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### The Spectrum of Procedural Flexibility

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## ARTICLES

### The Spectrum of Procedural Flexibility

Ronen Avraham<sup>†</sup> & William H.J. Hubbard<sup>††</sup>

*Sometimes the rules let you change the rules. In civil procedure, many rules are famously rigid—for example, neither the parties nor the judge can stipulate to subject matter jurisdiction—but closer inspection yields many ways that judges or parties (individually or by agreement) can change procedural defaults, such as the number of depositions, trial by judge or jury, or sometimes even jurisdiction. Whether the judge or parties have “flexibility” to change the rules of the game is an important, but understudied, aspect of procedure.*

*This Article is the first to document the full spectrum of procedural flexibility—the varied and sometimes surprising range of ways in which judges and parties can modify procedure in their cases. We show that procedural flexibility spans a broad spectrum from rigid inflexibility, to contracts that modify procedure, to unilateral control over procedure, and beyond, to a new frontier of innovations—buying and selling of procedures between parties in different cases, and markets or auctions for everything from depositions to jury trials. Some of these possibilities seem radical, but we show that, contrary to conventional wisdom, current civil practice already permits similarly radical flexing of procedure.*

*As a normative matter, we argue that even radical forms of flexibility (like markets in procedure) cannot be ruled out based on familiar normative criteria such as efficient dispute resolution, norm creation, distributive justice, or facilitation of*

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*democratic participation in the legal system. To the contrary, such forms of procedural flexibility may offer unexpected avenues for addressing inequities of the current status quo.*

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## INTRODUCTION

For students, and even for teachers, it is easy to see civil procedure as a fixed (albeit perplexing) set of rules. Parties in civil litigation have at their disposal all sorts of rigid, even numerically quantified, procedural entitlements. In federal court, for example, parties are entitled to discovery, including ten depositions,<sup>1</sup>

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<sup>1</sup> FRCP 30(a)(2)(A).

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 only at the end of a case.<sup>5</sup> And on and on.

As a general matter, however, the notion that the law imposes a fixed set of procedures on civil litigants is false. Many rules are mere defaults and can be adjusted if parties do not want some of their entitlements or feel that their entitlements are not enough. Sometimes a party can get around a rule by convincing its adversary or the judge to deviate from a default, but sometimes not. For example, parties can agree to increase or decrease the number of depositions, interrogatories, or document requests,<sup>6</sup> but they cannot agree to overlook the “final judgment rule.”<sup>7</sup> Parties can agree *not* to have a jury when they are entitled to one, but they cannot grant themselves a jury trial merely by agreement.<sup>8</sup> In other words, sometimes procedure is “flexible,” and sometimes it isn’t.

This poses a bundle of related questions: Who can modify procedural defaults? (The judge? The parties by mutual agreement? One party unilaterally?) Which procedures can be modified? Does the current state of the law, which intermingles rigid rules with bendable ones, make sense normatively? Together, these questions fall under the rubric of “procedural flexibility”: the ability of judges and parties, either jointly or independently, to modify default procedures. In this Article, we examine what we call the “spectrum of procedural flexibility”—the broad and sometimes surprising range of ways in which judges and parties can control or modify the rules in their cases.

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<sup>2</sup> FRCP 33(a)(1).

<sup>3</sup> See FRCP 34.

<sup>4</sup> US Const Amend VII.

<sup>5</sup> See 28 USC §§ 1291–92.

<sup>6</sup> See FRCP 30, 33, 34.

<sup>7</sup> A colorful illustration of this in a recent, high-profile case is *In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation*, 15 F Supp 3d 466 (SDNY 2014), revd and vacd, 829 F3d 197 (2d Cir 2016), vacd as moot, 138 S Ct 1186 (2018). Precisely because parties cannot stipulate around the final judgment rule, the district court refused to accept an agreement between the parties that an earlier order of the court was a final judgment. In response, Microsoft filed a motion *asking the court to hold it in contempt* so that there would be an appealable final judgment (the contempt order). The court obliged, and the case eventually reached the Supreme Court. See *United States v Microsoft Corp*, 138 S Ct 1186, 1187 (2018).

<sup>8</sup> See FRCP 38, 39.

One important aspect of procedural flexibility—parties’ ability to modify procedure by agreement—has attracted the attention of an active literature. This literature, which we discuss in greater detail in Part I.A, frames procedural flexibility as a choice between either private contracts between the parties to modify procedures in their case or no procedural flexibility for the parties. Scholars have grappled with one key question: 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 emerge from 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, such as rules governing the recusal of judges, judicial control over oral arguments and decision-making, and the right to appeal. Second, outside of this “core,” contracts between parties should be invalidated only in limited circumstances, such as when the contract harms third parties or contains unacceptably one-sided terms.

This core/non-core framework captures common intuitions about how procedural flexibility works in practice, but as we will document in Part I.B, this framework incompletely characterizes the current landscape of procedural flexibility. By focusing on the most familiar form of flexibility—contracts between the parties—this framework overlooks other forms of procedural flexibility and cannot predict innovation in these forms. In other words, current scholarship (1) neglects forms of procedural flexibility that deserve study and are already prevalent in doctrine and legal practice and (2) leaves new forms of procedural flexibility undiscovered.

The existing literature on procedural flexibility also struggles to rationalize the normative basis for the core/non-core distinction. For example, if the “core” exists to protect the legitimacy of judicial decision-making, why do parties have control over how much evidence the judge sees (which could profoundly affect the quality of a watershed decision) but not over whether the judge’s decision is written or oral (which in most cases will have zero effect on the quality or legitimacy of the court’s decision)? For another example, if we conclude that private contracts between parties are undesirable, why is the only remedy to take away private contracting? Are we so sure that the problem with “private contracts between parties” is that it involves “private contracts,” or

could the problem be that the contracts are limited to being “between parties”? If so, couldn’t the remedy be to *expand* private exchanges to include contracts between parties and nonparties? Lastly, is it reasonable to expect that the answers to the previous questions will be the same all the time for all types of cases? Is it reasonable to expect that civil procedure should be a one-size-fits-all set of rules?

With these questions in mind, we set out in this paper as cartographers to survey the landscape of procedural flexibility and catalog the full spectrum of procedural flexibility in practice. We also embark as explorers to discover entirely new approaches to procedural design that can expand the reformer’s toolkit. Our approach here is primarily descriptive and taxonomic. We reframe questions of procedural design not as “Which procedures are in the core and therefore cannot be modified?” but as “Where on the spectrum of procedural flexibility does this procedure belong?” or “Which cases can utilize which forms of procedural flexibility?”

What we find is that most of what lawyers and academics think they know about procedural flexibility is wrong. There are more types of flexibility than we realize. Some types that seem novel are in fact commonplace, and some truly radical types may be normatively superior to the status quo we take for granted.

In Part II, we begin this process of charting the landscape by examining the understudied dimensions of procedural flexibility that already exist in practice. These aspects of procedural flexibility, even though ubiquitous in practice, have largely avoided sustained examination.<sup>9</sup> Our contribution in Part II is to provide a detailed examination of the many forms of flexibility embedded in current procedure.

We uncover an entire spectrum of procedural forms that allow modifications by one or both parties, with or without the court’s involvement. Some points on the spectrum are well studied, such as flexibility by agreement between the parties,<sup>10</sup> or “no-flex” rules where neither the parties nor the judge have any

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<sup>9</sup> Procedural flexibility keeps a low profile in case reports and jurisprudence. After all, flexibility involves discretion and agreement as the basis for procedure, two factors that steer cases away from the spotlight of appellate review. Appellate courts defer to discretionary decisions in lower courts; agreement means that issues aren’t disputed, and therefore aren’t the subject of appellate opinions.

<sup>10</sup> Many discovery rules have this character. The numeric limits on depositions and interrogatories can be lifted by party agreement. See FRCP 30 (depositions) and 33 (interrogatories). See also Part II.A.4.

discretion.<sup>11</sup> Other points on the spectrum are more obscure. For example, sometimes there must be agreement among the judge and all the parties to budge a default, while other times the law allows the judge, or even a single party, to freely deviate from the rule as she sees fit.<sup>12</sup>

We then discuss how the degree of procedural flexibility can vary by venue and by case, such that the same procedures may have different degrees of flexibility in different contexts. For some smaller-value claims, a plaintiff may have a choice between filing in a small-claims division of a state court or in a federal district court. Not only will procedures differ, but procedural *flexibility* will differ dramatically, too. Moving from one forum to the other, procedural options that are unthinkable in one setting become routine in the other.<sup>13</sup>

In Part III, we shift our focus from cataloging the present to discerning the future. The Federal Rules of Civil Procedure (“Federal Rules” or “Rules”) expressly permit and even encourage procedural flexibility. But lawyers, judges, and rulemakers tend to take for granted that bargaining by the parties to modify the procedures in their case must take place *within that case*.

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>14</sup> A plaintiff can agree to take three extra depositions by negotiating with the defendant *in that case*, perhaps by offering the defendant three extra depositions as well. Yet, a plaintiff can’t get three extra depositions by paying a defendant *in a different case* to take three fewer depositions. Why not? Our imagination should not be limited by the status quo.

In this Article, we expand the range of procedural flexibility to its full limits. We imagine procedural flexibility not merely as agreements between parties but as a spectrum from rigid inflexibility to unilateral control and beyond—to wholesale selling and

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<sup>11</sup> Federal subject matter jurisdiction is often described in this way, although as we shall discuss, it is more complicated than this! See Part II.A.1.

<sup>12</sup> Either party’s unilateral right to invoke trial by jury in suits at common law is the most familiar example of unilateral flexibility. See FRCP 38(b). We canvass less well-known examples of unilateral flexibility in Part II.A.2 (judge) and Part II.A.5 (one party). More broadly, Professor Alexandra Lahav’s recent work has begun to illuminate the broad but underappreciated degree to which judges exercise discretion to deviate from default procedure. Alexandra D. Lahav, *Procedural Design*, 71 Vand L Rev 821, 861–62 (2018).

<sup>13</sup> See Part II.B.

<sup>14</sup> FRCP 30(a)(2)(A)(i).

trading of procedures across cases, with markets or auctions for procedural entitlements from depositions to jury trials.<sup>15</sup>

These ideas may sound radical, even outlandish. The idea of trading procedural entitlements across cases *seems* utterly alien to current practice. And our instincts tell us that markets in procedure would offend norms of professional legal ethics, not to mention make for lousy policy.

Yet these ideas are less radical than you might think. Our claim is not merely that one can imagine previously undiscovered forms of flexibility; rather, it is that once we imagine them and know what to look for, we find versions of these radical forms of procedural flexibility already in use. We don't just imagine the future, we also uncover hidden features of the present. Consider these possibilities:

- *Trading procedures across cases.* Why not create a market where lawyers in one case give up their day in court so that another case gets extra attention, so long as both clients benefit from the bargain?
- *Raising pleading standards in exchange for easier recovery.* Why not let a judge raise the bar for pleading in exchange for an easier path to victory if the complaint survives a motion to dismiss?
- *Auctions.* Why not have the court system auction off the juiciest procedural entitlements to the highest bidder?

Such radical notions as these will never see the light of day in a courtroom, right? Well . . .

Of course, lawyers don't *label* what they are doing as "trading procedures across cases." But in literally thousands of civil cases in federal court every year, groups of lawyers do, in fact, make deals to ask for less procedure in some cases in exchange for more judicial attention in others. (And judges go along with this.)<sup>16</sup>

And of course, judges don't *label* what they are doing as "raising pleading standards in exchange for easier recovery." But in

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<sup>15</sup> In the spirit of Professors Guido Calabresi and Douglas Melamed, we consider procedure not only as a "property" regime, in which a party must bargain to a price with a seller, but also possibly as a "liability" regime, in which parties may unilaterally invoke procedure, but the court sets prices for doing so. Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv L Rev 1089, 1105–06 (1972).

<sup>16</sup> The context is multidistrict litigation (MDL), and they are not called "procedural markets." They are called "Plaintiffs' Steering Committees." See Part III.B.2.

literally thousands of civil cases in federal court every year, judges set pleading standards far above the plausibility pleading standard under Rule 8(a)(2) but then facilitate settlement payments from defendants to those plaintiffs whose pleadings survive. (And the plaintiffs' attorneys go along with this.)<sup>17</sup>

And of course, courts don't *label* what they are doing as "auctioning" juicy procedural entitlements to plaintiffs' lawyers—oh, wait. Never mind. They do. (And yes, defense attorneys go along with this.)<sup>18</sup>

These private bargains and court orders need to be recognized for what they are—innovations in procedural flexibility—and evaluated as such. By identifying the full spectrum of procedural flexibility, we provide the framework for understanding how judge and party control over procedure is evolving, even in ways that the statutes and Rules governing procedure do not acknowledge.

Our project necessarily raises normative and policy questions: Are current approaches to procedural flexibility suited to the goals of the civil justice system? Would radical reshaping of procedural flexibility improve access to justice or quash it? Would it reduce the cost of litigation? Could it accelerate the resolution of cases? Would it increase or reduce inequalities within the system? Could it reverse the flow of cases out of court and into arbitration?

These questions require sustained treatment. In the present Article, although we focus on transforming the descriptive framework for procedural flexibility, we also begin the project of normatively evaluating the more radical forms of flexibility. In Part IV, we argue that nothing in the full range of procedural flexibility—even more radical options like markets in procedure—is clearly ruled out as a normative matter by the criteria most often invoked by the existing literature on procedural flexibility. These criteria include facilitating dispute resolution and norm creation. Neither is anything ruled out by concerns about democratic participation, commodification, and distributive justice.

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<sup>17</sup> It is not called "raising pleading standards." It is called "issuing a *Lone Pine* order." Again, the context is MDL. See Part III.B.2.

<sup>18</sup> See *In re Auction Houses Antitrust Litigation*, 197 FRD 71, 78–82 (SDNY 2000) (reviewing history of courts using reverse auctions to select class counsel in class actions). See also Part III.B.1.

To be clear, we make *no* claim that more flexibility is better, and it would be premature in this Article to claim that any specific form of procedural flexibility is good policy. But we *do* argue that, just as traditional descriptive criteria fail to account for the current complexity of procedural flexibility, traditional normative criteria fail to provide adequate guidance for future procedural reform. Hence, we end this Article with a call for a more ambitious normative theory of procedure.<sup>19</sup>

## I. BACKGROUND

### A. The Core/Non-Core Paradigm

The idea that procedural rights can or should be modified by parties to a lawsuit has recently been examined by scholars in both criminal<sup>20</sup> and civil<sup>21</sup> contexts. Practitioners, however, have

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<sup>19</sup> We take up this challenge in a work in progress, in which we seek to develop a comprehensive normative framework for evaluating procedure that can unpack the policy implications of the full spectrum of procedural flexibility. See Ronen Avraham and William H.J. Hubbard, *Civil Procedure as the Regulation of Externalities* (unpublished working paper 2020).

<sup>20</sup> See, for example, John Rappaport, *Unbundling Criminal Trial Rights*, 82 U Chi L Rev 181, 193 (2015) (proposing to abandon the all-or-nothing choice between a guilty plea and a full-blown jury trial); Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 J Crim L & Crimin 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) (suggesting three bargains that a defense counsel could propose to simplify a trial in exchange for some guaranteed leniency for the defendant); Gregory M. Gilchrist, *Trial Bargaining*, 101 Iowa L Rev 609, 622–23 (2016) (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 (2011) (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>21</sup> See, for example, Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 Tex L Rev 1329, 1382 (2012) (documenting various ways in which parties make their own procedural rules and the normative concerns they might raise); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 Va L Rev 723, 783 (2011) (exploring limits on the enforcement of procedural contracts, particularly when they conflict with substantive, nonwaivable legal rights and obligations); Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 Geo Wash L Rev 461, 467–91 (2007) (proposing to conceptualize the rules of civil procedure as default rules that can and should be modified to suit the needs of each case); Scott Dodson, *Party*

been modifying procedure all along,<sup>22</sup> and such control over procedure has been on the rise as traditional hostility to party control over procedure has disappeared from doctrine.<sup>23</sup> As scholars have noted, parties may agree on the state in which they will litigate their dispute<sup>24</sup> and on the law which would govern their dispute,<sup>25</sup> even when that state's laws otherwise could not.<sup>26</sup> They may agree to waive various evidence objections, such as the right to object on hearsay grounds, in return for their opponent doing the same<sup>27</sup> or for some other favor.<sup>28</sup> They may waive claims about

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*Subordination in Federal Litigation*, 83 Geo Wash L Rev 1, 37 (2014) (framing parties as subordinate to the law and judicial authority, and suggesting limitations on procedural customization); David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U Ill L Rev 389, 402–16 (noting a lack of evidence that parties commonly develop bespoke procedural rules through private agreement); Daphna Kapeliuk and Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*, 91 Tex L Rev 1475, 1485–91 (2013) (arguing that the public implications of private procedural agreements must be analyzed not only from the ex post but also the ex ante perspective—that is, before disputes arise); Gary Lawson, *Stipulating the Law*, 109 Mich L Rev 1191, 1203–18 (2011) (noting the possible benefits to litigants and courts of agreements stipulating facts and extending this reasoning to stipulations of law); Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 NYU L Rev 514, 570 (2009) (advocating “procedural optionality”—that is, modification of procedural rules through private agreement—as a means of reducing frivolous litigation).

<sup>22</sup> The earliest example of negotiation over procedure—the standard of proof in particular—that 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>23</sup> See Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 BU L Rev 127, 133 (2018).

<sup>24</sup> See Moffitt, 75 Geo Wash L Rev at 493 (cited in note 21); Hoffman, 2014 U Ill L Rev at 408 (cited in note 21).

<sup>25</sup> Moffitt, 75 Geo Wash L Rev at 493 (cited in note 21); Hoffman, 2014 U Ill L Rev at 427 (cited in note 21).

