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I. INTRODUCTION

In his provocative article, *"Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals*,[1] Professor John M. Rogers has provided a valuable opportunity for those of us interested in the structural aspects of appellate court decisionmaking—especially Supreme Court decisionmaking—to step back, to compare notes, and to evaluate an increasingly prominent proposal

* Associate Professor of Law, George Mason University School of Law. B.A. 1983, University of Pennsylvania; J.D. 1987, University of Virginia School of Law. I would like to thank Jim Chen, Erin O'Hara, Linda Schwartzstein, and David Skeel for their helpful comments and suggestions. I would also like to acknowledge the generous funding provided through the Law and Economics Center of the George Mason University School of Law.

1. 49 Vand. L. Rev. 997 (1996).

for institutional reform.[2] More importantly, this Colloquium provides an opportunity to explore more deeply several anomalies associated

2. For two prominent articles advocating replacing the prevalent practice of outcome voting with issue voting on appellate courts, see David Post and Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 Georgetown L. J. 743 (1992); Lewis A. Kornhauser and Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 Cal. L. Rev. 1 (1993). See also Regers, 49 Vand. L. Rev. at 998 & nn.6-7 (cited in note 1). Professors Kornhauser and Sager do not argue that appellate courts should always employ issue voting, but rather they argue that in those cases in which it becomes clear upon deliberation that a "doctrinal paradox" exists such that the case's outcome turns on whether the court employs outcome or issue voting, Kornhauser and Sager, 81 Cal. L. Rev. at 10-12 (describing the doctrinal paradox), the court should take a metavote to determine which of the two regimes it will use to resolve the case. See id. at 30-33, 49 (describing the metavote procedure); id. at 57 (positing that "[t]he unreflective perpetuation of case-by-case voting is a mistake, and issue-by-issue voting is clearly the better option in many cases"). In contrast, Professors Post and Salop posit that "while outcome-voting is the norm for appellate courts," the regime is "deeply flawed," and issue voting is "a superior decisionmaking procedure." Post and Salop, 80 Georgetewn L. J. at 745, 772. While both groups of authors cite a number of objections to outcome voting, Post and Salop best capture the objections when they state "outcome-voting leads to arbitrary path dependence as well as to incomplete, inconsistent, or incoherent guidance te lower courts and future litigants." Id. at 745. See also Kornhauser and Sager, 81 Cal. L. Rev. at 43-44 (discussing the lack of guidance to lower courts under outcome voting); id. at 45-48 (discussing the lack of guidance in future cases under outcome voting); id. at 36-39 (discussing path dependence under outcome voting).

In *Ways of Criticizing the Court*, then Professor Frank Easterbrook recognized many of the problems that these scholars associate with outcome voting, albeit in the context of discussing the relationship between adherence to stare decisis and the problem of path dependency. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802, 819-20 (1982) (positing that under a regime that adheres to stare decisis, "everything depends upon the fortuitous order of decision"). As demonstrated in Part II, the problems that Professors Post, Salop, Kornhauser, and Sager ascribe to outcome voting and that Easterbrook ascribes to stare decisis are closely related. See also Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 Cal. L. Rev. 1309, 1349 (1995) (explaining that case-by-case voting within single cases and adherence to stare decisis across cases prevent the requisite number of votes to reveal cycles, thus preventing institutional inertia); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. Pa. L. Rev. 309, 320-23 (1995) (describing the evolution of case-by-case voting); id. at 323-27 (describing the evolution of stare decisis). The anomaly of path dependence arises in both contexts because outcome voting and stare decisis are non-Condorcet-producing rules. For definitions of the terms Condorcet winner and Condorcet-producing rule, see text accompanying notes 25-28. In contrast with Professors Post, Salop, Kornhauser, and Sager, Judge Easterbrook proposed a relatively more modest but no less flawed solution to the problem of path dependency in appellate court decisionmaking. Easterbrook proposed relaxing stare decisis, at least in constitutional cases. See Easterbrook, 95 Harv. L. Rev. at 819-20. I have previously responded to Easterbrook's proposal. See Stearns, 83 Cal. L. Rev. at 1355-56 n.138; id. at 1371 n.194. Specifically, I explained that while stare decisis ensures that the evolution of legal doctrine will be path dependent, the standing doctrine ameliorates path dependency's most damaging effects by presumptively grounding the critical path of case decisions in fortuitous historical facts beyond the control of the litigants themselves. Id. at 1355-56 n.138. In turn, standing substantially limits opportunistic litigant path manipulation. Id. at 1371 n.194. See also Stearns, 144 U. Pa. L. Rev. at 319-20 (explaining that in grounding the critical path of case decisions in fortuitous historical facts beyond the control of the litigants themselves, standing promotes fair constitutional process).

Professor Rogers apparently accepts my evolutionary explanation of the standing doctrine. See Rogers, 49 Vand. L. Rev. at 1026 n.98 ("I agree with Stearns's ultimate point in his pieces on standing: 'standing . . . limit[s] the extent to which litigants can benefit by opportunistically manipulating the order in which issues are presented to federal circuit courts and, ultimately, to

with appellate court decisionmaking. At the outset, I should emphasize that while he devotes a considerable portion of his article to evaluating my scholarship on appellate court decisionmaking,[3] as Professor Rogers himself observes,[4] none of my three articles on appellate court voting[5] contains any of the "Radical Proposals" to which Rogers's title refers. In fact, a careful reading of Professor Rogers's article reveals a considerable range of agreement between us. We both agree, first and foremost, that proposals to replace outcome voting with issue voting on appellate courts are misguided;[6] second, that Arrow's Theorem provides a critical benchmark with which to analyze and compare institutions to avoid the "nirvana fallacy";[7] third, that to the extent cycling is a problem in a given collective decisionmaking body, that institution, by operating in conjunction with another collective decisionmaking body, can reduce cycling;[8] and finally, that the standing doctrine serves to ameliorate the problem of

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the Supreme Court for consideration'" (quoting Stearns, 83 Cal. L. Rev. at 1351)). Rogers, however, disagrees with my evolutionary explanation of outcome voting because he thinks that outcome voting is in fact a Condorcet-producing rule. See note 12. As I explain in Part II, however, the latter disagreement stems from Professor Rogers's misunderstanding of the terms Condorcet winner and Condorcet-producing rules.

3. See Regers, 49 Vand. L. Rev. at 1025-37 (cited in note 1). See also id. at 1001 n.27, 1016 n.71.

4. Id. at 1026 n.97 ("Stearns does not make a normative assessment of competing voting regimes for appellate courts, but rather he discusses such regimes as a part of a larger inquiry into whether proposals to expand judicial review based upon social choice are sound").

5. See generally Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 Yale L. J. 1219 (1994) (using Arrow's Theorem to evaluate and compare supreme court and congressional rulemaking procedures to evaluate normative proposals, based upon social choice theory, to expand the scope of judicial review); 83 Cal. L. Rev. at 1309 (cited in note 2) (providing a positive evolutionary model of stare decisis and standing and demonstrating that while stare decisis prevents the Supreme Court from revealing intertemporal cycles, it creates the unintended and deleterious byproduct of inviting opportunistic path manipulation, which is significantly ameliorated by standing); 144 U. Pa. L. Rev. at 309 (cited in note 2) (providing comprehensive empirical support for the social choice theory of standing, based upon relevant history and case law).

6. See generally Stearns, 103 Yale L. J. at 1258-71 (cited in note 5) (providing an evolutionary thesis of outcome voting).

7. Rogers, 49 Vand. L. Rev. at 1001 n.27, 1026 n.97 (cited in note 1). See Stearns, 103 Yale L. J. at 1247-52 (cited in note 5) (using the five fairness conditions of Arrow's Theorem and collective rationality to define the "ideal norm" that no single institution can simultaneously satisfy); Stearns, 144 U. Pa. L. Rev. at 330-38 (cited in note 2) (describing the corollary of Arrow's Theorem that any institution that issues collective decisions must compromise at least one of the six criteria that Arrow's Theorem reveals cannot be satisfied simultaneously in one institution).

