# FINELY TUNED: CALIBRATING PROCEDURE THROUGH CONTRACT

Allen Blair

*The history of liberty has largely been the history of the observance of procedural safeguards.*[1]

*The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms.*[2]

## INTRODUCTION

For a long time, arbitration was the only game in town for parties who wanted more flexibility in the adjudication 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 before a dispute has arisen."[3] This sort of private procedural ordering[4] allows parties to unbundle off-the-rack procedures applied in public

---

[1] Felix Frankfurter.

[2] Judith Resnik, *Tiers*, 57 CAL L. REV. 837, 1030 (1984).

[3] Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 510-11 (2011).

[4] 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").

courts and bargain over individual rules.[5] 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.[6] While arbitration has arguably become more like litigation, litigation may be becoming more like arbitration.[7]

---

Unlike some commentators, however, unless otherwise specifiedI 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 extra-judicial procedures and processes such as arbitration, mediation, med-arb and settlement. *Compare* Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 511 (2011) (describing contract procedure as "the practice of setting out procedures in contracts to govern disputes . . . that will be adjudicated in the public courts").

[5] Erin O'Hara O'Connor & Christopher R. Drahozal, *Carve Outs and Contractual Procedure*, at 2.

[6] *See e.g.,* Allen Blair, *Is Less Really More? Hall Street Associates, Private Procedural Ordering, and Expanded Review of Arbitral Awards in State Courts*, 5 Y.B. ON ARB. & MEDIATION 74, 74 (2013) (noting that in "bet the farm" cases, parties, or one of them, might crave the safety of a second set of eyes reviewing their awards); Brief for the Petitioner at 40*, Hall St. Assoc., L.L.C. v. Mattel, Inc.,* 552 U.S. 576 (2008) (No. 06-989) (arguing that the concern is that many business managers may lose their appetite for arbitration by requiring them to "bet the company" on a process with no prospect of meaningful review); s*ee also, e.g.,* Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 241 (1999) (recognizing "a growing concern over the 'Russian Roulette' nature of arbitration"); Carroll E. Neesemann, *Contracting for Judicial Review: Party-chosen Arbitral Review Standards Can Inspire Confidence in the Process, and is Good for Arbitration*, 5 DISP. RESOL. MAG. 18, 18 (1998) (expressing concern over "knucklehead awards").

[7] Douglas Shontz, Fred Kipperman & Vanessa Soma, *Business-to-Business Arbitration in the United States*, RAND (2011), *available at* http:// www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR781.pdf, at 20.

But the notion that parties are free to customize procedural rules in public courts is controversial, and a burgeoning literature about the subject has sprung up in recent years.[8] On one hand, parties can enjoy significant benefits if procedure is seen as a set of defaults rather than immutable or mandatory rules.[9] A default regime allows parties to calibrate their

---

[8] *See, e.g.*, Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An* Ex Ante *Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475, (2013); Colter L. Paulson, *Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure,* 45 ARIZ. ST. L.J. 471 (2013); Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice,* 90 TEX. L. REV. 1329 (2012); Jaime Dodge, *The Limits of Private Procedural Ordering*, 97 VA. L. REV. 723 (2011); Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103 (2011); David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments,* 57 UCLA L. REV. 605 (2010); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2009); Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514 (2009); David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in Federal Courts*, 82 TUL. L. REV. 973 (2008); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design,* 115 YALE L.J. 814, 856-69 (2006); Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181; 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 (2002); John W. Strong, *Consensual Modifications of the Rules of Evidence: The Limits of Party Autonomy in an Adversary System*, 80 NEB. L. REV. 159, 160-61 (2001); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court,* 57 FORDHAM L. REV. 291 (1988).

[9] 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.,* 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 17 pieces on theoretical perspectives on contract default rules); 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); Ian Ayres, *Making a Difference: The*

adjudicatory procedures, trading off accuracy and efficiency to meet their particular *ex ante* preferences.[10] But a default regime might also undermine other core normative values that we associate with public adjudication, subverting notions of fairness and procedural justice.

Much of the concern about private procedural ordering, however, rests on the premise that parties will opt out of the defaults frequently and in extreme ways. While the current trend of doctrine would seem to allow parties wide latitude to customize procedure and thus justify this premise, I contend that it is flawed. Considering the limited number of parties who are most likely to be able to contract for procedure and assuming that these parties are acting rationally,[11] I argue that they will likely only seek to alter default procedural rules in a narrow set of circumstances and the degree of alteration that they seek will be in the direction of simple and easy to apply rules. While such fine-tuning of procedure involves small alterations unlikely to warrant strong normative concerns, these alterations can pay large dividends. By looking at

---

*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)).

[10] *See, e.g.,* Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUDIES 307,314 (1994) (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).

[11] Contracting parties, I assume, are rational in the sense that they only enter into contracts that they believe will make them better off. *See, e.g.*, Scott, , at 280 (assuming that contracting parties "act rationally, within the constraints of their environment, in the sense that they wish to contract if they believe the arrangement will make them better off and not otherwise"); Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 602 (1990) ("If we assume rationality, then it follows that, regardless of the risk attitudes of particular parties, the dominant strategy for contractual risk allocation is to maximize the expected value of the contract for both parties. Only by allocating risks in order to maximize the joint expected benefits from their contractual relationship can the parties hope to maximize their individual utility.").

matters from the perspective of the transacting parties, then, many of the most egregious normative concerns raised about private procedural ordering are diminished or disappear altogether and we are left with significant efficiency gains to the parties.

This Article proceeds in three Parts.

In Part I, I briefly recount the doctrinal ascendancy of private procedural ordering. Although some uncertainty continues to exist about the contractibility of specific rules, I contend that the trend of precedent could not be clearer: courts, and the United States Supreme Court in particular, favor parties' ability to customize procedure.

In Part II, I survey the normative concerns that have been raised about private procedural ordering. While these concerns are serious and should not be dismissed lightly, I evaluate the concerns with an eye towards showing that most of them can be allayed by considering the likely rules that parties will seek to alter and the degree of that alteration.

In Part III, I turn to an analysis of the potential efficiency gains for parties from private procedural ordering. I begin by rehearsing the basic economic justification for procedural rules, and then sketching the core features of current public procedural rules. Next I turn to an evaluation of the potential gains from seeing public procedural rules as defaults. I wrap up by evaluating the reasons why parties are likely to seek alteration of the defaults in only very limited circumstances and only to a limited degree.

