analysis or identify potential procedural innovations that could mark a novel "third way" in polarized debates. Out of the three, our main example discusses class actions and MDL—two of the most highly debated procedural mechanisms currently applied by judicial systems. Class actions and MDLs are subject to contentious debate precisely because they involve many types of externalities, making them an ideal ground on which we can apply the framework brought forward in this Article.

A. Expert Witnesses and Amici Curiae

For some claims, current law requires parties to support their claims with expert opinions. In some states, a party can't file a medical malpractice case unless it has a physician expert supporting his claim.[75] Experts providing reliable scientific evidence confer a public-goods externality on the system; they help the court reach an informed and hopefully correct outcome that can serve as useful precedent. Requiring expert testimony may also reduce

---

[75] *See, e.g.*, 735 ILL. COMP. STAT. 5/2-622 (2013); IDAHO CODE §§ 6-1012 to -1013 (1976); N.Y. C.P.L.R. § 3012-A (MCKINNEY 1986). For a compilation of twenty-nine state statutes that require an affidavit of merit in medical malpractice cases, see Christine Funk, *Affidavits of Merit in Medical Malpractice Cases*, EXPERT INST. (June 23, 2020), https://perma.cc/GXV5-MEMN.

system externalities to the extent that it blocks or deters meritless claims that no expert could be found to support. At the same time, to the extent that parties engage in an arms race for expert opinions based on junk science, they also create a strategic externality. To cheaply reduce strategic externalities, we might expect courts to check the credentials of experts and evidence. For example, courts might look at the expert's record of scholarship and whether the research has been subject to peer review. Indeed, the standard established by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[76] does just that. Still, experts passing the *Daubert* standard and the cross-examinations that follow their testimony delay trials and impose costs on opponents and therefore create system and strategic externalities. The "battle of the experts" is a costly event—not just for the parties but for the system as a whole. Here we sometimes find courts appointing their own experts to avoid these particular system externalities.[77]

But why not do this more often? It seems to us that in most cases (e.g., a car crash with accident-reconstruction experts), there is little public-good benefit, other than perhaps educating the judge about relevant science that might apply in future cases. Strategic and system externalities loom larger than public-goods concerns in most of these cases. This suggests that the solution should entail less party flexibility and perhaps some regulation in the form of Pigouvian taxes and money paid to the other party. Because experts burden the system more than they benefit it in the typical case, this activity should be taxed.

In contrast, in cases with large public-goods externalities, the reverse would be true. We may want to invite nonparties to propose experts, perhaps via the mechanism of amici curiae. Or we can just have more court-appointed experts. And the price mechanism can work here as well, through subsidies instead of taxes. If this sounds far-fetched, it isn't. In Israel, there is government-sponsored funding worth 1.5 million NIS annually that covers experts in class actions that the fund committee finds to be socially

---

[76] 509 U.S. 579 (1993).

[77] For articles giving examples of state and federal courts appointing their own experts, see, for example, Stephanie Domitrovich, Mara L. Merlino & James T. Richardson, *State Trial Judge Use of Court Appointed Experts: Survey Results and Comparisons*, 50 JURIMETRICS 371, 375–77, 387–89 (2010); Shirley A. Dobbin, Sophia I. Gatowski, Rebecca J. Eyre, Veronica B. Dahir, Mara L. Merlino & James T. Richardson, *Federal and State Trial Judges on the Proffer and Presentation of Expert Evidence*, 28 JUST. SYS. J. 1, 11–12 (2007).

important—or, in the lingo of our framework, that generate large public-goods externalities.[78]

Indeed, it is worth considering the extent to which the discussion here applies to discovery generally, not just experts. A lot (probably most) of discovery has few public-goods ramifications but can be used for strategic reasons. This may help explain why the United States is an extreme outlier internationally in its use of party-driven discovery.[79] If strategic externalities are a major concern, parties should not have unilateral control over the procedure. Most countries utilize a system of court-directed discovery, which seems more consistent with our analysis. Nonetheless, court-directed discovery raises a different concern—a greater burden on the court, which generates system externalities. Thus, the U.S. approach to discovery, insofar as it is party driven, may reflect prioritization of system externalities over strategic externalities.[80] Party-driven discovery allows the court, in most cases, to withdraw from the litigation process for the entire phase from the end of pleading to the beginning of trial or summary judgment.

Nonetheless, experts may really be different. A notable distinction between expert discovery and other forms of discovery is that other forms of discovery are limited to the evidence that already exists. Experts are about creating new evidence, which has no limit in principle. For this reason, strategic-externality concerns may loom even larger. Hence, our focus is on experts here.

Perhaps an even more valuable method for the introduction of new information crucial for court rulings in high-stakes, high-public-goods externality cases is amicus curiae briefing. Indeed,

---

[78] Class Actions Law, 5776–2016, SH 2054 264 (Isr.). For discussion, see Eli Bukspan, *The Israeli Public Class Action Fund: New Approach for Integrating Business and Social Responsibility*, *in* THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS: AN INTERNATIONAL SURVEY 528, 532–35 (Brian T. Fitzpatrick & Randall S. Thomas eds., 2021) (noting that the fund serves to pay expert-witness fees to support socially important cases and guarantees legal fees imposed on plaintiffs—under the loser-pays rule—in unsuccessful cases).

[79] Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 301–07 (2002).