8. Rogers, 49 Vand. L. Rov. at 1026 (cited in note 1) ("Stearns has argued persuasively that the problem of cycling in legislatures is alleviated by the interplay of Congress and the courts"). See Stoarns, 103 Yale L. J. at 1233-47 (cited in note 5) (discussing the "isolation fallacy").

path dependence in appellate courts, including the Supreme Court, by grounding the critical path of case decisions, at least presumptively, in fortuitous factors beyond the control of the litigants themselves.[9] This level of agreement is striking, especially in an area of scholarship typified by such sharp division as that surrounding the jurisprudential implications of social choice.[10]

Given the extent of our apparent agreement, it might appear curmudgeonly of me to dwell on our points of contention, which some may view as details between two scholars who are mainly in accord. But I hope to show in this Reply that getting to the right outcome—that issue voting in appellate courts is a fundamentally bad idea—if for the wrong reasons, will not do.[11] Social choice provides a uniquely powerful set of analytic tools, which may explain its broad-based appeal. But when basic social choice terminology is distorted, or its basic principles applied inconsistently, as unfortunately occurs at several points throughout Professor Rogers's article, meaningful debate becomes difficult, and the promise that scholarship will advance our collective understanding is rendered illusory. I do not intend to suggest that Professor Rogers's article fails to make a significant contribution. In fact, I hope to show that what I perceive to be the article's major contribution—that the potential number of paths that may be created in appellate courts using issue, rather than outcome, voting is considerable—fits nicely with my broader positive analysis of appellate decisionmaking based upon social choice.

I have three closely related, but nonetheless distinct, criticisms of Professor Rogers's analysis. First, his claim that outcome voting is at least as likely as unlimited motion-and-amendment voting to yield a Condorcet winner,[12] and perhaps more so, is based upon upon a very

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9. Rogers, 49 Vand. L. Rev. at 1026 n.98 (cited in note 1); Stearns, 83 Cal. L. Rev. at 1355-56 n.138 (cited in note 2).

10. For a brief overview of this scholarship, see Stearns, 103 Yale L. J. at 1225-29 (cited in note 5).

11. Stated in terms of the theme of this Colloquium, in scholarship, unlike in appellate court decisions, one cannot divorce the analysis of issues from the correctness of the outcome. How one gets te an outcome is no less, and perhaps more, important than whether the outcome is ultimately sound.

12. See, for example, Rogers, 49 Vand. L. Rev. at 1026 n.97 (cited in note 1) ("My problem with Professor Stearns's argument is not with his conclusion [that outcome voting is preferable to issue voting] but rather with his ultimately undemonstrated characterization of outcome voting as 'non-Condorcet producing' "); id. at 1032 ("In contrast, if we focus on outcomes, then as demonstrated above, under outcome voting even in cases like *Tidewater* and *Kassel* the clear Condorcet winner was the side that actually won, since a majority of justices supported that outcome over its (one) alternative"); id. at 1037 n.130 ("Hazarding a guess, however, I think that C (a possibility under outcome voting) would more likely be the Condorcet winner than A (the

significant technical misunderstanding of the terms Condorcet winner and Condorcet-producing rule. Without agreement on the meaning of these terms, one cannot meaningfully claim to assess the social choice implications of various appellate court voting rules. Second, contrary to Professor Rogers's often repeated claim in demonstrating that unlimited motion-and-amendment voting, unlike outcome voting, is Condorcet-producing,[13] I have not once "mixed" issue and outcome voting.[14] Finally, while I agree in principle—and indeed I think this insight to be a genuine and significant contribution to the literature on Professor Rogers's part—that the issues in a given case can be divided and subdivided in a considerable number of ways, thus defeating the claims that issue voting produces more stable, coherent, predictable, or defensible results, or that issue voting renders appellate court decisionmaking less prone to path dependency,[15] I will demonstrate that the potential number of genuine legal issues in the cases that Professor Rogers discusses is much smaller than he suggests. I will further demonstrate that the admittedly broader number of genuine legal issues that Professor Rogers has identified

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only possibility under issue voting), since C is the regime that in some sense is in the 'middle' position").

13. The careful reader will no doubt observe that in the preceding two sentences, my terminology differs somewhat from that of Professor Rogers in his characterization of my work. I have not done this to nitpick, but rather because unlimited motion-and-amendment voting, as I will demonstrate below, is a Condorcet-producing rule. Issue voting can include either of two regimes: unlimited motion-and-amendment, in which case it is the same thing, *or* limited motion-and-amendment, in which motions for reconsideration of rejected alternatives may no longer be reconsidered. In the latter case, issue voting, no less than outcome voting, is a non-Condorcet-producing rule. See text accompanying notes 25-28 (discussing Condorcet-producing rules). In this Roply, I demonstrate why appellate decisionmaking has evolved toward outcome voting, given this choice of non-Condorcet rules. In the remainder of this Roply, I will use motion-and-amendment and issue voting interchangeably te describe *limited* issue voting, as defined above, unless otherwise specified.

14. Rogers, 49 Vand. L. Rev. at 1031 (cited in note 1) ("The example used [based upon my discussion of *Kassel*] is not one in which issue voting is used, hut one in which the Court goes back and forth between issue voting and outcome voting"); id. at 1030 n.111 ("This confusion is particularly obvious in Stearns's standing example, where the reasons are mixed with results *with abandon*" (emphasis added)); id. at 1034 n.123 ("Thus when Stearns intersperses votes on *Flast* versus not-*Flast*, *Valley Forge* versus not-*Valley Forge*, and X versus not-X, he is again mixing votes on outcomes with votes on issues").

15. In fact, I will demonstrate that issue voting, if anything, would likely promote strategic issue identification, a form of path manipulation, among deciding judges or justices, thus exacerbating the very path dependence problem that it is in part intended to cure. See Part IV. Compare by analogy Stearns, 83 Cal. L. Rev. at 1355-67 (cited in note 2) (positing that while stare decisis renders the evolution of legal doctrine path dependent, the real problem is not path dependence itself, but rather strategic path manipulation by litigants, which is substantially ameliorated by the modern standing doctrine).

furthers, rather than undermines, my overall positive analysis of outcome voting in appellate courts.

While each of the above criticisms is important in its own right,[16] it is more important to use this Colloquium as an opportunity to explore further the nuances of appellate court decisionmaking. Finally in this Reply, I will demonstrate a subtle but important additional feature of appellate court voting that further explains the evolution in appellate courts toward outcome rather than issue voting. Specifically, I will demonstrate that while outcome voting sometimes thwarts the will of a majority on a given issue or set of issues, outcome voting serves the critical purpose of promoting principled issue identification among the deciding judges. Stated differently, outcome voting, in contrast with issue voting, encourages judges to identify the genuine legal issues to be decided in a given case or, in the language of social choice, to adhere to the principle of Independence of Irrelevant Alternatives[17] in issue selection. It does so by divorcing the resolution of the case from the identification of issues or issue levels, thus encouraging writing justices to focus on the more persuasive statements of the issues in an effort, albeit not always a successful one, to get colleagues to join. Somewhat ironically perhaps, outcome voting thus provides a vehicle through which courts and litigants can seek to change over time the very anomalous outcomes that Professors Post, Salop, Kornhauser, and Sager criticize it for producing.

II. THE BASIC TERMS: THE CONDORCET CRITERION AND CONDORCET-PRODUCING RULES

While I have previously provided a brief intellectual history of both the theory of social choice and the Condorcet criterion,[18] a bit of background is in order. Writing in 1785, the Marquis de Condorcet discussed the paradox that underlies the modern social choice movement, namely that three individuals whose preferences are transitive (or rational) may produce intransitive collective orderings when trying to aggregate their preferences through some commonly em-

16. In addition to these thematic criticisms, I will also set out several substantial misrepresentations by Professor Rogers of my work, which appear to be the product of a lack of close reading. See note 45.

