I. Introduction

The procedures used to adjudicate civil lawsuits in federal court have many different sources. Some procedures are constitutionally mandated. The Due Process Clause of the United States Constitution, for example, imposes minimum notice and hearing requirements, and the Seventh Amendment guarantees a jury trial in many cases. Other procedures are prescribed by statute. The Private Securities Litigation Reform Act, for example, creates strict pleading requirements for securities fraud suits and penalizes frivolous filings. Most procedures are based on the Federal Rules of Civil Procedure (FRCP), the work of a committee-based rulemaking process authorized by statute. In addition, each federal district has the power to make local rules for cases litigated in its own district courts, and district judges have broad discretion to create procedures tailored to a specific case through pretrial management and trial supervision. And federal judges also have some power to make procedural rules through the common law process.
This Article focuses on yet another source of procedural: party choice. One aspect of party-made procedure is fundamental to litigation. In the American adversary system, litigants enjoy broad freedom to make their own litigation choices. They do so within the constraints and guidelines of general procedural rules and case-specific judicial-management decisions, but these constraints leave wide latitude for parties to make procedural moves strategically.  

*1331 This point is obvious perhaps, but it is also important. The fact that parties exercise substantial control over how their lawsuits are adjudicated raises the question of whether they should be able to control procedure in other ways as well. There are three additional possibilities: First, parties might commit in advance to the same actions they could choose strategically during litigation. This is possible to some extent today, and subpart II(B) describes typical instances where it occurs, such as when parties select the forum, contractually waive jury trial, or limit discovery in advance. In effect, the parties create a simple rule for the later suit that requires the action the parties have agreed to take. 

Second, parties can make procedure by precommitting to general procedural rules for their lawsuit. They do this now when they choose rules to govern an arbitration proceeding, and there is no conceptual problem with extending the same privilege to adjudication. If this were done, existing procedural rules would serve as defaults and apply only when the parties failed to choose something different. In fact, the current system permits some party rulemaking along these lines. As subpart II(B) explains, parties can contract in advance for a shorter statute of limitations and for exceptions to the American rule on attorneys’ fees. However, this type of party rulemaking appears to be extremely limited. This prompts the question of how much more freedom parties should have. Should they be able to contract for a different pleading standard or summary judgment test, or even a particular jury composition or method of judicial decision?  

The third way parties might make procedure is to choose rules not just in advance of a suit, but also at the time of implementation. This third option is more difficult to envision because it is quite foreign to litigation as we know it. But it is conceptually feasible. Suppose a plaintiff, at the time she files her complaint, could choose among different combinations of pleading standards, discovery limits, and summary judgment procedures.  

*1332 If she chose a strict pleading standard, for example, she would be allowed to opt for broad discovery, and any summary judgment motions would be postponed until later in the suit. If she chose a liberal pleading standard, on the other hand, discovery would be limited and summary judgment available at an earlier stage. The idea would be to allow the plaintiff to make her own trade-off between case-screening methods and information-access opportunities. Notice that, unlike the second possibility, there is no precommitment in these scenarios. The choice results from noncooperative strategic interaction during litigation.

In previous writing, I have discussed the relative merits of three different methods of procedural rulemaking: the committee-based rulemaking process currently in place, legislative rulemaking, and common law. This Article examines a fourth possibility: procedural rulemaking by parties. It focuses on the first two modes of party rulemaking described above: committing in advance to a specific action, and committing in advance to a general rule different from the official rule that would otherwise apply. The third mode, choosing general rules noncooperatively at the time of implementation, is too complicated to explore here and deserves separate treatment. The proper scope of party rulemaking is an important topic today. Ever since the Supreme Court opened the door to liberal enforcement of forum-selection clauses in The Bremen v. Zapata Off-Shore Co. and extended its holding to consumer contracts in Carnival Cruise Lines, Inc. v. Shute, the question of party freedom to contract for procedure has received a great deal of scholarly attention. In recent years, the stakes have risen. Companies now include arbitration clauses in consumer and employment contracts to avoid undesirable procedures in court. For example, in AT&T Mobility LLC
v. Concepcion, the United States Supreme Court last term reversed a Ninth Circuit decision that refused to enforce a class-action-waiver clause as part of a consumer arbitration agreement. The arbitration and class-action-waiver clauses were included in a service contract between a cell phone company and its subscribers, and the company used the provisions to avoid consumer class actions in arbitration. This is not an example of party rulemaking within adjudication; the company altered applicable procedures by switching to arbitration. But it does raise the question of how far parties should be allowed to shape their own procedures. Indeed, this question applies equally to arbitration and adjudication. For example, had the Supreme Court in Concepcion affirmed the Ninth Circuit's holding, firms might well have shunned consumer arbitration altogether and switched back to adjudication. In that case, they would almost certainly have tried to use contractual waivers to avoid class actions in court, so the courts would have had to deal with the enforceability of these waivers in the adjudication setting. Thus, the general question is whether there should be limits on the power of parties to contractually modify procedural rules and whether those limits should differ between adjudication and arbitration.

The debate over party rulemaking is sharply divided. Some scholars favor broad freedom to customize procedure both before and after a dispute arises. Others urge much stricter limits. Both sides agree that relative bargaining power and externalities are important factors, but they disagree about how the costs and benefits should be weighed. Proponents of a broad scope for party rulemaking argue that the efficiency and autonomy benefits outweigh the costs. Those who advocate strict limits place greater weight on the potential unfairness to weaker parties and focus more strongly on risks to adjudicative legitimacy and on other institutional costs.

The problem with these arguments is that they are insufficiently theorized. Both sides assume that all the benefits and costs can be catalogued, roughly measured, and weighed properly. But this assumption is flawed. Benefits and costs are extremely difficult to evaluate in the intensely strategic environment of litigation. For example, it might seem that contractual limits on discovery will reduce the social costs of litigation, but in fact, they might increase costs if the lower discovery burden reduces the gains from settlement and makes trial more attractive.

There is an even more serious problem. I argue in Part III below that the most salient objection to party rulemaking has to do with its potential impact on adjudicative legitimacy; yet commentators tend to treat the legitimacy objection superficially, as a concern about public perceptions or adverse reputational effects for the judiciary. As Part IV explains, legitimacy is about much more than public perception. If giving parties the power to design court procedure threatens the normative legitimacy of adjudication, it must be because party rulemaking offends some feature of adjudication that is essential to its legitimacy. It follows then that one must be prepared to explain which features are essential, and this requires a deep theoretical inquiry into the nature of adjudication. Critics of party rulemaking do not even attempt that task.

In fact, there are widely accepted features of the current system of civil litigation that are difficult to square with an aversion to broad party choice. For one thing, parties can design their own procedure through the simple expedient of agreeing to arbitration. This at least raises the question of why they should not be allowed to do the same thing in adjudication. Moreover, parties have considerable freedom to choose which substantive law to apply to their dispute. Why then should they not have broad control over procedure? The prevalence of settlement also presents serious problems for critics of party rulemaking. Settlement allows parties to alter the default system of procedure radically by replacing adversarial adjudication with a process of negotiation or mediation. Most people believe that settlements achieve good results under a wide range of conditions and without undermining the legitimacy or integrity of adjudication. How can these beliefs be squared with an aversion to agreements that shape procedure in other ways?
Still, there is something to the concerns of the party rulemaking critics. Imagine that two parties enter into a contract for a pleading standard stricter than plausibility as well as a stricter version of Rule 11 sanctions. Imagine that they also agree to bar joinder, class actions, and pleading amendments, and adopt a very narrow summary judgment rule, all in order to cut costs and expedite the pretrial stage. Suppose too that their contract limits discovery, provides for only truncated evidentiary presentations, and bars appeals, all in order to achieve a final result more quickly and efficiently in the event settlement fails. And suppose that it bars motions for judgment as a matter of law (directed verdict or JNOV) and provides that the case should be decided by the judge with the assistance of a panel of experts in the field--like the merchant juries that Karl Llewellyn endorsed for commercial cases--with an instruction that the judge and the experts apply only certain specified legal rules or simply follow their own sense of fairness and practicality.

My guess is that many, maybe all, proponents of broad party rulemaking would find this degree of procedural manipulation disturbing for adjudication, even though something like it can occur in arbitration. Moreover, they would still find it disturbing even if there were no apparent reason to think that the modifications would increase the public costs of litigation or negatively affect other litigants. It is hard to dispel the nagging sense that something is wrong, that parties should not be allowed to change adjudication to this extent. The question is why.

This Article sets out to answer that question. Part II frames the problem more precisely. It describes in broader context and defines with greater care the distinct ways in which parties can choose procedure. With this background in place, Part III critically examines the conventional arguments for and against party rulemaking. It evaluates those arguments from utilitarian and rights-based perspectives, finds them unconvincing except in certain special cases, and identifies three limited scenarios where concerns about the costs of party rulemaking justify judicial restraint in enforcing agreements. Part III concludes that if party rulemaking is to be limited or barred in a wider range of cases, it must be because giving parties control over procedures risks jeopardizing the normative legitimacy of adjudication.

Part IV then attempts to flesh out a coherent and convincing version of the legitimacy critique. First, it identifies core elements of adjudication that are critical to its institutional legitimacy. Those elements have to do with adjudication's commitment to a distinctive method of reasoning. Part IV then argues that the most troubling examples of party rulemaking are those that tinker with procedures that frame, guide, or incentivize this reasoning process. This analysis identifies some party-made rules as problematic on legitimacy grounds--namely, those that seriously interfere with the adjudicative reasoning process--but it also leaves considerable room for party rulemaking. Part IV closes by examining reasons why parties should not be allowed to alter procedures that are central to the reasoning process even when those parties are willing to assume the risks. Part V concludes.

II. Framing the Problem

The following discussion frames the problem of party rulemaking by placing it in a broader setting and summarizing the current law.

A. The Problem Clarified and in Context

To see how party choice relates to other methods of making procedure, it is helpful to organize the various sources of procedural law in the form of a nested hierarchy starting with the Constitution at the top. Each level of the hierarchy must be consistent with all the levels higher up. For example, federal procedural statutes lie just below the Constitution and must conform to constitutional requirements. The Federal Rules of Civil Procedure are at the next level; they are supposed to conform to the Constitution and federal statutes. One step further down lie the local district rules, which are supposed to be
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consistent with the Federal Rules, federal statutes, and the Constitution. Common law procedure lies below that, followed by a trial judge's discretionary case-management orders.

Ordinarily we think of party choice as lying at the very bottom of this hierarchy. Parties fashion procedure only to the extent that the rules and norms higher up allow it. This view is correct for party choice of actions before or during litigation, but it is not correct for party choice of general procedural rules. Empowering rule choice inverts the usual order, for it allows parties to alter rules higher up in the hierarchy. This is one of the reasons that party choice of general rules seems problematic.

The previous point assumes that the distinction between a general rule and an action is intuitively obvious. The distinction is clear enough in the ordinary case when parties are already engaged in strategic litigation. The general procedural rules define the set of permissible actions, and lawyers for the parties choose actions from the permissible set. The lawyers make their choices strategically, by which I mean that each chooses her action anticipating and responding to the choices that others make (or will make), all the while aware that others will anticipate and respond to what she does. Thus, assuming rationality, each lawyer's choice is constrained to some extent by what she believes other lawyers will do.

The distinction between rules and actions also applies when parties make choices in advance of the time when the rule would be implemented or the action taken. These choices require cooperation and are usually implemented through some kind of agreement. While the usual case involves an agreement entered into prior to a dispute, there is nothing stopping parties from agreeing after a dispute arises or while a lawsuit is ongoing. As we shall see in subpart II(B) below, most of the cases involve contracts in which the parties commit to particular actions that the general procedural rules would permit them to take during litigation. For example, parties can waive jury trial in the course of litigation, and they can also agree to waive jury trial by contract in advance. Similarly, they can stipulate to limits on discovery during litigation, and they can also agree to discovery limits in advance. In a sense, this type of agreement fashions a rule for the future suit, but the rule is a very simple one, merely a directive requiring implementation of the specific action. Most importantly for our purposes, the simple rule does not alter the general rules that would otherwise apply; instead, it just moves to an earlier point in time a choice that the general rules allow parties to make later on.

*1339 Parties can choose not only actions but also general rules. One way they do so today is by choosing the forum. If a suit can be filed in Court A or Court B, and A would apply different procedural rules than B, the plaintiff can choose the rules applicable to the case by choosing the appropriate court. This can happen in federal courts when local rules or interpretations of the Federal Rules of Civil Procedure vary across different districts, but it is much more likely to happen in state courts. Similarly, if the plaintiff files in state court and the case can be removed to federal court--and the rules differ between state and federal court--the defendant can choose the rules by removing the case. Choice of rules through choice of forum can be accomplished not only through unilateral strategic choice, as in these examples, but also through mutual agreement on choice of forum in advance of suit. Like choice of action in the previous paragraph, however, choosing rules by choosing a forum does not place party choice in conflict with what the chosen court would otherwise have applied. It merely selects among different sets of official rules.

Choice of rules need not be so limited. In theory at least, parties might agree on their own procedural rules rather than select among different official rule systems. The rules they choose could be different than--indeed, inconsistent with--the official rules that would otherwise apply. This is the type of party rulemaking that I focus on in this Article. As we shall see in subpart II(B) below, there is relatively little support for this form of rulemaking in the current case law. Moreover, it raises serious concerns, especially when the chosen rule differs markedly from the default rule that would otherwise apply.
We can organize the different types of party-made procedure into a two-by-two matrix with the method of choice on one axis and the object of choice on the other:

<table>
<thead>
<tr>
<th>No Agreement</th>
<th>Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Choice of Actions</td>
<td>Type I</td>
</tr>
<tr>
<td>Choice of Rules</td>
<td>Type IV</td>
</tr>
</tbody>
</table>

Type I is the usual sort of party-made procedure associated with ordinary strategic interaction in the course of litigation. As mentioned above, Type IV procedure is rather foreign to our current litigation system and *1340 difficult to envision—aside from the simple case of a party choosing procedural rules by selecting the forum. This leaves Type II and Type III. Both are methods of making rules. Type II is the most common form of party rulemaking. Parties commit in advance to a specific action that one or both of them could have taken during litigation. Type III involves contractual choice of general rules rather than choice of specific actions. It includes agreements that choose general rules different from the official rules that would otherwise apply. While we will consider Type II rulemaking, our principal interest is in Type III, especially Type III rulemaking that alters otherwise applicable rules.

Before proceeding, a word of caution is in order. The difference between Type II and Type III rulemaking is not perfectly sharp. The distinction is analytically useful; it helps to highlight the difference in normative stakes. But as the following subpart illustrates, some examples of party rulemaking are not easy to classify in one category or the other.

So far we have been assuming a bilateral agreement between two parties. However, the trial judge can be involved in the agreement as well. Trial judges have broad case-management powers and often “negotiate” with the parties to establish discovery limits, trial deadlines, and the like. While the arrangement is not exactly contractual—the judge has the final word and in theory, at least, can impose procedures unilaterally—the result can resemble a three-party contract when the judge has something to lose by thwarting the parties’ preferences (such as overseeing a more protracted litigation). Moreover, even when parties agree in advance, the trial judge often has power to check the agreement ex post. This can set up a bargaining game at the time of implementation, and the possibility of later renegotiation with the judge is likely to affect the parties’ contracting incentives ex ante.

One final point warrants clarification. Type II and Type III rulemaking can take place at any time before an action or rule is implemented. This includes during the course of litigation as well as before a lawsuit arises. Some commentators assume that cooperation is nearly impossible during litigation, but they tend to exaggerate the difference between ex ante and ex post. To be sure, agreement can be more difficult to reach after a dispute materializes. In the ex ante world, both parties are uncertain about the kind of suit they will face and what position (plaintiff or defendant) they will occupy. As a result, they take expectations over all future states of the world, and if the benefits and burdens cancel out in expectation, the parties have *1341 incentives to make a procedural choice that reduces joint litigation costs. For example, two contracting parties might agree on limited discovery if they both believe that they are just as likely to be a defendant who is benefitted by limited discovery as they are to be a plaintiff who is burdened by it. After a dispute materializes, however, the defendant knows he will benefit from limited discovery and the plaintiff knows she will be burdened. So it is more difficult to find a bargaining range.

However, the informational differences between ex ante and ex post are not as stark as some commentators assume. The ex ante world is not a Rawlsian veil of ignorance, and the ex post world is not a state of complete information. Parties in the ex ante position are often able to predict salient characteristics of future litigation. Consider a contract between a seller and consumer
for the sale of goods. The seller knows with reasonable confidence that he is likely to be the defendant and the consumer is likely to be the plaintiff in any future litigation over the quality of the goods. The same is true for contracts between firms. For example, contracts between building owners and building contractors frequently give rise to lawsuits in which the owner sues the contractor for building defects or the contractor sues the owner for nonpayment.

Moreover, uncertainty exists in the ex post world as well as the ex ante. For example, parties early in a lawsuit are likely to be uncertain about the fruits of discovery or the prospect of success on a later summary judgment motion. They must make litigation decisions by taking expectations over all the future possibilities, and these expectations permit some canceling of benefits and burdens. Given uncertainty about summary judgment, for example, parties might be able to agree to a modified summary judgment rule or even no summary judgment at all. Doing so could make both parties better off in expectation by reducing litigation costs and securing a speedier trial.44

It is true that there is more room for making side payments ex ante.45 But side payments are also possible during litigation. For example, one party might agree to pay the other a portion of the additional costs incurred by a new procedure or agree to adjust the settlement or trial outcome. Also, *1342 parties could trade benefits under one rule or action for burdens under another. A plaintiff and defendant, for instance, might trade a broader discovery scope for a staged discovery process and an early summary judgment evaluation of the case. The plaintiff would benefit from the broader scope, and the defendant would benefit from an earlier summary judgment check of the merits.

To sum up, the parties might make procedural rules for their own cases through agreement by committing to a specific action (Type II) or a general rule (Type III) in advance of when the action or rule must be implemented. But the judge can force renegotiation of the agreement when she has the power to review it ex post. Committing to an action in advance can make both parties better off in expectation, but it also can raise concerns about the bargaining conditions that give rise to the agreement. Committing to a general rule raises additional and possibly more serious concerns when the chosen rule deviates sharply from the background rules in place.

B. Current Law on Party Rulemaking

Parties have some latitude to choose procedural rules under current law. Most of the cases that I reviewed involve Type II rulemaking, with parties committing to a procedural action in advance as part of a commercial or consumer contract. There are not many examples of Type III. The most common example involves parties choosing a rule system by choosing a forum with the desired rules, and the following discussion examines contractual forum choice. But there are very few examples of parties designing their own rules at odds with the official rules that would otherwise apply.

As we shall see, the cases usually involve parties reaching agreement before a dispute arises. I found very few examples of agreements entered into after filing, other than the usual stipulations for additional time and the like. One possible reason is that procedural options after filing are treated as bargaining chips in settlement negotiation, so any agreement takes the form of a settlement ending the suit.

The following discussion briefly reviews examples of party rulemaking in the context of forum choice, pretrial procedure, trial procedure, remedies, and appeals.46 While the main focus of this Article is on federal civil *1343 procedure, its analysis applies more generally, and the following discussion reviews both federal and state examples.

1. Forum Choice.--Courts routinely enforce agreements that select a forum. One example is a contract to arbitrate, which removes a dispute entirely from adjudication.47 Another example, more centrally relevant to the concerns of this Article, is
a forum-selection clause that chooses a particular court. There are two types of forum-selection clauses. A “consent-to-jurisdiction clause” is strictly permissive; it commits the parties to submit to a particular court's jurisdiction and venue if the suit is filed there, but it does not exclude other possible locations. A mandatory clause--also called a “prorogation clause”-- commits the parties to a single forum exclusively. Judges routinely enforce both types of agreements provided they are reasonable.

A permissive consent-to-jurisdiction clause is an example of Type II rulemaking. The parties in effect commit to a forum choice that they could have chosen noncooperatively at the time of suit. Noncooperative choice would have been possible if the defendant had consented to personal jurisdiction and venue or waived any objections. Thus, a consent-to-jurisdiction clause merely moves a future defendant's forum-specific consent or waiver to an earlier point in time. This does not necessarily mean enforcement of the clause is unproblematic, but it does mean that any problems must flow from the specific facts of the case, such as the time shift or the contracting circumstances.

At first glance, the mandatory prorogation clause might seem more like Type III rulemaking than Type II. It locks both sides into a single forum, a result that could not be achieved without agreement. Suppose A and B agree to a clause that identifies the Southern District of New York as the exclusive forum for future federal litigation. If A files in the District of Massachusetts, B can move to dismiss the suit, relying on the forum-selection clause. In the absence of such a clause, B would have to bring a motion to transfer under § 1404(a), and the judge would apply a balancing test that gives great weight to the plaintiff's forum choice. Thus, B can effectively lock A into the Southern District of New York with a mandatory forum-selection clause, but it cannot achieve the same result noncooperatively by using § 1404(a).

However, this distinction does not make mandatory clauses a form of Type III rulemaking. A mandatory clause, like a permissive one, is simply a reflection of party choices at an earlier stage. Parties can settle on a forum if the plaintiff files there and the defendant consents to the forum or waives objections. A mandatory clause merely makes that consent bilateral and moves it up in time to a point before the lawsuit materializes. Moreover, a mandatory clause does not create a general rule that then guides or constrains strategic choice at the time of litigation; instead, it names a specific forum. Therefore, even a mandatory clause is better seen as an example of Type II rulemaking than of Type III.

