

2018

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## Recommended Citation

Ronen Avraham, William H. J. Hubbard & Itay Lipschits, "Procedural Flexibility in Three Dimensions," Coase-Sandor Working Paper Series in Law and Economics, No. 843 (2018).

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## Procedural Flexibility in Three Dimensions

Ronen Avraham, William H.J. Hubbard, and Itay E. Lipschits<sup>†</sup>

### I. INTRODUCTION

Parties in civil litigation have at their disposal countless procedural entitlements. In federal court, for example, parties are entitled to discovery, including ten depositions,<sup>1</sup> twenty-five interrogatories,<sup>2</sup> and an indefinite number of requests for the production of documents.<sup>3</sup> In cases “at common law,” parties have a right to trial by jury.<sup>4</sup> Under the “final judgment rule,” parties have a right to one appeal at the end of a case—but not before.<sup>5</sup> And on and on.

But what happens when a party doesn’t want its entitlement, or feels that its entitlement is not enough? This raises two questions. First is the question of *judicial discretion*: can the judge modify the procedural rules and entitlements? This is an important question, but it is not our subject in this paper. The short answer to this question, though, is “yes.”<sup>6</sup> Second is the question of what we label *procedural flexibility*: Can parties modify procedural rules and entitlements on their own?

The answer to this question varies widely across procedures. Parties can simply agree to increase (or decrease) the number depositions or interrogatories, or document requests.<sup>7</sup> Yet parties cannot agree to overlook the “final judgment rule.”<sup>8</sup> And there are intermediate cases of procedural

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<sup>1</sup> FRCP 30.

<sup>2</sup> FRCP 33.

<sup>3</sup> FRCP 34.

<sup>4</sup> U.S. Const., Amend. VII.

<sup>5</sup> See 28 U.S.C. §§ 1291–1292.

<sup>6</sup> There are exceptions, of course, most of which are well understood, such as the entitlement to litigate in federal court only if the requirements of federal subject matter jurisdiction are satisfied.

<sup>7</sup> FRCP 30, 33, 34.

<sup>8</sup> A colorful illustration of this in a recent, high-profile case is *In re Microsoft Corp.*, No. 1:13 Civ. 02814 (S.D. N.Y. filed Dec. 4, 2013). After the district court refused to accept an agreement between the parties that an earlier order of the court was a final judgment, Microsoft filed a motion *asking the court to hold it in contempt* so that it

flexibility; parties can agree not to have a jury when they are entitled to one, but they can't grant themselves a jury trial merely by agreement.<sup>9</sup> Does this mish-mash of approaches to procedural flexibility make sense?

This question has attracted the attention of an active literature that has begun to explore procedural flexibility. This literature, which we discuss in greater detail in Part II, frames the question as identifying the limits of private contracts that modify procedure. In other words, when is an agreement between the parties to modify the procedure in their case a permissible use of contracting and when do we forbid private exchange? Two major concepts come out of this literature. First, there is a "core" of procedure that cannot be altered by the parties. These are the aspects of procedure that are central to the functioning or legitimacy of the courts, and examples that scholars have given include rules governing the recusal of judges, judicial control over oral arguments and decision-making, and the right to appeal. Second, contracts between parties should be invalidated in other circumstances, such as when the contract harms third parties or contains unacceptably one-sided terms.

This analysis does well in explaining doctrine, but we argue that it has less success normatively justifying existing patterns, and it leaves important questions unanswered. For example, if our concern is the legitimacy of judicial decision-making, why should it be that parties have control over how much evidence the judge sees—which could have a profound effect on the quality of a watershed decision—but not over whether the judge's decision is written or oral—which in most cases would have zero effect on the quality or legitimacy of the court's decision? For another example, if agreement between the parties in a case is an impermissible way to modify procedure, why is the only alternative to have the court decide? Instead of taking away private contracting, couldn't the remedy be to *expand* private exchange beyond contracts between the parties to the case?

These questions arise because current law and scholarship treat procedural flexibility as a policy choice in one-dimensional space. In other words, there is only type of question: *Which procedures* can parties agree to change? This dimension, however, is just one axis in a larger conceptual space.

Viewing procedure through a wider lens reveals three dimensions of procedural flexibility, which we label "Which procedures?," "Which cases?," and "Which type of flexibility?" We show that all three dimensions of procedural flexibility can be utilized to design novel reforms that can reduce litigation cost, increase tailoring of procedure to parties' needs, reduce court congestion, and improve distributional equity.

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would have a final judgment (the contempt order) that it could then appeal. See *In re Microsoft Corp.*, 2014 BL 242947 (S.D. N.Y. Sept. 8, 2014).

<sup>9</sup> FRCP 39.

In this paper, we examine each of these three dimensions of procedural flexibility. Our approach is primarily normative, in that we set out a framework for assessing how, when, and which procedures *can* and *should* be subject to modification by parties. We show that considering all three dimensions of procedural flexibility may require us to revise current views about which procedures belong in the “core” and may open up new avenues for reform.

In Part III, we ask, “Which procedures?” The first dimension of procedural flexibility is the spectrum of procedural rights potentially subject to party control. Or, viewed from the opposite perspective, Which are the “core” procedures that parties cannot alter? This question has been the focus of a robust literature, whose insights we largely embrace. We show, however, that once one recognizes the other dimensions of procedural flexibility, the irreducible core of procedure is in most cases smaller than one might otherwise presume—but for a small subset cases, may be much broader.

In Part IV, we ask, “Which cases?” This second dimension is the range of cases in which procedural flexibility may be available (or more available than in other cases). In other words: Which are the “important,” non-routine cases over which judges must maintain more control of procedure, to protect the goals—to be discussed later—of the civil procedure apparatus? This question has largely been overlooked in the existing literature. Perhaps counter to intuition, we show that the set of cases over which judges should limit procedural flexibility is likely to be quite small.

In Part V, we ask, “Which type of flexibility?” This third dimension provides a menu of options for allowing parties to exercise their control over procedure. This requires us to identify potential means by which parties could tailor procedural rules. So far, the literature has focused on one possibility—contracts between the parties in a given case that alter procedure in that case, usually after the dispute has emerged. To be sure, this type of party control over procedure is of primary practical relevance today. But we argue that our imagination should not be limited by the status quo.

And in our view, the status quo takes an excessively narrow approach to procedural flexibility—so narrow that this third dimension has gone largely unnoticed. To be sure, the current approach to civil procedure permits considerable flexibility. As we noted at the outset, many of the Federal Rules of Civil Procedure (“Federal Rules” or “Rules”) are explicitly default rules,<sup>10</sup> and the Federal Rules imbue the court with tremendous discretion over procedure in the individual case. But this procedural flexibility is cabined in a way that is so widely accepted, so taken for granted, that a more fundamental

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<sup>10</sup> See, e.g., FRCP 30 (setting default number of depositions per case); FRCP 33 (setting default number of interrogatories).

rigidity or constraint is invisible to most practitioners: Any bargaining by the parties to modify the procedures in their case must take place *within the specific case*, and again, usually after the dispute has already emerged.

For example, the Federal Rules allow each party to take ten depositions without having to request court approval, but parties can agree to more.<sup>11</sup> A plaintiff can agree to take three extra depositions by negotiating with the defendant *in that case*, and the agreement might even be part of an explicit contractual exchange where the defendant can take three more depositions as well. The parties can freely reach this agreement without court involvement, notwithstanding the third parties (the deponents) burdened by the obligation to participate in the dispute, and the potentially increased length of the trial, and the congestions it might create for other litigants.

Parties' agreements are limited in various ways. First, some of them require the court's consent. This will be evaluated when we discuss the first two dimensions. Second, the agreements are limited to barter exchanges only. Parties are usually not allowed to trade piecemeal their civil pro rights for cash, although they are allowed to sell all of them for cash, a sale called settlement. Third, parties are limited to trading with each other, subjecting themselves to problems stemming from a bilateral monopoly. In other words, a plaintiff can't get three extra depositions by paying a defendant *in a different case* to take three fewer depositions. This is so, despite the fact that this exchange would be no less the product of thoughtful, arms-length bargaining. And it would have none of the negative external effects generated by the exchange permitted by the Rules: the net direct burden on courts and third parties is exactly zero.

But why not allow this? In this paper, we consider a bigger, bolder approach to procedural flexibility: not merely "contract" between parties but wholesale "markets" in procedure. Instead of allowing barter trade only between parties stuck in bilateral monopolies we explore more general market-based alternatives.

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

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<sup>11</sup> FRCP 30.

Cap-and-trade is behind one of the great success stories of environmental regulation, the dramatic reduction of acid-rain-causing sulfur dioxide and nitrogen oxides in North America over a twelve-year period (three years ahead of schedule) at a fraction of the projected cost to industry.<sup>12</sup>

But is procedure comparable to pollution? As odd as it sounds, there is a sense in which it is. Procedure is rife with externalities. Litigation generates external benefits, insofar as precedent and legal certainty are public goods. These benefits of litigation are a positive externality, because parties to litigation bear many of the costs of creating precedent (factual investigation, legal research and argument) but capture only their proportional share of the benefits to the system as a whole.

Litigation also generates negative externalities, insofar as litigants' private cost-benefit calculations do not fully take into account the effect of their litigation activity on their opponents, third parties, or the judicial system.<sup>13</sup> In fact, there are three kinds of negative externalities here: parties impose costs on each other (e.g., discovery or motion practice), parties impose burdens on specific third-parties (e.g., subpoenas directed to non-parties), and parties impose burdens on the system (e.g., hearings that consume scarce court time).

The civil justice system has several features that address the positive externalities generated by litigation. Because private externalities involve private costs but public benefits, providers of public goods need to be subsidized. For litigants, this comes in the form of policies incentivizing lawyers to bring cases—subsidized court fees, enforceability of contingency fee contracts, one-way fee shifting in favor of plaintiffs, and court-awarded fees to class counsel in class action settlements. However, these measures are often crude and are not always sensitive enough to whether the cases are worthy of incentivizing.

But our courts don't have a comparable record of dealing with the negative externalities. A series of amendments to the Federal Rules over a period of decades has exhorted courts to limit the scope of discovery and offered a variety of sticks and carrots to litigants—alternately threatening sanctions for unnecessary litigation activity and pleading with litigants to cooperate with each other.<sup>14</sup> To date, it is not clear that any of these reforms have had an effect.<sup>15</sup>

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<sup>12</sup> [https://en.wikipedia.org/wiki/Acid\\_Rain\\_Program](https://en.wikipedia.org/wiki/Acid_Rain_Program).

<sup>13</sup> Of course, lawyers do take into account the costs their choices (such as broad discovery requests) impose on their opponents. But their private incentives are backwards—increasing opponent's costs yields strategic benefit but this benefit is, in itself, socially wasteful.

<sup>14</sup> See [1983 amendments to Rule 11; 2015 amendments to Rules 1 and 26].

<sup>15</sup> Or at least not a positive effect. The 1983 amendments to Rule 11 are widely regarded as a disaster, and were abrogated in 1993. [cite.]