[80] Discovery was not originally envisioned by the drafters of the Federal Rules to pose significant opportunities for gamesmanship. *See* Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 931 (1976). Depositions—not document discovery—were seen as the centerpiece of discovery, and the Rules easily limit the abuse of deposition discovery through numerical limits. In other words, procedural *inflexibility*—rather than open-ended party control, which more accurately characterizes the discovery process for documents, tangible things, and electronically stored information. *Compare* FED. R. CIV. P. 30(a)(2)(A)(i) (limiting depositions, presumptively, to ten per side), *with* FED. R. CIV. P. 34(a) (imposing no numerical limits on requests for production).

in a court system with judicial precedent, a tension exists between the fact that an individual case resolves a concrete dispute between two parties and the fact that the decision sets a precedent that potentially affects future parties whose interests are not directly represented in the present suit. One way that courts address this tension between the public-goods externality of judicial precedent and the private incentives of individual parties is to permit nonparties to file amicus briefs. The main role of amicus briefs is to enrich courts with more and better legal arguments.[81] In principle, amicus briefs ensure that a court properly accounts for the broader effects of its decision on nonparties, thereby maximizing the public-goods benefit of judicial precedent.

Amicus briefs have a downside too. They exacerbate congestion caused by a proliferation of briefs and cause delay as timelines extend to accommodate them. Parties can use them strategically. A party seeking to evade word limits or to raise an opponent's costs of responding to arguments can recruit third parties to file amicus briefs. Such briefs might be written by the party itself and merely signed by the third party.[82]

These factors would lead us to expect a proliferation of amicus activity in high-stakes, precedential litigation, and that is what we see. The number of amicus briefs has increased dramatically over the past decades. In the U.S. Supreme Court alone, about eight hundred amicus briefs are filed each term (an average of about fourteen briefs per case).[83] This is an 800% increase from the 1950s and a 95% increase from 1995.[84]

If the public-goods value of amicus briefs is high, we should see courts citing those briefs, and it appears that they do. Indeed, Supreme Court Justices routinely cite amicus briefs, with many of them doing it in more than a third of their opinions, and one of them, Justice Elena Kagan, doing it (in the 2017 term) in two-thirds

---

81 Experts can sometimes inform the court about the law in other countries, and amici curiae can inform the court about relevant facts or technologies relevant to the case.

82 For a recent article describing how orchestrated and intentional the amicus world is, see generally Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901 (2016).

83 *Id.* at 1902.

84 *Id.*

of her opinions.[85] More importantly, briefs are often thought to exert influence on the Court's final rulings.[86]

Given that the benefits of amicus briefs must be weighed against their costs, we should expect the use of these briefs to drop off as the public-goods externality falls, such as when the court is lower in the legal hierarchy. Thus, it is not surprising that amicus briefs are so prevalent in the Supreme Court and less so in other courts. As a normative matter, since the public-goods externalities in the U.S. Supreme Court are large, amicus briefs should be encouraged (at least, up to the point where the incremental costs of more briefs balance the incremental benefits).

Indeed, our theory suggests that, even in the Supreme Court, there should be rules mitigating strategic and system externalities. The Supreme Court is a setting where all three externalities are potentially large. Thus, our theoretical framework suggests that parties should have less flexibility.[87]

Consistent with what our theory would predict regarding strategic and system externalities, the Supreme Court has issued (only recently, unfortunately) explicit formal guidance on the standards for filing amicus briefs.[88] The guidance announced rules that combat system and strategic externalities. To combat system externalities, the guidance explicitly provides word limits to the briefs, including a requirement that the amicus certifies compliance with the word limit.[89] And with respect to delay, the guide states that the Court will not entertain motions to extend various filing deadlines or to file a reply brief.[90]

Our theory, however, opens up new, more creative ways to combat system externalities. For example, one could imagine a cap on the total number of words allowed in all amicus briefs filed in a Supreme Court term and then have parties trade words within the cap (cap-and-trade). This would be an example of a scenario where market-based solutions may be appropriate even

---

85 Anthony J. Franze & R. Reeves Anderson, *Supreme Court Amicus Curiae Review: 'Friends of the Court' Roared Back in 2017-18 Term*, NAT'L L.J. (Oct. 16, 2018).

86 *See* Larsen & Devins, *supra* note 82, at 1954–55. Professors Joseph Kearney and Tom Merrill cite several cases where the court explicitly relied on arguments raised only in the amicus curie briefs. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 745 n.5 (2000).

87 *See supra* Figure 5, Point H.

88 SCOTT S. HARRIS, SUP. CT. OF THE U.S., MEMORANDUM TO THOSE INTENDING TO FILE AN AMICUS CURIAE BRIEF IN THE SUPREME COURT OF THE UNITED STATES (2019), https://perma.cc/QL2K-FPJ8.

89 *See id.* at 5.

90 *See id.* at 2–3, 6.

in a setting (the Supreme Court) where large public-goods externalities otherwise require a heavy dose of direct judicial control.

To combat strategic externalities, the guide requires parties' consent for amicus briefs, presumably enabling a party to signal to the Court its fears that the opponent is using the amicus briefs strategically.[91] In such a case, the Court itself will decide whether to accept the brief. The guide also requires the brief to include the interests of the amicus and to disclose the financial arrangements of the parties involved in the brief.[92]

As before, our theory opens up new and potentially more effective options to combat strategic externalities. For example, there could be a fee for filing an amicus brief that would balance the (negative) system and the (positive) public-goods externalities the brief creates. This fee could be a one-size-fits-all amount fixed in advance, or it could depend on the importance of the case or even on the contribution of the individual brief to the Court's analysis as determined by the Court in retrospect, similar to the way that courts all over the country determine attorney's fees in thousands of cases a year. To combat strategic externalities, there could be a limit on the number of amicus briefs filed by the parties or, even better, on the *ratio* of the number of amicus briefs filed by the parties, so that the strong party will not be able to bombard the Court with many more legal documents than its opponent. Alternatively, the side that has fewer amicus briefs could be compensated by getting more time for its oral arguments, and, to prevent system externalities, that time should come at the expense of the stronger party.