## I. The Rise of Private Procedural Ordering

*Any customer can have a car painted any colour that he wants so long as it is black.*[12]

Historically, courts were skeptical of private procedural ordering, preferring to limit parties to the off-the-rack set of rules supplied by the sovereign.[13] Party-driven rulemaking was seen as a dangerous threat the legitimate public function of courts.[14] Although the history of arbitration in England is sketchy, at best, in the nineteenth and much of the early twentieth centuries, courts essentially refused to enforce non-judicial modes of dispute resolution like

---

[12] Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 462 (2007) (arguing that "[o]ur judiciary has unfortunately embraced Henry Ford's sense of consumer choice" with respect to litigation procedural rules).

[13] *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).

[14] 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).

arbitration.[15] They also effectively prevented private parties from altering or opting out of almost all procedural rules in judicial proceedings.[16]

Eventually, however, beginning with a grudging acceptance of arbitration and the passage of the 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 and more freedom to tailor process and procedure in order to increase certainty while efficiently adjusting accuracy to fit with their *ex ante* preferences.[17]

The first two subsections below briefly trace the evolution of the law governing private procedural ordering. Their primary goal is to 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, these sections show a clear trend in the case law favoring parties' ability to structure their own procedural rules.

---

[15] *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 histories.").

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

[17] *See, e.g.,* Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUDIES 307, 310 (1994) (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).

### 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 non-court dispute resolution processes or other forms of private procedural ordering as infringements on the proper public role of the court system.[18] As one commentator has observed, there existed "a taboo against party autonomy in procedural matters."[19] 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 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*.[20] There, the parties had entered into a contract

---

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

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

[20] *Vynior's Case*, 77 Eng. Rep. 595, 599-600 (K.B. 1609).

for repair work on several buildings.[21] They agreed to submit any disputes about the work to arbitration, and, as was customary at the time, a performance bond secured this agreement.[22] 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.[23] Lord Coke ruled that when there was a suit on a bond given for 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*.[24]

Whatever Lord Coke's original intent,[25] *Vynoir's* became a leading case "establishing the revocability doctrine."[26] Pursuant to this doctrine, a party to an arbitration agreement could

---

[21] *See id.*

[22] *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 Bewteen the Parties*, 67 LAW & CONTEMP. PROBS. 207, 208 (2004) (noting that "the common law of contract was in its infancy" at the time that *Vynior's Case* was decided).

[23] *See*

[24] *Vynior's Case*, 77 Eng. Rep. 595, 601-02 (K.B. 1609) (emphasis added).

[25] Some commentators have suggested that Lord Coke was effectively relying on agency principles. *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 at the time that *Vynoir's* was decided. *See* Paul D. Carrington & Paul Y. Castle, *The Revocability of Contract Provisions Controlling Resolution of Future Disputes Bewteen the Parties*, 67 LAW & CONTEMP. PROBS. 207, 210 (2004). They contend, instead, that Lord Coke was likely motivated by a desire to "insure the

revoke an arbitrator's authority at any time before the arbitrator rendered an award, even if the parties had agreed the delegation was irrevocable.[27] Although U.S. courts would usually enforce arbitration awards once issued,[28] following the practice of their English counterparts, they would not generally enforce executory contracts to arbitrate.[29] Practically, this 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.

Still, the revocability doctrine alone did not necessarily create an insuperable barrier to arbitration or other forms of procedural contracting. The doctrine mutated, however, over time into the so-called ouster doctrine. The mutation can be traced to an eighteenth century English

---

disinterest of arbitrators" at a time when there were no real substantive constraints on arbitrator authority. *Id.*

[26] 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.,* Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 Yale L.J. 595, 602 (1928).

[27] *See, e.g., Tobey v. County of Bristol et al*., 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").

[28] *See, e.g, Burchell v. Marsh*, 58 U.S. 344, 349 (1854).

[29] *See, e.g., Red Cross Line v. Atlantic Fruit Co.,* 264 U.S. 109, 121 (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, *Pitfalls 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 v. Atlantic Fruit Co.,* 264 U.S. 109, 122-25 (1924) (finding that New York courts could equitably enforce arbitration agreements in their own courts under New York's arbitration statute).

decision, *Kill v. Hollister*.[30] 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]."[31] As with the dicta giving rise to the revocability doctrine itself, no authority was given for this "ouster" rule.[32] Nevertheless, by 1856, the rule had become justified as legitimate "judicial jealousy" over jurisdiction, and this explanation for it stuck.[33]

Although the ouster doctrine began as anti-arbitration rule, 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.[34] The Court analogized the matter to a jury trial waiver and an arbitration agreement, concluding that

> [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.[35]

---

[30] 95 Eng. Rep. 532 (K.B. 1746).

[31] *Id.*

[32] *See id.*

[33] *See Scott v. Avery*, 10 Eng. Rep. 1121 (H.L. 1856) (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"); *Home Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874) (citing *Scott v. Avery* as one of "numerous cases" showing that parties cannot by contract oust a court of jurisdiction).

[34] *Home Ins. Co. v. Morse*, 87 U.S. 445, 451-52 (1874).

[35] *Id.* at 451.

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 . . . ."[36] Soon, courts went on to find that anti-suit covenants, pre-dispute waivers of liability, and forum selection clauses were similarly barred by the ouster doctrine.[37] 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."[38]

---

[36] *Id.* at 451-52.

[37] *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"); *Knorr v. Bates et al.*, 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"); *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).

[38] *Tobey v. County 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*, 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 v. Hamilton Mutual Ins. Co.*, 72 Mass. (6 Gray) 174 (1856) as articulating this extrajudicial concern)).

### B. More than Mere Contract Law: Autonomy and Private Procedural Ordering

By the late Eighteen-century, 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.[39] At the height of the revocability and ouster doctrines, contract law was in its infancy, and most contracts were discrete and simple.[40] 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,[41] the same principles of autonomy began gaining traction in the context

---

[39] *See, e.g.,* 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.'"); 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 in modern American law.").

[40] 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.

Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415, 428-29 (1988); *see also* Bruce L. Benson*, An Exploration of the Impact of Modern Arbitration 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).

[41] 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 Llwellyn's Concept of Agreement Should Change the Law of Open-Quantity Contracts*, 37 SETON HALL L. REV. 67, 77 (2006).

of private procedural ordering.[42] The trend towards acceptance of procedural contracts, in fact, follows the path charted by G. Richard Shell twenty years ago in his study of contracts and the Supreme Court: 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.[43]

Arguably, the first steps towards unlocking the potential of private procedural ordering started with increasing demand for arbitration.[44] Businesses that saw the potential efficiency gains from arbitration, but they were frustrated with court refusal to enforce arbitration agreements.[45] 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

---

[42] *But see* David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 1014 (2008) (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 concerns shaped the design of clause enforcement docrine").

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

[44] *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 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."); Jeffery W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 275 (1990) ("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.").

[45] *See, e.g., Atlantic 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).

