Nebraska Law Review

Volume 95 | Issue 3 Article 5

2017

Promise and Peril: Doctrinally Permissible Options for Calibrating Procedure Through Contract

H. Allen Blair
Mitchell Hamline School of Law, allen.blair@mitchellhamline.edu

H. Allen Blair*

Promise and Peril: Doctrinally Permissible Options for Calibrating Procedure Through Contract

TABLE OF CONTENTS

* Robins Kaplan Distinguished Professor of Law and Senior Fellow, Dispute Resolution Institute, Mitchell Hamline School of Law. I would like to thank Robert E. Scott, Victor Goldberg, and Thomas Charbonneau; the faculty, staff, and students at Columbia University School of Law; the St. Thomas University School of Law and the organizers of and participants at the 9th Annual International Conference on Contracts; and the law faculty at Oxford University for their excellent feedback and input on early drafts of this paper. I would also like to thank the Center for Law and Economic Studies at Columbia University School of Law and Hamline University School of Law for providing financial support in drafting and presenting versions of this paper.

Nothing is of more immediate practical importance to a lawyer than the rules that govern his own strategies and maneuvers; and nothing is more productive of deep and philosophical puzzles than the question of what those rules should be.[1]

I. INTRODUCTION

For a long time, arbitration was the only game in town for parties who wanted more flexibility in the adjudication of their disputes. They faced a dichotomous choice between accepting the public court system and its attendant procedural rules or opting out entirely and resolving their disputes in arbitration. Private process, however, "has migrated in surprising ways into the public courts: despite public rules of procedure, judicial decisions increasingly are based on rules of procedure drafted by the parties . . . ."[2] This sort of private procedural ordering gives parties the ability to unbundle the off-the-rack procedures applied in public courts and bargain about individual rules.[3] Customized procedure, in short, offers parties much of the flexibility that once seemed the prerogative of arbitration while maintaining the advantages of public adjudication, including, most significantly, rights to appeal and public subsidization. While arbitration has arguably be-

1. RONALD A. DWORKIN, A MATTER OF PRINCIPLE 72 (1985).
2. Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 510–11 (2011).
3. Private procedural ordering allows parties to bargain over the procedural rules that will govern the resolution of any disputes that might arise between them in the future. *See, e.g.*, Jaime Dodge*, The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 724–25 (2011) (describing the process of modifying by contract the "spectrum of procedure" as private procedural ordering). Following the lead of other commentators who have described this form of private ordering, I will use the terms "private procedural ordering" and "procedural contracting" interchangeably. *See, e.g.*, Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 598 (2005) (recognizing a movement from "Due Process Procedure to Contract Procedure"). Unlike some commentators, however, unless otherwise specified, I use these terms in the broadest possible sense, to include all party agreements regarding resolution of their disputes, including procedures that may be used in courts and extrajudicial procedures and processes such as arbitration, mediation, med-arb and settlement. *Cf.* Davis & Hershkoff, *supra* note 2 (describing contract procedure as "the practice of setting out procedures in contracts to govern disputes . . . that will be adjudicated in the public courts"); Erin A. O'Hara O'Connor & Christopher R. Drahozal, *Carve-Outs and Contractual Procedure*, in Vand. L. and Econ. Res. Paper No. 13-16, at 2 (June 14, 2013) https://ssrn.com/abstract=2279520 or http://dx.doi.org/10.2139/ssrn.2279520 [https://perma.unl.edu/C9GT-ZCYM].

come more like litigation,[4] litigation may be becoming more like arbitration.[5]

The promise of more flexible public adjudication presents parties with significant benefits.[6] If public procedure is seen as a set of defaults rather than immutable or mandatory rules, then parties may negotiate over the contents not only of their substantive obligations but also of their preferred enforcement mechanisms.[7] A default regime allows parties to design organizational frameworks within which the integrity of a contractual relationship is decided and maintained, calibrating accuracy and efficiency to meet their preferences.[8] Predispute procedural contracting allows parties to create additional incentives for performance, avoid opportunistic and socially wasteful *ex post* litigation spending, and limit risk by leveraging their collective interests and shared ignorance about what the future may hold. Post-

4. *See, e.g.*, Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 8 (1997) (arguing that arbitration has evolved into something of a "civil court of general jurisdiction"); Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 52 (calling arbitration the "new litigation").

5. Douglas Shontz, Fred Kipperman & Vanessa Soma, *Business-to-Business Arbitration in the United States*, RAND (2011), http://www.rand.org/pubs/technical_reports/TR781.html [https://perma.unl.edu/9L2Y-P6ZG], at i; *see also, e.g.*, Henry S. Noyes, *If You (Re)build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 622 (2007).

6. Indeed, innovating through contract generally is a pervasive phenomenon. *See generally* Kevin E. Davis, *Contracts as Technology*, 88 N.Y.U. L. REV. 83, 85 (2013) (arguing that contractual innovation is a form of technological progress that spurs economic growth).

7. For a particularly good introduction to the subject of default rules, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (applying game theory to the question of how lawmakers should create contract default rules to facilitate efficient contracts); *see also, e.g.*, Ian Ayres, *Making a Difference: The Contractual Contributions of Easterbrook and Fischel*, 59 U. CHI. L. REV. 1391 (1992) (reviewing FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991)); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992) (discussing the default rule approach to gap-filling); Jules L. Coleman et al., *A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law*, 12 HARV. J.L. & PUB. POL'Y 639 (1989) (applying an economic analysis to default rules); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990) (employing game theory, but challenging Ayres and Gertner's conclusions); *Symposium on Default Rules and Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 1 (1993) (featuring seventeen pieces on theoretical perspectives on contract default rules).

8. *See, e.g.*, Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 314 (1994) [hereinafter Kaplow, *Accuracy in Adjudication*] (showing that heightened accuracy in adjudication can only be obtained at higher costs so an efficient balance has to be struck on a case-by-case basis).

dispute procedural contracting allows parties to tailor the adjudication process in light of their unique and potentially differing evaluations of a dispute in order to constrain litigation expenditures and mitigate risk.

Given the potential gains from finely tuned procedure, it is puzzling that current empirical evidence suggests that few parties explore the full range of customization theoretically available to them.[9] Indeed, while the evidence we have is far from perfect, it seems to indicate that parties are doing precious little fine-tuning, at least *ex ante*. Although parties routinely engage in a few sorts of coarse pre-dispute customizations—choosing to arbitrate or engage in some other form of alternative dispute resolution, waiving rights to a jury, picking a law to govern their deals and selecting a forum for their disputes—it does not appear that parties regularly attempt more precise calibrations of procedure. It is less clear how often and to what extent parties may be engaging in fine-tuning of procedure after a dispute has arisen, though commentators have speculated that such agreements are similarly rare.[10]

One key explanation for the relative dearth of fine-grained procedural customization, and the explanation that many commentators rely on, might be that the practice constitutes a radical departure from current doctrine.[11] It might be that the costs of innovating in the face of doctrinal norms or trying to change those norms are simply too steep for any single party to bear, especially given worries about freeriding.[12]

This Article evaluates this doctrinal explanation for the puzzle created by the gap between the potential gains of customized procedure and the apparent reality that parties do little of it, at least before a dispute arises. It concludes that a close look at the doctrine does not bear this story out. To the contrary, while express authorization for

9. *See infra* Part III.

10. *See, e.g.*, Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1342 (2012) (finding few examples of agreements entered into after filing, other than extensions of time for filing and similar modest adjustments to scheduling); David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389, 393 (suggesting that procedure-related agreements are not as common as generally imagined).

11. *See, e.g.*, Scott Dodson, *Party Subordinance in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 6–7 (2014) (arguing that "parties fall at the bottom of the power hierarchy" and parties' attempts "to alter otherwise applicable procedures . . . are wholly unenforceable absent some legal authorization for judicial enforcement").

12. *See infra* note 131 and accompanying text. Essentially, innovators have a hard time excluding others from taking advantage of their work. If the innovation is valuable, others can copy it easily. By itself, this problem might dissuade some potential innovators, who have to spend time and money designing the innovation. But the free rider problem is exacerbated by the fact that innovators also disproportionately bear the risks that go along with adopting customizations.

many forms of customized procedure does not exist, the current trend of doctrine could not be clearer: courts seem ready to enforce parties' autonomous procedural choices. Accordingly, there are minimal risks that a court will refuse to enforce or abide by a procedural customization so long as it does not suffer from some fundamental contract formation flaw, like unconscionability or fraud.

The conclusion reached in this Article leaves the animating puzzle unsolved. It also leaves significant and important normative questions about the desirability of private procedural ordering unanswered. I take up these two matters in separate articles.[13] But in this Article, by precisely articulating the benefits of the practice, surveying the existing empirical evidence about it and addressing its doctrinal feasibility in detail, I hope to clear a path to a better understanding of the promise and peril of procedural contracting.

This Article proceeds in three parts.

In Part II, I analyze the potential efficiency gains for parties from private procedural ordering. I begin by rehearsing the basic economic justifications for procedural rules and then turn to sketching the core features of current public procedural rules. Next I outline the benefits that parties might realize from seeing public procedural rules as defaults that can be varied.

In Part III, I present the existing empirical evidence regarding the degree to which parties seem to engage in procedural contracting. This evidence, while imperfect, indicates that outside of a few traditional and relatively coarse areas of customization, parties seem uninterested in exploring the promise of fine-tuned procedure, at least *ex ante*. The evidence suggests, however, that parties may be doing more individualized and tailored procedural contracting *ex post*.

In Part IV, I evaluate the contention that there are doctrinal limits to private procedural ordering. I conclude that, although courts have not expressly sanctioned many specific forms of procedural customization, particularly before a dispute arises, the overall trend of doctrine supports procedural innovations.

---

13. I provide an informal model that offers an explanation to the puzzle in H. Allen Blair, *Finely Tuned: Customizing Procedure Through Contract*, where I evaluate when and the extent to which parties rationally might seek to modify default rules of procedure and conclude that in arms' length deals, parties are unlikely to seek radical departures from the defaults. I then evaluate the normative implications of procedural contracting in H. Allen Blair, *The Line Between Mockery and Efficiency: The Normative Implications of Private Process*, [hereinafter Blair, *Normative Implications*] where I conclude that the most concerning objections to private process map onto general concerns about assent in disparate contracts generally and thus cannot and should not be viewed in isolation from that larger subject.

II. THE GAINS FROM CUSTOMIZED PROCEDURE

Due to these multiple and moving targets, the optimal design of adjudication may be more roundabout than building a road up a treacherous mountain: at least the mountain stands still.[14]

No two disputes look the same. The path to resolving each dispute, then, is unique. That path will vary based on the substantive law implicated—which in a contract dispute depends not only on default contract rules but also on the parties' agreement—the procedural rules applied, the resources each side has and is willing to invest in dispute resolution, each side's estimation of the merits of the dispute, and each side's sensitivity to risk. The kaleidoscopic number of combinations of these interrelated elements defies generalization.[15]

Viewing public procedure as primarily comprised of default rather than mandatory rules empowers parties to represent their own interests when confronting an infinitely variable future. Contractible procedure rests not only the content of a dispute but also the process by which a dispute will be resolved on negotiation between the parties. In other words, procedural customization puts the parties in control, allowing them to define the scope of the dispute and to specify the form and substance of the proceedings that will resolve it. Being closer to the unique facts and circumstances surrounding their deal, contracting parties may construct a dispute resolution mechanism that optimally aligns their incentives, reduces expected dispute resolution costs, and mitigates risk.

The following sections explore these benefits in more detail. The first sets the stage by briefly articulating an economic perspective on procedure generally, showing that procedural rules must strike a balance between increased accuracy and increased costs, taking into account the needs of the parties to a dispute as well as the broader society. The second then specifically describes several core features of the current set of procedural rules in public courts. It argues that the default rules of civil procedure achieve this balance, in the main, by relying on standards implemented *ex post* by adjudicators with the

14. Louis Kaplow, *Information and the Aim of Adjudication: Truth or Consequences*, 67 STAN. L. REV. 1303 (2015) [hereinafter Kaplow, *Truth or Consequences*].

15. *See, e.g.*, Samuel C. Damren & Lisa A. Brown, *Every Case is Unique, but Commercial Cases Are More So—Don't Ever Forget That*, 93 MICH. B.J., Aug. 2014, at 22, https://www.michbar.org/file/journal/pdf/pdf4article2416.pdf [https://perma.unl.edu/58ZT-TWHH] ("There is no single template that adequately describes—and no single strategy for winning—commercial litigation. Each case is different."); *cf.* David R. Carlisle & Bruce A. Blitman, *Tips for Managing the "Mega-Mediation,"* 67 DISP. RESOL. J., no. 4, 2013, at 1 ("There is no such thing as a simple or typical mediation. Every case you mediate will present unique challenges . . . . Just like snowflakes and fingerprints, no two mediations . . . will be the same.").

benefit of hindsight. Relying on the first two, the third section connects the dots and outlines some of the efficiency gains that might be realized through private procedural ordering.