2. Pretrial.--There are numerous pretrial matters that might be the subject of agreement. In theory, parties could agree to a different pleading standard, different timing and other conditions for raising defenses, limitations on joinder of additional parties, limitations on discovery, different summary judgment standards, shortened time for the pretrial stage, and so on. It turns out, however, that the cases cover a much more limited range. The following discussion examines the only two pretrial matters that receive substantial attention in the case law and scholarly commentary: agreements concerning discovery and agreements modifying the applicable statute of limitations.

a. Discovery.--Rule 29 of the Federal Rules of Civil Procedure gives parties wide latitude, with court oversight, to stipulate to discovery procedures different from those provided in the Federal Rules. Moreover, other features of the Federal Rules give parties additional freedom to shape discovery. However, there are very few examples in the case law of parties entering into formal agreements committing to discovery limits or modified discovery procedures. This is not surprising for the post-filing stage. The Federal Rules of Civil Procedure establish a formal process for planning discovery. Rule 26 requires the parties to meet and confer over a discovery plan shortly after a lawsuit is filed and to submit a report to the court summarizing their efforts. The trial judge then holds a scheduling conference, consults with the parties' attorneys, and
enters an order outlining a plan for discovery. It would not be surprising if parties relied on this process rather than formal discovery agreements, especially as the judge would likely review the terms of their agreement in any event.

It is a bit more puzzling that there is only meager evidence in the case law of discovery agreements before litigation. The conventional wisdom repeated in treatises and commentaries is that parties have broad power to contract for discovery limits ex ante, but these claims rely on flimsy case law support. Most of the secondary sources rely on a single case, Elliott-McGowan Productions v. Republic Productions, Inc., in which the district judge enforced a pre-suit agreement placing limits on who could inspect documents and when notice of inspection had to be given. Perhaps the availability of arbitration explains the paucity of cases involving ex ante agreements: contracting parties might just switch to arbitration when they are concerned about excessive or abusive discovery in court.

Among the few examples of discovery agreements, some are instances of Type II rulemaking while others are more properly treated as Type III. For example, an agreement not to take any depositions or to use a particular method to review documents in response to a document request is an example of Type II rulemaking. In these cases, the parties are merely committing to choices they could make noncooperatively at the point of implementation: each party can choose not to take any depositions and one party can use a special document-review method, assuming no objection from the other side. An agreement to set a limit on depositions that leaves room for choice seems more like Type III rulemaking since it alters the limits already set by the Federal Rules. But this is not a particularly dramatic example since Rule 29 already allows parties to modify discovery rules by stipulation. In fact, in view of Rule 29, discovery agreements are probably more akin to Type II rulemaking than Type III: parties achieve by agreement before filing what the existing rules give them freedom to accomplish after filing.

b. Statute of Limitations.--The law is relatively clear about contractual modification of statutes of limitations. Parties are free to shorten an applicable statute by agreement as long as the shorter period is reasonable. However, parties have much less freedom to lengthen a statute of limitations or waive the defense in advance of suit. The reason courts give for the difference has to do with the legislative policy of avoiding stale claims: lengthening a statute of limitations increases the risk of stale claims, while shortening it does not.

An agreement to lengthen a statute of limitations is a form of Type II rulemaking. The statute of limitations is a waivable defense, so the same result could be achieved noncooperatively by waiver after the plaintiff files. Thus, an agreement to lengthen the statute of limitations is functionally equivalent to an agreement to waive it conditioned on suit being filed before the later date.

It is more difficult to classify an agreement to shorten a statute of limitations. If it is treated simply as a promise to file suit at an earlier time, it is a form of Type II rulemaking. Filing earlier is, of course, something the plaintiff can do noncooperatively. However, this interpretation misses the fact that the parties have not merely arranged for a filing date; rather, they have agreed to alter a general rule constraining their future strategic choices, and they have done so in a way that is not possible to achieve through provisions like waiver that are built into the rule itself. The plaintiff is still free to choose when to sue, but she is constrained to a shorter period of time. This interpretation of the agreement makes it a form of Type III rulemaking.

3. Trial.--The clearest example of party rulemaking aimed at the trial stage is the contractual waiver of jury trial. According to the prevailing view, prelitigation agreements to waive jury trial are enforceable as long as they are made in a knowing, voluntary, and intelligent manner. This is a straightforward example of Type II rulemaking. Parties to a suit can
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choose a bench trial noncooperatively if both waive their rights independently. Thus, contractual waiver simply moves the choice to a point earlier in time.

There is some authority for the proposition that pretrial agreements to waive evidence objections are enforceable. Many of the cases, however, deal with stipulations during the course of litigation rather than contractual commitments entered into before litigation begins or a claim arises. Moreover, these cases tend to involve stipulations to the admissibility of case-specific evidence or stipulations to waive evidence-specific objections that could be waived at trial, rather than agreements to alter the general evidence rules themselves. In other words, the cases recognizing party control over admissibility of evidence tend to focus on Type II rulemaking. They enforce agreements that commit parties to actions they could have taken noncooperatively at trial.

*1350 Finally, it is worth mentioning that parties sometimes contract in advance to reassign the burden of proof. One might view this as contracting for a substantive rule, but burdens also have a strong procedural dimension. Insofar as burden modification counts as altering procedure, it is probably best understood as Type III rulemaking since it is not clear how the parties could effect the same result noncooperatively at trial.

4. Remedies.--Parties can control a number of substantive aspects of remedies. For example, parties can contract for liquidated damages within limits, and they have broad, though not unlimited, power to choose the substantive law applicable at the remedy as well as the liability stage. Moreover, parties are free to enter into high-low agreements, which impose a floor and a ceiling on the amount of any damages recovery. And they sometimes agree ex ante to forego damages altogether, thereby limiting themselves to injunctive and declaratory relief.

On the more procedural (though still rather substantive) side, parties sometimes commit in advance to the entry of a preliminary injunction or provide contractually for fee shifting. The former best fits under Type II rulemaking because the defendant could do the same noncooperatively during litigation, and the latter fits within Type III since it alters the generally applicable fee rule that applies at trial.

*1351 5. Appeals.--In theory, parties might have an interest in contracting about various aspects of appeal, including timing, scope of review, and so on. The case law, however, is quite thin. Courts enforce agreements to forego appeal as part of a settlement. And some commentators claim that parties can agree to forego appeal rights in advance.

It is unclear why there are not more cases involving agreements to customize appellate procedure. One reason might have to do with restricted appeal rights in arbitration. Perhaps parties who wish to limit appeal do so by choosing arbitration rather than contracting for limitations in adjudication. In any event, contractual waiver of appeal rights is clearly an example of Type II rulemaking.

6. Summary.--Three general points emerge from this brief overview. First, it is notable how little case law authority there is on the subject of party rulemaking. Parties can benefit from modifying procedural rules in a variety of different ways both before and after a lawsuit is filed. As Part III explains, doing so can reduce litigation costs, signal good faith, and bond a promise. Yet the cases that I found involve only a limited range of party rulemaking. To be sure, reported cases might not accurately reflect what is actually going on. Nevertheless, one would expect to see precedent supporting enforceability if the practice were widespread. For without formal assurance of legal enforcement, parties would have trouble making credible commitments.
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Second, most of the precedents deal with Type II rulemaking. There are very few examples of Type III rulemaking that changes otherwise applicable rules. Altering the general rules of discovery is a possible example of Type III, as are agreements to shorten the statute of limitations, to alter the American rule on attorneys' fees, and possibly to reassign the burden of proof. But this seems to be the extent of it.

Third, a court is not bound to enforce an agreement committing to a procedural choice or creating a procedural rule. The judge can decline enforcement on the usual grounds of validity and enforceability applicable to all contracts. In addition, it appears that judges have some power to refuse enforcement beyond the general rules of contract law. For example, a contractual waiver of jury trial must be made in a knowing, voluntary, and intelligent manner. Still, judges seem quite willing to enforce most agreements as long as they deal with the set of procedures recognized as suitable for ex ante specification.

One possible reason for the scarcity of cases involving party rulemaking might have to do with the availability of arbitration. But this explanation just poses the salient question in sharp relief: If parties can and do cooperatively design their own procedures in arbitration, why should they not have broad power to do so in adjudication as well?

III. The Normative Dimension: Conventional Arguments

The remainder of this Article addresses the normative question of how much power parties should have to make their own procedural rules. This part summarizes and critically reviews the conventional arguments for and against party rulemaking. These arguments are important and helpful, but they are also seriously incomplete because they lack a convincing normative account of adjudicative legitimacy. Part IV attempts to fill that gap. But first we need to see just where and why the existing arguments fall short.

Although the following discussion focuses mainly on policy, there is an important legal question that should be addressed at the outset. Some critics argue that it is inconsistent with the Rules Enabling Act to give private parties the power to alter official rules adopted through the congressionally authorized rulemaking process. Section III(B)(2) below responds to this argument at the policy level by explaining how party rulemaking is consistent with the values and policies served by the rulemaking process. Here, I want to address a different concern. The Rules Enabling Act authorizes “general rules of practice and procedure.” If this phrase is understood as a limitation, then one might argue that the rulemaking committees have no power to authorize party rulemaking because it creates case-specific rather than “general” rules. In other words, by adopting a master rule authorizing party rulemaking, the rulemaking committees would in effect give power to private parties to make rules that the committees could not make themselves.

However, the Rules Enabling Act’s “general rules” requirement, whatever it means, cannot possibly bar case-specific procedure. As we have seen, Rule 29 of the Federal Rules of Civil Procedure already gives parties power to alter the generally applicable discovery rules, and to my knowledge, no one has suggested that this Rule violates the Enabling Act. Moreover, both trial judges and parties have broad power to tailor procedures to the specific circumstances of particular cases under the current Federal Rules, and no one claims that this power is inconsistent with the Enabling Act. To be sure, these are examples of Type II rulemaking, but I can see no principled reason to distinguish between Type II and Type III insofar as application of the “general rules” provision is concerned. Indeed, it seems reasonable to construe the phrase “general rules” to refer to a uniformly applied set of rules, even if some of those rules authorize judges or parties to make more specific rules for individual cases.
Whether federal courts have common law power to authorize party rulemaking inconsistent with the Federal Rules is a more complicated question. The Supreme Court has noted on more than one occasion that the federal courts do not have power to adopt common law procedural rules inconsistent with the Federal Rules. A common law rule favoring enforcement of Type III rulemaking agreements would not itself be inconsistent with the Federal Rules unless the Federal Rules were construed to be mandatory. But a common law rule might be inconsistent if its specific aim were to license private parties to deviate from the Federal Rules.

We need not dwell on these issues any further. The following discussion assumes that if party rulemaking is justified on policy grounds, it can be implemented by Federal Rule, common law, or congressional statute.

A. Considerations Favoring Party Rulemaking

1. The Flawed Argument from Arbitration.--Some courts and commentators defend broad freedom to shape procedure in adjudication by comparing adjudication with arbitration. One version of this argument holds that party-made procedures cannot be unfair or inefficient if they are tolerated in arbitration. Another version holds that there is little point in disallowing party rulemaking if the result will be that parties exit adjudication and create the same procedures in arbitration. And a third version argues that it is a good idea to allow parties to design their own procedures in adjudication as a way to discourage them from escaping adjudication for arbitration.

All of these arguments are extremely weak. The first assumes that arbitration and adjudication are normatively comparable: what is unfair or inefficient for adjudication must also be unfair or inefficient for arbitration. But this is not necessarily correct. Civil adjudication performs different functions than arbitration and draws on different sources for its institutional legitimacy. In Part IV, I argue that the distinctive feature of adjudication is its commitment to a particular form of principled reasoning and that this commitment is essential to its institutional legitimacy. The second and third versions of the argument are also inadequate. The risk that parties will turn to arbitration is not a good enough reason by itself to make adjudication more party friendly. It all depends on the costs and benefits of the change. Indeed, this argument taken to its logical extreme could justify converting adjudication completely into arbitration.

Still, the comparison to arbitration is illuminating. If it makes sense to bar some types of party rulemaking in adjudication even when those types are permissible in arbitration, it must be because adjudication is different in a normatively relevant way. Part IV develops that insight in greater depth.

2. The Benefits of Party Rulemaking.--Proponents of party rulemaking cite a number of benefits, and the following discussion addresses each in turn.

a. Outcome Benefits.--Parties can use ex ante agreements to solve collective-action problems that produce costly and wasteful litigation investment ex post. A good example is discovery. As many commentators have pointed out, parties to a lawsuit face a collective-action problem at the discovery stage. In one version of the problem, it is a classic prisoner's dilemma: each party anticipates that the other will use discovery abusively, so each responds in kind, and the result is an equilibrium in which both sides are worse off than if they had exercised restraint. By agreeing to limit discovery in advance, the parties are able to commit to mutual restraint--that is, provided courts routinely enforce discovery agreements ex post. In a different version, the parties adopt substitute strategies in equilibrium: one side invests much more aggressively than the other. This is less likely to produce wasteful litigation costs, but it is more likely to produce skewed settlements. By contracting for discovery
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limits before a dispute arises, when neither party knows which side of a future lawsuit she will occupy, the *1356 parties can commit to mutual restraint and thus reduce the likelihood of a one-sided result.

Furthermore, party rulemaking can influence the parties' pre-suit behavior in ways that enhance their joint welfare. To illustrate, suppose A enters into a contract with B for the design and construction of a new technological component. The technology is complex, and A and B worry about a significant risk of jury error in the event of a future lawsuit for breach of contract. The parties can reduce this risk substantially by agreeing in advance to waive jury trial and appoint an expert who will assess compliance with the contract specifications in the event of an alleged breach. Doing so increases the value of the contract to A and B, and a more valuable contract can elicit greater investment in the venture, which in turn increases the contract's value even more.

There is a third way that parties can reap benefits by using party rulemaking. Their ex ante procedural choices can signal private information that is difficult to communicate credibly in any other way. For example, suppose that A, a trade secret owner, and B, a licensee, enter into a long-term trade-secret licensing agreement. Suppose that in arrangements of this kind, some trade secret owners bring frivolous suits during the licensing period in order to pressure settlement for better licensing terms. A assures B that it is not that kind of trade secret owner, but B is skeptical. A might agree to a strict pleading rule that makes it more difficult to file a frivolous suit. In equilibrium, B will infer from A's willingness to include such a rule that A is not the type of firm that files frivolous suits. As a result, B should be willing to pay more for the license and perhaps invest more in the arrangement.

Party rulemaking can also generate benefits beyond the parties to the agreement. When party-chosen rules enhance the value of a contract, there are likely to be spillover benefits for others. More directly related to litigation, party rulemaking can reduce the public costs of the court system when it reduces the private costs of litigation insofar as private and public costs are correlated. Public benefits can also be produced in more complicated ways. Suppose A and B agree to a strict pleading rule that screens frivolous suits. If the presence of frivolous suits in litigation makes it more difficult for parties to settle meritorious suits, as is likely, a strict pleading rule in a case between A and B should make it easier for parties to settle and thereby save the public cost of a trial. *1357 However, this rosy picture assumes that we can predict the effects of a party-selected procedural rule. Prediction, it turns out, is very tricky in the complex strategic environment of litigation. A party-made rule that seems to reduce public costs might actually increase those costs. For example, an agreement to limit discovery could increase public costs if the expectation of a less onerous discovery burden and limited access to information reduced the size of the settlement surplus and with it the likelihood of settlement, thereby increasing the risk of trial. Also, by restricting access to information, discovery limits could generate trial or settlement outcomes with a higher-than-optimal error risk, thereby undermining deterrence goals. To be sure, parties will take account of private costs when they negotiate their contract, but there is no reason for them to take account of public costs like these. We shall return to this point later.

b. Autonomy Values.--One might argue in support of party rulemaking that giving freedom of choice enhances party autonomy, which furthers one of the core values of the adversary system. This argument has superficial appeal. Party rulemaking, after all, does give litigants a larger menu of choices. But it turns out to be quite problematic on closer analysis. Party autonomy serves two main functions in litigation. First, it promotes accurate outcomes by harnessing private incentives to develop the facts and the law. As the previous subsection suggests and as is developed in greater detail later, giving the parties a broader range of choices may or may *1358 not enhance outcome quality, depending on party incentives, externalities, and public costs.118
Party autonomy is also thought to serve an intrinsic function. There are two different versions of this claim. One version focuses on the psychological benefits of participation. Those who subscribe to this version point to a body of empirical findings, collectively known as the procedural justice literature, that shows that parties tend to be more satisfied with the justice of the outcome and the fairness of the process when they have had a chance to participate personally, even if they lose in the end. 119 At first glance, this literature might seem to offer support for party rulemaking. Perhaps feelings of just and fair treatment increase with the expanded control opportunities that procedural contracting affords. 120 However, this argument is weak. A party might feel better at the time of contracting, but she is likely to feel frustrated at the time of enforcement whenever her ex ante choice turns out to be adverse to her ex post interests. Indeed, after she knows the facts of her particular case, she might even think that it is unjust to apply the procedure she agreed to ex ante. Furthermore, even if procedural contracting does enhance feelings of just treatment, that fact alone offers no normative reason to support party rulemaking. It must be connected to a normative theory that gives weight to party preferences. 121

The second version of the intrinsic value claim is normative. It focuses on a Kantian principle of respect for persons and holds, roughly speaking, that respect for the autonomy and dignity of individual litigants requires giving each party a right to participate in and exercise some control over proceedings that significantly affect her life. 122 I have referred to this in other writing as a “process-oriented” theory of participation because it focuses on the value of participation to the litigation process apart from any value it might have for outcome quality. 123 Assuming that process-oriented theory is coherent—and it is not at all clear that it is 124—the question is whether the value of process-oriented participation is furthered by party rulemaking. The answer is unclear. Although allowing enforceable rulemaking contracts expands the ex ante choice set, it also restricts participation opportunities and limits party control ex post. A party who would rather employ a different procedure at the time of litigation is unable to do so when she is bound by a pre-suit agreement.

Thus, the critical question for the autonomy argument is which perspective -- ex ante or ex post--is the right one to use to evaluate party autonomy and litigant control. A good argument can be made in favor of crediting control only when it is exercised ex post in the context of a specific lawsuit and not ex ante before any dispute arises. To see this point, consider an analogy to voting. The right to vote has been justified on intrinsic as well as instrumental grounds. 125 Like guaranteeing party control over litigation, assuring the right to vote is said to respect individual autonomy and dignity by giving each person an opportunity to participate in elections that affect her life and on an equal basis with all other citizens. 126 But the autonomy values underlying the right to vote are not advanced by allowing voters to commit before an election to vote in a particular way and then enforcing those commitments on election day when the voters have changed their minds. Voting has value not simply as another way to exercise freedom of choice. It has value primarily as a way for individuals to express their political preferences within the institutional framework of electoral politics, which means at the ballot box.

Similarly, the value of party autonomy in litigation depends on how participation works within the framework of adjudication, and this depends in turn on a theory of adjudicative participation. If participation has intrinsic value as a means of exercising control during litigation, ex ante agreements restricting choices ex post would not necessarily further party autonomy. In any event, it will not do to argue that procedural contracting furthers autonomy in a relevant way just because it expands party choice by adding a contract option.

*1360 B. Considerations Opposing Party Rulemaking
1. The Problem of Consent.--One of the major criticisms of *party rulemaking* has to do with defective consent. According to this argument, consent can never be meaningful when bargaining power is seriously skewed, as it is for consumer, employment, and other similar contracts. Over the past decade, this complaint has focused mainly on contracts of adhesion in the arbitration setting. This is largely because arbitration has been the primary locus of *procedural* contracting. However, the complaints readily carry over to adjudication as well. Therefore, we can learn a great deal about the strengths and limits of the consent argument in general by examining its merits in the arbitration setting.

The major focus of attention these days is consumer arbitration, but arbitration of employment disputes not covered by a collective bargaining agreement has also come into heavy criticism. These two types of *arbitration* share common features that can be problematic. Both involve repeat players--the employer in one case and the seller in the other--who enjoy relative advantages in crafting the arbitration contract and prosecuting an arbitration proceeding. Moreover, the employment agreement, like the consumer contract, can be adhesive in nature, although employment agreements are less likely to be adhesive than consumer contracts. Of course, the fact that an employment contract is adhesive is not necessarily a problem in itself. After all, many features of the employment relationship are imposed on a take-it-or-leave-it basis. In addition, labor-market competition can ameliorate some of the potentially adverse effects of adhesive employment contracts in much the same way as competition can for consumer contracts, as described below. However, competition works only if a sufficiently large number of employees read and understand these agreements and can shop for jobs, both of which are questionable for employees in the lower ranks.

These problematic features are certainly cause for concern. However, an employee can also benefit from arbitration even when she does not expressly bargain for it. For example, sometimes both the employee and the employer desire the confidentiality that arbitration confers, especially when the dispute involves sensitive matters. Also, the employee can benefit from speedier and less costly dispute resolution insofar as arbitration is faster and less expensive than adjudication. Moreover, employment disputes are less likely than consumer disputes to involve the small-claims problem discussed below, so individual arbitration proceedings are more likely to be cost effective. And the data on win rates do not show a strong skewing effect in favor of employers compared to outcomes in adjudication. In any event, it is clear that lack of consent associated with adhesion employment contracts is not itself a reason to deny *party rulemaking* anymore than it is a reason to deny all employment arbitration.

The critics of employment arbitration often cite a different problem, one that has little to do with lack of employee consent. They argue that adjudication in court is superior to arbitration for enforcing the broad public interest in statutory civil rights claims, such as Title VII claims, Age Discrimination in Employment Act claims, and the like. However, this objection is much weaker for *party rulemaking* than for arbitration since *party rulemaking* keeps the dispute in a federal court and assures that it will be public to some extent. Moreover, the judge has the power to deny enforcement to any *procedures* that sharply conflict with a statute's public goals.