<sup>26</sup> See Restatement (Second) of Conflict of Laws § 187 & cmt f (noting circumstances under which contractual parties may choose the law of a state “with which the contract has no substantial relationship”). Further, forum-selection clauses are commonly viewed as virtual choice-of-law clauses because the ability to choose a forum often converges with choosing the substantive law that would apply. See, for example, *Allstate Insurance Co v Hague*, 449 US 302, 320 (1981) (finding that a Minnesota court could apply Minnesota law, even though the action was brought against a Wisconsin resident and arose out of events in Wisconsin).

<sup>27</sup> For a discussion by a court (though in a criminal case) of parties' ability to waive evidentiary rules, including the hearsay rule, see *United States v Mezzanatto*, 513 US 196, 202 (1995).

<sup>28</sup> See Colter L. Paulson, *Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure*, 45 Ariz St L J 471, 518–19 (2013) (discussing mixed judicial responses to attempts by parties to contractually waive rules of evidence). Judges, especially in federal court, often strongly “encourage” parties to agree on resolving evidentiary disputes, and they discourage tactics by one party that force the other party to jump through the hoops sometimes required to get evidence admitted when the only purpose of doing so is to waste the other party's time and efforts. Courts, however, tend to relax the

statutes of limitations,<sup>29</sup> craft their own jury instructions,<sup>30</sup> or even totally waive their right to a jury trial.<sup>31</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>32</sup> They may agree to limit the number of witnesses or the timeline, form, and content of discovery.<sup>33</sup> Parties may even agree to forego their appeal rights, not only as a part of a settlement agreement, but also in advance.<sup>34</sup> And so on. Parties can agree on waiving or trading many rights besides these 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>35</sup> stipulate that the judge will not give reasons for her decision,<sup>36</sup> or change the standards by which the judge will review another adjudicator's decision.<sup>37</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 courts' missions that they form a "core" set

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rules of evidence more in bench trials than in jury trials because, in bench trials, there is no concern that jurors might go astray. See Elizabeth Thornburg, *Designer Trials*, 2006 J Disp Resol 181, 203.

<sup>29</sup> Parties can shorten an applicable statute of limitations by agreement if the shorter period is reasonable, though "[m]any judges . . . are uncomfortable with changing statutes of limitations that they perceive as fair." Paulson, 45 Ariz St L J at 498 (cited in note 28). Some courts prohibit the enforcement of contractual statutes of limitations altogether. See *id.* at 499. Parties are less free to lengthen a statute of limitations, since lengthening it increases the risk of stale claims. See Bone, 90 Tex L Rev at 1347–48 (cited in note 21); Paulson, 45 Ariz St L J at 499 (cited in note 28).

<sup>30</sup> See Moffitt, 75 Geo Wash L Rev at 501–02 (cited in note 21).

<sup>31</sup> See *id.* at 494; Bone, 90 Tex L Rev at 1348 (cited in note 21); Paulson, 45 Ariz St L J at 488, 490 (cited in note 28); Thornburg, 2006 J Disp Resol at 185 (cited in note 28); Kevin E. Davis and Helen Hershkoff, *Contracting for Procedure*, 53 Wm & Mary L Rev 507, 517 (2011).

<sup>32</sup> See Thornburg, 2006 J Disp Resol at 193 (cited in note 28).

<sup>33</sup> See Moffitt, 75 Geo Wash L Rev at 500 (cited in note 21). See also FRCP 29(b), which requires the 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>34</sup> See Bone, 90 Tex L Rev at 1351 (cited in note 28).

<sup>35</sup> See *id.* at 1384–85.

<sup>36</sup> See Moffitt, 75 Geo Wash L Rev at 505–07 (cited in note 21) (suggesting that the public would resist agreements that impede the clear articulation of the law and publicity of court proceedings).

<sup>37</sup> See *Hall Street Associates, LLC v Mattel, Inc*, 552 US 576, 578 (2008) (holding that parties' agreement cannot change the district court's standard of review of an arbitral award under the Federal Arbitration Act).

of procedures that cannot be altered by contract between the parties?<sup>38</sup>

This literature traces its roots back to the work of Professor Lon Fuller and the Legal Process School,<sup>39</sup> which attempted to distill the essential characteristics of adjudication. Fuller described adjudication as “a device which gives formal and institutional expression to the influence of reasoned argument in human affairs.”<sup>40</sup>

The concept of the core has been most fully articulated in recent work by Professor Robert Bone, which focuses on defining the core of procedural rights.<sup>41</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>42</sup> These rights are the “core” of procedure, in the sense that they are essential to adjudication.<sup>43</sup>

Several other scholars have emphasized legitimacy as well. They note that the public *perception* of the courts is likely to be

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<sup>38</sup> Some scholars take this framing as given and distinguish further between types of contracts that parties to a dispute can use to alter procedure by agreement. Daphna Kapeliuk and Professor Alon Klement highlight the significance of the timing of the contract: the distinction between predispute (ex ante) and postdispute (ex post) procedural contracts. According to Kapeliuk and Klement, evaluating procedural contracts solely from an ex-post perspective—when they are already enforced in litigation—neglects some important features and effects of predispute contracts. For example, a clause that seems costly, such as one allowing broad discovery, can incentivize parties to settle, so it would never actually be enforced. The same distinction holds importance when evaluating the implications of the contract’s institutional legitimacy. See Kapeliuk and Klement, 91 Tex L Rev at 1490 (cited in note 21).

<sup>39</sup> See generally Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv L Rev 353 (1978); Henry M. Hart Jr and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation 1958); Robert G. Bone, *Lon Fuller’s Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 BU L Rev 1273 (1995). See also Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 BU L Rev 485, 509–10 (2003); William N. Eskridge Jr and Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U Pitt L Rev 691, 694 (1987).

<sup>40</sup> Fuller, 92 Harv L Rev at 366 (cited in note 39).

<sup>41</sup> See Bone, 90 Tex L Rev at 1385–91 (cited in note 21). For a response to Bone that emphasizes that many seemingly problematic provisions may be useful to promoting settlement while rarely implicating legitimacy concerns, see Kapeliuk and Klement, 91 Tex L Rev at 1486–87 (cited in note 21). For closely related arguments in the criminal procedure context, see Rappaport, 82 U Chi L Rev at 194–95 (cited in note 20); Fisher, 97 J Crim L & Crimin at 977 (cited in note 20).

<sup>42</sup> See Bone, 90 Tex L Rev at 1378, 1384–94 (cited in note 21).

<sup>43</sup> Id at 1384–85.

shaped by the perception that court decision-making is fair because it employs broadly applicable, consistently applied procedures that can benefit all parties.<sup>44</sup> In contrast, Bone focuses not on perceived legitimacy but on normative legitimacy by arguing about what elements *should* comprise the core of adjudication because they preserve the legitimate operation of the institution.<sup>45</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>46</sup> This leads him to exclude from the core procedures such as pleading rules, joinder rules, discovery rules, summary judgment rules, and evidence rules.<sup>47</sup> 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.<sup>48</sup> More generally, he distinguishes between rules that regulate the conduct of parties and those that regulate the decision-making process of the judge.<sup>49</sup>

To illustrate something clearly within the core, Bone uses the example of deciding a case by flipping a coin. He notes the strong intuition that this would be wrong, even if the parties genuinely consent to it and its attendant risks, even if it surely would be a cost-saving method of dispute resolution, and even if (let us suppose) the resolution of the particular case would have no negative effects on third parties.<sup>50</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.<sup>51</sup> Chipping away at a universal norm of reasoned decision-making and judicial reputations built upon this skill, Bone cautions, would undermine the

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<sup>44</sup> See Davis and Hershkoff, 53 *Wm & Mary L Rev* at 547–48 (cited in note 31); Moffitt, 75 *Geo Wash L Rev* at 480–81 (cited in note 21); Thornburg, 2006 *J Disp Resol* at 209–10 (cited in note 28).

<sup>45</sup> Bone, 90 *Tex L Rev* at 1378–79 (cited in note 21).

<sup>46</sup> *Id* at 1385–88.

<sup>47</sup> *Id* at 1393.

<sup>48</sup> *Id*.

<sup>49</sup> Bone, 90 *Tex L Rev* at 1393–94 (cited in note 21).

<sup>50</sup> *Id* at 1379–80.

<sup>51</sup> *Id* at 1394–95.

internalization of these norms among judges engaging in adjudication.<sup>52</sup> But what is the mission (or missions) that adjudication is to achieve?

Closely related to Fuller and Bone is the work of Professors 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>53</sup> Like Bone, Resnik sees the legitimacy of the courts as dependent on judges fulfilling this role.<sup>54</sup> Moffitt is more explicit about the relationship between the essential features of adjudication and the missions it is to achieve. Moffitt couches the public interest in litigation in terms of two core functions of courts—resolving disputes and producing rules and precedents (that is, norm creation).<sup>55</sup> 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>56</sup>

## B. Limitations of the Core/Non-Core Paradigm

Although different scholars have offered different articulations of the core functions of courts, we see broad agreement over their general contours. Adjudication by a judge lends finality to the resolution of a dispute.<sup>57</sup> This is the dispute-resolution function of courts. A judge's decision must be reached through a

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<sup>52</sup> Id at 1396–97.

<sup>53</sup> See Judith Resnik, *Procedure as Contract*, 80 Notre Dame L Rev 593, 623–24 (2005).

<sup>54</sup> Id. See also Paulson, 45 Ariz St L J at 475–76, 527–30 (cited in note 28) (characterizing a procedural contract as a joint petition for the court to modify its rules, and proposing that courts require judicial control over decision-making, among other conditions, before implementing the terms of the contract).

<sup>55</sup> See Moffitt, 75 Geo Wash L Rev at 505–07 (cited in note 21).

<sup>56</sup> Id. Of course, concerns about legitimacy are not the only reasons why courts would, or should, reject party agreements to modify procedure. Scholars have noted that even outside the core, parties cannot agree to a procedure that impairs parties' ability to bring claims to vindicate federal rights. See Bone, 90 Tex L Rev at 1382–83 (cited in note 21); Dodge, 97 Va L Rev at 786–87 (cited in note 21). This concern has become acute in the wake of *American Express Co v Italian Colors Restaurant*, 570 US 228 (2013), a case that directly pitted party control over procedure—albeit in arbitration—against the effective vindication of rights under federal antitrust law. Nor should courts be able to enforce party contracts that reflect a one-sided agreement—a civil procedure species of unconscionability. See Bone, 90 Tex L Rev at 1382–83 (cited in note 21); Paulson, 45 Ariz St L J at 475–76, 527–30 (cited in note 28). Scholars have also cautioned against agreements that unjustifiably affect the rights of third parties or increase the burdens on courts, which would increase court congestion and taxpayer expense. See Bone, 90 Tex L Rev at 1382–83 (cited in note 21); Moffitt, 75 Geo Wash L Rev at 478–83 (cited in note 21).

<sup>57</sup> See Moffitt, 75 Geo Wash L Rev at 506 (cited in note 21).

process of reasoned application of law to facts,<sup>58</sup> and the judge's decision provides guidance about the law to the public and future judges.<sup>59</sup> This is the norm-creation function of courts. The core is characterized by procedures central to the norm-creation role of courts, while the non-core includes procedures tied to the dispute-resolution function of courts, which relates more to the facts of the individual case than to the rules that courts announce.

At a high level of generality, these principles allow one to 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 can indeed apply to cases involving parties' contracts that attempt to modify procedure. As we've noted, flipping coins to decide a case generates easy intuitions about what 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 Associates, LLC v Mattel, Inc.*,<sup>60</sup> in which 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 referred their dispute. Their agreement did not diminish the power of the court; instead, it replaced a deferential standard of review under the Federal Arbitration Act<sup>61</sup> with a de novo review of the arbitrator's legal interpretations.<sup>62</sup> Nonetheless, the Supreme Court held that this was not within the parties' power.<sup>63</sup>

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<sup>58</sup> See Bone, 90 Tex L Rev at 1379 (cited in note 21).

<sup>59</sup> See Moffitt, 75 Geo Wash L Rev at 506 (cited in note 21).

<sup>60</sup> 552 US 576 (2008).

<sup>61</sup> 43 Stat 883 (1925), codified as amended at 9 USC § 1 et seq. Under the Federal Arbitration Act (FAA), a court must confirm an arbitral award even if the award was based on erroneous legal standards. See 9 USC § 10 (permitting vacatur of arbitral awards only for arbitrator partiality, corruption, or "other misbehavior," but not for errors of law).

<sup>62</sup> *Hall Street Associates*, 552 US at 580.

<sup>63</sup> *Id.* at 590. In reaching this result, the Court concluded that the text of the FAA's provisions for judicial confirmation of arbitral awards "carries no hint of flexibility." *Id.* at 587. 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. See *id.* at 591–92. This, too, may be consistent with the concept of the core, at least to the extent that it dictates only what parties may not alter, not what is unalterable altogether.

The core/non-core binary is simple and elegant. But it suffers from limitations that, in our view, highlight the need for a richer descriptive and normative account of procedural flexibility. We note three tensions that arise in the simple core/non-core framework:

*First*, the claim that the core protects the norm-creation process of courts from party control may be less robust than assumed. In some important respects, party agreements *can* control the legal standards applied by the court. Courts enforce choice-of-law clauses in contracts (albeit, only to the extent that the claims are contractual in nature).<sup>64</sup> They also vigorously enforce forum-selection agreements,<sup>65</sup> and although dictating the forum does not formally dictate the governing law, as a practical matter it often does.<sup>66</sup> Thus, with choice-of-law and choice-of-forum clauses, the parties are, in effect, choosing the legal rules that the court will apply. They may even choose to burden a court with the task of applying the law of another jurisdiction, which imposes greater decision-making costs on the court even as it lowers the precedential value of the court's decision. Why aren't choice of law and choice of forum within the core? Indeed, although such a notion seems exotic today, historically this was not always the case.<sup>67</sup>

*Second*, 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

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<sup>64</sup> See, for example, *Finance One Public Co Ltd v Lehman Brothers Special Financing, Inc*, 414 F3d 325, 335 (2d Cir 2005) (holding that "extra-contractual setoff rights fall outside the scope" of choice-of-law clauses).

<sup>65</sup> See, for example, *Carnival Cruise Lines, Inc v Shute*, 499 US 585 (1991). Enforcement does depend, however, on the extent to which the forum chosen falls within broad limits of reasonableness. See *id.* at 593 (discussing the "reasonableness" inquiry that the Court has used to determine whether forum-selection clauses are enforceable).

<sup>66</sup> See, for example, *Allstate*, 449 US at 320 (finding no due process violation when a Minnesota court applied Minnesota law to an action by a Wisconsin resident against a Wisconsin resident arising out of events in Wisconsin and an insurance policy held in Wisconsin).

<sup>67</sup> Historically, courts often held contractual choice-of-forum clauses unenforceable at common law. See, for example, *The Bremen v Zapata Off-Shore Co*, 407 US 1, 9 (1972) ("Forum-selection clauses have historically not been favored by American courts."). The law of choice of law and personal jurisdiction tended to follow strict territorial rules; the canonical case on premodern personal jurisdiction is *Pennoyer v Neff*, 95 US 714 (1877) (describing the general rule that a court can exercise jurisdiction only over persons physically within the territory of the sovereign).

<sup>68</sup> See Bone, 90 Tex L Rev at 1390 (cited in note 21).

whole) benefit from habituation into certain modes of decision-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 as a descriptive matter, is judicial decision-making uniform? Even in the absence of attempts to contractually modify procedure, variety, not uniformity, is the norm in court procedure. As Professor Alexandra Lahav has documented in detail, civil procedure is far less standardized than textbook accounts indicate.<sup>69</sup> Often, modes of judicial reasoning are not even 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>70</sup> Some of these distinctions go to the heart of what it means for a process to be adversarial or to be participatory, and some go to the heart of what it means for a decision to be reasoned or to be public. None of these distinctions is uniform.

*Third*, even as a normative matter, the sharp distinction between the core and the non-core may be problematic. To put methods of judicial reasoning to assure optimal norm creation on one side of the line and elaboration of facts by the parties to assure optimal dispute resolution *for the specific parties* on the other side of the line may disserve the interdependence between the two. We might think that the legitimacy of the court and the public value of the court's opinions are undermined if the court rests its decision upon a dubious stipulation of facts by the parties.<sup>71</sup> And lawyers seem to believe that better facts make for better law, given

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<sup>69</sup> See generally Lahav, 71 Vand L Rev 821 (cited in note 12).

<sup>70</sup> See Richard A. Posner, *Reflections on Judging* 287–315 (Harvard 2013) (describing some of the challenges that confront district judges and the various practical decisions they must make to address them).

<sup>71</sup> To be sure, parties have an ethical duty of candor to the court. See, for example, Model Rules of Professional Conduct Rule 3.3 (ABA 2018). Our claim is not that parties necessarily 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

the care with which lawyers filing impact litigation select their test cases. Indeed, the distinction between what counts as a factual claim and what counts as a legal conclusion is a famously slippery one in other contexts.<sup>72</sup>

A full-blown normative theory for procedural flexibility is beyond the scope of this Article. But the observations above indicate that, just as there is a need for a richer descriptive account of procedural flexibility, there is also a need for a richer normative account. In this Article, we provide this new descriptive account, mindful that it lays the groundwork for a new normative account to come.

## II. THE SPECTRUM OF PROCEDURAL FLEXIBILITY

As we saw in the previous Part, existing scholarship draws a distinction between a “core” of procedures, which no one can modify, and a “non-core” of procedures, which the parties to a case may modify by contract, subject to some qualifications. In this way, existing scholarship has taken an all-or-nothing approach to the core: there are two types of flexibility, core (judge control) and non-core (party control), and there are two types of procedure, in the core and out of the core. But as we will show in this Part, there is a spectrum of procedural flexibility that contains many different possibilities for allocating control over procedure. Within the core, there can be more flexibility or less—the amount of *judicial* flexibility varies across procedures. Outside the core, there are many configurations of the judge and one or both parties, who, by agreement, can modify procedure in a given case.