A. Brief Primer on the Economic Theory of Procedure in Dispute Resolution

Adjudication can be costly. So what are parties purchasing when they choose to invest in it? Most fundamentally, they are buying a resolution to their dispute. More precisely, they are hoping to buy a reasonably accurate resolution to their dispute. This is where procedure factors into the mix. In adversarial systems of adjudication, perhaps the primary role of procedure is to produce results that optimally enforce the substantive law.[16] Optimal enforcement strikes the best balance possible in a given case between accurate outcomes and the increased costs of reaching such outcomes.[17]

Accurate outcomes are valuable not only to the parties—providing fair, equitable, and hopefully even dignified closure—but to society as a whole. So long as adjudicators accurately enforce substantive law, rational actors expect to face liability to the degree that they behave unlawfully. As a result, they conform their behavior to the substantive standard.[18] It follows that, to the extent that procedure reduces the risk of outcome error, it also reduces the incidence of unlawful behavior and corresponding social costs.[19]

Still, accurate outcomes are not all that interest parties or society at large. Assuming that the goals of adjudication are fostering productive activity, restraining harmful conduct and avoiding undue expenses, then the key to assessing the success of adjudication rests on its consequences, not accuracy per se.[20] Perfectly accurate adjudica-

16. *See* ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 128–48 (2003) (explaining expected error costs and the error cost analysis in more detail); Todd J. Zywicki & Anthony B. Sanders, *Posner, Hayek, and the Economic Analysis of Law*, 93 IOWA L. REV. 559–602 (2008).

17. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970) (balancing the risk of error and the cost of additional procedure in determining the due process right to an evidentiary hearing).

18. RICHARD A. POSNER, REGULATION (AGENCIES) VERSUS LITIGATION (COURTS): AN ANALYTICAL FRAMEWORK 11–25 (Daniel P. Kessler ed., 2011); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1166 (2001) (stating that "a primary reason to permit individuals to sue is that the prospect of suit provides an incentive for desirable behavior in the first instance" and also noting that in some cases the prospect of suit deters future conduct).

19. *See, e.g.*, Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1058 (2015) (describing how some organizations use information obtained from litigation to adjust behavior going forward).

20. *See, e.g.*, Kaplow, *Accuracy in Adjudication*, *supra* note 8 (arguing that the primary goal of adjudication should be to incentivize *ex ante* socially optimal primary behavior not to achieve accurate outcomes); Kaplow, *Truth or*

tive outcomes should, usually, correspond with the best consequences. But accuracy is expensive, so there is, in the real world, always a tradeoff. Sometimes that tradeoff does not pay. Parties, and society, have to balance their appetite for accuracy against its increased costs.[21] Procedures designed to reduce outcome error, like extra layers of appellate review or more searching discovery, necessarily cost more.[22] Moreover, many such procedures create opportunities for a mismatch between a socially optimal level of investment and private incentives to overinvest in litigation.[23] Because individual parties do not completely internalize the costs of their litigation choices, and because such choices take place incrementally over time, the decision to incur some litigation costs may be individually rational while still being socially wasteful.[24] To achieve proportionality—an optimal level of litigation investment—any system of procedure must strive to balance the sum of both parties' expected process costs against the private and social value of enhanced accuracy.[25]

Consequences, *supra* note 14, at 1306 (explaining that "[t]he value of truth in adjudication depends on its consequences, and valuing various outcomes is outside the realm of truth per se").

21. Even Professor Solum, who has argued persuasively and passionately that procedural justice requires consideration of more than the tradeoff of costs and accuracy acknowledges that this tradeoff is an essential part of procedural justice. *See, e.g.*, Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. LAW REV. 181, 183 (2004) (noting that procedural justice requires, in part, "a reasonable balance between cost and accuracy").

22. *See, e.g.*, Kaplow, *Truth or Consequences*, *supra* note 14, at 1335; *see also, e.g.*, Jonathan T. Molot, *The Feasibility of Litigation Markets*, 89 IND. LAW J. 171, 174 (2014) (noting that procedures designed to enhance accuracy often have the opposite of their intended effect, costing too much and accordingly forcing parties to make second-best litigation choices).

23. Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1486 (1999) (discussing the possibility that parties will either underinvest or overinvest in the search for evidence, relative to the social optimum).

24. *See, e.g.*, Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 577–78 (1997) (noting that many litigants consider only the benefits they garner and the costs they incur and not the benefits of the lawsuit that they do not capture or the costs that their behavior imposes on others). As Professors Grundfest and Huang have demonstrated, parties invest in litigation in increments rather than all at once. *See* Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1293–98 (2006). This fact results in plaintiffs having a counterintuitive incentive, under some conditions, to file suit in cases in which neither they nor society expect a positive return. *See id.* at 1277, 1299–305 (explaining that a lawsuit with a negative expected value is equivalent to an out-of-the-money call option that a plaintiff will rationally pursue as long as the price of the option is low and the volatility of the claim's value is high).

25. *See* Zywicki & Sanders, *supra* note 16, at 559–602. Although dispute resolution unequivocally implicates the interests of society, particularly in some domains like civil rights cases, most commentators and the rules themselves seem to prioritize the private interests of the parties. *See, e.g.*, 1 JAMES WM. MOORE ET AL.,

So far as the parties themselves are concerned, at least, optimal resolutions are frequently found in full settlements.[26] In fact, much of the literature on the law and economics of adjudication suggests that a full settlement is usually a first, best solution for parties.[27] As the old saw goes, a bad settlement is often better than a good trial.[28] Assuming that parties are rational and are not acting strategically to influence current or future actions of one another or third parties or alter legal rules,[29] they will calculate a settlement value by multiplying the probability of success on the merits in a given case by the value of an anticipated judgment in that case net of transaction costs.[30] Adjudication should only happen if the plaintiff's minimum

---

MOORE'S FEDERAL PRACTICE § 1.21[1][a] (3d ed. 2008) ("The application of orderly rules of procedure does not require the sacrifice of fundamental justice, but rather the Rules must be construed to promote justice for both parties, not to defeat it. This mandate is met if substantial justice is accomplished between the parties."); FED. R. CIV. P. 1 (stating that the Federal Rules of Civil Procedure "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding").

26. *See, e.g.*, John Barkai, Elizabeth Kent & Pamela Martin, *A Profile of Settlement*, 42 CT. REV. 34, 34 (2006) (observing that generally less than 3% of filed cases reach trial verdict). Significantly, there is a good deal of debate in the literature about the socially optimal level of litigation versus settlement. *See generally, e.g.*, Steven Shavell, *The Level of Litigation: Private Versus Social Optimality of Suit and of Settlement*, 19 INT'L R. L. & ECON. 99 (1999). The trouble is that when parties spend on litigation, they do not take into account the costs that such an action will require of others. On the other hand, when parties spend on litigation, they also do not take into account the impact that this will have on incentives to reduce harm in the future or other positive externalities. *See id.* Despite the fact that the default rules of procedure seem to espouse belief that settlements generally enhance social welfare, see, for example, FED. R. CIV. P. 16 (requiring pretrial settlement conferences) and FED. R. CIV. P. 68 (imposing legal costs on a party who refuses a settlement offer that turns out to have been more favorable than a trial outcome), several commentators have persuasively argued that, in some circumstances, settlement can lower social welfare. *See, e.g.*, Ezra Friedman & Abraham L. Wickelgren, *Chilling, Settlement, and the Accuracy of the Legal Process*, 26 J.L. ECON. & ORG. 144 (2010).

27. I distinguish here between a full settlement and various sorts of partial settlements, which are actually forms of *ex post* procedural contracting. *See infra* Part II.C.

28. *See, e.g.*, *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985), aff'd, 798 F.2d 35 (2d Cir. 1986) (noting "the familiar axiom that a bad settlement is almost always better than a good trial").

29. *See, e.g.*, Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 226 (1982) (noting that problems with figuring out how to divide a settlement surplus may lead to strategic bargaining that undermines the settlement). This simple model of settlement also only applies in one-shot cases. The equation will necessarily look different if one of the parties is acting to influence third parties or the outcome in future similar cases or if one of the parties is trying to change the law.

30. According to Posner:

> The plaintiff's minimum offer is the expected value of the litigation to him plus his settlement costs, the expected value of the litigation being

settlement value exceeds the defendant's maximum settlement value and there is, accordingly, no surplus over which the parties can bargain.[31] Generally, such a divide will exist only if the parties have differing estimates of the probability of success on the merits or differing estimates of an anticipated judgment.[32] Indeed, a substantial number of commentators and even courts have implied that adjudication results from grave analytical errors.[33] With the goal of aligning the parties' respective views of the dispute, many of the current default rules

---

> the present value of the judgment if he wins, multiplied by the probability (as he estimates it) of his winning, minus the present value of his litigation expenses. The defendant's maximum offer is the expected cost of the litigation to him and consists of his litigation expenses, plus the cost of an adverse judgment multiplied by the probability as he estimates it of the plaintiff's winning (which is equal to one minus the probability of his winning), minus his settlement costs.

Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 418 (1973); *see also, e.g.*, George L. Priest, *Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes*, 14 J. LEGAL STUD. 215, 217 (1985). For the sake of simplicity, my textual formulation ignores the time value of money, conflates settlement costs and litigation expenses and characterizes them as transaction costs, and assumes that parties are risk-neutral. It also does not address the problem of risk versus uncertainty, where risk can be quantified and uncertainty cannot be. *See* FRANK H. KNIGHT, RISK, UNCERTAINTY, AND PROFIT 259 (London Sch. Econ. & Pol. Sci. ed., 7th prtg. 1948) (1921) ("When our ignorance of the future is only partial ignorance, incomplete knowledge and imperfect inference, it becomes impossible to classify instances objectively.").

31. Thomas J. Miceli, *Settlement Strategies*, 27 J. LEGAL STUD. 473, 474 (1998) ("In the differing perceptions model, a *bargaining* process is envisioned in which the parties arrive at a settlement amount somewhere between their reservation prices. Thus, when a settlement occurs, the parties share the surplus from settlement.").

32. In a simple model of settlement, this leads to the intuitive conclusion that cases with high transaction costs relative to the stakes are more likely to settle while cases with low transaction costs relative to the stakes are more likely to proceed to adjudication. *See, e.g.*, Grundfest & Huang, *supra* note 24, at 1299–305 (showing how a case with a negative expected judgment value can still have substantial settlement value); Posner, *supra* note 2, at 419 n.29 (1973) (asserting that empirical evidence exists to show that higher stakes cases are more likely to be litigated).

33. *See, e.g.*, Marek v. Chesny, 473 U.S. 1, 10 (1985) ("In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants."); G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 664 (7th Cir. 1989) ("Settling litigation is valuable, and courts should promote it."); Robert Cooter et al., *supra* note 29, at 225 (stating that trial "represents a bargaining breakdown."); Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1074 (1989) (noting that trials result from "mistaken prediction[s]" made by parties); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 108 (1994) (noting that most scholars believe "that trials represent mistakes—breakdowns in the bargaining process—that leave the litigants and society worse off than they would have been had settlement been reached").

of civil procedure, particularly related to discovery and pretrial management, work to educate the parties about the likely outcome of any adjudication.[34]

Of course, in reality, full settlements are not always reached. Not only do parties make analytical errors, but, in the rough and tumble of actual disputes, there are a number of reasons why even rational parties might reach different expected judgment values and thus choose to adjudicate rather than fully settle.[35] For the purposes of this Article, at least three of these reasons are particularly relevant.

First, judging is difficult.[36] In the adversarial system, courts make factual determinations with substantially less than complete confidence, getting information from the self-interested parties. Courts are therefore doomed to experience shortages of quality information regarding what the relevant facts are.[37] As a result, judges, by definition busy generalists, may have a hard time discerning the wheat from the chaff.[38] The risk of judicial error can be significant and this risk has to be rolled into the parties' respective estimate of success on the merits.[39] Parties may not estimate a common base rate, however,

34. *See, e.g.*, Robert G. Bone, *"To Encourage Settlement": Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW. U. L. REV. 1561 (2008) (examining the evolution of Rule 68 and its ability to encourage settlement).

35. *See, e.g.*, Maya Steinitz, *How Much Is That Lawsuit in the Window? Pricing Legal Claims*, 66 VAND. L. REV. 1889, 1893–94 (2013) (arguing that valuation of legal claims is characterized by extreme uncertainty, extreme information asymmetry, extreme agency problems, and the problem of effort provision). Of course, parties may also act irrationally. Among other things, parties might try to recover sunk costs and thus make poor investment decisions. *See* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 113 (1990) ("Although economists exhort decision-makers to ignore sunk costs and to attend only to the prospective benefits and costs of alternative courses of action, few attain this ideal. Instead, individuals often incur further losses ('throw good money after bad') or take great risks in order to recover those losses.").

36. *See, e.g.*, Chris Guthrie*, Misjudging*, 7 NEV. L.J. 420, 428 (2007) (arguing that judges have three sets of "blinders": informational blinders, cognitive blinders, and attitudinal blinders).

37. *See* ALEX STIEN, FOUNDATIONS OF EVIDENCE LAW 34–35, 73–106 (2005) (analyzing the sources of uncertainty in fact finding); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 4 (2006) (describing judicial ascertainment of the law as "choice under uncertainty" that implicates "limited information and bounded rationality").

38. *See, e.g.*, Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 407–13 (2013) (describing how federal appellate judges spread their deliberative efforts across cases, thereby economizing on decision making resources).

39. *See* Lea Brilmayer, *Wobble, or the Death of Error*, 59 S. CAL. L. REV. 363, 367–69 (1986) (stating that errors in both fact finding and applications of the law are inevitable and explaining why).

for the probability that a judge will make a mistake, and any difference they have will ultimately impact their reasonable estimates of success on the merits.