The fundamental problem with policies like these, which rely on judicial discretion or party agreement, is that the externalities generated by litigation activity are not priced into these decisions. No one rewards the parties who mutually agree to ease the burden on the system by forgoing additional briefing or issuing fewer third-party subpoenas. For parties who wish to *increase* these burdens on the system, there is often someone there to punish the parties or prevent them from doing so: the judge. But ironically, the court's obligation to prevent parties from burdening the system is *itself* a burden that parties impose on the court system when they seek its consent to modify procedures. Further, judges themselves face a collective action problem: a judge's vigilance benefits that judge only to the extent that she shares in the benefit to the system as a whole, but each judge bears the full cost of her vigilance.

It should be no surprise, therefore, that congestion of the courts remains an eternal lament of judges and commentators. Perhaps a better analogy for the courts—as they operate today—is not the environment but roads: We build roads (at public expense) because we want people to drive on them—but each car on the road increases the traffic congestion that all drivers must suffer. Likewise, we provide courts (at public expense) because we want parties to use them—but each case on the docket increases the congestion that all litigants experience. The analogy to congestions has its limits as we usually regulate roads and courts congestions via quotas and fees, and not through secondary markets as we do with the environment. But it is exactly the option of secondary markets which we want to highlight here.

Thus, we consider the potential breadth of the third dimension of procedural flexibility by entertaining a radical proposal for procedural flexibility. Rather than Federal Rules setting various defaults for discovery—rather than forcing judges to rule on all manner of requests for extensions and exceptions to the Rules—rather than relying on parties to a case agreeing among themselves to modify procedure—we imagine a regime for allocating procedural entitlements (potentially everything from page limits for briefs to the right to file an appeal) through market processes. Initial endowments could be distributed either through cap-and-trade (think greenhouse emission credits) or by auction (think broadband spectrum). Either way, those endowments would then be freely tradeable on a secondary market. A plaintiff in an antitrust case could purchase higher page limits for briefing from a defendant in a tort action. A defendant seeking to conduct additional depositions could buy the rights to additional depositions another defendant—or maybe from a procedure broker, a non-party who buys from parties who no longer need their procedural endowment and then finds interested buyers. A party seeking to make a second appeal might even be able to purchase that right from a party willing to forgo any appeal.

The proposal we describe is mostly implausible, and in any event well outside the realm of existing law. Our objective however is more to broaden the imagination of civil procedure than to prescribe a specific agenda for reform.

But as we will show, the system we propose may be as normatively attractive as it is jarring to our lawyerly sensibilities. Our proposal would improve the *allocative efficiency* of the legal system by assigning costly and elaborate procedural rights only to those litigants who most value them. But perhaps more surprisingly, our proposal would also improve the *distributional equity* of the legal system. Consider the following: In a cap-and-trade system, litigants with limited resources—who otherwise could not afford to exploit the full scope of procedural rights anyway—could raise money by selling parts of their allocated set of rights. In an auction system, the revenue from the sale of procedural rights could be used to increase access to the courts through an across-the-board reduction in filing fees or through the financing of expanded legal aid and pro bono legal services. In short, a market-based approach to procedural flexibility will mean that sophisticated, well-resourced parties whose cases impose the greatest costs on the system will have to foot the bill for these costs, while litigants with the fewest resources will see their cost of litigation go down. And if nothing else, our proposal illustrates how seeing procedural flexibility in three dimensions can radically expand the domain of possibilities for procedural innovation.

## II. BACKGROUND

That procedural rights (as well as some rules of evidence) can or should be modified by parties to a lawsuit have recently been observed by scholars both



in the criminal<sup>16</sup> and the civil<sup>17</sup> contexts. Practitioners however have been doing it all along,<sup>18</sup> both before litigation begins and after, and litigant control over procedure has been on the rise as traditional hostility to party control over procedure has disappeared from doctrine.<sup>19</sup> For example, parties may agree on the state in which they will litigate their dispute,<sup>20</sup> on the law which would govern their dispute<sup>21</sup>, even when that state law otherwise could not.<sup>22</sup> They may agree to waive various evidence objections such as the right to object on

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<sup>16</sup> For the criminal context see John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181 (2105) (proposing to abandon the all or nothing choice between a guilty pleas and full blown jury trial). Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 J CRIM. L. & CRIMINOLOGY 943, 944–45 & n 6 (2007) (proposing a negotiable standard of proof and flagging, but not developing, the possibility of additional unbundled bargains); Gregory M. Gilchrist, *Counsel’s Role in Bargaining for Trials*, 99 Iowa L Rev 1979, 1982, 1988–92 (2014) (identifying fact stipulations and bench trials as precedents for unbundled bargains and suggesting three bargains defendants might propose); Gregory M. Gilchrist, *Trial Bargaining* \*1–24, 60–67 (University of Toledo College of Law Working Paper, Oct 2014), archived at <http://perma.cc/Q7SX-HUCA> (similar); Samuel R. Gross, *Pretrial Incentives, Post-conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 NY L Sch L Rev 1009, 1011 (2012) (proposing a mechanism by which defendants “waive major procedural rights at trial, in return for important procedural advantages on post-conviction review”). See also Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L Rev 113, 118–19, 124 (1999) (identifying the bargaining aspect of some stipulations and waivers and suggesting that “the market for some rights may yet emerge”); Saul Levmore and Ariel Porat, *Bargaining with Double Jeopardy*, 40 J Legal Stud 273, 282–92 (2011) (suggesting the potential utility of permitting defendants to waive double jeopardy protection against retrial after acquittal).

<sup>17</sup> In the civil context see Robert G. Bone, *Party Rulemaking: Making Procedural Rules through Party Choice*, 90 TEX. L. REV. 1329, (2012); Jaime Dodge, *The limits of Private Ordering*, 97 VIRGINIA L. REV. 723 (2011); Michael Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEORGE WASHINGTON L. REV. (2007); Scott Dodson, *Party Subordination in Federal Litigation*, 83(1) GEORGE WASHINGTON L. REV. (2014) 1; David Hoffman, *Whither Bespoke Procedure*, U. ILL. L. REV. 389 (2014); Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475, 1475 (2013); Gary Lawson, *Stipulating the Law*, 109 Mich. L. Rev. 1191, 1203 (2011); Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514, 516 (2009).

<sup>18</sup> The earliest example of negotiation about the rules of the game—in that case the standard of proof—we could think of is when Abraham argued with God about the standard required for condemning the cities of Sodom and Gomorrah to destruction. See Genesis 18:16–33. It is not clear that Abraham counts as a practitioner, however!

<sup>19</sup> Robin Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, BOSTON U. L. REV. (forthcoming 2018).

<sup>20</sup> Moffitt supra note \_\_, at 28, Hoffman, at 397.

<sup>21</sup> Moffitt, page 28-29, Hoffman, page 427.

<sup>22</sup> Forum selection clauses are commonly viewed as virtually choice of law clauses, since the ability to choose a forum often converges with choosing the substantive law that would apply.

hearsay grounds in return for their opponent doing the same,<sup>23</sup> or in return for some other favor.<sup>24</sup> They may waive claims about statute of limitations,<sup>25</sup> craft their own jury instructions,<sup>26</sup> or even totally waive their right to a jury trial.<sup>27</sup> In fact, parties may completely waive their right for a day in court by agreeing, even in advance, to arbitrate their dispute if it ever emerges.<sup>28</sup> They may agree to limit the number of witnesses or the timeline, form and content of the discovery.<sup>29</sup> Parties may even agree to forego their appeal rights, not only as a part of a settlement agreement, but also in advance.<sup>30</sup> And so on. Parties can agree on waiving or trading many other rights granted to them by the legal system.

Of course, the power of the parties to alter by agreement the procedure governing their dispute is not unlimited. Parties cannot agree that the judge will decide the case by flipping coins,<sup>31</sup> stipulate that the judge will not give reasons for her decision,<sup>32</sup> or change the standards by which the judge will review another adjudicator's decision.<sup>33</sup> This poses the question of which procedural rights can be altered and which cannot. The literature has framed this question in the following way: Which procedures are sufficiently central to

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<sup>23</sup> For a court (though in a criminal case) which discusses parties ability to waive evidentiary rules, including the hearsay rule, See *United States v. Mezzanatto*, 513 U.S. 196, 202 (1995).

<sup>24</sup> Paulson, page 518. Judges, especially in federal court, often strongly “encourage” parties to agree on resolving evidentiary disputes and discourage forcing the other party to jump through the hoops sometimes required to get evidence admitted, when the only purpose of doing so is to force the other party to go to the time and trouble of doing so. Courts however might tend to relax the rules of evidence in bench trials, but will tend to maintain the default rules of evidence in jury trials, because of the concern that the jurors might go astray (Thornburg, page 203).

<sup>25</sup> Parties are free to shorten an applicable statute by agreement, as long as the shorter period is reasonable, though many judges are uncomfortable with changing statute of limitations they perceive as fair (Paulson, page 498). However, some courts prohibit the enforcement of contractual statutes of limitations, *Id* at 499. Parties are less free though to lengthen a statute of limitations, since lengthening statute of limitations increases the risk of stale claims (Bone, page 1347, Paulson, page 498).

<sup>26</sup> Moffitt, *supra* note 3 at pp 35-36.

<sup>27</sup> Moffitt, *supra* note 3 at pp 29-30. Bone *supra* note 3 at pp 1348. Colter L. Paulson, *Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure*, page 488, 490. Elizabeth Thornburg, *Designer Trials*, page 185. Davis and Hershkoff, page 14.

<sup>28</sup> Thornburg, page 193.

<sup>29</sup> Moffitt, page 34. See also Rule 29, which requires court's approval when parties agree to extend the time for any form of discovery. This probably reflects an attempt to control the externality on the court.

<sup>30</sup> Bone, page 1351.

<sup>31</sup> Bone, *supra* note \_\_, at 1384–85.

<sup>32</sup> Moffitt, *supra* note \_\_, at 38–40.

<sup>33</sup> *Hall Street Assocs. LLC v. Mattel, Inc.*, 552 U.S. 576 (2008) (holding that parties' agreement cannot change the district court's standard of review of an arbitral award under the Federal Arbitration Act).

courts that they form a “core” set of procedures that cannot be altered by contract between the parties?

This literature traces its roots back to the work of Lon Fuller and the Legal Process School,<sup>34</sup> who attempted to distill the essential characteristics of adjudication. Lon Fuller, for example, described adjudication as “a device which gives formal and institutional expression to the influence of reasoned argument in human affairs.”<sup>35</sup> The concept of the core has been most fully articulated in recent work by Robert Bone, which focuses on defining the core of procedural rights.<sup>36</sup> Bone focuses on *legitimacy*, as distinct from concerns about economic efficiency, party autonomy, or party equality, as the key explanatory factor—both descriptively and normatively—for preserving a core of procedural rights that cannot be altered by party agreement.<sup>37</sup> These rights are the “core” of procedure, in the sense that they are essential to adjudication.<sup>38</sup>

Several other scholars have emphasized legitimacy as well. They note that the public perception of the courts is likely to be shaped by the perception that court decision-making is fair because it employs broadly applicable, consistently applied procedures that can benefit all parties.<sup>39</sup> In contrast, Bone focuses on normative legitimacy rather than perceived legitimacy; he makes a normative argument about what elements *should* comprise the core of adjudication because they preserve the legitimate operation of the

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<sup>34</sup> See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Henry M. Hart, Jr. & Albert M. Sacks, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (Tentative edition, 1958); William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 694 (1986-1987); Robert G. Bone, *Lon Fuller’s Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 25 B.U. L. REV. 1273 (1995); Robert G. Bone, *Agreeing to Fair Process: the Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 509–510 (2003).