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presentation of facts was not in their mutual interest. Of course, it is also possible that a stipulation may be known to be factually false. In her monograph on the interbellum Constitution, Professor Alison LaCroix colorfully documents how a significant Commerce Clause case, *Willson v Black Bird Creek Marsh Co*, 27 US (2 Pet) 245 (1829), rested on a stipulation that was “a fictionalized account of the crucial facts of the case.” Alison LaCroix, *The Interbellum Constitution: Union, Commerce, and Slavery from the Long Founding Moment to the Civil War* (Yale forthcoming). For a more recent example of what *may* have been a collusive stipulation used to generate a court decision with potentially binding effect on nonparticipants in the lawsuit, see generally *Hansberry v Lee*, 311 US 32 (1940).

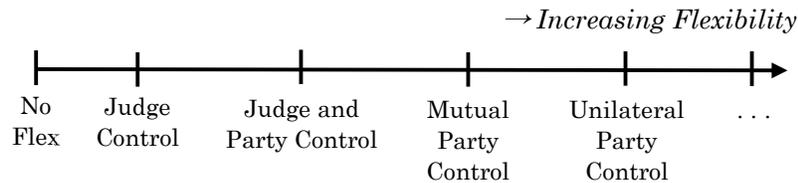
<sup>72</sup> See, for example, Elizabeth Thornburg, *Law, Facts, and Power*, 114 Penn St L Rev Penn Statim 1, 3–4 (2010); Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 Colum L Rev 416, 417 (1921) (arguing that there is no logical distinction between statements categorized by courts as “statements of fact” and “conclusions of law”).

### A. Breaking Up the Core and Non-Core

As we just noted, conventional wisdom assumed two categories of procedural flexibility: one where the parties cannot modify procedure through mutual agreement—this category is the “core” of procedure—and one where parties can control procedure through contracts between themselves. However, a more complete view of procedural flexibility reveals that these categories are just two points along a spectrum. Figure 1 begins to illustrate a more complete picture of the range of options for assigning control over procedure to actors in the system.

Viewed within this spectrum, we see that the core/non-core distinction reflects attention to two sections of the larger spectrum. The core, where parties have no ability to alter procedural defaults, occupies the left end of the spectrum, and mutual party agreements to alter procedural defaults sit at the middle of the spectrum.

FIGURE 1: A SPECTRUM OF FLEXIBILITY



This spectrum does not merely list theoretical possibilities. Current procedure is chock-full of examples of every one of these forms of procedural flexibility. (And we have left space at the right end of the spectrum to introduce, in Part III, new forms involving even greater flexibility.) In the sections below, we describe the points along the spectrum and document examples of procedural flexibility from the Federal Rules, statutes, and case law for each.

#### 1. No flex.

On the far left, no one has discretion. As a formal matter, there is no flexibility at all. As a practical matter, the judge has whatever wiggle room doctrine provides, but nothing else. The canonical example of this is federal subject matter jurisdiction, which neither the parties nor the court have any freedom to waive or alter by agreement.

The central principle governing appellate jurisdiction in the federal courts is likewise inflexible: the “final judgment rule” in essence requires that all activity in a case short of execution of the judgment be complete before a party may appeal a decision of the district court.<sup>73</sup> Even the collateral order doctrine, a gloss on the final judgment rule that allows certain interlocutory decisions to be treated as final judgments, gives no discretion to judges or parties.<sup>74</sup>

Indeed, this “no flex” category appears in all facets of civil procedure. Our survey of the Federal Rules of Civil Procedure reveals that most of the Rules, either in part or in whole, create inflexible rules. This is unsurprising, insofar as there must be some basic “rules of the game” that serve as a fixed reference point for all litigants.<sup>75</sup> Thus, many Rules governing what activities count as civil litigation (answer: a “civil action”<sup>76</sup>), what begins litigation (answer: “filing a complaint with the court”<sup>77</sup>), and how to go about doing that (answer: by, among other things, making “a short and plain statement of the claim showing that the pleader is entitled to relief”<sup>78</sup>) are expressed as no-flex rules. Other Rules governing the inclusion of additional claims or parties in a single action likewise contain many inflexible requirements.<sup>79</sup>

Despite the apparent abundance of no-flex rules, the Rules on the whole reflect a commitment to party-driven procedure in which the court takes a passive role, acting only in response to motions. This commitment bakes discretion into procedure, even when it is not made explicit. For example, Rule 8(a)(2) requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” This is stated as a no-flex rule. There is no reference to discretion of the judge and no proviso, “unless the parties agree otherwise.” But there is still a sense in which the parties could agree to a lower bar for pleading: the Rules do not obligate the defendant to file a motion to dismiss, and the

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<sup>73</sup> See, for example, *Mohawk Industries, Inc v Carpenter*, 558 US 100, 106–07 (2009).

<sup>74</sup> *Id.*

<sup>75</sup> FRCP 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts . . .”).

<sup>76</sup> FRCP 2 (“There is one form of action—the civil action.”).

<sup>77</sup> FRCP 3 (“A civil action is commenced by filing a complaint with the court.”).

<sup>78</sup> FRCP 8(a)(2). See also FRCP 4 and 4.1 (governing service of process and summons); FRCP 8, 9, 10, 11, and 12 (governing form and content of pleadings).

<sup>79</sup> See, for example, FRCP 13, 15(c), 19(c), 23(a)–(b), 24 (governing joinder of claims and parties, misjoinder, class certification, and intervention).

court need not act in the absence of such a motion.<sup>80</sup> Thus, procedural rigidity is not absolute even for threshold questions governing the making of a civil claim. Further, note that there is nothing inevitable about the degree of flexibility or rigidity here. The Rules could, for example, obligate the court to act *sua sponte* to dismiss inadequate pleadings under Rule 8(a)(2).<sup>81</sup>

Nor is this an isolated example. The law often intermingles procedural flexibility and inflexibility. As noted above, the final judgment rule is a no-flex rule. But as we shall see below, jurisdictional statutes and the Federal Rules of Civil Procedure create exceptions that permit interlocutory appeals, which are expressly based on the exercise of discretion by parties and judges.<sup>82</sup> And while parties cannot create federal subject matter jurisdiction by agreement (this is explicitly forbidden by statute<sup>83</sup>), parties can agree to resolve their cases before other tribunals, even when their disputes fall within the subject matter jurisdiction of the federal courts.<sup>84</sup> Indeed, in some limited instances, plaintiffs can unilaterally exercise discretion to stay out of federal court.<sup>85</sup> So although parties cannot flex into federal court, they can flex out.

Thus, while this Section has highlighted areas of procedure with no-flex rules, it also shows that drawing lines between a core of inflexible procedure and a non-core of flexible procedure is not

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<sup>80</sup> More radically, though, could the parties agree to a higher bar at the pleading stage, perhaps in exchange for allowing the plaintiff a broader scope of discovery or a lower bar at summary judgment? Could the judge unilaterally raise the pleading standard? Nothing in Rule 12 suggests this is possible, and Supreme Court precedent from other contexts indicates that the answer is no. See *Hall Street Associates*, 552 US at 592–93 (holding that parties’ agreement cannot change the district court’s standard of review of an arbitral award under the FAA). But stay tuned. We return to these questions later. See Part III.

<sup>81</sup> See FRCP 12(b). Note that the court is always under an obligation to dismiss for lack of subject matter jurisdiction. See FRCP 12(h)(3).

<sup>82</sup> See Part II.A.3 (discussing FRCP 54(b) and 28 USC § 1292(b)).

<sup>83</sup> See 28 USC § 1359.

<sup>84</sup> Absent a statute vesting exclusive jurisdiction in the federal courts, parties are free to agree to litigate in state court or through alternative dispute resolution, such as arbitration, which is expressly endorsed by the FAA. See 9 USC § 1 et seq.

<sup>85</sup> In a case arising under state law but potentially within the diversity jurisdiction of the federal courts, an individual plaintiff may avoid federal jurisdiction by pleading or stipulating to damages below the amount necessary to create federal jurisdiction. This is an application of what is called the “*St. Paul Mercury* rule.” See *St. Paul Mercury Indemnity Co v Red Cab Co*, 303 US 283, 288 (1938) (“The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith.”).

so simple. The rigidity of rules governing subject matter jurisdiction or appellate jurisdiction might seem to imply jurisdiction is at the core of procedure, but even here we see a commingling of no-flex and various forms of flexibility.

## 2. Judge control.

Moving right in Figure 1, we encounter the first of many forms of procedural flexibility: judge control. Judge control means that the judge (but only the judge) has discretion to deviate from defaults. In the prior core/non-core framework, this would still count as part of the core of procedure because the parties cannot exercise control through contract. Examples include certain categories of appeals, which a court has discretion to allow or deny. Such discretion is familiar in the context of certiorari to the US Supreme Court, but it is also a part of everyday litigation. For example, a district court judge may designate certain judgments to be final (and thus immediately appealable) in multiparty actions when such judgments would otherwise be nonfinal (and thus not immediately appealable).<sup>86</sup>

Our survey of the Rules documents many instances of judicial discretion to set procedural requirements. Examples include judicial discretion to change requirements governing service and pleading, including obviating requirements for service on all defendants and adding or subtracting requirements for responsive pleadings.<sup>87</sup> The court also has broad discretion to revise the default deadlines and dates set by the Rules;<sup>88</sup> to schedule and manage conferences, hearings, and trial;<sup>89</sup> and even to change the configuration of parties.<sup>90</sup> The court's unilateral discretion extends to matters governing whether the case ends or continues: the judge has discretion to enter summary judgment *sua sponte* and on grounds not raised by the parties,<sup>91</sup> and the court can order a new

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<sup>86</sup> See FRCP 54(b).

<sup>87</sup> See, for example, FRCP 5(c)(1) (permitting the court *sua sponte* to waive the requirement of serving pleadings on all defendants and to deem all crossclaims denied).

<sup>88</sup> See, for example, FRCP 5.1(e), 6, 12(a)(4), 15(a)(3), 56(b) (giving the court discretion to extend time).

<sup>89</sup> See, for example, FRCP 16 (giving the court discretion to call pretrial conferences); FRCP 20(b) (permitting the court to set separate trials in multiparty actions); FRCP 26(f) (giving the court discretion over discovery management conferences); FRCP 47 (governing examination of prospective jurors).

<sup>90</sup> See, for example, FRCP 19(a)(2) (realigning parties); FRCP 21 (permitting the court to sever parties or claims); FRCP 42 (giving the court discretion to consolidate or separate actions).

<sup>91</sup> FRCP 56(f).

trial sua sponte after entry of judgment on a jury verdict.<sup>92</sup> As noted above, a district judge has discretion to enter a final judgment with respect to one or more claims in a multicclaim or multi-party action.<sup>93</sup> And, as one would expect, the court always has discretion to inquire into and sanction misconduct.<sup>94</sup>

### 3. Judge and party control.

Next is the segment of the spectrum where the judge and the parties together share the power to flex the rules. This form of procedural flexibility is, within the core/non-core framework, still in the core, insofar as it requires judicial approval. Parties cannot modify procedure on their own.

The stricter variety of flexibility here requires agreement of both parties and of the judge. This form of flexibility is less common, but one can nonetheless find examples throughout the Federal Rules. An example would be empaneling a jury to issue a binding (that is, nonadvisory) verdict in a case where there is no right to a civil trial by jury.<sup>95</sup> Similarly, trial before a magistrate judge requires the consent of the district judge and the parties.<sup>96</sup> Another example is the requirement of a judicial order to enforce “clawback” agreements against third parties that protect parties from waiver of attorney-client privilege due to inadvertent disclosure of documents in litigation.<sup>97</sup> Class-wide settlement of claims also falls into this category,<sup>98</sup> and although the practice is not explicitly authorized by the Rules, judges in some multidistrict litigations have required judicial approval of mass settlements as well.<sup>99</sup>

The looser variety of flexibility here is more common and requires agreement of the judge and only one of the parties.<sup>100</sup> There

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<sup>92</sup> FRCP 59(d).

<sup>93</sup> FRCP 54(b).

<sup>94</sup> See FRCP 11 (governing non-discovery-related filings with the court); FRCP 16(f) (governing failing to appear at a pretrial conference); FRCP 37 (governing discovery-related filings with the court); FRCP 56(h) (governing summary judgment).

<sup>95</sup> See FRCP 39(c)(2).

<sup>96</sup> FRCP 73(a).

<sup>97</sup> See FRE 502(e).

<sup>98</sup> See FRCP 23(e). See also FRCP 23.1(c) (requiring court approval of settlements in derivative actions).

<sup>99</sup> See Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 NYU L Rev 71, 85 (2015); Andrew D. Bradt and D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 Cal L Rev 1259, 1298–1301 (2017).

<sup>100</sup> The court-and-one-party structure of court action is ubiquitous. When a party files a motion and the court grants it, this is essentially the court and one party agreeing to

are countless ways in which parties and courts exercise this form of flexibility, given that courts are granted broad discretion to regulate procedure to the extent that statutes and Rules do not otherwise specify,<sup>101</sup> and the Rules place no rigid limits on what a party can request by motion.<sup>102</sup> Examples include party requests to act outside of a deadline imposed by the Rules,<sup>103</sup> requests to the Court of Appeals to hear an interlocutory appeal,<sup>104</sup> and motions for the court to exercise its discretion to require amended or additional pleadings<sup>105</sup> or to change venue.<sup>106</sup>

#### 4. Mutual party control.

Moving further to the right we get to mutual party control. This has been the subject of most past academic attention on procedural flexibility. It is the realm in which party agreement can alter default rules without court involvement and potentially even against the court's will. This is the "non-core" that the literature contrasts with the "core" of fundamental procedures that the parties cannot modify by agreement. Thus, this portion of the spectrum maps neatly onto the existing core/non-core paradigm. But even here, a close look at doctrine and practice complicates the intuition that the core (and not the non-core) includes features of litigation that go to the essence of judicial decision-making or its perceived legitimacy.

For example, party agreement—with little or no say in the matter by a judge—can play a decisive role even in deciding which court will hear a case or whether a court will resolve the dispute

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something, but it is important to distinguish when this sequence of events involves procedural flexibility as opposed to something else. Procedural flexibility is when a party and the court both have discretion to change procedure away from a default, not when one or both of the judge and the party are not exercising discretion or changing procedural defaults. Further discussion on these forms of motion practice is outside the scope of this Article.

<sup>101</sup> See FRCP 83(b) ("A judge may regulate practice in any manner consistent with federal law . . .").

<sup>102</sup> See FRCP 7(b) (outlining requirements for motions in terms of minimal formal requirements but no substantive limits).

<sup>103</sup> See, for example, FRCP 14(a) (allowing extension of time for third-party claims with "the court's leave"); FRCP 51(a)(2) (allowing untimely requests for jury instructions). See also FRCP 6(b) (stating general rules governing extending time).

<sup>104</sup> See FRCP 23(f) (discretionary appeal of class certification decision); 28 USC § 1292(b) (discretionary interlocutory appeal requiring assent of both district and appellate courts).

<sup>105</sup> See FRCP 12(e) and 15 (clarifying and amending or supplementing pleadings, respectively).

<sup>106</sup> See 28 USC § 1404.

at all. Parties can agree or consent to a court's exercise of personal jurisdiction.<sup>107</sup> Arbitration agreements are, as a general matter, enforceable.<sup>108</sup> Again as a general matter, parties can, by contract, select the court that will serve as the forum for their dispute and, at least in contract disputes, the law that court will apply.<sup>109</sup> As a practical matter, parties can choose their court, maybe even the decision-maker, and then tell the judge (or arbitrator) which law to apply. Few procedural choices are more essential or consequential for legal decision-making than these.

Further, the Rules require a unanimous verdict returned by a jury of no fewer than six jurors—unless the parties stipulate otherwise.<sup>110</sup> Doesn't the difference between a unanimous verdict of twelve jurors and a verdict by a bare majority of two-out-of-three jurors affect the perceived legitimacy of the judgment? And of course, in most cases, the parties can settle their dispute and terminate the litigation without any input from the court other than the judge's rubber stamp of an agreed order to dismiss the case.<sup>111</sup>

Our earlier discussion of the no-flex zone remarked that inflexibility and flexibility often coexist in the same areas of procedure, undermining the theory that some areas of procedure belong in a core that is immune to alteration by agreement. Here, we see the other side of the same coin: party agreement playing a decisive role in procedures that implicate the legitimate authority of the court (personal jurisdiction and jury verdicts) and the capacity of courts to create, interpret, and modify legal norms (arbitration agreements and choice-of-law clauses).<sup>112</sup>

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<sup>107</sup> See, for example, *J. McIntyre Machinery, Ltd v Nicaastro*, 564 US 873, 880 (2011) (noting "explicit consent" as a basis for general personal jurisdiction).

<sup>108</sup> See 9 USC § 2.

<sup>109</sup> See, for example, *Shute*, 499 US at 595 (holding forum-selection clause presumptively valid under federal law); *Volt Information Sciences, Inc v Board of Trustees of Leland Stanford Junior University*, 489 US 468, 476 (1989) (rejecting a challenge to choice-of-law clause in context of arbitration agreement). There are ways of further fine-tuning the choice of judge beyond selection of the specific court, too. For example, if there is one judge that a party would like to avoid in the courthouse it would otherwise prefer, that party can hire a relative of that judge as a member of its legal team, in order to induce the judge to recuse herself.

<sup>110</sup> FRCP 48(b).

<sup>111</sup> See FRCP 41(a)(1) (governing voluntary dismissal by party agreement and noting exceptions to the general rule permitting settlement with court oversight).

<sup>112</sup> Note that a court's statements on the law of a different sovereign are not authoritative. For example, when a contract directs a Georgia court to apply Florida law, the Georgia court is deprived of the opportunity to create substantive legal precedent.