B. The Boundaries of Alternative Dispute Resolution: Settlement and Withdrawal of Pending Cases and Arbitration

We begin our discussion of alternative dispute resolution by highlighting the simple notion that for a case to have value to anyone but the parties involved, it must receive some degree of publicity. It is thus evident that, as a society, we should strive for cases with high public-goods externalities to be resolved within courtrooms rather than privately, far away from the public eye. In this Section, we consider two ways in which parties' decisions

---

[91] *See id.* at 1–2.

[92] *See id.* at 4–5.

can deprive cases of these public-goods externalities: settlement and agreements to arbitrate.

1. Settlement.

Consider the U.S. Supreme Court's focus on hearing cases that allow it to resolve circuit splits. From the perspective of the parties, the value of review by the Supreme Court may simply be to decide which party wins. But from the perspective of the legal system as a whole, the value of the case lies in its capacity to create a uniform and predictable legal norm (i.e., a high level of public-goods externalities). In the context of the Supreme Court, we might not want parties to tinker with the rules because keeping them untouched might be valuable for the case's precedential value.

When the public-goods externalities are very large, our objection to parties' opting out from the default civil procedure rule is large as well in that we might sometimes even object even to the parties' most basic way to opt out of procedure—by settlement. While settlement is desirable in most cases and eliminates negative system externalities (of all types), it may be socially harmful when parties settle in the U.S. Supreme Court. The U.S. Supreme Court grants cert in exceedingly few cases per year (about 1% of petitions for certiorari are granted),[93] devotes a substantial fraction of its attention to each case, and chooses cases not because those cases require dispute resolution but to set legal norms for the courts. In this context, settlement by the parties after the Court has invested significant resources may be privately optimal for the parties but a waste of the Court's resources and a lost opportunity for the provision of a public good. Thus, for a court like the U.S. Supreme Court, the public-goods externality may be so large that it displaces even traditionally accepted forms of procedural flexibility, such as allowing parties to withdraw a pending case.[94]

---

93 *See* PUB. INFO. OFF., A REPORTER'S GUIDE TO APPLICATIONS PENDING BEFORE THE SUPREME COURT OF THE UNITED STATES 15–16 (2021), https://perma.cc/HME9-VAN4.

94 In Israel, the general rule is that the appeals court needs to approve a request to withdraw the appeal. In one Israeli Supreme Court case, the parties asked the court to extend the deadline for their briefs in order to let them mediate the case. The Supreme Court refused. Later on, the parties asked the court to withdraw the appeal because they successfully mediated the case, and the Supreme Court refused again. In both cases, the Supreme Court explained that the issue was too principled for mediation and required a full resolution by the court. CivA 7368/06 Dirot Yokra v. Gov-Ari, Nevo Legal Database, at *11–12 (June 29, 2011) (Isr.).

Alternatively, withdrawing parties might be required to compensate the court system for the system externality that they created and the treasury for the loss of the public-goods externality that their case could have created. While the magnitude of the compensation for the "lost chance" of public externality may be fixed over time, the compensation for the system externality might increase over time. If parties settle very late in the game (say, a day before the Supreme Court opinion is delivered), they should pay more for the congestion externality they have created than if they settle early in the game (say, a day after their case has been picked by the Supreme Court).[95]

2. Arbitration.

Another mechanism for alternative dispute resolution on which our theory can shed new light is arbitration. Private arbitration under the FAA is an increasingly common—and increasingly controversial—form of dispute resolution. Viewed through the lens of our framework, we see that both its popularity and its controversy emanate from the mix of externalities implicated when a dispute moves from court to arbitration. Indeed, each of the major narratives about arbitration, pro and con, corresponds to one dimension of externality.

The traditional proarbitration story is that litigation is beset by cost, delay, and gamesmanship, and arbitration is a means for faster and cheaper dispute resolution.[96] This is basically an account of system and strategic externalities pushing cases into arbitration.

The traditional antiarbitration story is that because arbitration is confidential and informal, dispute resolution through arbitration produces none of the most important benefits of litigation—development and exposition of the law, uniformity of

---

[95] Of course, there are all sorts of complications here. Could parties settle their individual dispute but continue to litigate? If not, how could a court compel parties not to settle? If so, would this still satisfy the "case or controversy" requirement under Article III? We acknowledge these concerns but note that they are orthogonal to the normative argument we make. Furthermore, there may be ways to address these concerns if the value of discouraging settlement is great enough. For example, the Court could favor certiorari for petitioners who commit not to settle, perhaps even through posting a bond that would be forfeited if the case settles before the Court renders its opinion. In any case, this concern rarely arises in the U.S. Supreme Court given the infrequency of settlement in that court.

[96] *See, e.g.*, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010) ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, [and] greater efficiency and speed.").

judgments, and public confidence.[97] This is basically an account of public-goods externalities lost when cases move to arbitration.