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.[46] In 1925, the U.S. Congress followed New York's lead by enacting the United States Arbitration Act, later renamed the Federal Arbitration Act ("FAA"). Accordingly, as the Supreme Court later explained, the FAA was a "response to the refusal of courts to enforce commercial arbitration agreements."[47] But the Act did more. It also represented a decisive step towards recognizing the value of autonomy in procedural choices.

That progression continued and, as due process became recognized as a waivable right, the Warren and Burger Courts embraced more and more forms of procedural private ordering.[48] The current era customizable procedure, however, was not ushered in until 1972 in *The Bremen*

---

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

[47] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 125 (2001); *Southland v. Keating*, 465 U.S. 1, 13-14 (1984) ("[T]he need for the law arises from ... the jealousy of the English courts for their own jurisdiction.... This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts.") (quoting H.R. Rep. No. 96, 68th Cong., Sess. 1 (1924)). 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, 9 U.S.C. §1, 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).

[48] Jamie Dodge, *The Limits of Procedural Private Ordering*, 97 VIR. L. REV. 723, 735 (2011) (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)).

*v. Zapata Off-Shore Co.*,[49] when the Supreme Court addressed enforcement of a forum selection clause in the context of an international transaction.[50] *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."[51] More significantly, it shifted focus to party autonomy, making the touchstone for enforcement of forum selection clauses the quality of the bargaining process.[52] 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.[53]

---

[49] 407 U.S. 1, 2 (1972).

[50] *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, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 302-03 (1988) ("The current doctrine of consensual adjudicatory procedure . . . is based on Supreme Court pronouncements in *The Bremen*.").

[51] 407 U.S. 1, 12 (1972).

[52] *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.,* 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, 597 (2007) (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, 543 (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").

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

It is also worth noting that the Court in *Bremen* at least tacitly endorsed some party choice over procedures other than forum choice. The general rule was, and still is, that the forum court's procedural rules will apply.[54] Accordingly, by allowing parties to contract for the forum in which their future disputes will be heard, the Court was effectively allowing parties to shop for bundles of procedural rules that they might prefer.

Following *Bremen*, the Court has never looked back during its march to internalize contract norms and abandon its historic skepticism over the devolution of judicial authority.[55] Instead, the Court has taken multiple opportunities to reinforce the instrumental character of procedure and its malleability at the hands of parties.[56] 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.[57]

---

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

[55] *See Judith Resnik*, at 598--99 (describing how changes in adjudicatory practice are shifting the focus of civil procedure from "due process procedure" to "contract procedure").

[56] *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); Add cites.

[57] 473 U.S. 614, 628 (1985); add cites; *see also, e.g., Metro East Center for Conditioning & Health v. Qwest Communications International, 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.").

Using this instrumental logic, the Court later broke down one of the few remaining barriers standing in the way of private procedural ordering by abandoning any effort to distinguish between commercial and consumer contracts in *Carnival Cruise Lines v. Shute*.[58] There, extending its pro-autonomy decision in *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 consumers "benefit in the form of reduced [prices] reflecting the savings that the [firm] enjoys by limiting the fora in which it may be sued."[59]

Even *Hall Street Associates, L.L.C. v. Mattel,* heralded as the sole decision in the last thirty years to invalidate a procedural contract, advances the logic of party autonomy and freedom to tailor procedure.[60] In *Hall Street*, the Court was faced with a contractual provision expanding the scope of judicial review of arbitral awards. [61] While the Court did, in fact, invalidate this provision, holding that the grounds for review of arbitral awards under the FAA

---

[58] 499 U.S. 585, 587–88 (1991).

[59] *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.").

[60] 28 S. Ct. 1396, 1408 (2008). *See* Jamie Dodge, *The Limits of Procedural Private Ordering*, 97 VIR. L. REV. 723, 738 (2011) (describing *Hall Street* as "[t]he Court's sole invalidation of a procedural term").

[61] 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 Street,* 28 S. Ct. 1396, 1401-02 (2008).

were complete and exclusive,[62] the Court did not even hint that its rejection of the customized procedure sprung from any concerns over party control of judicial processes.[63] 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."[64] The Court was not rejecting private procedural ordering at all.[65]

In short, since *Bremen*, every word from the Court suggests that parties have virtually unfettered ability to customize procedure.[66] In a variety of instances, parties do, in fact, take

---

[62] 28 S. Ct. 1396, 1408 (2008).

[63] 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. ADD.

[64] *Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1406.

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

Jamie Dodge, *The Limits of Procedural Private Ordering*, 97 VIR. L. REV. 723, 738 (2011). 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.*

[66] Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 Fordham L. Rev. 291, 302-03 (1988).

advantage of this ability, including forum selection clauses,[67] choice of law clauses,[68] clauses dealing with appointment of service agents or waiver of notice,[69] and limitation period clauses[70] in their contracts. Additionally, parties regularly waive the right to notice and a hearing by using cognovits notes,[71] and waive the right to a trial by jury.[72] Even procedural requirements that

---

[67] *See, e.g.,* 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"); Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1987 tbl.2 (2006) (finding that about 53-percent of a sample of mergers clauses included forum selection provisions).

[68] *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).

[69] *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.").

[70] *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).

[71] *See, e.g., Swarb v. Lennox*, 405 U.S. 191 (1972); *D.H. Overmyer Co. 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.

[72] Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1583-84 (2005) ("Most courts will enforce contractual jury waivers."); Theodore Eisenberg & Geoffrey P. Miller, Do Juries Add Value? Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts, 4 J. EMPIRICAL LEGAL STUD. 539, 539 (2007) (finding that about 20-percent 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 Co. of Ohio v. Frick Co.,* 405 U.S. 174, 185 (1972), lower courts seem to focus on the propriety of the bargaining process to the exclusion of any other concerns, *see, e.g., 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

might seem "immutable," such as jurisdictional requirements, have, in recent years been subject to some contractual modification.[73]

Although the Supreme Court has not specifically endorsed the use of all of these – and the many other potential – forms of private procedural ordering, with no 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."[74] The trend of precedent, in short, seems unequivocally to favor party autonomy and private procedural ordering.

## II. The Concerning Normative Implications of Private Procedural Ordering

While the trend of precedent may be clear, private procedural ordering raises serious concerns about subverting public process by prizing personal autonomy. Espousing one aspect of this concern in his customary charismatic style, Judge Kozinski once said that he would have qualms about enforcing a procedural contract opting into expanded judicial review of arbitral awards "if the agreement provided that the district judge would review the award by flipping a

---

"[a]s long as the price is negotiable and the customer may shop elsewhere, consumer protection comes from competition rather than judicial intervention").

[73] Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 514 (2011) (noting that recent cases arguably allow for parties to enlarge the subject matter jurisdiction of federal courts and contract around some constitutional standing barriers).