<sup>35</sup> Fuller, *supra* note 34, at 366.

<sup>36</sup> Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329 (2012). For a response to Bone that emphasizes that many seemingly problematic provisions may be useful to promoting settlement while rarely implicating legitimacy concerns, see Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475, 1490 (2013). For closely related arguments in the criminal procedure context, see John Rappaport, *Unbundling Criminal Trial Rights*, 182 U. CHI. L. REV. 181, 194–95 (2015), and Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 J. CRIM. L. AND CRIMINOLOGY 943 (2007).

<sup>37</sup> *Id.* at 1378, 1384.

<sup>38</sup> *Id.* at 1384–85.

<sup>39</sup> Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 547–48 (2011); Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 2, 42–43 (2007); Elizabeth Thornburg, *Designer Trials*, J. DISPUTE RESOLUTION 209–10 (2006).

institution.<sup>40</sup> He concludes that the core is defined in terms of courts' commitment to reasoning from general principles to decide cases based on their particular facts.<sup>41</sup> This leads him to exclude from the core aspects of procedure such as pleading rules, joinder rules, discovery rules, summary judgment rules, and evidence rules. But he includes in the core rules defining the decision-making body, ensuring judicial impartiality, guiding the reasoning process for the decision maker, and creating appeal rights. More generally, he distinguishes between rules that regulate the conduct of parties and those that regulate the decision-making process of the judge.<sup>42</sup>

To illustrate something clearly within the core, Bone uses the example of deciding a case by flipping a coin. We all share the strong intuition that this would be wrong, even if the parties genuinely consent to it and its attendant risks, and even though it surely would be a cost-saving method of dispute resolution and (let us suppose) the resolution of the particular case would have no negative effects on third parties.<sup>43</sup>

Bone then addresses the question of why we ought to prevent the parties from agreeing to different "core" procedures, even if no third-parties are harmed. His worry here is the effect on the norms that define judging and ensure that judges preserve certain approaches to judicial decision-making. Chipping away at a universal norm of reasoned decision-making and judicial reputations built upon this skill, Bone cautions, would undermine the internalization of these norms among judges.<sup>44</sup>

Closely related to Fuller and Bone is the work of Judith Resnik and Michael Moffitt. Resnik sees the essential feature of judging as engaging in public reasoning about the application of law to facts.<sup>45</sup> Like Bone, Resnik sees the legitimacy of the courts as dependent on judges fulfilling this role.<sup>46</sup> Moffitt, too, couches the public interest in litigation in terms of two core functions of courts—resolving disputes and producing rules and precedents. Moffitt rules out party agreements that would interfere with these functions by, for example, preventing the resolution of a dispute or eliminating a reasoned explanation from a judgment.<sup>47</sup>

Of course, concerns about legitimacy are not the only reasons why courts would, or should, reject party agreements to modify procedure. Scholars have

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<sup>40</sup> *Id.* at 1378–79.

<sup>41</sup> *Id.* at 1385–88.

<sup>42</sup> *Id.* at 1393–94.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1396–97.

<sup>45</sup> Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 623–24 (2005).

<sup>46</sup> *Id.* at 667. See also Colter L. Paulson, *Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure*, 45 ARIZ. ST. L.J. 471, 475–76, 527–530 (2013).

<sup>47</sup> Moffitt, *supra* note \_\_, at 38–40.

noted that parties cannot agree to a procedure that impairs the rights of third parties or unjustifiably increases the burdens on courts, which would increase court congestion and taxpayer expense.<sup>48</sup> Our analysis below pays special attention to these concerns, as court congestion and the public-good quality of law are perennial concerns for policymakers, and policy tools developed by economists to address both positive and negative externalities have been deployed with great effectiveness in other settings,<sup>49</sup> and we argue that related approaches can be applied here.

Another criterion scholars have discussed is that contracts cannot block the effective vindication of federal rights.<sup>50</sup> Scholars have also cautioned against judicial enforcement of one-sided agreements—a civil procedure species of unconscionability.<sup>51</sup> Finally, we note that as a descriptive matter, some statutes and doctrines simply preclude the enforcement of party agreements, such as in the context of subject matter jurisdiction.<sup>52</sup>

In the next section we expand the horizon by introducing our three-dimensional theoretical framework.

### III. WHICH PROCEDURES?

The first dimension we consider is which procedures can be traded and which cannot be altered by party choice. As we described in Part II, this dimension of procedural flexibility has been extensively studied, and our analysis draws heavily upon existing insights. Rather than belabor points of agreement, we will largely take current thinking on the subject as given, delving into greater detail only when necessary to show points of divergence. We will show that recognizing the other two dimensions of procedural flexibility (“Which cases?” and “Which type of flexibility?”) reveals that the set of procedures that ought to be insulated from party control may be in some ways broader, and in other ways narrower, than previously understood.

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<sup>48</sup> Bone, *supra* note \_\_, at 1382–83; Moffitt, *supra* note \_\_, at 40–45.

<sup>49</sup> For discussion of congestion in the traffic context, see Jonathan D. Hall, *Pareto Improvements from Lexus Lanes: The Effects of Pricing a Portion of the Lanes on Congested Highways*, J. PUB. ECON. (forthcoming 2018). For discussion of policy instruments for environmental externalities, see Robert Stavins, *Experience with market-based environmental policy instruments*, in HANDBOOK OF ENVIRONMENTAL ECONOMICS, v. 1, (edited by KG Maler and JR Vincent 2003).

<sup>50</sup> Bone, *supra* note \_\_, at 1382–83; Jaime L. Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 724, 731 (2011). This concern has become acute in the wake of *American Express v. Italian Colors*, 570 U.S. 228 (2013), a case that directly pitted party control over procedure—albeit in arbitration—against the effective vindication of rights under federal antitrust law.

<sup>51</sup> Bone, *supra* note \_\_, at 1382–83; Paulson, *supra* note \_\_, at 475–76, 527–530.

<sup>52</sup> Moffitt, *supra* note \_\_, at 37.

We begin our analysis in this Part with the set of procedures that constitute the irreducible “core.” In this area, we essentially adopt the views of earlier work. We then turn to cases where existing work argued that the validity of contractual modifications to procedure would depend on factors such as the fairness of the contract terms or negative effects on third parties. For these situations, we show that these concerns are largely a product of framing the question as a choice between (a) allowing parties to control procedure through agreements between them and (b) forbidding party control of procedure. Recognizing that we can allow party control of procedure without relying on contracts between the parties, however, opens up new possibilities for permitting party control over procedure, without the dangers associated with unfair contracts or negative effects on third parties.

#### A. Protecting Legitimacy and Substantive Law: The “Core”

Although different scholars have offered different articulations of the core functions of courts, we see broad agreement over its general contours. Adjudication by a judge lends finality to the resolution of a dispute;<sup>53</sup> a judge’s decision must be reached through a process of reasoned application of law to facts;<sup>54</sup> and the judge’s decision provides guidance about the law to the public and future judges.<sup>55</sup> We do not purport to dispute these principles here.

Indeed, these principles allow one to easily sort most procedures into or out of the “core.” How the judge renders opinions, the governing substantive law, and the availability or unavailability of further review is largely beyond the control of the parties. Other types of procedures, however, are open to adjustment.

This approach to defining the core seems to work quite well in both easy and hard cases involving parties’ procedural contracts. As we’ve noted, flipping coins presents an easy case of something parties cannot make a judge do. It easily fits within both the need for reasoning and the value of precedent as aspects of the core. This approach to defining the core also explains hard cases like *Hall Street Assocs. LLC v. Mattel, Inc.*,<sup>56</sup> where two sophisticated businesses entered into a carefully negotiated agreement that expanded the power of the district court to review the award of the arbitrator to whom they were referring their dispute. Their agreement did not diminish the power of the court; indeed, it replaced a standard of review under the Federal Arbitration Act that would require the court to confirm an award based on

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<sup>53</sup> Moffitt, *supra* note \_\_.

<sup>54</sup> Bone, *supra* note \_\_.

<sup>55</sup> Moffitt, *supra* note \_\_.

<sup>56</sup> 552 U.S. 576 (2008) (holding that parties’ agreement cannot change the district court’s standard of review of an arbitral award under the Federal Arbitration Act).

erroneous legal standards<sup>57</sup> with a *de novo* review of the arbitrator's legal interpretations.<sup>58</sup> Nonetheless, the Supreme Court held that this was not within the parties' power.<sup>59</sup> The Court left open the possibility, however, that such alterations to procedure might be within the District Court's power to manage litigation under the Federal Rules of Civil Procedure.<sup>60</sup> This, too, is consistent with the concept of the "core," as it dictates only what parties may not alter, not what is unalterable altogether.

Although the principles we have drawn from the existing literature work well, we note three points of tension, each of which bears on our later discussion of the other dimensions of procedural flexibility.

*First*, the distinction between reasoned decision-making and standards of review, on the one hand, and party conduct and fact gathering, on the other, does not hold up consistently in practice, and might not consistently align with our normative impulses, either. As noted above, parties can't change the standard of review in a case. But they can stipulate to facts, agree to limit discovery, agree not to cross-examine witnesses, or pursue other ways to circumscribe the court's ability to investigate the facts of a case. This is largely consistent with the idea that the court's legal reasoning is at the core of procedure, while fact-gathering by the parties does not implicate the court's legitimacy. This distinction might make sense insofar as the facts of a case may matter only to the parties before the court, while the law announced by the court has public value.

Still, we might think that the legitimacy of the court, and perhaps the public value of the court's opinions, is undermined if it rests its decision upon merely upon an unproven stipulation of facts by the parties.<sup>61</sup> Thus, we should hesitate to accept the sharp distinction that earlier work seeks to make between the process of legal reasoning by the court (core) and the process by which the court develops the factual premises for its reasoning (non-core).

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<sup>57</sup> See FAA, 9 U.S.C. § 10 (permitting vacatur of arbitral awards only for arbitrator partiality, corruption, or "other misbehavior" but not for errors of law).

<sup>58</sup> 552 U.S. at 579.

<sup>59</sup> *Id.* at 590.

<sup>60</sup> *Id.* at 591.

<sup>61</sup> To be sure, parties have an ethical duty of candor to the court, See, e.g., ABA Model Rule of Professional Conduct 3.3. Our claim is not that parties stipulate to falsehoods, but that the quality of the factual premises for a judicial decision may be low, because the parties agreed that careful investigation and presentation of facts was not in their mutual interest. Of course, it is also possible that a stipulation may be known to be factual false. For an infamous example of what *may* have been a collusive stipulation used to generate a court decision with potentially binding effect on non-participants in the lawsuit, see *Hansberry v. Lee*, 311 U.S. 32 (1940).

Indeed, the distinction between what counts as a factual claim and what counts as a legal conclusion is a slippery one.<sup>62</sup>

By focusing only on the first dimension of procedural flexibility—the “Which procedures?” question—existing scholarship has had to take an all-or-nothing approach to the core. A procedure is either always in the core or always out of it. Below, in Part IV, we show how consideration of another dimension of procedural flexibility—the “Which cases?” question—can allow for an approach that better protects the interest in judicial legitimacy, even with respect to fact-finding by the court, but also preserves *nearly* complete party control over discovery and the presentation of evidence. The key, we argue, is to recognize that only in very few cases denying party control over factual issues is important for the core functions of the court.