A more nuanced proarbitration story is that employment and consumer-protection class action litigation is largely characterized by suits of low merit (or perhaps some merit but little practical importance) that nonetheless produce large paychecks for entrepreneurial plaintiffs' lawyers who use impositional discovery and other sharp tactics to extract lucrative settlements (for the lawyers—not necessarily the class).[98] This is basically an account of strategic externalities in courts pushing cases into arbitration.

There is a mirror-image antiarbitration story, which is that employment and consumer arbitration is a way to push claims of high merit—or perhaps some merit but high aggregate value—out of court (where the class action device would make them viable) and into individualized arbitration (where arbitral fees render claims impracticable).[99] This is basically an account of strategic externalities in arbitration pushing cases into arbitration—which makes things worse.

Organizing these arguments within our framework suggests some possible paths for using arbitration in a way that serves the goals underlying procedure. For cases of limited social concern between parties of equal sophistication, arbitration is an uncontroversial ideal. Those cases fall in the flex zone in our cube, for which party choice is maximized. If anything, we would want to encourage more arbitration for cases in this region because of the avoided system externalities.

For cases with some public-goods qualities or concerns about strategic behavior, though, a more nuanced approach is necessary. Importantly, as our recitation of the arguments above notes,

---

97 *See, e.g.*, Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 426–27 (1999) (arguing that "judicial adjudication generates specific and general deterrence, educates the public, creates precedent, develops uniform law, and forms public values" while arbitration does not).

98 *See, e.g.*, Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 494 (2000) ("Entrepreneurial plaintiffs' lawyers can draft broad claims so as to pull in the greatest possible number of potential class members. A large class gives a plaintiffs' attorney leverage against a defendant and creates the potential to generate lucrative windfall fees with low marginal investment.").

99 *See, e.g.*, Katherine V.W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. REV. DISCOURSE 164, 169 (2013) (discussing the prevalence of aggressive imposition of mandatory-arbitration clauses and class action waivers by large service providers).

the proarbitration argument based on strategic externalities depends on inefficiencies in the administration of court-related procedural rules—such as class action certification and discovery rules. The claim is that these rules allow for gamesmanship by plaintiffs with questionable claims. If so, then identifying the right reforms for arbitration law is tied up in identifying the right reforms for court procedure. The case for limiting arbitration improves when the rules for litigation are reformed to address the strategic externalities created by court-related procedures. Reduce the pathologies of class actions and discovery that arise in large, complex, and important cases, and the normative case for keeping more cases in court and out of arbitration becomes one-sided.

But the debate over arbitration reform should not be limited to arguments over whether the availability of arbitration should be scaled back or whether arbitration should be banned for categories of disputes, such as consumer or employment cases. Our analysis points to a more nuanced approach. Arbitration ameliorates system externalities, but it deprives the courts of their ability to generate public-goods externalities. (We set aside strategic externalities, which cut both ways.) Given these facts, the design of arbitration reforms should be tailored to retaining the benefits of arbitration to system externalities while minimizing the costs to public-goods externalities. Banning arbitration (altogether or for categories of cases) only addresses the need to protect public-goods externalities; it fails to account for system externality benefits.

We see alternatives that account for both. For example, one concern about public-goods externalities is that entire areas of law are being moved outside of litigation, depriving courts of their precedent-generating function. A related concern is that wrongdoing by parties to arbitration agreements will be shielded from public view. Reforms to arbitration law could seek to ensure that courts do not lose these functions by channeling a share of cases into court, even if they contain otherwise enforceable arbitration agreements. Although we recognize that this would entail dramatic changes to current law, such a change could be accomplished through amendments to the FAA. A radical possibility would be to randomize the enforceability of arbitration agreements by sending a small, randomly chosen subset of disputes to court despite the presence of arbitration agreements.[100] This

[100] Although randomization in law is rare, it is used. The procedure we describe here could be analogized to random audits of tax filings by the IRS to ensure compliance. Here, the goal of randomization is not to deter lawbreaking but to sustain lawmaking.

would ensure that courts continue to make law in every area of law, even those for which arbitration agreements are the norm. This would also ensure that a representative sample of disputes (that otherwise go to arbitration) become public.

A less radical possibility would be to amend § 10 of the FAA, which governs the enforcement of arbitral awards. Currently, § 10 permits the vacatur of an arbitral award only in the event of misconduct by the arbitrators or a party or the arbitrators exceeding their authority.[101] The bases for vacatur could be broadened, however, so that those disputes with the greatest public-goods externalities are pulled out of arbitration. An additional basis for vacatur of an arbitral award could be that the arbitration raised novel questions of law such that, without a court judgment on the merits of the claims, those questions of law would remain unanswered but are likely to recur in future in arbitrations.[102] Cases in which an arbitral award is vacated on this ground would then be litigated. This possibility would occasionally lead to litigation that duplicates an already-completed arbitration, but this reform would only affect a small share of arbitrations (given that the vast majority of arbitrations do not involve novel issues) while protecting the courts' role in creating precedent.

C. Class Actions and Multidistrict Litigation

In federal court, class actions and MDL are procedural devices for the aggregation of many claims into a single proceeding. A class action aggregates into a single civil action many claims, including claims of individuals who never become a party to the case but are nonetheless bound by the judgment as class members.[103] MDL proceedings take already-filed actions (some of which may themselves be class actions) and transfer them to a single district court for consolidated pretrial proceedings before a single judge, even as each action retains its identity as a separate case.[104]

Class actions and MDLs have distinct relevance to our analysis because they both address and create massive externalities for

---

101 9 U.S.C. § 10(a).