[74] Jamie Dodge, *The Limits of Procedural Private Ordering*, 97 VIR. L. REV. 723, 739 (2011). In fact, since the Supreme Court's decision in *Shute*, the Court has not found that "a procedural contract violates fundamental fairness." *Id.* at 725.

coin or studying the entrails of a dead fowl."[75] Provocative as such *reductio ad absurdum* thought experiments can be, the hard work of actually finding the line between mockery and the potential efficiency gains discussed in the Part III of this Article, however, can be daunting.[76] Part III will attempt to make the task easier, but for now I want to investigate the concerns themselves.

Most concerns over private procedural ordering fall into one of four categories, the first two of which focus on the immediate parties and the second two of which are societal: (1) doubts about the quality of consent in the context of disparate party transactions;[77] (2) worries that procedural machinations will be used to gain covert substantive advantages;[78] and (3) concerns that private procedural ordering will hinder the structural role of private enforcement in our

---

[75] *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring).

[76] *See* David H. Taylor and 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, 1090 (2002) ("So where is the line between mockery and efficiency? Or, should there be any line at all? That is, should a public dispute resolution system be altered by private agreement?").

[77] *See, e.g.*, Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 642–43 (1996) ("[I]t is critical to distinguish between commercial arbitration voluntarily agreed to by parties of approximately equal bargaining power, and commercial arbitration forced upon unknowing consumers, franchisees, employees or others through the use of form contracts."); Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 S.M.U. L. REV. 819, 822 (2003) (arbitration "has the capacity to reduce, if not altogether eliminate access to the courts and to the law.").

[78] Add.

governmental system;[79] and (4) worries that private procedural ordering will impede dissemination of information that can be used to public benefit.[80]

The first concern is not unique to procedural contracting. In many respects, one could say that the toughest nut to crack in contracts literature over at least the last decade has been how the law should address disparate party contracting generally and the myth that weaker parties are really consenting specifically.[81] Frequently, though not exclusively, the concern has come up in the context of mandatory arbitration.[82]

TBC

---

[79] *See e.g., Nebraska Ass'n of Pub. Employees*, 477 N.W.2d 577, 581-83 (1991) (basing refusal to enforce pre-dispute arbitration agreements on Nebraska cases decided in the 1800s, and relying on pre-FAA cases in warning that arbitration will "open a leak in the dyke of constitutional guarantees which might some day carry all away") (quoting *Phoenix Ins. Co. v. Zlotky*, 92 N.W. 736 (Neb. 1902)).

[80] 1 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 7a, at 605 (Peter Tillers ed. 1983) ("It is arguable that the proceedings in courts are not there solely for the convenience of the parties and that it is important for social reasons to maintain the solemnity and dignity of judicial proceedings regardless of the wishes of the parties.").

[81] Add

[82] *See, e.g.*, Linda J. Demaine & Deborah R. Hensler, "*Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 72–74 (2004) (noting the lack of voluntary agreement to many consumer arbitration contracts); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 788–89 (2002) (noting bargaining-power problems in consumer arbitration agreements).

## III. The Gains From Customized Procedure

*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.*[83]

Notwithstanding the serious normative concerns discussed in the previous Part, seeing public procedure as primarily comprised of default rather than mandatory rules provides the parties with a strong form of representativeness: both the process and the content of the dispute are based on negotiation between the parties. The flexibility that attends procedural customization permits parties to define the scope of the dispute and to specify the form and substance of the proceedings that will resolve it. Contracting parties may, thus, construct a dispute resolution mechanism that optimally aligns their incentives with their preferred contractual norms.

The following sections explore these benefits in more detail. The first section sets the stage by briefly articulating the economic rationale for procedure generally. The second section then specifically describes several core features of the current set of procedural rules in public courts. Relying on the first two, the third section connects the dots and explains the efficiency gains that can be realized through private procedural ordering. The fourth section assumes that the current set of procedural rules constitute defaults and anticipates the conditions in which parties will seek to alter those defaults and the degree of any alteration.

---

[83] RONALD A. DWORKIN, A MATTER OF PRINCIPLE 72 (1985).

### A. 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? At the least, they are buying a resolution to their dispute. More precisely, they are hoping to buy an accurate resolution to their dispute. This is where procedure factors into the mix. In adversarial systems of adjudication, the primary role of procedure is to produce outcomes that optimally enforce the substantive law.[84] Accurate outcomes are valuable because they deter potential wrongdoers. So long as adjudicators accurately enforce substantive law, rational actors expect to face liability to the degree that they behave unlawfully.[85] As a result, they conform their behavior to the substantive standard. It follows that to the extent that procedure reduces the risk of outcome error, it also reduces the incidence of unlawful behavior and the corresponding social costs.

But accurate outcomes are not the only things that interest parties. Indeed, procedures designed to enhance accuracy, like extra layers of appellate review or more searching discovery, cost more. Parties have to balance their appetite for accuracy against its increased costs. Any system of procedure then must strive to minimize the sum of expected error costs and expected process costs.[86]

---

[84] *See* POSNER, ECONOMIC ANALYSIS OF LAW, § 21.1, at 559-602; 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).

[85] Importantly,

[86] *See* POSNER, ECONOMIC ANALYSIS OF LAW, § 21.1, at 559-602*; see also, e.g.,* 1 JAMES WM. MOORE ET AL., 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

Importantly, optimally accurate resolutions can include not only judgments but also settlements. After all, parties can likely settle their dispute for less than adjudication will jointly cost. As the old saw goes, a bad settlement is almost always better than a good trial.[87] Assuming that parties are rational and are not acting strategically to influence the current or future actions of one another or third parties,[88] they will calculate a settlement value by multiplying the probability of success on the merits by the value of an anticipated judgment net of transaction costs.[89] Adjudication should only happen if a plaintiff's minimum settlement value is greater

---

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 ("[The Rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").

[87] *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").

[88] *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 look different if one of the parties is acting to influence third parties or the outcome in future similar cases.

[89] 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 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

than a defendant's maximum settlement value and there is, accordingly, no surplus over which the parties can bargain.[90] Generally, this gap will exists only to the degree that the parties have differing estimates of the probability of success on the merits or differing estimations of an anticipated judgment.[91]

---

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.

[90] Indeed, a substantial number of commentators and even courts have suggested that adjudication only happens if the parties have made a grave analytical error. *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, 225 (1982) (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) (Trials result from "mistaken prediction[s]" made by parties.); Margaret Meriwether Cordray*, Settlement Agreements and the Supreme Court,* 48 HASTINGS L.J. 9, 36 (1996) ("Settlement is favored in the law for a variety of reasons."); Russell Korobkin & Chris Guthrie*, Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 107-08 (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"); *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."), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075-76; *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.").