*Second*, notwithstanding the examples we’ve discussed so far, it is not obvious as a descriptive matter that the parties can’t control the legal standards applied by the court. For the most part, courts vigorously enforce choice-of-law clauses in contracts (albeit, only to the extent that the claims are contractual in nature<sup>63</sup>) as well as forum-selection agreements.<sup>64</sup> Although dictating the forum does not formally dictate the governing law, as a practical matter is usually does.<sup>65</sup> Why isn’t choice of law, or even choice of forum, within the core? Indeed, although such a notion seems exotic today, historically this was not always the case.<sup>66</sup> On the one hand, this might not affect the legitimacy of the process of rational deliberation, because the court is in any event applying existing law, rather than legal rules invented by the parties. On the other hand, the parties are changing the standards of review and rules of decision that apply to their disputes, and they are doing so by contract and without input from judges. Further, when law the court is applying is the law of another jurisdiction, this imposes greater decision costs on the court even as it lowers the precedential value of the court’s decision. As a normative matter, at least, this degree of party control over the law governing a dispute may be worth revisiting.<sup>67</sup>

*Third*, a key rationale for defining a core of procedure is that the reasoned decision-making process of courts should not be altered, because a uniform approach to judicial decision-making inculcates norms essential to the proper functioning of the courts.<sup>68</sup> It is certainly true that judges (and therefore the system as a whole) benefit from habituation into certain modes of decision-

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<sup>62</sup> [cites.]

<sup>63</sup> [check.]

<sup>64</sup> See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

<sup>65</sup> [cites. Discuss *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981)?]

<sup>66</sup> [Discuss traditional approaches to choice of law and choice of forum/personal jurisdiction?]

<sup>67</sup> [Say more later in the context of what entitlements to include in a market system?]

<sup>68</sup> See Bone, *supra* note \_\_\_\_.



making based on reasoning and deliberation. Further, the uniformity of the modes of decision and the standards applied has a public-good quality. It is easier for consumers of judicial opinions to digest their holdings when background norms for those decisions are common across cases.

But this argument can be overstated. Even in the absence of attempts to contractually modify procedure, variety, not uniformity, is the norm in court procedure. As Alexi Lahav has documented in detail, civil procedure is far less standardized than textbook accounts indicate.<sup>69</sup> Even the most rigid rules that parties ostensibly have no power to modify, such as the requirement that a federal court decide questions of jurisdiction before the merits, are often honored in the breach.<sup>70</sup>

Further, even to the extent that procedural rules and substantive laws tend to be uniform, the processes for reasoned decision-making may be as numerous as judges themselves. There are rules and prohibitions governing the most extreme deviations from norms of course (again, we have the coin-flipping example, or prohibitions on corruption and conflicts of interest), but within a broad range, the judicial reasoning process is not governed by articulated, let alone uniform, norms. To answer the same legal question, different judges—or even the same judge in different cases—may require briefing, or not; may require oral argument, or not; may raise issues *sua sponte*, or not; may consider facts outside the record, or not; may rely on clerks to draft a judgment, or not; may rule from the bench, or only after deliberation; may rule orally, or with a written opinion; may designate the opinion for publication, or not; may write a long opinion, or a short one; may use a style suited to an audience of lawyers, or to a lay audience.<sup>71</sup> Some of these distinctions go to the heart of what it means for a process to adversarial, or for a process to be participatory; some go to the heart of what it means for a decision to be reasoned, or to be public. None of it is uniform.

This demonstrates that to a significant degree, inculcating norms of reasoned decision-making through uniformity is beside the point, as far as the scope of the “core” is concerned. The boundaries of the core separate those procedures that parties may tinker with from those procedures that only courts can modify; it does not prevent the courts themselves from tinkering. Placing some procedures within the core does *not* guarantee a minimal degree of uniformity. On balance, then, this suggests that we ought not be *overly* concerned about procedural reforms (such as our proposal in Part V) that explicitly anticipate considerable variance across cases in procedure, even when parties have control over that variability.

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<sup>69</sup> Alexandra Lahav, *Procedural Design* (working paper 2017).

<sup>70</sup> *Id.* at \_\_\_.

<sup>71</sup> [Citations to Posner’s work on judging?]

## B. Protecting Third-Parties and Fairness between the Parties

Even for rights outside the core, scholars have noted conditions where it would be improper to enforce contracts between the parties that modify procedure. The two key ideas here are policing unfair contract terms as between the parties and protecting third parties. The former is an application of the broader concept of unconscionability, which is to say that courts will not (or at least should not) enforce contract terms that are excessively one-sided.

The latter is a straightforward application of the broader principle that freedom of contract may be limited to the extent that third-parties' interests are compromised. In the parlance of economics, the concern here is negative externalities: the contract may be good for the parties, but the parties do not take into account (or "internalize") the harms the contract causes to non-parties. Although some of the literature directs its attention to negative effects on "identifiable" third parties,<sup>72</sup> we don't see the need to cast this concern so narrowly. Identified harms to unidentified third parties could justify limiting parties' freedom to modify procedure by agreement, and if the harms are great enough, curtailing it altogether.

One of the ways in which agreements between parties could cause identifiable harms to unidentified third parties is through placing greater burdens on the court, who will then have less time to devote to other cases. Burdening the courts increases congestion in the system—a classic negative externality. As a descriptive matter, the law sometimes seems to track this logic. For example, parties may agree not to have a jury trial even though there is a right to have one. But the reverse is not true; if there is no jury trial right, the parties must obtain the agreement of the court before they can have a jury trial.<sup>73</sup> This is consistent with the view that concerns about externalities explain the contours of the rule. Adding a jury trial increases court congestion; therefore, parties cannot do so without court approval. Subtracting a jury trial raises no such concern.<sup>74</sup>

There is an important distinction between the set of procedures within the core and the set of procedures in contracts that implicate unconscionability concerns or negative effects on third parties. For procedures within the core, the alternative to party control is easy: parties can't modify those procedures. The existing literature focuses on this same dichotomy for procedures outside the core: the alternatives are either contracts between the parties, or no contracts at all. But as we will show in Part V, there is another alternative,

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<sup>72</sup> Bone, *supra* note \_\_, at 1382.

<sup>73</sup> See Federal Rule of Civil Procedure 39(c)(2).

<sup>74</sup> Note that this pattern requires an explanation based on third-party effects. Explanations based on the definition of jury rights as within (or without) the core don't work.

which is to broaden, rather than narrow, parties' freedom to trade for procedure.

#### IV. WHICH CASES?

Debates about procedural flexibility have focused on which procedures are open for modification by the parties and which are not. We argue, however, that a second dimension of procedural flexibility is essential for understanding the first. The concerns that animate defining a core of procedures that parties cannot modify, or that motivate judicial scrutiny of party agreements for negative effects on third parties, do not apply equally in all cases. We ask, therefore, in which cases is greater or lesser procedural flexibility appropriate?

As our discussion of the first dimension ("Which procedures?") demonstrates, what drives the need to take some procedures off the table for litigants is the need to protect the legitimacy of the courts' processes of reasoned decision-making, the development of doctrine in order to incentivize better conduct, and the interests of third parties. The practical reality, however, is that the vast majority—and we would venture to say this is literally 99 percent of all cases—simply do not implicate these concerns. They are routine and self-contained. No third parties will ever be *directly* affected by how the parties litigate these cases. These cases will not generate judicial opinions (most will settle, regardless),<sup>75</sup> or if they do, the opinions will have no binding precedential effect (the vast majority of cases are in courts of first instance with no authority to create binding precedent),<sup>76</sup> and most will never be consulted or cited as authority in any event.<sup>77</sup> For these cases, which we will call "routine," concerns about negative effects on judicial decision-making or third parties and even on parties' primary behavior largely melt away.

All cases, of course, *indirectly* affect third parties in the sense that they impose congestion externalities on the system. Whether a case is routine or non-routine, if it involves a 30-minute hearing with the judge, the delay added to the system is the same. Thus, for some concerns related to procedural flexibility, such as congestion, it makes sense to lump all cases together, while for other, such as precedent-creation, it makes sense to treat routine cases differently.

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<sup>75</sup> In federal court, about two-thirds of civil cases end in settlement. See, e.g., Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004).

<sup>76</sup> Less than 5 percent of federal civil actions are appealed from the district courts to the courts of appeal. See, e.g., Yun-chien Chang and William H.J. Hubbard, *Procedural Efficiency of the Taiwan Courts: An Empirical Analysis with Comparison to U.S. Federal Courts* (unpublished paper 2018).

<sup>77</sup> [Are there stats on this?]

The remaining fraction of cases—the non-routine ones—implicate third parties or the quality of precedent-creation by courts. These would include cases in which the court determines it is appropriate to write a full-blown opinion addressing novel or significant legal issues raised by the case. These would also include cases, such as mass actions, class actions, MDLs, or test cases, where large numbers of people with no meaningful control over the proceedings have a stake in the outcome, either as a formal matter (e.g., absent class members in a certified class action) or as a practical matter (e.g., individual litigants in an MDL with respect to a bellwether trial, or non-parties whose rights are being asserted by a party in a test case). For these cases, legitimacy, fairness, and effects on third parties loom largest, and leaving parties free rein over procedure may be unwise. At the least, these non-routine cases require separate consideration, which is exactly why we define the question of “which cases” as a second, important dimension of procedural flexibility.

This dimension has been largely overlooked, probably for two reasons. First, the idea that different standards might apply in different cases seems to rub against the strong norm of transsubstantivity in civil procedure.<sup>78</sup> This norm is widely endorsed; indeed, a driving force behind the procedural reforms that culminated in the promulgation of the Federal Rules of Civil Procedure in 1938 was the abolition of the old forms of action, which dictated distinct procedures for each cause of action.<sup>79</sup> But even if the rules of procedure are formally transsubstantive, courts do not necessarily apply the rules in a uniform manner,<sup>80</sup> and the emphasis in the Federal Rules on judicial discretion reflects a recognition of the value of tailoring broad principles to individual cases.<sup>81</sup> Second, there is the idea noted above that uniform application of core procedures serves to entrench valuable norms of reasoned decision-making among judges.<sup>82</sup> In this view, the suggestion that judges would comply with such norms in some cases but not others would be counterproductive. But here, too, we must recall that the endless variation in procedural practice and judicial decision-making we observe hardly resembles the idealized forms we hope to see.<sup>83</sup>

This second dimension (“Which cases?”) means that the scope of procedure within the control of the parties may be broader or narrower than the set of procedures identified in prior scholarship. For routine cases the core may be

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<sup>78</sup> See, e.g., David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. REV. 1191 (2014).

<sup>79</sup> [cite.]

<sup>80</sup> See, e.g., J. Maria Glover, *The Supreme Court’s “Non-Transsubstantive” Class Action*, 165 U. PA. L. REV. 1625 (2017).

<sup>81</sup> [cites.]

<sup>82</sup> See Part II.