Of course, procedural flexibility by party agreement plays a major role in civil litigation after a court and the relevant rules of decision are set. The Federal Rules prioritize party agreement as a means for managing litigation. Familiar examples include party stipulations to increase the quantity, length, or form of depositions, interrogatories, or document production in discovery.<sup>113</sup> By agreement, parties can circumvent the automatic disclosures otherwise required by the Rule governing discovery.<sup>114</sup> More generally, the Federal Rules delegate to the parties broad power to modify discovery by stipulation.<sup>115</sup> Parties can agree to try issues not raised in the pleadings,<sup>116</sup> and in some cases can change deadlines without leave from the court.<sup>117</sup>

##### 5. Unilateral party control.

Then there is unilateral party control, which refers to rules that permit a party to invoke a procedure without need for agreement from their counterparty or the court. This type of flexibility does not fit comfortably in the core/non-core paradigm. It is not in the core because the parties, not the judge, exercise flexibility. But it is not flexibility exercised through party agreement, either. Unilateral party control means that a party can change procedural defaults *without* agreement from anyone.

In a sense, some of the most fundamental actions in dispute resolution are subject to unilateral party control. Filing a civil action is a unilateral action. Filing suit imposes new duties and burdens on the defendant and the court, with no need to obtain assent from any other party or the court.<sup>118</sup> Note, though, that this form of unilateral control is not exclusively held by would-be plaintiffs. In some jurisdictions, would-be defendants can initiate

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<sup>113</sup> See FRCP 30(a) (depositions); FRCP 33(a) (interrogatories); FRCP 34(b) (production of documents, electronically stored information, and tangible things).

<sup>114</sup> See FRCP 26(a).

<sup>115</sup> FRCP 29.

<sup>116</sup> See FRCP 15(b)(2) (allowing trial of issues not raised in pleadings if parties explicitly or implicitly consent).

<sup>117</sup> See FRCP 15(a)(2) (deadline for amending pleadings); FRCP 26(a) (timing of automatic disclosures).

<sup>118</sup> Defendants in turn have this unilateral power with respect to third-party defendants, so long as they implead them within fourteen days of their original answer. See FRCP 14.

litigation when an action is threatened, if only to dispel the uncertainty from an indefinite threat of future suit.<sup>119</sup> And within limits, a party is free to withdraw a filed case as well.<sup>120</sup>

Once suit is filed, procedural rules endow parties with a panoply of procedural entitlements that each party has the right to exercise unilaterally. Such procedures include discovery requests (depositions, interrogatories, document requests, requests to admit, and so on) up to the default limits prescribed by the Rules.<sup>121</sup> For some forms of discovery, such as document requests, the Rules do not prescribe default limits.<sup>122</sup> Discovery requests are limited to seeking nonprivileged information relevant and “proportional to the needs of the case,”<sup>123</sup> but the Rules leave wide latitude for a party to unilaterally define the scope of discovery, whether directed toward parties or nonparties.<sup>124</sup> And of course each party has the unilateral right to demand a jury trial in cases “at common law.”<sup>125</sup> In short, answers to the question, “How much procedure?” are often within the unilateral discretion of each party.

But a party taking fewer than ten depositions is exercising procedural flexibility only in a limited sense because it is not changing the default limit of ten. Although relatively rare, in other places, unilateral control over procedure allows a party to create *more* procedure rather than merely elect *less* than the Rules permit. For example, after a party requesting a deposition designates a method of recording the deposition, any other party may unilaterally designate a different, additional method.<sup>126</sup>

Importantly for our purposes, a party designating a method for recording bears the cost of making that recording. Such a requirement—that a party pay for the process that it is triggering—may seem intuitive or obviously correct. But for *every other example above*, this is not true. We consider this a puzzle. Why does it

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<sup>119</sup> See Declaratory Judgment Act, 28 USC § 2201. See also generally Sharon Hannes and Issachar Rosen-Zvi, *Defendant Initiated Litigation*, 40 Tel Aviv U L Rev 173 (2017) (in Hebrew).

<sup>120</sup> The Rules limit this unilateral power, however, to withdrawals before the defendant has filed an answer or motion for summary judgment. See FRCP 41(a)(1)(A)(i).

<sup>121</sup> See, for example, FRCP 30(a)(1), 33(a)(1), and 34(a).

<sup>122</sup> See FRCP 34.

<sup>123</sup> FRCP 26(b)(1).

<sup>124</sup> See FRCP 34(c) and 45 (specifying availability of discovery from nonparties).

<sup>125</sup> See US Const Amend VII. See also FRCP 38. In such trials, each party has the unilateral right to strike prospective jurors with peremptory challenges. See 28 USC § 1870 and FRCP 47(b).

<sup>126</sup> See FRCP 30(b). Methods of recording could include video, audio, stenography, etc.

seem natural that a party that unilaterally invokes a method of recording a deposition should bear the cost of producing that record, when the norm in essentially every other facet of discovery is that a party may exercise its right to request discovery while placing the cost of producing the requested answers or materials on the other party?

The Rules may be (for the most part) silent on this, but courts sometimes are not. Recognizing that in high-stakes litigation discovery can become very expensive,<sup>127</sup> meaning that parties can use the cost of responding to discovery requests as a bludgeon, some district court judges have exercised their authority to “specify conditions for the discovery”<sup>128</sup> by requiring the requesting party to pay for some or all of the costs of complying with discovery requests.<sup>129</sup>

Still, these cases are not like the example above of a party paying its own way for the method of recording a deposition that it demands. Instead, the party objecting to the cost of discovery calls upon the court to regulate. Nonetheless, we emphasize that, even if rare in practice, one possible form of procedural flexibility is unilateral party control over procedure, where the party exercising the unilateral control must pay for the privilege of doing so. For reasons we elaborate below, we believe this is a potentially important and underutilized form of procedural flexibility.<sup>130</sup>

## B. Variation in Flexibility Across Case Types and Courts

As we saw, conventional wisdom has focused on which procedures can or cannot be modified by the parties. We have refined the discussion to recognize an entire spectrum of ways in which procedures can be modified. Still, the approach presented above remains categorical since it seeks to match a procedure to a form of flexibility, but such a categorical approach is not necessary. One could also ask whether a given procedure should have a given

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<sup>127</sup> In most cases, discovery costs are low, comprising only a small fraction of total costs. Conversely, a small fraction of cases accounts for the majority of discovery costs in the system as a whole. See Emery G. Lee III and Thomas E. Willging, *National, Case-Based Civil Rules Survey* \*40 (Federal Judicial Center, Oct 2009), archived at <https://perma.cc/XN4U-KXUK>; William H.J. Hubbard, *The Discovery Sombrero and Other Metaphors for Litigation*, 64 *Cath U L Rev* 867, 874 (2015).

<sup>128</sup> See FRCP 26(b)(2)(B).

<sup>129</sup> See, for example, *Boeynaems v LA Fitness International, LLC*, 285 FRD 331, 341 (ED Pa 2012).

<sup>130</sup> See Part III.A.1.

degree of flexibility *in this case*. In principle, at least, a procedural rule could be flexible in one case but not in another.

The idea that the same procedural rule (say, appealability, or the right to jury trial, or the availability of discovery) should be rigid in some cases but open to modification in others is unintuitive. While the merits of such heterogeneity might be debatable, for purposes of this Article, our claim is descriptive: regardless of whether tailoring procedural flexibility to the individual case is a good idea or a bad idea, it is happening, and we need to recognize and study it.

Existing analyses of procedural flexibility engage very little with this dimension of flexibility. They are primarily normative and abstract, asking whether a particular procedure *in general* should be within the core or not. But the virtue of generality rather than tailoring of procedural flexibility to the specific case is assumed, not proven.

In this Section, we seek, again, to shake conventional wisdom. We show that, in fact, the same procedures are rigid in some cases and flexible in others. We present two examples. First is heterogeneity in flexibility across court systems. A look at a small-claims court reveals both more flexibility and a very different concept of the no-flex core of procedure than one finds in federal practice. Second is heterogeneity in flexibility among cases of the same type before the same judge. Judges—for reasons that have more to do with their interest in making law than tailoring procedure to the needs of the case—will exercise their own discretionary power over procedure to expand or limit the parties' control over procedure. Thus, as a descriptive matter, procedural flexibility can vary case-to-case, even for the same procedural rule.

### 1. Small-claims versus ordinary courts.

Small-claims courts provide a low-cost and informal venue for unrepresented claimants bringing claims for modest amounts (usually up to \$10,000).<sup>131</sup> They are ubiquitous in the United States.<sup>132</sup> Because they seek to increase access to justice for unrepresented parties, their procedures tend to be simplified and

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<sup>131</sup> See Bruce Zucker and Monica Her, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 *USF L Rev* 315, 317 (2003) (defining small-claims courts and noting variance across states in the scope of cases within their jurisdiction).

<sup>132</sup> As Professors Bruce Zucker and Monica Her note, "every state in the United States has created some form of a small claims court system." *Id.*

largely discretionary for judges. This has two consequences for procedural flexibility in small claims settings.

*First*, the simplification of procedure radically shrinks the set of no-flex procedures that are otherwise taken as inherent parts of fair process in American courts. In a revealing study of small-claims practice in California courts, Professors Bruce Zucker and Monica Her note several distinctive features of small-claims courts in California. These include that the court may “consult witnesses informally and otherwise investigate the controversy with or *without notice to the parties*,”<sup>133</sup> and *only defendants* may appeal an adverse judgment.<sup>134</sup> This is not to criticize these procedures—a full normative accounting may deem them entirely desirable—but such rules will be shocking to readers accustomed to what is taken for granted as “due process” in federal district court!

The minimal no-flex procedures in small-claims courts call into question the notion that there is an irreducible core of procedure essential to fair judging. To be sure, the California rules noted above do not allow party agreement to modify the judge’s power to investigate *ex parte* or to expand the availability of appeal, but to the extent that the core exists to protect the normative legitimacy of judging,<sup>135</sup> it seems that the procedure required for legitimacy depends on the nature of the court. Small-claims tribunals have a thinner set of core procedural elements.

*Second*, to the extent that judges and parties have discretion and flexibility, it is greater in the small-claims-court context, where bargains struck by the parties and/or the judge are largely unconstrained by procedural rules or appellate review. The lack of constraints enables parties to reach agreements that are not possible outside the small-claims-court system. For example, the rules allow the parties, by mutual agreement, to delegate the court’s power to a commissioner or judge *pro tempore* rather than a full-time judge.<sup>136</sup> These temporary judges are attorneys with at least five years of experience and who have completed training for the role.<sup>137</sup> Some are paid; some are unpaid volunteers.<sup>138</sup> This

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<sup>133</sup> Cal Civ Proc Code § 116.520 (emphasis added).

<sup>134</sup> See Cal Civ Proc Code § 116.710(b).

<sup>135</sup> See Part IV.B.

<sup>136</sup> See Cal Civ Proc Code § 116.240.

<sup>137</sup> Zucker and Her, 37 *USF L Rev* at 330 (cited in note 131).

<sup>138</sup> *Id.*

dramatic expansion of who counts as a California judge is up to the parties.<sup>139</sup>

## 2. Watershed cases versus routine cases.

Even when (as a formal matter) two cases are entitled to an identical amount of flexibility, courts may (as a practical matter) cede more flexibility to parties in routine cases but enforce considerable procedural rigidity in cases they deem important. This reflects the fact that flexibility is conducive to resolution of a dispute, usually by settlement, and inflexibility is conducive to creating legal precedents. Settlement is attractive to judges seeking to clear cases from their dockets—but it is less attractive to judges who see a dispute as a vehicle for rendering opinions on novel or contested questions of law.

Although this evidence is anecdotal and not for 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 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 example of how this might play out in practice is the seminal case in the field of e-discovery, *Zubulake v UBS Warburg LLC*.<sup>140</sup> In that case, a securities trader, Laura Zubulake, sued her former employer, UBS, alleging sex discrimination and retaliation.<sup>141</sup> Despite being “a relatively routine employment discrimination dispute,”<sup>142</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 discovery of electronically stored information (ESI) and the nature of legal obligations to retain ESI in anticipation of litigation. The case would generate

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<sup>139</sup> Nor is this a minor feature of the system. It might even be essential to the system’s continued functioning. In their study of 253 small claims cases filed in Ventura County Superior Court, Small Claims Division, Zucker and Her found that only five of the cases (less than 3 percent) were decided by full-time judges. *Id.* at 336.

<sup>140</sup> See 217 FRD 309 (SDNY 2003) (*Zubulake I*).

<sup>141</sup> For details of the history of the case, see *Zubulake I*, 217 FRD at 311–12. *Zubulake I* is an example of the rare district court case that regularly appears in casebooks.

<sup>142</sup> *Zubulake v UBS Warburg LLC*, 229 FRD 422, 424 (SDNY 2004) (*Zubulake V*).

seven published opinions<sup>143</sup> during the three and a half years from its filing to its post-trial settlement in the district court.<sup>144</sup>

*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.<sup>145</sup> A case like this, unlike a case that begins its life as a high-profile case, would presumably be the tougher case for courts to curb flexibility, as this would require pulling back from the status quo of flexibility established earlier in the case. Yet even here, we see that the court had little difficulty adapting as the nonroutine quality of the case emerged. As the paper trail left by the court reveals, when the complexity of the case increased, the court heightened its oversight and pushed the parties to engage in more extensive discovery and report back to the court.<sup>146</sup> Discovery—a process distinctively flexible and party-driven under the Rules—became the subject of close oversight by the court.

Importantly, the nonroutine quality of this case and the judicial control over discovery were 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 Shira Scheindlin could have waited for another case that was better litigated. But Laura Zubulake was a tenacious plaintiff, and her highly remunerated position at UBS meant she was seeking millions in damages;<sup>147</sup> hence, her legal team had ample financial incentive to vigorously litigate discovery-related issues.

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<sup>143</sup> See generally *Zubulake I*, 217 FRD 309; *Zubulake v UBS Warburg LLC*, 230 FRD 290 (SDNY 2003) (*Zubulake II*); *Zubulake v UBS Warburg LLC*, 216 FRD 280 (SDNY 2003) (*Zubulake III*); *Zubulake v UBS Warburg LLC*, 220 FRD 212 (SDNY 2003) (*Zubulake IV*); *Zubulake V*, 229 FRD 422; *Zubulake v UBS Warburg LLC*, 231 FRD 159 (SDNY 2005) (*Zubulake VI*); *Zubulake v UBS Warburg LLC*, 382 F Supp 2d 536 (SDNY 2005) (*Zubulake VII*).

<sup>144</sup> See Docket Sheet, *Zubulake v UBS Warburg LLC*, No 1:02-cv-01243 (SDNY filed Feb 14, 2002). Notably, although all seven opinions would be published in official West reporters (Federal Rules Decisions and the Federal Supplement), 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 would have noticed that the *Zubulake* opinions, which are listed in chronological order of issuance in note 143, are out of order in terms of reporter citations.

<sup>145</sup> *Zubulake V*, 229 FRD at 424.

<sup>146</sup> See *Zubulake I*, 217 FRD at 324; *Zubulake IV*, 220 FRD at 222.

<sup>147</sup> See *Zubulake I*, 217 FRD at 311 n 9 (noting that Zubulake, by her own estimation, could be entitled to \$13,000,000 in damages).

Nor was the stardom of this case an accident. From the very first opinion in *Zubulake*, Judge Scheindlin made clear her audience was not the parties but posterity: her talent as writer was on full display, with the key opinions opening with colorful and slyly apropos quotations from literature.<sup>148</sup> In short, *Zubulake* is an example of how judges can adjust the amount of flexibility they yield to the parties based on whether the judge's goal for the case is quick disposition or precedent setting.

### III. UNRECOGNIZED DIMENSIONS

So far, we have cataloged the spectrum of procedural flexibility, noting many ways in which some combination of judge and parties can change procedures. We have argued that the scope of procedural flexibility not only varies across procedures but also varies for the same procedure across courts and cases. In this Part, we show that, despite the great breadth and variety of procedural flexibility in practice, our survey of existing statutes, Rules, and doctrine has holes—missing forms of flexibility. Forms of regulatory flexibility, such as user fees, tradeable credits, and auctioning of procedural entitlements, have been successfully deployed in other domains but appear to be absent from civil procedure. Indeed, these ideas sound downright radical in the context of civil procedure.

In this Part, we describe these other forms of flexibility, explain their benefits in other regulatory domains, and translate those benefits to the civil procedure context. Given the plausible benefits of new approaches to flexibility, it is natural to wonder why we don't already see them built into current civil procedure.

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<sup>148</sup> See, for example, *Zubulake I*, 217 FRD 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 FRD at 214 (“Documents create a paper reality we call proof.”), quoting Mason Cooley, *City Aphorisms, Sixth Selection* (Pascal Press 1989); *Zubulake V*, 229 FRD at 424 (ellipsis in original and citations omitted):

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.

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.

We therefore pose the question: If these forms of flexibility are desirable, can we find examples of courts experimenting with them?

Perhaps surprisingly, courts *are* experimenting with these forms of flexibility. In the last Section of this Part, we detail several under-the-radar examples of radical flexibility in current civil litigation. Although none of these examples is expressly permitted by statute or Rule, enterprising district court judges and lawyers have experimented with crude versions of ideas like trading procedural entitlements across cases or auctioning procedural rights to the highest bidder.

#### A. Unrecognized Forms of Procedural Flexibility

##### 1. Payments and prices.

When a plaintiff files a claim, she must pay filing fees.<sup>149</sup> But when a defendant files an answer, when either party files a motion or a jury demand, or when a party serves a discovery request on the other party, there is no fee. Indeed, in our review of the spectrum in Part II.A, we found only one example of a Rule that required a party to pay for a procedure they chose to add.<sup>150</sup> This asymmetry leads us to the first gap we identify in the spectrum of procedural flexibility: current procedural law is full of examples of rules which enable the free exercise of flexibility by agreement or unilateral discretion, but virtually no examples where there is a price or fee for modifying or adding procedures.

Despite their rarity in practice, fees for flexing procedure are an intriguing possibility as a policy matter. Consider an analogy between (public) courts and (public) roads. Roadways are valuable public infrastructure. We build roads at public expense because we want people to drive on them. Their value comes from being used, but each new user increases congestion, affecting every other user. Well-calibrated tolls can maximize the aggregate benefit of a road to drivers. The challenge is to set tolls so that when drivers make their unilateral decisions to drive, they internalize the effect of their driving on overall road congestion. The key idea here is that when roads have few cars on them, adding one car to the road has minimal effect on other drivers, but adding one car to a more crowded road increases delays for everyone by slowing the overall flow of traffic. Thus, tolls for using a

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<sup>149</sup> See 28 USC § 1914 (setting a \$350 filing fee).