Second, the scarcity of high quality information impedes the parties' ability to estimate success on the merits. The ultimate judgment that results from adjudication is the product of the parties' interactive strategies in presenting evidence to the court. This presentation occurs incrementally over time. At least at the outset, the parties are likely to have asymmetric information about the salient features of the dispute. In fact, parties may not have complete access to information about their own conduct at the outset of a lawsuit. In complex organizations, information is decentralized and held by a variety of people at different levels separated hierarchically and often geographically from one another.[40] Even as the case progresses and more information comes to light, each side's strategic maneuvering may undermine the credibility or completeness of the information or merely reinforce self-serving optimism.[41] This noise can make it difficult for parties to arrive at common present forecasts of the value of a future judgment.

Third, agency problems or frictions related to agency may stymie the parties' ability to accurately forecast adjudicative outcomes. Of course, the interests of lawyers and their clients may differ. A robust literature discusses the traditional formulation of the principal agent problem in the context of lawyers and their clients.[42] But subtler, though not necessarily less significant, imbalances of information be-

40. *See, e.g.*, Schwartz, *supra* note 19 (arguing that lawsuits help produce information for organizations that otherwise would not be available to them).

41. *See, e.g.*, Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337, 1338 (1995) (using the same experiment to find causation); Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 444–50 (1994) (noting that one cost of discovery is the error in parties' decision making attributable to the discovery of information that makes them unduly optimistic or pessimistic about their likelihood of success at trial); George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 139 (1993) (finding a positive correlation between self-serving bias and failure to settle). The strategic advantages that can sometimes come with systematic optimism have also been explored. *See, e.g.*, Oren Bar-Gill, *The Evolution and Persistence of Optimism in Litigation*, 22 J.L. ECON. & ORG. 490, 491 (2006) (discussing optimistic lawyers who succeed in extracting favorable settlements by credibly threatening to resort to costly litigation); Daniel Klerman & Yoon-Ho Alex Lee, *Inferences from Litigated Cases*, 43 J. LEGAL STUD. 209, 216–21 (2014) (concluding that a more pro-plaintiff rule might assign a higher probability of plaintiff success, thus giving a plaintiff a credible threat to go to trial and convincing the defendant to settle); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17 (1984) ("Where either the plaintiff or defendant has a 'powerful' case, settlement is more likely because the parties are less likely to disagree about the outcome.").

42. *See generally, e.g.*, James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court,"* 48 BUFF L. REV. 349 (2000); Grace M. Giesel, *Client*

tween lawyers and parties, as well as frictions in exchanging information, can weaken the accuracy of estimates about the merits of a dispute. Parties presumably know more about the facts and circumstances surrounding their dispute. Lawyers presumably know more about the law and processes that will be used to resolve the dispute. An accurate forecast of the merits of a dispute depends on a clear picture and balancing of all three: facts, substantive law, and procedural law. But lines of communication between parties and their lawyers are not always clear and the risk of errors in the exchange of vital information creates additional hurdles.

In short, adjudication constitutes a nontrivial part of dispute resolution and procedural rules must account not only for settlement effects but also for the quality of the adjudicatory process itself. Procedural rules must strive to balance accuracy and efficiency, particularly in light of the reasons why parties might have differing estimates of the value of their respective positions, while fairly accounting for the interests of both parties and the larger society. Designing a set of procedural rules that accomplishes this difficult balance in the widest swath of cases possible was the animating goal of the current rules of civil procedure.

B. The Current Default Rules of Procedure

Our existing rules of civil procedure were born during a period of renewed faith in centralized government as the guardian of social justice.[43] Congress passed the Rules Enabling Act (REA) in 1934.[44] The REA authorized the Supreme Court to create a single procedural regime for federal courts. The Court, in turn, delegated its task to an Advisory Committee, which set out to draft a procedural code that limited the impact of process itself.[45] Because the reformers were moved by pragmatic instrumentalism, they saw procedure exclusively as a

---

Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer–Client Relationship, 86 NEB. L. REV. 346 (2007).

43. *See* Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1651 (1981) ("The federal rules [of civil procedure] ultimately were passed as New Deal legislation."); Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1272–80 (1997) (describing influence of New Deal principles such as nationalism, expertise, and social reform on the Rules Enabling Act). Notably, the reform effort that led to the REA began nearly thirty years earlier. Roscoe Pound popularized the effort in 1906 in his famous address to the American Bar Association, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906).

44. Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2012)).

45. Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774, 774–75 (1935).

means of finding facts and accurately enforcing substantive law.[46] Procedure, in other words, was deemed a value-neutral means of enforcing substantive rights.[47] Procedural rules, the reformers accordingly believed, should be general in nature and "trans-substantive," meaning that a single set of rules could apply to all civil cases without regard to essence of the dispute.[48] Uniformity and trans-substantivity aimed to standardize procedure and achieve, in the aggregate, the compromise between efficiency and accuracy discussed in the previous section.[49]

Practically accommodating the hopeful expansiveness of the ideal of trans-substantivity, however, was no easy task. Indeed, designing a set of fixed rules that could optimally balance accuracy and costs across an almost infinitely diverse range of future disputes was impossible. Instead, the reformers opted to entrust judges with broad discretion to put the rules of procedure into action in individual cases.[50]

---

46. *See* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 80–98 (1989); *see also, e.g.*, Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 PENN. L. REV. 1791, 1795 (2014) (noting that the Rules, "with their functionalist, anti-formalist" underpinnings, committed "to easing barriers to entry through trans-substantive, uniform, national provisions that expanded opportunities for information exchange, vested discretion in trial judges, and aimed for efficient decision making focused on the merits of claims.").

47. Of course, the myth that procedure was value-neutral and independent from substance quickly became a concern for many commentators. *See generally, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L. J. 718 (1971).

48. Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 324 (2008); *see also, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIR. L. STUD. 459, 519 (2004) ("Modern procedure has conferred on trial court judges broader unreviewed (and perhaps unreviewable) discretion.").

49. *See* Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 318–19 (1938). Professor (and later, judge) Clark was perhaps the "dominant intellectual and operational force" behind the Federal Rules of Civil Procedure. Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?*, 21 SUFFOLK U. L. REV. 351, 357 (1987). In Clark's view, there were "two basic principles behind" the procedural reform: "all cases should be decided on their merits rather than on procedural maneuverings and that a basic goal in litigation should be economy of time and resources." *Id.*

50. *See, e.g.*, Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005) (noting how the Rules retrieved equity as a source of procedural discretion); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429 (2003) (arguing for broad use of equitable discretion); Jeffrey W. Stempel, *Complex Litigation at the Millennium: Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform"*, 64 LAW & CONTEMP. PROB. 197, 232–34 (Spring/Summer 2001) (advocating broad trial judge discretion to tailor discovery to individual cases).

"[I]t is only a slight exaggeration to say that federal procedure, especially at the pretrial stage, is largely the trial judge's creation subject to minimal appellate review."[51] In economic terms, the reformers opted to create a procedural rule set comprised predominately of open-textured standards rather than rules.[52] Accordingly, public procedural rules in the United States delegate to a judge the task of specifying precise obligations in light of the contingencies arising after a dispute has fomented.[53] This delegation occurs both expressly and through the use of vague language inviting flexible interpretation.

---

51. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961 (2006); *see also, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIR. LEG. STUD. 459, 519 (2004) ("Modern procedure has conferred on trial court judges broader unreviewed (and perhaps unreviewable) discretion").

52. The "rules versus standards" debate has occupied the attentions of scholars for many years. *See, e.g.*, David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*, 44 HASTINGS L.J. 829, 830 (1993) ("[T]he amount of ink spilled over debating the virtues of rules versus standards would lead the reasonable observer to believe that something momentous was at stake."). For good contemporary discussions of the distinction, see FREDERICK SCHAUER, THINKING LIKE A LAWYER 13–29 (2009) (discussing the relative advantages and disadvantages of legal norms being articulated as rules or standards); Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117, 1124–42 (1999); Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 J.L. ECON. & ORG. 256, 258 (1995) (examining relative efficiency of two-party bargaining under rules and standards); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 557–68 (1992) (viewing rules and standards for their economic efficiency); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 25 (2000) ("Rules establish legal boundaries based on the presence or absence of well-specified triggering facts."); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) ("Rules aim to confine the decision maker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere."). For purposes of this analysis, it is enough to say that rules and standards differ only to the extent to which effort to give substance to a legal command gets expended before or after a dispute has arisen. *See* Kaplow, *Truth or Consequences*, *supra* note 14.

53. Importantly, these standards tend to remain open-textured over time. *See, e.g.*, Bone, *supra* note 51, at 1970 ("Moreover, case precedent offers little constraint in this area because balancing tests and discretionary decisions are normally too fact-specific to support generalizations."); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 957 (1987) (noting that usually whether precedent about discretionary Rules of Civil Procedure exists does not function to minimize discretion). Precedent, in short, does not operate to harden these standards into rules. *See, e.g.*, H. Allen Blair, *Hard Cases Under the Convention on the International Sale of Goods: A Proposed Taxonomy of Interpretative Challenges*, 21 DUKE J. COMP. & INT'L L 269, 312 (2011) (recognizing the possibility that the value of open-textured standards could be eroded if they are hardened into rules through precedent); Kaplow, *Truth or Consequences*, *supra* note 14, at 1313 n.10 ("More

For example, Rule 16 expressly authorizes judges to hold pretrial conferences and "take appropriate action" with respect to a diverse range of matters, including pleading, discovery, settlement, summary judgment, and trial.[54] The Rule envisages a key role of a judge as that of settlement facilitator,[55] but it provides almost no substantive guidance, leaving it instead up to an individual judge to effectuate the goals of "expediting the disposition of the action" and "discouraging wasteful pretrial activities."[56]

Rule 19 is example of a provision that contains such vague language as to allow judges wide latitude to decide particular cases.[57] Rule 19(a), dealing with compulsory joinder, relies on open-ended language, such as "interest" and "impair or impede," to define the circumstances under which an absentee should be joined. When applying the Rule to a particular case, a judge has discretion to decide whether the absentee's interest is sufficiently significant and whether that interest would be impaired or impeded if the absentee were not joined. In making her decision, the judge can consider a range of case-specific management considerations in making those decisions.[58]

There are many other Rules that either expressly delegate discretion to judges or implicitly give judges discretion to put the rules into effect in particular cases.[59] Cataloguing them is beyond the scope of this Article, but the fundamental point is that "[t]he Federal Rules of the 1930s are founded upon judicial discretion."[60]

C. The Potential Benefits of Procedural Customization through Contract

Despite the aspirations of the reformers who revolutionized procedure pursuant to the REA, no fixed set of rules could possibly account for the individual nuances of every case. Accordingly, as the previous section pointed out, many of our public procedural rules delegate to

broadly, it is useful to view the creation of precedent as a particular means of collecting information to give content to the law.").

54. FED. R. CIV. P. 16(c).

55. *See* FED. R. CIV. P. 16(a)(2) (regarding management); FED. R. CIV. P. 16(a)(5) (regarding settlement); 3 MOORE ET AL., *supra* note 25, §§ 16.02, 16.03[1][a] ("Rule 16 is explicitly intended to encourage active judicial management . . . judges are encouraged to actively participate in designing case-specific plans to position litigation as efficiently as possible for disposition by settlement, motion, or trial.").

56. FED. R. CIV. P. 16(a)(1), (3).

57. FED. R. CIV. P. 19(a).

58. *See* FED. R. CIV. P. 19(b)(1).

59. *See, e.g.*, Subrin, *supra* note 53, at 923 n.76 (1987) (identifying thirty-six provisions in the *Federal Rules of Civil Procedure* that expressly delegate discretion to trial court judges).

60. Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 201 (1997).

judges the task of specifying precise obligations after a dispute has arisen. Perhaps more importantly, however, the rules also leave litigants with broad discretion in conducting their affairs throughout the litigation process.[61]

For instance, after a dispute arises and adjudication has begun, parties enjoy tremendous flexibility in tailoring discovery processes to meet their needs, including deciding how much to invest in evidence production.[62] But parties can control the post-dispute contours of procedure in a variety of other ways as well.[63] For example, litigants may enter stipulations,[64] consent to waiver of service of process,[65] amend pleadings,[66] waive the right to a jury trial,[67] substitute a magistrate judge for an Article III District Judge,[68] or even waive their right to appeal.[69] Alternatively, parties might settle on the question of liability, or postpone that question, but continue to litigate the issue of damages.[70] Or parties might enter into a high-low agreement,

61. Bone, *supra* note 10, at 1330 ("In the American adversary system, litigants enjoy broad freedom to make their own litigation choices."); *see also* STEPHEN C. YEAZELL, CIVIL PROCEDURE 138 (7th ed. 2008) ("One of the hallmarks of the U.S. law is the extent to which the rules of procedure are 'default' rules, rules that govern if the parties have not agreed to something else.").

62. *See* FED. R. CIV. P. 29 (providing that "[u]nless the court orders otherwise, the parties may stipulate" that certain aspects of depositions will be conducted in particular ways and that "other procedures governing or limiting discovery be modified"); Patrick E. Higginbotham, *Duty to Disclose; General Provisions Governing Discovery*, *in* 6 MOORE ET AL., *supra* note 25, § 26.04[1] ("Parties may mutually stipulate to use procedures for discovery that vary from the rules . . . ."); 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE §§ 2091–92 (3d ed. 2012) (delineating the parameters of the ability of litigants to stipulate discovery procedure).

63. For a thorough discussion of post-dispute procedural stipulations, see generally Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461 (2007) and J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59 (2016).

64. *See, e.g.*, 73 AM. JUR. 2D *Stipulations* § 15.

65. *See* FED. R. CIV. P. 4(d) (allowing parties to waive service of process in order to save money and effort); 4A WRIGHT, MILLER, & MARCUS, *supra* note 62, § 1092.1 (discussing the process for procuring waiver).