17. For an explanation of this fairness condition from Arrow's Theorem, see notes 26, 63.

18. See Stearns, 103 Yale L. J. at 1221-25 (cited in note 5) (providing an intellectual history of social choice and collecting authorities); id. at 1252-57 (describing the Condorcet criterion and collecting authorities).

ployed voting techniques, including unlimited pairwise voting.[19] Condorcet was trying to devise a solution to the problem of selecting a winner among three or more candidates or options where none has simple majority support as the first choice among decisionmakers. To understand his statement of the problem and his partial solution, it is necessary to consider two sets of ordinal rankings among three persons. In the first group, in which members possess the following ordinally ranked preferences over alternatives A,B,C—(1) A,B,C; (2) B,C,A; and (3) C,A,B—unlimited pairwise voting produces a cycle such that the group as a whole prefers A to B and B to C, but C to A. In the second group, with the following preferences over the same alternatives, in which only the preferences of person 3 have been altered—(1) A,B,C; (2) B,C,A; and (3) C,B,A—unlimited pairwise voting will produce B as the stable outcome, since it beats both A and C. The Marquis de Condorcet proposed that in the absence of a simple majority first-choice winner, as in both examples, the alternative that defeats all available alternatives in unlimited pairwise contests should prevail.[20] This rule is now known as the Condorcet criterion.[21]

The Condorcet criterion suffers two apparent defects. First, it is only a partial solution to the problem of selecting an outcome in the absence of a majority first-choice winner among three or more options; there are preference structures—including the first of the preference structures set out above—that simply lack a Condorcet winner or, stated differently, that cycle.[22] Second, the Condorcet criterion does not account for intensities of preference.[23] Notwithstanding these

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19. For a brief discussion of the intellectual history of social choice, and support for all of the propositions set out in this Part, see id. at 1221-25. For a more detailed discussion of the Condorcet criterion, see id. at 1252-57.

20. See H.P. Young, *Condorcet's Theory of Voting*, 82 Am. Pol. Sci. Rev. 1231, 1239 ("Condorcet proposed that whenever a candidate obtains a simple majority over every other candidate, then that candidate is presumptively the 'best.' This decision rule is now known as 'Condorcet's criterion,' and such a candidate (if it exists) is a 'Condorcet winner' or a 'majority candidate' "); Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 Va. L. Rev. 971, 989 n.55 (1989) ("A Condorcet winner is an alternative which beats all alternatives in one-on-one comparisons"); Stearns, 103 Yale L. J. at 1221-25, 1252-57 (cited in note 5).

21. See Young, 82 Am. Pol. Sci. Rev. at 1239 (cited in note 20); Levmore, 75 Va. L. Rev. at 989 n.55 (cited in note 20); Stearns, 103 Yale L. J. at 1221-25 (cited in note 5).

22. This turns out te be essential te the second critical term, namely Condorcet-producing rules.

23. Thus, while in the second example B is the Condorcet winner, it may be that persons 2 and 3 are close to indifferent between all three options, while person 1 intensely prefers option A to either B or C. If so, it is quite possible that if the voting regime allowed for commodification of preferences, the three members would select option A. See Stearns, 103 Yale L. J. at 1276-81 (cited in note 5) (demonstrating that congressional practices have evolved in a manner

defects, many commentators have placed great faith in the Condorcet criterion, based largely upon the intuition that if the outcome is disfavored to an available alternative in a direct pairwise contest, majority rule has in a very real sense been thwarted.[24] For present purposes, it is important to consider the first defect, namely that the Condorcet criterion is only a partial solution to the problem of aggregating collective preferences in the absence of a simple majority first-choice winner because some sets of preference structures lack a Condorcet winner. Social choice theorists have divided voting rules into two categories: (1) those that are capable of ensuring that if a Condorcet winner is available, it will prevail, referred to as Condorcet-producing rules, and (2) those that are not, referred to as non-Condorcet-producing rules. As with the Condorcet criterion, there is a notable defect with Condorcet-producing rules. The same two preference structures can be used to illustrate the point.

All Condorcet-producing rules share the common feature of permitting at least the same number of pairwise votes as options.[25] Thus, with the first set of preferences set out above—(1) A,B,C; (2) B,C,A; and (3) C,A,B—we need no less than three pairwise votes to determine whether there is a Condorcet winner or a cycle. With only two votes, for example—(1) B versus C (B wins), (2) A versus B (A wins)[26]—A emerges the winner. Only by taking the third pairwise

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better suited to preference commodification than appellate court voting practices); Stearns, 83 Cal. L. Rev. at 1371-84 (cited in note 2) (discussing the evolution of informal practices that promote commodification of preferences in legislatures but not courts).

24. See, for example, Duncan Black, *The Theory of Committees and Elections* 158 (Kluwer, 1963) ("[The Condorcet criterion] appeals, perhaps via mathematical symmetry, to our sense of justice.... Our own position is that our faith in the Condorcet criterion is stronger than any other, but it is not an unqualified faith"); Levmore, 75 Va. L. Rev. at 995 n.69 (cited in note 20) ("Most writers accept almost as a given that the ability not to miss a Condorcet winner is a hasic test when evaluating a voting procedure"); id. at 994-95 ("[I]t is reasonahle to proceed, as does virtually the entire collective choice literature, under the assumption that a Condorcet winner is very desirable" (footnote omitted)); William H. Riker, *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* 100 (Waveland, 1982) ("This notion [that available Condorcet winners should prevail] is closely related to the notion of equality and 'one man, one vote,' in the sense that, when an alternative opposed by a majority wins, quite clearly the votes of some people are not being counted the same as other people's votes"). See also Stearns, 103 Yale L.J. at 1255 (cited in note 5).

25. See William H. Riker, *The Paradox of Voting and Congressional Rules for Voting on Amendments*, 52 Am. Pol. Sci. Rev. 349, 354 (1958) (explaining that congressional rules that limit the number of votes relative te the number of pending motions can mask cycles by preventing the same number of pairwise contests as options). See also Stearns, 103 Yale L. J. at 1264-65 n.171 (cited in note 5); id. at 1273 n.199.

26. I am assuming that the participants vote strictly in accordance with their ordinal rankings, which, in social choice is referred to as Independence of Irrelevant Alternatives and which I have referred to as principled voting. See Stearns, 83 Cal. L. Rev. at 1343 n.113 (cited in note 2). See also note 63.

vote, in which we resurrect the option defeated in the first round, C, and pit it against the victor in the second round, A, do we learn that while the group prefers A to B to C, it also prefers C to A.[27] Thus, a rule that allows only two pairwise votes for three alternatives, for example motion and amendment with no reconsideration of defeated alternatives,[28] is *not* a Condorcet-producing rule. As with the Condorcet criterion, Condorcet-producing rules contain a critical defect. In the absence of a Condorcet winner, as in this example, such rules produce the phenomenon of cycling, such that for any proposed alternative, another has majority support.

Outcome voting is not a Condorcet-producing rule. In fact, neither is issue voting, as Professors Post and Salop[29] and Professors Kornhauser and Sager[30] employ that term. In outcome voting, the justices take but one binding vote on the most often binary choice of outcome, affirm or reverse. In doing so, the justices may thwart the will of a present majority of their members, or they may mask a set of preferences that if revealed would demonstrate a cycle. This is demonstrated in both *National Mutual Ins. Co. v. Tidewater Transfer Co., Inc.*[31] and *Kassel v. Consolidated Freightways Corp.*,[32] both of which reveal a set of cyclical preferences when all three relevant issues are voted upon pairwise. For ease of comparison, I will illustrate using *Tidewater* and employ Professor Rogers's breakdown of that case.[33]

If the justices vote on Rogers's issue B—"Is a D.C. citizen a citizen of a 'State' under Article III? (2 yes, 7 no)"—and then vote upon Rogers's issue C—"Can Congress confer the jurisdiction of federal courts under Article I beyond the limits of Article III? (3 yes, 6 no)"—the outcome would appear to be to strike down the federal statute that confers jurisdiction between D.C. citizens and citizens of a state based upon Article III. Only by taking the third and final pairwise vote, on Rogers's issue A—"Is a statute giving federal court

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27. The reader is free to confirm that applying the same voting regime to the second group of ordinally ranked preferences will produce B, the Condorcet winner, as the outcome.