<sup>150</sup> See Part II.A.5; FRCP 30(b)(3).

road should rise as the road becomes more congested. “Congestion pricing” is the term used to describe tolls that are calibrated to reflect the level of congestion on a given road at a given time. Making drivers pay higher tolls when roads are congested encourages drivers with flexible schedules to save money by driving at other times, thereby improving driving times for everyone who must drive at peak travel times.

By ensuring that drivers internalize the effects of their driving on congestion, proper design of tolls can make *all* drivers better off, even after accounting for the cost of tolls to drivers. Indeed, in some cases, the benefits of congestion pricing can be so great, and so widely distributed, that all drivers are better off, even if the revenue from tolls is thrown away!<sup>151</sup> The key to this happy result is that tolls need not be an all-or-nothing proposition—some lanes can have tolls while other lanes do not. Those who want a faster commute can move to a fast lane by paying more, thereby supporting maintenance that benefits all users, and their move reduces congestion in the free lanes as well. Thus, those who are unwilling or unable to pay tolls nonetheless benefit from the presence of toll lanes.<sup>152</sup>

Another way that tolls can reduce congestion is by incentivizing less wasteful use of the roads. An example of this can be found on many turnpikes in the US, where drivers who use prepaid electronic tolling systems (such as E-ZPass) receive a discount relative to drivers who pay cash at toll plazas.<sup>153</sup> Toll plazas, which slow or stop traffic, increase congestion and air pollution.<sup>154</sup>

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<sup>151</sup> Jonathan D. Hall, *Pareto Improvements from Lexus Lanes: The Effects of Pricing a Portion of the Lanes on Congested Highways*, 158 J Pub Econ 113, 120 (2018).

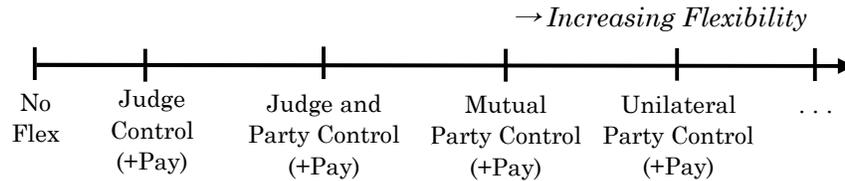
<sup>152</sup> Id at 120–21. The logic behind this remarkable result proceeds in two steps: First, precisely because congestion is inefficiently high without fees, imposing (optimal) fees increases private cost to fee-payers by less than it increases social benefit to all. Because the total cost of optimal fees is (by definition) less than the social benefit of the fees, such fees improve allocative (Kaldor-Hicks) efficiency, even if the fees are thrown away. Second, imposing fees on all users of a road may harm users with low ability to pay. To address this, one can both vary fees by time of day and partition the road into toll lanes and free lanes. Toll lanes are faster but more expensive, but Professor Jonathan Hall’s key insight is that by regulating congestion externalities, fees increase total throughput, that is, cars-per-minute, on the road. In equilibrium, some of this throughput increase accrues to free lanes. Consequently, it is possible for fees on some lanes to be *Pareto* improving for all drivers.

<sup>153</sup> For an example of a prepaid electronic tolling system, see Illinois Tollway, *About I-Pass*, archived at <https://perma.cc/5UHM-EJAB>.

<sup>154</sup> Indeed, a recent study found that the introduction of E-ZPass reduced carbon monoxide levels by 40 percent in areas that no longer needed toll plazas, which in turn led to a 10 percent reduction in low birth weight among babies born to mothers living nearby.

Likewise, we provide courts (at public expense) because want parties to use them—but each case on the docket increases the congestion that all litigants experience. Court fees, like road tolls, can help control congestion by forcing litigants to account for both their private benefits and the public costs of using the system more heavily. This is why when a plaintiff files a claim, it makes sense that she must pay filing fees. Similarly, charging fees to parties that seek to increase the use of individual procedures may allow courts to regulate docket congestion in a more precise way—akin to charging tolls only for certain lanes or for certain drivers who contribute the most to traffic congestion.

FIGURE 2: A SPECTRUM OF FLEXIBILITY WITH PAYMENTS



Despite their rarity, payments as a component of procedural flexibility have potential merit, and in principle, courts could use pricing and fees much more than they currently do. Thus, we add to the spectrum of procedural flexibility the possibility of flexibility requiring a payment. Figure 2 redraws Figure 1 and adds a payment option for each type of flexibility. By “payment,” we mean something distinct from a payment amount that parties might agree to as part of a mutual agreement to modify procedure. Rather, we refer to a fee or price that a party must pay in order to invoke flexibility, even when acting unilaterally. Such payments could go from one party to the other, in which case the payment would serve to compensate the other party for the extra burden the new procedures impose on it. The payments could go from a party to the court, in which case the payment would serve to compensate the court for the additional burdens the new procedures place on the judge or the court system more generally. For that matter, one can also imagine a system in which a judge

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Janet Currie and W. Reed Walker, *Traffic Congestion and Infant Health: Evidence from E-ZPass*, 3 *Am Econ J: Applied Econ* 65, 84–86 (2011).

unilaterally exercising control might have to spend court funds to pay the parties to exercise flexibility or to forgo its exercise.

Although pricing and fees for procedure are rare in practice, they have attracted scholarly attention. Indeed, in response to concerns about the congestion and other externalities in litigation, some scholars have advocated taxing procedural activities or increasing user fees in courts.<sup>155</sup> Notably, though, most of these proposals advocate a fee-per-case solution. Thus, this line of argument tends to take as given an all-or-nothing approach to procedural flexibility. This overly coarse approach to pricing suffers from at least three major weaknesses. First, the fee is not proportionate to the externality; it is the use of court time and resources, not the filing of the complaint itself, that generates most of the congestion. Second, and relatedly, there is wide variation in the intensity with which cases are litigated, and a one-time fee does not even attempt to match the expected burden imposed by a specific case. Third, raising filing fees does little to address distributive equity concerns because, as a practical matter, high filing fees may exclude many litigants and especially the poor from court. This latter reason is, no doubt, why this proposal, so frequently made, remains a dead letter.

Our spectrum of procedural flexibility reveals another way: a fee-per-procedure—or, more accurately—fee-per-deviation-from-default-procedure approach. This would better tie the externalities from procedural activities to the costs that parties are forced to internalize. Some scholars have already taken cautious steps

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<sup>155</sup> Examples include Richard A. Posner, *The Federal Courts: Challenge and Reform* 195–210 (Harvard 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, Christopher Rendall-Jackson, and David Rosenberg, *Litigating BP's Contribution Claims in Publicly Subsidized Courts: Should Contracting Parties Pay Their Own Way?*, 64 *Vand L Rev* 1919, 1925–26 (2011) (suggesting mandatory user fees in commercial contract disputes with limited exceptions); Brendan S. Maher, *The Civil Judicial Subsidy*, 85 *Ind L J* 1527, 1528 (2010) (suggesting a scheme whereby “each litigant would bear responsibility for one half of court usage costs, collectible at the conclusion of the case”); Stephen J. Ware, *Is Adjudication a Public Good? “Overcrowded Courts” and the Private Sector Alternative of Arbitration*, 14 *Cardozo J Conflict Resol* 899, 900 (2013) (suggesting “a fee high enough to reimburse the court for its costs of adjudicating [a] case . . . [such that] litigation [would] look more like arbitration”). See generally Patrick E. Longan, *The Case for Jury Fees in Federal Civil Litigation*, 74 *Or L Rev* 909 (1995); Shay Lavie, *Quotas*, 34 *J L & Polit* 21 (2018) (proposing quotas on the use of legal procedures as an alternative to user fees).

in this direction by, for example, proposing fees for the use of juries.<sup>156</sup>

When a party decides to use a specific procedural rule, that party imposes external costs not only on the court system through docket congestion and judge time, but also on counterparties. In fact, some procedural choices have little effect on the court but a large effect on other parties. Take discovery requests, for example. So long as it is not litigated, a discovery request may have no effect on the court's time.<sup>157</sup> But complying with a discovery request can be burdensome to the responding party. Thus, one can imagine that for some procedures, the law could allow a party to unilaterally deviate from the default only so long as it fully compensates the other party (and, if appropriate, the court) for the burden it imposes on them.

This type of procedural flexibility takes an approach known as "Rule 2" under Professors Guido Calabresi and Douglas Melamed's framework.<sup>158</sup> Rather than negotiating an agreement to flex procedure, a party unilaterally flexes the procedure, but pays for doing so. Thus, for example, a plaintiff may exercise his option—technically, a "call option"—to take more depositions, provided he pays the defendant a predetermined price and the court system a predetermined fee. In this way, a party compensates the other party and the court for the externalities it creates. Once we recognize that such an approach basically gives parties a call option on a procedure (where the procedure is the underlying asset), even more can happen. As is well-known from the literature that conceptualizes Calabresi and Melamed's legal rules as call options, there are other forms of options, borrowed from the finance literature, that offer additional variations on flexibility.<sup>159</sup> These

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<sup>156</sup> See generally Longan, 74 Or L Rev 909 (cited in note 155) (advocating payment of jury fees).

<sup>157</sup> Discovery requests do not even need to be filed with the court. See FRCP 5(d)(1)(A) (stating that, absent certain circumstances, "depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission" do not need to be filed with the court).

<sup>158</sup> Calabresi and Melamed, 85 Harv L Rev at 1120 (cited in note 15).

<sup>159</sup> See, for example, Ronen Avraham, *Modular Liability Rules*, 24 Intl Rev L & Econ 269, 278–82 (2004); Ian Ayres and J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 Yale L J 703, 709 (1996); James E. Krier and Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 NYU L Rev 440, 442 (1995); Ian Ayres, *Monsanto Lecture, Protecting Property with Puts*, 32 Valp U L Rev 793, 801–18 (1998). See also generally Ian Ayres and Paul M. Goldbart, *Optimal Delegation and Decoupling in the Design of Liability Rules*, 100 Mich L Rev 1 (2001).

include consecutive call options, put options, and many others.<sup>160</sup> To demonstrate how consecutive call options may work, consider a case in which the plaintiff unilaterally decides to pay extra dollars to depose another witness, essentially exercising a call option for another witness. Then, the defendant pays a larger amount to block that extra witness. But why stop here? After several such consecutive rounds the right to depose or to block the extra witness will land in the hands of the *local* highest valuer. Indeed, this set of consecutive call options mimics a local auction between the plaintiff and the defendant on the right to have extra witnesses. Of course, because it is a local auction in which no external parties participate, we do not get many of the benefits of an external auction, such as that the right to depose an extra witness will land in the hands of the *global* highest valuer.

To demonstrate how put options might work, we first recall that a call option gives a party a unilateral right to purchase extra procedure at a predetermined price even when the other party objects. A put option, in contrast, gives a party a unilateral right to sell extra procedure at a predetermined price even when the other party objects. For example, imagine a plaintiff files a lawsuit and the defendant counters with a motion to dismiss. The defendant might be happy with an offer from the court to withdraw his motion to dismiss in return for a more lenient standard on a motion for a summary judgment, or even in return for cash from the plaintiff. In this scenario, a put option would allow the defendant to unilaterally sell his motion to dismiss to the plaintiff.<sup>161</sup> Whether giving a party a call option to buy an entitlement it does not have is superior to giving a party a put option to sell an entitlement it has (or may have in the future) might depend

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<sup>160</sup> For an excellent book demonstrating how different legal rules can be conceptualized as different types of options (albeit not demonstrating it in the civil procedure context) see generally Ian Ayres, *Optional Law: The Structure of Legal Entitlements* (Chicago 2005). See also Ronen Avraham and Zhiyong Liu, *Private Information and the Option to Not Sue: A Reevaluation of Contract Remedies*, 28 J L Econ & Org 77, 81 (2012); Ronen Avraham and Zhiyong Liu, *Incomplete Contracts with Asymmetric Information: Exclusive Versus Optional Remedies*, 8 Am L & Econ Rev 523, 526, 545–47 (2006).

<sup>161</sup> There are several reasons why such a scheme might be desirable for the defendant. First, the defendant might want to hedge against the risk of his motion to dismiss being rejected, and so will be happy to give up the motion in exchange for better procedure later. Second, the defendant might foresee similar lawsuits coming, and so would like to litigate the case in order to possibly deter future (better prepared) parties (such as parties who did not miss the statute of limitation deadline) from filing lawsuits.

on whether the potential buyer or potential seller has better private information about who is the highest valuer of the entitlement.<sup>162</sup>

As attractive as the idea of a fee-per-flex regime is, we note the potentially insuperable epistemic burdens (and political costs) of assigning prices 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 the next Section we turn to a different approach: what might be called “market-based flexibility.”<sup>163</sup>

## 2. Markets and auctions.

As with payments, markets rely on prices to improve the allocation of resources and internalize externalities, but unlike court-set (or legislature-set) prices, markets allow prices to emerge out of the disaggregated activities of everyone in the market, which tends to impose smaller epistemic burdens on policymakers.

If procedural entitlements can be bought and sold among participants in the system, and the pricing of such procedures incorporates their net social costs (or benefits), then markets can address problems, such as congestion, that existing approaches to procedure do not. Yet markets in procedure are virtually absent from either the scholarly debate or real-world practice. At least sometimes, however, trading of legal entitlements is permitted at the claim level, that is, a claimant can sell her entire claim to someone else, who can then bring the claim.<sup>164</sup> This alienability of legal claims creates a form of flexibility for parties in litigation. Nonetheless, the idea of one person selling their procedural rights to a third party is unheard of in civil procedure.

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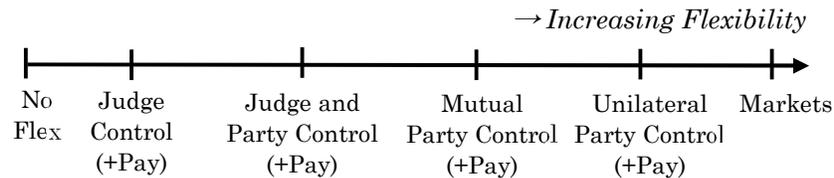
<sup>162</sup> See Ayres, *Optional Law: The Structure of Legal Entitlements* at 25 (cited in note 160).

<sup>163</sup> Similarly, the literature on pollution control has debated whether price control or quotas are the better way to go. See generally Cameron Hepburn, *Regulation by Prices, Quantities, or Both: A Review of Instrument Choice*, 22 *Oxford Rev Econ Pol* 226 (2006); Robert N. Stavins, *Experience with Market-Based Environmental Policy Instruments*, in Karl-Göran Mäler and Jeffrey R. Vincent, eds, 1 *Handbook of Environmental Economics* 355 (Elsevier Science 2003); Louis Kaplow and Steven Shavell, *On the Superiority of Corrective Taxes to Quantity Regulation*, 4 *Am L & Econ Rev* 1 (2002).

<sup>164</sup> There is, for example, active buying and selling of creditor claims in major bankruptcy proceedings. See Adam J. Levitin, *Bankruptcy Markets: Making Sense of Claims Trading*, 4 *Brooklyn J Corp Fin & Comm L* 67, 72–76 (2009).

We seek to make market-based approaches part of the conversation on procedural design. Figure 3 redraws Figure 2 above and adds “markets” to the right end of the flexibility spectrum. Market-based approaches represent maximum possible procedural flexibility, inasmuch as they allow buying, selling, and trading of procedural entitlements between parties to a case or even between parties in different cases.

FIGURE 3: THE COMPLETE SPECTRUM OF FLEXIBILITY



There are two primary approaches to allocating the initial set of entitlements in a market-based system where entitlements can be traded: a *cap-and-trade* system and an *auction* system. In both systems, the courts would first set aggregate, system-wide limits on total procedural activity. These aggregate limits would reflect a collective judgment about how much congestion and cost is optimal (or at least acceptable) for the system as a whole. These aggregate limits would then be converted into procedural “credits”—virtual tickets that parties could redeem in order to utilize a procedure. Parties would be free to buy and sell credits—buying credits for procedures they plan to use more of and selling credits for unneeded procedures to raise money.

For example, let’s say that there are 15,000 motions to dismiss for failure to state a claim filed in the federal courts each year. (There are about 250,000 civil actions filed in federal court each year, and motions to dismiss are filed in about 6 percent of them.<sup>165</sup>) Let’s assume for sake of argument that policymakers think that number is about right. Then, in a market-based approach, the courts would set an aggregate limit of 15,000 motions to dismiss per year. Based on this limit, the courts would create 15,000 credits for motions to dismiss for failure to state a claim. In order to file such a motion, a party would need to redeem one

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<sup>165</sup> Joe S. Cecil, et al, *Motions to Dismiss for Failure to State a Claim After Iqbal* \*8 (Federal Judicial Center, Mar 2011), archived at <https://perma.cc/2MAA-R4RU>. See also Administrative Office of the United States Courts, *Federal Judicial Case-load Statistics 2018*, archived at <https://perma.cc/L7YU-7CAA>.

of these credits. If a defendant doesn't have a credit for a motion to dismiss, then it must buy one or it can't move to dismiss.

The key distinction between the cap-and-trade and auction methods is the step between setting the aggregate cap and allowing parties to trade. Before trade can occur, the court system must first allocate the total credits to parties in some way. The difference between the cap-and-trade method and auction method is how the credits are initially allocated among parties. In a *cap-and-trade* system, the courts simply divvy up the total among litigants in equal shares, and then allow them to trade these endowments of procedures freely in open markets.<sup>166</sup> In an *auction* system, the same aggregate, system-wide limits on total procedural activity would not be handed out but instead auctioned off to whomever wishes to bid for them, and then the procedures would be freely tradeable thereafter.