102 The logic of this exception to the enforceability of arbitration agreements would parallel the "capable of repetition, yet evading review" exception to mootness. *See, e.g.*, Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1976 (2016) (quoting Spencer v. Kemna, 523 U.S. 1, 17 (1998)).

103 *See* FED. R. CIV. P. 23(c)(3).

104 *See* 28 U.S.C. § 1407.

courts. While aggregative mechanisms help relieve congestion and bring before the court important cases that would otherwise not have been pursued (something likely to happen when there is a widely dispersed harm that is small for each victim but large in the aggregate),[105] they also exacerbate some externalities. As noted by scholars and judges alike, the accountability of the representative plaintiffs and lawyers to the remaining claimants is weakened in MDLs and class actions.[106] This is a form of strategic externality that, while intrinsic to the agency relationship between lawyers and their clients, is especially large in class actions and MDLs.

Given these large sets of externalities, we would predict (as a positive matter) and hope (as a normative matter) that the rules governing class actions and MDLs would structure these processes in ways that address the challenges that arise in aggregate litigation. We address these possibilities below.

1. Strategic externalities.

The heightened risk of strategic externalities in aggregate litigation should lead rule makers and courts to exercise judicial control to a greater extent.[107] This judicial oversight could take the form of traditional command and control, with judges directing outcomes in the litigation or, perhaps, with the use of the kinds of innovative tools that we have described. Precisely because of the unusual extent of externalities in this context, we argue that judges should (and in fact do) innovate with procedural flexibility to a greater degree in the context of class actions and MDLs than in any other context. In terms of our cube in Figure 5, high levels of strategic externalities call for judicial control or regulated markets and prices.

---

[105] If damages vary across potential claimants, it is possible for both effects to occur—those with higher damages who find it worthwhile to sue congest the courts while those with lower damages who do not sue forgo creating a benefit shared by all.

[106] For a discussion of this issue, see generally Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846 (2017) (arguing that class actions in MDLs are more "participatory" in the sense of class members having a meaningful voice). For a more skeptical view of MDLs relative to class actions on this front, see Gluck & Burch, *supra* note 13, at 67–71 ("[MDL judges] focus on attorneys' MDL experience, their ability to fund the proceeding, and whether they can 'play well in the sandbox' with others, all of which tend to produce leadership slates of repeat, inside players focused on settlement.").

[107] Because the strategic externalities extend beyond counterparties to unrepresented claimants, requiring consent between the parties is insufficient to discipline this externality.

In the class action context, this takes the form of the unique suite of procedural protections codified in Rule 23. Rule 23 specifies greater judicial oversight of the attorney-claimant relationship than found in any other context in civil litigation. For example, in order to certify a class action, the court must satisfy itself that the class counsel will "fairly and adequately represent" the class and even looks into the attorneys' proposed fee arrangements.[108] The Federal Rules nowhere else provide for such an insertion of the judge into attorney representation. Furthermore, the class action rule is unique in requiring that a settlement involving a class be approved by the judge.[109] Indeed, courts reject settlement when they feel the class attorney sold out the claim for a hefty fee for herself.[110]

Based on the reasoning above, we would predict that MDLs have the same features as class actions in this regard: they would consolidate counsel in order to reap the benefits to system externalities but then subject the representation process to extraordinary safeguards in order to mitigate strategic externalities. In this respect, what we observe in practice strongly confirms our predictions—and not because the rules actually require this! As noted above, the rules governing judicial oversight of representation, fees, and settlement are unique to class actions and do not apply to MDLs. Rather, our prediction is confirmed in the most striking possible way: the statutes and Rules governing MDLs do not permit these safeguards against system and strategic externalities—but judges use them anyway.[111] Lawyers and parties tacitly—even explicitly—endorse this, and appellate courts look the other way.[112] MDL judges themselves say that "the very hallmark of the MDL is the ability to deviate from traditional procedures."[113]

As Professor Elizabeth Chamblee Burch has shown, one divergence from well-established legal rules in MDLs is the capping of contingent fees. The fee agreement that a lawyer and a client

---

108 FED. R. CIV. P. 23(g)(1)(B); FED. R. CIV. P. 23(h).

109 FED. R. CIV. P. 23(e)(2). We note that this treatment of class actions is not unique to the United States. In Israel, the attorney general can object to any class action settlement. Class Actions Law, 5776–2016, SH 2054 264 (Isr.).

110 In *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884 (Del. Ch. 2016), the Delaware Court of Chancery announced that it will no longer lightly approve a class action settlement when the settlement does not include any monetary recovery for the class (the so-called disclosure-only settlements). *Id.* at 891–92.

111 Burch, *supra* note 13, at 84–86.

112 *See* Gluck & Burch, *supra* note 13, at 20.

113 Gluck, *supra* note 13, at 1689.

enter into is generally seen as a private contract.[114] Typically, courts can interfere with private contracts only when there is some exceptional reason, such as mental infirmity of a party to the contract.[115] Nonetheless, MDL judges have capped attorneys' contingent fees without any evidence or suggestion of exceptional reasons. Judges in prominent, closely watched MDLs, including *In re Vioxx Products Liability Litigation* (*Vioxx III*),[116] *In re Zyprexa*,[117] and *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*,[118] capped attorney fees, notwithstanding the absence of any apparent authority to do so.