Consumer arbitration is more controversial than employment arbitration. This category includes consumer contracts with discount-securities brokers, credit card companies, telecommunications providers, and so on. A recent Supreme Court case, AT&T Mobility LLC v. Concepcion, nicely illustrates the problem. In that case, AT&T Mobility included an arbitration clause combined with a class-action-waiver clause in wireless-service contracts offered to its subscribers. The plaintiffs complained that the agreement deprived consumers of the only viable method of obtaining relief for small claims--
the class action—and that it did so through a contract of adhesion offered on a take-it-or-leave-it basis without any opportunity
for meaningful consent. At the outset, it is important to note the limited scope of this criticism. It does not apply to cases where sophisticated parties bargain for contract terms. There might still be reasons to oppose enforcement in these situations, but those reasons are unlikely to include defective consent.

Moreover, even in the context of adhesion contracts, the policy analysis is more complex and the results more nuanced than many of the most vocal critics assume. There is no question that wealth disparities, informational asymmetries, and bounded-rationality constraints produce some problematic agreements. But these same factors also operate in ordinary litigation to skew settlements and trial judgments. It is true that consumers have legal representation when they file lawsuits but not when they buy products. However, agency problems weaken the attorney-client bond. Indeed, consumer suits and other class actions featuring mostly small claims are notorious for high agency costs. In short, it is a mistake to romanticize civil litigation, just as it is a mistake to romanticize arbitration. If the criticism is about arbitration as it actually exists and arbitration agreements as they actually operate, then the proper comparison is to litigation as it is actually conducted.

Furthermore, the fact that a contract does not involve bargaining is not a reason by itself to condemn it. Standard form contracts are pervasive these days, and mass markets could not function effectively without them. Indeed, enforcing procedural contracts can improve consumer welfare even when those contracts are adhesionary and consent is problematic. The reason is easy to see. Suppose most consumers would prefer to accept limited procedures in a future lawsuit in return for a lower product price. If Firm A tries to force the limited procedures through an adhesion contract without reducing price, competitors have an incentive to offer the same package at the lower price. Moreover, if Firm A includes draconian procedures that consumers would reject if they had a chance, competitors should step in and offer better terms for a somewhat higher price and aggressively publicize Firm A’s exploitative conduct and the comparative benefits of the competitor’s terms. Therefore, to some extent, market forces limit the ability of sellers to foist upon consumers grossly one-sided procedural terms.

In fact, by enforcing procedural contracts ex post, sellers can reliably offer different procedural packages to cater to different consumer tastes. Consumers who value procedure highly will be able to purchase a package with the robust procedures they want at a higher price, and consumers who do not care much about procedure will be able to purchase a suitable package at a lower price. Moreover, if the different packages are advertised aggressively, consumers might receive helpful information about the relative advantages of different procedural opportunities.

Not all consumers need know about or understand the price-procedure package to drive this type of competition, as long as enough do and the seller cannot distinguish one type of consumer from the other. The less knowledgeable consumers can free ride on the more knowledgeable. And if consumers value the procedural component of the package highly enough, sellers will have incentives to advertise its advantages, thereby educating everyone. One commentator has argued that sellers are unlikely to offer better procedural terms where doing so will attract consumers with highly litigious preferences. But this just depends on the price the seller is able to charge. As long as there are enough consumers who want the better terms and sellers can charge a price high enough to cover the additional risk, some seller should be willing to offer the option.

This rosy picture assumes a robustly competitive market with no serious imperfections. Insofar as actual market conditions depart from the ideal, enforcing consumer contracts with limited procedures could be more problematic. But this means only that enforcement should depend on the circumstances; it does not mean that courts should deny enforcement altogether. In fact, it is perfectly rational for a consumer to accept very limited procedural opportunities in return for a lower product
price. This is not to say that consumers are free of bounded-rationality constraints; they surely are not.\textsuperscript{153} My point is only that the presence of limited \textit{procedures} in a consumer contract is not in and of itself a sign that a consumer who accepts the terms must be acting irrationally.

To see the latter point clearly, let us look more closely at consumer \textit{choice}. Two factors enter into a rational consumer's evaluation of \textit{procedural} terms: the probability of a future lawsuit, and the expected recovery should such a lawsuit materialize. As for probability, a consumer might reasonably assume a relatively small likelihood of an unsatisfactory product and resulting litigation. Product safety and health are monitored to some extent by public agencies and private testing organizations (like Consumer Reports), and numerous websites report product evaluations and consumer complaints. Given this intense level of scrutiny, reputable sellers have incentives to market reasonably safe goods and services, and when they do not, consumers are likely to learn about the defects. As for expected recovery, a rational consumer will anticipate receiving very little from a consumer lawsuit unless she suffers serious personal injury from a product defect. Individual losses are too small to justify separate suits, and each consumer's share of a class settlement is minimal. When the probability of a defect and resulting lawsuit is low and any recovery is likely to be small, the expected benefit of more robust \textit{procedural} terms is also small. Indeed, this may be the reason there is not more competition over \textit{procedural} packages: rational consumers simply do not care enough about the \textit{procedures} that govern future lawsuits.

Furthermore, while the evidence is mixed, there are empirical studies that show consumers fare reasonably well in some important types of consumer arbitration.\textsuperscript{154} Reputable organizations like the American Arbitration Association (AAA) have incentives to provide reasonably fair arbitration \textit{procedures} in order to preserve a reputation for evenhandedness.\textsuperscript{155} Moreover, reputable sellers have incentives to make use of fair \textit{procedures} in order to avoid developing a reputation for unfair dealing. Although reputation markets do not always work well, they are more effective today with the Internet as a low-cost medium to spread reputational information.\textsuperscript{156} Moreover, when sellers go too far and impose severely restrictive \textit{procedural} terms, courts can handle the problems on a case-specific basis.\textsuperscript{157}

Finally, the problem with consumer contracts in many cases has less to do with consent or individual unfairness and more to do with the adverse effect of the \textit{procedural} term on deterrence.\textsuperscript{158} AT&T Mobility LLC v. Concepcion is a good example. In that case, wireless-service subscribers alleged that AT&T Mobility offered “free phones” to anyone who agreed to a services contract but then turned around and charged sales tax on the phones.\textsuperscript{159} Each subscriber's loss—the amount of the tax on a cell phone purchase—was too small to justify a separate suit.\textsuperscript{160} Given the small potential losses, it would have been completely rational for even a fully informed consumer to accept the arbitration and class-waiver terms at the time of purchase.\textsuperscript{161}

\*\textsuperscript{1368} Thus, the problem in Concepcion had little to do with lack of consent.\textsuperscript{162} As in most consumer arbitration cases, the problem in Concepcion was that the class waiver eliminated the most effective device for aggregating individual claims and attracting lawyers to serve as private attorneys general to enforce deterrence goals.\textsuperscript{163} In short, the criticism is actually about the external costs of the class action waiver and in particular the adverse impact on private enforcement of consumer protection laws.\textsuperscript{164}

The experience with arbitration shows that one must be careful about using a defective-consent argument against \textit{party rulemaking} in adjudication. The conditions for valid consent should take account of how consent actually operates in ordinary litigation. Moreover, enforcing a \textit{party rulemaking} agreement might be beneficial to a \textit{party} even when that \textit{party}'s consent is problematic ex ante. And an argument ostensibly based on defective consent can really be about adverse substantive effects resulting from limits to private enforcement of public law, or—as in the employment context—about the superiority of adjudication for deciding civil rights and other public law issues. I do not mean to suggest that there are no cases where consent...
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is a problem. But there are not so many that party rulemaking should be banned altogether, even for adhesion contracts.\(^{165}\) Thus, the defective consent argument *\(^{1369}\) at most justifies judicial refusals to enforce agreements in specific situations.

2. The Baseline Argument.--Some commentators argue that as a policy matter, contracting should be allowed only when it is sanctioned in some way by existing procedural rules. There is a strong and a weak version of this argument. The strong version supposes that procedural contracting should be allowed only insofar as it is explicitly authorized by existing rules.\(^{166}\) The weak version expands permissible contracting a bit further to include Type II rulemaking: on this view, parties should be able to contract in advance of litigation to accomplish what the rule system allows them to do during litigation, even when the Federal Rules do not explicitly authorize ex ante contracting.\(^{167}\) In other words, they should be able to use contract to change the timing, but only the timing, of a procedural choice. To illustrate the difference, the strong version of the argument would bar enforcement of a pre-suit jury trial waiver because pre-suit waiver is not explicitly authorized by the Federal Rules of Civil Procedure or statute, whereas the weak version would allow enforcement of the waiver because parties can waive jury trial during the course of litigation.\(^{168}\)

Each version of the argument relies on problematic assumptions about the formal rule system. One assumption is that the existing system reflects an optimal balance of competing social policies and that contractual departures necessarily upset the balance.\(^{169}\) The other assumption is that the process for making procedural rules has important features, such as uniformity and public debate, that are not shared by party rulemaking and that should be part of any method for making procedural rules.\(^{170}\) Both assumptions are flawed.

*\(^{1370}\) As for the first assumption, it is highly implausible that the current system of procedural rules reflects an optimal policy balance. Federal Rules are frequently amended and revised, a fact that is hard to square with optimality. For example, Rule 26--prescribing basic discovery rules--was significantly revised in 1970 and amended again in 1980, 1983, 1993, 2000, and 2006.\(^{171}\) Rule 16, the pretrial conference rule, was revised in 1983 to officially recognize judicial involvement in settlement and again in 1993 to expand judicial settlement powers.\(^{172}\) And Rule 11, the sanctioning rule, was made stricter in 1983 and then relaxed in 1993.\(^{173}\)

In addition, courts have been very active in shaping civil procedure over the past thirty years. For example, the Supreme Court expanded the availability of summary judgment in 1986 by reinterpreting Rule 56 to alter doctrines reasonably well accepted at the time.\(^{174}\) And in two recent decisions, the Supreme Court modified Rule 8(a)(2)’s liberal notice-pleading standard that had been in place for fifty years, ushering in the era of plausibility pleading.\(^{175}\) This dynamic approach to the Federal Rules hardly seems consistent with a firm conviction that the existing rules are optimal.

Moreover, parties are sometimes (perhaps frequently) in a better position than rulemakers to design procedures for their own cases. Rulemakers necessarily aim their general rules at the typical or average case. *\(^{1371}\) Although rational parties also use averages when they contract ex ante, their average is taken over a much smaller domain since it focuses on those cases that might arise between the two of them. For this reason, the rules that parties choose in advance are likely to reflect superior information about their own future disputes.

This does not mean that party-selected rules are necessarily optimal from a social point of view. That depends, among other things, on the external effects of those rules. But it does mean that we should not blithely assume that the current system of procedural rules is superior to those that parties select.
The second assumption focuses on the superiority of the process for making procedural rules rather than on the superiority of the rules themselves. It is certainly possible to authorize party rulemaking through the formal rulemaking process, but this critique runs deeper. If party rulemaking conflicted with important values that should be honored by all rulemaking processes, even private bargaining in a Type III model, there would be reason to be concerned about allowing parties to make their own rules. The problem with this critique, however, lies in its assumption that formal rulemaking embodies values with the requisite force and reach.

The two most promising candidates for such values are uniformity and publicity. Perhaps party rulemaking undermines the uniformity goal of the Federal Rules by creating different rules for different cases and threatens publicity and transparency values by delegating rulemaking to private bargaining. But neither claim survives close scrutiny. The current Federal Rules are uniform only at a very high level of generality. They do not in fact create uniform procedure in particular cases; instead they delegate broad discretion to trial judges to tailor procedures to case-specific circumstances. If the value of uniformity is consistent with judicial tailoring, it is not also consistent with party tailoring.

Moreover, the publicity value does not rule out all party rulemaking. In fact, party choices in the adjudicative setting become public and subject to public criticism when they are implemented. If there are systemic problems, rulemakers can respond by amending the formal rules to regulate those problems. One might worry that the privacy of the bargaining process conceals bargaining defects. But the results of those defects are not concealed; they are visible when a judge applies the parties’ chosen rule to pending litigation.

Thus, one should not reject party rulemaking just because party-selected rules might diverge from the existing system or because the bargaining process lacks features characteristic of formal rulemaking. Whether and when it is a good idea to enforce contracts of this sort, especially those that implement Type III rulemaking, should depend on the costs and benefits.

3. The Costs of Party Rulemaking.--In this section, I discuss the most significant costs identified by critics of party rulemaking and conclude that none present a strong case to disallow it, except in a few specific circumstances.

a. Third-Party Costs.--One risk of allowing party rulemaking is that a party-selected rule might harm third parties not privy to the contract. These harms might include delay costs if party-made rules prolong litigation and increase case congestion, or they might include error costs if those rules affect the ability of third parties to recover on their claims. Although these are legitimate concerns, the problem with evaluating third-party effects lies in measuring the seriousness of the harms. Strategic behavior in ordinary litigation already harms third parties in multiple ways. When the existing parties prolong discovery or file summary judgment motions to delay litigation, for example, their choices are likely to impose delay costs on third parties in other suits. When a plaintiff exercises her right not to include others as co-plaintiffs in her suit, the result can adversely affect those not joined by delaying their suits or creating stare decisis effects. The important question therefore is not whether party-chosen rules might harm third parties but instead whether, and by how much, those rules are likely to exacerbate the harmful effects that already exist.

The answer is unclear. In fact, some forms of party rulemaking might mitigate third-party harms. Parties usually have incentives to choose rules that reduce the duration or cost of their future suits, and in many cases, these rules will also reduce delay costs for other litigants. For example, parties might impose limits on discovery in order to save costs and control abuse. If those limits reduce the time to disposition, they will also marginally reduce the delay costs in other suits. Sometimes party choices might have the opposite effect, such as when limiting discovery unexpectedly reduces settlement incentives and increases the risk of a time-intensive trial. But identifying the problem cases is bound to be very difficult.
To be sure, there are cases where party rulemaking is more certain to adversely affect third parties. To illustrate, suppose A and B agree not to complicate future litigation between them by joining additional parties. Suppose that a suit arises in which the only source of recovery is B's insurance policy, which is limited in amount. Another person, C, has also suffered injuries as a result of B's actions, and the policy proceeds are insufficient to cover all of B's potential liability to A and C. This is a classic limited-fund situation. If the court enforces the pre-suit agreement between A and B and allows A and B to litigate without joining C, then A might exhaust the entire limited fund and leave C out in the cold.

*1374 In this hypothetical, the contract between A and B imposes a negative externality on C. But this problem is hardly unique to procedural contracting. If it is in the interests of A and B to litigate without C, they can do so under the current rules simply by choosing not to join C (as long as these strategies support an equilibrium). In fact, A would have an incentive to pay B a portion of the surplus created by not joining C if that was necessary to induce B's cooperation. The point is that it is unclear whether party rulemaking, especially rulemaking before a dispute arises, adds significantly to the external costs that would otherwise exist.

In addition, under the current mandatory- joinder rule applicable in federal court, the plaintiff has a duty to identify all persons who are required to be joined if feasible to avoid externalities. And the trial judge has power to require joinder of any such person sua sponte, even when the parties prefer to litigate without the person. The same solution to the problem can be used for party rulemaking. Whenever a party-made procedural rule threatens serious harm to identifiable third parties, the judge could require joinder of the third party or refuse to enforce the parties' agreement. Indeed, as we saw in Part II above, judges today have power to review procedural agreements to make sure that they are not seriously unfair. It might be difficult to identify everyone who is seriously affected, but this same problem exists under the current system.

b. Public Litigation Costs.—Another problem with party rulemaking stems from the fact that private litigation incentives are not necessarily socially optimal because private parties do not internalize the public costs of the court system. Thus, the parties might agree to rules that reduce their private costs but increase public costs. The problem with evaluating this argument is the same as the problem with evaluating the argument from third-party effects. It is extremely difficult to identify cases where party rulemaking generates costs substantially in excess of those already created by the current system.

Indeed, parties have such wide latitude to engage in costly strategic behavior currently that it is not evident why adding another strategic option—ex ante contracting—will increase costs. For example, A and B might agree to rules that signal type and deter frivolous filings but cost more to administer. One might expect those rules to increase public litigation costs, but they could reduce public (and private) costs by discouraging frivolous filings or facilitating settlements in meritorious suits. Of course, the opposite effect is possible too. For example, parties might agree in advance to limit discovery in order to save costs and prevent abuse. But lower anticipated discovery costs and limited access to information could end up reducing the likelihood of settlement and increasing the risk of trial, thereby adding public costs. The important general point here is that the complexity of intense strategic interaction makes it difficult in many cases to determine whether party rulemaking will increase or reduce public litigation costs relative to the ordinary litigation baseline.

One might worry about the added administrative costs when judges have to interpret contracts to determine what procedural rules parties have selected. But administrative costs are already high in the current system, and they might actually decline with party rulemaking. District judges now spend considerable time and energy crafting procedures for individual cases, and the Federal Rules of Civil Procedure depend on this case-specific discretion. If party agreements replace open-ended

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Federal **Rules** with clearer alternatives—as one might expect, given **party** incentives to reduce process cost and risk—these administrative costs could be reduced as well.

c. Outcome-Quality Costs.--Many commentators worry about the impact of **party rulemaking** on the quality of outcomes. 198 If **parties** contract for **procedural rules** that increase or skew the risk of error—such as **rules** constraining discovery, restricting witness testimony, or limiting appeals—those **rules** can adversely affect the outcomes in both the **parties'** suit and in future suits that rely on the earlier suit as a baseline for settlement 1376 valuation. 199 For example, one **party** might be more powerful and better informed than the other and thus able to impose a contract with **procedural rules** that skew the error risk in its favor. Or the two **parties** might have equal power and choose **rules** that reduce costs but increase the risk of error. If there are enough such contracts and the chosen **procedures** produce erroneous outcomes, the compensation and deterrence goals of the substantive law might be impaired.

This is a legitimate concern, but one has to be careful about evaluating its significance. The current litigation system also produces bad outcomes. **Parties** do not always get access to critical information through discovery, hire competent experts at trial, and appeal. Given the risks of the current system, it is hard to tell how much of an additional risk **party rulemaking** would add.

Moreover, when **parties** have roughly equal bargaining power, neither can insist on a **rule** that favors one **party** over the other. Therefore, they are likely to choose **rules** that affect the variance of the error-risk distribution symmetrically and avoid skewing it to the disadvantage of one side. A symmetric increase in error risk will not affect expected recovery and thus should leave the incentives of risk-neutral actors relatively undisturbed. This is so because risk-neutral actors average over past cases when they predict the potential liability from engaging in a particular course of action or estimate the value of a future case for purposes of settlement. Averaging cancels errors on the high side of the mean against errors on the low side, leaving the mean undisturbed. 200

The situation is different when one **party** has much more bargaining power than the other. The former can insist on a contract with **procedural rules** that skew the error risk in its favor. For example, a large corporation might use a form contract to foist unfavorable **procedural rules** onto a consumer. If litigation ensues, the unfavorable **rules** might produce an outcome improperly skewed in the corporation's favor. This is a serious concern, but it too should not be exaggerated. As section III(B)(1) explained, the contract might actually make the consumer better off if the corporation passes along some of its savings in the form of a lower price. Moreover, the market can deter some of the more abusive practices through competition and reputation effects.

In addition, it is important to bear in mind that **parties** with more power already enjoy substantial litigating advantages that skew outcomes improperly. To be sure, a weaker **party** is represented by a lawyer during litigation but probably is not when a contract is formed prior to suit. However, one should not exaggerate the benefits of legal representation. In the cases of greatest concern, the weaker **party** is likely to be the plaintiff and represented by a lawyer hired on contingency or by a class action attorney. In either situation, there are serious risks of high attorney-client agency costs, which can undermine the attorney's effectiveness in assuring a good outcome. 201 Finally, as I explain more fully below, the importance one assigns to the risk of skewed outcomes depends on whether one takes a utilitarian or a rights-based approach. 202

Another way that **party rulemaking** can have an adverse impact on future suits is by affecting the quality of legal precedent. 203 Any evaluation of these effects, however, depends on one's theory of adjudication and, in particular, on what constitutes a good decision as well as a good decision-making process. 204 On the one hand, for example, one might view decisions on legal issues as an abstract exercise of reasoning from extant legal materials without regard to case-specific facts. From this perspective, **party-chosen rules** that limit discovery or restrict access to experts should have little impact. Constraints on appellate review
might have an adverse effect over the long run, but the same is true under the current system, given that most cases settle and therefore are not subject to review. On the other hand, one might view judicial decision making as intimately connected in some way to the facts of each particular case. On this view, rules that limit or distort the case-specific information available to the judge could have an adverse effect on the quality of judicial decisions over the long run, although it is unclear how serious it would be. I shall return to this problem in Part IV below.

d. Judicial Legitimacy.--It is quite common for critics of party rulemaking to cite the potential risks to judicial legitimacy. One common example imagines parties agreeing that their future cases should be decided by a judicial flip of a coin. Unfortunately, those making this argument do not carefully define what they mean by legitimacy. They might believe that a process is legitimate if it produces a reasonably good outcome subject to cost and fairness constraints. However, this view of legitimacy imposes no additional constraints beyond those already discussed. In particular, it cannot rule out the use of a coin flip in all cases. If the parties genuinely consent to coin flipping and its attendant risks, and if using a coin flip does not impose serious externalities on third parties (or at least none more serious than already exist under current procedures), then it is difficult to see how someone holding this view of legitimacy could object.