In both cap-and-trade and auction systems, though, the basic idea is to set the aggregate amount of a given procedure (depositions, motions, hearings, etc.) at an acceptable level, and then let parties freely allocate the total among cases through secondary markets. Because the total number of credits is fixed, the courts can control the total amount of court congestion and procedural activity. But because credits are freely tradeable, litigants retain the ability to exercise procedural flexibility to customize their own cases to their needs and budgets. Parties who want more procedure can buy it from parties who are willing to litigate with less.

Markets in procedure harness the power of supply and demand to give litigants incentives to litigate in a way that considers their effect on the system as a whole. Parties whose reduced activity eases the burdens on the system are rewarded, because they can generate income by selling their credits. Parties who place greater burdens on the system in terms of congestion and cost have to pay for credits in order to have that privilege. This gives parties a disincentive to over-litigate, regardless of whether they are doing so because they fail to consider their effect on overall congestion, or because they are trying to impose burdens on

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<sup>166</sup> The idea of allocating caps among parties (whether equal shares or not) is related to the idea of setting quotas on procedure. Professor Shay Lavie has recently analyzed the idea of a system of "quotas" given to parties. See Lavie, 34 *J L & Polit* at 33–40 (cited in note 155).

their opponents. Parties will think twice before filing another motion or issuing another discovery request if they can profit from selling that entitlement to someone else instead.<sup>167</sup>

Markets in procedure not only allocate procedure across cases more efficiently but also increase court efficiency by reducing waste from court time spent on requests to modify procedural defaults. In a market-based system, parties don't file motions requesting additional pages or depositions or hearing time—they go out and get what they need on the market. Fewer motions for leave to take additional discovery or file longer briefs means less congestion for everyone and more judicial attention devoted to the substance of parties' claims.

In these ways, market-based approaches would reduce court congestion and more broadly improve *allocative efficiency* by ensuring that procedures are being used by (and only by) those who value them most highly. Nonetheless, there remains the important fact that allocative efficiency is limited by ability to pay. The highest-value users, from society's point of view, may not have the resources or access to credit to pay for some procedural entitlements. This is a concern for any market-based system, and the markets in procedure that we imagine are no exception. But it is crucial to recognize that the relevant comparator for a market in procedure is not a utopia where no litigant has a disadvantage, but the real-world status quo, which is marked by severe disparities in litigant resources. The relevant question from the standpoint of allocative efficiency and distributive equity is whether markets would be better than their alternatives, and in particular the status quo. As we will explain further in Part IV, market-based approaches for allocating procedure may on balance ameliorate current disparities in the ability to utilize procedural entitlements. Thus, we believe these approaches at least merit consideration when they can be implemented to improve *distributive equity* among litigants.

In the remainder of this Section, we provide additional discussion of the cap-and-trade and auction approaches, noting some

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<sup>167</sup> In Israel, courts achieve something similar to this with respect to motion practice. Under new rules that took effect in 2019, a party who files a motion but then loses the motion may have to pay the costs of the party who defended the motion. See Israel Rules of Civil Procedure, Rule 53 (2018) (effective date Sept 5, 2020) (in Hebrew) (“At the end of the hearing on each motion, the Court shall determine the expenses of the motion and the parties to whom they apply, irrespective of the results of the main proceeding, unless it finds that there are special reasons not to charge such expenses.”) (translation by author).

of their potential features and bugs and giving concrete examples of how these ideas could be applied to specific procedures.

*Cap and trade.* Examples of allocating procedural entitlements via a cap-and-trade system include the following:

- *Depositions under Rule 30.* There are about 250,000 civil cases per year in the federal courts, and most do not require the default maximum of ten depositions by each side.<sup>168</sup> Let's say for the sake of argument that there is an average of four depositions per case (two for each side), and let's assume that our goal is not to restrict discovery but solely to improve the allocation of depositions across cases. A cap-and-trade system would set the new default to two depositions per side in each case but allow parties who will not use all their depositions to sell their allocation to other parties (either their opponents, co-plaintiffs, or parties in other cases).
- *Page limits for briefs and time limits for hearings.* Currently, when parties want to prepare a brief that exceeds the default length limits set by their court, or they want to have hearing time in excess of the time chosen by the court, they file a motion for more pages or more minutes. The irony of this is that these limits are supposed to save the time and attention of the judge, but because the limits are only defaults, judges have to devote time and attention to the motions to change the limits. Even if a judge denies a motion for more pages or more minutes, that motion itself has wasted the judge's time! Rather than allow motions of this sort, a cap-and-trade system requires parties who want to exceed their default number of pages or minutes to buy credits for those excess amounts from other parties (in the same case or in other cases) who will use less than the default amount. Such a change will doubly improve the use of courts' time hearing motions and reading briefs: First, parties will be more likely to 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 extensions of page limits or additional hearing dates. That

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<sup>168</sup> *Federal Judicial Caseload Statistics 2018* (cited in note 165); FRCP 30(a)(2)(A)(1).

time and space will be allocated through supply and demand rather than judicial deliberation.

- *Juror time.* Jury trials are expensive and time consuming for parties, courts, and the jurors themselves, but they are also a treasured institution of the American civil justice system. One way to sustain the use of juries while regulating their overall cost would be through cap-and-trade. For example, every case that reaches the trial stage could be allocated a total of twelve days of juror time—enough for a one-day trial with a jury of twelve, or a two-day trial with a six-person jury. Parties that wish to save money could opt for a bench trial and sell their allotment to parties in another case who wish to have a longer trial or a larger jury.<sup>169</sup>

Note that the cap-and-trade approach involves assigning procedural entitlements in equal shares to each litigant. In this respect (only), cap-and-trade is no different from the status quo, where one's status as a litigant entitles one to a fixed and equal bundle of procedures. What makes cap-and-trade novel is a litigant's ability to buy, sell, or trade her procedural entitlements with any other litigant, not merely her counterparty in the same case.

The cap-and-trade approach has a simple and intuitive method for initial allocation of credits. It retains the feature of the current system that each litigant, once a case is filed, receives the same default set of entitlements. This central feature of the cap-and-trade approach, however, leads to a potential bug. What if someone files a lawsuit with no intention of pursuing a claim, but merely to sell off the default bundle of procedural credits he receives when he files the suit? This possibility is something that any cap-and-trade system would need to foreclose.

We note two potential responses to this concern about filing suit just to sell procedures. First, it may be that this possibility

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<sup>169</sup> In theory, one could construct an auction-based alternative to this cap-and-trade scenario. However, because an auction system would likely involve parties bidding for the right to have a jury trial (rather than receiving an entitlement that they can trade away), this system would run afoul of the constitutional right to trial by jury in cases at common law. See US Const Amend VII.

will not materialize. Filing suit is itself costly.<sup>170</sup> It exposes the filing party and lawyers to sanctions for groundless claims.<sup>171</sup> Selling off all the procedures in a case—a dead giveaway for a sham suit—may not generate enough income to compensate the filing parties and their lawyers for the costs of filing plus the expected cost of sanctions. (And, if we are wrong about this, then in a cap-and-trade system there is an argument for increasing both filing fees and the sanctions for filing frivolous lawsuits.)

Second, initial allocations of procedural rights need not be tied to the *filing* of a lawsuit. Instead, entitlements could exist entirely independent of a filed suit. Each natural person in the United States, for example, could receive their per capita share of procedure each year and sell it if they want to. This way, there is no incentive to file suit to gain entitlements.

As an alternative to the cap-and-trade system, we next consider the auction system, which retains the benefits of tradable procedure but avoids complications associated with how to allocate initial entitlements.

*Auction.* The auction approach is in some respects an even more radical alternative to the status quo. This approach shares features of the cap-and-trade approach, and we will argue it avoids some of the bugs, such as parties filing cases merely to sell the procedures. In an auction system, rather than simply allocating the total amount of procedure among all litigants, procedural entitlements are auctioned off to the highest bidder, and the revenues can be used to subsidize low-income litigants or supplement the court system's budget. Any procedures that are auctioned would be freely tradable, no different from under the cap-and-trade approach.

Thus, the auction approach involves a radical rethinking of two aspects of procedural flexibility: First, unlike cap-and-trade, it revolutionizes how procedures are initially assigned to cases and litigants. Second, like cap-and-trade, it opens up procedural flexibility to include trades with parties in different cases. The auction approach treats the capped amount of procedure like the broadband spectrum—a public resource to be auctioned off. The auction process, plus a freely trading secondary market, would

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<sup>170</sup> Filing a civil action in federal court costs \$400 in fees. See 28 USC § 1914 (setting a \$350 filing fee); Administrative Office of the United States Courts, *District Court Miscellaneous Fee Schedule* (Aug 20, 2014), archived at <https://perma.cc/KR5B-WSK2> (setting a \$50 administrative fee for initiating a civil action).

<sup>171</sup> See FRCP 11.

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 credits only if, after factoring in external effects, the procedure is still worth it to them.

To again offer concrete examples, we revisit the procedural examples from cap-and-trade and describe how an auction system might address them:

- *Depositions under Rule 30.* To continue the example above, there are about 250,000 cases per year,<sup>172</sup> and we have assumed an average of four depositions per case. This means there are a total of 1,000,000 depositions per year. An auction system could allocate one deposition to each side and auction off credits for the rest (that is, the remaining 500,000). Revenue from the auction could be used to fund legal aid for indigent litigants (including subsidies for additional depositions!).
- *Page limits for briefs and time limits for hearings.* In an auction setting, credits for pages and minutes could be purchased at auction or in a secondary market from parties who no longer need their pages or minutes. Indeed, in an auction setting, motions themselves could be allocated by markets. A total cap on the number of motions to 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, or, if as a normative matter we concluded that parties were wasting court time with too many motions to dismiss, the courts could set a lower aggregate maximum number of motions to dismiss per year. Then, at regular intervals (for example, every month) the courts would auction off credits (for example, one-twelfth of the annual cap), and parties that want to file a motion to dismiss could purchase credits at the going price. There would be a secondary market where parties could resell their credits, and anyone who missed an auction could buy credits on the open market.
- *Appeals.* As discussed earlier, under the final judgment rule, a party has a right to a single appeal after final judgment in the district court level. Beyond this, opportunities

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<sup>172</sup> *Federal Judicial Caseload Statistics 2018* (cited in note 165).

for appeal are few, although parties may request additional opportunities for interlocutory appeal subject to the discretion of the district court and the appellate court.<sup>173</sup> A major justification for the final judgment rule is to reduce congestion and delay in the courts; a major justification for the exceptions is to allow interlocutory appeals when the value of immediate appeal is unusually high. But by requiring both the district court and the appellate court to hear and decide petitions for discretionary interlocutory appeal adds additional motion practice and judicial involvement that exacerbates the problem of expense and delay that justifies limits on appeals in the first place. One alternative could be to set a total number of interlocutory appeals that each circuit court will hear, and then auction off the appeals. (In this example, each party would remain entitled to one appeal after final judgment.) This shifts the burden of sifting urgent interlocutory appeals from appeals that can wait from judges to the parties themselves, who know better whether an appeal really is necessary to their case. Parties also (by paying for the appeal) internalize the costs of increased congestion in the appellate court that their appeals impose.<sup>174</sup>

We emphasize here that non-market- and market-based approaches are not mutually exclusive. Hybrid approaches to procedural flexibility are possible and could potentially capture the relative strengths of each. For example, one could combine a baseline amount of procedure that cannot be traded or sold with auctions for any procedures above that baseline amount. This hybrid approach would ensure that all litigants have access to a baseline set of procedures without the need to avail themselves of a market. It would also spare judges the need to hear motions seeking leave for additional procedure and keep the aggregate quantities of procedures within optimal ranges. Plus, the auction portion could raise money to support the court system or subsidize *in forma pauperis* litigants.

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<sup>173</sup> There is also the collateral order doctrine. See Parts II.A.1 and II.A.3.

<sup>174</sup> In principle, interlocutory appeals could alternatively be handled through cap-and-trade, although since most cases are never appealed, a cap-and-trade system that apportioned appeals evenly across cases would involve each case receiving only a fraction of a single interlocutory appeal. Thus, an auction might be a simpler mechanism.

Further, we reiterate what we have emphasized above: our goal in this Article is fundamentally descriptive. Recognizing possibilities like cap-and-trade or auctions for allocating procedures opens up new possibilities for the design of civil justice systems, but these possibilities may or may not be desirable. As the experience of regulatory efforts in other domains teaches, market-based regulation can alleviate many of the shortcomings of command-and-control, but they are not panaceas. For example, trading credits for emissions of pollutants may give rise to “hot spots”—dangerous concentrations of pollution in a single area, when diffusion of lower levels of pollution over a wider area would be safer.<sup>175</sup> While we leave for future work the ultimate balance of pros and cons for any form of procedural flexibility, we emphasize here the importance of recognizing potential innovations such as market-based solutions. Seeing the full spectrum of flexibility opens up new avenues for reform, and as we will now explain, helps identify nascent forms of these innovations in current practice.

#### B. Are Market-Based Solutions Missing—or Hidden?

The use of tools like congestion pricing or cap-and-trade in civil litigation sounds radical. It is. So perhaps it is no surprise that many readers might assume that these approaches to flexibility are unprecedented. Certainly, most lawyers and academics have not considered them before. But are they truly unprecedented?

This question is not merely a matter of academic curiosity. One might worry that since we have not seen such innovations emerge in practice, either the problems they address are not significant problems or the solutions they offer do not work. In short, if these approaches to procedural flexibility are good ideas, why haven't they appeared already—at least somewhere and to some extent?

In Part II, we documented many different types of procedural flexibility. Now that we have identified new forms of flexibility, we can return to our task of charting existing practice. It is possible that radical forms of flexibility, like trading procedures between different cases, are not unprecedented; instead, the precedents have remained undetected. As we show below, once we

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<sup>175</sup> See Stavins, *Experience with Market-Based Environmental Policy Instruments* at 420 (cited in note 163).

understand what to look for, we do in fact find early signs of markets, congestion pricing, and auctions in current practice. While we are unaware of explicit or well-developed markets or auctions in procedure, we argue that some features of contemporary litigation are manifestations of exactly the novel procedural categories we describe. Due to their ad hoc origins and lack of grounding in express rules, however, these procedural innovations are underdeveloped and undertheorized as forms of procedural flexibility.

Below, we describe two contexts in which the problems that have motivated the use of pricing, markets, and auctions in other contexts have led courts and lawyers to apply procedural flexibility in ways that mimic—sometimes explicitly, but more often subtly—innovations like congestion pricing, cap-and-trade, and auctions. These are class actions and multidistrict litigations (MDLs).

Notably, both contexts involve the aggregation of large numbers of similar claims, and this commonality is no coincidence. Current practice limits procedural flexibility to adjustments and trades within a given case, while the innovations we consider allow flexibility across cases. Class actions and MDLs involve a middle ground where many claims coexist in the same case (class actions) or in a set of nominally separate cases coordinated before a single judge (MDLs). Within the context of class actions and MDLs, a judge can maintain the norm of cabining procedural flexibility within a single proceeding,<sup>176</sup> while also permitting the judge or the lawyers to make procedural trade-offs across cases in ways akin to what our market-based approaches envision.

We begin with class actions. There are two forms of procedural flexibility in class actions that are nowhere formally recognized by statute or Rule but occur in practice and serve as precedent for the market-based innovations we envision. These are auctions for class counsel (an explicit invocation of the auction concept) and reallocation of rights and compensation across class members (a non-market-based practice analogous to a cap-and-trade allocation across class members).

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<sup>176</sup> We are fudging a bit here, but this is because the judges are fudging, too. We say “proceeding” rather than “case” because individual cases consolidated in an MDL remain distinct civil actions. So, when courts in MDLs engage in the cross-claim procedural flexibility we describe below, they are actually much closer to markets and congestion pricing than first appears.

We then turn to MDLs to describe three forms of de facto market-based procedural flexibility. These are Plaintiffs' Steering Committees and bellwether trials (both non-market-based practices akin to a cap-and-trade allocation of procedural rights across plaintiffs), and *Lone Pine* orders (a crude form of congestion pricing).

1. Class actions.

Aggregating individual cases is a way to reap efficiencies of scale in litigation. Unlike joinder, in which each party retains their own counsel, class action litigation places the claims of an entire class (almost always plaintiffs) in the hands of a single class counsel. Class actions generate widely recognized benefits for the civil justice system. They generate economies of scale by conducting once what would otherwise be duplicative litigation on issues common to the claims of each class member. And these economies of scale, in turn, make it worthwhile for plaintiff's lawyers to bring claims that would not be cost-effective to bring on an individual basis.

*a) Auctions for class counsel.* Part of a court's duty in certifying a class action is selecting class counsel.<sup>177</sup> In selecting class counsel, the court must select counsel who will "fairly and adequately represent the interests of the class,"<sup>178</sup> and one component of this is ensuring that attorney fees for class counsel are charged at a competitive rate, so as to maximize the share of any payout that will go to the class. Yet the judge is not in a good position to set fees or to review attorney fees in a proposed class settlement. Some class actions are risky and expensive for class counsel, so high fees are not necessarily unreasonable.

Rather than having a judge unilaterally choose class counsel and evaluate attorney fees, a market-based approach would invite competition among law firms. One possible method, which some district courts have employed, is for the court to auction off the right to represent the class (and therefore to collect fees).<sup>179</sup> The basic idea is that firms bid by offering the amount of fees they would charge, and the lowest bidder wins.

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<sup>177</sup> FRCP 23(c)(1)(B).

<sup>178</sup> FRCP 23(g)(4).

<sup>179</sup> See *In re Auction Houses Antitrust Litigation*, 197 FRD 71, 78–82 (SDNY 2000) (discussing prior cases employing auctions, and ordering an auction in the case before the court). The first case to order an auction was *In re Oracle Securities Litigation*, 136 FRD 639, 641 n 4 (ND Cal 1991) (acknowledging the "relative novelty" of competitive selection of class counsel).