<sup>83</sup> See, e.g., Lahav, *supra* note \_\_.

very small. Parties may dispense with all sorts of procedure, even procedures that might affect the quality of judicial decision-making. The only ones harmed by such actions are the parties themselves, and there is nothing wrong with saving the time and expense of procedure at a cost of the judge having a rougher sense of the issues when deciding the case. For example, earlier work cites the right to appeal as within the core, and thus something that parties could not waive *ex ante*.<sup>84</sup> In our view, for routine cases even the right to appeal would be subject to party modification. An unappealed judgment that affects no third parties and creates no precedent is of no normative concern to us. Indeed, it may compare favorably to resolution through arbitration (which is essentially unappealable).

For non-routine cases, in contrast, the core may be much broader than the rules governing the process of judicial reasoning. Even rules governing the presentation of evidence or the conduct of discovery between the parties may be subject to greater oversight or even outright control by the court, if thorough examination of the facts is necessary for the court to maintain its legitimacy, protect the interests of third parties, and generate quality precedent.

By recognizing the spectrum of cases from the routine to the non-routine, we see that courts can tie procedural flexibility more closely to the principles that justify it. Without this dimension of procedural flexibility, the question of core versus non-core becomes all-or-none question of which procedures are (always) within the core or (always) outside of it. For this reason, earlier work had little choice but to exclude procedures related to discovery from the core, lest the implication be to turn American litigation upside-down by condemning the practice of party-driven discovery. But the implication that the quality of fact-finding is not central to the legitimacy of courts, while probably true in most cases, seems to rely on too sharp a distinction between facts and law. We show here that this approach is unnecessary. The answer to “Which procedures?” depends on the answer to “Which cases?”

Further, we note that the “which procedures” and “which cases” dimensions have no necessary correlation. It is not necessarily the case that non-routine cases should always get more of every procedure than routine cases. Of course, to the extent that extensive briefing or discovery is often necessary for a well-informed decision in non-routine cases, then we should expect to see a positive correlation between non-routine cases and more procedure being desirable. But we can think of circumstances where the approach should be precisely opposite. For example, the civil jury provides important benefits to the (perceived) legitimacy of the system and may generate positive externalities with respect to developing norms of civic and political participation.<sup>85</sup> Yet jury

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<sup>84</sup> [cite.]

<sup>85</sup> For evidence, see Valerie P. Hans, John Gastil, and Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697 (2014).

verdicts do not supply “reasoned elaboration” of the application of law to fact,<sup>86</sup> and are subject to highly discretionary review by judges,<sup>87</sup> limiting their value to the development of the law. Thus, one could argue that jury trials should be promoted in routine cases but discouraged in non-routine cases.

Finally, there is the matter of workability. While routine and non-routine cases might be sensible conceptual categories, granting differing degrees of procedural flexibility to routine and non-routine cases requires that courts distinguish between these categories in practice. Further, we might think that courts might have to make such distinctions at the outset of a case, so that parties can act accordingly. Yet, seemingly routine cases may evolve into cases that raise novel or important issues, or new facts may come to light that change the social or legal significance of a case. If so, would any attempt to distinguish routine from non-routine cases be unworkable?

We think not. To the extent that one might think that courts need to sort cases into the routine and the non-routine as they are filed, we note that many if not nearly all cases are clearly routine or non-routine from the outset. Most cases do not see dramatic shifts in scope, scale, or legal issues. As a concrete example, class actions are almost always captioned as such in their initial complaints. And when a case does change dramatically in character, the change resets the litigation in an obvious and formalized way, such as through an amended complaint, an MDL transfer order, or the like. Thus, the only situation likely to cause complications is the rare case where a new and important issue arises mid-stream in the litigation.

More fundamentally, though, there is no reason why courts must commit to labeling every case routine or non-routine at the get-go. In fact, we expect that courts will rarely ever have to say, “This case is non-routine—you can’t modify the procedures.” Instead, cases will almost always sort themselves. Here is what we mean: To the extent that courts will permit procedural flexibility in routine cases, then they will need to do nothing in 99 percent of cases. Courts will only have to look out for non-routine cases. But most of *those* cases will meet the requirements for non-routine cases, in the sense that they will already have all of the procedures the court would require, even without any intervention by the court. After all, if a case is non-routine in the sense that it raises legal issues of broad interest, or presents high stakes for non-parties, then these cases will provide elaborate procedure and extensive litigant effort anyway. The parties, amici, litigation financiers, and legal NGOs will do what they already do today—support a litigation effort that utilizes a complete set of procedures to ensure a deliberate and thorough litigation process.

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<sup>86</sup> Hart & Sacks, *supra* note \_\_\_, at \_\_\_.

<sup>87</sup> [cite.]

Further, whether a case is non-routine depends not only on the characteristics of the case, but how the judge handles the case. Not every case involving novel issues needs to produce a precedential opinion or resolve those issues in a way that affects third parties. The Supreme Court is known to pass over certiorari petitions raising important issues as it waits for a case that does a better job of presenting the issue.<sup>88</sup> Lower courts, too, will see similar cases over time and can choose among those cases when to take the plunge and use a case as a vehicle for creating precedent. To the extent that a case presents a court this kind of choice, then courts can treat as non-routine those cases where the parties' procedural choices are consistent with a broadly defined core. These can serve the court's law-giving function. Less thoroughly-litigated cases can be shepherded toward settlement or resolved through narrower judgments. Although this evidence is anecdotal and without attribution, we note conversations with judges who have described their own practice as pushing parties to settle if the judge perceives the case as routine, but actually steering the parties away from settlement if the judge perceives the case as legally significant, such that the judge would see value in writing opinions in the case and ultimately having the case reach an appellate court.

A concrete and somewhat famous example of how this already plays out in practice is the seminal case in the field of e-discovery, *Zubulake v. UBS Warburg*.<sup>89</sup> In that case, a securities trader, Laura Zubulake, sued her former employer, UBS, alleging sex discrimination and retaliation.<sup>90</sup> Despite being "a relatively routine employment discrimination dispute,"<sup>91</sup> UBS's failure to adequately respond to discovery requests by Zubulake for emails would eventually lead to a series of novel legal questions about cost-sharing for discovery of electronically stored information (ESI) and the nature of legal obligations to retain and search ESI stored on backup tapes and other "inaccessible" storage media. The case would generate *seven* published opinions<sup>92</sup> during the three and a half years from its filing to its post-trial settlement in the district court.<sup>93</sup>

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<sup>88</sup> [cite?]

<sup>89</sup> No. 02 Civ. 1243 (S.D. N.Y. filed Feb. 14, 2002) (Scheidlin, J.).

<sup>90</sup> For details of the history of the case, see *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D. N.Y. 2003) ("*Zubulake I*"). *Zubulake I* is an example of the rare district court case that regularly appears in casebooks. [cites.]

<sup>91</sup> *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 424 (S.D.N.Y. 2004) ("*Zubulake V*").

<sup>92</sup> *Zubulake I*; *Zubulake v. UBS Warburg LLC*, 230 F.R.D. 290 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*); *Zubulake V*; *Zubulake v. UBS Warburg LLC*, 231 F.R.D. 159 (S.D.N.Y. 2005); *Zubulake v. UBS Warburg LLC*, 382 F.Supp.2d 536 (S.D.N.Y. 2005).

<sup>93</sup> See Docket Sheet, No. 02 Civ. 1243 (S.D. N.Y. filed Feb. 14, 2002). Notably, although all seven opinions would be published in official West reporters (F.R.D. and F.Supp.), the first two opinions were initially passed over for publication and were not officially reported until after the third *Zubulake* opinion had been released. The attentive reader

*Zubulake* is an example of the rare case that begins as a “relatively routine” action but develops into a case implicating new and important legal questions. A case like this should be the toughest case for ensuring that it is litigated in a way that protects the “core” of procedure for non-routine cases. Yet even here, we see that the court had little difficulty adapting as the “non-routine” quality of a case emerged. As is obvious from the paper trail left by the court, as the complexity of the case rose, the court increased its oversight, pushing the parties to engage in more extensive discovery and report back to the court with additional evidence.<sup>94</sup> Further, the non-routine quality of this case is as much a product of the judge as of the underlying case facts. Parties fail to produce emails all the time in litigation; if the parties in this case had not done an adequate job of teeing up the issues for the court, Judge Scheindlin could have waited for another case that was better litigated. But Laura Zubulake was a dogged plaintiff. And her highly remunerated position at UBS meant she was seeking millions in damages; hence, her legal team had ample financial incentive to vigorously litigate discovery-related issues.

Nor was the fact that this case became highly cited precedent happenstance. From the very first opinion in *Zubulake*, Judge Scheindlin made clear her audience was posterity, not the parties: her talent as writer was on full display, with her key opinions opening with colorful, but slyly apropos, quotations from literature.<sup>95</sup> In short, even for the type of case that isn’t easy to identify as non-routine *ex ante*, courts can adapt their handling of these cases as the circumstances warrant. An approach to procedural flexibility that distinguishes between routine and non-routine cases, therefore, should not be in general unworkable for courts.

Having said this, there remains one category of cases likely to be the most challenging scenario for courts. This is where there is a frequently litigated, but consistently low-stakes, issue. It is possible that across an entire set of

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would have noticed that the *Zubulake* opinions, which are listed in chronological order of issuance in footnote 92, are out of order in terms of reporter citations.

<sup>94</sup> See *Zubulake I*, 217 F.R.D. at \_\_; *Zubulake IV*, 220 F.R.D. at \_\_.

<sup>95</sup> See, e.g., *Zubulake I*, 217 F.R.D. at 311 (“The world was a far different place in 1849, when Henry David Thoreau opined (in an admittedly broader context) that “[t]he process of discovery is very simple.”); *Zubulake IV*, 220 F.R.D. at 214 (“Documents create a paper reality we call proof.”) (citing Mason Cooley, *City Aphorisms, Sixth Selection* (1989)); *Zubulake V*, 229 F.R.D. at 424 (“Commenting on the importance of speaking clearly and listening closely, Phillip Roth memorably quipped, ‘The English language is a form of communication! . . . Words aren't only bombs and bullets—no, they're little gifts, containing meanings!’ What is true in love is equally true at law: Lawyers and their clients need to communicate clearly and effectively with one another to ensure that litigation proceeds efficiently. When communication between counsel and client breaks down, conversation becomes ‘just crossfire,’ and there are usually casualties.”) (ellipsis in original; footnotes omitted). The key opinions in the series are *Zubulake I, IV*, and *V*. *Zubulake I* is the most famous, but to the discerning student of e-discovery, just as it is with the discerning fan of *Star Wars*, Episode V is the best one.



cases, the parties' private incentives never align with the court's goal of providing the public good of precedent based on highly developed facts and legal arguments. Maybe a good example is premises liability, where for example a property owner is allegedly liable to a tenant for bad plumbing. The stakes are low relative to the costs of litigation, and there are never class actions for these types of claims. In circumstances such as these, it is unlikely that a case will arise that will attract the best lawyers and experts, even though we might all agree that a case with extensive discovery and briefing would generate a high-quality legal rule that will benefit thousands of future cases. What can we do for this kind of case?