[91] In a simple model of settlement, this leads to the 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.,* Joseph A. Grundfest & Peter H. Huang*, The Unexpected Value of Litigation: A Real Options Perspective,* 58 STAN. L. REV. 1267, 1299-1305 (2006) (showing how a case with a negative expected judgment value can still have substantial settlement value); Richard A. Posner*, An Economic Approach to Legal Procedure and Judicial Administration,* 2 J. LEGAL STUD. 399, 419 n.29 (1973) (asserting that empirical evidence exists to show that higher stakes cases are more likely to be litigated).

In the rough and tumble of real disputes, however, there are ample reasons why even rational parties might reach different expected judgment values and thus choose to adjudicate rather than settle.[92] For the purposes of this Article, two of these reasons are particularly salient.

First, judging is difficult.[93] In the adversarial system, courts make factual determinations with substantially less than complete confidence, getting information from the self-interested parties. Courts therefore systematically experience shortages of information regarding what the relevant facts are and what applicable legal rules say.[94] As a result, judges, by definition busy generalists, may have a hard time discerning the wheat from the chaff. 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. Parties may not share a common base rate, however, 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.[95]

---

[92] *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).

[93] *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).

[94] *See* ALEX STIEN, FOUNDATIONS OF EVIDENCE LAW 34-35, 73-106 (2005) (analyzing the sources of uncertainty in factfinding); 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").

Second, 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 merits, which impedes their capacity to make high quality probabilistic estimates of success. 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. This noise can make it difficult for parties to arrive at common present forecasts of the value of a future judgment.

In short, adjudication constitutes a non-trivial part of dispute resolution and procedural rules must account not only for settlement effects but also for the quality of the adjudicatory process. Procedural rules must strive to balance accuracy and efficiency while fairly accounting for the interests of both parties and the larger society.

### 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.[96] Congress passed the Rules Enabling

---

[96] 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. REB. 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).

Act ("REA") in 1934.[97] The REA authorized the Supreme Court to create a single procedural regime for federal courts. The Court delegated its task to an Advisory Committee, which set out to draft a procedural code that limited the impact of process itself.[98] Because the reformers were moved by pragmatic instrumentalism,[99] they saw procedure exclusively as a means of finding facts and accurately enforcing substantive law. Procedure was deemed separate and independent from substance. 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 substance.[100] Uniformity and trans-substnativity aimed to standardize procedure and achieve, in the aggregate, the compromise between efficiency and accuracy discussed in the previous section in the widest swathe of cases possible.[101]

---

[97] Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2006)).

[98] Appointment of Committee To Draft Unified System of Equity and Law Rules, 295 U.S. 774, 774–75 (1935).

[99] *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).

[100] Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLAHOMA 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.").

[101] *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, 356 (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.*

In order to accommodate the hopeful expansiveness of trans-substantivity, the reformers opted to entrust judges with broad discretion to put the rules of procedure into action in individual cases.[102] "[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."[103] In economic terms, the reformers opted to create a procedural rule set comprised predominately of open-textured standards rather than rules.[104] Accordingly, public procedural rules in the United

---

[102] *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) (retrieving 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 Millenium: Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform"*, 64 LAW & CONTEMP. PROB. 197, 232-234 (Spring/Summer 2001) (advocating broad trial judge discretion to tailor discovery to individual cases).

[103] Robert G. Bone, *Procedural Discretion* at 3.

[104] 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) ("The 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 Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 557-68 (1992) (viewing rules and standards for their economic efficiency); 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); 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 decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere."); 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); FREDERICK SCHAUER, THINKING LIKE A LAWYER 13-29 (2009) (discussing the relative advantages and disadvantages of legal norms being articulated as rules or standards).

States delegate to a judge the task of specifying precise obligations in light of the contingencies arising after a dispute has fomented. This delegation occurs both expressly and through the use of vague language inviting flexible interpretation.[105]

### C. The Potential Benefits of Procedural Customization through Contract

Despite the aspirations of the reformers who revolutionized procedure pursuant to the REA, the existing rules of public procedure do not and cannot account for the individual nuances of every actual case. Accordingly, the rules cannot achieve the optimal balance of accuracy and efficiency in every case. The rules themselves suggest as much, recognizing that their one-size-fits-all template may not be optimal in all situations. As the previous section pointed out, a number of rules delegate to judges the task of specifying precise procedural obligations after a dispute has arisen. Perhaps more importantly, the rules also leave litigants with broad discretion in conducting their affairs throughout the litigation process.[106]

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

---

[105] Robert G. Bone, *Procedural Discretion* at 9.

[106] Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice,* 90 TEX. L. REV. 1329, 1330 (2012) ("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.").

evidence production.[107] But parties can control the post-dispute contours of procedure in a variety of other ways as well.[108] For example, litigants may enter stipulations,[109] consent to waiver of service of process,[110] amend pleadings,[111] waive the right to a jury trial,[112] substitute a magistrate judge for an Article III District Judge,[113] or even waive their right to appeal.[114] By making such post-dispute procedural choices, litigants can calibrate their litigation expenditures to their individual tolerances for accuracy and risk and thus maximize efficiency.

---

[107] *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 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 26.04[1], at 26-35 (3d ed. 2008) ("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 and Procedure §§ 2091-2092 (3d ed. 2012) (delineating the parameters of the ability of litigants to stipulate discovery procedure).

[108] 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).

[109] *See, e.g.,* 73 AM. JUR. 2d *Stipulations*, §15.

[110] *See* Fed. R. Civ. P. 4(d) (allowing parties to waive service of process in order to save money and effort); 4A CHARLES ALLEN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE §1092.1 (3d. ed. 2012) (discussing the process for procuring waiver).

[111] *See* Fed. R. Civ. P. 15 (both before and during trial).

[112] *See* Fed. R. Civ. P. 39(a)(1).

[113] *See* Fed. R. Civ. P. 73.

[114] *See e.g. Acton v. Merle Norman Cosmetics, Inc.*, 163 F.3d 605 (9th Cir. 1998) (unpublished table decision) (dismissing appeal base don a post-dispute agreement); *see also* 15A Charles Allen Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure: Jurisdiction and Related Matters §3901 (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").

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,[115] but the parties agree to alterations of the default rules with their "eyes wide open" and with approval of a supervising judge.[116]

But the analytical distance between *ex post* modifications and *ex ante* modifications public procedures is exaggerated.[117] 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. Although in a sense parties *ex post* might be in a position to better value the trade offs that they are making, this certainty itself comes at the price greater enforcement costs. And, although judicial approval of a customized procedure might be clearer *ex post*, a court will always have the opportunity to weigh, expressly or impliedly, a *ex ante* customized procedure as well.

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

---

[115] *See, e.g.,* Rule 26 which requires the parties to confer and results in an agreed upon scheduling order under Rule 16.