The use of this form of market-based allocation of class counsel has been controversial, however. As a theoretical matter, if counsel quality cannot be observed by the court, then there is a danger of a “race to the bottom” where low-quality counsel underbid counsel who would demand more in fees but earn more for the class.<sup>180</sup> Indeed, the potential merits of auctioning the right to class counsel (or even auctioning the underlying claims) has been the subject of a vigorous academic debate for more than twenty years.<sup>181</sup> In practice, the use of auctions in class actions has dried up after coming under criticism for its questionable legality and practicality.<sup>182</sup> But whether wise or unwise to do so, courts have put the right to represent a class on the auction block. Procedural auctions are not a mere theoretical possibility.

*b) Reallocation of rights and compensation across class members.* The fact that class actions combine otherwise-distinct claims into a single civil action and consolidate control over those claims in the hands of a single class counsel and presiding judge has major implications for how the judge and parties exercise procedural flexibility. As noted above, current law specifies no way for parties to trade procedures across cases. If a plaintiff wants more depositions or more hearing time, for example, she must either work it out with the defendant or file a motion with the judge. By collecting a large group of distinct claims in a single action and giving a single team of lawyers control over them, the class device converts what would be untradeable procedural entitlements into a pool of de facto tradeable procedural rights.

Class counsel seek relief on behalf of the class, but the class device gives some class members more procedure than others. Representative plaintiffs get more procedure (both the benefits, such as their “day in court,” and the costs, such as responding to potentially intrusive discovery requests). Absent class members get less procedure (usually no more than notice and opportunity to opt out and, in the event of settlement, opportunity to object).

Importantly, when we say representative plaintiffs in a class action get *more* procedure, we mean not just more procedure than absent class members get. As a practical matter, they get more

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<sup>180</sup> See, for example, Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 Colum L Rev 650, 658 n 195 (2002).

<sup>181</sup> For a recent contribution and a review of the literature, see Alon Klement and Moran Ofir, *Auctioning Class Action Representation* (working paper 2019), archived at <https://perma.cc/PE4K-PKLK>.

<sup>182</sup> See id at 10–11.

procedure than they would get were they to bring identical claims on an individual basis. With the benefit of a class standing behind them, class plaintiffs usually obtain vastly more motion practice and discovery than they would in individual litigation. Of course, no procedural entitlements are formally changing hands. But as a practical matter, when a class action is certified, a large group of would-be litigants surrender the procedural entitlements they would have if they litigated separately, while a small number of representative plaintiffs gain an expanded arsenal of procedures to deploy. This can be seen as a crude (and involuntary!) approximation of cap-and-trade: if each plaintiff litigated separately, they would each have their individual procedural entitlements to employ, but the class device in effect trades all of these procedural entitlements from absent class members to the class representatives, who litigate far more heavily than any individual plaintiff would. In effect, class members exchange their procedural entitlements for the ability to free ride on the efforts of class representatives and class counsel.

In this way, the class device serves as a workaround to the general inability of plaintiffs who lack the means or motivation to use the full set of available procedures to trade them away to other plaintiffs in separate (albeit similar) cases. The allocation of attention and procedural rigor among class members involves flexing across parties and nonparties, something otherwise alien to current practice and procedure.<sup>183</sup>

Still, this *de facto* reallocation of procedure across plaintiffs is a far cry from trading or selling of those entitlements. No one consults (or even notifies, generally) absent class members before filing a lawsuit that seeks class action status. It is only after the court certifies the class action that absent class members receive notice, and only then do they have a choice to stay in or opt out of the class action. (And for some types of class action, there is not even an opportunity to opt out.<sup>184</sup>) There is certainly no open market where some persons can sell unwanted procedures or purchase additional procedures.

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<sup>183</sup> Recall that absent class members, although bound by the judgment in the class action, are not parties to the suit. See FRCP 23.

<sup>184</sup> See FRCP 23(b)(1)–(2).

The rules governing class actions instead rely on rules that hybridize market approaches and command-and-control approaches. We can see this through the lens of exit and voice.<sup>185</sup> In a setting of freedom to contract, parties could negotiate for the procedures they want (voice), and if the deal is unsatisfactory, they could walk away (exit). In a proceeding to certify a class action, the absent class members (who may not even be aware that a suit has been filed) have no voice, so the Rules place a duty upon the court to, in some sense, “speak” for the class in judging the fairness and adequacy of the representation they would receive.<sup>186</sup> But (at least in most cases) class members do have the opportunity to exit, in that once the deal is struck and the terms of a certified class are fixed, each individual member of the now-certified class receives notice and the right to opt out.<sup>187</sup>

Of course, sometimes command-and-control, or a mixture of command-and-control and markets, is better than markets alone. The transaction costs associated with individualized bargaining or decision-making by each class member prior to class certification may make class member “voice” impractical in most class actions. Our purpose here is not to judge the wisdom of class action rules.<sup>188</sup> For now, we highlight that class actions reallocate procedure among claimants to show that forms of flexibility *already exist* that go beyond flexibility involving discretion of the judge and/or the parties to a given case. Although only implicitly, the law already recognizes the value of procedural trades between parties and nonparties.

## 2. Multidistrict litigation.

Multidistrict litigation is a statutorily authorized process through which related cases in the federal system, regardless of where they are filed and whether they are individual cases or class actions, are transferred for coordinated pretrial litigation before a single district court judge.<sup>189</sup> Multidistrict litigation is arguably the single defining feature of contemporary civil practice,

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<sup>185</sup> See generally Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard 1970).

<sup>186</sup> See FRCP 23(a), (g).

<sup>187</sup> See FRCP 23(c)(2)(B).

<sup>188</sup> In a companion paper, we explore this question and the broader question of when market-based forms of flexibility are wise or unwise in greater depth. See generally Avraham and Hubbard, *Civil Procedure as the Regulation of Externalities* (cited in note 19).

<sup>189</sup> See 28 USC § 1407.

with over 40 percent of all civil case filings in federal court ending up in MDLs.<sup>190</sup> Several distinctive practices in MDLs increase the efficiency of litigation and reduce court congestion, including (1) selection of a Plaintiffs' Steering Committee to oversee the resolution of common questions across cases, (2) bellwether trials, where the judge selects a sampling of cases for full-blown trials to inform settlement decisions in other cases or aid the creation of rubrics for standardized compensation for groups of similar claims, and (3) special procedures such as *Lone Pine* orders for screening out cases at the pleading stage.

None of these devices for managing MDLs is regulated (or even explicitly authorized) by statute or Rule, and their use in MDLs is ad hoc, entirely within the discretion of the judge. Indeed, MDL judges have aggressively exercised judicial discretion to flex procedures, leading one pair of commentators to describe MDLs as "something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies."<sup>191</sup> Many MDL judges themselves say that "the very hallmark of the MDL is the ability to deviate from traditional procedures."<sup>192</sup> Thus, the unique procedures of MDLs embody no deliberate federal policy to expand procedural flexibility beyond its traditional bounds. Yet that is exactly what MDLs are doing. As we show below, the innovations we observe in MDLs parallel the kinds of flexibility we have described in this Article, even if they are not currently understood as doing so.

*a) Plaintiffs' Steering Committees.* An MDL coordinates litigation among dozens, hundreds, or even thousands of separately filed cases, each with their own plaintiffs and attorneys. As a practical matter, it would be exceedingly difficult for a district judge to coordinate proceedings directly with all of the dozens or hundreds of different lawyers and law firms. Thus, for the sake of efficiency, the MDL judge typically appoints a group of attorneys—the Plaintiffs' Steering Committee (PSC)—to serve as the leadership group responsible for coordinating litigation on behalf of all the plaintiffs. As one scholar has noted, notwithstanding the norm that an individual plaintiff can retain a lawyer of her own

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<sup>190</sup> Elizabeth J. Cabraser and Samuel Issacharoff, *The Participatory Class Action*, 92 NYU L Rev 846, 850 (2017).

<sup>191</sup> Martin H. Redish and Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 BU L Rev 109, 111 (2015).

<sup>192</sup> Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U Pa L Rev 1669, 1689 (2017).

choosing to handle her case, “[t]he individually retained attorney has no power to appoint or discharge the leaders who assume control of her clients’ cases.”<sup>193</sup>

In any given MDL, the PSC undertakes to coordinate litigation in a way that serves the interests of all the plaintiffs, although of course conflicts of interest among individual plaintiffs or between the PSC and lawyers representing individual plaintiffs are inevitable. One respect in which the interests of the PSC and the rest of the lawyers and parties in the MDL are always aligned, however, is in efficient management of the MDL—gaining economies of scale from coordinated proceedings. To do this, the PSC works with the judge and defense counsel to handle the litigation of common issues in a consolidated (and therefore lower-cost) way. Methods include filing a “master complaint,” filing a single set of discovery requests, allowing discovery only from subsets or samples of the plaintiffs, and, as discussed in more detail below, fully litigating or trying a limited number of cases in order to facilitate settlements for the remainder.

When a common issue is litigated in an MDL, it receives more extensive briefing and argument than it would in any one individual case litigated separately. The PSC has more resources and the stakes are higher. In this way, all plaintiffs benefit from the more thorough litigation and the spreading of costs across cases within the MDL.<sup>194</sup>

But in another sense, cases or plaintiffs selected for greater discovery or extra attention from the PSC get more procedure, while the rest get less. In this way, the MDL device reallocates procedure across plaintiffs and across cases. Like with the class action device, this is a crude approximation of cap-and-trade, where a given aggregate quantity of procedure available to individual plaintiffs is reallocated across plaintiffs in the consolidated proceeding.<sup>195</sup> This degree of flexibility is usually ignored in the literature on procedural flexibility but is akin to the unrestrained trading across cases of procedure that we imagine. We note that

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<sup>193</sup> Burch, 90 NYU L Rev at 88 (cited in note 99).

<sup>194</sup> The effects for the defendant are more ambiguous. The more extensive procedure is costlier to the defendant, but the spreading of costs across cases in the MDL is a benefit. And to the extent that the MDL facilitates the filing of cases that otherwise would never have been filed individually (including meritorious ones), this increases a defendant’s expected liability and costs.

<sup>195</sup> Note that this trading and reallocation across (rather than within) cases is not only de facto, as in class actions, but de jure, given that MDL cases remain distinct civil actions throughout the process.

the “trading” here is implicit and (unlike in a market-based solution) not mutually agreed upon. The court selects attorneys for inclusion and exclusion from the PSC, and thereafter the allocation of procedure is a mixture of negotiated deals with lawyers in individual cases and PSC fiat. Thus, it has elements of the open trading across cases that we envision, but it does not fully realize that vision. Given the inevitable divergence between the interests of the PSC and the interests of the individual plaintiffs unrepresented on the PSC, we are open to the argument that a purer market for procedure might better empower individual plaintiffs in situations such as these, where (whether explicitly acknowledged or not) procedural rights are already being traded across cases.

*b) Bellwether trials.* One of the key questions that PSCs, judges, and defense attorneys must address in MDLs that reach an advanced stage is the possibility of trial in the MDL rather than remand of the cases back to their home districts for trial.<sup>196</sup> Given that mass settlement is almost always the endgame in MDLs, both plaintiffs and defendants have an interest in doing trials in the MDL if such trials will facilitate settlement. To facilitate settlement, parties will often designate a small sample of cases for trials, called “bellwether trials,” to inform the parties of how their evidence and arguments will likely fare before juries. For parties who are close to settlement but disagreeing on the terms, seeing the outcomes of trials in several representative cases can close the gap and precipitate settlement.<sup>197</sup>

Different judges and different lawyers favor different methods for selecting cases for bellwether trials.<sup>198</sup> Most of the time, judges delegate the selection to the parties, sometimes allowing each side to identify half of the total number. Harder to implement and less common is random sampling among cases for bellwether treatment. This is, in principle, more likely to yield a sample representative of the whole than plaintiffs and defendants each cherry-picking the most favorable cases for their side.

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<sup>196</sup> By statute, MDL courts can handle only pretrial proceedings, 28 USC § 1407, but parties can consent to trial in the MDL court. See FRCP 77(b).

<sup>197</sup> For an overview of MDLs and the bellwether trial process, see Eldon E. Fallon, Jeremy T. Grabill, and Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 Tulane L Rev 2323, 2326–42 (2008).

<sup>198</sup> For discussion, see Alexandra D. Lahav, *Bellwether Trials*, 76 Geo Wash L Rev 576, 635–36 (2008).

Regardless of the method of selection, however, because the parties to a bellwether trial must all consent to the trial,<sup>199</sup> the selection of bellwether trials inevitably involves negotiation among the judge, PSC, and defense attorneys, and between the PSC and the lawyers representing the individual plaintiffs whose cases would be tried. Crucially for our purposes, this process of negotiation among the attorneys and parties in *separate* cases yields a result whereby a few plaintiffs in a few cases get lots of procedure—full-blown trials litigated to the hilt with the fate (in settlement) of many *other* cases hanging in the balance—while the rest go dormant.<sup>200</sup> In other words, the practice of selecting cases for bellwether trials quite explicitly involves parties in separate cases making deals to give more procedure to some cases than others. It is not quite a cap-and-trade market, but it is a crude approximation.

This crude trading of more procedure in some cases for streamlined settlement in other cases facilitates the creation of an MDL-specific public good: information about likely trial outcomes. Each case that goes to trial creates a benefit for all the other cases—parties now have a better sense of what to expect, which means settlement is easier. In the absence of coordinated proceedings, this positive externality might be underprovided, because of the free-rider problem—everyone would want someone else to be the guinea pig who goes to trial! In a world of fluid markets, one can imagine the free-rider problem being solved by crowdfunded trials, where everyone would chip in to cover the cost of trying a few cases. The MDL process approximates this solution.

c) *Lone Pine Orders*. In *Lone Pine* orders,<sup>201</sup> MDL judges require plaintiffs to make a prima facie evidentiary showing of injury and exposure to the defendant's products or other alleged

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<sup>199</sup> Recall that without consent of all parties to that case, trial can only occur after remand to the district in which it was originally filed. See note 196.

<sup>200</sup> Several commentators have noted that bellwether trials are far more expensive than trials in normal litigation, as attorneys “pull out all the stops” given the high stakes of the bellwethers for the MDL as a whole. Fallon, Grabill, and Wynne, 82 *Tulane L Rev* at 2366 (cited in note 197). See also J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 *Wm & Mary L Rev* 1137, 1214 (2012); Redish and Karaba, 95 *BU L Rev* at 128 (cited in note 191).

<sup>201</sup> For a comprehensive discussion, see generally Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 *Yale L J* 2 (2019). See also *id.* at 13 (describing how “*Lone Pine* orders originated and draw their name from an unpublished order . . . in an otherwise obscure 1985 New Jersey state case, *Lore v. Lone Pine Corp.*”).

tortious conduct, and sometimes even specific causation.<sup>202</sup> *Lone Pine* orders are obviously controversial. In *no* other context in federal practice are plaintiffs required to attach such evidence to their complaint, nor must they supplement their allegations with evidence in order to survive a motion to dismiss and proceed to discovery. MDL courts have explicitly noted that “no federal rule or statute requires, or even explicitly authorizes, the entry of *Lone Pine* orders.”<sup>203</sup>

Yet defenders of the practice explain that it is a practical necessity that responds to so-called tag-along cases—cases filed after the creation of an MDL, often with threadbare or boilerplate pleadings, by plaintiffs and counsel who are inactive in the litigation. The concern with such cases is that, given the low cost of filing a baseless tag-along complaint and the high likelihood of an MDL-wide mass settlement, the tag-along plaintiff and her attorney will be able to collect a pro-rata share of any settlement despite expending virtually zero effort to establish that her claim has any merit.<sup>204</sup> *Lone Pine* orders address this concern by forcing plaintiffs and their attorneys to provide a minimal showing of colorable merit.<sup>205</sup>

Here we see forms of procedural flexibility that would likely be considered shocking, even unlawful, in other contexts. In every way but the strictest possible sense, a district court unilaterally changes the standard for surviving a motion to dismiss, and only for a particular set of cases on its docket. Yet *Lone Pine* orders play a role akin to congestion pricing in urban planning. As the saying goes, “Build a superhighway, create a traffic jam.” A highway designed to conveniently bring commuters into a city becomes a victim of its own attractiveness when drivers eager to use

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<sup>202</sup> More precisely, one might distinguish a *Lone Pine* order, which requires a prima facie showing of all of these, including specific causation, with an order requiring a plaintiff fact sheet that provides evidence of only the plaintiff’s injury and exposure to the defendant’s product. *Id.* For simplicity, we lump plaintiff fact sheets into the general category of filings required by *Lone Pine* orders.

<sup>203</sup> *In re Digitek Product Liability Litigation*, 264 FRD 249, 256 (SD W Va 2010).

<sup>204</sup> For an example of an opinion expressing exasperation at this practice in one judge’s MDL, see *In re Mentor Corp Obtape Transobturator Sling Products Liability Litigation*, 2016 WL 4705827, \*1 (MD Ga).

<sup>205</sup> What makes this controversial is that, depending on the content of a given *Lone Pine* order, the plaintiff may be required, at the outset of a case, to submit evidence beyond what one would expect to be in the possession of the plaintiff prior to discovery. See Engstrom, 129 Yale L J at 20–22 (cited in note 201). Orders limited to the submission of a fact sheet with information on injury and exposure are less controversial, as evidence of these facts is more likely in the possession of the plaintiff at the outset of the case. *Id.*

it clog it up. MDLs are the superhighways of the federal courts. By making litigation cheap, fast, and remunerative for participating litigants and lawyers, a pathway designed to whisk meritorious claims to their destination may become congested with tag-along cases. By implementing higher tolls during rush hour, urban planners limit use of the highway to those who really need to drive at that time. By putting the onus of an initial showing of proof on plaintiffs, MDL judges limit the benefits of the MDL to those who really belong in the eventual settlement.

Importantly, this form of procedural flexibility offers to tag-along cases an implicit bargain: lower-cost procedure in exchange for a higher pleading standard. Thus, both parties gain something from the exchange. But note that it is not a freely bargained exchange. *Lone Pine* orders are a radical form of procedural flexibility, but they are not market based. An open question that remains, therefore, is whether explicit pricing or trading of the right to punch a ticket to an MDL could offer a better way to reduce congestion and screen out tag-along claims while also reducing burdens on claimants with plausible claims.