There is, however, a stronger version of the argument from legitimacy. The stronger version supposes that certain procedures are off-limits even when parties consent to use them and no third-party litigants are harmed by them. There are two versions of the stronger legitimacy critique. One version focuses on perceived legitimacy and the other on normative legitimacy. Perceived legitimacy is concerned with whether the public perceives the court system as legitimate; normative legitimacy is concerned with whether a procedure is actually legitimate on normative grounds independent of public perception or belief. The critique regarding perceived legitimacy is the more common of the two among those who discuss party rulemaking. They assume that the public will perceive courts as acting illegitimately and lose faith in adjudication if judges are forced to abide by agreements that require them to take bizarre actions. Sometimes the argument is presented in terms of potential costs to judicial “reputation,” but it amounts to the same thing. Public perception is what matters and party rulemaking can lead to bad perceptions. The argument is weak when framed in this way. The first problem is that perceptions are malleable. Take the example of the coin flip. Much of its force depends on an implicit assumption that deciding cases by flipping a coin would be purely arbitrary, and as a result, the public would perceive coin flipping as offensive to a system of adjudication based on reasoned deliberation. But the assumption is flawed. Coin flipping would not be an arbitrary choice if it were the choice that satisfied the parties’ preferences. This could matter to the public’s reaction. A member of the public might respond differently if she knew that it was the parties who chose the coin flip and understood the reasons why they did. In other words, information about reasons might make the method seem less arbitrary and elicit a more positive response.

Second, public perceptions are circular. People come to believe that a procedure is inappropriate for adjudication because it conflicts with what they believe courts ought to do. Thus, the answer to the normative question of what courts should and should not do affects the answer to the empirical question of how the public will react when courts do something they should not. If judges routinely flipped coins, for example, public opinion might well shift toward accepting coin flipping as a proper decisional method. But the shift in public opinion by itself would not make coin flipping normatively legitimate. In fact, complaints about perceived legitimacy are often disguised complaints about normative legitimacy. The critic starts with an intuitive belief that the particular procedure is normatively illegitimate or unfair, imputes that belief to the public, and then
concludes that the public will perceive the courts as illegitimate if the procedure is implemented. By framing a normative intuition as an empirical claim about public perceptions, the critic never has to confront the theoretical basis for the underlying intuition.

This last point is crucial. The legitimacy that matters is not perceived legitimacy but normative legitimacy. Admittedly, there would be reason to worry if party rulemaking produced weird rules so frequently that the public lost faith in the court system. But this is not a realistic risk. Parties are not likely to choose extremely bizarre rules; there is no reason for them to do so. Moreover, it is simply implausible to think that the public would give up on the courts if judges occasionally decided cases according to unusual procedures, especially if they had good reasons for doing so. 215

The conclusion is clear. If it is normative legitimacy that matters, the critics of party rulemaking must ground their arguments in a theory of adjudicative legitimacy. Part IV takes up that challenge.

C. Balancing the Competing Considerations

Any decision whether to enforce procedural agreements should depend on the balance of benefits and costs. The previous analysis, however, highlights a serious problem with striking this balance. The strategic environment of litigation is far too complex to make confident predictions. An agreement to restrict procedural options might reduce the public costs of the court system, but it also might increase them. An agreement to expand procedural options might increase public costs, but it also might reduce them. *1381 It is possible that private procedural choices might significantly affect outcome quality in a way that harms third parties or creates other negative externalities, but strategic litigation without modified procedures produces similar results, especially in a world of settlement.

The indeterminacy of the cost-benefit balance has important implications for party rulemaking. These implications vary to some extent depending on whether one applies a utilitarian or rights-based analysis. 216 In a utilitarian approach, at least one with a law and economics bent, all the benefits and costs, private and public, are balanced. The goal is to minimize social costs (or maximize social welfare) in the aggregate. 217 Some commentators who follow this approach assume that judges can strike the social cost-benefit balance in individual cases and make sound case-specific decisions about whether to enforce the parties agreement in the face of ex post opposition. 218 However, this proposal is impractical. A judge in an individual case lacks the information and expertise to make highly complex predictions about case-specific benefits and costs.

The analysis proceeds a bit differently under a rights-based approach. The goal in rights-based theory is not to maximize social welfare but rather to furnish each individual what her right guarantees, even when doing so reduces overall welfare. 219 More precisely, a right constrains, checks, or trumps justifications for limiting what the right guarantees when those justifications rely on increasing social welfare in the aggregate. 220

Balancing is still appropriate in a rights-based theory, but social costs and benefits play a much more limited role. 221 How this balance works for *1382 procedural rights is an extremely complex matter and beyond the scope of this Article. 222 One thing is clear, however. Consent does more work in a rights-based theory because valid consent is the ultimate justification for enforcing party-making agreements ex post. By contrast, in a utilitarian theory, the ultimate justification for enforcement remains the social cost-benefit balance, and consent is simply a proxy for potential Pareto improvement. Moreover, insofar as costs and benefits matter to a rights-based theory, private costs and benefits to the right holder should receive much greater weight than public costs and benefits because of the focus on respecting the individual's right. There is an exception, however,
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when party choice seriously risks impairing the procedural rights of third parties. In such a case, the conflicting rights must be accommodated.

Unless consent is problematic, a rights-based approach should raise no obstacle to enforcing an agreement. 223 This does not necessarily mean, however, that all agreements should be enforced. Because procedural rights impose minimum requirements, they have nothing to say one way or the other about party choices that are consistent with the minimum but go further. 224 It follows that the decision whether to implement rules created by party rulemaking depends first on whether consent is valid, then on whether third-party rights are threatened, and finally on whether the social costs and benefits justify enforcing the parties' choice.

With this background in place, it is easy to see that evaluation and prediction are problems in a rights-based theory as well. Public costs and benefits are still relevant to the analysis when the parties agree to rules that extend beyond the rights-based floor, and as we have seen, these factors are very difficult to predict. The same is true for the likely impact on third parties.

Still, there are three relatively clear situations that should trigger concern under both a utilitarian and a rights-based approach. 225 First, when *1383 the parties expressly agree to exclude an identifiable third party with legal rights that might be seriously affected, the judge should refuse to enforce the agreement and join the third party if the judge decides that the mandatory-joinder rule requires it. Second, the judge should refuse enforcement of a sharply one-sided agreement in a market with little competition or under circumstances where it is clear that one party would not have accepted the onerous terms if given a chance to bargain, all on the theory that party consent and private benefits are questionable. Third, the judge should refuse enforcement if she is convinced that the agreed-upon procedures are inadequate for proper consideration of statutory or constitutional civil rights claims, such as in the employment context, or if she is convinced that those procedures seriously interfere with private enforcement of public law, such as when parties agree to exclude class actions in cases that are likely to involve small stakes and a substantive claim that Congress has assigned to private enforcement.

Beyond these three situations, however, it is not clear what to do in light of the problems with prediction and evaluation. One might ban all party rulemaking on the conservative theory that no deviations from the baseline system should be allowed without clear justification. However, this seems excessively restrictive. In fact, it makes sense to give broad scope to party rulemaking as long as defective consent is not a serious impediment. Party welfare is improved (at least ex ante), and the public cost-benefit balance, given its indeterminacy, does not clearly weigh against--and might even weigh in favor of--enforcement.

The case for broad enforcement of party-made rules is particularly strong for Type II rulemaking. 226 The fact that the parties can take the same action during litigation means that their choice is not likely to increase public costs significantly, compared to the default system, and also not likely to impair adjudicative legitimacy. Therefore, as long as consent is not seriously suspect, ex post enforcement of ex ante commitments should enhance welfare and respect rights. The case for enforcement is not as clear for Type III rulemaking. Nevertheless, given that the parties usually have better information about their cases than the court, allowing parties to customize rules could reap substantial benefits. 227

*1384 Moreover, there is an alternative to case-specific evaluation with all its prediction problems. The formal rulemaking process can be used to create general rules regulating party rulemaking. This formal process has advantages over case-specific assessment. 228 Rulemaking committees are able to evaluate effects for general categories of cases; they have access to empirical information not available to judges, and they can take a global perspective necessary to evaluate complicated intrasystem effects. The general rules would have to rely on criteria that judges can assess relatively easily in specific cases, but there is no a priori reason to believe that this cannot be done. Prediction, though easier, will still be difficult, and general rules are under- and over-inclusive. But the same is true for the current Federal Rules of Civil Procedure.
This analysis suggests that the arguments against party rulemaking, even Type III rulemaking, are relatively weak on cost-benefit and rights-based grounds, at least beyond a small set of clearly problematic cases. One might conclude from this that parties should be given wide latitude to design their own procedures and rules. But this conclusion grates against some strong intuitions. The critics have a point when they say that there are procedures, like a coin flip, that seem sharply at odds with what courts are supposed to do even when those procedures serve the parties' private interests, reduce litigation costs, and produce no serious externalities to identifiable third persons. Efforts to capture this intuition in terms of external costs to the court system, whether in the form of harm to reputation or negative public perception, miss the point. The objection is not that there are other costs to include in the cost-benefit balance. The objection is that some party choices should be categorically forbidden because what is chosen is not appropriate for adjudication.

If this is correct, it means that the case against party rulemaking cannot be mainly about cost-benefit balancing or bargaining-power inequities. Instead it must be based on an independent argument from adjudicative legitimacy. The following discussion explores that argument.

IV. The Legitimacy Critique

As we saw in the previous part, any serious legitimacy problem with party rulemaking must be based on normative legitimacy, and normative legitimacy does not depend on public perceptions or judicial reputation. If some exercises of party rulemaking threaten legitimacy, it must be because the particular rules that the parties have chosen alter core elements of adjudication that are essential to its institutional legitimacy. The challenge is to identify these core elements, and to do that, one needs a theory of adjudication. This Article is not the place to elaborate a comprehensive theory—an undertaking that would, of course, be extremely complex. The following discussion focuses on the element of adjudication that I believe is most central to understanding the appropriate limits on party rulemaking: the mode of judicial reasoning. Party rulemaking is most problematic when it generates rules that interfere with this reasoning method.

Some readers might object to the argument developed in this part on the ground that it assumes some natural essence to adjudication. This is incorrect. The argument is not essentialist or conceptualistic. It focuses on institutions as they actually operate in the American legal system. Although complex institutions have multiple functions and those functions overlap to some degree, a major institution like adjudication has a core function (or functions) that distinguishes it from other institutions, such as legislation or arbitration. Moreover, it has certain core features that are critical to its specialized function, and those features ground its normative legitimacy as an institution. One can formulate this same point in terms of integrity rather than legitimacy. Whether formulated in terms of legitimacy or integrity, the question is the same: What features of adjudication define its institutional core?

A. Identifying Adjudication's Core

One approach to teasing out the core elements of adjudication is to compare it with arbitration. Since parties are free to structure their own procedures in arbitration (within very generous limits), it is worth asking why party choice is more troubling in adjudication. One problem with answering this question is that arbitration takes so many different forms today that it is hard to distill a paradigmatic core. For example, there are areas such as sports and labor arbitration in which many arbitrators feel obliged to follow precedent and give reasons for their decisions. There are other types of arbitration, such as international commercial arbitration, in which arbitrators write opinions but do not feel obliged to follow precedent. And there are still others, such as domestic commercial arbitration, in which arbitrators feel obliged neither to write opinions nor to give
reasons unless the parties direct them to do so. Moreover, arbitral procedures in some areas have moved rather close to the litigation model, incorporating such litigation procedures as broad discovery and strict evidence rules. Finally, since arbitral procedure depends on party choice, one can find different procedural packages for different sets of party preferences.

Nevertheless, it is possible to piece together a baseline for arbitration that differs from adjudication. Arbitration, at its core, focuses on resolving the dispute between the particular parties to the arbitration agreement. This is, after all, why parties have such broad freedom to shape the arbitral process as well as the arbitrator's decision-making protocol. They can choose to have their dispute decided under the laws of a preferred legal system, or they can instruct the arbitrator to decide according to customary norms or even the arbitrator's sense of fairness. Moreover, arbitration is not thought at its core to be about reasoning to a decision from general principles with an obligation to respect precedent. To be sure, arbitrators are expected to do this sometimes, but when they are, it is usually explained by features of the particular context rather than properties of arbitration in general. As far as arbitral procedure is concerned, the move toward a litigation model is a relatively recent phenomenon, in large measure responsive to the Supreme Court's decisions expanding the scope of arbitrable subject matter. And some commentators find this development a bit troubling insofar as it imposes mandatory procedures at odds with arbitration's core commitment to flexibility and party autonomy.

Adjudication is different. Judges do not simply decide disputes between the parties. They enforce the substantive law. Moreover, they are expected, if not obliged, to give reasons for their decisions and those reasons are supposed to attend to principle and usually to precedent. In addition, judges are expected to be independent of the parties and (at least in federal court) insulated from political and third-party influence. Independence is meant, among other things, to ensure the sort of detachment essential to principled reasoning. The same is not true for arbitrators. To illustrate, consider the tripartite arbitration panel. It is quite common in these cases for each party to choose one arbitrator and the two arbitrators to choose the third. This is not just a convenient method of choosing a panel; rather, it is in many cases a device for constituting a particular decision-making process. In these cases, the party-appointed arbitrators are supposed to be sympathetic to the interests of the party who appointed them. The result is a panel that engages in a mix of deliberation and straightforward interest bargaining, probably with greater emphasis on the latter. Of course, many political scientists describe multimember courts in much the same way, but the characterization elicits concern and controversy when it is applied to adjudication as compared to relative complacency (if not enthusiastic endorsement) when it is applied to arbitration.

This suggests that adjudication's core distinctiveness lies in its commitment to reasoning from general principle and doing so in a way that engages the facts of particular cases. Although respecting precedent does not follow inevitably from this commitment, it is closely linked to it either pragmatically (e.g., following precedent limits cognitive error, saves decision costs, or protects reliance interests) or morally (e.g., following precedent is required by equal concern and respect or a norm of integrity, which also supports the core commitment to principled reasoning). I realize that this formulation is highly imprecise and that people can hold different views about what principled reasoning entails in adjudication. Even so, the formulation as it stands points us in a productive direction for thinking about party rulemaking. If parties choose procedural rules that undermine the capacity of judges, and perhaps even juries, to engage in principled reasoning of the right sort, then perhaps their choices should not be honored. This is just a beginning, however, for we must explain how procedure is connected to principled reasoning and why parties to a particular case should be constrained if they bear the risks and costs of their own choices.

Before proceeding, it is useful to approach the question of limits from a different direction. Many commentators who reach the question of legitimacy rely on a distinction between two models of adjudication: the dispute resolution model, and the norm-creation or public law model. This is a very common way to look at adjudication. Courts perform two separate
functions on this view: they resolve disputes and they make the law. At first glance, this dichotomy might seem tailor-made for evaluating party rulemaking: on this view, party rulemaking should be given broad scope in those cases that are mostly about dispute resolution, such as private contract and tort suits, and very narrow scope in those cases that are mostly about public law or norm creation, such as civil rights suits.

This dichotomy is attractive because it offers a relatively simple way to handle the legitimacy issue, but it fails on two counts. First, it fails to adequately explain why procedures or procedural rules chosen by the parties necessarily threaten the norm- or law-creation function of the court, at least any more so than party choices within the current procedural system. Second and more importantly, the argument grossly oversimplifies adjudication--and in a way that misleads more than helps. The fact is that courts do not, and are not supposed to, merely resolve disputes. That is one of the reasons why adjudication and arbitration are different; they perform different functions. Courts resolve disputes according to the substantive law. The italicized phrase makes all the difference. It means that we have to pay attention to the conditions for optimal law enforcement.

The point seems so obvious when stated, but the dichotomy between the dispute resolution and public law models ignores its implications. As every first-year law student learns, the substantive law must be interpreted. Interpretation is necessary when a rule is vague or ambiguous, and it is also necessary whenever a rule is applied to the facts of a specific case. There are relatively clear rules, to be sure, but a judge must determine whether the rule's directive is clear when read against the facts. Moreover, when the judge applies a common law rule, the judge always must decide whether the case at hand is one warranting further development of the rule. Indeed, the common law does not present itself as a set of canonical rules, although here I realize that I am making a controversial assertion. There are rules, to be sure, but they are linked to and conditioned on general principles and the facts of previous cases in a way that gives them a more-or-less flexible character. Thus, the judge in every case must engage in an interpretive exercise to determine the legal norm that should decide the case. This is not to say that judges never apply common law rules as such; it means that the judge must decide whether applying a relatively clearly established rule in a strict way is appropriate given rule-of-law values such as predictability and consistency, the magnitude of the case, and the costs of a deeper analysis.

The reasoning process I have just described is not limited to some special category of public law cases. It, or something roughly like it, is how all judges should go about deciding any case according to the substantive law. They interpret the law, including precedent, in light of the facts of the dispute in order to enforce the parties' substantive rights and decide the case accordingly. Thus, resolving disputes and making law or norms are not two distinct functions; instead, they are two integrated aspects of a single function. Judges neither resolve disputes just for the sake of resolving them nor make decisions just for the sake of guiding future conduct. Adjudication is about both together--and this is so for each and every case. This means that any theory of adjudication must account for the blended character of the decision-making method, and no dichotomy between the dispute resolution model and the public law model can possibly do that.

This approach to the problem of justifying limits on party rulemaking takes us to a similar place as does the arbitration comparison. The core element of adjudication is its distinctive mode of principled reasoning. Judges must interpret the law as they enforce it, and they interpret the law by placing existing legal norms alongside the facts of the particular case. One way to describe this process is in terms of reflective equilibrium. The judge moves back and forth between her best understanding of the law and whatever moral or practical intuitions are generated by the facts, adjusting law and intuition until they fit together in a reflective equilibrium.

This is just the first step of the analysis, however. The next step is to explain how and when party choice of procedure interferes with this core element.
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B. Party Choice and Principled Reason

My claim is straightforward: because the reasoning process is central to adjudication, we should focus on those procedural rules that have a strong effect on how that process is conducted. This claim is likely to elicit two sorts of objections at the outset. One objection is that parties bear all the risks of the procedures they adopt so there is no reason for special concern about procedures that frame or guide the reasoning process in their case. This is a serious objection and I shall take it up in the following subpart.

The second objection is that there is no way to identify particular procedures that strongly affect the reasoning process because all procedures have the capacity to do so, and one cannot determine in general which procedures are likely to have stronger effects than others. It is correct that many procedures affect the judge's process of deliberation. For example, a party made rule that restricts discovery to save costs could end up producing only limited evidence that makes the case seem much easier than it really is, and the judge as a result might invest less time deliberating about the law and the facts. But the limited discovery in this example does not necessarily alter the basic process of principled reasoning through reflective equilibrium; it affects the intensity with which the judge engages in it. Intense deliberation is not an essential feature of adjudication. For example, judges today vary in how intensely they deliberate over hard issues. Those who shirk can be criticized for adjudicating poorly, but within outside limits, they cannot be accused of not adjudicating at all.

Compare this example to a situation where the parties agree that their case should be decided by a panel of experts along with the judge and that all these decision makers should give great weight to their own sense of fairness as well as the substantive law. I am much more confident that this agreement alters the reasoning process. In any event, the following discussion assumes that those procedures that frame or guide the decision-making process are likely to have a particularly strong effect on how that process is conducted.

Which procedures and procedural rules fall into this category? This is a difficult question to answer. It might be helpful to consider the views of Lon Fuller, the well-known legal-process theorist who thought a great deal about adjudication in just these terms. Fuller believed that all the main features of adversarial process and party participation were core elements of adjudication and essential to the type of reasoning method that judges should employ. Fuller described that method as a form of moral reasoning roughly similar to the reflective-equilibrium idea summarized above. He believed that the institution of adjudication had evolved a set of processes that made this method of reasoning work well and that the reasoning method itself was essential to adjudication's ability to assure reasonably good rules and principles over the long run.

Thus, Fuller isolated a set of procedural elements that he believed were essential to the core function of adjudication and thus to its legitimacy. Fuller did not discuss party rulemaking in particular, but we can guess at his views. He probably would not have been concerned about parties limiting discovery, shortening the statute of limitations, or allowing fee shifting as long as the changes were reasonable, and he probably would not have worried too much about agreements to alter pleading standards or bar joinder. But given his focus on party participation through reasoned argument, he probably would have frowned on agreements that instruct the judge to decide the case solely on the basis of written submissions without any oral argument and perhaps also on agreements that give the judge broad power to limit and control adversarial confrontation during oral argument or trial. For Fuller, the interplay between judge and counsel at oral argument was important to the judge's ability to engage with the case both sympathetically and objectively. And Fuller would certainly be concerned about the hypothetical agreement above that placed a panel of experts alongside the judge and dictated a particular decision method.
There is much in Fuller with which I disagree. I am not a philosophical pragmatist like Fuller, and I do not believe that social institutions are structured around natural-ordering principles. Nor do I believe that individual participation and adversarial process are as tightly bound up with adjudicative legitimacy as Fuller insisted they were. For Fuller, the natural-ordering principle of adjudication was the guarantee of individual participation through evidence and reasoned argument in an adversarial setting, and it was this principle that supported an individual right to participate and demanded adversarial procedures. But I do agree with Fuller that it makes sense to focus on the reasoning process and to be concerned about procedural choices that might interfere with that process.

It is no doubt impossible to catalog all the procedural rules that belong in this special category. Pleading rules and related rules about motions to dismiss do not belong, nor do most discovery rules, joinder rules, summary judgment rules, evidence rules, and so on. However, the category does include rules defining the decision-making body and the decision protocol, including not only those directed to the judge but also to the jury. To be sure, we treat the jury process more or less as a black box, but that does not mean that we are indifferent to how the jury conducts its deliberations. We expect a reasoned decision and one that takes account of relevant law and principle. It is more difficult to classify rules that aim to shape reasoning incentives indirectly, but some of these might have a strong enough connection to the quality of deliberation to be included, such as rules dealing with appeal rights.