[116] *See* Hoffman, *Whither Bespoke Procedure* at 8.

[117] *But see generally* Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*.

enforcement buck."[118] *Ex ante* procedural contracting simply extends the logic and the range of potential efficiency gains from 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.[119] According to Professors Scott and Triantis, parties vary the precision of contract provisions in order to shift costs between the time of contracting and the time of dispute in order to enhance their overall welfare.[120] When parties choose a relatively precise or specific rule, they are increasing their *ex ante* investment.[121] 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. 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.[122] On

---

[118] Robert E. Scott & George E. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L. J. 814, 856 (2006).

[119] *Id.* at 856-60.

[120] *See* Allen Blair, *Hard Cases Under the Convention on the International Sale of Goods: A Proposed Taxonomy of Interpretive Challenges*, 21 DUKE J. COMP. & INT'L L. 269, 301-02 (2010).

[121] *See* Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U L. REV. 1023, 1071 (2009).

[122] Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U L. REV. 1023, 1071 (2009) (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").

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.[123] 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* 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.[124] In short,

> By 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.[125]

This insight reveals the potential of procedural contracting.[126] In fact, Professors Scott and Triantis point out that parties often choose to opt out of the public adjudicatory system

---

[123] *See id.*

[124] *Id.* 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.").

[125] Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L. J. 814, 817 (2006).

[126] *See also, e.g.,* Albert Choi and George Triantis, Albert Choi and George Triantis, *Completing Contracts in the Shadow of Costly Verification*, 27 J. LEGAL STUD. 503 (2008) (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).

entirely in favor of arbitration because "the parties' ex ante agreement as to procedure improves the cost-effectiveness of their prospective enforcement mechanism."[127] 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.[128]

With respect to burdens of proof, as Professors Scott and Triantis argue, even if the default allocation can be rationalized,[129] "it is highly unlikely that it yields the efficient . . . allocation for every contract."[130] They go on to show how three different customized allocations might benefit parties.[131] The same fundamental point holds for most procedural rules. Even to the extent that existing public procedural rules can be rationalized,[132] it is unlikely that they optimally balance efficiency and accuracy in all cases. Fine-tuning procedure can benefit parties

---

[127] *Id.* 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 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)).

[128] *Id.* at 857-871.

[129] They argue that they are "hard pressed," along with most other commentators, to rationalize the default allocation. Robert E. Scott & George E. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L. J. 814, 866 (2006).

[130] *Id.*

[131] *See id.* at 867-78.

[132] 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 non-parties. *See, e.g.,* Ian 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."); an Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (explaining penalty defaults).

in at least two significant ways: by curbing post-dispute opportunism and by reinforcing substantive obligations and optimizing pre-dispute behavior.

### *1. Curbing Post-Dispute Opportunism*

Private procedural ordering can help maximize the joint surplus from contracting by reducing the expected costs of future disputes. 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.[133]

Pre-dispute private procedural ordering, in fact, is far more effective than post-dispute ordering in this regard for at least three reasons. First, before a dispute, parties cannot accurately predict how a dispute will arise or what side of issues they will each take. This uncertainly affords the parties a degree of objectivity that they lack by the time that a dispute foments, allowing them to make less emotionally charged choices about procedures and process that will maximize their joint welfare.[134] Second, pre-dispute, and particularly at the outset of

---

[133] *See generally, e.g.,* David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985). Parties face a collective-action problem during discovery. In a highly simplified model, each party could choose to be abusive or reasonable with its discovery requests. Jointly, the parties would be best served by both employing reasonable discovery requests. Individually, however, each party would do better if it employed abusive discovery techniques while the other was reasonable. Because both parties know this, they face a Prisoner's Dilemma, which results in an equilibrium where both parties are worse off than if they had been reasonable. The same basic model applies to abusive motion practice. *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); 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).

[134] *See, e.g.,* Bruce L. Hay, *Procedural Justice--Ex Ante vs. Ex Post,* 44 UCLA L. REV. 1803, 1828-39 (1997) (describing the difference between *ex ante* and *ex post* perspectives when

contracting, transfer payments are much more feasible. Accordingly, even asymmetric procedural advantages can be considered so long as the benefited party can purchase such advantages from the other at an agreed upon price.[135] Finally, before a dispute arises, and again especially during contract negotiations, parties enjoy the cooperative benefits of a deal-making ethos.[136] They are, thus, less likely to succumb to various cognitive biases that might impede negotiating mutually beneficial procedural terms.[137]

By delimiting through contract the range of strategic procedural choices available before a dispute arises, the parties can enhance the overall value of their agreements.

### *2. Reinforcing Substantive Obligations and Optimizing Pre-Dispute Behavior*

Pre-dispute procedural contracting also provides parties with additional means of reinforcing or defining their substantive obligations to and behavior towards one another.[138]

---

information differs); Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 743 (2001) (noting that "because no dispute has yet arisen, the parties can consider the range of possible disputes that might arise in agreeing on a dispute resolution forum"). *But see* Robert G. Bone*, Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness,* 83 B.U. L. REV. 485, 526-29 (2003) (criticizing some of the assumptions about information access that underlie typical *ex ante* arguments).

[135] *See id.* ("[P]redispute arbitration agreements provide greater opportunities for making transfer payments than do postdispute arbitration agreements.").

[136] *ADD*

[137] *See generally, e.g.,* Russel Korobkin*, Psychological Impediments to Mediation Success: Theory and Practice,* 21 OH. ST. J. DISP. RES. 281 (2006) (discussing a range of cognitive biases that can prevent successful post-dispute negotiations).

[138] The divergence between *ex ante* and *ex post* optimal litigation decisions has been extensively analyzed in the law and economics literature. *See generally, e.g.,* Steven Shavell*, The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System,* 26 J. LEGAL STUD. 575 (1997); Steven Shavell, FOUNDATIONS OF ECONOMIC ANALYSIS

Parties already regularly negotiate over substantive terms that might be difficult to verify in subsequent litigation.[139] For instance, 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 can be realized by reducing the likelihood of future litigation altogether or by narrowing the range of disputes in any future litigation.

---

OF LAW 392-401 (2004). Suffice it to say here 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.

[139] Information may be said to be unobservable if the other contracting party cannot 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 Agreements*, 103 COLUMB. 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* Albert Choi & George Triantis, *Completing Contracts in the Shadow of Costly Verification*, 37 J. LEGAL STUD. 503 (2008); 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).