Similarly, as Professors Andrew Bradt and Teddy Rave have shown, MDL judges have inserted themselves into settlement-agreement processes, even when not authorized to do so. As a matter of statutory law and the Federal Rules, "no statute or rule grants MDL judges the power to formally approve or reject a proposed global settlement."[119] Yet sometimes at the invitation of the parties, and sometimes despite the apparent intentions of the parties, judges have intervened to approve or disapprove settlements. Parties can reconfigure a mass settlement in an MDL as a proposed class action settlement, thereby explicitly inviting (and formally authorizing) judicial review of the settlement.[120] In other cases, MDL settlement agreements contain provisions for judicial review.[121] While the law allows for party rulemaking in this way, the reality is that the judge is involved as well. High-profile

---

114 *See* Burch, *supra* note 13, at 111–12.

115 *Id.*

116 760 F. Supp. 2d 640 (E.D. La. 2010). Judge Eldon Fallon in the *Vioxx* case capped attorneys' fees at 32%. *In re* Vioxx Prod. Liab. Litig. (*Vioxx II*), 574 F. Supp. 2d 607, 617 (E.D. La. 2008). He ultimately allocated 6.5% of that amount to lead lawyers, further reducing nonlead lawyers' payment. *Vioxx III*, 760 F. Supp. 2d at 662.

117 424 F. Supp. 2d 488 (E.D.N.Y. 2006). In the *Zyprexa* case, Judge Jack Weinstein capped attorneys' fees at 35%. *Id.* at 491 (allowing special masters to vary caps upward to 37.5% and downward to 30% in individual cases).

118 MDL No. 05-1708, 2008 WL 682174 (D. Minn. Mar. 7, 2008). In the *Guidant* case, Judge Donovan Frank capped all contingent fees at 20%, although he allowed special masters to adjust the fees upward to 33.33%, the contracted-to fee. *Id.* at *19.

119 Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1263 (2017).

120 *Id.* at 1292.

121 *Id.* at 1263 (stating that the judges in the *Vioxx* and *Zyprexa* litigations—who were given contractual authority to review the settlement—"sa[id] that MDLs are really 'quasi-class actions' that demand formal judicial oversight in order to protect claimants who have had little involvement in the actual litigation of the aggregated proceeding, but whose rights may be profoundly affected"); *see also* Burch, *supra* note 13, at 118 (arguing that judicial oversight may improve "the transparency and legitimacy of deals negotiated by self-interested attorneys that occur[ed] with little client involvement, monitoring, or consent.").

examples of this model include the *Zyprexa* case, where the lawyers "sought and obtained Judge Jack Weinstein's formal approval of their non-class aggregate settlement"; the *Guidant* case, where the lawyers "sought and obtained Judge Donovan Frank's approval of their non-class aggregate settlement"; and the *Vioxx* case, which was in the same vein but had a more complex structure.[122] And in at least one case, a judge reviewed a settlement without any basis in the parties' agreement.[123]

The same pattern appears with respect to representation. There is no explicit provision in law for the appointment of lead attorneys in MDLs like there is under Rule 23 for a certified class action. Yet it is standard practice for the MDL judge to appoint lead attorneys to serve on behalf of the entire group, and "[t]he individually retained attorney has no power to appoint or discharge the leaders who assume control of her clients' cases."[124] MDL judges have then gone on to award attorney fees to lead counsel, despite lacking what Burch tactfully calls a "unified doctrinal basis" for doing this.[125] In authorizing compensating lead attorneys, judges have "borrowed piecemeal from class actions' common-fund doctrine, contract principles, ethics, and equity"[126] and "cited their 'inherent managerial authority' or 'inherent equitable authority.'"[127] As we noted in a prior article, this operates as a de facto market in legal representation where the power to allocate litigation resources and procedure (depositions, discovery requests, even trials) is traded across cases.[128] It is market-based procedural flexibility in everything but name. In the terms of Figure 5, we are talking about a form of regulated markets where judges monitor something akin to barter or an implicit cap-and-trade system.

We take no position on the formal question of the extent to which existing legal authority provides a sufficient foothold for

---

122 Bradt & Rave, *supra* note 119, at 1296–97 (first citing *In re* Zyprexa, 424 F. Supp. 2d at 490; then citing *In re* Guidant Corp., 2008 WL 682174, at *15–17; and then citing Settlement Agreement § 1.2.8.1, *In re* Vioxx Prod. Liab. Litig. (*Vioxx I*), MDL No. 1657 (E.D. La. Nov. 9, 2007), https://perma.cc/K8H3-5GK4).

123 *See id.* at 1277 (citing Transcript of Status Conference at 54–64, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (S.D.N.Y. Mar. 19, 2010), ECF No. 2037).

124 Burch, *supra* note 13, at 88.

125 *Id.* at 74.

126 *Id.*

127 *Id.* at 105. Judges have also invoked Rule 42, which allows courts to consolidate actions and "issue any other orders to avoid unnecessary cost or delay," in support of the invocation of managerial or equitable authority. *Id.* (quoting FED. R. CIV. P. 42(a)(3)).

128 Avraham & Hubbard, *supra* note 9, at 938–39.

these innovations by MDL judges. As a normative matter, we endorse the view that MDL procedure must be unusual because the MDL process itself creates unusually large strategic externalities even as it reduces unusually large system externalities.