Again, my purpose is not to provide an exhaustive list but rather to illustrate what I have in mind and to highlight the kind of inquiry that classification entails. It might be useful, for example, to distinguish between rules that aim to regulate the conduct of parties and rules that aim to regulate the conduct or decision-making process of the judge. Although this is hardly a clean division, and the precise status of any rule will depend on its particular content and effect, it seems reasonable to suppose, as a rough first cut, that the latter set of rules is more likely than the former to be problematic on legitimacy grounds. In the end, not everyone will agree about which party-made rules impair legitimacy, but at least the debate will focus on the right questions.

C. Justifying the Limits

This leaves the last and most difficult question: Why limit the parties’ freedom to tinker with rules that frame the reasoning process if the parties are free to tinker with everything else? One possible answer is that when parties change these core rules, they make the judge oversee a process that is not “adjudication.” But this answer merely begs the question. Even if the resulting process is not properly called “adjudication,” the question still remains: Why is it undesirable for judges to engage occasionally in a process that is not adjudication, especially when the parties prefer it? The answer cannot be simply a matter of proper labeling.

We could justify imposing restraints if parties routinely made procedural changes that altered the decision-making process in ways that produced bad law or bad precedents. The concern here is not an undersupply of good precedent but rather an oversupply of bad precedent. The problem, however, lies in the premise that parties would routinely make radical procedural alterations if allowed to do so. This is ultimately an empirical question, but I am highly skeptical.

Still, it might be possible to justify restraints even if radical departures happen only occasionally and not routinely. The concern on this view is that asymmetric information will generate a “lemons” problem. The argument starts from the premise that it will be very difficult for lawyers and judges in later cases to distinguish between those precedents that are tainted by parties’ tinkering with core elements and those that are not. If lawyers and judges cannot sort the good precedents from the bad, they are likely to discount the value of all precedents. However, one should not put too much weight on this argument. The
quality of legal rulings and precedents created by the current system varies a great deal already, yet the system of precedent still seems to function. Given this, it is hard to tell whether party rulemaking will have a significant negative impact.

*1395 We might worry about outcomes in a slightly different way. The core elements of adjudicative process have developed over centuries. A Burkean conservatism might counsel against letting parties tinker with these elements because of deep uncertainty about the consequences. This argument has some merit, I believe, but it also has the potential to sweep too broadly. Nothing about it focuses necessarily on judicial reasoning. Any longstanding feature of procedure can fall within its scope.

This leaves two other ways to justify limits on party rulemaking. One focuses on the interests of the parties themselves. The other focuses on long-term effects not already discussed.

First consider party interests. One might argue that even sophisticated parties are in a poor position to make predictions about how procedural rules that alter core elements of adjudication will affect their cases. Adjudication is such a complex institution that predicting outcome effects is bound to be extremely difficult, if not impossible. If parties are likely to overestimate their ability to evaluate these risks due to bounded-rationality constraints, then preventing them from tinkering with core elements of adjudication might be justified as serving their best interests.

The problem with this argument is that it proves too much. It is very hard to predict the effects of any procedural change in the highly strategic environment of litigation. Unless one is prepared to ban all party rulemaking, which seems unjustified as a way to serve party interests, it is not clear how to draw lines. In fact, this same argument could justify banning arbitration or at least requiring arbitration to be modeled on the core elements of adjudication.

Finally, consider long-term effects. One such effect that concerns some scholars analyzing party rulemaking has to do with harm to the symbolic value of adjudication. In this connection, one might argue that adjudication has social value as a symbol of our collective commitment to principled reason in government decisions and actions, and that this commitment is reflected in certain invariant elements of procedure closely tied to principled decision making. Giving parties wide latitude to shape these elements threatens the value of the symbol in two ways. First, it sends the message that adjudication is simply a device for serving party interests. Second, it places the invariant elements up for grabs, which introduces variability and distorts the symbol's message.

I agree that adjudication has symbolic value, but I do not believe that symbolic value can carry the full weight of justifying a party-rulemaking ban. The conclusion that party rulemaking endangers symbolic value depends on empirical assumptions about public perceptions. I find it rather far-fetched that people would lose the meaning of the symbol if judges sometimes followed procedures that parties dictate. The default system of procedure would be as it is today, and there would still be decisions and judgments. Perhaps there would be fewer trials, which might reduce the most dramatic way that the symbol's meaning is communicated. But that is far from certain, and anyway, there are very few trials today.

There is, however, a more serious long-term effect that supports a stronger argument for limiting party rulemaking. This effect has to do with the likely response of judges to a system in which parties can direct what judges do and how they do it. If a judge believes that all judges should think hard about law and fact in an effort to reach a principled decision, the judge is likely to invest the effort necessary to do so, and to do so very well. Procedures and decision rules designed to frame, guide, and encourage the operation of principled reason are constant reminders to the judge of its importance. Also, these procedures and rules provide a foundation for the development of a shared norm among judges in favor of principled decision making. If each judge knows that other judges are subject to the same norms and thus similarly incentivized, all judges are more likely to
invest in the process. Doing it well will confer prestige and other reputation benefits. Furthermore, with a collective practice of principled reason, the norm is more likely to become internalized and serve as a reason in itself for action.

This beneficial equilibrium is put at risk by allowing parties to alter the procedures and rules that frame and incentivize the proper reasoning process. In such a world, judges would likely revise their perception of the ideal judicial role, perhaps modeling it more on the role of an arbitrator. Also, the altered perceptions would destroy or seriously undermine the benefits of a reputation market and impede the internalization of the proper norm. Moreover, these consequences could happen even if parties only occasionally employed radically altered procedures. To be sure, there would have to be enough cases to make the threat of party rulemaking sufficiently credible to undermine the equilibrium, but the critical number need not be very large.

*1397 This is so because the consequences flow from inferences about judicial role based on the fact that parties are allowed to make their own rules and not on how many parties actually do it. 270

I believe that this might well be the most compelling defense of party rulemaking limits on legitimacy grounds. Of course, it depends on empirical assumptions about judicial psychology. But if those assumptions are correct, then it might be wise to restrain parties from making radical changes to procedure that impair the uniformity of core elements. Moreover, it might be sensible to allow judges to review permissible party agreements for reasonableness subject to a presumption in favor of enforcement, just as they do for most agreements today. This would instill a feeling in the judge that she has control and is not just a tool for the parties to manipulate. Moreover, doing so enables judges to prevent changes that they believe risk the core elements of adjudicative reasoning in individual cases.

To recap, the key to the legitimacy critique of party rulemaking is to identify a core element of adjudication. I argued that the core is a commitment to a mode of reasoning that engages general principle and case-specific facts in an effort to reach reflective equilibrium. It follows that party rulemaking is most problematic when it alters procedures and rules designed to frame, guide, or incentivize this reasoning process. If doing so is likely to increase bad law or bad precedents significantly, then there is reason to ban party rulemaking when it affects these procedures and rules. But if party rulemaking is not likely to produce bad law or bad precedent on a sufficiently large scale, then the most compelling reason to ban it is to prevent long-term adverse consequences to judicial role-perceptions and, as a result, to the quality of judicial decisions.

V. Conclusion

Our journey has been a lengthy one, but this is because the problem we set out to solve is a complicated one, more complicated than scholars have realized. Whether to allow party rulemaking, especially Type III rulemaking, requires the answer to a deep question about the source of adjudication's normative legitimacy. Before we reached that question, however, we explored other arguments that have been made against party rulemaking and concluded that they justify imposing restraints in three limited situations: when parties expressly agree to exclude a third party with legal rights that might be seriously affected, when the agreement is sharply one-sided and the *1398 market has little competition, and when the agreement adopts procedures that seriously disable private enforcement of the substantive law or impair the proper consideration of civil rights claims. And in the end, our analysis led us to conclude that if parties are to be barred in other situations, it must be because those alterations impair the normative legitimacy of the institution.

We then explored the core of adjudication's legitimacy and found it in a distinctive mode of reasoning. Even a thin account of this reasoning process was enough to predicate important insights and recommendations. In particular, it provided a basis for banning party rulemaking that tinkers with procedures and rules closely tied to the judge's or the jury's reasoning process, and it also supported giving judges power to review rulemaking agreements for reasonableness.
Party rulemaking is here to stay and it has the potential to transform the way we think about procedural law. It also creates risks to the institution of adjudication itself. We must think harder about these consequences and their policy implications. The future of adjudication may depend upon it.

Footnotes

a1 G. Rollie White Professor of Law, The University of Texas School of Law. I am grateful to Larry Sager, Victor Ferreres, Alan Rau, Joey Fishkin, and Larry Ribstein for extremely helpful conversations, guidance, and comments and to participants in faculty colloquia at the University of Illinois College of Law and The University of Texas School of Law. I would also like to thank Ashwin Rao and Neil Gehlawat for their valuable research assistance.

1 U.S. Const. amend. V.

2 Id. amend. VII.


6 Fed. R. Civ. P. 83. Also, federal judges have the power to adopt standing orders for cases that they hear. Id.


8 Judges also have latitude to craft general procedural rules through interpretation of vague constitutional, statutory, and FRCP language. Technically, these interpretations are part of the law being interpreted. Sometimes, however, it is difficult to distinguish between rule interpretation and common law creation, especially when a judge interprets an extremely vague Federal Rule of Civil Procedure, such as Rule 56 before the 2010 amendments. Compare, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-25 (1986) (purporting to construe the provision of FRCP 56(c) requiring that the litigants' filings “show that there is no genuine issue as to any material fact” to support a rule that the movant need only “point[] out” a lack of evidence supporting the nonmovant's case), with id. at 337-39 (Stevens, J., dissenting) (criticizing the Court's “abstract exercise in Rule construction”).

9 For example, a plaintiff has broad freedom to choose how much factual detail to include in her complaint, how much discovery to take, and which parties and claims to join to her suit—all within the constraints of the relevant procedural rules and subject to the defendant's likely response. See Fed. R. Civ. P. 8-9 (addressing pleading); Fed. R. Civ. P. 26-37 (addressing discovery); Fed. R. Civ. P. 13-14, 18-20, 24 (addressing joinder).

10 An extreme example would be an agreement for the case to be decided by a judicial coin flip. Perhaps more realistically, parties could agree that the judge decide on the basis of moral principles, even if those principles conflict with the law. Or they might agree that the judge use a particular approach to statutory interpretation or narrow her attention to a delimited set of precedents. Cf. Frank Partnoy, Synthetic Common Law, 53 U. Kan. L. Rev. 281, 283 (2005) (proposing a system of private judges who decide cases according to a menu of precedents selected or designed by the parties).

11 We might also involve the defendant in the choice by giving him a veto or allowing him to modify the plaintiff's choice. One compelling reason to give these options to the parties would be to harness the superior information parties have about their own lawsuits. However, it would be important to design the procedural combinations and the choice conditions in a way that incentivized parties to make the socially optimal choice for their case.
This assumes, of course, that plaintiffs use the threat of broad discovery to leverage settlements in frivolous and weak suits. See, e.g., Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 557-59 (2007) (expressing concern about high discovery costs pressuring unjustified settlements). If the judge could screen more vigorously for frivolous suits at the pleading stage, there would be less need for a summary judgment screen and less concern about limiting discovery.


407 U.S. 1, 12-14 (1972).


See generally, e.g., Linda S. Mullenix, Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court, 57 Fordham L. Rev. 291 (1988) (analyzing and critiquing "consensual adjudicatory procedure"). Professors Paul Carrington and Paul Haagen wrote one of the early, in-depth critical examinations of the Supreme Court's generous approach to forum-selection agreements, both for courts and for arbitration. Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction, 1996 Sup. Ct. Rev. 331. These early articles inspired an extensive follow-on literature, which was fueled as well by the Supreme Court's increasingly solicitous attitude toward agreement developments among the 1990s and 2000s. See, e.g., Jean R. Sternlight, Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns, 72 Tul. L. Rev. 1 (1997) (challenging some widespread uses of arbitration as possibly unconstitutional); see also infra notes 21-22 (collecting other sources). For background on the Supreme Court's expansion of arbitration, see Thomas E. Carbonneau, The Law and Practice of Arbitration, at xi-xxix (3d ed. 2009).

131 S. Ct. 1740 (2011), rev'd Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009).

Id. at 1745, 1753.

Id. at 1744.

See Transcript of Oral Argument at 42, Concepcion, 131 S. Ct. 1740 (No. 09-893) (statement of Kagan, J.) (noting that refusals to enforce class action waivers are likely to encourage companies to exit arbitration); cf. Samuel Issacharoff & Erin F. Delaney, Credit Card Accountability, 73 U. Chi. L. Rev. 157, 179 (2006) (explaining that credit card companies have proven to be “even less enthusiastic about classwide arbitration than about class action litigation,” illustrating the point with an example of one company whose contractual language revealed that if it “[could]n't compel individual arbitration, it [did]n't want to be in arbitration at all”).


23 See, e.g., Kapeliuk & Klement, Contractualizing Procedure, supra note 21, at 2 (endorsing and expanding on the insight of Professors Scott and Triantis that “contracting parties can structure procedural rules in ways that would increase their joint surplus from the contract,” and agreeing that “by varying the degree of precision of contract provisions and terminology, contracting parties can shift costs between the time of contracting and the time of dispute, in ways that would prove beneficial for both” (citing Scott & Triantis, supra note 21, at 856-60)).

24 See, e.g., Resnik, supra note 22, at 623-24 (noting that the traditional conception of adjudication values “public and disciplined factfinding,” “norm enforcement,” and transparent process as central to judicial legitimacy, and that the new Contract Model of Procedure threatens those values); Taylor & Cliffe, supra note 22, at 1100, 1103-04 (noting that private procedural agreements operate “outside of the publicly crafted rules” with the result that “wisdom gained from public debate is subverted” and also observing that private procedure can give one side unfair strategic advantages); Thornburg, supra note 22, at 210 (stressing, among other things, “the development of legal rules” and “the educational and symbolic functions of the courts” and concluding that “[t]he normative and political values supporting public adjudication cannot be bargained away without the involvement of anyone representing the public interest” (footnote omitted)).

25 See infra note 115 and accompanying text.

26 See infra subsection III(B)(3)(d). For example, Professors Daphna Kapeliuk and Alon Klement, in what is perhaps the most rigorous economic analysis of party rulemaking in the existing literature, assume that any threat to judicial legitimacy can be cashed out in the form of reputation costs and that judges can trade those costs off against the benefits of enforcing ex ante contracts in individual cases. See Kapeliuk & Klement, Contractualizing Procedure, supra note 21, at 44 (explaining how party rulemaking can have an adverse reputational effect on the court). Professors Davis and Hershkoff take a somewhat broader view, Davis & Hershkoff, supra note 22, at 541-63, but they do not analyze adjudicative legitimacy rigorously in the way I do here.


28 See generally Gary Lawson, Stipulating the Law, 109 Mich. L. Rev. 1191 (2011) (noting that courts have allowed parties to stipulate to the answer to a specific legal question that was then used as a basis for deciding the case, and evaluating this practice).

29 See, e.g., Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 Stan. L. Rev. 497, 498 (1991) (“Most cases are resolved through settlement. Indeed, federal policy (and probably that of most states) favors settlement over trial, to such an extent that it is a familiar axiom that a bad settlement is almost always better than a good trial.” (internal quotation marks omitted)); Samuel R. Gross & Kent D. Syverud, Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial, 90 Mich. L. Rev. 319, 320 (1991) (“With some notable exceptions, lawyers, judges, and commentators agree that pretrial settlement is almost always cheaper, faster, and better than trial.”). But see Marc Galanter, The Quality of Settlements, 1988 J. Disp. Resol. 55, 56-59, 82 (chronicling an “anthology of assertions about the estimable qualities of settlements drawn from judges and legal scholars” but concluding that “[s]ettlements are not intrinsically good or bad, anymore than adjudication is good or bad”).

There could be Article III problems with the parties' chosen decision protocol, especially if the contract gives the experts any decision-making power. But the negative reaction I imagine in the text is not likely to depend on a proper interpretation of Article III.

There are a few exceptions that do not fit neatly into the hierarchy, but the most important sources are included.

An exception is the Supersession Clause, which provides that the Federal Rules of Civil Procedure supersede any inconsistent statute adopted before their enactment. Rules Enabling Act §401(a), 28 U.S.C. § 2072(b) (2006). This clause was added to the original Federal Rules of Civil Procedure “to obviate a need for explicit repeal of any provisions of the Judicial Code which might later be found to be in conflict with the new rules.” Paul D. Carrington, “Substance” and “Procedure” in the Rules Enabling Act, 1989 Duke L.J. 281, 322. The Supersession Clause, however, has rarely been applied. Id.


Trial judges also have some inherent power, but this power ordinarily must be exercised in a manner consistent with rules higher up in the hierarchy. See Chambers v. NASCO, Inc., 501 U.S. 32, 44-47 (1991) (outlining the various “facets to a federal court’s inherent power,” while noting that “the exercise of the inherent power of lower federal courts can be limited by statute and rule”).

This Article assumes specific enforcement of agreements to choose procedural rules or actions in advance. It is only through specific enforcement that parties can directly shape procedure for their cases.

An analogy to game theory might be helpful. See generally Eric Rasmusen, Games and Information: An Introduction to Game Theory 12-14 (3d ed. 2001) (explaining that in a game, the rules of the game identify the players, the choices available at each node, the information structure, and the payoffs). Procedural rules create the rules of the litigation game. They identify those who can be parties to litigation (the players of the game), the stages at which choices can be made, and the actions available to each party at each stage. Litigation payoffs are defined by the substantive and procedural law (procedural law insofar as it affects the magnitude of litigation costs), and the information structure is a result of all the numerous factors that influence access to information, including the procedural rules.

This type of rulemaking also includes choice of actions when the chosen action conflicts with a general rule that would otherwise apply at the later litigation stage. In this situation, the parties alter the general rule indirectly by creating an exception to it. In other words, they create a new rule consisting of the existing rule plus the exception.

It also includes situations where the parties choose the rules indirectly by choosing the forum.

See infra subpart II(B).

See, e.g., Kapeliuk & Klement, Contractualizing Procedure, supra note 21, at 13-14, 16-17 (observing the divergence of parties' predispute and postdispute interests and noting that “after the parties have embarked on the litigation war-game, cooperation is difficult to achieve”).


Cf., e.g., Robert G. Bone, Civil Procedure: The Economics of Civil Procedure 85-91 (2003) [hereinafter Bone, Civil Procedure] (describing how factors such as litigation costs, divergent expectations of success, and mutual optimism influence the "settlement surplus").
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See Kapeliuk & Klement, Contractualizing Procedure, supra note 21, at 17 (evaluating the likelihood of cooperation, willingness to make procedural arrangements, and ability to make transfer payments at the pre-dispute-contracting stage compared to the stage after a dispute has arisen).

The cognovit note is also worth mentioning in this connection. A debtor who executes a cognovit note waives all defenses in case of default and agrees in advance that the creditor can obtain a judgment without any notice or hearing at all. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 176 (1972). These agreements, which waive all due process rights, are enforceable provided they are made “voluntarily, intelligently, and knowingly.” Id. at 187. The cognovit, however, is an “ancient legal device” and firmly entrenched as a longstanding method to regulate credit risk. Id. at 176-78. As such, it is an exceptional form of waiver. It would be a mistake to infer from the existence of cognovit notes a more general power to waive specific procedural rules in all cases or a power to engage in Type III contractual modification of existing rules. But see Noyes, supra note 21, at 603 (suggesting this argument but not actually making it clearly).


Casad, supra note 48, § 108.53[4], at 108-98. Parties sometimes couple consent-to-jurisdiction clauses with consent to a specified mode of service. See, e.g., Nat’l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964) (allowing contracting parties to “agree in advance to submit to the jurisdiction of a given court” and modify or waive service operation); Beautytuft, Inc. v. Factory Ins. Ass’n, 48 F.R.D. 15, 27 (E.D. Tenn. 1969) (considering it “well settled” that parties may agree to personal jurisdiction and modifications to service by contract).

Casad, supra note 48, § 108.53[5], at 108-100.

See, e.g., Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593 (1991) (permitting “reasonable forum clause[s]” in form contracts); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972) (advocating a default rule of specific enforcement of forum-selection clauses unless a contesting party can show the specific clause to be “unreasonable and unjust”); see also 14D Wright, Miller & Cooper, supra note 22, § 3803.1, at 51-52 (“T]he common understanding is that these provisions are prima facie valid and should be enforced unless enforcement is shown to be unreasonable under the circumstances of the particular contract.”). This is especially true of commercial contracts, but as the Carnival Cruise Lines decision makes clear, a liberal approach applies to consumer contracts too. As long as the consumer has notice of the forum-selection clause and there is no bad faith or fraud, the clause will be enforced even if it is part of a contract of adhesion. See Carnival Cruise Lines, 499 U.S. at 595 (enforcing a forum-selection clause against cruise line customers because there was no evidence of bad faith or fraud on the part of the company).

This was not always so. Historically, courts were hostile to mandatory forum-selection clauses. They developed the so-called ouster doctrine, which rejected pre-suit agreements that ousted a court’s jurisdiction. See, e.g., Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) (“[A]ny citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement ... to forfeit his rights at all times and on all occasions, whenever the case may be presented.”).

See 14D Wright, Miller & Cooper, supra note 22, § 3803.1, at 52-58 (“Generally, a strongly hospitable judicial attitude toward these clauses prevails.”).

Fed. R. Civ. P. 12(h)(1). By contrast, the parties can neither commit to nor choose noncooperatively a federal court when there is no federal subject matter jurisdiction over the suit.
See, e.g., Nw. Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 375 (7th Cir. 1990) (making this point in the course of enforcing a forum-selection clause).

Or perhaps a judge might decide that for some reason the particular choice is better made noncooperatively than through bargaining.

See 14D Wright, Miller & Cooper, supra note 22, § 3803.1, at 79-80, 104-05 (noting that most federal courts dismiss if the forum-selection clause is reasonable, but criticizing that approach).