66. *See* FED. R. CIV. P. 15 (allowing amendment both before and during trial).

67. *See* FED. R. CIV. P. 39(a)(1).

68. *See* FED. R. CIV. P. 73.

69. *See, e.g.*, Acton v. Merle Norman Cosmetics, Inc., 163 F.3d 605 (9th Cir. 1998) (unpublished table decision) (dismissing appeal based on a post-dispute agreement); *see also* 15A CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION AND RELATED MATTERS § 3901 (3d ed. 2012) (noting that "the most likely occasion for waiver arises from a settlement agreement that calls for resolution of some disputed matter by the district court, coupled with an explicit agreement that the district court decision shall be final and that all rights of appeal are waived").

70. *See, e.g.*, Drury Stevenson, *Reverse Bifurcation,* 75 U. CIN. L. REV. 213, 216 (2006) (explaining "reverse bifurcation" as a process in which the parties have a trial on

which allows a defendant to put a cap on the upper end possible liability (the "high") in exchange for guaranteeing a minimum payment (the "low").[71] Of course, finally and most conclusively, parties may resolve their dispute altogether through a full settlement, giving up claimed legal rights, on one hand, for some consideration on the other. By making any of these post-dispute procedural commitments, litigants can calibrate their litigation expenditures to meet their individual tolerances for risk and accuracy.

Most commentators do not object to party control of litigation after a dispute has arisen. Not only is such control expressly allowed by the rules in many instances,[72] but the parties agree to alterations of the default rules with their "eyes wide open" and with approval of a supervising judge.[73]

Some commentators contrast this sort of *ex post* party agreement with an *ex ante* agreement, suggesting that the latter raises more serious due process concerns. But the analytical distance between *ex post* modifications and *ex ante* modifications of public procedures is exaggerated.[74] As Professors Kapeliuk and Klement have persuasively argued, any mutual commitment to constrain, extend, or substitute the set of permissible actions defined by a procedural rule modifies the procedural rule and hence the litigation game.[75] This is true no matter when the commitment occurs.[76] Although in a sense parties *ex post* might be in a position to better value certain trade offs that they are making, this certainty itself comes at its own steep price. More information, which leads to the greater certainty, is not free. Parties might well trade greater certainty for lower costs *ex post*. And, although judicial approval of a customized procedure might be clearer *ex post*, a court will always have the opportunity to evaluate, expressly or impliedly, an *ex ante* customized procedure as well, policing custom-

damages first and then settle on remaining liability issues once the stakes of the dispute are understood).

71. *High-Low Agreement*, BLACK'S LAW DICTIONARY (9th ed. 2009).

72. See, for example, FED. R. CIV. P. 26, which requires the parties to confer and results in an agreed upon scheduling order under Rule 16.

73. *See* Hoffman, *supra* note 10, at 396.

74. *See generally* Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An* Ex Ante *Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475 (2013).

75. Technically, as Professors Kapeliuk and Klement point out, a procedural decision is different than a procedural commitment. Some of the default rules of procedure authorize parties to make decisions and when a party makes such a decision it is not actually changing the litigation game. But, if a party commits itself to a particular decision, the litigation game is changed.

76. *See id.* at 1482 ("An ex ante or an ex post commitment to constrain, to extend, or to add to the original set of permissible actions defined by the rule modifies the rule, and thus changes the litigation game that would have taken place absent such commitment.").

ized procedures for due process concerns and fundamental contract flaws.

Indeed, stripped of the superficial appeal of a distinction between *ex post* and *ex ante* procedural modifications, it becomes evident that the economic justifications for each rest on the same underlying premise: parties are in the best position to maximize the "incentive bang for the enforcement buck."[77] *Ex ante* procedural contracting simply extends the logic and the range of potential efficiency gains from *ex post* customizable procedure.

To see how, it is worth recapping the path-breaking article *Anticipating Litigation in Contract Design* in which Professors Scott and Triantis suggest that contracting parties can structure procedural rules in ways that will increase their joint surplus.[78] According to Professors Scott and Triantis, when dealing with their substantive contractual obligations, parties may effectively substitute costly and fact-intensive adjudication for specific rules by varying the precision of contract provisions.[79] When parties choose a relatively precise or specific rule, they are increasing their *ex ante* investment.[80] In other words, parties spend more money at the front end of the contracting process contemplating future contingencies and negotiating over terms specifying precise obligations in light of those contingencies. More precise rules require less from the adjudicatory process. By investing more at the front end of the process, parties are hoping to leverage the information that they have about their shared contracting goals and incentives to maximize gains from trade in order to reduce *ex post* enforcement costs.[81] If a fight arises in the future, a court or adjudicator should be able to resolve that fight relatively easily and cheaply in light of the specific rules that the parties have chosen.

On the other hand, when parties choose a relatively open-textured standard, they are decreasing their *ex ante* investment and increasing their expected *ex post* enforcement costs.[82] Rather than spending time and money worrying about future contingencies and terms specifying precise obligations in light of those contingencies at the front end of the contracting process, parties are choosing to delegate to a future tribunal the task of specifying precise obligations. Such *ex post*

77. Robert E. Scott & George E. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 856 (2006).
78. *Id.* at 856–60.
79. *See* Blair, *supra* note 53, at 301–02.
80. *See* Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1071 (2009).
81. *Id.* (noting that parties "are exploiting their informational advantage (they know their contractual ends and have the right incentives to choose the best means to achieve them), but they are sacrificing the hindsight advantage that a court might have").
82. *See id.*

or back-end specification is efficient, Professors Scott and Triantis argue, where the value to the parties of a decision maker's hindsight outweighs the value that the parties would gain by specifying *ex ante* a more precise rule to govern their contract.[83]

In short,

> [b]y reaching the optimal combination of front-end and back-end costs, parties can minimize the aggregate contracting costs of achieving a particular gain in contractual incentives. Conversely, for any given expenditure of contracting costs, the parties can reach the highest possible incentive gains by optimizing the allocation of their investment between the front and back ends.[84]

This insight reveals the potential of procedural contracting.[85] In fact, Professors Scott and Triantis point out that parties often choose to opt out of the public adjudicatory system entirely in favor of arbitration because "the parties' *ex ante* agreement as to procedure improves the cost effectiveness of their prospective enforcement mechanism."[86] They then go on to identify other possible procedural contracting mechanisms and apply their insights to one example, *ex ante* modifications of burdens of proof.[87]

With respect to burdens of proof, as Professors Scott and Triantis argue, even if the default allocation can be rationalized,[88] "it is highly unlikely that it yields the efficient . . . allocation for every contract."[89] They go on to show how several different customized allocations might benefit parties.[90]

The same fundamental point holds for other procedural rules. Even to the extent that existing public procedural rules can be ratio-

---

83. Scott & Triantis, *supra* note 77, at 819 ("The parties choose between front- and back-end proxy determination by comparing the informational advantage the parties may have at the time of contracting against the hindsight advantage of determining proxies in later litigation."); *id.* at 842 ("The parties may view the court's hindsight as an advantage or disadvantage depending on how much uncertainty has been resolved by the time contract performance is due.").

84. *Id.* at 817.

85. *See also* Albert Choi & George Triantis, *Completing Contracts in the Shadow of Costly Verification*, 37 J. LEGAL STUD. 503 (2008) [hereinafter Choi & Triantis, *Completing Contracts*] (demonstrating that increasing litigation costs may induce better incentives to perform contractual obligations); Alan Schwartz, *Contracting About Bankruptcy*, 13 J.L. ECON. & ORG. 127 (1997) (discussing the advantages of contracting over preferred Bankruptcy procedures).

86. Scott & Triantis, *supra* note 77, at 856. Part of the reason that arbitration might be desirable is because it permits vague contractual terms to be interpreted and enforced by industry experts rather than generalist judges. *See id.* at 856 n.123 (citing Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549, 558 (2003) for this proposition).

87. *Id.* at 857–71.

88. They argue that they are "hard pressed," along with most other commentators, to rationalize the default allocation. *Id.* at 866.

89. *Id.*

90. *See id.* at 867–78.

nalized, it is unlikely that they optimally balance efficiency and accuracy in all cases.[91] Recall that most public procedural rules are open-textured standards. While such standards can and do have value to parties in some circumstances, more precise rules can also create value. Fine-tuning procedure can benefit parties in at least four significant and interrelated ways: (1) curbing post-dispute opportunism; (2) reinforcing substantive obligations and optimizing pre-dispute behavior; (3) mitigating risk; and (4) directly reducing the costs of adjudication.[92]

1. Curbing Post-Dispute Opportunism

Private procedural ordering can help maximize the joint surplus from contracting by reducing the expected costs of future disputes.[93] Customized procedural rules might achieve this gain by limiting or eliminating certain kinds of costly post-dispute behavior, such as escalating the costs of discovery or engaging in abusive motion practice or constraining the range of matters over which the parties might disagree.[94]

With respect to both discovery and abusive motion practice, parties face a collective-action problem. In a highly simplified model, each party could choose to be abusive or reasonable with its discovery requests or its motion practice. Jointly, the parties would be best served by both acting reasonably. Individually, however, each party would do

91. This is true even though I presume that most such rules are soundly underpinned by a desire to replicate what parties would have chosen for themselves if they had thought about them—they are, in other words, so-called "majoritarian" defaults—or they exist in order to protect vulnerable parties or nonparties. *See, e.g.*, Ayres & Gertner, *supra* note 7, at 91 (explaining penalty defaults); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 596 (2003) ("The justification for a default rule is that it does for parties what they would have done for themselves had their contracting costs been lower.").

92. For purposes of analysis, it is useful to think about these independently, but in reality, they are very closely related. For instance, mechanisms that reinforce substantive obligations and thus limit the range of future disputes altogether also necessarily function to curb post-dispute opportunism. Curbing post-dispute opportunism functions to reduce overall litigation costs. Reducing overall litigation costs mitigates risk. The fundamental point is that these four benefits are mutually reinforcing and often positively correlated.

93. *See, e.g.*, Bruce L. Hay, *Civil Discovery: Its Effects and Optimal Scope*, 23 J. LEGAL STUD. 481, 500–01 (1994) (discussing how plaintiffs may use discovery strategically to impose costs on the defendant).

94. *See* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 514–15 (1994); David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985) (providing a formal analysis of the impact of nuisance suits); John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569, 584–86 (1989).

better if it employed abusive techniques while the other was reasonable. Because both parties know this, and thus know that the other is likely to defect and employ abusive techniques, they face a Prisoner's Dilemma. The equilibrium is for both parties to defect, acting abusively, even though that leaves them both worse off than if they had simply acted reasonably. By binding themselves, in advance of any dispute, to a more limited slate of discovery options or more limited motion practice, the parties can reduce the opportunity for this Prisoner's Dilemma to sap individual resources.[95]

With respect to the range of matters over which parties might disagree, customized procedure might limit the discursive space within which disputes take place, such as by mandating the use of joint experts, binding the parties to factual stipulations, or even bifurcating the adjudication of liability and damages, allowing parties to gain information about the stakes of a dispute before considering the question of liability.[96] Each of these mechanisms allows parties to short-circuit incentives for one side or the other to engage in jointly wasteful posturing or distraction tactics.[97] Parties can focus a future fact finder on the issues that are most relevant or most likely to be relevant.

Other mechanisms are also imaginable,[98] but at bottom, procedural contracts can limit or raise the expected costs of future disputes by preventing parties from strategically gaming the asymmetry between what the parties can observe and what a court can verify.[99] By delim-

95. The same logic could apply to waivers of the right to appeal. Parties might well dispense with a right to appellate review, even before a dispute arises, because they believe that the collective value of enhanced accuracy is not worth the costs.

96. *See, e.g.*, Drury Stevenson, *Reverse Bifurcation*, 75 U. CIN. L. REV. 213, 216 (2006) (discussing bifurcation of damages and liabilities).

97. As Gordon Tullock argued years ago, error costs are likely to be higher in more adversarial systems. *See* Gordon Tullock, *The Case Against the Common Law*, *in* 9 THE SELECTED WORKS OF GORDON TULLOCK 422 (C.K. Rowley ed. 2005) ("[The adversary system] places little or no value on searching for the truth. It is a combat system in which winning is the sole objective."). Professor Tullock's models analyzed this issue in a binary manner, comparing inquisitorial systems with the American adversarial system, but through various issue limiting agreements, parties can reduce the space within which the adversarial contest takes place and garner many of the error reduction and perhaps rent-seeking reduction benefits that Professor Tullock associated with inquisitorial systems of adjudication. *See, e.g.*, *id.* at 423 (suggesting that there is no reason to believe that self-interested parties competing in the litigation process will bring a social benefit).

98. For example, fee-shifting agreements and burden-shifting agreements could also raise the price of brining non-meritorious or speculative claims and thus limit opportunities for extortionate lawsuits, thus actually reducing the overall expected costs of dispute resolution.

99. Information may be said to be observable if the other contracting party can perceive it. Information may be observable but not verifiable if the other party can perceive it but cannot, at a reasonable case, prove that information to a court or other third party. *See, e.g.*, Robert E. Scott, *A Theory of Self-Enforcing Indefinite*

iting through contract, usually before a dispute arises, the range of strategic procedural choices or the space within which a dispute can occur, the parties may be able to enhance the overall value of their agreements.