28. For a demonstration that the doctrine of stare decisis operates as a proscription against reconsideration of defeated alternatives, thus preventing appellate courts, including the Supreme Court, from revealing preferences that cycle over time and across cases, see Stearns, 83 Cal. L. Rev. at 1350-70 (cited in note 2).

29. See Post and Salop, 80 Georgetown L. J. at 743 (cited in note 2).

30. See Kornhauser and Sager, 81 Cal. L. Rev. at 1 (cited in note 2).

31. 337 U.S. 582 (1948).

32. 450 U.S. 662 (1981).

33. I have previously demonstrated the same point using *Kassel*. See Stearns, 103 Yale L. J. at 1256-57 (cited in note 5); id. at 1269-71.

jurisdiction over controversies between D.C. citizens and citizens of a state within the constitutional power of Congress? (5 yes, 4 no)"—do we discover that for the deciding group of justices, there are three irreconcilable majorities across the three relevant pairwise contests.[34] Thus, using outcome voting, the Court thwarts the will of a majority of the justices on the two underlying issues, which a majority agrees are essential in reaching an outcome in the case.[35] And using issue voting, without taking a final pairwise vote on the outcome of the case, the same justices will thwart a majority on the pairwise choice of outcome. In fact, the only way to ensure that the Court's outcome does not defy the Condorcet criterion in both *Tidewater* and *Kassel* would be to take a pairwise vote on each of the two underlying issues and then take a pairwise vote on the outcome, or the reverse, take a pairwise vote on the outcome, and then take a pairwise vote on each of the two underlying issues. Only by taking all three critical pairwise votes is it possible to determine whether the justices' preferences cycle or produce a Condorcet winner.

Neither defenders of outcome voting nor proponents of issue voting have advocated such a regime,[36] and for good reason. If the Court were to employ such a regime, it might well identify preferences that cycle, but it would not be able to ensure an outcome.[37] That was among the major points of my article, *The Misguided Renaissance of Social Choice*,[38] in which I used Arrow's Theorem to analyze and compare rulemaking processes in Congress and in the Supreme Court. In that article, I demonstrated that while congressional voting rules have generally evolved toward the Condorcet criterion, in large part because Congress has the institutional power of inertia when

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34. As explained below, to fully demonstrate the point one needs to make certain assumptions about the participating justices' preference structures. See notes 41-45 and accompanying text.

35. Professor Rogers's repeated claims that outcome voting produces the Condorcet winner, see note 12, simply disregards the very thwarted majorities he outlines in his analysis of *Tidewater*, under either a limited issue-voting or outcome-voting regime. But merely saying that a majority has not been thwarted, or that the justices' preferences do not cycle, does not make it so. Quite obviously using *either* outcome or limited issue voting, the majority that would have achieved a contrary result under the altornative regime *has* been thwarted.

36. To be clear, in defending against Professor Rogers's mistaken assertion that I have mixed outcome and issue voting, see note 14 and accompanying text and Part III, I am not advocating that courts employ my hypothetical voting regime. Instead, I am doing the opposite, namely, illustrating, with reference to a particular Condorcet-producing rule, why appellate courts cannot simultaneously employ such a rule and meet their institutional obligation to resolve all cases properly before them.

37. Compare Riker, 52 Am. Pol. Sci. Rov. at 364 (cited in note 25) (observing that "as Arrow has shown, an intransitivity, once in existence, cannot be eliminated simply by juggling the techniques of counting").

38. Stearns, 103 Yale L. J. at 1219, 1258-71 (cited in note 5).

faced with preferences that cycle, the Supreme Court, because it is collectively obligated to decide cases, has evolved (along with virtually all appellate courts) away from the Condorcet criterion.

Fortunately, to illustrate this, I did not need to consider every conceivable voting rule. Social choice theorists have demonstrated that when a group of collective preferences contains a Condorcet winner, *all* Condorcet-producing rules will yield that outcome.[39] As a result, I was able to demonstrate why the Court has elected outcome voting by considering only a couple of potential Condorcet voting rules.[40] To do so, it was necessary to make a few assumptions about the preference structures of the justices. While Rogers faults me for making assumptions, given that we do not have complete ordinal rankings for all justices,[41] his criticism misses the point of my analysis. It is not necessary that my assumptions about the justices' preferences in any particular case be correct for my positive analysis to be persuasive. In fact, I have tried throughout my articles to provide a large number of alternative assumptions for various cases, including multiple sets of assumptions drawn from the same case or cases, some of which may be more intuitive than others.[42] Instead, we need only

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39. Riker states:

> There are many rules that utilize paired comparisons of alternatives to discover a Condorcet winner. If a Condorcet winner exists, then all these methods come out the same way. If a Condorcet winner does not exist, however, these rules typically produce different results, no one of which, in my opinion, seems more defensible than another.

Riker, *Liberalism Against Populism* at 69 (cited in note 24). See Stearns, 103 Yale L. J. at 1255 n.127 (cited in note 5) (discussing the procedures that yield Condorcet winners). While Professor Riker is correct that all Condorcet rules produce the same results when a Condorcet winner is present and different results when no such winner exists, in this Reply I will demonstrate that among the two relevant non-Condorcet-producing rules, outcome and limited issue voting, the results of outcome voting *are* better in that they alone promoto principled issue identification, and thus they promote adherence to Independence of Irrelevant Alternatives. See Part IV.

40. For the reason set out in the foregoing text, I could have used but one example to prove the difficulty associated with employing a Condorcet-producing voting rule in the Supreme Court (or any appellate court). I chose to employ more than one to flesh out a broader range of assumptions about the participating justices' preference structures in an effort to demonstrate the range of credible cyclical preference structures. See Stearns, 103 Yale L. J. at 1258-71 (cited in note 5).

41. Compare Rogers, 49 Vand. L. Rev. at 1032 (cited in note 1) ("This is not enough information to know which preference is the Condorcet winner, or indeed whether there is one").

42. See, for example, Stearns, 103 Yale L. J. at 1258-71 (cited in note 5) (discussing variations on *Kassel*, 450 U.S. at 662, *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), and *Crawford v. Board of Ed. of Los Angeles*, 458 U.S. 527 (1982)); Stearns, 83 Cal. L. Rev. at 1335-50 (cited in note 2) (discussing variations on *Flast v. Cohen*, 392 U.S. 83 (1968), and *Valley Forge Christian Coll. v. Americans for Sep. of Church & State*, 454 U.S. 464 (1982)); Stearns, 144 U. Pa. L. Rev. at 359-66 (cited in note 2) (discussing variations on *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 981 (1992); *Bowers v. Hardwick*, 478 U.S. 186

recognize that *if* the supreme court justices ever have cyclical preferences in a given case,[43] the Court must employ a non-Condorcet-producing voting rule to resolve that case or it will cycle. But it will not do to say that because we lack complete information we cannot make those assumptions necessary to assess the consequences of various voting regimes.[44] Instead, we must make multiple sets of assumptions, then test them using the proposed rules.[45]

(1986), and the general expansion of Warren-era precedents and the use of standing itself as illustrating potential multipeakedness).