See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981) (acknowledging that “there is ordinarily a strong presumption in favor of the plaintiff’s choice of forum” in § 1404(a) transfer determinations).

It is worth noting that the authors of the Wright, Miller, and Cooper treatise see the matter differently. They read the Supreme Court's decision in Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988), to hold that in diversity and federal question cases, where the contractual forum has personal jurisdiction and venue, a motion to dismiss should be treated as a motion to transfer under § 1404(a) and the forum-selection clause should be a “significant factor that figures centrally” in the § 1404(a) analysis but should not be determinative. 14D Wright, Miller & Cooper, supra note 22, §3803.1, at 75-79 (quoting Stewart, 487 U.S. at 29). If this approach were followed, then the only difference between a scenario with a mandatory forum-selection clause choosing a federal court and one without such a clause would be the additional weight given to the contractual choice in the §1404(a) analysis. The contractually chosen forum would still have to qualify independently for personal jurisdiction and venue. The balancing test would then “place[] a significant limit on the extent to which private parties, even through a freely bargained contract, are permitted to refashion the laws of federal procedure.” Id. § 3803.1, at 76. However, the authors concede that their approach is not widely followed. See id. § 3803.1, at 79 (noting that, given the “confusion surrounding forum-selection clause analysis, many lower federal courts have failed to distinguish between the approach taken in Carnival Cruise and that taken in Stewart”).

Even so, it might support closer scrutiny of mandatory clauses than permissive ones.

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. 2010) (delineating the parameters of the ability of litigants to stipulate discovery procedure).


However, the advisory committee’s note to the 1970 amendment of Rule 29 observed that “[i]t is common practice for parties to agree on” variations of the “procedures by which methods of discovery other than depositions are governed” and that Rule 29 was meant to recognize such agreements and give them formal effect. Fed. R. Civ. P. 29 advisory committee’s note (1970).

This formal process has been in full effect only since 1993. See Steven S. Gensler, Judicial Case Management: Caught in the Crossfire, 60 Duke L.J. 669, 676-80 (2010) (describing the evolution of the case-management process and, in particular, the 1993 amendment to Rule 26(f), mandating discovery planning conferences for the first time). One might expect to find earlier cases dealing with discovery agreements, but I was not able to locate any.


Fed. R. Civ. P. 16(a)-(b).

See, e.g., 11 Matthew Bender & Co., Bender's Forms of Discovery Treatise § 1.04 (2011) (“[P]rovided there is no inequality of bargaining power, [parties] may also contractually limit discovery with respect to future litigation.”); Higginbotham, supra note 61,
§ 26.04[1], at 26-35 (stating the same); Noyes, supra note 21, at 609-10 (assuming that parties can contract for discovery limits ex ante); Thornburg, supra note 22, at 202 (stating that parties can limit discovery by contract); Note, Discovery Abuse Under the Federal Rules: Causes and Cures, 92 Yale L.J. 352, 364 (1982) (assuming that parties can “make judicially enforceable private agreements concerning discovery”). But see 8 Wright, Miller & Marcus, supra note 22, § 2005, at 52 (criticizing this practice as “hardly an appropriate means for disregarding rules of court devised to serve the public interest in bringing out all the facts prior to trial”). The benefits are well-known. Parties can escape the Pareto-inferior equilibrium of the prisoner's dilemma and achieve gains through cooperation, such as reduced litigation costs. Kapeliuk & Klement, Contractualizing Procedure, supra note 21, at 16.


69 Id. at 50; see also 8 Wright, Miller & Marcus, supra note 22, § 2005, at 52 (criticizing Elliott-McGowan); Developments in the Law--Discovery, 74 Harv. L. Rev. 940, 979 (1961) (same).

70 See supra note 61 and accompanying text.

71 A clear example of Type III rulemaking would be an agreement to alter Rule 26's provisions on scope, expert discovery, protective orders, and the like. Yet it is not at all clear that judges would be willing to enforce that type of agreement.

72 One survey of contracts filed with the SEC revealed that contractual modification of statutes of limitations was rather common. Kapeliuk & Klement, Contractualizing Procedure, supra note 21, at 6-7. In addition, parties sometimes waive other related defenses such as estoppel and laches. Id. at 7 & n.25.

73 See, e.g., Gifford v. Travelers Protective Ass'n of Am., 153 F.2d 209, 211 (9th Cir. 1946) (confirming the ability of the parties to shorten the limitations period but warning that “the interval may not be unreasonable”); Shaw v. Aetna Life Ins. Co., 395 A.2d 384, 386 (Del. Super. Ct. 1978) (explaining that an expressly abbreviated limitations period is permitted because it “hastens the enforcement and complements the policy behind the statute of limitations”); Keiting v. Skauge, 543 N.W.2d 565, 567 (Wis. Ct. App. 1995) (“[T]he right to contract for a shortened limitations period is ... supported by public policy.”); 15 Grace McLane Giesel, Corbin on Contracts: Contracts Contrary to Public Policy § 83.8, at 287 (Joseph M. Perillo ed., rev. ed. 2003) (reporting that contractually shortening the limitations period “is not contrary to public policy but rather assists the public policy behind statutes of limitations: preventing stale claims”).

74 See, e.g., Shaw, 395 A.2d at 386-87 (concluding that a contract that extends the limitations period beyond the statute violates public policy and impermissibly circumvents the law); 15 Giesel, supra note 73, § 83.8, at 289-90 (noting that “courts do not enforce parties agreements to lengthen the limitations period” and that “general agreements in advance to waive or not plead the applicable statute of limitations are void”). But see Collins v. Envtl. Sys. Co., 3 F.3d 238, 241 (8th Cir. 1993) (holding that Minnesota law allows the parties to agree to waive the statute of limitations but only for a reasonable period of time).

75 See, e.g., Shaw, 395 A.2d at 386 (explaining that extending a statute of limitations contradicts the device's public policy purpose of “discourag[ing] the litigation of old or stale demands” (citation omitted)). Even so, parties are relatively free to extend a statute of limitations after the cause of action has accrued, subject once again to a reasonableness constraint. 15 Giesel, supra note 73, § 83.8, at 290. The argument for distinguishing lengthening from shortening is flawed, however, because it ignores one side of the policy balance. Any statute of limitations seeks to strike a balance between allowing adjudication of meritorious claims and screening claims that are weak because of stale evidence. Lengthening the statute of limitations jeopardizes the latter policy. But shortening it jeopardizes the former. After all, it is the risk of screening meritorious suits that prompts courts to impose a reasonableness limitation when shortening the limitations period.

76 See, e.g., Thompson v. Volini, 849 S.W.2d 48, 50 (Mo. Ct. App. 1993) (holding that parties can waive the statute of limitations defense after the statutory period has expired); Duncan v. Lisenby, 912 S.W.2d 857, 858 (Tex. App.--Houston [14th Dist.] 1995, no writ) (“Parties may agree to waive the statute of limitations before the statutory bar has fallen.”).

77 There is another way to see this point. The statute of limitations rule is actually a complex set of requirements and conditions, something like the following:
A lawsuit shall be commenced (where commence is defined legally) within X years of the accrual of the cause of action (where accrual is defined legally), and if the lawsuit is not commenced within the requisite period of time, it shall be dismissed unless the defendant consents to the suit going forward or waives the objection.

When parties agree to lengthen the statute of limitations, it might seem as though they are altering the rule by changing X, the number of years, but they are actually invoking the waiver provision in advance.

See, e.g., Great Earth Int'l Franchising Corp. v. Milks Dev., 311 F. Supp. 2d 419, 437 (S.D.N.Y. 2004) (“Unquestionably, the Seventh Amendment right to trial by jury may be waived, and the waiver is enforceable so long as it is made ‘knowingly and voluntarily.’”) (citing Morgan Guar. Trust Co. of N.Y. v. Crane, 36 F. Supp. 2d 602, 603 (S.D.N.Y. 1999)); RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002) (“The federal standard for determining the validity of a contractual waiver of the right to a jury trial is ... whether the waiver was made in a knowing, voluntary, and intelligent manner.”); see also 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2321, at 278 (3d ed. 2008) (noting that contractual waivers of jury trial “will be strictly construed”).

See Fed. R. Civ. P. 38 (providing that any party who fails to properly serve and file its demand for a jury trial waives that right).

See, e.g., United States v. Mezzanatto, 513 U.S. 196, 202-03 (1995) (noting that there is a “presumption of waivability”); 21 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5039.5, at 860 (2d ed. 2005) (noting that courts traditionally had resisted allowing bargaining over the rules of evidence but that recently courts have been more receptive); Noyes, supra note 21, at 607 (“It is generally acknowledged that ex ante contracts to alter the rules of evidence are enforceable.”); Taylor & Cliffe, supra note 22, at 1086 n.5 (“[A] contract may specify that evidence in the form of hearsay that would otherwise be admissible pursuant to a hearsay exception would be inadmissible unless the declarant were unavailable to testify.”).

See, e.g., United States v. Bonnett, 877 F.2d 1450, 1458-59 (10th Cir. 1989) (enforcing a stipulation made during prosecution of a criminal case); Tupman Thurlow Co. v. S.S. Cap Castillo, 490 F.2d 302, 309 (2d Cir. 1974) (enforcing a stipulation made during litigation); see also Mezzanatto, 513 U.S. at 203 & n.3 (enforcing a waiver agreement made during plea bargaining in a criminal case but assuming in dictum that “extrajudicial contracts made prior to litigation [might] trigger closer judicial scrutiny”).

Compare, e.g., Bonnett, 877 F.2d at 1458-59 (enforcing a stipulation as to admissibility of certain evidence over a hearsay objection); Tupman Thurlow, 490 F.2d at 309 (enforcing a stipulation that certain documents were admissible), with People v. Baynes, 430 N.E.2d 1070, 1077 (Ill. 1981) (refusing to enforce a stipulation to the admissibility of polygraph evidence in a criminal case when the evidence would otherwise have been excluded as unreliable, noting that “[t]he stipulation attempts to change the legal standard for admissibility [and] [t]his court cannot accept such a result”).

Many of the sources that report broad party freedom to enter into contracts relating to evidence rely on a 1932 Harvard Law Review note. See, e.g., Mezzanatto, 513 U.S. at 202 (citing Note, Contracts to Alter the Rules of Evidence, 46 Harv. L. Rev. 138 (1932), for the proposition that ex ante contracts to alter the rules of evidence are generally enforceable); Noyes, supra note 21, at 607 (same). That note cites cases where courts have allowed parties to waive or dispense with obstacles to the admission of certain evidence, but it observes that courts have been more wary of contracts or stipulations that do away with the hearsay rule in general. Note, supra, at 139-40. Interestingly, the note also distinguishes between agreements that allow evidence to be admitted that would otherwise have been excluded and agreements that exclude evidence that would otherwise be admitted. Id. at 142-43. The former are mostly unobjectionable, but the latter are an “impediment to ascertaining the facts.” Id.

See Scott & Triantis, supra note 21, at 866-78 (discussing different ways that parties can and do reassign the burden of proof by contract).

See, e.g., Ashcraft & Gerel v. Coady, 244 F.3d 948, 954 (D.C. Cir. 2001) (acknowledging the validity of liquidated damages provisions so long as “the amount agreed to by the parties prior to the breach is reasonable”); Wassenaar v. Panos, 331 N.W.2d 357, 361 (Wis. 1983) (“The overall single test of validity is whether the [stipulated-damages] clause is reasonable under the totality of circumstances.”); 15 Giesel, supra note 73, § 83.7, at 286 (“As long as the stipulated damage amount is a true liquidated damage amount and not simply a penalty, the courts have enforced the stipulation.”).

See O'Hara & Ribstein, supra note 27, at 56-60 (describing the broad power parties have to choose the substantive law they prefer).
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87 See Moffitt, supra note 21, at 496-97 (describing high-low agreements and noting that courts usually enforce them).

88 I am not aware of any case law reviewing the enforceability of such agreements, but one survey of contracts filed with the SEC found evidence for this type of clause. Kapeliuk & Klement, Contractualizing Procedure, supra note 21, at 7-8.

89 Kapeliuk and Klement found examples of these provisions. Id. at 8 nn.28-29 (providing examples of agreements with fee and cost shifting); id. at 9 n.32 (providing examples of agreements with preliminary injunctions). I am aware of no legal authority reviewing the enforceability of agreements for entry of preliminary injunctions, and the only authority I know addressing contractual fee-shifting provisions is a passage in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), noting generally that exceptions to the American rule can be created by enforceable contract. Id. at 257.


91 E.g., Noyes, supra note 21, at 612-13; Thornburg, supra note 22, at 202.

92 See Noyes, supra note 21, at 608 (“Beyond Rule 38, there have been relatively few judicial decisions requiring a federal court to decide whether to enforce a contractual agreement to alter the Federal Rules of Civil Procedure.”).

93 This might actually be an example of Type II rulemaking insofar as the parties simply implement in advance what Rule 29 of the Federal Rules of Civil Procedure already allows them to do during litigation. See supra note 61 and accompanying text.

94 Moreover, some of those grounds, such as the defense of unconscionability, are sufficiently vague and elastic that they can be used as a platform for active judicial oversight.

95 See supra note 78 and accompanying text.

96 Another reason might have to do with the rise of trial judge case management. It is well known that the Federal Rules of Civil Procedure delegate broad discretion to trial judges. See Bone, Procedural Discretion, supra note 7, at 1967-70 (examining ways the Federal Rules facilitate trial judge discretion). If judges frequently shape case-specific procedure without much constraint from general rules, parties would have very weak incentives to make rules ex ante knowing that those rules would just end up being renegotiated with the judge ex post. There are two problems with this explanation. First, case management has arisen in response to concerns about case backlog and delay, so one would expect trial judges to be receptive to agreements that limit procedure to save costs. See Bone, The Process of Making Process, supra note 13, at 904 (noting the example of the Civil Justice Reform Act of 1990, which required courts to develop case-management plans in an effort to control case backlog and delay). Yet there are very few cases evidencing those agreements. For example, one does not see parties agreeing to stricter pleading standards even though they could benefit from such an agreement and the agreement should be appealing to trial judges concerned about backlog and frivolous suits. Second, aggressive trial judge case management is a phenomenon of the past thirty years, but there is no evidence of broader party rulemaking before that time. See Ginsler, supra note 64, at 670-72 (noting the evolution from passive to active case management by federal judges in the last thirty years, including amendments to the Federal Rules of Civil Procedure giving judges an “ever-expanding set of case-management tools”).

97 See, e.g., Taylor & Cliffe, supra note 22, at 1098-104 (criticizing judicial recognition of private agreements to alter procedural rules as circumventing the deliberative decisions of Congress and undermining the goals of uniformity and resolution based upon the merits rather than upon procedural technicalities).


99 See Stephen B. Burbank, Pleading and the Dilemmas of “General Rules,” 2009 Wis. L. Rev. 535, 541-43 (noting that the drafters intended the phrase general rules to ensure interdistrict uniformity and probably also assumed uniformity vis-à-vis the substantive character of cases).

100 One might also object that this places rulemaking authority in the hands of private parties, but the parties make rules only for their own cases.
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101 See supra note 61 and accompanying text.

102 See Bone, Procedural Discretion, supra note 7, at 1967 (noting the broad scope of case-specific discretion that the Federal Rules of Civil Procedure give district judges).

103 It is an interesting question whether a rule made by the parties pursuant to an explicit grant of party-rulemaking power in the Federal Rules could ever violate the Rules Enabling Act proviso prohibiting rules that “abridge, enlarge or modify any substantive right.” Rules Enabling Act §401(a), 28 U.S.C. § 2072(b). If the Federal Rules were to authorize Type III rulemaking and parties were to adopt a rule for the purpose of indirectly limiting or expanding substantive rights (such as a rule shifting the burden of persuasion or eliminating judgment as a matter of law), one might argue that the proviso has been violated. However, a Federal Rule authorizing Type III rulemaking furthers a procedural purpose—enabling party choice in litigation—and therefore is not obviously substantive. The situation might be different if private parties routinely contracted for a particular procedural rule that had major substantive effects contrary to congressional policy. In that case, the Federal Rule that licensed this predictable pattern might be invalid as violating the Rules Enabling Act proviso.

104 Federal courts do have power to make common law procedural rules, and they have done so in several different areas, such as forum non conveniens and preclusion. See Amy Coney Barrett, Procedural Common Law, 94 Va. L. Rev. 813, 822-32 (2008) (discussing five different areas of procedural common law, including forum non conveniens and preclusion). But none of these rules conflict with the Federal Rules of Civil Procedure.


106 Noyes, supra note 21, at 594, 620.

107 See, e.g., In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 132 (Tex. 2004) (arguing that an ex ante contractual waiver of a jury trial should be enforced because otherwise the parties would have to go to arbitration).

108 Id. at 132; Moffitt, supra note 21, at 490-91; cf. Noyes, supra note 21, at 594 (arguing for more contractual flexibility to design court procedures to facilitate party access to the superior features of adjudication compared to arbitration).

109 See Kapeliuk & Klement, Contractualizing Procedure, supra note 21, at 17-19 (discussing these benefits); see also Steven Shavell, Alternative Dispute Resolution: An Economic Analysis, 24 J. Legal Stud. 1, 5-21 (1995) (concluding that alternative dispute resolution (ADR) that is contractually chosen before a dispute arises provides economic benefits while ADR chosen after a dispute arises does not).


111 See Chris William Sanchirico, Harnessing Adversarial Process: Optimal Strategic Complementarities in Litigation 2-3 (Jan. 2006) (unpublished manuscript), available at http://ssrn.com/abstract=788564 (arguing that parties will “strategically substitute” and citing empirical research on discovery showing that plaintiffs retreat in response to defendant aggression). The reason why the parties adopt opposite strategies is easy to understand. Both parties know that abusive expenditures on discovery will simply cancel out and thus confer no gain. Given this, the parties are better off adopting opposite strategies. When A adopts a strategy of retreat in the face of aggression, for example, B will act less aggressively since A’s retreat reduces the marginal benefit to B of additional aggression. And less aggression by B makes A better off.

112 I adopt this example from Kapeliuk & Klement, Contractualizing Procedure, supra note 21, at 21.

113 Id. at 23-25.
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115 This can happen in at least two ways. First, limited discovery, while it reduces litigation costs, also restricts access to private information useful for aligning the parties’ estimates of likely success. Divergent estimates are a major impediment to settlement. See Robert D. Cooter & Daniel L. Rubinfeld, An Economic Model of Legal Discovery, 23 J. Legal Stud. 435, 439-44 (1994) (discussing the ways in which information exchange through discovery increases the probability of settlement). Second, limited discovery reduces total discovery costs and thus the amount that the parties can save by settling. With less to save, the parties might be less inclined to settle. See Bone, Civil Procedure, supra note 44, at 71-76 (describing the basic economic model of settlement).

116 The parties do not internalize all the social benefits of increased deterrence, and therefore they might agree to discovery limits that make them better off but weaken deterrence from a social perspective. See generally Steven Shavell, The Social Versus the Private Incentive to Bring Suit in a Costly Legal System, 11 J. Legal Stud. 333 (1982) (describing the divergence between social and private benefits and costs of litigation).

117 Versions of this argument appear in the literature dealing with procedural contracting. For example, Professor Moffitt argues that procedural customization through contract promotes procedural justice values by furthering party participation and control. Moffitt, supra note 21, at 479-81. I discuss this procedural justice argument in the text below. Furthermore, Professor Noyes argues that liberal enforcement of procedural contracts reflects a commitment to party autonomy, promotes the idea that “parties own their disputes and may design their own dispute resolution rules,” and preserves “the concept of freedom of contract.” Noyes, supra note 21, at 598 n.78, 620-21 (citation omitted). In addition, autonomy values are often used to justify arbitration. See, e.g., Edward Brunet, The Core Values of Arbitration, in Edward Brunet et al., Arbitration Law in America: A Critical Assessment 3, 11, 28 (2006) (identifying party autonomy as one of the key values of arbitration).

118 See infra section III(B)(3).


120 See Moffitt, supra note 21, at 479-81 (arguing from “[t]he lessons of procedural justice research” that “[p]roviding disputants with process control increases their perception of justice”).

121 As I have argued elsewhere, the most suitable normative theory for this purpose is utilitarian, and the aggregative calculus of utilitarianism gives positive feelings about process or outcome no particular priority over any other feelings. Bone, Agreeing to Fair Process, supra note 43, at 505-07.

122 See, e.g., Jerry L. Mashaw, Due Process in the Administrative State 158-200 (1985) (defending a dignitary-values theory of due process). Other scholars argue that participation is essential to the legitimacy of adjudication as a source of binding judgments, just as participation is essential to the legitimacy of legislation and other forms of government action in a liberal democracy. See, e.g., Lawrence B. Solum, Procedural Justice, 78 S. Cal. L. Rev. 181, 273-77 (2004) (arguing that the legitimacy of final adjudications is predicated on the right of parties to participate and that this value cannot be reduced to accuracy or efficiency).


124 See id. at 279-88 (detailing a number of ways in which the process-oriented view is problematic).

125 See, e.g., Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) (arguing that the right to vote is instrumental in securing “basic civil and political rights”); Mashaw, supra note 122, at 163 (arguing that enfranchisement has an intrinsic value linked to autonomy out of all
proportion to the minuscule amount of political power it actually confers); Solum, supra note 122, at 277 (noting the intrinsic value of the right to an equal vote independent of outcomes).


127 See Taylor & Cliffe, supra note 22, at 1105 (identifying an imbalance of bargaining power as “[o]ne of the more troubling aspects of” prelitigation agreements); Thornburg, supra note 22, at 209-10 (identifying valid consent as an important factor in enforcing a procedural contract).