2. Reinforcing Substantive Obligations

A key *ex ante* goal of contracting in general is reducing the likelihood of a dispute occurring in the first instance. Pre-dispute procedural contracting also provides parties with additional means of reinforcing or defining their substantive obligations to and behavior towards one another. The divergence between *ex ante* and *ex post* optimal litigation decisions has been extensively analyzed in the law and economics literature.[100] Suffice it to say that procedural rules impact how parties evaluate their post-dispute payoffs and thus impact when, or if, parties assert their claims and how they make strategic choices during litigation.[101]

Parties already regularly negotiate over substantive terms that might be difficult to verify in subsequent litigation. For example, parties often include terms that condition on vague or difficult to prove states like "best efforts." The high costs of proving (or disproving) these states in court can function as a disincentive for parties to bring a claim and, at the very least, negatively impact the expected value of any claim. Parties might conversely contract for very precise obligations that are easily verifiable in court. Such terms can function to dissuade opportunistic shirking or holdups during performance of the contract. Alternatively, they can deter parties from filing nuisance claims or claims that have only marginal factual support. Such gains

---

Agreements, 103 COLUM. L. REV. 1641, 1642 n.2 (2003); *see also* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1791–95 (1996) (discussing the distinction between observable information, which is information that it is both possible and worthwhile for transactors to obtain, and verifiable information, which is information that it is worthwhile for transactors to prove to a designated third-party neutral in the event of a dispute). Parties often include in their contracts terms that might be cheap to observe but costly to verify. *See* Choi & Triantis, *Completing Contracts*, *supra* note 85; Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L. J. 848 (2010); s*ee also, e.g.*, Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150, 150–63 (1995); Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1, 1–15 (1994).

100. *See generally, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 392–401 (2004); Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997).

101. *See, e.g.*, Kapeliuk, *supra* note 74, at 1482–83 (noting that just as the prospect of full settlement has an impact on the selection of cases that are litigated, so too does the choice of procedural rules).

can be realized by reducing the likelihood of future litigation altogether or by narrowing the range of disputes in any future litigation.

But pre-dispute procedural contracting offers parties even more options for calibrating their substantive obligations to one another and optimizing behavior. Aware of the rules that will govern any future disputes at the time of contracting, and knowing that these rules will affect their litigation behavior and the outcome of litigation, parties can tailor their respective pre-dispute actions.[102] For instance, agreeing that expert testimony or an expert opinion will be given by a neutral third party rather than through party-appointed advocates could incentivize greater compliance with performance standards predispute or, at the least, change the parties' incentives in deciding what claims to bring and how much to invest in proving claims once they have been asserted.[103] Agreeing to give a defendant the right to exercise an option making any settlements unenforceable could reduce litigation holdup problems, eliminating the incentive for plaintiffs to bring negative expected value lawsuits.[104] Or, opting into expanded review of arbitral awards could be seen as a means of increasing accuracy (and costs) and thus deterring more questionable claims.[105]

Pre-dispute procedural contracting also provides the parties with additional means to signal credibly about reliability, propensity for litigation, or other similar matters. For instance, a manufacturer could signal confidence in its product by offering to bear the burden of proof in any lawsuit for breach.[106] Or, to borrow an example from another

102. Procedural contracting, in other words, can help overcome the "acoustic separation" between the *ex ante* understanding that parties have about how their future disputes will be adjudicated and their *ex post* understanding. *See, e.g.*, Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984); *see also, generally*, Bruce Hay, *Procedural Justice: Ex Ante Vs. Ex Post*, 44 UCLA L. REV. 1803 (1997).

103. *See, e.g.*, AMF Inc. v. Brunswick Corp., 621 F. Supp. 456, 458 (E.D.N.Y. 1985) (in a settlement between competitors, parties agreed to submit any future dispute involving an advertised claim of data based comparative superiority to a neutral third party expert to provide a non-binding opinion); Bone, *supra* note 10, at 1356 (offering a similar example).

104. *See generally, e.g.*, 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).

105. *See, e.g.*, Steven Shavell, *The Appeals Process as a Means of Correction*, 24 J. LEGAL STUD. 379 (1995).

106. A variety of other customizations to burdens of proof can also be envisaged. A rich literature exists exploring the connections between the burden of proof, risk of error, primary behavior, and cost of litigation. *See, e.g.*, Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413 (1997) (analyzing burden of proof as an instrument for reducing the cost of litigation); Gideon Parchomovsky & Alex Stein, *The Distortionary Effect of Evidence on Primary Behavior*, 124 HARV. L. REV. 518 (2010) (explaining people's primary behavior as motivated by the burdens of proof and other evidentiary requirements); Posner, *supra* note 23, at 1502–07 (using the

context, Professors Daphna Kapeliuk and Alon Klement suggest that a prospective tenant might signal reliability by agreeing to let the landlord quickly obtain provisional relief in the event of a default.[107]

These simple examples do not exhaust the numerous possibilities.[108] Essentially, procedural contracting simply illustrates the "well-appreciated general conclusion that a party may benefit by removing future options, since this form of commitment can have advantageous incentive effects."[109] Parties can use customized procedural devices in combination with carefully tailored substantive obligations to incentivize pre-dispute behaviors that increase their joint contracting surplus.

3. Mitigating Risk

Litigation can be risky. Parties often find themselves wedged between climbing costs and unpredictable awards. Of course, if the risk premium of pursuing litigation exceeds whatever gains a party expects, that party should be willing to fully settle. But, as previously discussed, there are many reasons why parties might want to cabin the riskiness of dispute resolution but still continue their fight.[110] Various forms of procedural contracting can function to hedge against outlier outcomes, providing a benefit for both parties.

For instance, parties might opt to waive a jury. Although use of a judge as a factfinder may also reduce the overall costs of adjudication by eliminating the time and effort that goes into empaneling a jury and streamlining presentation of evidence, perhaps the most impor-

---

economic analysis of the burden of proof as a tool for reducing the cost of errors and error-avoidance as a total sum); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 861–67 (1984) (carrying out economic analysis of the burden of proof and identifying the limits of the "preponderance" standard in tort cases with uncertain causation); Chris W. Sanchirico, *Games, Information, and Evidence Production: With Application to English Legal History*, 2 AM. L. & ECON. REV. 342 (2000) (developing an account of proof burdens that uses evidence production as a proxy for determining the harmfulness of primary behavior); Chris W. Sanchirico, *Relying on the Information of Interested—and Potentially Dishonest—Parties*, 3 AM. L. & ECON. REV. 320 (2001) (analyzing the proof burdens' effect on primary behavior).

107. Daphna Kapeliuk & Alon Klement, Contractualizing Procedure 3, 24–25 (Dec. 31, 2008) (unpublished manuscript) (on file with author) (suggesting that parties can signal private information by agreeing to custom procedural clauses).

108. *See generally, e.g.*, Daphna Kapeliuk & Alon Klement, *Contracting Around* Twombly, 60 DEPAUL L. REV. 1 (2010) (discussing possible advantages of modifying the *Twombly* pleading standard by contract).

109. Rosenberg & Shavell, *supra* note 104, at 43 (noting that a stock example of this maxim is "that an advancing army might want to burn bridges behind it, so that its troops will fight aggressively and that the enemy will take heed of this").

110. *See infra* Part II.A.

tant reason parties choose to try a case to a judge is that judges may also be more predictable and conservative decision makers.[111]

More innovatively, parties might reach some form of award-modification agreement.[112] Most commonly, such modifications take the form of so-called high-low agreements, in which a defendant agrees to pay the plaintiff a minimum recovery in return for the plaintiff's agreement to accept a maximum amount regardless of the outcome of the trial.[113] Such agreements could be simple, with two payoff alternatives, or more complicated, with multiple payoffs contingent on various outcomes.[114] It is even possible to imagine an award modification in which the function is continuous and differentiable across outcomes. For example, a defendant might offer to compensate a plaintiff with a fixed transfer payment plus 25% of whatever a jury ultimately awards in exchange for the plaintiff giving up its opportunity to capture the full amount of a jury award.[115]

4. Reducing the Direct Costs of Litigation

Litigation can, of course, be expensive. Avoiding wasteful, offsetting litigation expenditures after a dispute has already arisen may be a key goal for parties to procedural contracts. In a sense, this goal is an analogue to the first—curbing post-dispute opportunism. In many instances, the symmetrical lack of knowledge about the future may make it easier for parties to lash themselves to the mast, as it were, and commit before a dispute to avoiding opportunistic exploitation of one another. But even after litigation has commenced, the threat of excessive costs may inspire parties to come up with ways to reduce their effort and increase efficiency.[116]

111. A sizeable literature addresses the possibility that juries are less predictable and more extreme in their decisions. *See, e.g.*, John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1, 21, 33–34 (1998) (presenting evidence from interviews and surveys suggesting that juries are less accurate and more extreme); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 102–03 (2000) (discussing reasons why juries might be more extreme).

112. *See* Prescott, *supra* note 63, at 85–98 (discussing in detail various forms of award modification agreements).

113. J.J. Prescott et al., *Trial and Settlement: A Study of High-Low Agreements*, 57 J.L. & ECON. 699, 700 (2014).

114. *See, e.g.*, Prescott, *supra* note 63, at 92 (citing Verdict and Settlement Summary, Clemente v. Duran, No. L-003405-04, 2006 WL 4643243 (N.J. Super. Ct. Law Div. Dec. 18, 2006) in which the parties agreed to a three-tiered set of payoffs dependent on how much fault a jury attributed to the defendant).

115. *See id.* at 94 (offering a similar example).

116. *See* Prescott et al., *supra* note 113, at 728–30 (recognizing further that "parties may not need high-low agreements to limit excessive rent seeking when they can do so directly through explicit contractual limitations on [litigation] activities that are costly").

At the simplest, parties can and do modify procedure by adjusting the timing and other pedestrian aspects of litigation. These minor procedure-modification agreements reduce costs by allowing the parties to disperse their obligations sensibly, avoiding what can be an expensive bunching of deadlines or what can be an inefficient overlap of deadlines. But parties go further than this and often simplify or streamline the process by which their dispute will be resolved in additional ways, such as waiving rights to present oral testimony and treating a summary judgment proceeding as a trial on the merits, agreeing to a trial on stipulated facts, agreeing to expedited trials with a magistrate judge, waiving rights to appeal, and similar agreements.

These sorts of commitments to procedural modifications, although taking place after a dispute has arisen, function in much the same way as pre-contractual modifications do. These commitments trade off procedural rights provided by the default rules of civil procedure that one or both parties may have for other perceived or real benefits, essentially making those procedural rights alienable.

III. THE LIMITED EMPIRICAL EVIDENCE

Several commentators have conducted empirical evaluations of the degree to which parties engage in various forms of procedural contracting.[117] For the most part, these commentators focus their attentions on a limited subset of possible procedural customizations, looking for evidence about how frequently parties incorporate specific provisions into their deals. Accordingly, their methodologies and conclusions are not precisely the same. Nevertheless, the overall picture presented by these empirical studies suggests that even sophisticated commercial parties rarely engage in fine-grained procedural customization, at least before a dispute arises.[118] To be sure, several

117. *See, e.g.*, Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. DISP. RESOL. 433, 449–67 (2010) (analyzing material contracts filed with the SEC); Christopher R. Drahozal & Erin O'Hara O'Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 FLA. L. REV. 1945, 1972 (2014) (compiling a sample of a variety of contracts filed with the SEC); Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1983–94 (2006) (analyzing merger agreements filed with the SEC); Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335 (2007) (analyzing material contracts filed with the SEC); Hoffman, *supra* note 10, at 403–16 (studying CEP employment contracts); Erin O'Hara O'Connor et al., *Customizing Employment Arbitration*, 98 IOWA L. REV. 133, 136–37 (2012) (same); W. Mark C. Weidemaier, *Customized Procedure in Theory and* Reality, 72 WASH. & LEE L. REV. 1865 (2015) (collecting contracts that were exhibits to SEC filings).

118. *See, e.g.,* Weidemaier, *supra* note 117, at 1889.

coarse forms of customization are common—choice of law clauses,[119] forum selection clauses,[120] clauses choosing arbitration,[121] clauses choosing arbitration but providing some sort of "carve-outs" that allow parties to go court in some subset of disputes,[122] jury trial waivers,[123] and sometimes attorney fee provisions.[124] But "[w]hat parties almost never do is write contracts that dictate procedure at the granular level of pre-trial and trial practice."[125] The majority of contracts, it seems, do not address matters of pleading, discovery, the rules of evidence, burdens of proof, or other more innovative forms of procedural customization.

For a variety of reasons, this empirical evidence may be somewhat suspect. As Christopher Drahozal and Erin O'Hara O'Connor have argued, customization commonly occurs through carve-outs from arbitration protocols.[126] These carve-outs are hard to detect in standard searches and the databases of commercial contracts containing arbitration carve-outs is limited. Moreover, with the exception of the com-

119. *See, e.g.*, Eisenberg & Miller, *supra* note 117, at 1987 tbl.2 (all merger agreements in sample designate governing law); *see also* Hoffman, *supra* note 10, at 410 (finding over 1,000 contracts each year in text-based search of SEC material contracts).

120. Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1504 tbl.11 (2009) (finding that 38.9% of a sample of commercial contracts included choice of forum clause); Eisenberg & Miller, *supra* note 117, at 1987 (finding that 52.5% of a sample of merger agreements included choice of forum clause); *see also* Hoffman, *supra* note 10, at 407–08 (concluding based on text search of SEC filings that "a plurality of contracts choose forum").