This is a hard question with no obvious answer. But a virtue of our framework is that it poses the question. Without it, this question isn't even articulated clearly. The merit of our approach is that it separates those systemically important cases that are likely to need special attention from the courts from those important cases where the parties (and amici, etc.) will expand and protect the "core" of procedure endogenously—without any effort by the court. For the former, the challenge is to leverage court procedure to better align our normative conception of a broad core with the practical reality of how these cases are litigated. Today, the core of procedural entitlements for these cases is no broader or narrower than any other cases as a formal matter. But as a practical matter, it is almost certainly much narrower. These cases may deserve a broadly defined core of procedures—broader than other cases—but due to litigant resource constraints or lack of incentives, they get less.

In Part V, we present a proposal that offers a radical approach to procedural flexibility. As we will discuss therein, one of the virtues of this approach is that it relieves courts of the burdens associated with overseeing procedural flexibility in the vast majority of cases and could even be used to raise money (through auctions of procedural entitlements) to subsidize court filing fees and other costs. Importantly, this proposal also points toward a possible solution to the conundrum of the frequently litigated, low-stakes, but systemically important cases that we are discussing here. Revenue raised from the proposed auction could be allocated to a fund through which courts could subsidize important but underserved categories of cases. Much like a bellwether trial in mass litigation, a single instance of (in our example) premises liability could be chosen as a bellwether case, with court-appointed amici or special masters to improve the quality of the court's decision-making.

In sum, our point is that most cases sort themselves in ways consistent with the normative ends of our framework. For the limited set of cases that do not sort themselves neatly, courts can worry about explicitly sorting through *just those* cases.

## V. WHICH TYPE OF FLEXIBILITY?

### A. Judicial Discretion, Party Agreement, or Procedural Market?

There is long-standing disconnect in debates about procedural reform. The problems (or alleged problems) that occupy the attention of advocates and policymakers are things like court congestion, delay, and expense: problems at the *systemic* level that critics allege burden courts *as a whole*, deny access to justice to plaintiffs *as a class*, and/or impose unjustified costs of defendants *in general*. Yet the policy tools under consideration almost inevitably are tools that operate at the *individual case* level. For example, judges should have more discretion,<sup>96</sup> or less discretion,<sup>97</sup> to manage discovery or regulate party conduct; parties should cooperate more<sup>98</sup>; or they should file fewer motions.<sup>99</sup>

This framing of problems and potential solutions exactly mirrors the framing of questions about procedural flexibility in the literature. Procedural flexibility can only take two forms: judicial discretion or party agreement, and this agreement usually does not involve cash. The parties in a case can, by agreement between themselves, choose different procedural rules for that case, or only the judge in that case can do so in her discretion. There is no need to consider a wider frame, because each case resolves its procedural issues in isolation and independently from the others. The total amount of procedure is simply the sum of the parts.

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

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

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<sup>96</sup> See FRCP 16, 26 Advisory Committee Notes to \_\_\_\_ Amendments. [check]

<sup>97</sup> See FRCP 11 (1983 amendments; abrogated 1993).[check]

<sup>98</sup> See FRCP 1 Advisory Committee Notes to 2015 Amendments. [check]

<sup>99</sup> See FRCP 11 Advisory Committee Notes to \_\_\_\_ Amendments. [check]

*Second*, even though judges are constantly, and adversely, affected by court congestion, they themselves lack full incentive to reduce it. The efforts of a single judge to reduce court congestion redound to the benefit of all, while the costly effort is borne entirely by the individual judge.

*Third*, and most subtly, if we are concerned about modifications to procedure having negative effects on the court and third parties, then judges have to review party agreements that modify procedure. But judicial review of these agreements is itself a burden on the system!

These problems are clear enough. But what is the alternative? Our thesis is that procedure doesn't *have to* work this way, at least not all the time. Currently, parties and judges make decisions about the optimal level of discovery in each individual case. The total level of discovery in the system is simply a by-product of individual-case-level decisions. It is likewise for motion practice, hearings, and so on. But there are alternatives. If court congestion is a systemic problem, then the best response may be a systemic solution.

Indeed, in response to concerns about the congestion and other externalities parties impose when litigating, some scholars have advocated the taxation of procedural activities, or increased user fees associated with the courts.<sup>100</sup> These proposals did not fly, the reason being—so we believe—the aversion people have to officially mixing money and civil procedure rights. This aversion can stem from concerns about the distributional effects of such fees, or the effects of such fees on primary behavior, or just some, perhaps irrational, aversion to so explicitly commodifying civil procedure rights, or some combination of all these. Whatever the source for the aversion is, it is this aversion which also explains why we neither see parties selling their civil procedure rights piecemeal for cash but only engage in barter exchanges.

We, therefore, train our sights on a different set of possible reforms where prices and cash are not directly involved—at least not at the policy-making

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<sup>100</sup> Examples include RICHARD POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 195–210 (1996) (discussing the overcrowding problem and suggesting a user fee with limited exceptions); Rex E. Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?* 34 *CATH. U. L. REV.* 267, 272 (1985); Bruce L. Hay et al., *Litigating BP's Contribution Claims in Publicly Subsidized Courts: Should Contracting Parties Pay Their Own Way?*, 64 *VAND. L. REV.* 1919, 1932–39 (2011) (suggesting, with limited exceptions, mandatory user-fees in commercial contract disputes); Brendan S. Maher, *The Civil Judicial Subsidy*, 85 *IND. L.J.* 1527, (2010) (In principle, “each litigant would bear responsibility for one half of court usage costs, collectible at the conclusion of the case); Patrick E. Longan, *The Case for Jury Fees in Federal Civil Litigation*, 74 *OR. L. REV.* 909 (1995) (advocating payment of jury fees); Stephen J. Ware, *Is Adjudication a Public Good? “Overcrowded Courts” and the Private Sector Alternative of Arbitration*, 14 *CARDOZO J. CONFLICT RESOL.* 899, 899 (2013) (suggesting “a fee high enough to reimburse the court for its costs of adjudication . . . [such that] litigation [would] look more like arbitration.” *Id.*, at 900). See also Shay Lavie, *Quotas* (manuscript 2016).

stage. The basic idea is to set the aggregate amount of discovery or motions or hearings at an acceptable level, and then let parties freely allocate the total among the cases. What has not yet been done with road congestions has been done in other contexts: introducing secondary markets.

The two reforms that we propose are familiar to students of the regulation of externalities: they are a *cap-and-trade* system and an *auction* system. In a cap-and-trade system, the courts would set aggregate, system-wide limits on total procedural activity, divvy up the total among parties, and then allow them to freely trade these endowments of procedures in open markets to allocate specific amounts of procedural activity (motions, discovery requests, hearings, witnesses, etc.) to specific cases. In an auction system, the same aggregate, system-wide limits on total procedural activity would be auctioned off, and then the procedures would be freely tradeable thereafter.

To be more concrete, examples of procedural rights that one might consider allocating in this way include the following:

- *Depositions under FRCP 30.* There are about 250,000 cases per year, and most do not require the default maximum of 10 depositions by each side. Let's say, for the sake of argument, we observe an average of 3 depositions per case (750,000 depositions in total), which let's assume we agree is normatively unobjectionable. We consider a system where, for example, the courts could allocate 1 deposition to each side and auction off the rest (i.e., the remaining 250,000)!
- *Page limits for briefs and time limits for hearings.* Rather than set defaults and have parties going to court to seek higher limits, parties would simply buy their right to extra pages. Likewise, courts' limited time for hearings could be allocated by a market for hearing minutes. Such a change will doubly improve the use of courts' time hearing motions and reading briefs: First, parties will forgo borderline arguments, since they now need to pay for the time and space to make them. Second, courts won't have to spend their time hearing and deciding motions for extension of page limits or additional hearing dates. That time and space would be allocated through supply and demand, rather than judicial deliberation. A clock ticking in the courtroom might look bizarre at first. But one just needs to recall the successful implementation of such a clock in presidential debate to realize it is not that bizarre after all.
- *Dispositive motions and motions for reconsideration.* A total cap on the number of motions of dismiss for failure to state a claim, motions for summary judgment, motions for reconsideration, etc., could be set based on the aggregate numbers filed in recent years, and to file such a motion, a party would have buy the entitlement on the open market.

Such a cap-and-trade or auction system should reduce court congestion and more broadly improve *allocative efficiency* by ensuring that procedures are being used by those who value them most highly. And as we will explain further below, we believe these approaches can also be implemented to simultaneously improve *distributional equity* among litigants.

This system would also retain (and expand) the procedural flexibility associated with party contracts modifying procedure while eliminating some of the problems with party contracts. First and most obviously, neither the parties nor the court need to attempt to adjust their behavior to account for adverse effects on court congestion. The pricing mechanism automatically builds that in, so that the cost to the system of congestion impacts the parties directly through the price of buying more procedure. Second, a party that needs to deviate from procedural defaults, but faces an uncooperative, stonewalling opponent, will not be beholden to their opponent. This will reduce gamesmanship and hold-up behavior. We replace the bilateral monopoly between the parties with a multi-party, competitive, market. Third and relatedly, courts will not have to review procedure-modifying contracts for one-sidedness or unconscionability. Parties will be able to obtain their preferred bundle of procedures on a competitive, open market.

In principle, an optimal Pigouvian tax on procedural activity could have the same benefits we described above for a cap-and-trade or auction system. We argue, however, that our proposed approaches are superior to higher taxes and fees.<sup>101</sup> This is because they avoid the epistemic burdens (and political costs) of assigning taxes or fees to each procedural right. Expecting policymakers to be *willing*, let alone *able*, to assign exact prices to the use of each of the many procedural rights seems to demand too much as a practical matter. In contrast, setting targets for the aggregate functioning of the courts, while letting celebrated “invisible hand” of market forces work out the specific prices, seems far more plausible. Further, the process of freely buying, selling, and trading procedural rights will inherently maximize the personalization of procedure for each litigant, without any special effort on the part of regulators.

To be sure, any attempt to assign prices to procedural rights, or weigh the relative value of different procedures is a fraught undertaking. The normative underpinnings of procedure are highly diverse and hotly contested, and any attempt at regulation by cap-and-trade or auction would only sharpen these debates. By focusing on aggregate targets for quantities (such as total numbers

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<sup>101</sup> Similarly, the literature on pollution control has debated whether price control or quotas are the better way to go. Cameron Hepburn, *Regulation by Prices, Quantities, or Both: A review of Instrument Choice*, 22(2) OXFORD REV. ECON. POL'Y 226 (2006); Robert Stavins, *Experience with market-based environmental policy instruments*, in HANDBOOK OF ENVIRONMENTAL ECONOMICS, v. 1, (edited by KG Maler and JR Vincent 2003); Louis Kaplow & Steven Shavell, *On the Superiority of Corrective Taxes to Quantity Regulation*, 4 AM. L. & ECON. REV. 1 (2002).

of motions) rather than prices, our proposed approaches may invite less controversy than explicit taxes and fees for procedure, but we recognize that framing in terms of quantities rather than prices only goes so far. Still, our view is that normative debates about the exact justifications and rationales for procedure need not be resolved in order to implement our proposals. There are likely many aspects of procedure over which a degree of consensus exists. For example, it may not be controversial to set targets for the aggregate number of motions for reconsideration that are lower than current levels.