But procedural contracting offers parties even more options for calibrating their substantive obligations and to one another and optimizing behavior prior to a dispute arising. 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.[140] For instance, agreeing that expert testimony will be given by a third-party-appointed neutral rather than through party appointed advocates might incentivize greater compliance with performance standards pre-dispute.[141] 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.[142]

These simple examples do not exhaust the numerous possibilities.[143] The fundamental point, however, is that parties can use customized procedural devices in combination with carefully tailored substantive obligations to reduce opportunities for *ex post* opportunism and to incentivize pre-dispute behaviors that increase their joint surplus. In addition to benefiting the parties directly, customized procedure might also reduce the public costs associated with the

---

[140] Procedural contracting 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).

[141] *See, e.g.,* Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice,* 90 Tex. L. Rev. 1329, 1356 (2012) (offering a similar example).

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

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

court system, at least to the degree that private and public costs are correlated.[144] Finally, there are potential spillover benefits to the public adjudicator system, at least with some forms of procedural contracting, such as expanded judicial review of arbitral awards.[145]

### D. Anticipating Party Customization

Given the doctrinal picture painted in the first Part of this Article and considering the impressive value-maximizing opportunities presented by procedural customization, it is tempting to predict that parties will engage in private procedural ordering with great gusto and regularity. What little empirical evidence we have, however, indicates that parties are, in fact, doing precious little *ex ante* customization.[146] For a variety of reasons, that evidence may be suspect – as Christopher Drahozal and Erin O'Hara O'Connor have argued, customization commonly occurs through carve-outs from arbitration protocols[147] and the evidence omits a number of customizations that have become routine, such as choice of law provisions, forum selection provisions and arbitration agreements generally. Nevertheless, this evidence highlights an important point: parties seem to engage in only limited procedural customization.

---

[144] *See, e.g.,* Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice,* 90 Tex. L. Rev. 1329, 1356 (2012); *Cable Connection, Inc. v. DirectTV, Inc.*, 190 P.3d 586, 606 (Cal. 2008) (discussing among the advantages of allowing parties to contract for expanded judicial review of arbitral awards the reduced burdens on the court system).

[145] *See Cable Connection, Inc. v. DirectTV, Inc.*, 190 P.3d 586, 606 (Cal. 2008) ("This procedure better advances the state of the law and facilitates the necessary beneficial input from experts in the field.").

[146] David A. Hoffman, Whither Bespoke Procedure?, 2014 U. ILL. L. REV. ___ (manuscript at 4).

[147] Drahozal at 1.

The question is why. One very 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. It is difficult to imagine parties bargaining *ex ante* for procedural contracts in isolation. If this intuition is correct, then less than 1/3 of all disputes in courts would even have the potential of implicating customized procedures.[148] This fact alone radically reduces the space within which concerns about procedural contracting can arise.

As important as this answer is, the more interesting answers, I contend, have to do with several forms of default stickiness, a closer examination of which can reveal the likely circumstances in which contractual parties will seek to customize procedure.

### *1. High Transaction Costs*

At least after Ronald Coase's revolutionary work, it seems clear that, if transaction costs are sufficiently low, contractual defaults are really irrelevant because parties can and will negotiate around suboptimal ones.[149] "Parties should arrive at the same contractual risk allocations, either explicitly (by contracting around the defaults) or implicitly, (by choosing not to contract around the defaults) regardless of the content of the default rules."[150]

---

[148] *See, e.g.,* http://bjs.gov/content/pub/pdf/pdasc05.pdf.

[149] *See generally* Ronald .H. Coase*, The Problem of Social Cost,* 3 J.L. & ECON. 1 (1960). The Coase theorem predicts that contracting parties will bargain to the efficient allocation of rights and responsibilities, without regard to initial entitlements so long as transaction costs are low. *See, e.g.,* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 81-82 (2d ed. 1997).

[150] Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 Cornell L. Rev. 608, 613 (1998).

Of course, transactions costs are not always low, and high transaction costs effectively dissuade would be customizers from taking up the opportunity. In the context of procedural defaults, there are several interlacing reasons why parties might face transaction costs that outweigh whatever potential gains they might get from altering the procedural defaults.

Most importantly, procedure is opaque even to highly trained experts. *Ex Ante,* parties considering a procedural contract face a particularly acute knowledge problem. Contracts are always incomplete.[151] The inevitability of incompleteness reflects, to borrow a distinction from H.L.A. Hart, both our "relative ignorance of fact" and "our relative indeterminacy of aim."[152] Although many contracts are negotiated and entered into by sophisticated parties, often acting with the assistance of counsel, no contract accounts for every future contingency.[153] But

---

[151] *See, e.g.,* Robert E. Scott, *Rethinking the Default Rule Project*, 6 VIR. J. 84, 85 (2003) ("As an organizing principle, the notion that contract rules are defaults inevitably leads to the conclusion that all contracts are inevitably incomplete."); Alan Schwartz and Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L. J. 541, 595 (2003) ("There is an infinite number of possible future states and a very large set of possible partner types. When the sum of possible states and partner types is infinite and contracting is costly, contracts must contain gaps. Parties cannot write contracts about everything.").

[152] H.L.A. HART, THE CONCEPT OF LAW 125 (1961); *see also* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VIR. L. REV. 821, 822 (1992) ("Parties drafting a contract confront a serious knowledge problem. Because they cannot foresee every future event or know precisely how their own purposes may change, they cannot negotiate terms specifically to cover all contingencies.").

[153] Importantly, a contract may be "obligationally" complete by providing for an obligation that applies in a wide range of circumstances. *See, e.g.,* Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. RES. L. REV. 187, 190 (2005). For instance, a contract might provide that, no matter what, a seller must deliver 2,000 widgets on January 1, 2010, for a price of $10,000. While such a contract is free from gaps in the sense that it specifies the parties' rights and obligations in all states of the world, the contract remains "informationally" incomplete in the sense that the parties cannot know whether delivery of the widgets on that date and for that price will truly be efficient. *See id.; see also, e.g.,* Robert

procedural contracts are especially daunting. The forecasting needed to predict an altered procedural rule's impact requires the services of a highly trained legal professional. That professional must estimate a proposed idiosyncratic rule's impact over a wide range of possible future states of the world. Exacerbating this already challenging problem can be the novelty of the proposed rule and the complexity of the underlying range of future facts, both of which may continue ratchet up specification costs.

In this context, the existing set of procedural defaults will often be more efficient. The existing defaults, recall, address the knowledge problem by delegating to a court and to the parties the discretion to specify particular obligations *ex post*. At the very least, the substantial obstacles to creating *ex ante* state contingent procedural contracts suggest that such contracts will usually be limited to circumstances where the parties have relatively clear goals and simple rules can achieve those goals.[154]

---

E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L. J. 814, n.2 (2006). According to Professors Scott and Triantis,

> A contract may be obligationally complete even though it is informationally incomplete. An obligationally complete contract might lump together various states and provide for the same obligations across the states of each lumped set. Yet, such a contract is informationally incomplete because it fails to discriminate within each set between states of the world that, optimally, call for different obligations. States of the world reflect both exogenous and endogenous variables. For example, different oil prices produce different states, but so does the decision of a seller to tender or not. Each event changes the state of the world and may be paired in the contract with a different obligation on the buyer.