121. *See, e.g.*, Drahozal & O'Hara O'Connor, *supra* note 117, at 1973 (finding that 47.5% of a sample of technology contracts included an arbitration clause, again with substantial variation across contract type); O'Hara O'Connor et al., *supra* note 117, at 161 tbl.1 (2012) (finding that 51.5% of a sample of CEO employment contracts required arbitration of some or all disputes).

122. For example, O'Hara O'Connor et al. found such carve-outs in nearly half of a sample of CEO employment contracts. O'Hara O'Connor et al., *supra* note 117, at 167–68. Likewise, Drahozal and O'Hara O'Connor found routine use of carve-outs in arbitration clauses in samples of joint venture, technology, and franchise agreements. Drahozal & O'Hara O'Connor, *supra* note 117, at 21–31.

123. Theodore Eisenberg & Geoffrey P. Miller, Do Juries Add Value?: Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts (Cornell Law Sch. Legal Studies Research Paper Series, Working Paper No. 06-044, 2006), http:// ssrn.com/abstract=946465 [https://perma.unl.edu/NWS7-Z3YM] (finding about 20% of 2,800 commercial contracts contained jury trial waivers, although also finding substantial variance across contract type, ranging from 1.9% to 64.5%).

124. *See* Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 350–52 (2013) (finding that 37.1% of the contracts in their sample adopted the American rule, while 36.4% adopted the English rule).

125. Weidemaier, *supra* note 117, at 1938.

126. Drahozal & O'Hara O'Connor, *supra* note 117, at 1949–50.

prehensive survey conducted by Professor Weidemaier, who collected a dataset of over 400 contracts and hand coded them, most of the extant studies rely on text searches that may well overlook more nuanced customized terms.[127]

Nevertheless, while the empirical evidence we have may not be perfect, it seems to point in the same direction—parties do not seem to engage in robust customization of procedure. Considering the impressive value-maximizing opportunities presented by procedural customization, as discussed in Part II, this empirical evidence is puzzling to say the least.

IV. THE DOCTRINALLY PERMISSIBLE OPTIONS FOR CALIBRATING PROCEDURE THROUGH CONTRACT

Any customer can have a car painted any colour that he wants so long as it is black.[128]

The question is why parties seem not to engage in procedural customization. One important part of the answer is that only parties who have a primary contractual relationship are likely to be able to bargain for customized procedures as an ancillary part of their agreement. Parties are unlikely to bargain *ex ante* for procedural contracts in isolation. If this intuition is correct, then only a limited subset of all disputes in courts would even have the potential of implicating customized procedures.[129]

As important as this answer is, however, it does not account for the dearth of procedural innovation and fine-tuning within the remaining set of disputes where customization could occur. It is possible, of course, that parties are stuck using suboptimal defaults for any number of reasons. But the first, and perhaps most fundamental as many commentators suggest, is that the practice of procedural customization might constitute a radical change to current doctrinal norms.[130]

---

127. *See* Weidemaier, *supra* note 117, at 1871.

128. Moffitt, *supra* note 63, at 462 (2007) (arguing that "[o]ur judiciary has unfortunately embraced Henry Ford's sense of consumer choice" with respect to litigation procedural rules).

129. *See, e.g.*, *U.S. District Courts—Judicial Business 2014*, U.S. COURTS, http://www.uscourts.gov/Statistics/JudicialBusiness/2014/us-district-courts.aspx [https://perma.unl.edu/DA34-254G] (showing that less than 10% of civil cases filed in federal court over the past five years are categorized as contract disputes); *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads*, CT. STATISTICS PROJECT (Dec. 2012) http://www.courtstatistics.org/other-pages/~/media/microsites/files/csp/data%20pdf/csp_dec.ashx [https://perma.unl.edu/LYW4-F6VS] (showing that in seventeen general jurisdiction courts approximately 61% of civil cases filed in 2010 were contract disputes).

130. *See generally, e.g.*, Dodson, *supra* note 11. Importantly, in this Article, I do not address a related and important question: when, if ever, is the practice of procedural customization normatively desirable or permissible. I take up this question

The costs of innovating in the face of those norms or trying to change those norms might simply be too steep for any single party to bear, especially given worries about freeriding.[131]

Historically, in fact, courts were skeptical of private procedural ordering, preferring to limit parties to the off-the-rack set of rules supplied by the sovereign.[132] Party-driven rulemaking was seen as a dangerous threat the legitimate public function of courts.[133] This wary view of nonjudicial, nonpublic dispute resolution is perhaps most evident in the way that courts treated arbitration during the nineteenth and much of the early twentieth centuries. Essentially, courts refused to enforce nonjudicial modes of dispute resolution.[134] Using the same logic, they also effectively prevented private parties from altering or opting out of almost all procedural rules in public judicial proceedings.[135]

Eventually, however, beginning with a grudging acceptance of arbitration and the passage of the Federal Arbitration Act (FAA), but really gaining momentum under Chief Justices Warren and Burger, judicial tides began to turn. Through an expanding array of private procedural ordering options, courts have steadily allowed parties more

---

in a forthcoming article, H. Allen Blair, *The Line Between Mockery and Efficiency: The Normative Implications of Private Process*. *See* Blair, *Normative Implications*, *supra* note 13.

131. *See supra* note 11. Essentially, innovators have a hard time excluding others from taking advantage of their work. If the innovation is valuable, others can copy it easily. By itself, this problem might dissuade some potential innovators, who have to spend time and money designing the innovation. But, the free rider problem is exacerbated by the fact that innovators also disproportionately bear the risks that go along with adopting customizations.

132. *See, e.g.*, Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 599–600 (1997) (noting that judges were either wary of quality of justice available in arbitration or—because they were paid on per case basis—protective of their own pocketbooks).

133. Several scholars have suggested that at least some of this hostility towards private procedural ordering might have been less high-minded. Professor Alan Scott Rau, for instance, has suggested that courts' traditional hostility to arbitration may have "originated in considerations of competition for business, at a time when judges' salaries still depended on fees paid by litigants." ALAN SCOTT RAU, ARBITRATION 57 (2d ed. 2002); *see also* JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 83 (1918) (recognizing the judicial competition with private tribunals and the fear that arbitration threatened a significant source of judicial business, as well as judicial jobs linked to the courts' caseloads).

134. The history of arbitration itself has been difficult to completely uncover. *See, e.g.*, Douglas Yarn, *A Cautionary Tale of Isomorphism Through Institutionalism*, 108 PENN. ST. L. REV. 929, 937 (2004) ("It is a matter that seems to fall in the gap between social and legal historians."). The fundamental point, however, is that courts were highly skeptical of non-judicial forms of dispute resolution.

135. *But see* Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 2009 J. DISP. RESOL. 1, 20 (surveying treatises and concluding that "English and American colonial courts were neither hostile nor blindly deferential to arbitration").

and more freedom to tailor process and procedure in order to increase certainty while efficiently adjusting accuracy to fit with their *ex ante* preferences.[136]

The first two subsections below briefly trace the evolution of the law governing private procedural ordering, focusing primarily on the U.S. Supreme Court. The third subsection looks at trends in lower courts and state courts. In total, these sections demonstrate that good reason exists to believe that courts would enforce a wide range of procedural contracts. Although some uncertainty persists about the contractibility of specific procedural rules, a clear trend favoring parties' ability to structure their own procedural paths exists.

A. Procedure as Public Law: Historic Skepticism of Private Procedural Ordering

Until the early twentieth century, courts protected their turf. They tended to see efforts by parties to provide for most noncourt dispute resolution, as well as other forms of private procedural ordering, as infringements on the proper public role of the court system.[137] As one commentator has observed, there existed "a taboo against party autonomy in procedural matters."[138] Courts primarily relied on two interlacing doctrines—the revocability and ouster doctrines—to prevent procedural contracting. Perhaps not surprisingly, both doctrines arose out of a judicial skepticism of arbitration, though at least the ouster doctrine expanded over time to bar other forms of private procedural ordering as well.

The revocability doctrine sprung into existence, near full gown, from dicta in Lord Edward Coke's 1609 opinion in *Vynior's Case*.[139] There, the parties had entered into a contract for repair work on several buildings.[140] They agreed to submit any disputes about the work to arbitration, and, as was customary during the period, a perform-

136. *See, e.g.*, Louis Kaplow, *Accuracy in Adjudication*, *supra* note 8, at 310 (arguing that heightened accuracy in adjudication can only be obtained at higher costs so an efficient balance has to be struck on a case-by-case basis).

137. *See, e.g.*, Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1947 (1996) (recognizing that prior to the early twentieth century, the traditional view was that if courts were to function as the national source of justice, there was no room for "makeshift, party-confected modes of dispute resolution"); Reuben, *supra* note 132, at 599–600 (noting that judges were either wary of quality of justice available in arbitration or—because they were paid on per case basis—protective of their own pocketbooks). *But see* LeRoy, *supra* note 135, at 20 (surveying treatises and concluding that "English and American colonial courts were neither hostile nor blindly deferential to arbitration").

138. Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 294 (1988).

139. *Vynior's Case*, 77 Eng. Rep. 595, 599–600 (K.B. 1609).

140. *See id.*

ance bond secured this agreement.[141] The plaintiff brought a court action, seeking to recover on the bond as well as to recover damages. The plaintiff claimed that the defendant had failed to comply with the arbitration agreement.[142] Lord Coke ruled that when there was a suit on a bond securing a submission to arbitration, the submission itself was revocable although the price of revoking was forfeiture of the bond:

> [a]lthough . . . the defendant, was bound in a bond to stand to, abide, observe, etc., the rule, etc., of arbitration, etc., yet he might countermand it, *for one cannot by his act make such authority, power, or warrant not countermandable which is by the law or of its own nature countermandable*.[143]

Whatever Lord Coke's original intent,[144] *Vynoir's* became a leading case "establishing the revocability doctrine."[145] Pursuant to this doctrine, a party to an arbitration agreement could revoke an arbitrator's authority at any time before the arbitrator rendered an award, even if the parties had agreed the delegation was irrevocable.[146] Although U.S. courts would usually enforce arbitration awards once issued,[147] following the practice of their English counterparts, they would not generally enforce executory contracts to arbitrate.[148] Practically, this

141. *See id.* The common law of contract was just beginning to form at the time, so bonds often secured contractual promises. *See, e.g.*, Paul D. Carrington & Paul Y. Castle, *The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties*, 67 LAW & CONTEMP. PROBS. 207, 208 (2004) (noting that "the common law of contracts was in its infancy" at the time that *Vynior's Case* was decided).

142. *See id.*

143. *Vynior's Case*, (1609) 77 Eng. Rep. 595, 601–02 (K.B.) (emphasis added).

144. Some commentators have suggested that Lord Coke was effectively relying on agency principles to find that the principle could revoke the agent's authority at any time. *See, e.g.*, Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 598–99 (1928). Professors Paul Carrington and Paul Castle have compellingly, pointed out, however, that the concept of agency had not developed fully when *Vynoir's Case* was decided. *See* Carrington & Castle, *supra* note 141, at 210. They contend, instead, that Lord Coke was likely motivated by a desire to "insure the disinterest of arbitrators" at a time when there were no real substantive constraints on arbitrator authority. *Id.*

145. Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L.Q. 238, 240 (1930); *see also, e.g.*, Sayre, *supra* note 144, at 602 (stating that *Vynior's Case* has "generally been regarded as the original and controlling authority for revocability").

146. *See, e.g.*, Tobey v. County of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (citing *Vynior's Case* as authority for the proposition that arbitration submissions are revocable regardless of a stipulation to the contrary because one "cannot alter the judgment of law, to make that irrevocable, which is of its own nature revocable").

147. *See, e.g.*, Burchell v. Marsh, 58 U.S. (17 How.) 344, 349 (1854).

148. *See, e.g.*, Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 120–21 (1924) ("The federal courts—like those of the states and of England—have, both in equity and at law, denied in large measure, the aid of their processes to those seeking to en force [sic] executory agreement to arbitrate disputes."); Jeffery W. Stempel, *Pit-*

meant that a party to an arbitration agreement faced continual risk that her counterparty would renege on his promise and exercise his right to demand that a court hear any disputes.

Although the revocability doctrine alone did not necessarily create an insuperable barrier to arbitration or other forms of procedural contracting, it mutated over time into the so-called ouster doctrine. The mutation can be traced to an eighteenth century English decision, *Kill v. Hollister*.[149] There, while interpreting the revocability doctrine, the court allowed a judicial action over an insurance policy to proceed despite an arbitration clause on the grounds that "the agreement of the parties cannot oust this court [of jurisdiction]."[150] The revocability doctrine, then, allowed courts to ignore the parties' delegation of authority to an arbitrator. As with the dicta giving rise to the revocability doctrine itself, no authority was given for this "ouster" rule.[151] Nevertheless, by 1856, the rule had become justified as legitimate "judicial jealousy" over jurisdiction, and this explanation for it stuck.[152]

The ouster doctrine began as anti-arbitration rule, but it quickly expanded into a more general principle precluding courts from enforcing various contractual provisions limiting redress in courts. In *Home Insurance Co. v. Morse*, for instance, the U.S. Supreme Court held that an agreement by which an insurance company waived its right to remove state cases to federal courts was not enforceable.[153] The Court analogized the matter to a jury trial waiver and an arbitration agreement, concluding that

---

falls of Public Policy: The Case of Arbitration Agreements, 22 ST. MARY'S L.J. 259, 272 (1990). This rule was incorporated in the First Restatement of Contracts as well. RESTATEMENT (FIRST) OF CONTRACTS § 550 cmt. A (1932) ("A bargain to arbitrate, though it is not illegal, is practically unenforceable. . . ."). Of course, even at the height of its power, the revocability doctrine had exceptions. *See, e.g.*, *Red Cross Line*, 264 U.S. at 122–25 (1924) (finding that New York courts could equitably enforce arbitration agreements in their own courts under New York's arbitration statute).