And more to the point, our proposals need not reduce aggregate quantities of procedural entitlements. They could increase them, or (probably least controversially) maintain the status quo at the aggregate level. Even if the aggregate cap is identical to the status quo, and thus total court congestion will not change, the ability to re-allocate procedures across cases will improve allocative efficiency and distributive equity as we describe below. As a consequence, regardless of the normative commitments motivating our procedural system, we can retain the current levels of utilization of procedure, but still improve the system in terms of efficiency and distribution.

## B. Market Mechanisms

Even taking as given a market-based system that permits a wide market for trading of a fixed, aggregate set of civil procedural rights, there remains the question of how to allocate the initial endowments of those rights. As noted above, we see two possible answers to this question. The first is a cap-and-trade system, whereby litigants or potential litigants receive a fixed bundle of rights, which they are then free to trade. The second is an auction system, which allocates an identical quantity of rights as a cap-and-trade system through an auction. Individuals and organizations can bid for quantities of rights, which they can then freely re-sell in an open market. We consider these possibilities in turn.

The cap-and-trade approach may be the more obvious answer: give every litigation an endowment equal to their per capita share of the total quantity. Parties who want more procedure would buy it from parties who are happy to litigate with less. In this way, parties whose reduced activity eases the burdens on the system are rewarded with income that offsets their legal expenses, while parties who place greater burdens on the system have to pay for the privilege. In this way, the system not only creates incentives that allocate procedure across cases more efficiently, but also allows parties to discharge some of the risk of litigation. Parties will think twice before filing another motion or issuing another discovery request, because they could profit from selling that entitlement to someone else.

This approach has nice distributional consequences, too. The reality is that litigation resources are not deployed equally across cases, and this correlates with the resources of parties and their lawyers. Plaintiffs of modest means often cannot maximize the value of their claims because they cannot afford to pursue full-blown litigation. Such plaintiffs could monetize the gap between what the average plaintiff does and what they can afford to do by selling the rights that they won't or can't use themselves. Put bluntly, the fat-cat litigants have to pay the hard-luck litigants for the right to litigate their cases to the hilt. This both discourages excess in litigation and redistributes wealth. Moreover, at the end of the day it can even increase the volume of civil procedure that the poor use in practice, relative to the current volume they use in a world of no trade.

Even if one accepts the desirability of this approach, however, an inherent problem with a cap-and-trade system is how (and specifically to whom) to allocate the initial endowments of procedure. So far, we have assumed that one could allocate procedural entitlements across all "parties." But who is a "party"? Conditioning an endowment of tradable procedural rights on participation in litigation creates incentives to increase "activity levels": some parties will file collusive lawsuits whose only purpose is to obtain, and then sell, the procedural rights associated with the lawsuits. Sanctions under Federal Rule 11 or the like may help here, but distinguishing bona fide cases that simply require no procedures from attempts at pure arbitrage will be difficult. In the environmental cap-and-trade context we do not usually see anything like that, as one is unlikely to build a factory for the sole purpose of selling the pollution permit in the secondary market. A solution would be to set a filing fee high enough to prevent filing of pretextual lawsuits, but raising filing fees would hurt everyone who sought to use the courts, not merely arbitrageurs.

An alternative solution would be to endow every *potential* plaintiff (and defendant, although *ex ante* we don't know who is who anyway) with an allocation of procedural rights, either to use in the event of litigation or to sell. Although this seems far-fetched, we could imagine a world in which well-developed, low-transaction cost markets for procedural rights exist, such that every person who has no interest in litigation can cash in their annual (decadal, or even life-time) endowment at an online store. But this scenario involves a lot of shuffling around of rights among hundreds of millions of people, most of whom will never directly use the court system.

The way around this is our second approach. This treats the capped amount of procedure not as credits to be allocated to individuals, but more like the broadband spectrum—a public resource to be auctioned off. The auction process plus a freely trading secondary market would ensure that procedures would be available to all litigants, but at prices that would force them to

account for their impact on the system as a whole and purchase the procedure only if, after factoring in external effects, the procedure is still worth it.

The auction system avoids the problem of allocating initial endowments and the possibility that that would invite gamesmanship. The challenge for the auction approach, however, is ensuring that the distributional effects of the system are progressive rather than regressive. An auction of the “procedural spectrum” would offer distributional benefits if, for example, the revenue from the auction permits a reduction in filing fees. The cases that demand the greatest share of the courts’ time and that involve the greatest procedural complexity are not cases funded by impecunious plaintiffs—they can’t afford to litigate that way anyway—but by large corporations and powerful, well-heeled plaintiffs’ firms. As with cap-and-trade, the costs of pricing procedural rights will be borne by those who can better afford it (and who already exercise the lion’s share of such rights today), but unlike cap-and-trade, the auction method does not create an incentive to file bogus suits solely to cash in on the procedural endowments that come with it. We also imagine that it would facilitate the development of procedural brokers, market-makers who buy up huge blocks of rights and then re-sell them at the retail level for litigants as they need them, further reducing the epistemic and transaction costs of more efficiently allocating procedures to cases.

### C. Addressing Potential Concerns

In this part, we address several concerns that arise with our proposal to create a market for civil procedural rights. The notion of freely buying and selling procedural rights raises questions about distributive justice, effects on the values (other than efficient dispute resolution) underlying the civil justice system, and commodification of the legal process. It also raises practical concerns with implementation, such as whether parties will flee the courts in search of alternate venues of dispute resolution.

#### 1. Distributional Effects

Shouldn’t we worry that the rich are going to fare better in the system we propose? They could purchase more pages of briefing, more depositions, more document discovery, longer appeals, and who knows what else, couldn’t they? Our response is: Yes, they can, and they will. But the truth is that the rich *already* have a huge advantage in our legal system—they can hire better lawyers, better experts, better forum, better everything.<sup>102</sup> The question is not whether the rich have an advantage—that is virtually inevitable—but whether

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<sup>102</sup> Albert Yoon, *The Importance of Litigant Wealth*, 59 DEPAUL L. REV. 649, (2010) (presenting empirical evidence that the more financial resources available to a party in litigation, the greater her chances, all things being equal, of a favorable legal outcome).



the design of the system ignores this advantage or takes this into account and begins to counteract it.

As a practical matter, the rich already buy longer briefs, more discovery, and more court time. But they don't have to pay the courts, or their adversaries, for this privilege.<sup>103</sup> To the contrary, the courts' decision-making burdens are increased by the aggressive motion practice of heavily-lawyered parties, and counterparties must pay more to keep with them. In our proposed system, though, parties that would place greater burdens on courts and their adversaries would have to pay for the privilege, which will, on the margin, discourage litigation that is not well tailored to the legitimate needs of a case.

Further, under our approach the poor can directly benefit from the rich exercising their advantages. In an auction system, the revenue from the sale of procedural entitlements could be used to increase court resources, reduce court fees, or subsidize needy litigants. In a cap-and-trade system, the poor can directly profit by selling procedural entitlements they cannot use to the rich. And because there would be a market for procedure across cases, a poor party would not be limited to bargaining (perhaps on unfavorable terms) with a well-heeled adversary, but would be able to tap into a larger, more liquid market. Other market makers, such as third party litigation funders, can help poor parties buy more procedural rights in return to some stake in the lawsuit.

Moreover, because procedure is a creature of the courts, the nature of the rights being traded can be defined in ways designed to improve distributional consequences.<sup>104</sup> For example, we can require at least some of the procedural adjustments to be symmetric across the parties in an individual case—i.e., a plaintiff could buy additional briefing space from a third party, but the plaintiff would have to share the additional briefing space purchased equally with the defendant. This would help ensure that parties invested in more extensive procedure because the scope of the case required it, rather than merely to steamroll an opponent with a disproportionate investment in argument and evidence.

As a second example, an auction method could be paired with a version of the status quo that maintains a minimum amount of procedure as a default entitlement (which can't be traded) in every case. This arrangement would address the concern that litigants will be so constrained that they could not

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<sup>103</sup> They must pay their own lawyers, of course, but this cost does not capture the externalities they impose.

<sup>104</sup> On the idea that distribution is not always most efficiently done through the tax and transfer system see Avraham and Logue, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance* 56 TAX LAW REVIEW 157 (2003); Avraham, Fortus, and Logue, *Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 IOWA LAW REVIEW 1125 (2004).

even afford to purchase a minimum of procedure on the market.<sup>105</sup> Everything above this floor would be tradeable on the procedure market. This minimum amount could be set to correspond to the amount of procedure that a litigant who could not afford to purchase procedure would nonetheless be able to utilize. The proceeds from auctioning procedures above this floor could be redistributed as well. Poor parties might end up using more procedure than under the current regime.

## 2. Effect on Norm-Creation and Democratic Participation Values

The literature suggests three theoretical models of civil procedure: dispute resolution, norm-creating, and a democratic model.<sup>106</sup> The relative importance of the values underlying these models is contested, and it is not our goal to reweigh or prioritize these values. Rather, we argue that regardless of the relative weights of these values, our proposal could be beneficial, insofar as it promotes some of them without compromising the others.

Of course, our scheme is most impactful when civil procedure is understood as primarily a system of rules-of-the-game created to help parties resolve their dispute efficiently and fairly. Market-based allocation schemes are designed with allocative efficiency in mind, and that translates into lower costs and better tailoring of procedure to the needs of the case.

With respect to the norm-creation goal, we observe that most cases bear little importance for society as a whole in terms of their “norm creating” value. As we have discussed, most cases simply do not generate important precedents or clarify ambiguous important parts of the law.<sup>107</sup> Therefore, in the majority of the cases our scheme does affect the norm-creation role at all. In the few cases that are important to the objective of norm-creation, we have described above how to ensure that party control over procedure does not interfere with this objective.<sup>108</sup> Simply put, courts’ wishes can trump the parties’ wishes when norm-creation is on the line.

As with respect to the “democratic participation” value of civil procedure, we doubt our proposal has a negative effect, and it may have positive effects. For one thing, our scheme might shift more victims of wrongdoing to litigate their claims rather than settle or drop them because the system is better personalized for their cases. Further, it is important to remember that all three dimensions of procedural flexibility interact. We embrace the view of Bone and others that some civil procedure rights cannot be traded away. The scope of these core procedural rights is defined in part by those rights the loss of which

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<sup>105</sup> As we have already noted in Part V.B, however, this should not be a concern if revenue from auctioning rights is used to subsidize *in forma pauperis* litigants.

<sup>106</sup> [Citations. More discussion and background is required here.]

<sup>107</sup> See Part IV.

<sup>108</sup> *Id.*

would undermine the legitimizing effect of democratic participation in the court system.

In short, our proposal involves potential reforms that do not clearly improve or undermine the norm-creation and democratic-values aspirations of system, but that do promise to improve the efficiency and fairness of the system in terms of dispute resolution. Thus, our approach does not require anyone to embrace some normative commitments of the civil justice system and reject others, but rather seeks to improve the dispute-resolution effectiveness of the system while leaving other values essentially undisturbed.

### 3. Commodification

An instinctive objection that may arise is that trading away procedural rights places prices on them and reduces them to commodities. We certainly acknowledge that the right to appeal or the right to take an additional deposition will have a price associated with it, and these rights will be traded in the same way commodities are—indeed, that is the whole point of our proposal! To the extent that commodification in this sense is a bad thing, then we must simply concede the point.