43. In their reply to Professor Rogers's article, Professors Post and Salop posit that under specified assumptions, 9% of cases will generate cyclical preferences in a three-judge court. See David G. Post and Steven C. Salop, *Issues and Outcomes, Guidance, and Indeterminacy: A Reply to Professor John Rogers and Others*, 49 Vand. L. Rov. 1069, 1081 n.35 (1996). In fact, their simplifying assumptions *understate* the significance of cyclical preferences in the Supreme Court (and in the federal judiciary generally) and the importance of such preference structures to path manipulation. See generally Stearns, 144 U. Pa. L. Rev. at 309 (cited in note 2). In a system with fifty-one separate jurisdictions and with thirteen federal circuits, the possibilities for interest groups to seize relevant facts that test the limits of multipeaked judicial preferences is greatly enhanced. Thus, under the Post and Salop shifting-majority hypothetical in which the questions of a lawful search technique and a peremptery challenge arise naturally in a single case and in which the court's reversal fails to provide guidance on which of the two claimed bases of relief is dispositive, see Post and Salop, 49 Vand. L. Rev. at 1071-72, a future litigant, absent some barrier te justiciability, could readily test the limits of the court's holding by presenting a case that turns solely upon the more favorable of the two issues. Thus viewed, strategic path manipulation casts doubt on the authors' assumption that "all issues are equiprobable and mutually independent," id. at 1081 n.35, and, in turn, increases the likelihood that cyclical preferences will generato path-dependent legal doctrine. For an analysis demonstrating the role of standing in ameliorating strategic path manipulation of legal doctrine, see generally Stearns, 83 Cal. L. Rev. at 1309 (cited in note 2); Stearns, 144 U. Pa. L. Rev. at 309 (cited in note 2).

44. This is true of economic analysis generally. The only way to test the effect of changing an economic variable is to make certain assumptions that allow us to hold the rest of the world constant. That, of course, does not mean that we believe the rest of the world *is* constant, which is why sophisticated analysis always comes back to simplifying assumptions and relaxes them, after completing the analysis for which simplification was necessary.

45. I should note that while Professor Rogers faults me for making assumptions, with the exception of my *Crawford* and *Seattle* discussion, he has not criticized any of the assumptions that I have made in any of my examples. See Rogers, 49 Vand. L. Rev. at 1016 n.71 (cited in note 1). In that discussion, Rogers states: "In the example, G,H,I thought that X and Y should both be upheld; it does not follow that if X is struck down, Justices G,H,I would be unable to distinguish the case that they disagreed with." Id. Of course, Professor Rogers is correct that this does not follow, which is why I was careful to defend my assumption that the vote for consistent outcome was supported by substantive analysis demonstrating that the cases were indistinguishable for a majority of justices deciding the two cases. See Stearns, 103 Yale L. J. at 1262-64 & nn.159-70 (cited in note 5). As before, Rogers has not attacked my actual case analysis; indeed, he appears to have iguored it.

I should also note that while I have chosen in this Reply to emphasize my substantive disagreements with Professor Rogers concerning the implications of social choice for analyzing appellate court voting procedures, this should not be taken to suggest that I endorse his remaining characterizations of my work. At several points, Professor Rogers mischaracterizes my articles in a manner that appears te reflect a lack of careful reading. I do not have space to identify every example, but four are particularly noteworthy. First, Professor Rogers states that "Maxwell Stearns has treated the incoherence problem in ways that suggest outcome voting is bad." Rogers, 49 Vand. L. Rov. at 1025 (cited in note 1). Similarly, Professor Rogers states that

In each of my examples, I illustrated, based upon a reasonable set of assumptions, that if the Court employed unlimited motion-and-amendment voting, a Condorcet-producing rule, it would be unable to resolve cases in which its preferences cycled. Even if the assumptions about the particular cases that I discuss are far-fetched, which I be-

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"Stearns once called the result of issue voting the Condorcet winner, thereby strongly suggesting that outcome voting does not lead to the best result as a matter of public policy." Id. at 1027. The whole point of my discussion of outcome versus issue voting, however, was to demonstrate why, notwithstanding the possibility that outcome voting may mask a cycle or fail to produce a Condorcet winner, it remains the least-bad alternative among potential appellate court voting rules. See Stearns, 103 Yale L. J. at 1258-71 (cited in note 5) (explaining the evolution of supreme court voting rules toward outcome voting). Unless one equates "least-bad" (which of course means best available or simply "best," see id. at 1230 n.33 (describing the nirvana fallacy)) with "bad," Rogers's assertion is unsupportable. Of course, defining X to mean not-X makes it impossible to employ X as a meaningful standard.

Second, Professor Rogers asserts that "Stearns has referred to cases like *Tidewater* and *Kassel* as three-remedy cases." Rogers, 49 Vand. L. Rev. at 1032 (cited in note 1). In fact, in the very footnote that Professor Rogers cites for this proposition, I distinguish the same three-remedy cases that he has previously discussed, see John M. Rogers, *"I Vote This Way Because I'm Wrong": The Supreme Court Justice as Epimenides*, 79 Ky. L. Rev. 439, 439-42, 475 n.124 (1991); Stearns, 103 Yale L. J. at 1266-67 n.176 (cited in note 5), including *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), and *Arizona v. Fulminante*, 499 U.S. 279 (1991), from the principal cases that I had discussed thus far in the text, including *Seattle School Dist. No. 1*, 458 U.S. at 457, *Crawford*, 458 U.S. at 527, and *Kassel*, 450 U.S. at 662, all three of which are *two-remedy* cases.

Third, in his effort to clarify my position, Professor Rogers demonstrates further confusion. See Rogers, 49 Vand. L. Rev. at 1028 n.106 (cited in note 1). He is correct that I have retracted my assertion that the Supreme Court missed a Condorcet-winning outcome in *Kassel*. See Stearns, 144 U. Pa. L. Rov. at 321 n.49 (cited in note 2) (explaining, instead, that *Kassel* can be used te demonstrate why the Supreme Court employs outcome voting, which is a non-Condorcet-producing rule). But each of his further citations to my work, following a "But see" (which I have to assume is intonded to demonstrate that I am being inconsistent), is, in fact, fully consistent with my corrected assertion. In each of the three parentheticals, Professor Rogers cites me for the proposition that outcome voting, a non-Condorcet-producing rule, fails to ensure that available Condorcet winners prevail or, alternatively, may result in a masked cycle. Those propositions not only are consistent with the corrected statement, they, in fact, make the identical point. See id. at 321 n.49. They also happen to be correct. While I have not proved that the Supreme Court missed a Condorcet winner in *Kassel*, I *have* explained the Supreme Court's choice of a non-Condorcet-producing rule. By definition, a non-Condorcet-producing rule is one which prevents the collective decisionmaking body from *either* determining whether a Condorcet-winner or a cycle is present. See generally Part II.

Finally, Professor Rogers states: "Unfortunately, in making his points Stearns treats the incoherence problem addressed by Professors Post, Salop, Kornhauser, and Sager as if it were a cycling problem." Rogers, 49 Vand. L. Rev. at 1026-27 (cited in note 1). I do not treat the problem of incoherence *as if* it were a cycling problem; instead, I demonstrate that those who advocate issue voting have failed to recognize that the problem of incoherence *is in fact* a cycling problem and one which would be exacerbated if the Court were to employ a Condorcet-producing rule. See Stearns, 103 Yale L. J. at 1258-71 (cited in note 5) (explaining the evolution of Supreme Court decisionmaking toward non-Condorcet-producing rules). See also Part II. Again, this list is not exhaustive.

lieve them not to be,[46] that in no way undermines my general positive analysis. To do that, Professor Rogers would have to argue that cyclical preferences *never* arise in tbe judiciary, an assumption that I would suggest truly is far-fetched.[47] I should also note that while Professor Rogers has not discussed it, I have set out an elaborate explanation in the context of standing of why the Supreme Court, from the early 1970s to the present, was particularly prone to having cyclical preferences.[48] Professor Rogers may respond that even if I am right in my assumptions and even if the Court's preferences sometimes cycle (granted this too is an assumption, but I have little else to go on here), it does not matter: My cycling analysis does not explain supreme court voting rules because my analysis has "mixed" issue and outcome voting regimes,[49] and without having done so, there is no cycle. In fact, as the next part will demonstrate, I have done no such thing.

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46. Again, Professor Rogers has criticized *none* of the assumptions in any of my examples intended to demonstrato the possibility of masked cycling in the Supreme Court. See note 42.