The specific methods of addressing system and strategic externalities, however, should be open to debate. For example, it is worth considering whether MDLs should further borrow from class actions in experimenting with market-based approaches. Rather than having a judge unilaterally choose class counsel and evaluate attorney fees, a market-based approach would invite competition among law firms. One possible method—which some district courts have employed in class actions—is for the court to auction off the right to represent the class (and therefore to collect fees).[129] The basic idea is that firms bid by offering the amount of fees they would charge, and the lowest bidder wins. A challenge here—and a reason why auctions for class counsel have been criticized—is that while the court can easily determine the lowest bidder, it is not necessarily in the best position to weigh bids against the quality of the lawyering that each bidder could provide.[130]

Unique to the MDL context would be market-based solutions to the disconnect between the lead attorneys—usually organized as a "Plaintiffs' Steering Committee" or PSC[131]—and the individual attorneys and their clients who benefit from the efficiencies of the MDL process but lose much of their control over their own claims to the PSC. For example, rather than offering bids to the court, as in the class action context, law firms vying for a seat on the PSC could bid for seats by offering to take a smaller cut of the total fees from individual plaintiffs (and their attorneys). The fact that bids can be offered directly to plaintiffs and their attorneys is a distinct advantage of this market-based approach in the MDL context over the class action context. When a court is assessing bids, it is difficult for the court to weigh a lower bid on price against hard-to-quantify factors like lawyer skill. In the MDL context, the court would not have to make these trade-offs but rather would allow the individual parties and lawyers to judge for themselves.

---

[129] *See In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 78–82 (S.D.N.Y. 2000) (discussing prior cases employing auctions and ordering an auction in the case before it). The first case to order such an auction was *In re Oracle Securities Litigation*, 136 F.R.D. 639 (N.D. Cal. 1991).

[130] Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 686–87 (2002).

[131] Redish & Karaba, *supra* note 12, at 117–18.

2. System externalities.

Class actions and MDLs are designed to solve, not create, system externalities. Nonetheless, there may be a need to manage system externalities here as well. As the saying goes, "build a superhighway, create a traffic jam."[132] Precisely because most decision-making in an MDL is done by a PSC rather than the individual plaintiff or lawyer, it can become cost-effective for a lawyer to file suit on behalf of a plaintiff with a very weak claim with the expectation that the claim will be swept up in a mass settlement in MDL proceedings. This generates a settlement payout with little cost to the plaintiff or lawyer and little risk that the validity of the individual claim will be tested in court. Such claims, known as "tag-alongs," undo some of the benefits of MDLs. Tag-alongs crowd the MDL judge's docket and dilute the value of legitimate claims, both of which are negative spillovers.

As our other work has noted, an approach to combatting congestion like this is the judicial equivalent of toll roads—forcing parties to internalize the cost they are imposing on others.[133] Under current practice, some courts attempt to screen tag-along cases using orders in the spirit of *Lore v. Lone Pine Corp.*[134] (*Lone Pine* orders), through which MDL judges require plaintiffs to make a prima facie evidentiary showing of injury and exposure to the defendant's products or other alleged tortious conduct—and sometimes even specific causation.[135] By raising the cost of piling into an MDL (more for low-merit claimants than for high-merit claimants, one hopes), a *Lone Pine* order regulates the flow of cases into an MDL the way that a tollbooth controls congestion on a highway—by charging for entry and not letting slow vehicles (tractors, horse and carriages, etc.) go on the highway.

But do these orders work as intended? *Lone Pine* orders impose evidentiary burdens at a stage of litigation—the pleading stage—where the plaintiff may lack the very evidence that the order demands.[136] If so, then the orders may fail to sort between low- and high-merit claimants. Rather than regulating the flow of traffic, so to speak, they may simply block it.

---

[132] This analogy is explored in depth in Tracey E. George & Chris Guthrie, *Induced Litigation*, 98 NW. U. L. REV. 545, 563–71 (2004).

[133] *See* Avraham & Hubbard, *supra* note 9, at 916–18.

[134] No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986).

[135] *See* Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2, 5 (2019).

[136] *Id.* at 45.

Our approach suggests the possibility of replacing the figurative toll (the *Lone Pine* order) with a literal toll imposed on claimants or, perhaps even better, imposed personally on lawyers representing them. As indicated in Figure 5, pleading in MDLs falls in the zone of regulated markets/prices where judicially regulated pricing would allow parties to join the MDL as long as they internalize the externalities that they create. This pricing-based solution offers three potential improvements over the *Lone Pine* order. First, it does not require plaintiffs to produce evidence that they do not have. In this way, it better allows sorting between stronger and weaker claims. Lawyers representing claimants will be more willing to front the cost for a strong claim than a weak claim; this is no different than how contingency fee attorneys approach legal costs in other contexts. Second, rather than potentially and unintentionally erecting a (figurative) blockade to the superhighway, a (literal) toll can be calibrated up or down to regulate congestion depending on the needs of the court in any given MDL. And third, *Lone Pine* orders impose a deadweight loss—the resources spent on filings, evidentiary submissions, and fact sheets are used up—while tolls and fees are merely a transfer of resources. The revenue received by the court could be spent on providing legal services or rebated to the population at large.

3. Public-goods externalities.

Finally, while class actions and MDLs facilitate positive spillovers across claimants, the lead plaintiffs or lead attorneys still need incentives to bring the actions and make the arguments in the first place. Further, some aggregate litigation generates public-goods externalities even beyond the claimants directly affected; class actions in particular often raise issues of importance to society at large.