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In sum, our spectrum of procedural flexibility rationalizes (in the descriptive sense) practices that otherwise seem like peculiarities of MDL and class actions practices. Our framework not only envisions new forms of procedure, but it makes existing, poorly understood processes more explicit and comprehensible.

#### IV. TOWARD THE NORMATIVE

While an assessment of how to optimize procedure must await a full treatment, we argue here that familiar normative considerations cannot rule out the new forms of procedural flexibility that we have identified above. In fact, many of these normative considerations cut in surprising directions, sometimes favoring market-based approaches over the status quo. While we do not provide a normative justification for any specific proposal for procedural flexibility in this Article, we respond to potential normative critiques of market-based approaches to procedural flexibility.

As noted above in Part I, the extant literature suggests two broad normative objectives of civil procedure: dispute resolution (facilitating the timely, low-cost, and accurate resolution of disputes) and norm creation (facilitating the creation of law by

courts). Below, we show that even the most exotic forms of procedural flexibility—things like auctions or markets in procedure—are at least defensible (and arguably might be superior to existing forms) when measured against these criteria.

We then add three additional normative considerations to the mix: democratic participation in the legal system, commodification, and distributive justice. If concerns about democratic participation in the court system are paramount, we argue that better tailoring will increase, not decrease, parties' participation and might well counter the drift away from courts to alternative dispute resolution systems. If concerns about commodification of procedure are paramount, then things like auctions and markets look dubious (although we argue that even this conclusion is not so simple). If concerns about distributive equity among parties in the civil justice system are paramount, we argue that (counterintuitively) approaches such as tradeable credits for procedural rights will *reduce* inequalities of resources and bargaining power between parties.

To be clear, we do not claim here that any particular point on the spectrum of procedural flexibility is optimal for any type of procedure. Rather, our point in this Part is to show that familiar normative criteria are not sufficient in themselves to select among this wide spectrum of options. This indeterminacy is exactly why a broader, more ambitious normative framework is necessary. To construct a prescriptive agenda for procedural design requires knowing which innovations are "better." In subsequent work, we undertake this task.<sup>206</sup> For now, we simply aim to show that our new descriptive framework poses an important and new set of normative questions: Which procedures and what type of flexibility are best for a given court?

#### A. Goal: Dispute Resolution

Civil procedure is (if nothing else) 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. When parties have to pay for the procedures they use, this will, on the margin, discourage litigation that is not well tailored to the legitimate needs of a case. This serves the goal of efficient dispute resolution.

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<sup>206</sup> See generally Avraham and Hubbard, *Civil Procedure as the Regulation of Externalities* (cited in note 19).

What about accurate decision-making, which also serves the broader goal of dispute resolution but may be at odds with lower cost? This is an open question. Deviation from procedural defaults today requires either party agreement or judicial approval (or sometimes both). In a market-based system, party willingness to pay replaces judicial fiat. This presents a trade-off. On the one hand, if judges value accuracy more than parties (perhaps because judges believe that greater accuracy improves the legitimacy or deterrent value of judgments), then a shift away from judicial fiat may reduce accuracy. On the other hand, the court is (almost by definition) the least informed player in the dispute and thus the least likely to have a clear sense of the benefit, in terms of accuracy, of additional procedure.<sup>207</sup> Market-based approaches place greater power and responsibility in the hands of the better-informed players—the litigants themselves.

In short, market-based approaches to procedural flexibility would improve allocative efficiency of procedure and may even improve the accuracy of dispute resolution.

#### B. Goal: Norm Creation and Legitimacy

With respect to the norm-creation goal, we begin by observing that most cases simply do not generate important precedents, clarify ambiguous parts of the law, or otherwise have any chance of impacting future parties' behavior. Most cases settle, and even those that do not rarely involve a precedent-setting appellate opinion. Therefore, choices about procedural flexibility are orthogonal to the goal of norm creation in most cases. In the few cases that are important to the objective of norm creation, we have described above how a court may ensure that party control over procedure does not interfere with this objective.<sup>208</sup> Simply put, if courts' wishes can trump the parties' wishes when norm

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<sup>207</sup> Judge Frank Easterbrook has written (with characteristic flourish) about this problem in the context of discovery. Frank H. Easterbrook, *Discovery as Abuse*, 69 BU L Rev 635, 638–39 (1989) (emphasis in original):

Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves. The timing is all wrong . . . . A judicial officer does not know the details of the case the parties will present and in theory *cannot* know the details. Discovery is used to find the details. The judicial officer always knows less than the parties . . . . How can a judge distinguish a dry hole (common in litigation as well as in the oil business) from a request that was not justified at the time?

<sup>208</sup> See Part II.B.

creation is on the line, then the use of any form of procedural flexibility in other cases will not impact the goal of norm creation.

There is also the potential concern that greater procedural flexibility will undermine the perceived legitimacy of the civil litigation process. Ultimately, perceived legitimacy is an empirical question, and perceptions of illegitimacy may depend on the specific type of procedural flexibility in question. Thus, we cannot dismiss wholesale this concern. By the same token, it may not be the case that perceived legitimacy is threatened by even the most radical forms of procedural flexibility.

Consider markets in tradeable credits for procedure. This would be a radical change from the status quo, surely, but would it undermine the perceived legitimacy of the courts? Reformers in the United States undertook bold reimaginings of procedure in the past, such as abandoning writs for simplified pleading in the nineteenth century, abandoning law and equity for the unified civil action under the Federal Rules of Civil Procedure in 1938, and inventing the modern class action in 1966. Each wave of reform was intensely controversial but over time came to be second nature for lawyers.<sup>209</sup>

This is so despite there being nothing inevitable about these reforms. Many aspects of these reforms, such as liberal pleading, party-driven discovery, and opt-out class actions, are examples of American exceptionalism in procedure. Their absence is as much second nature to lawyers outside the US as their presence is taken for granted among lawyers inside the US. All this is to say that the perceived legitimacy of the system may depend much less on maintaining the procedural status quo than one might assume.

Further, the perceived legitimacy of procedural design depends on its suitability to the social and technological context in

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<sup>209</sup> See Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 Colum L Rev 866, 866 (1977) (noting controversy over the promulgation of the new Rule 23 in 1966); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U Pa L Rev 909, 922 (1987) (describing how the adoption of the Rules in 1938 brought about “an enormous change”). See also Charles E. Clark and James W.M. Moore, *A New Federal Civil Procedure: I. The Background*, 44 Yale L J 387, 390 (1935):

Experience teaches us, that while individual members of the bar are enlightened agents of reform, the general professional reaction is, quite naturally, against change . . . . It is only human for a successful practitioner to conclude that the practice of which he has made himself master is a desirable one to follow.

See also Henry H. Fowler, *A Psychological Approach to Procedural Reform*, 43 Yale L J 1254, 1265 (1934) (noting the almost inevitable conservatism in the approach toward procedure).

which courts operate. This is most colorfully illustrated by Professor Peter Leeson, who shows how archaic procedural devices such as trial by battle and trial by ordeal can be understood as well suited to the limits of courts' dispute resolution technology (for example, poor records of land title and few resources for fact investigation) and shared cultural understandings of the time (for example, a belief that divine favor would protect the innocent).<sup>210</sup>

The change from 1938 to today may not be as stark as England's emergence from the Dark Ages, but it is fair to say that the technology by which products and services can be allocated and the social understanding of how individuals consume has radically changed over the past eight decades. Vast computing power and internet connectivity means that a degree of product disaggregation and unbundling is possible today that would have been prohibitively expensive in the past. As a consequence, individuals have become much more used to the idea of buying only as much as you need.

For example, rather than buying a car, someone who doesn't need to drive as often can join a car-sharing program such as Zipcar. Such programs save money for light users of cars who would otherwise have to buy cars, and they increase access to driving for people who cannot afford a car.<sup>211</sup> Importantly, such programs yield societal benefits by increasing the number of users per car, thereby reducing land required for parking spaces and lots.

Similarly, the idea of paying a stranger for a ride in their personal car or paying a stranger to sleep for one night in their apartment was almost unthinkable for most people a decade ago,<sup>212</sup> but

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<sup>210</sup> See Peter T. Leeson, *Trial by Battle*, 3 J Legal Analysis 341, 348–51 (2011); Peter T. Leeson, *Ordeals*, 55 J L & Econ 691, 705–08 (2012).

<sup>211</sup> Similarly, someone who likes only a few songs from a music album can purchase individual songs online rather than the entire album in physical form. This saves money for those who would otherwise have to buy the entire album and increases the ability to consume music for those unable or unwilling to pay for the full album. And with streaming music services, one need not even buy a song for perpetuity, but instead may listen to as much or as little of that song as one likes. For a discussion of how technological change has allowed consumer to purchase "slices" of what used to be "lumpy" goods, see Lee Anne Fennell, *Slices and Lumps: Division and Aggregation in Law and Life* 124–26 (Chicago 2019).

<sup>212</sup> Uber Technologies, Inc. was founded in 2009; Airbnb, Inc. was founded in 2008. See Uber Newsroom, *The History of Uber* (2019), archived at <https://perma.cc/E45X-EMYR>; Airbnb Newsroom, *The Airbnb Story* (2019), archived at <https://perma.cc/T3WR-GC95>.

this is second nature to millions of Americans now. Thus, redefining procedure not as a fixed bundle of procedural entitlements but as a disaggregated menu from which litigants can select the most valuable components à la carte should seem much less radical today than even in the recent past.

### C. Goal: Democratic Participation

With respect to the “democratic participation” value of civil procedure, we doubt that new forms of flexibility, such as markets, would have a negative effect. In fact, they may have positive effects. To the extent that this goal implicates access to courts and a preference for dispute resolution in court rather than through settlements, market-based flexibility should be attractive. Because markets in procedure would allow parties to tailor procedure to their interests, victims of wrongdoing would be more willing to litigate their claims rather than settle, arbitrate, or drop them. Further, given that litigants on the margin of suing in court versus dropping their claims are likely to be the same litigants who cannot afford to use all the procedures they are formally entitled to under the status quo, tradable credits in procedure would make court more attractive because unused procedure would be monetizable.<sup>213</sup>

### D. Goal: Distributive Equity

Should we worry that new forms of procedural flexibility, such as tradeable credits for procedures, will disproportionately benefit the rich? The rich 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 get more lawyers, more experts, more forum choice, more everything.<sup>214</sup> The question is not whether the rich have an advantage—that is virtually inevitable—but whether the design of the procedural system *ignores* this advantage or *accounts* for it and even counteracts it.

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<sup>213</sup> Or, if procedures are auctioned rather than allocated to litigants, litigation would cost less for these litigants relative to everyone else.

<sup>214</sup> See Albert Yoon, *The Importance of Litigant Wealth*, 59 DePaul L Rev 649, 656 (2010) (presenting empirical evidence that the more financial resources that are available to a party in litigation, the greater its chances, all else being equal, of a favorable legal outcome).

Any analysis of the impact of procedure on poor or otherwise disadvantaged litigants must assess the realities of litigation from the perspective of those parties.<sup>215</sup> Currently, the rich already buy longer briefs, more discovery, and more court time, but they do not have to pay the courts or their adversaries for this privilege.<sup>216</sup> To the contrary, courts' decision-making burdens are increased by the aggressive motion practice of heavily lawyered parties, and counterparties must pay more to keep up with them. The poor are currently subsidizing the rich. In contrast, with congestion pricing or markets, parties who place greater burdens on courts and their adversaries would have to pay for that privilege. The rich would subsidize the poor.

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 could directly profit by selling procedural entitlements they cannot use. 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, could help poor parties buy more procedural rights in return for a stake in the lawsuit.

The fact that any litigant is free to negotiate with anyone, not just their opponent, equalizes bargaining power. Under the status quo, in David-and-Goliath cases, the weak party has no choice but to bargain for procedures with a monopolistic opponent who holds greater bargaining power. But in a free-market-based system, a party facing a powerful or stubborn opponent could walk away from a bad offer. In a market setting, there is a "going rate" for each procedure. The powerful litigant and the weak litigant pay exactly the same going rate for a deposition or a motion to dismiss.

The existence of predictable market rates for different quantities of procedure may also foster the expansion of legal insurance, prepaid legal, and third-party litigation finance markets. Financial intermediaries would be able to more accurately price products that, in the event of litigation, guarantee coverage for a

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<sup>215</sup> For an extended development of this idea, see generally Andrew Hammond, *Pleading Poverty in Federal Court*, 128 Yale L J 1478 (2019).

<sup>216</sup> They must pay their own lawyers, of course, but this cost does not capture the externalities they impose.

certain level of procedural intensity. These products would benefit the rich and poor alike, but in our estimation, the poor will benefit more. This is because wealthy individuals and businesses already have sophisticated forecasts for litigation costs and the ability to self-insure against the costs of litigation. Less wealthy individuals and organizations, however, stand to benefit from insurance against litigation cost risk that offers lower premiums and well-tailored coverage.

Moreover, the nature of the rights being traded can be defined in ways designed to improve distributional consequences.<sup>217</sup> For example, one can require at least some of the procedural adjustments to be symmetric across the parties in an individual case—that is, 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, not because they merely wanted to steamroll an opponent with their 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 an untradeable default entitlement in every case. This arrangement would address the concern that some litigants will be so constrained that they will not be able to afford even a minimum of procedure on the market. 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. Unlike under the status quo, the auction would raise revenue, and the proceeds from auctioning procedures above this floor could be redistributed. Thus, the least-resourced parties would be no worse off than under the present rules—and possibly much better off, especially if revenue from the sale of procedural entitlements is redistributed.

In short, contrary to what initial intuitions suggest, market-based approaches to procedural flexibility do not necessarily raise concerns about distributive equity. To the contrary, if designed

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<sup>217</sup> On the idea that distribution is not always most efficiently done through the tax and transfer system, see Kyle Logue and Ronen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 *Tax L Rev* 157, 207–08 (2003); Ronen Avraham, David Fortus, and Kyle Logue, *Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 *Iowa L Rev* 1125, 1149 (2004).

properly, they may do far better than the status quo in this respect.

#### E. Goal: Avoiding Commodification

Finally, an instinctive objection to prices, trading, or markets in procedure is that these things reduce procedural rights to commodities. To the extent that commodification in this sense is a bad thing, 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>218</sup> Settlement involves the parties giving up whatever remaining procedural rights they have in exchange for an end to litigation and (for the plaintiff) money. Such exchanges of procedural rights for cash sometimes occur in piecemeal ways, too. 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>219</sup>

Further, as we showed above, parties trade away procedural rights on an à la carte basis every day.<sup>220</sup> Agreements to limit depositions, stipulate to the authenticity of an exhibit, or not to object to a motion are routine affairs. And although such trades are usually in kind rather than for cash, there are some agreements that exchange procedural entitlements for cash. Cost-sharing or cost-shifting agreements for the costs of discovery of ESI are increasingly prevalent, and they explicitly involve money changing hands in exchange for a party forfeiting objections to discovery. Most obviously, the right to pursue justice in court comes with an explicit price tag. In federal court, this price tag is \$400, the sum of the filing fees for initiating a lawsuit in US district court.<sup>221</sup>

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<sup>218</sup> See J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 NYU L Rev 1713, 1743 (2012).

<sup>219</sup> J.J. Prescott and Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 NYU L Rev 59, 88–89, 115 (2016).

<sup>220</sup> See text accompanying notes 23–34.

<sup>221</sup> See 28 USC § 1914 (setting a \$350 filing fee for a civil action in US district courts); *District Court Miscellaneous Fee Schedule* (cited in note 170) (noting that the “[a]dministrative fee for filing a civil action, suit, or proceeding in a district court” is \$50).

Thus, we don't see our proposal as inviting any concern about commodification that does not already apply to virtually any aspect of the current system. The only thing our proposal does is force us to admit that commodification already (and inevitably) exists. Commodification presents a question not of whether, but how.

All that remains, then, is the argument that even if commodification is already the reality, markets in procedure would make this fact *more transparent*. The argument would be that the system benefits from obscurity, not transparency, on this score. This may be true, but we are reluctant to accept this conclusion uncritically. This conclusion depends on two premises: First, that the legitimacy of the system would suffer from greater transparency, and second, that benefits from allocative efficiency and distributive justice are less worthy goals than maintaining perceived legitimacy through nontransparency. Neither premise appears to be obviously true. As for the first premise, the power of wealth under the status quo is obvious, so there is not much of a secret to maintain. As for the second premise, if new approaches to procedure improve the efficiency and equity of the system, it is hard to see how the net effect would be a loss of confidence in the system.

#### 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. 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. Yet as we show in this Article, the breadth and depth of these insights occupies only a subset of a much larger conceptual space in which procedural flexibility can and does occur.

In this Article we provided a descriptive framework for understanding procedural flexibility. Our framework not only explains familiar practices, but also points toward bold new approaches to procedural flexibility, such as congestion pricing, auctions, and markets for civil procedure.

We also showed that such radical steps are not purely theoretical. Less explicit, but equally radical, forms of procedural flexibility already exist in certain types of litigation. A close examination of procedures in class actions and MDLs reveals exotic and ad hoc exercises in extreme procedural flexibility (such as class counsel auctions, bellwether trials, and *Lone Pine* orders) that serve as rough examples of a much larger set of pricing-based or market-based approaches to procedure that we imagine. And given that MDLs now comprise more than a third of all civil cases in federal court, radical procedural flexibility is not a fringe phenomenon. The spectrum of procedural flexibility that we have described enables us to predict and then identify these important innovations in procedure for what they are—the first, tentative steps toward procedural flexibility through prices and markets.

This in turn calls for a new normative framework which will enable judges, lawyers, and policy makers to evaluate procedural flexibility. When is cap-and-trade desirable? When (if ever) should the government auction procedural entitlements? When are fees for deviating from procedural defaults desirable? When is “no-flex” the right approach? Answering these and many other similar questions requires traversing new normative terrain. We take up these questions in our companion work.<sup>222</sup>

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<sup>222</sup> See generally Avraham and Hubbard, *Civil Procedure as the Regulation of Externalities* (cited in note 19).