*Id.*

[154] Ian Ayres made a related point with respect to the design of corporate law default rules. He argued that they should be general standards that a court will apply ex post, and that firms

### *2. Network and Learning Externalities*

Network externalities exist where "the utility that a user derives from consumption of a good increases with the number of other agents consuming the good."[155] In the context of a procedural rule, a network externality would exist where more and more parties use the same rule and, as a result, the rule can be priced accurately. In contrast, more novel procedural rules will have greater uncertainty about their value.[156] Note, however, that novelty in this context exists on a spectrum. Procedural customizations that only modestly alter existing rules or provide the sort of specification that we would anticipate would ultimately be provided *ex post* will have more certain values as well procedural customizations that resemble existing defaults. More idiosyncratic or complex procedural customizations will have less certain values.

Closely related is the phenomenon of learning externalities, which exist where multiple parties are using and reusing a widely proliferated rule.[157] Essentially, when a rule gets regularly used by multiple parties, it may become a shorthand signifier of more complex norms because it is now a familiar and commercially standard part of transactions. Courts and parties develop

---

that opt out would do so with specific rules that require no such ex post application. Ian Ayres, *Making a Difference: The Contractual Contributions of Easterbrook and Fischel*, 59 U. CHI. L. REV. 1391, 1403-08 (1992).

[155] Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 483 (1998)

[156] See Kahan & Klausner, *The Economics of Boilerplate* at __.

[157] *See, e.g.,* Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate"),* 83 VA. L. REV. 713, 718-23 (1997).

confidence in the rule and understand what it means.[158] This reduces the risk of erroneous application by a court and thus enhances accuracy of adjudication at a relatively low cost. The understanding that parties have also reduces the costs that they incur in estimating their likelihood of success on the merits – they can make higher quality estimates of this probability while assigning a lower risk to the possibility that a court will make a mistake. Novel rules do not have these learning benefits, though, as with network externalities, novelty here should be understood to exist along a spectrum. Procedural customizations that hew relatively closely to existing defaults or to the sort of specification that we would expect the existing defaults to have *ex post* may be able to benefit from some learning externalities. In contrast, highly novel procedural customizations will not benefit from learning externalities created by the defaults.

Network and learning externalities are theoretically available for customized procedural rules but only if they become widely adopted--and a collective action problem stands in the way of widespread adoption.[159] On the other hand, the network and learning benefits of a default rule can outweigh the inherent benefits of a procedural rule that a party might tailor to fit its own circumstances.[160]

As a result, network and learning externalities suggest that procedural customization will likely only occur in a limited set of circumstances when the stakes are sufficiently high or the degree of customization is modest.

---

[158] Michael Klausner, Corporations, Corporate Law, and Networks of Contracts, 81 Va. L. Rev. 757, 776 (1995).

[159] Robert Scott cite.

[160] *See, e.g.*, Michael Klausner*, Corporations, Corporate Law, and Networks of Contracts,* 81 VA. L. REV. 757, 826-29 (1995)

### *3. Negative Signaling*

In some circumstances, proposing an opt out might send an undesirable signal to a contracting partner.[161] This is particularly true in situations where repeat interaction are likely or necessary and thus where relational norms may become as important or more important than legal norms in enforcing the arrangement.[162] In the context of procedural contracting, this signaling constraint will often not be strong, as the parties are likely not to be in a long-term relationship any longer.

That said, a variation of the constraint can apply and limit the scope of likely procedural innovation. Defaults serve a coordinating function, providing focal points that align the parties' expectations.[163] Parties to any contract negotiation have mixed motives. Parties to procedural contracts should be particularly wary of one another's motives. The parties seek to coordinate certain aspects of their potential future dispute but they do so with obvious individual interests that often conflict. Although parties can and will find ways of coordinating so long as there is

---

[161] *See* Lisa Bernstein*, Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISC. L.J. 59, 71-72 (1993); *see also, e.g.,* Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615, 626-27 (1990) (arguing that some defaults are stickier than others because proposing an opt out would reveal particularly sensitive information that might allow the contracting partner to expropriate a greater share of the contractual surplus).

[162] Lisa Bernstein*, Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISC. L.J. 59, 70 (1993; *see also, e.g.,* Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements,* 103 COLUM. L. REV. 1641, 1646 (2003) ("[W]here parties contemplate repeated interactions, neither party will breach an agreement if the expected gains from breaching are less than the expected returns from future transactions that breach would sacrifice."); Avner Greif, *Informal Contract Enforcement: Lessons from Medieval Trade*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 287, 287-95 (Peter Newman ed., 1998) (describing how cultural and social standing impact self-enforcement).

[163] Robert E. Scott, Rethinking the Default Rule Paradigm, 6 Va. J. 87, 92 (2002).

surplus to share, as Thomas Schelling noted, the problem is that the parties have to agree on one out of a number of potentially viable solutions, which can raise transactions costs.[164] The State, by creating a default rule, can focus parties on a subset of potential solutions and thus economize on costly negotiations.[165]

That said, particularly in the context of procedural contracting, the defaults may have a super-focusing effect. As noted, under the best of circumstances, parties have good reason to be wary of one another's intentions with respect to procedural customizations. A party who proposes customizations that diverge widely from the default may inadvertently signal to her partner that she is covertly trying to sneak in some substantive advantage through the procedural backdoor. In contrast, a party who proposes customizations that center closely around the default may be more likely to find a receptive trading partner.

## CONCLUSION

I have argued that parties can enjoy significant benefits if procedure is seen as a set of defaults rather than immutable or mandatory rules. Allowing parties to unbundle off-the-rack procedures in public courts gives them flexibility to trade off accuracy and efficiency to meet

---

[164] THOMAS SCHELLING, THE STRATEGY OF CONFLICT 54-55 (1963).

[165] Robert E. Scott, Rethinking the Default Rule Paradigm, 6 Va. J. 87, 92 (2002).

their *ex ante* preferences. But private procedural ordering implicates a number of serious normative concerns. While those concerns cannot be lightly dismissed, I have argued that the limited number of parties who are most likely to be able to contract for procedure will likely only seek to alter default procedural rules in a narrow set of circumstances and the degree of alteration that they seek will be in the direction of simple and easy to apply rules. While this sort of fine-tuning of procedure is unlikely to warrant strong normative concerns, it can provide parties with large efficiency gains. Accordingly, by viewing contract procedure through the eyes of the transacting parties, we can reduce or eliminate the most egregious normative concerns that the practice raises.