128 See Taylor & Cliffe, supra note 22, at 1105 (“[T]he opportunity for bargaining is not realistically present ... in employment contracts, franchise agreements, and consumer transactions, where one party is largely at the disposal of the other in entering the contract....”).


130 In fact, many commentators focus on problematic consent as a ground for rejecting the Supreme Court’s generous approach to enforcing forum-selection clauses. See, e.g., Carrington & Haagen, supra note 16, at 350-57 (lamenting the lower courts’ enforcement of the Bremen rule in cases where the forum-selection clause was buried in fine print and criticizing the flawed argument that Carnival Cruise Line's forum-selection clause will result in savings to those who purchase tickets for a cruise); Mullenix, supra note 16, at 362-63 (arguing that courts almost always find fair bargaining—without regard to the relative sophistication of the respective parties—by presuming that the party opposing the forum-selection clause “received consideration or a contractual concession in return for the provision”).

131 See, e.g., David Sherwyn et al., Assessing the Case for Employment Arbitration: A New Path for Empirical Research, 57 Stan. L. Rev. 1557, 1558-60 (2005) (noting the explosion of literature about employment arbitration and the sharp debate over its merits). There is also some criticism of arbitration in franchise agreements. See, e.g., Jennifer L. Gehrig, Arbitration: A Franchisee's Perspective, 22 Franchise L.J. 121, 121 (2002) (acknowledging that arbitration clauses have “allowed franchisors to shield themselves from class action suits by franchisees, limit available damages, select a forum favorable to the franchisor, and eliminate franchisees' right to a jury trial,” but that, at times, arbitration clauses can be favorable to franchisees); William L. Killian, An Informal Study of Arbitration Clauses Reveals Surprising Results, 22 Franchise L.J. 79, 79 (2002) (noting that “arbitration clauses in typical franchise agreements probably deprive franchisees of the opportunity to band together in suing their franchisor” but that arbitration clauses are still beneficial to franchisees). But franchise agreements are not really adhesion contracts. The franchise agreement involves relatively high stakes and the parties are businesspeople who are likely to consult lawyers and bargain for their contract terms. See Christopher R. Drahozal & Keith N. Hylton, The Economics of Litigation and Arbitration: An Application to Franchise Contracts, 32 J. Legal Stud. 549, 581-82 (2003) (noting that arbitration is frequently criticized as coercive but asserting that “[t]he coercion claim is weak in the franchising context, since ... both parties are businesses that consult with lawyers”); Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. Ill. L. Rev. 695, 766 (“Many franchisees are sophisticated business people who can and do shop around for franchise opportunities.


133 The consumer contract in mass marketing is clearly a take-it-or-leave-it arrangement, whereas employees, especially those at higher levels of the company, sometimes have the ability and the sophistication to bargain for contract terms. See, e.g., Randall Thomas et

See Sherwyn et al., supra note 131, at 1563-64 (making this point and noting that the contract-of-adhesion criticism is mostly “an issue of perception”).

See id. at 1578-81 (reviewing the empirical studies current as of 2005 and conducting their own empirical study, and theorizing that while some employers might use arbitration to avoid courts and undermine employee rights, many use arbitration to provide a nonadversarial, low-cost forum for low-value claims).

At least with the empirical studies available as of 2005. Id. at 1567-72. Sherwyn et al. also conclude that the empirical results on comparative damages amounts are inconclusive. Id. at 1573-78. But see David S. Schwartz, Mandatory Arbitration and Fairness, 84 Notre Dame L. Rev. 1247, 1283-315 (2009) (criticizing empirical studies that purport to show the fairness of arbitration).

One empirical study identified circumstances where bargained-for CEO agreements included arbitration clauses and generalized from these results to identify circumstances where other employees might have agreed to arbitration had they been able to bargain. See id. at 962 (noting, for example, that arbitration clauses were used in industries subject to rapid change (where speedy resolution is desirable), and in firms with lower profitability (where low-cost procedures are advantageous) and also when complicated issues are involved (since those are better decided by expert decision makers)).

See, e.g., Sternlight, supra note 129, at 1664-65 (“[W]e care more when federal statutory claims such as employment discrimination are taken away from the public eye than when a dispute over the quality of soybeans shipped from Missouri to Nevada is handled privately.”).

See supra note 129 (collecting relevant sources).


Brief for Respondents at 39-44, Concepcion, 131 S. Ct. 1740 (No. 09-893), 2010 WL 4411292, at *39-44. This is essentially the basis for the Ninth Circuit's unconscionability holding in the case, which was later reversed by the Supreme Court. Laster v. AT&T Mobility LLC, 584 F.3d 849, 853-54 (9th Cir. 2009), rev'd sub nom. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011). Moreover, this is one of the main arguments that critics use to attack consumer arbitration agreements and class action waivers more generally. See generally Sternlight, supra note 129, at 1648-53 (summarizing the critics' arguments).

See, e.g., Russell Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 U. Chi. L. Rev. 1203, 1217-18 (2003) (“[T]he fundamental cause of inefficient terms in form contracts lies in the boundedly rational approaches buyers use to evaluate information...”).

See Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1, 19-27 (1991) (“The existing regulatory system cannot effectively deal with agency costs that arise in class action and derivative litigation because plaintiffs in the class action and derivative context are often completely incapable of monitoring the attorney.”).

See, e.g., Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997) (discussing the problems with providing notice of contractual terms to consumers in advance of a purchase and the efficiencies of relying instead on the availability of postpurchase rejection once the consumer has received the enclosed legal terms with the product); Mark R. Patterson, Standardization of Standard-Form
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See generally O'Hara & Ribstein, supra note 27, at 34-36, 133-45 (analyzing the benefits and costs of enforcing choice-of-law and choice-of-forum clauses in consumer contracts). In fact, consumers give consent in a competitive market that offers a variety of product-procedure packages for shopping for the package that best meets their preferences. For discussion of these points in the arbitration context, see Stephen J. Ware, Replies to Professor Sternlight, in Brunet et al., supra note 117, at 327, 327-34.

See David Gilo & Ariel Porat, Viewing Unconscionability Through a Market Lens, 52 Wm. & Mary L. Rev. 133, 139 & n.9 (2010) (“[A]s long as there is a credible threat that competitors ... bring consumers' attention to suppliers' inefficient or unfair terms, no supplier would incorporate such terms in its contract in the first place.”). But see Xavier Gabaix & David Laibson, Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets, 121 Q.J. Econ. 505, 505-07 (2006) (arguing that the existence of “myopic” (or unaware) consumers creates an environment that can be at least partially “immune to such competitive pressure”).

Also, reputation markets can exert a disciplining force. See Drahozal, supra note 131, at 767-69 (observing that in some contexts a firm's interest in maintaining a good reputation should act as a deterrent to abusive arbitration practices, at least when reputational information is widely distributed).

See Keith N. Hylton, Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis, 8 Sup. Ct. Econ. Rev. 209, 253 n.98 (2000) (noting that this effect depends on the proportion of informed and uninformed consumers); Alan Schwartz & Louis L. Wilde, Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis, 127 U. Pa. L. Rev. 630, 637-38 (1979) (describing how the presence of informed consumers incentivizes companies to offer competitive terms to uninformed consumers as well); cf. Drahozal, supra note 131, at 766 (making this point for franchisor-franchisee arbitration agreements).

On the other hand, if only a few consumers want the better procedural package, then the package with limited procedures should satisfy most consumers.

There is some evidence that the frequency of pro-seller conflict resolution terms varies with industry concentration and thus the degree of competition in the market. See, e.g., Eisenberg et al., supra note 141, at 891-92 (comparing industries with high and low concentrations and correspondingly high and low rates of arbitration clauses). But see Florencia Marotta-Wurgler, Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements, 5 J. Empirical Legal Stud. 447, 467-74 (2008) (finding no evidence that concentration of software industries leads to worse terms for consumers in end-user license agreements).


See, e.g., Christopher R. Drahozal & Samantha Zyontz, An Empirical Study of AAA Consumer Arbitrations, 25 Ohio St. J. on Disp. Resol. 843, 847-62, 916-18 (2010) (summarizing the results of previous empirical studies and reporting the results of a new empirical study of American Arbitration Association (AAA) arbitrations). One of the chief complaints about arbitration has to do with the fear that arbitrators might bias outcomes in favor of repeat players in order to attract future business. However, the empirical evidence does not clearly support this concern, and several respectable studies show no statistically significant effects. See Eisenberg et al., supra note 141, at 873 n.8 (collecting studies reporting no statistically significant difference between litigation and arbitration awards); id. at 894 (noting that studies do not show biased outcomes). But see Catherine A. Rogers, The Arrival of the “Have-Nots” in International Arbitration, 8 Rev. L.J. 341, 351 n.56 (2007) (collecting sources that suggest there is a repeat-player problem). The risk of bias no doubt depends on the arbitration association. While the AAA has strong incentives to use neutral arbitrators, there are organizations, such as the National Arbitration Forum (NAF), that might be less careful. See Schwartz, supra note 136, at 1286 (stating that the NAF “has come under heated criticism from consumer watchdog groups for creating a systematically biased arbitration forum for banking and consumer credit interests”). For a theoretical study of arbitrator bias based on a model of arbitrator incentives, see Alon
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See, e.g., Drahozal, supra note 131, at 769-70 (noting incentives of arbitration organizations to provide procedures that judges will consider adequate to support enforcement of the organizations' arbitration awards); Rogers, supra note 154, at 355 (describing how the AAA and other organizations have responded to public criticism with pro-consumer changes in arbitration procedures). For an example of the results of these changes, see the AAA's Consumer Due Process Protocol. Consumer Due Process Protocol, Am. Arb. Ass'n (Apr. 17, 1998), http://adr.org/sp.asp?id=22019. It makes some sense to focus on the AAA because it handles much of the arbitration in the United States. See Alan Scott Rau et al., Arbitration 30 (3d ed. 2002) (outlining the “central role [of the AAA] in the administration of much of the arbitration that takes place in this country”). However, it is important to add that the significance of AAA data in this connection depends on the fraction of consumer arbitrations that the AAA handles. See Schwartz, supra note 136, at 1285-86 (making this point and stating that it is uncertain how much consumer and franchise arbitration goes through the AAA).

See Daniel J. Solove, The Future of Reputation: Gossip, Rumor, and Privacy on the Internet 4 (2007) (explaining that reputational information used to be “scattered, forgettable, and localized” but is now “permanent and searchable” because of the Internet). Still, it is not always easy to sort between reliable and unreliable information on the web. Moreover, a consumer who searches for information about an arbitration association is likely to pick up the association's home page at the top of the search results and might never look further if the home page makes sufficiently strong assurances.

In the arbitration setting, courts use the unconscionability doctrine to invalidate oppressive arbitration agreements. The recent Supreme Court decision in Concepcion imposed limits, but those limits still leave room for judicial monitoring of particularly abusive arbitration terms. See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746, 1753 (2011) (abrogating California precedent deeming most class-arbitration waivers unconscionable as “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in promulgating the Federal Arbitration Act (FAA) but reaffirming that the FAA “permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability’” when such defenses do not “apply only to arbitration or ... derive their meaning from the fact that an agreement to arbitrate is at issue” (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)). But see Jean R. Sternlight, Tsunami: AT&T Mobility v. Concepcion Impedes Access to Justice, 90 Or. L. Rev. (forthcoming 2012) (manuscript at 7), available at http://ssrn.com/abstract=1924365 (reporting that “a number of judges are extending” Concepcion’s reasoning beyond class action waivers to limit the use of the unconscionability doctrine to invalidate other arbitration terms). Moreover, the Court's holding is based on preemption under the FAA, so it would not apply to adjudication. Thus, in adjudication, a judge could simply refuse to enforce an abusive contract on public policy or other grounds.

If one believes that a procedural modification is normatively undesirable on substantive grounds, it is easy to impute one's beliefs to other individuals and then conclude that those individuals must be victims of bargaining inequality when they consent to the undesirable terms. But the problem is in fact substantive, and the criticism is actually about the social costs of party rulemaking. We shall examine those costs in section III(B)(3), infra.

Concepcion, 131 S. Ct. at 1744.

The total loss for the Concepcions was $30.22. Id.

In addition, AT&T Mobility guaranteed a conditional payment that had the effect of making arbitration feasible for individual subscribers, and it also provided pro-consumer arbitration procedures. See id. at 1753 (noting that AT&T Mobility agreed to “pay claimants a minimum of $7,500 and twice their attorney’s fees if they obtain an arbitration award greater than AT&T’s last settlement offer” and that the district court judge found this sufficient to incentivize individual proceedings).

Someone who holds a very strong view of consumer autonomy might still object, but this extreme position is difficult to hold without rejecting all adhesion and form contracts.

It is noteworthy that critics of the Concepcion decision emphasize its adverse effect on substantive law enforcement and not its impairment of meaningful consent. See, e.g., Myriam Gilles & Gary Friedman, After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion, 79 U. Chi. L. Rev. (forthcoming 2012) (manuscript at 5), available at http://ssrn.com/
abstract=1928071 (arguing that the Court's decision will end up scuttling private consumer class actions and encouraging state attorneys general to take up the enforcement slack); Sternlight, supra note 157, at 1-2 (decrying the effect of the Court's decision on substantive law enforcement). To be sure, weaker deterrence will adversely affect consumers in the long run, but no single consumer is likely to give much weight to that cost, especially as deterrence is a public good and consumers have incentives to free ride.

It is possible to frame this in terms of consent, but doing so requires a stretch. One might argue that as a practical matter the real party in interest is the class attorney since she has the largest stake and effectively controls the suit, and therefore her consent is needed to make a valid agreement. Alternatively, one might argue that the relevant consent is that of the consumer class as a whole, and class consent cannot be reduced to the sum of individual consents because of free-rider problems.

Over the past several years, Congress has entertained bills that would ban arbitration clauses in consumer and employment contracts, but none has yet been adopted. See, e.g., Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011) (proposing to amend Title 9 of the U.S. Code to prohibit predispute arbitration agreements in employment, consumer, and civil rights disputes). One might expect a similar response to party rulemaking if it became more available. However, an outright ban is unwise even though more limited regulation might be desirable. See generally Sarah Rudolph Cole, On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence, 48 Hous. L. Rev. 457, 460-62, 467-69 (2011) (opposing the Arbitration Fairness Act's proposed ban on consumer arbitration but recommending more refined adjustments).

See Taylor & Cliffe, supra note 22, at 1088 (arguing for explicit congressional authorization of any party rulemaking).

See Dodge, supra note 22, at 783-85 (referring to this approach of rulemaking as a “rule of symmetry”).

These arguments, therefore, are different than the Rules Enabling Act argument discussed above. See supra notes 97-105 and accompanying text. The claim that party rulemaking violates the Rules Enabling Act depends on a legal argument about the proper interpretation of the Act. The claims discussed in this section depend instead on the policies and values underlying the rulemaking process authorized by the Act.

See Taylor & Cliffe, supra note 22, at 1090-91 (contending that the rules of public dispute resolution strike a balance between parties and that this balance is “fine tune[d]” through continual adjustments); Thornburg, supra note 22, at 207-08 (“The government-created rules of procedure represent ... the system's best efforts to find a correct balance between fairness and efficiency....”); see also Dodge, supra note 22, at 766-67, 770 (arguing that, within the structure provided by the Federal Rules, the courts have already weighed procedural rights and balanced the competing public and private rights of the litigation process).

See Taylor & Cliffe, supra note 22, at 1099-100 (recounting the beneficial features of the formal rulemaking process, including increased deliberation, the opportunity for public debate, and uniformity).


Fed. R. Civ. P. 11 advisory committee's notes. The 1983 amendments to Rule 11 were intended to “reduce the reluctance of courts to impose sanctions ... by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions.” Id. The 1993 amendments “place[d] greater constraints on the imposition of sanctions [in order to] reduce the number of motions for sanctions presented to the court.” Id.

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departure from traditional summary judgment doctrine” by adopting a standard allowing judges to “decide for [themselves] whether the weight of the evidence favors the plaintiff”).


See Taylor & Cliffe, supra note 22, at 1100, 1103 (stressing the values of public debate and procedural uniformity and warning that private prelitigation agreements undermine these values).

See id. at 1100-04 (arguing that by enforcing a private prelitigation agreement that deviates from the Federal Rules, courts subvert the wisdom that was gained from public debate over the Rules, diverge from the uniformity the Rules were intended to provide, and potentially impart litigation advantages that contravene a “framework for dispute resolution that is fundamentally fair and evenhanded”); cf. Davis & Hershkoff, supra note 22, at 550-54 (arguing that a cost of “contract procedure” is that it allows parties to “end-run the public rulemaking process” and change the rules for private gain without sufficient public debate about the consequences).

See Bone, Procedural Discretion, supra note 7, at 1967-70 (giving examples of how the Federal Rules grant case-specific discretion). There are good reasons to be skeptical about a trial judge’s ability to use this discretion effectively. See id. at 1986-2001 (citing bounded-rationality constraints, information-access obstacles, and strategic-interaction effects). One of the problems--information-access obstacles--involves the difficulty of obtaining reliable, case-specific information from parties who, in the midst of adversarial battle, have strong incentives to be strategic about disclosure. See id. at 1996-2000 (discussing these incentives). Procedural contracting might be superior in this regard if it is able to harness the parties’ private information.


In this regard, party rulemaking in adjudication differs from arbitration, which can remain secret throughout the entire process. See Brunet, supra note 117, at 8 (“The desire for secrecy can be a prime determinant in selecting arbitration.”).

For a discussion of bargaining inequality, see supra section III(B)(1). It is important to bear in mind, however, that settlement can make it difficult for judges to monitor bargaining defects if the settlement takes place before the chosen rule is implemented. Still, in many cases, at least some rules dealing with pretrial matters, such as pleading rules, are likely to be implemented before settlement. Moreover, there is no need for every case to go through trial for a pattern of abuse to become visible. Finally, the lawyer for a party disadvantaged by a sharply one-sided contractual rule might ask the court for relief from the rule and do so early in the case to avoid any adverse effect on settlement.

See, e.g., Kapeliuk & Klement, Contractualizing Procedure, supra note 21, at 38-44 (describing negative externalities of private, contractualized procedure).

Potential stare decisis effects usually do not trigger compulsory joinder under Rule 19 or support intervention as of right under Rule 24. See, e.g., Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 407 (3d Cir. 1993) (holding that creation of the “persuasive effect of a district court decision” on an absent party’s rights was insufficient to make joinder compulsory under Rule 19); 4 James Wm. Moore et al., Moore’s Federal Practice § 19.03(3)(e) (3d ed. 2011) (noting that stare decisis can be enough to compel joinder under Rule 19, but only if the issue is truly difficult and likely to be reviewed on appeal); 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1908.2, at 369-74 (3d ed. 2007) (showing that intervention under Rule 24 is not available in every case where the decision may have stare decisis effect).
See supra notes 109-11 and accompanying text.

See supra note 115 and accompanying text.

They might do this for various reasons, such as to limit the costs of a future lawsuit, simplify settlement bargaining, or reduce the time to trial. Joinder agreements of this sort also might have adverse effects on delay costs by increasing the number of separate suits and thus case backlog, but predicting these effects would be very difficult.

See Fleming James, Jr. et al., Civil Procedure § 10.12, at 612 (5th ed. 2001) (noting that the “necessary party rule” can apply to a suit seeking a judgment distributing a fund when the claim of a nonparty on the fund “may as a practical matter be worthless”); Stephen C. Yeazell, Civil Procedure 771 (6th ed. 2004) (listing the limited-fund scenario as one of the common situations for application of Rule 19).

The result could be achieved noncooperatively in this case if both parties had an interest in cutting costs, facilitating settlement, or expediting trial. In fact, it is difficult to see why B would raise the joinder objection in this scenario except perhaps as a threat to force settlement (in which case B is not likely to carry through on the threat if it benefits from a simpler case as well).

Fed. R. Civ. P. 19(a), (c).

See Fed. R. Civ. P. 19(a)(2) (“If a person has not been joined as required, the court must order that the person be made a party.”).

See supra notes 94-95 and accompanying text.

See Kapeliuk & Klement, Contractualizing Procedure, supra note 21, at 39-42 (discussing the inefficient overuse of public judicial resources by litigants).

See id. at 41 (describing the difficulty of identifying the inefficiencies created by contractualized procedures).

See supra note 114 and accompanying text.

See supra notes 115-16 and accompanying text. Moreover, if one party seeks broader discovery ex post, the court will have to determine whether the agreement was breached, and this will add public as well as private litigation costs. Of course, each party should also take account of the additional expected costs of trial. However, parties only consider the private costs of trial and not the public costs. Moreover, the parties usually bear most of the discovery costs, except when motions to compel are frequent. Therefore, limited discovery might be optimal for the parties when it is not optimal from a social perspective.

See Moffitt, supra note 21, at 514-15 (addressing this objection).

See Bone, Procedural Discretion, supra note 7, at 1967-75 (describing the range of procedural discretion and the history of heavy reliance on it).

See, e.g., Taylor & Cliffe, supra note 22, at 1103-04 (noting that prelitigation agreements can be used to gain an unfair strategic advantage); Thornburg, supra note 22, at 209 (contending that while it might make sense for courts to enforce procedural contracts when they are sure the provisions were genuinely bargained for, it is too difficult to be sure and as a result these contracts should not necessarily be entitled to specific performance); Kapeliuk & Klement, Contractualizing Procedure, supra note 21, at 44-46 (explaining the potential fairness and efficiency concerns when parties enter into predispute procedural arrangements unaware of the likely consequences).

The latter effect is particularly important because most cases end in settlement. See Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. Empirical Legal Stud. 459, 459 (2004) (reporting data showing that in 2002 the portion of federal civil cases resolved by trial was only about 2%).