47. I admit to finding far-fetched Professor Rogers's notion that path dependence is significantly reduced based upon a high "co-occurrence likelihood" of related substantive issues in given cases. See Rogers, 49 Vand. L. Rev. at 1018 (cited in note 1). Since this hypothesis is entirely conjectural on Professor Rogers's part, I can only respond by asserting that beyond a very small percentage of cases in which litigants can choose the manner in which to package issues, I would expect most issues to arise stochastically across cases. At the very least, that is more consistent with my social choice analysis of standing, which suggests that the critical path of case decisions, with standing in place, is presumptively grounded in fortuitous facts beyond the control of the litigants themselves. See Stearns, 83 Cal. L. Rev. at 1309 (cited in note 2). Moreover, in a federalist system like our own, the very fact that no less than fifty-one jurisdictions can litigate most issues at any given time, and that the Supreme Court can grant certiorari on discrete issues in particular cases, rather than having to resolve all issues that the parties wish to have resolved, suggests that, at best, the "co-occurrence likelihood" is unlikely to be a significant factor in ameliorating the problem of path dependency of law. See also note 43 (making a related argument in evaluating the reply by Professors Post and Salop). Instead, as I have demonstrated in my other articles, the fact that the Supreme Court employs, by necessity, a non-Condorcet-producing rule within and across cases means that we are inevitably stuck with a considerable degree of path dependency of legal doctrine. See Stearns, 83 Cal. L. Rev. at 1309 (cited in note 2); Stearns, 144 U. Pa. L. Rev. at 309 (cited in note 2). But, by presumptively grounding the critical path of case decisions in fortuiteus facts beyond the control of the litigants themselves, the standing doctrine presumptively renders the critical path of case decisions, and constitutional process generally, more fair.

48. Stoarns, 144 U. Pa. L. Rev. at 349-85 (cited in note 2) (explaining why the Supreme Court was prone to multipeakedness during that period and how that phenomenon contributed to the evolution of modern standing).

49. See note 14.

III. ISSUE SUBSUMES OUTCOME, BUT OUTCOME DOES NOT SUBSUME (ALL) ISSUES

At the outset it is worth noting that while Professor Rogers accuses me at several points in his Article of mixing issue and outcome voting to demonstrate cycling,[50] to the extent that he is correct in his analysis of *Tidewater* (which I will demonstrate that he is not), he has done the same thing. Quite clearly in trying to demonstrate that there are many ways of dividing up the issues in that case, he has presented at the very start two alternatives, issue A, which is a direct vote on the outcome, or issues B plus C, which together create an opposite outcome based upon a voting path that, by the justices' own analyses, is needed to achieve that outcome.[51] Thus, in his very first illustration of multiple issue division in a single case, Professor Rogers engages in the very "mixing" that he claims is improper. But surely that is a quibble. I will therefore assume that Professor Rogers intends to attack this part of his own analysis, along with my own, and defend us both against his erroneous attack. Little analysis is needed to see the flaw here. Using *Tidewater*, Professor Rogers has shown that there are many ways and levels at which one can divide the issues in a given case. His critique of my analysis demonstrates that all issues, subissues, sub-subissues, and sub-sub-subissues can be deemed "issues" for purposes of employing an issue voting rule. Thus, one can use issue voting to decide issues B and C in *Tidewater*, resulting in striking the statute. Alternatively, one might choose to subdivide either or both of issues B and C, thus producing the potential that with respect to either or both of those major issues, there will be a cycle, such that the combination of subissues B-1 and B-2 will produce the opposite result of a direct vote on B.

To give an example, which is admittedly hypothetical, it is possible that issue B could be subdivided into two discrete inquiries: (B-1) Should the judiciary employ an originalist analysis to avoid unfair results that would follow from a literal reading of Article III's statement of diversity jurisdiction?; and (B-2) If so, does an originalist analysis reveal an intent to treat citizens of the District of Columbia as citizens of a State for purposes of diversity jurisdiction? If the answers to these two questions are both "yes," then the very anomaly created by dividing issue A into B plus C is recreated in dividing issue

50. See id.
51. Rogers, 49 Vand. L. Rev. at 1002 (cited in note 1).

B into subissues B-1 and B-2. An individual vote on each subissue now produces the opposite outcome of a direct vote on the larger issue.[52] Of course, one can go deeper still, subdividing subissue B-1 into B-1-a and B-1-b, and on and on.[53] In Rogers's analysis (other than in his own example, in which issue A is, and then is not, an "issue"), issues B, B-1 and B-2, and B-1-a and B-1-b, and however many further subdivisions one cares to engage in, carry the label "issue," while the one potential vote on issue A, namely the dispositive vote on the question of "what is the outcome on these facts," apparently does not.[54] This appears to me to be utterly indefensible.

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52. Professors Post and Salop agree. Thus, they state:

> The paradoxical result under outcome voting . . . is thus just a special case of the more general phenomenon discussed in the text. Just as voting on the single "issue" at the highest level of the issue hierarchy—that is, outcome voting—can yield a different result if one breaks that issue inte its component subissues and votes separately on each of those, so too can the result of the vote on any subissue change if one takes votes on each of its components, and so on further down the issue hierarchy.

Post and Salop, 49 Vand. L. Rev. at 1077, 10 n.24 (cited in note 43).

53. It should not be necessary to devise further hypotheticals to illustrate this point, especially since Professor Rogers concedes it, stating: "Nightmares of infinite regression are conceivable." Rogers, 49 Vand. L. Rov. at 1025 (cited in note 1).

54. In fairness, Professors Post and Salop recognize this problem, although they do not offer a satisfactory solution. Thus, they state:

> We have argued that the appellate court should vote separately on each issue. But this raises the question of what determines an issue. On one extreme, critics would contend that every case has only a single issue—whether to reverse or affirm tbe lower court. According te this view, outcome voting is really just issue voting where the case involves only a single issue. At the other extreme, it could be argued tbat virtually every issue can be broken down into a discrete series of subissues. Does this mean that the appellate court must vote on every tiny step of each argument to satisfy a requirement of issue voting?
>
> We recognize that this is a troublesome question, and we invito further work to refine the analysis.

Post and Salop, 80 Georgetown L. J. at 772 (cited in note 2). To be clear, this critic of issue voting does not contend that every case "has only a single issue—whether to reverse or affirm the lower court." See id. Instead, it is my position that through careful legal analysis, appellate judges, including supreme court justices, arrive at an equilibrium of sorts in each case in which they derive the principal issues in that case, *plus* the further macro-issue, "what is the outcome on these facts?" In the shifting majority cases (as I employ that term, see Stearns, 83 Cal. L. Rov. at 1338 n.97 (cited in note 2) (using the term to describe cases like *Kassel* and *Tidewater*, in which an issue vote on the two or more major case issues produces the dissenting result, and distinguishing Professor Rogers's use of that term to describe cases like *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), in which two separate majorities of the Court create the case ruling)), or those cases that present what Professors Kornhauser and Sager term the "doctrinal paradox" (which is the same thing), we can infer a masked voting cycle across the macro-issue and the principal issues by making reasonable assumptions about the preference structures of the participating judges or justices. To avoid the institutional inertia that would result from employing a Condorcet-producing rule te resolve such cases, the Court is forced to employ either outcome or limited issue voting (meaning issue voting in which the justices escbew a final determination of the macro-issue, "what outcome on these facts?"). In addition, as set out more fully below, to prevent strategic identification of issues by subdividing issues down solely to

Surely, just as issue B, when subdivided into B-1 and B-2, remains an issue, so too does issue A when subdivided into issues B and C. But even if we are to accept Professor Rogers's characterization as a matter of pure semantics, it does not matter. Without engaging in the fairly obvious sequence, the reader is free to confirm that the very cycling that I have illustrated using issues A, B, and C can be reproduced using issues B, B-1, and B-2. As a result, even labeling issue A as "outcome" in no way undermines my larger thesis that in the absence of a Condorcet winner, unlimited motion-and-amendment voting, a Condorcet-producing rule, in contrast with outcome voting, a non-Condorcet-producing rule, will produce cycling. And, in fact, it will produce cycling among *issues*, even with no mixing of issues and outcomes whatsoever.