This suggests that, at least for actions with societal importance, a subsidy for the cost of fully litigating a class action or MDL could be appropriate. Under current U.S. law, there is no explicit subsidy given for litigating important cases, although perhaps the large compensation earned by the elite class action bar—which, we should recall, is reviewed and sometimes set by courts—could be understood as, in part, reflecting an implicit subsidy for positive spillovers. Still, we are not aware of cases where courts adjust that compensation based on the public or social importance of the cases. Elsewhere, though, the law is explicit. Israeli law provides a Public Fund to Finance Class Action Lawsuits,

which by its own terms serves "to aid representing plaintiffs in financing requests for approval and class actions, which hold a public and social importance."[137] In terms of Figure 5, the regulators help markets achieve efficiency by providing a subsidy to cases with large public-goods externalities.

Since class actions often raise issues of social importance, protective orders, settlements, and other confidentiality agreements that bar information obtained in private litigation from reaching the public eye should be avoided to protect society from losing the public-goods externality that class actions generate. Rule 26(c)(1) allows a court to issue a protective order for "good cause" to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense."[138] The problem is that shielding the defendant from "embarrassment" often also shields society from learning important, life-saving information. We therefore expect that in important cases, such as safety-related class actions, Rule 26(c)'s "good cause" requirement will be construed narrowly so that important information will reach the public—or at least government agencies. Indeed, both the National Highway Traffic Safety Administration and the Consumer Product Safety Commission have recently published guidance urging parties and courts to ensure that safety information is disclosed to government agencies, claiming that they would otherwise violate the "good cause" requirement of Rule 26(c).[139]

CONCLUSION

In this Article, we organized existing arguments about procedural design into three strands and showed that each strand is focused on how procedure can address one type of externality.

The first strand of the literature addresses what we call "system externalities," the effects of actions on other cases in the same court or court system. The second strand addresses what we call "strategic externalities," the effects of a party's actions on opposing parties in the same case. The third strand implicates

---

137 Class Actions Law, 5776–2016, SH 2054 264 (Isr.). For discussion of this law, see Bukspan, *supra* note 78, at 332–35.

138 FED. R. CIV. P. 26(c)(1).

139 *See* NHTSA Enforcement Guidance Bulletin 2015–01: Recommended Best Practices for Protective Orders and Settlement Agreements in Civil Litigation, 81 Fed. Reg. 13,026, 13,027–28 (Mar. 11, 2016); CPSC Litigation Guidance and Recommended Best Practices for Protective Orders and Settlement Agreements in Private Civil Litigation, 81 Fed. Reg. 87,023, 87,023 (Dec. 2, 2016).

external effects on society as a whole, which we call "public-goods externalities."

Our framework allows us to identify approaches to procedural design that can address these externalities, whether singly or in combination. Our focus is on different and sometimes radically new forms of *procedural flexibility* that tailor procedures within and across cases. Some of the solutions arising from our theoretical framework were brought forward in this Article and include surprising forms of judicial command and control—for example, the Supreme Court prohibiting parties from settling or withdrawing a pending petition. We explored other ideas in our earlier work where, among other things, we illustrated specific examples of regulated markets—including establishing markets for depositions or appeals.[140] It is clear that when we perceive the dilemmas of civil procedure in terms of externalities, a whole new world of possibilities opens up—allowing us to provide new solutions for the problems that legal scholars have been debating for years.

Even more exciting, we believe that allowing this kind of market-based tailoring of legal rules could be extended beyond civil procedure. In principle, it is not obvious why our arguments could not also apply in the criminal procedure context.[141] Plea bargaining has long been controversial for inducing defendants to trade away their constitutional and procedural rights. Given that plea bargaining is here to stay, one could imagine that creating open markets for procedural rights in this context might increase the options available to defendants, make trials more viable in some cases, and better leverage the overtaxed resources of public defenders and state's attorneys. For example, a rich criminal defendant who wants a jury of twelve rather than six could buy the right to six jurors from a poor defendant who would use the sale of such rights to finance his defense in a bench trial.[142]

The ideas in this Article can apply more broadly to the role of explicit markets in increasing transparency and access to governmental institutions beyond the courts too.[143] For example, lobbyists

---

[140] Avraham & Hubbard, *supra* note 9, at 926–31.

[141] *Cf.* Ramon Feldbrin, *Procedural Categories*, 52 LOY. U. CHI. L.J. 707, 710 (2021) (arguing that formal rules of criminal and civil procedure were introduced as recently as the 1930s and that there are still contexts in Europe in which there is no such divide).

[142] *Cf.* Williams v. Florida, 399 U.S. 78, 86 (1970) (holding that a jury of six satisfies the constitutional right to criminal trial by jury).

[143] We thank Sarath Sanga for suggesting this direction of inquiry.

and constituents gain access to meetings with elected representatives in ways that may be opaque, difficult to navigate, and reliant on anything from large campaign contributions to social networks to expensive meals. Imagine a representative distributing freely tradable credits for meeting time among all of her constituents or a government agency distributing tradable credits for hearing time and meeting time.

In such a scenario, would big money still dominate lobbying? Inevitably, yes—but three things *would* change: First, powerful interests would have to compensate regular citizens if the powerful interests are going to monopolize lobbying opportunities. Currently, weak and disorganized groups are shut out of the process but receive nothing in return. Second, groups that are politically engaged but lack financial resources could refuse to sell their credits and pool them instead, thereby gaining access that they lacked before. Third, the information available to stakeholders would be (partially) equalized. Everyone could observe the "going price" for access to decision makers. And it is no rejoinder to say that this commodifies access to government—does anyone believe that there isn't already a "market price" for gaining access to authority, whether judicial, legislative, or executive? Making the market price a literal rather than figurative reality would make the process more comprehensible and accessible to the relatively powerless.

While some literature on these possibilities exists, we leave all that to another day.