See Bone, Civil Procedure, supra note 44, at 20-29 (explaining expected value and the rational-choice model). However, a mean-preserving increase in the error risk might have an adverse impact on risk-averse parties.
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See infra subpart III(C).

Some critics of party rulemaking mention this concern. See, e.g., Thornburg, supra note 22, at 209 (arguing that a court's decision whether to enforce party-made rules “might be an easy 'yes' if we could be sure that ... the outcome of the dispute would only affect those parties”). Moreover, it figures prominently in the literature critical of the judicial focus on settlement, of ADR, and of the Supreme Court's strongly favorable attitude toward arbitration. See, e.g., Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073, 1089 (1984) (noting that settlement is a “poor substitute” for judgment, which is fundamental to “bring[ing] a recalcitrant reality closer to our ideals”); David Luban, Settlements and the Erosion of the Public Realm, 83 Geo. L.J. 2619, 2641 (1995) (describing a lack of legal precedents as an unfortunate consequence of a world dominated by settlement). My discussion here focuses on the quality of precedents. There is no reason to believe that party rulemaking will have a seriously adverse effect on the quantity since it is not obvious that party-made procedure would generate more settlements than the current procedural system does. In any event, it is not clear how much precedent is optimal, and without that baseline, it is impossible to tell whether the actual quantity is deficient. For a critical take on the precedent argument in the context of arbitration, see Hylton, supra note 149, at 243-47.

For example, some commentators praise international commercial arbitration for producing good precedents notwithstanding its procedural limitations. E.g., Rogers, supra note 154, at 370-71.

See supra note 199.

See, e.g., Davis & Hershkoff, supra note 22, at 547-51 (discussing risks to perceived legitimacy as well as other legitimacy-related concerns); Taylor & Cliffe, supra note 22, at 1090 (assuming that legitimacy would be impaired if the judge had to honor the parties agreement to flip a coin); Thornburg, supra note 22, at 207-09 (lumping a number of different arguments under the theme of preserving the legitimacy and integrity of the courts); see also Dodge, supra note 22, at 764-70 (discussing concerns of legitimacy and judicial integrity); Kapeliuk & Klement, Contractualizing Procedure, supra note 21, at 42-44 (discussing potential adverse effects on a court's reputation capital as a constraint on party rulemaking).

See, e.g., Sarah Rudolph Cole, Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution, 51 Hastings L.J. 1199, 1225 (2000) (arguing that an agreement to decide a dispute by flipping a coin would “undermine the integrity of the court as an institution by making it appear that courts exist to serve the whims of litigants”); Taylor & Cliffe, supra note 22, at 1090 (noting that “a court would not enforce an agreement to resolve a dispute by judicial coin toss” because it is “simply too ridiculous and makes a mockery of why the court is there”); see also LaPine Tech Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring) (noting that he would refuse to enforce an arbitration clause that “provided that the district judge would review the [arbitration] award by flipping a coin or studying the entrails of a dead fowl”), overruled on other grounds sub nom. Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (9th Cir. 2003) (en banc); cf. United States v. Josefik, 753 F.2d 585, 588 (7th Cir. 1985) (noting that an agreement to trial by twelve orangutans would be invalid). One might wonder why parties would not just flip the coin themselves, but maybe they do not trust one another to do it fairly.

See generally Bone, Rethinking, supra note 123, at 233-36 & n.155 (distinguishing perceived from normative legitimacy and noting the prevalence of perceived legitimacy arguments in the nonparty-preclusion setting).

Id. at 233, 236.

See, e.g., Cole, supra note 207, at 1225 (“If courts begin to make decisions in an arbitrary manner, ... the respect the public currently has for the judiciary as a decision-maker will be dissipated.”); Moffitt, supra note 21, at 509-11 (“Society has an important interest in preserving the public perception that courts are legitimate.”). Some commentators do not clearly state whether they are concerned about perceived or normative legitimacy, but insofar as they focus on the way individuals would react to a procedure upon seeing it, they seem to be concerned with perceived legitimacy. See, e.g., Noyes, supra note 21, at 625 (noting that bizarre procedures would “make the court look silly or incompetent”); Taylor & Cliffe, supra note 22, at 1090 (worrying that enforcing unusual procedural...
agreements could make a “mockery” of the court); Thornburg, supra note 22, at 207-08 (arguing that court “ritual [s] legitimiz[e] legal authority” and cashing this out in terms of symbolic and educational benefits).

211 See, e.g., Kapeliuk & Klement, Contractualizing Procedure, supra note 21, at 42-44 (discussing ways in which enforcement of procedural contracts might affect a court’s “reputational capital”).


213 Indeed, flipping a coin can be justified on moral grounds when it is impossible to tell which party is correct and both have equally strong substantive entitlements. See Lewis A. Kornhauser & Lawrence G. Sager, Just Lotteries, 27 Soc. Sci. Info. 483, 495-503 (1988) (discussing equal-entitlement and scarcity conditions for using the lottery as an exclusive or nonexclusive method of allocation and noting that using the lottery under these conditions is supported by reasons).

214 Even a moral conventionalist, who believes that moral principles are those that the society in general accepts as moral, is likely to focus on well-considered beliefs about legitimacy, not raw perceptions. See generally The Encyclopedia of Philosophy: Supplement 103-04, 361-65 (Donald M. Borchert ed., 1996) (defining conventionalism as the view that truth is a matter of social convention and describing three competing metaethical theories of morality, all of which focus on careful consideration rather than crude perception).

215 For example, a judge might flip a coin in cases of genuine indeterminacy or party agreement. See supra note 213 and surrounding text; see also Davis & Hershkoff, supra note 22, at 547-48 (recognizing that arguments based on perceived legitimacy are “necessarily speculative” and depend on the circumstances).

216 See Robert G. Bone, Twombly, Pleading Rules, and the Regulation of Court Access, 94 Iowa L. Rev. 873, 910-15 (2009) [hereinafter Bone, Regulation of Court Access] (describing the difference between a utilitarian and a rights-based theory focused on outcome quality); see also Bone, Rethinking, supra note 123, at 237-64 (applying utilitarian and rights-based theories to evaluate nonparty preclusion rules).

217 Bone, Regulation of Court Access, supra note 216, at 910.

218 See, e.g., Kapeliuk & Klement, Contractualizing Procedure, supra note 21, at 42 (“[W]e suggest that in evaluating whether to enforce pre-dispute procedural arrangements that may impact judicial time and costs, courts should be aware of the possible tradeoff between pre-dispute and post-dispute costs and benefits of such arrangements.”); id. at 49 (“[C]ourts should be careful not to overturn efficient modifications.”).


220 Here, I gloss over the distinctions between two different versions of rights-based theory: outcome-oriented and process-oriented. An outcome-oriented theory values procedure instrumentally, as a means to the end of producing judgments and settlements that conform to the parties’ substantive rights. A process-oriented theory values procedure intrinsically, as a way to respect the autonomy and dignity of individuals by guaranteeing them an opportunity to participate in litigation that affects them personally. See Bone, Agreeing to Fair Process, supra note 43, at 508-16 (describing the difference between outcome-based and process-based rights theories).

221 See Bone, Procedure, Participation, Rights, supra note 219, at 1013 (“Because they are rights, they must resist arguments for limiting procedure based on the high social costs of litigation, but to fit prevailing intuitions of procedural fairness, they must also yield to social cost arguments, at least to some significant degree.”).

222 I have argued elsewhere that social costs should have more weight in limiting the scope of procedural rights than the scope of other kinds of rights. Bone, Agreeing to Fair Process, supra note 43, at 513-17; Bone, Procedure, Participation, Rights, supra note 219, at 1015-18.
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223 This assumes that parties are free to trade their procedural rights. Obviously, they can do so during litigation. After all, parties trade procedural rights when they settle, and most lawsuits end in settlement. See supra note 199. Moreover, there is no apparent reason to treat the matter differently when parties bargain before a dispute arises. Settlement involves ex ante trading, just as pre-suit agreements do. When a party settles a pending suit, she agrees to trade her procedural rights in advance of the time she would otherwise exercise them. One might argue that parties have better information as well as attorney representation after a suit is filed. But information varies continuously over time and representation is not necessarily confined to litigation, so there is no reason to draw a sharp line at the point a dispute arises or a suit is filed.

224 This assumes that the baseline itself satisfies rights.

225 I do not mean to suggest that these are the only situations that should be considered. They are, however, the clearest cases. For example, one might also object to courts enforcing an agreement as part of a settlement that requires the parties to maintain the confidentiality of potentially damaging discovery materials and asks the judge to seal any court records that might reveal those materials. See, e.g., Richard L. Marcus, The Discovery Confidentiality Controversy, 1991 U. Ill. L. Rev. 457, 502-05 (discussing the objections and concluding that they do not support a general rule against enforcement). Agreements of this sort can be treated as a form of procedural rulemaking insofar as they alter a default rule of public access. It is far from clear, however, that a general rule barring enforcement in all cases is justified. Id.

226 See Dodge, supra note 22, at 783-85 (making the same point).

227 Other commentators have reached similar conclusions, but mostly on the basis of a utilitarian approach. See, e.g., Hylton, supra note 149, at 212-13 (“Although I note important exceptions along the way, the principal argument of this paper is that waiver and arbitration agreements should be enforced ... as long as they have been entered into knowingly and voluntarily.”); Shavell, supra note 109, at 3 (“Because ex ante ADR agreements made by knowledgeable parties raise their well-being, the agreements raise social welfare (in the absence of external effects). Thus, it is suggested that ex ante ADR agreements should ordinarily be enforced by the legal system.”).

228 For an account of the relative advantages of the formal rulemaking process, see Bone, The Process of Making Process, supra note 13, at 920-26.

229 Contractual freedom to shape procedure lies at the core of arbitration. Brunet, supra note 117, at 3-4. There are some limits, however. For example, the parties cannot contractually provide for broader grounds of judicial vacatur and modification of arbitration awards than the Federal Arbitration Act (FAA) allows. See Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1406 (2008) (holding that contracting parties cannot expand the scope of review beyond the strict limits of the FAA).


231 See Kaufmann-Kohler, supra note 230, at 362-65 (reporting data showing that arbitrators do not tend to follow precedent in international commercial arbitration). But see Christopher R. Drahozal, Is Arbitration Lawless?, 40 Loy. L.A. L. Rev. 187, 192-94, 212 (2006) (agreeing with other commentators that arbitrators ordinarily follow the law, despite incentives not to do so, but conceding that no empirical evidence exists “on the extent to which arbitration awards are reasoned or what proportion of reasoned awards are published”).


233 See Thomas J. Stipanowich, Arbitration: The “New Litigation,” 2010 U. Ill. L. Rev. 1, 11-15, 35-46 (describing this trend). Some but not all of these developments have taken place in the fields of consumer and employment arbitration, partly in response to concerns about the unfairness of adhesion contracts and bargaining inequality. Cf. id. at 37, 40 (noting that some courts and state legislatures have responded to the expansion of consumer arbitration by allowing process defenses to arbitration agreements or by imposing new procedural requirements on arbitrations).
This point should not be exaggerated. In some areas, such as investor-state arbitration, arbitration is an important source of norm creation. See Kaufmann-Kohler, supra note 230, at 376 (arguing that investment law has “a strong need for consistent rule creation”). Also, labor arbitrators, when they engage in interest arbitration, decide matters not strictly covered by the terms of a collective bargaining agreement and in so doing help to shape the framework for ongoing workplace relationships. See Rau et al., supra note 155, at 18-22 (describing interest arbitration in collective bargaining agreements).

I Thomas H. Oehmke, [2011] Oehmke Commercial Arbitration § 11.1 (West 3d ed.) (noting that parties can contractually choose to have their dispute decided by the laws of a preferred legal system); Rau, supra note 232, at 514-18 (discussing the arbitrator’s power to depart from formal legal rules and do equity in the individual case by relying on such things as “commercial understanding, good business practice and notions of honorable behavior”).

See Kaufmann-Kohler, supra note 230, at 375-78 (offering a context-specific explanation for differing attitudes toward precedent in different arbitration settings); see also Rau, supra note 232, at 510 (“We do not in any event expect that an arbitrator will decide a case the way a judge does.”).

See Stipanowich, supra note 233, at 9-11 (discussing the Supreme Court’s shift in attitude toward arbitration, which led to increased responsibility for arbitrators and necessitated an expansion of arbitration procedure and practice).

See id. at 50-52 (arguing that unless parties are free to choose the type of arbitration that suits their needs, they will be stuck with “arbitration [with] one-size-fits-all procedures” that mimics litigation and will ultimately be frustrating and unsatisfactory).

However, precisely how independent and insulated is a matter of some controversy and uncertainty. See generally John Leubsdorf, Theories of Judging and Judge Disqualification, 62 N.Y.U. L. Rev. 237 (1987) (discussing the law of judicial disqualification and impartiality).


See id. at 498 (discussing the usual assumption that “the ‘tripartite’ form was chosen precisely so that each party can have a ‘friendly’ representative on the arbitration panel who can make sure its ‘side’ is taken seriously”).

See id. at 501 (explaining how the need to obtain a majority of party-appointed arbitrators “often leads to a process of negotiation and compromise”). Until 2003, the presumption in United States commercial arbitration was that party-appointed arbitrators should be sympathetic to the position of the parties appointing them, but the AAA changed this presumption “[a]t the urging of the international arbitration bar” so that now party-appointed arbitrators must be impartial and neutral in AAA commercial arbitrations unless the parties provide otherwise. Rau et al., supra note 155, at 263-65.

See, e.g., Lee Epstein & Jack Knight, The Choices Justices Make 56-79 (1998) (defending a strategic model of Supreme Court decision making and arguing that it manifests itself partly in the form of strategic bargaining among Justices).

Compare Aaron H. Caplan, Malthus Justices: Another Former Clerk Looks at the Proposed Ninth Circuit Split, 73 Wash. L. Rev. 957, 981 (1998) (describing judges reasoning with each other as desirable and judges bargaining with each other as undesirable), with Rau, supra note 240, at 501-02 (supporting negotiation among party-appointed arbitrators).

See, e.g., Larry Alexander & Emily Sherwin, The Rule of Rules: Morality, Rules, and the Dilemmas of Law 136-56 (2001) (describing and evaluating three models of precedent with attention to the reasons each can give for following precedent); Ronald Dworkin, Law's Empire 225-75 (1986) [hereinafter Dworkin, Law's Empire] (explaining how the norm of integrity justifies the practice of following precedent); Ronald Dworkin, Taking Rights Seriously 110-23, 340-41 (1978) [hereinafter Dworkin, Taking Rights Seriously] (explaining a theory of judicial decision making based on principle and combining fit and justification, all required by a background principle of equal concern and respect); Jonathan R. Macey, The Internal and External Costs and Benefits of Stare Decisis, 65 Chi.-Kent L. Rev. 93, 95 (1989) (arguing that “stare decisis is an enormously efficient mechanism for conveying information” and enables judges to leverage “the ability to tell when like cases are alike ... into a facility for deciding a wide variety of cases that involve substantive legal issues about which the judges may know next to nothing”).
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See, e.g., Moffitt, supra note 21, at 505-07 (separating the private-dispute-resolution function from the public-goods-creation function in analyzing the limits of party rulemaking); Thornburg, supra note 22, at 206-08 (distinguishing between dispute resolution and public functions of courts). This dichotomy also plays a role in alternative-dispute-resolution scholarship, including evaluations of arbitration. See, e.g., Harry T. Edwards, Commentary, Alternative Dispute Resolution: Panacea or Anathema?, 99 Harv. L. Rev. 668, 671-72 (1986) (distinguishing between private dispute resolution and public law disputes in the context of alternative dispute resolution); Leo Kanowitz, Alternative Dispute Resolution and the Public Interest: The Arbitration Experience, 38 Hastings L.J. 239, 241-42 (1987) (noting the same distinction).


See Dworkin, Taking Rights Seriously, supra note 245, at 71-80 (discussing the importance of principles in common law reasoning).

Scholars disagree about when judges should ask the rule-of-law questions instead of just apply the rule strictly. Compare, e.g., Dworkin, Law's Empire, supra note 245, at 264-66 (noting that judges sometimes should apply rules strictly but always subject to the demands of principled integrity), with Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 196-206 (1991) (arguing for a strong presumption in favor of strict application).

Some commentators posit that these two sides of adjudication are “inexorably linked in every institutionalized mode of adjudication” and always in tension with one another. Dan-Cohen, supra note 247, at 5. While this view comes closer to the mark in recognizing the intimate connection between dispute resolution and norm creation, it falls short in conceiving of the two as distinct and in tension. I am not convinced that it makes sense to frame adjudication in terms of polar “models.” It is too easy and gives up too soon. Before settling for an account in terms of polar models, one should first make an effort to construct a more general theory aimed at a coherent account of the institution. To be sure, any such theory is likely to identify conflicting values, but it should also provide a more general framework to understand the nature of the conflict and assist in accommodating it.

See Dworkin, Law's Empire, supra note 245, at 225-27 (describing a process of legal reasoning grounded in an effort to form “the best constructive interpretation of the community's legal practice”). See generally Rawls, supra note 126, at 17-19 (describing the process of seeking a reflective equilibrium).

This is perfectly possible in arbitration. See supra notes 235-42 and accompanying text.

See Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 364, 366 (1978) (noting that “[a]djudication is ... a device which gives formal and institutional expression to the influence of reasoned argument in human affairs” and that “the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation ... that of presenting proofs and reasoned arguments for a decision in his favor”); see also Bone, Lon Fuller's Theory of Adjudication, supra note 248, at 1308 (“According to Fuller, adjudication simply could not function properly without party participation by proof and reasoned argument in an adversarial format.”).

See Bone, Lon Fuller's Theory of Adjudication, supra note 248, at 1303-06 (describing how Fuller modeled legal reasoning as a type of moral reasoning employing an approach akin to reflective equilibrium).

See generally id. (assessing Fuller's views on institutions, the law, and adjudication). Fuller was a pragmatist with a view of society as a field of complicated interaction. He believed that individual decisions produced complex indirect effects and triggered interactions
that altered social practice and legal rules dynamically. Id. at 1286-87. Thus, the only way to assure good outcomes in the long run was to assure good process. Id. at 1287.

257 Id. at 1306. Fuller believed that individual participation through lawyers in an adversarial setting allowed the judge to be objectively detached and sympathetically engaged with the case at the same time. Id. at 1307. He also believed that detachment and engagement were essential to the form of moral reasoning that adjudication required. Id. at 1309. The idea was that party presentation drew the judge into a sympathetic engagement with the facts (mediated by lawyers who could frame the facts in helpful legal terms), while adversarial interaction kept the judge at a distance and prevented too close an alignment with one side. Id. at 1308-09. The process of engaging the facts of the case deeply while reflecting from a distance about the implications at the level of general principle--and moving back and forth between fact and principle--was what Fuller believed judges should do. Id. at 1309-10.

258 For example, Fuller had problems with tripartite arbitration panels, at least when arbitrators acted in an adjudicative-type capacity. See Fuller, supra note 254, at 397 (“Where there is from the beginning no real hope of a unanimous decision, this arrangement [tripartite arbitration panels] comes close to being little more than a contractual legitimation of the practice of holding posthearing conferences....”).

259 For Fuller's views on natural-ordering principles, see Bone, Lon Fuller's Theory of Adjudication, supra note 248, at 1288-92.

260 Id. at 1303.

261 This special category also includes rules regarding judicial impartiality.

262 For example, most people would condemn a jury that simply flipped a coin. See supra notes 206-07 and accompanying text.

263 See generally George A. Akerlof, The Market For “Lemons”: Quality Uncertainty and the Market Mechanism, 84 Q.J. Econ. 488 (1970) (describing the lemons model, which is based on informational asymmetry). For example, suppose the market for used cars includes sellers who market high-quality cars and sellers who market low-quality cars. If consumers are unable to verify quality before purchase, they will pay only the average of the value over high- and low-quality cars, which will not be enough for the sellers of high-quality cars. As a result, only low-quality cars will remain. Id. at 489-90.

264 This assumes that judges, when they create precedents, do not routinely describe the procedures the parties have chosen.

265 See generally Ernest Young, Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation, 72 N.C. L. Rev. 619, 648-50 (1994) (describing Edmund Burke's philosophy, which counseled reliance on wisdom inherent in existing institutions because “[e]ven the most intelligent individual is limited not only by his own understanding but also by the relative deficiency of his own experience”).

266 Moreover, it is excessively paternalistic to assume that the parties cannot figure out that certain procedures might serve their interests better than others. For example, there are some fairly predictable advantages associated with having a panel of experts decide a case rather than a nonexpert judge. To be sure, there are also likely to be unanticipated consequences, but it is not clear why sophisticated parties should not be allowed to take the risk and strike the balance for themselves.

267 See supra note 210 and accompanying text.

268 There are two different ways in which adjudication might be a symbol. Adjudication might be thought to be an intrinsic symbol of principled reason in government, entirely apart from how people understand its meaning. This makes little sense, however. If a symbol's value is the message it symbolizes, then it must matter how people perceive its meaning. The other way that adjudication might be a symbol is that people perceive it as conveying a symbolic message about the importance of principled reason. This is the way I treat it in the discussion in the text.

269 See supra note 199.

270 The same effect can be created in a slightly different way. When judges expect that parties will sometimes choose procedures that undermine the reasoning process, they are not likely to invest as much in developing the requisite reasoning skills (assuming that it...
is costly for them to do so), and as a result, the quality of all judicial decision making suffers. In other words, party rulemaking that tinkers with the reasoning process generates externalities that can adversely affect the reasoning process in all other cases. The way to avoid this result is to make the core procedures closely linked to optimal reasoning mandatory and ban party rulemaking that tinkers with them. I thank my colleague Abe Wickelgren for suggesting this alternative formulation.

90 TXLR 1329