But what is the force of this objection, really? Parties settle their claims all the time; indeed, settlement is the norm and trial is the exception in American civil litigation.<sup>109</sup> Settlement involves the parties giving up whatever remaining procedural rights they have in exchange for an end to the litigation and (for the plaintiff) money. Such exchanges of procedural-rights-for-cash occur in piecemeal ways, too. As noted above, one example is a high-low settlement agreement, which limits the range of potential outcomes of a trial to a range of liability amounts. This has the effect of limiting parties' freedom to pursue certain arguments at trial, present certain evidence, or file certain objections or post-trial motions.<sup>110</sup>

Further, parties trade away procedural rights on an à la carte basis every day. Agreements to limit depositions, stipulate to the authenticity of an exhibit, or not to object to a motion are routine affairs. And such trades are not always in kind, but sometimes for cash. Cost-sharing or cost-shifting agreements for the costs of (for example) discovery of electronically stored information involve money changing hands in exchange for a party forfeiting objections to discovery.

And most obviously, the right to pursue justice in court comes with an explicit price tag. In federal court, this price tag \$400, the sum of the filing fees

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<sup>109</sup> Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713 (2012).

<sup>110</sup> J.J. Prescott and Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59 (2016).

for initiating a lawsuit in US district court.<sup>111</sup> Given the reality on the ground, we don't see our proposal as inviting any concern about commodification that would not already apply to virtually any existing aspect of the system. The only thing our proposal does in that respect is to force us to admit that commodification already (and inevitably) exists. Commodification presents a question not of whether, but of how.

#### 4. Practical Implementation and the Problem of Leakage

Implementing a cap-and-trade or auction system for procedural rights in one court system (say, the federal courts) but not others (say, the state courts), raises concerns about "leakage." If an activity subject to regulations can relocate to a legal regime without those regulations, the regulatory regime's effectiveness may be reduced. In the carbon emissions context, this has been a major hurdle to the success of carbon-trading blocs, as carbon-intensive industry simply moves to states or countries without caps on carbon.

Even if an auction or a cap-and-trade scheme for a court system (say, the federal courts) sets caps such that the total amount of procedural activity is the same, changes in prices will induce changes in participation in federal litigation vis-à-vis other available court systems that do not have the same cap-and-trade system. If so, then the system may simply push those who would have to pay more under the new system out of the federal courts. Assuming that the policymaker's goal is not to reduce overall levels of litigation, this would be an undesirable and counterproductive consequence.

We believe, however, that such effects would be quite small. First, parties can only opt out of the court system and into arbitration if both parties agree, and the same is largely true for opting out of federal court and into state court.<sup>112</sup> Thus, it is not enough that one party—the party who wants lots of procedure—desires to avoid a court that has implemented our proposal. Both parties would have to agree. This limits the set of disputes that might opt out of our system to those disputes where it is in the parties' *mutual* interest to have a lot of expensive procedure.

But those disputes seem unlikely candidates to flee the federal courts or courts altogether. The advantage of arbitration over courts, after all, is supposed to be its procedural simplicity and economy, not its complexity and

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<sup>111</sup> See 28 USC § 1914 (setting a \$350 filing fee for a civil action in US district courts); District Court Miscellaneous Fee Schedule (Administrative Office of the United States Courts, Aug. 20, 2014), archived at <http://perma.cc/Y9LR-4LVZ> (setting a \$50 administrative fee for initiating a civil action in US district courts).

<sup>112</sup> For cases within federal subject matter jurisdiction, the plaintiff can (unilaterally) file in federal court and the defendant, with some exceptions, can (unilaterally) remove to federal court a case filed in state court. See 28 USC § 1331 et seq. (original jurisdiction of federal courts); 28 USC § 1441 et seq. (removal jurisdiction of federal courts).

expense.<sup>113</sup> And with respect to federal courts vis-à-vis state courts, federal courts are generally considered to have relative expertise in high-stakes, complex litigation. Given this, it is implausible that many parties would give up the advantages of what would otherwise be their preferred court system merely to save modestly on the cost of obtaining a high level of procedure. After all, we would not expect market rates for procedural entitlements to be exorbitant, given that the current baseline from which our proposal would deviate is one in which the cost of additional procedure (other than one's own attorneys' fees) is zero. The cost of additional procedure under our proposal would surely pale in comparison to the attorney fees that parties seeking top-shelf procedure would be paying!

Further, our proposal would generate benefits that, even for the parties who would have to pay the most, would at least partly offset the cost of buying procedural entitlements on a market. Our proposal would reduce the cost and delay due to motions seeking leave of the court to deviate from procedural defaults. Parties would not have to worry about their requests for additional procedure being denied by the court. And overall reductions in court congestion should make the courts more attractive to all litigants.

Related to this last point is the likely result that our proposal may somewhat ameliorate concerns about the flight to arbitration in the consumer and employment litigation context, and about "vanishing" litigation more generally.<sup>114</sup> Our proposal increases flexibility for parties by allowing them to buy or sell procedure that varies from the default. This can only help reduce the flight from litigation, given that one of the attractive features of arbitration is the malleability of its procedures. Our procedure makes litigation more competitive with arbitration in this respect.

Of course, much of what is driving the increased prevalence of arbitration clauses in many settings, such as consumer contracts, is not the simplicity or low cost of arbitration, but the potential for a dispute resolution environment that is more favorable to the contract drafter.<sup>115</sup> Why this is happening is the subject of some debate. This may be because the contract-drafting party is worried about low-merit claims generating settlements in court, because of asymmetric litigation costs or plaintiff-friendly laws or judges. Or it may be because contract-drafting parties want to quash high-merit claims by erecting

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<sup>113</sup> Indeed, the Supreme Court has suggested that procedural simplicity and economy are "fundamental attributes" of arbitration. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

<sup>114</sup> [Citations. Additional discussion is needed.]

<sup>115</sup> There is also a third impetus for arbitration, which is a desire for privacy and confidentiality. Disputes that go to arbitration for this reason are unlikely to be affected by our proposal, one way or the other, so we do not dwell on them.

hurdles in the form of arbitration procedures that render plaintiffs' ability to pursue relief illusory.

Either way, we must confront how our proposal might affect the prevalence of arbitration agreements in settings like consumer contracts. To the extent that the flight to arbitration is being driven by concerns about nuisance litigation, then on the margin, our proposal could help draw more cases back into court and out of arbitration. Our proposal would make litigation more expensive for those plaintiffs who want to consume the most procedure. And it is presumably those plaintiffs who want to aggressively deploy procedure to take advantage of asymmetries in litigation cost who are of the greatest concern to defendants. By requiring the party seeking to expand procedure to pay for it, this would reduce slightly the asymmetry in cost. If, however, it is simply the ability to use arbitration to shut down meritorious claims that drives the popularity of arbitration today, then our proposal should have little effect.

In sum, drawing some consumer disputes back into the courts from arbitration is a potential beneficial effect of our proposal that would address, at least on the margin, an area of flight from litigation that is empirically significant and normatively very salient. And it might have a diagnostic effect, in that it could help separate wheat from chaff in debates about the causes of the flight to arbitration. Whether reforms in line with our proposal attract litigation back to the courts or not could be revealing about why litigation has shifted to arbitration in the first place.

## VI. CONCLUSION

The rise of party control over civil procedure is one of the defining characteristics of modern litigation. This phenomenon has attracted the attention of an active literature that has developed important insights into the "core" elements of procedure and the crucial role that legitimacy plays in predicting the limits of party control over procedure.<sup>116</sup> It has detailed the rich interplay between the centrality of judicial discretion and the rise of managerial judging, on the one hand, and the centrality of party-driven procedure, on the other hand.<sup>117</sup> Yet as we show in this paper, the breadth and depth of these insights occupies only a subset of much larger conceptual space in which procedural flexibility can occur.

We have identified three dimensions of procedural flexibility, all of which are potentially available to reformers seeking to improve procedure (whether

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<sup>116</sup> See Part II.

<sup>117</sup> See Lahav, *supra* note \_\_; Effron, *supra* note \_\_.

by reducing litigation cost, increasing tailoring of procedure to parties' needs, reducing court congestion, or improving distributional equity).

First, there is set of procedural rights potentially subject to party control. In other words: Which are the “core” procedures that parties cannot alter? This question has been the focus of a robust literature, whose insights we largely embrace. We show, however, that once one recognizes the other dimensions of procedural flexibility, the irreducible core of procedure is in most cases smaller than one might otherwise presume—but for a small subset cases, may be much broader.

Second, there is the set of cases over which the parties, rather than the court, can have primary control over the non-core elements of adjudication. In other words: Which are the “important,” non-routine cases over which judges must maintain control of procedure, so that the courts' role in publicly expounding upon the law is unimpeded? This question has largely been overlooked in the existing literature. Perhaps counter to intuition, we show that the set of cases over which judges should stay the freedom of parties to tailor non-core procedure is likely to be quite small.

Third, there is the set of tools with which parties can exercise procedural flexibility. In other words: Which is the “best” type of flexibility by which parties can tailor procedural rules? So far, the literature has focused only on one possibility—contracts between the parties in a given case that alter procedure in that case. To be sure, this means for party control over procedure is of immense practical relevance today. But we argue that our imagination should not be limited by the status quo. To the extent that agreed-upon exchanges between parties have a place in customizing procedure, we argue that a bigger, bolder approach to procedural flexibility—not merely “contract” between parties but wholesale “markets” in procedure—could both improve tailoring and ameliorate some of the downsides of party control that currently arise, such as effects on third parties or one-sided bargains.

By recognizing these three dimensions along which policymakers can adjust the flexibility of procedure, this paper identifies novel potential avenues for increasing procedural options for litigants while also reducing burdens on courts, improving distributional equity, and protecting the core functions of courts.

Finally, we note that although the tailoring of law to individuals has received a wave of attention in recent years, talk about personalized law is usually tied to the big data revolution. The conventional move is to harness huge amount of data to the process of better tailoring the law to a specific person. To do that, some branch of the government (courts, legislatures, agencies) need to apply, or to enable the application of, some statistical models to every single person. The thought experiment we undertake in this paper describes a totally different approach. We personalize the law not by collecting

data on what set of civil procedure rules best statistically match persons' preferences, but rather by allowing individual parties and their lawyers to customize procedure as they see fit.

Allowing this kind of market-based tailoring of legal rules could be extended beyond civil procedure, too. In principle it is not obvious why our arguments could not also apply in the criminal procedure context. Plea bargaining has long been controversial for inducing defendants to trade away their constitutional and procedural rights. Given that plea bargaining is here to stay, one could imagine that creating open markets for procedural rights in this context might increase the options available to defendants, make trials more viable in some cases, and better leverage the overtaxed resources of public defenders and state's attorneys. For example, a rich criminal defendant who wants a jury of twelve rather than six could buy the right to six jurors from a poor defendant who would use the sale of such rights to finance his defense in a bench trial.<sup>118</sup>

While some literature on it exists, we leave all that to another day.<sup>119</sup>

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<sup>118</sup> Cf. *Williams v. Florida*, 399 U.S. 78 (1970) (holding that a jury of six satisfies the constitutional right to criminal trial by jury).

<sup>119</sup> See *supra* note 16.