Professor Rogers may still offer two responses. First, he might imagine that voting can only take place at one level. Thus, even if issue B remains an "issue" after its subdivision into B-1 and B-2, it is no longer a relevant issue; the justices are only permitted to vote on the subissues and must allow their resolution of those subissues to determine the outcome of B. This, in turn, poses two problems. First, what happens if the judges choose to subdivide B but not C? They are then clearly mixing levels in voting on one issue and two subissues. Second, and more importantly, for Rogers to make this argument, he must defend the very issue-voting proposals that he attacks as indeterminate. The whole point of his critique, fairly read, is that there are an infinite number of potential issues and issue levels. He might further respond that in a given vertical path, we must stay at a single level. Thus, while we can subdivide issue B into B-1 and B-2, and then treat the combined outcome of B-1 and B-2 as controlling issue B, we cannot then consider issue B separately, although we *can* take the combined outcome of B-1 and B-2 (the new proxy for B) and combine it with issue C, to get an outcome on issue A. If so, I would suggest that Professor Rogers is no less guilty than Professors Post and Salop in devising a regime for which we need a new law school course on "Division of Issues."[55] The second problem is that even if we employed a metarule of one-level voting, it would not be difficult to imagine a voting cycle created as justices must now select (1) how to define the issues and subissues, (2) the level at which to define a

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create a favorable voting path, the Court elects outcome rather than issue voting from these two alternative non-Condorcet-producing voting rules. See Parts IV and V.

55. Rogers, 49 Vand. L. Rov. at 1014 (cited in note 1).

given line of issues and subissues, and (3) how to resolve substantively the issues and subissues, after completing the outcomes of parts (1) and (2). Any solution to the problem of cycling that multiplies the dimensions of decisionmaking, thus promoting new and greater opportunities for cycling, is no solution at all.[56]

Before leaving this Part, it is worth noting that Professor Rogers has also accused me of mixing issues and outcome "with abandon"[57] in my standing hypothetical set out in *Standing Back from the Forest*.[58] It is difficult to know exactly how I did this, given that Professor Rogers provides not a single example in his article. But since he accuses me of such a terrible thing, I feel the need to respond. In that hypothetical, I posited that the justices would face a combination of issues, including how to decide a given case, and, following a precedent that some believe is indistinguishable, whether the first case governs the second. The only way that he can accuse me of mixing issues with outcomes at all (let alone with abandon) is to suggest that the application of stare decisis is somehow not a legal issue. The mere statement of that contention carries its own refutation.[59]

IV. ANOTHER EVOLUTIONARY FEATURE OF APPELLATE COURT VOTING: PRINCIPLED ISSUE IDENTIFICATION

In fact, the foregoing analysis reveals another critical evolutionary feature of appellate court voting, beyond, but consistent with, those that I have previously identified. Specifically, any of the potential voting rules intended to resolve the problem of determining the level at which issues are identified, or whether mixing of levels is

56. Professor Riker has best explained the significance of agreement on how to define issues and issue dimensions as a means of preventing cycles: "Single-peakedness is important because it bas an obvious political interpretation. Assuming a single political dimension, the fact that a profile . . . is single-peaked means the voters have a common view of the political situation, although they may differ widely on their judgments." Riker, *Liberalism Against Populism* at 126 (cited in note 24). Riker further observes: "This kind of agreement is precisely what is lacking in a cycle, where voters disagree not only about the merits of alternatives but even where the alternatives are on the political dimension." Id. at 128. See Stearns, 103 Yale L. J. at 1245 n.90 (cited in note 5).

57. Rogers, 49 Vand. L. Rev. at 1030 n.111 (cited in note 1).

58. Stearns, 83 Cal. L. Rev. at 1329 (cited in note 2).

59. Stated differently, determining whether case A governs case B is no less a legal issue than how a court should resolve case B in the absence of a potentially indistinguishable precedent.

permitted, would invite strategic identification of issues[60] that may not be the best identification of genuine issues based upon careful legal analysis. Ironically, perhaps, outcome voting, in contrast with issue voting, promotes principled identification of issues necessary to resolve cases, even while it sometimes thwarts rational resolution of those very issues. It does so by divorcing the selection of issues from the resolution of the case. Precisely because the outcome of the case is based on the most often binary choice to affirm or reverse, justices at the opinion writing stage are free to identify the issues that they think best resolve the case under review. For that very reason, we are able to discern an honest disagreement across genuine issues among the justices in a given case. Also for that very reason, we can discern the *Tidewater* and *Kassel* anomalies, namely that resolution of the two critical issues produces a dissenting result on the outcome.

Without outcome voting, the determination of issues and issue levels would determine the outcome of the case. As a result, to avoid the outcome on a given issue, subissue, or sub-subissue, and so on, justices will have a strong incentive to continue going down levels until a path emerges (1) that gets to where they want to go, and (2) that exhausts the credibility of further issue subdivisions on the other side. The incentive under an issue-voting regime, oddly enough, even if it is to allow the fair resolution of issues ultimately identified to govern the outcome of a case, would be to thwart the identification of genuine issues in a case.[61] Stated in social choice terms, outcome

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60. Professors Post and Salop use the term "issue decomposition manipulation" to describe the same essential phenomenon. See Post and Salop, 49 Vand. L. Rev. at 1075-76 (cited in note 43).

61. To avoid this apparent difficulty with issue voting, Professors Post and Salop posit the following "primary issue" rule as a device to limit further strategic subdivision of issues in a given case:

> A *primary* issue on which multimember courts should vote is a question of law presented by a case that (a) is logically independent of any other questions presented by the case, in the sense that the question can be resolved as a logical matter without reference to any other accompanying questions, (b) is potentially dispositive of the outcome of the case, in the sense that resolution of the question can uniquely determine the outcome of the case, and (c) cannot be further decomposed into separate subquestions that fulfill criteria (a) and (b).

See Post and Salop, 49 Vand. L. Rev. at 1078 (cited in note 43). The authors further posit that "[t]he first two components of [this] issue decomposition rule assure that a 'primary issue' will be a question of law on which the court can issue a 'holding.'" Id. at 1079. The difficulty with their proposed regime, however, explains the evolution toward outcome, rather than issue, voting. As Post and Salop themselves recognize, in a considerable range of cases the deciding appellate court judges will possess cyclical preferences, see note 42 and citations therein, such that there exists more than one discrete method of devising statements of primary issues meeting the first two parts of their test. In such cases, the choice of issues becomes dispositive

voting ensures that the justices adhere to the principle of Independence of Irrelevant Alternatives[62] in identifying both issues and issue levels. Precisely because the path of issue identification is not dispositive of case resolution under outcome voting, the deciding judges have a strong incentive to provide persuasive statements of the legal issues genuinely in dispute (and, of course, how they would resolve them). Stated differently, under issue voting, judges would have an incentive to divide down, until a favorable voting path emerges, while under outcome voting, judges have an incentive *not* to do so, or to divide up, precisely because in setting out those issues that are the most critical to the resolution of a given case, the judges doing so are most likely to persuade others to vote their way. This holds even though in such anomalous cases as *Tidewater* and *Kassel*, a majority of the justices agreed on the definition of issues, but not on how to resolve them, thus producing a masked cycle.[63]

With issue voting, one imagines confirmation proceedings in which the parliamentary skills of the Supreme Court nominees are as, if not more, important than such matters as integrity, fitness for judicial service, knowledge of the law, or even jurisprudential perspective.

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even under their proposed issue-voting regime. Thus, even if courts were were to employ prong c, which Professors Post and Salop label the "stopping rule," no unique statement of issues will emerge. Instead, litigants—and jurists—will benefit from the very strategic issue identification (my term) or issue decomposition manipulation (the Post and Salop term) that their primary issue rule is intended to prevent. In fact, Professors Post and Salop later recognize this very problem:

> The issue decomposition rule will produce a unique set of primary issues defined vertically. That is, it provides a manageable "stepping rule" for the vertical issue decomposition process. However, cases may present alternative primary issues at any level of decomposition defined horizontally. For example, a judge presented with the case in [an example discussed in the toxt] may believe that [it] should be disposed of on grounds entirely unrelated to the constitutional questions on which we . . . have focused.