149. *Kill v. Hollister*, (1746) 95 Eng. Rep. 532 (K.B.). Notably, some commentators have suggested that the inverse historical evolution occurred: the ouster doctrine preceded the revocability doctrine. *See, e.g.*, Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 283 (1926) (explaining revocability as "rooted originally in the jealousy of courts for their jurisdiction"). The order of development is not particularly significant for purposes of my argument.

150. *Id.*

151. *See id.*

152. *See* Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) (citing Scott v. Avery, (1856) 10 Eng. Rep. 1121 (H.L.) as one of "numerous cases" showing that parties cannot by contract oust a court of jurisdiction); *Scott*, 10 Eng. Rep. 1121 (speculating that judicial hostility to arbitration "probably originated in the contests of the different courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would deprive one of them of jurisdiction").

153. *Morse*, 87 U.S. at 451–52.

> [a] man may not barter away his life or his freedom, [sic] or his substantial rights . . . . He cannot . . . bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.[154]

In the Court's view, privately negotiated contract provisions could not trump the role of the public adjudicatory system. If such contract provisions were enforced, the "regular administration of justice might be greatly impeded . . . ."[155] Soon, courts went on to find that antisuit covenants, pre-dispute waivers of liability, and forum selection clauses were similarly barred by the ouster doctrine.[156] Only courts, the prevailing opinion went, possessed the ability to "protect rights and to redress wrongs" because private tribunals or other private customizations of procedure were prone to "become . . . instrument[s] of injustice, or to deprive parties of rights which they are otherwise fairly entitled to have protected."[157]

B. Mere Contract Law No More: Autonomy and Private Procedural Ordering

By the late eighteenth century, however, although both the revocability and ouster doctrines were still in use in American courts, notions of party autonomy were starting to play a greater role in not only the public conscience but also in the judicial mind.[158] At the height of

154. *Id.* at 451.
155. *Id.* at 451–52.
156. *See, e.g.*, Mut. Reserve Fund Life Ass'n v. Cleveland Woolen Mills, 82 F. 508, 510 (6th Cir. 1897) (finding that a contract stipulating that suits could only be brought in federal court was void because it "intended to oust the jurisdiction of all state courts"); Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174, 184 (1856) (refusing to enforce a forum selection provision because forum choice was fixed by law "upon considerations of general convenience and expediency"); Meacham v. Jamestown Franklin & Clearfield R.R. Co., 105 N.E. 653, 656 (1914) (Cardozo, J., concurring) (finding that an arbitration contract is an invalid attempt to oust the jurisdiction of the courts because its purpose is the same as agreements requiring litigants to submit their case to a foreign court, but noting that there may be exceptional circumstances warranting enforcement of such forum selection clauses); Knorr v. Bates, 35 N.Y.S. 1060, 1062 (N.Y. Gen. Term. 1895) (holding that a contractual limitation on the right to sue underwriters on an insurance policy was unenforceable because "a provision in a contract that the party breaking it shall not be answerable in an action is a stipulation for ousting the courts of jurisdiction, and, as such, is void, upon grounds of public policy").
157. Tobey v. Cty. of Bristol, 23 F. Cas. 1313, 1320–21 (C.C.D. Mass. 1845). Thus, it is fair to say that the ouster doctrine was justified both based on concerns over individual rights, such as those set out in *Morse*, 87 U.S. at 451–52 and concerns about extra-individual matters such as "administrative efficiency, separation of powers, and public faith in the legitimacy of the judiciary." David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 995 (2008) (citing and discussing *Nute*, 72 Mass. 174, as articulating this extrajudicial concern).
158. *See, e.g.*, John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 630 (1995) ("Contract has become the dominant doctrinal current

the revocability and ouster doctrines, contract law was in its infancy, and most contracts were discrete and simple.[159] That began to change with rapid economic transformations in the American economy. As American courts routinely decided increasingly complex contract disputes based on the intentions of the parties,[160] the same principles of autonomy began gaining traction in the context of private procedural ordering.[161] G. Richard Shell identified the trend towards acceptance of procedural contracts more than twenty years ago in his study of contracts and the Supreme Court, where he documented the steady demise of the public policy exception to contract enforcement and, in particular, of an exception to contractual autonomy that draws from the special attributes of judicial process.[162]

Certainly arbitration played a key role in unlocking the potential of private procedural ordering.[163] Businesses saw the potential effi-

---

in modern American law."); Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415, 415 (1988) ("During the past century, contract law, along with most of American society, has undergone a 'major transformation.'").

159. In his article on the history of commercial law in the United States, Professor Walter F. Pratt, Jr. explains that:

> Contracting, like conversation, had in earlier times been rooted in the past. People who knew one another and who knew the local market, insulated as it was from dramatic shifts in the economy, faced little likelihood of changes in circumstances that would require elaborate agreements or provoke complex disputes. Railroads and cities, however, seemed to disrupt that past by bringing economic uncertainty into the local markets. Parties thus faced the tiring prospect of writing detail upon detail into each agreement if they were to account for every potential event.

Pratt, *supra* note 158, at 428–29; *see also* Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 489 (1995) (explaining that the doctrine of revocability set forth by Lord Coke in *Vynior's Case* occurred before the common law of contracts was fully formed).

160. Instead of being localized and discrete as they had been prior to the turn of the century, commercial transactions tended to be more complex and regional as well as national. *See* Allen Blair, *"You Don't Have to be Ludwig Wittgenstein": How Llewellyn's Concept of Agreement Should Change the Law of Open-Quantity Contracts*, 37 SETON HALL L. REV. 67, 77–78 (2006).

161. *But see* Marcus, *supra* note 157, at 1014 (arguing that, although "[i]ncreased appreciation for freedom of contract and individual autonomy and consent may have influenced the development of [forum selection clauses,] . . . these considerations played a small part at best, especially when compared to the degree to which extraindividual considerations shaped the design of clause enforcement doctrine").

162. G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 452–56 (1993) (detailing the Supreme Court's treatment of judicial access clauses and documenting judicial acceptance of *ex ante* forum selection clauses).

163. *See, e.g.*, William C. Jones, *An Inquiry Into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 U. CHI. L. REV. 445, 461–62 (1958) ("Statistics are not available and it is doubtful that they ever

ciency gains from arbitration, but they were frustrated with court refusal to enforce arbitration agreements.[164] Calls for the legal system to value freedom of contract fueled much of the reform effort. As Julius Henry Cohen, the chief draftsman of the Federal Arbitration Act (FAA), explained, "everybody today feels very strongly that the right of freedom of contract which the Constitution guarantees to men, includes the right to dispose of any controversy which may arise out of the contract in their own fashion."[165]

Responding to the interests of the business community, in 1920, New York broke from traditional English arbitration law by enacting a statute that enforced pre-dispute agreements to arbitrate, ended the practice of courts hearing questions of law during the course of arbitration, and provided for only limited judicial review of the final award.[166] In 1925, the U.S. Congress followed New York's lead by enacting the United States Arbitration Act, later renamed the Federal Arbitration Act.

The Supreme Court would eventually point out that the FAA was a "response to the refusal of courts to enforce commercial arbitration agreements."[167] But the Act did far more. It also represented a more general step towards recognizing the value of autonomy in procedural

---

will be, but it is probable that in the nineteenth century arbitration in one form or another became the most important form of mercantile dispute settlement . . . in the United States . . . although courts continued, of course, to be used."); Stempel, *supra* note 148, at 275 ("Despite an essentially unchanging judicial hostility toward arbitration, it grew in popularity as the commercial affairs of the United States became increasingly far flung and complex.").

164. *See, e.g.*, Atl. Fruit Co. v. Red Cross Line, 276 F. 319, 322 (S.D.N.Y. 1921) (recognizing the general displeasure in the business community with courts' unwillingness to enforce arbitration agreements in the early twentieth century).

165. *Arbitration of Interstate Commercial Disputes: Joint Hearings Before the Subcomms. of the Comms. on the Judiciary on S. 1005 and H.R. 646*, 68th Cong. 14 (1924) (statement of Julius Henry Cohen).

166. Michael A. Scodro, *Arbitrating Novel Legal Questions: A Recommendation for Reform*, 105 YALE L.J. 1927, 1941 (1996).

167. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 125 (2001); Southland v. Keating, 465 U.S. 1, 13–14 (1984) (quoting H.R. REP. NO. 68-96, at 1–2 (1924) ("[T]he need for the law arises from . . . the jealousy of the English courts for their own jurisdiction. . . . This jealousy survived for so lon[g] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts."). The statute's purpose was to ensure that "written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations" would be "valid and enforceable." United States Arbitration Act, 43 Stat. 883 (1925). For excellent accounts of the FAA's legislative history, see James E. Berger & Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J.L. & BUS. 745 (2009); Thomas E. Carbonneau, *Judicial Approbation in Building the Civilization of Arbitration*, 113 PENN ST. L. REV. 1343, 1348 (2009) (providing a brief history of the passage of the FAA).

choices. A House Report on the bill introducing the FAA explained its genesis in concerns about freedom of contract:

> Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. . . . An arbitration agreement is placed upon the same footing as other contracts, where it belongs. . . . This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.[168]

Numerous commentators as well as Supreme Court decisions have confirmed the central importance of freedom of contract to the law of arbitration.[169]

That progression continued and, with more and more norms of due process becoming waivable rights, the Warren and Burger Courts embraced an expanding range of procedural private ordering options.[170] Arguably, the current era customizable procedure was ushered by the Supreme Court's 1972 decision in *The Bremen v. Zapata Off-Shore Co.*[171] There, the Court addressed enforcement of a forum selection clause in the context of an international transaction, but the key rationales of the Court are hardly limited to that context.[172]

The Bremen revolutionized private procedural ordering by doing three things. First, it boldly and decisively discarded the ouster doctrine, relegating it to mere anachronism: "[the ouster doctrine] is hardly more than a vestigial legal fiction."[173] Notably, this sweeping language by the Court, unconstrained in any way, makes it evident

---

168. H.R. REP. No. 68-96, at 1–2.

169. THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 49 (5th ed. 2014) (noting that freedom of contract is the "primary legal concept" in the law of arbitration); *see also, e.g.*, ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 265 (4th ed. 2004) (citing UNCITRAL Arbitration Rules Art. 19(1)) ("Party autonomy is the guiding principle" in arbitration); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 472 (1989) (noting that arbitration "is a matter of contract"); Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 299 (2010) (same); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2010) ("[A]rbitration 'is a matter of consent, not coercion.'" (quoting *Volt*, 489 U.S. at 479)).

170. Dodge, *supra* note 3, at 734–35 (citing Boddie v. Connecticut, 401 U.S. 371, 378–79 (1971), Nat'l Equip. Rental v. Szukhent, 375 U.S. 311, 315–16 (1964), Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975), and D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187–88 (1972)).

171. 407 U.S. 1, 2 (1972).

172. *See, e.g.*, David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1095 (2002) (describing the case as "a sea-change in the way private agreement is viewed in relation to procedure"); William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1, 15 (2006) (observing that the law "changed dramatically" in *The Bremen*); Linda S. Mullenix, *supra* note 138, at 306–07 ("The current doctrine of consensual adjudicatory procedure . . . is based on Supreme Court pronouncements in *The Bremen*.").

173. 407 U.S. 1, 12 (1972).

that, whatever doctrinal logic animated the ouster doctrine, that logic has outlived its usefulness, even outside of forum selection clauses. More significantly, and consistent with this expansive revolution in private process, the case honed in on party autonomy, making the touchstone for enforcement of forum selection clauses the quality of the bargaining process.[174] Finally, "[e]schew[ing] a provincial solicitude for the jurisdiction of domestic forums," the Court linked party autonomy with greater predictability and stability in commercial relationships.[175] In other words, the Court reconceptualized procedural rights, ceasing to look at them from a vertical, individual-government perspective and focusing, instead, on seeing them from a horizontal, individual-individual perspective and thus as alienable.[176] Parties should be free, so long as they are bargaining at arms length, to trade off procedural rights for other benefits.

Importantly, not only did *The Bremen* radically alter the law of more than just forum selection clauses in spirit but it also did so in practice. At least tacitly, it endorsed party choice over other procedures, since a forum court's procedural rules will apply.[177] By allowing parties to contract for the forum in which their future disputes will be heard, the Court was in fact allowing parties to shop for bundles of procedural rules that they might prefer.

Following *The Bremen*, the Court has not looked back during its march to internalize contract norms and abandon its historic skepticism over the devolution of judicial authority.[178] Instead, the Court has taken multiple opportunities to reinforce the instrumental charac-

174. *See id.* at 15 (finding that forum selection clauses should be enforced unless the resisting party can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid"); *see also, e.g.*, Noyes, *supra* note 5, at 597 (describing the Court as elevating the concept of freedom of contract, thereby allowing parties to bargain about how a dispute will be decided); Linda S. Mullenix et al., *Case One: Choice of Forum Clauses*, 29 NEW ENG. L. REV. 517, 541 (1995) (arguing that the Court in *The Bremen* adopted a "strongly stated federal policy favoring enforceability, subject to usual contract principles"); KEVIN M. CLERMONT, CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE 85 n.60 (1999) (stating that *The Bremen* "shift[ed] from a jurisdictional to a contractual paradigm").

175. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 630 (1985) (construing *The Bremen*).

176. *See, e.g.*, Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 931 n.2 (1985) (listing a number of works that consider the traditional view of property rights and the law).

177. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmt. a (2013).

178. *See* Resnik, *supra* note 3, at 598–99 (describing how changes in adjudicatory practice are shifting the focus of civil procedure from "due process procedure" to "contract procedure").

ter of procedure and its malleability at the hands of parties.[179] For instance, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*—one of a number of cases putting the nail in the coffin of subject matter inarbitrability—the Court made it clear that it would allow parties to trade off judicial procedures for efficiency:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.[180]

Although the Court in *Mitsubishi* framed up the dispute as one involving unique "international" considerations, "[w]ithin a few years, the international aura of the reasoning dissipated and eventually vanished."[181] Soon, the arbitrability of statutory disputes was no longer predicated on the international character of the transaction, and the Court began recognizing that virtually any sort of civil dispute could be arbitrated.[182]

Using this same instrumental logic, the Court later broke down one of the few remaining barriers inhibiting the continued expansion of private procedural ordering by abandoning any effort to distinguish between commercial and consumer contracts in *Carnival Cruise Lines v. Shute*.[183] There, extending its pro-autonomy decision in *The Bremen*, the Court brushed past a common law rule that forum selection clauses in "form contracts" were presumptively unenforceable and reasoned that such clauses should, instead, be enforced because con-

179. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 347–49 (1976) (using a balancing approach to resolve the question of whether the denial of an opportunity to be heard violates due process).

180. 473 U.S. 614, 628 (1985); *see also, e.g.*, Metro E. Ctr. for Conditioning & Health v. Qwest Commc'ns Int'l, Inc., 294 F.3d 924, 928–29 (7th Cir. 2002) ("One aspect of personal liberty is the entitlement to exchange statutory rights for something valued more highly.").

181. THOMAS E. CARBONNEAU, TOWARD A NEW FEDERAL LAW ON ARBITRATION 39 (2014); *see also, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 624 (1986) ("We granted certiorari primarily to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction.").

182. *See* CARBONNEAU, *supra* note 181, at 39–41. Professor J. Maria Glover has argued for a far more restrictive reading of *Mitsubishi*, contending that the case sought to foster "claim-facilitative procedures, both as a descriptive matter and a normative one." J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3063–64 (2015). Professor Glover's argument, while innovative, does press against the grain of the decision as a whole. *See generally* Steven W. Feldman, *Italian Colors and Freedom of Contract Under the Federal Arbitration Act: Has the Supreme Court Enabled Disappearing Claims and the Erosion of Substantive Law?*, 2016 MICH. ST. L. REV. 109 (offering a compelling rebuttal to Professor Glover's reading of *Mitsubishi*).

183. 499 U.S. 585, 587–88 (1991).

sumers "benefit in the form of reduced [prices] reflecting the savings that the [firm] enjoys by limiting the fora in which it may be sued."[184]

Even the two Supreme Court cases in the past thirty years arguably suggesting some limitation to party autonomy over procedural choices—*Hall Street Associates, L.L.C. v. Mattel* and *Atlantic Marine Construction Co. v. U.S. District Court*—do more to vindicate this freedom than restrict it.

Hall Street Associates v. Mattel has been heralded by some as the sole decision to invalidate a procedural contract. But a careful read of the case shows that, to the contrary, it actually advances the logic of party autonomy and freedom to tailor procedure.[185] In *Hall Street*, the Court was faced with a contractual provision expanding the scope of judicial review of arbitral awards.[186] While the Court did invalidate this provision, holding that the grounds for review of arbitral awards under the FAA were complete and exclusive,[187] the Court did not even hint that its rejection of the customized procedure sprung from any concerns over party control of judicial processes.[188] Instead, the Court merely funneled innovation with respect to expanded judicial review of arbitral awards back to States: "[t]he FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable."[189] The Court was not rejecting private procedural ordering at all.[190]

---

184. *Id.* at 594 ("[I]t stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.").

185. Hall St. Assocs. v. Mattel, 128 S. Ct. 1396, 1408 (2008); *see* Dodge, *supra* note 3, at 738 (describing *Hall Street Associates v. Mattel, Inc.* as "[t]he Court's sole invalidation of a procedural term").

186. At issue in the case was a contract provision providing that:

> [t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.

Hall St. Assocs., 128 S. Ct. at 1401–02.

187. *Id.* at 1408.

188. It is worth noting that several Circuits had relied on the dubious and outmoded notion that contracting for expanded judicial review constituted an impermissible attempt to control federal court jurisdiction.

189. *Hall St. Assocs.*, 128 S. Ct. at 1406.

190. Professor Jamie Dodge, in her seminal article on private procedural ordering makes this point as well. In her view,

> although the Court narrowly held in *Hall Street Associates v. Mattel, Inc.* that the Federal Arbitration Act specifically preempted the modification of the standard of review in the courts, the Court expressly noted that

Atlantic Marine appears at first glance to support party autonomy, as the Court enforced a restrictive forum selection clause in the parties' contract.[191] Some commentators have suggested, however, that the manner in which the Court enforced the clause indicates a skepticism about party autonomy in procedural matters.[192] Essentially, the argument is that, although the Court enforced the clause, it did so on restrictive grounds. Many lower courts had taken to enforcing restrictive forum selection clauses through motions to dismiss for improper venue or through motions to dismiss for failure to state a claim.[193] The Supreme Court in *Atlantic Marine* rejected this approach, and instead concluded that the proper enforcement mechanism was a motion to transfer venue.[194] Still, the fundamental outcome of the case favored party choice and there is little reason, as even commentators sympathetic to a restrictive reading of *Atlantic Marine* concede, to believe that the Court intended the decision to signal any sort of concern about party autonomy over procedural matters.[195]

In short, since *The Bremen*, virtually every word from the Supreme Court suggests that parties have virtually unfettered ability to customize procedure.[196] Although the Supreme Court has not specifically endorsed many potential forms of private procedural ordering, with no notable exceptions the Court's precedent "treats procedural contracts as a method for generating procedural efficiencies and increased certainty of process, resulting in broad enforcement of procedural terms."[197] The trend of precedent, in short, seems unequivocally to favor party autonomy and private procedural ordering.

---

under state law or common law parties may be able to modify the standard of judicial review.

Dodge, *supra* note 3, at 738. This express notation suggests, in her view, that the Court does not fundamentally think parties should be barred from contracting for expanded judicial review or similar procedural modifications. *See id.*

191. Atl. Marine Constr. Co. v. U.S. Dist. Court, 134 S. Ct. 568 (2013).

192. *See, e.g.*, Scott Dodson, *Atlantic Marine and the Future of Party Preference*, 66 HASTINGS L.J. 675, 677 (2015) ("The Court's decision implicitly, though inconsistently, endorses the principle of party subordinance.").

193. 5B WRIGHT ET AL., *supra* note 62, § 1352 nn.4–5 (citing cases).

194. *Atl. Marine Constr. Co.*, 134 S. Ct. at 579.

195. *See, e.g.*, Dodson, *supra* note 192, at 684, 691 (describing the case as a "small-triumph" for the principle of party subordinance and recognizing that the Court was likely "focused on the particular statutory regime of venue" rather than on party autonomy in procedural matters).

196. Mullenix, *supra* note 138, at 302–03.

197. Dodge, *supra* note 3, at 739. In fact, since the Supreme Court's decision in Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991), the Court has not found that "a procedural contract violates fundamental fairness." Dodge, *supra* note 3, at 725, 736.

C. State Courts, Lower Federal Courts, and Procedural Autonomy

State courts and lower federal courts also seem to agree that parties are free within broad limits to agree on simplified procedures for the decision of their case.[198] In a variety of instances, parties do, in fact, take advantage of this ability, including when contracting for forum,[199] choice of law,[200] appointment of service agents or waiver of notice,[201] and limitation periods.[202] Additionally, parties regularly waive the right to notice and a hearing by using cognovits notes,[203] and waive the right to a trial by jury.[204] Even procedural requirements that might seem "immutable," such as jurisdictional require-

198. *See, e.g.*, DDI Seamless Cylinder Int'l, Inc. v. Gen. Fire Extinguisher Corp., 14 F.3d 1163, 1166 (7th Cir. 1994).

199. *See, e.g.*, Eisenberg & Miller, supra note 117, at 1987 tbl.2 (finding that about 53% of a sample of mergers clauses included forum selection provisions); Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 118 (2009) (observing that parties "commonly" contract over choice of forum "in merger agreements and other highly negotiated corporate and commercial contracts").

200. *See, e.g.*, Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 403 (2003) (discussing why most such clauses are enforced by courts).

201. Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315–16 (1964) ("[I]t is settled . . . that parties to a contract may agree in advance . . . to waive notice altogether.").

202. *See, e.g.*, 7 RICHARD A. LORD, WILLISTON ON CONTRACTS § 15:12, at 264–67 (4th ed. 1997) (discussing the enforceability of such clauses); Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 990 (2008) (discussing the frequency of use of such clauses in consumer contracts).

203. *See, e.g.*, Swarb v. Lennox, 405 U.S. 191 (1972); D.H. Overmyer Co., Inc. v. Frick Co., 405 U.S. 174 (1972). The enforcement of contractual confession of judgments does not violate the defendant's right to due process provided that there is clear and convincing evidence that the waiver of notice and hearing was voluntary, knowing, and intelligently made. *D.H. Overmyer*, 405 U.S. at 185–87.

204. Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1595 (2005) ("Most courts will enforce contractual jury waivers."); Eisenberg & Miller, *supra* note 123 (finding that about 20% of a sample of merger and acquisition agreements contained a jury trial waiver provision). Significantly, even though the Court has said that the standard for evaluating jury trial waivers is constitutional rather than contractual, see *D.H. Overmyer*, 405 U.S. at 185, lower courts seem to focus on the propriety of the bargaining process to the exclusion of any other concerns, see, for example, IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union, 512 F.3d 989, 993 (7th Cir. 2008) (reversing the district court's refusal to enforce a jury waiver embedded in a sales contract on the view that "[a]s long as the price is negotiable and the customer may shop elsewhere, consumer protection comes from competition rather than judicial intervention").

ments, have, in recent years arguably been subject to some contractual modification.[205]

The Texas Supreme Court offered a particularly clear justification for procedural customization outside of arbitration in a jury waiver dispute between a lessor and two tenants.[206] Effectively, the court argued that allowing parties room to customize public court litigation was better than shunting parties wanting room to customize out of the public system altogether an into arbitration.

In the case, Prudential was the building lessor, and the tenants were Francesco Secchi, a native of Italy, and his wife Jane, a native of England. Neither was educated beyond the eighth grade. The Secchis argued that jury waivers are contrary to public policy, because they give nongovernment actors "the power to alter the fundamental nature of the civil justice system by private agreement."[207] The Texas Supreme Court rejected that argument, noting that precedent already allows parties to contract for the law that will apply and the forum in which litigation will take place, and lets them waive the due-process based requirements for personal jurisdiction. "Public policy," the Court said, "that permits parties to waive trial altogether connected with this Lease, or any of its provisions" surely does not forbid waiver of trial by jury.

> [I]f parties are willing to agree to a non-jury trial, we think it preferable to enforce that agreement rather than leave them with arbitration as their only enforceable option. By agreeing to arbitration, parties waive not only their right to trial by jury but their right to appeal, whereas by agreeing to waive only the former right, they take advantage of the reduced expense and delay of a bench trial, avoid the expense of arbitration, and retain their right to appeal. The parties obtain dispute resolution of their own choosing in a manner already afforded to litigants in their courts. Their rights, and the orderly development of the law, are further protected by appeal. And even if the option appeals only to a few, some of the tide away from the civil justice system to alternate dispute resolution is stemmed.[208]

Like the U.S. Supreme Court, then, state courts and lower federal courts seem to view procedural autonomy as a hallmark of contractual freedom, allowing parties the ability to customize procedures to fit their particular dispute resolution needs.

V. CONCLUSION

I have argued that parties can enjoy significant benefits if procedure is seen as a set of defaults rather than immutable or mandatory

205. Davis & Hershkoff, *supra* note 2, at 513–14 (noting that recent cases arguably allow for parties to enlarge the subject matter jurisdiction of federal courts and contract around some constitutional standing barriers).
206. *In re* The Prudential Ins. Co., 148 S.W.3d 124 (Tex. 2004).
207. *Id.* at 131.
208. *Id.* at 130.

rules. Allowing parties to unbundle off-the-rack procedures in public courts gives them flexibility to trade off accuracy and efficiency to meet their *ex ante* preferences. Parties can optimize their contracts so that, given the particular nature of their relationship, they limit opportunities for post-dispute opportunism, enhance incentives to perform their contractual obligations, mitigate risks, and, to the extent that a dispute arises, minimize the costs of dispute resolution. Given these theoretical benefits, it is tempting to predict that parties will engage in such fine-tuning of procedure regularly. The empirical evidence, however, indicates the contrary. Although parties do engage in some coarse forms of procedural customization, they do not seem to consistently tailor procedures, at least before a dispute arises. One possible reason for this could be that existing doctrine blocks attempts at customization. I have considered this argument, however, and rebutted it, showing that doctrine not only seems to allow for party customization, but fully supports it. Parties are doctrinally free to modify procedure in innovative and expansive ways.

This conclusion leaves the fundamental puzzle unanswered, but it does clarify the promise and peril of procedural contracting, offering a clearer path to understanding both the practical and normative issues surrounding the practice.