Id. at 1083. The authors further recognize that in a case in which judges possess cyclical preferences, the deciding judges cannot resolve the case simply by electing to employ issue voting, but instead, must decide upon the formulation of the governing issues, which, in turn, reintroduces the problem of strategic issue identification. Id. As I explain in Part V, outcome voting alone produces a collective resolution in virtually every case and a principled statement of the issues in each case that is not dictated by strategic agenda considerations.

62. Independence of Irrelevant Alternatives holds that in each pairwise contest, each participant must choose solely based upon the merits of the alternatives presented, without considering, for example, such extraneous matters as agenda control or the path of decisions. See Stearns, 103 Yale L. J. at 1276-81 (cited in note 5); Stearns, 83 Cal. L. Rev. at 1371-84 (cited in note 2).

63. By "masked cycle," I am referring to the fact that a non-Condorcet-producing rule prevents the requisite number of pairwise votes to determine whether the group's collective preferences possess a Condorcet winner or instead cycle. As a result, outcome voting, a non-Condorcet-producing rule, might well mask cyclical preferences that would be revealed if the Court instead employed unlimited pairwise voting, a Condorcet-producing rule. See Stearns, 103 Yale L. J. at 1258-71 (cited in noto 5); Stearns, 83 Cal. L. Rev. at 1329-50 (cited in note 2). See also Part II.

Indeed, a good parliamentarian could outpace even the most brilliant jurist by seizing relevant issues and relegating them to dustbins of obscurity in favor of minute issues that, while not genuinely in dispute, produce a favorable voting path.[64] The final point of contention follows directly from the foregoing analysis. While Professor Rogers is correct that the potential number of issues in a given case, like *Tidewater* or *Kassel*, is greater than issue-voting proponents suggest, it is also much smaller than he suggests.

V. THE NUMBER OF GENUINE ISSUES IN A GIVEN CASE IS FAIRLY STABLE AND SMALL

The foregoing analysis demonstrates that while the potential number of issues in a given case is larger than the two major issues at the top of the list, for example, in *Tidewater* or *Kassel*, it is neither infinite nor nearly as large as Rogers suggests in his analysis of *Tidewater*.[65] While I agree in principle that there are numerous ways to slice issues in a given case, surely many if not most of the issues set out in his list are interesting questions for pedagogic inquiry, but they are not "issues" as lawyers and judges understand that term. An "issue," properly defined, is not any conceivable question that one can ask about a case. In fact, issues D, E, F, G, K, and L[66] are not really issues at all. A legal issue, as I have always understood that term, is a question or one of a series of questions the resolution of which, individually or in combination, creates a logical progression in the ultimate resolution of the case. For example, whether a given ruling is fair or unfair, whether the Constitution should be broadly or narrowly construed, and the like, do not meet this fairly uncontroversial (I think) working definition. We may be forced to admit, for example, that a particular ruling, fair or not, is the law, or that resolving a debate among jurisprudential approaches on constitutional interpretation, while interesting in the abstract, is simply not controlling in *Tidewater*, given the clear language of Article III. Answering these

64. Alternatively, each chamber might reserve at least one law clerk position for a first-rate parliamentarian. Compare by analogy Jim Chen, *The Mystery and the Mastery of the Judicial Power*, 59 Mo. L. Rev. 281, 299-302 (1994) (explaining the influence of law clerks on agenda control in the Supreme Court).

65. See Regers, 49 Vand. L. Rev. at 1002-04 (cited in note 1).

66. Id. at 1002-03. It is quite possible that Professor Rogers's issues M and N also belong in this category. See id.

questions, then, in either direction, is not necessary to the resolution of the case, and thus these questions are not issues.

Excessive subdivision of legal issues tends in either of two directions. Issue division can promote arcane, or exceedingly fact-specific, distinctions that have the appearance of promoting an outcome-oriented jurisprudence. Alternatively, it can produce statements of issues at far too high a level of generality, thus requiring more arcane, or fact-specific, distinctions in future cases in which applying a precedent drawn too broadly would produce displeasing, or absurd, results. In fact, these two tendencies are flip-sides of the same coin. It is precisely because a prior case was decided at too high a level of generality that courts are often forced to devise distinctions that, because they are overly fact-specific or arcane, fail to withstand critical analysis. For illustrations, we need go no further than Professor Rogers's division of issues in *Tidewater*.[67] Fairly read, *Tidewater* does not turn on the resolution of whether "the Constitution [should] be interpreted to avoid unfair results" (Rogers's issue G), or whether "words in the Constitution [should] be construed to have consistent meanings" (Rogers's issue L).[68] It is certainly no surprise, for example, that the justices did not elect to let the answer to Rogers's issue L control the case because if they did, *Tidewater* would have threatened to become the tail wagging a far bigger and more important dog than whether Congress can provide diversity jurisdiction in lawsuits between citizens of a state and of the District of Columbia. If resolving issue L controlled *Tidewater*, that (rather narrow and, ultimately, not terribly consequential) holding would have threatened to control the far more important incorporation/fundamental rights controversy, given the identical language of the Fifth and Fourteenth Amendments' Due Process Clauses.[69]

It is not surprising that, but for the shifting majority in *Tidewater*, the case instead devolved to the more manageable questions the answers to which would have resolved the case. Those, of

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67. Id. at 1002-04.

68. Id. at 1003. It is, of course, no answer to suggest that these are issues because the justices discussed them in their various opinions. Judges, including supreme court justices, discuss many ancillary issues that are not genuine legal issues necessary to the resolution of the cases that they are deciding. In any event, such a response would eschew any distinction between holding and dictum. Accord Post and Salop, 49 Vand. L. Rev. at 1080 n.31 (cited in note 43) (rejecting Rogers's characterization of *Tidewater* issues in favor of those set out in this Reply).

69. For my recent review of this controversy and its relationship to the evolution of standing, see Stearns, 144 U. Pa. L. Rev. at 367-83 (cited in note 2).

course, are Professor Rogers's issues B plus C.[70] As stated above, one of the critical evolutionary benefits of outcome voting is that it encourages meaningful identification of the real issues in a case. Precisely because the Supreme Court employs outcome, rather than issue, voting, the *Tidewater* justices were able to agree upon the genuine legal issues (Rogers's B plus C), even while they thwarted majority preferences on those issues. Thus, while I accept that it is always possible to devise more than one set of genuine legal issues, as I (and I believe lawyers generally) understand that term, the number of genuine legal issues in a given case, at least under outcome voting, is relatively small and stable (and certainly smaller than Professor Rogers suggests).

VI. CONCLUSION

The temptation to simplify is overwhelming for law professors, especially given the increasing extent to which jurisprudence draws upon other disciplines no less, and perhaps more, complex than law. The risk in doing so, however, is equally great. We do not, for example, advance the ball by making complex subjects or analyses appear easier than they actually are. I have used social choice throughout my scholarship as a positive, rather than normative, tool. In part, I have done so because social choice provides a large set of nonefficiency-based economic benchmarks that are uniquely conducive to providing great insights into public law.[71] I have also done so because I have long believed that true economic analysis—indeed the more difficult economic analysis—is almost always a positive endeavor. It is invariably easy to come up with an analytic framework and to apply it to propose a change in existing rules or institutions. The hard job is to identify what is missing in the story. Although we do not agree why, Professor Rogers and I do agree that issue voting is not a proposal worth trying. I hope in this Reply to have used the positive tools of social choice to explain what is missing in the analyses of those who think otherwise.

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70. See Rogers, 49 Vand. L. Rev. at ___ (cited in note 1).

71. See generally Maxwell L. Stearns, *Public Choice and Public Law: Readings and Commentary* ch. 2, notes and questions (Anderson, forthcoming 1996) (describing the normative baselines revealed by social choice and applying them to a number of public law institutions).