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Contracting for Procedure

Kevin E. Davis

Helen Hershkoff
helen.hershkoff@nyu.edu

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CONTRACTING FOR PROCEDURE

KEVIN E. DAVIS* & HELEN HERSHKOFF**

ABSTRACT

Judicial decisions of public courts increasingly are based on “contract procedure,” private rules of procedure that the parties draft and assent to before a dispute even has arisen. These rules govern such matters as the forum in which the proceeding will be conducted, whether a jury will be involved in adjudicating the dispute, the scope of rights of discovery, and rules of evidence. The practice deserves greater attention and should raise more profound concerns than the academic literature currently suggests. We argue that contract procedure operates as a form of privatization that effectively outsources government functions to private contracting parties. As such, contract procedure has the potential to promote self-governance, encourage innovation, and secure efficiency. Yet it also permits unelected and unaccountable contract drafters to reshape adjudication, procedural rulemaking, and substantive law with virtually no meaningful oversight by Congress, agencies, or the courts. The practice of contract procedure has effects that spill over from the private world of the contracting parties into a world in which more public modes of

* Beller Family Professor of Business Law, New York University School of Law.

** Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties and Co-Director, Arthur Garfield Hays Civil Liberties Program, New York University School of Law.

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deliberation and decision making have traditionally prevailed. Our argument that these spillovers may be negative draws from well-developed theoretical concerns about the potential inefficiency of the private production of public goods, the potential threats to political competition posed by allowing economic actors to influence the exercise of adjudicative power, the dangers of exit from public institutions highlighted by Albert Hirschman's theory of exit, voice and loyalty, and Michael Walzer's account of the appropriate boundaries of the different "spheres of justice." We suggest a package of reforms that are aimed at the system effects that we identify and that are designed to capture the benefits of privatization while ensuring the transparency, public-regarding values, and information production that are essential to sound judicial administration. The two central reforms can be easily administered and would encourage greater oversight by Congress, agencies, and the courts. The two reforms are: (1) a requirement that the civil cover sheet that typically accompanies the filing of a complaint in a public court inquire whether the parties have agreed to deviate from any public rules of procedure and (2) a requirement that any such deviation be a mandatory topic of discussion at a judicial pre-trial conference and that the court consider and assess the likely effect of the customized rule in terms of party fairness, judicial integrity, and administrative efficiency.

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INTRODUCTION

The last generation has seen a subtle but discernable shift in the relation between private mechanisms for dispute resolution and the public courts.¹ As the literature well documents, increasing numbers of civil disputes, particularly those involving consumer and employment contracts, are now decided by private decision makers such as arbitrators, mediators, and judges hired for the occasion.² Depending on the perspective, these private processes allow the parties to exit—or exile the parties—from the public system of adjudication, effectively “carving out spheres of ‘private government’” with their own tribunals, procedures, and rules of decision.³ On a parallel track, private process has migrated in surprising ways

1. See, e.g., Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 594-600 (2005) (discussing the surge in arbitration agreements and consent decrees); see also Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?*, 81 ST. JOHN'S L. REV. 77, 78 (2007) (reporting that “ADR is firmly entrenched in the litigation process”).

2. See Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 773 fig.1 (2008) (documenting the increased “privatization of court-based processes across the docket”); see also Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 5 (1997) (“In virtually every business transaction, including those involving individuals, large institutions are requiring consumers and employees to give up their constitutional rights to a jury trial, an impartial judge, and due process, by agreeing in advance that any dispute shall be resolved through binding arbitration.”). Private judges and mediators also increasingly are used for family disputes. See Sheila Nagaraj, Comment, *Marriage of Family Law and Private Judging in California*, 116 YALE L.J. 1615, 1617 (2007) (reporting on the use of private judges to resolve family disputes in California); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1587 (discussing the shift from adjudication to mediation to resolve family disputes and observing that the “judiciary has generally welcomed the opportunity to reduce its involvement in divorce and custody disputes”). Some commentators question whether this trend will continue worldwide, pointing to international dissatisfaction with commercial arbitration. See Steven Seidenberg, *International Arbitration Loses Its Grip: Are U.S. Lawyers To Blame?*, A.B.A. J., Apr. 2010, at 50, 51 (citing survey results showing increasing dissatisfaction with international commercial arbitration as compared to litigation).

3. See Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 130-31 (1997) (quoting Heinrich Kronstein, *Business Arbitration—Instrument of Private Government*, 54 YALE L.J. 36, 66 (1994)); see also JOHN D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* 150 (1989) (reporting that civil litigants “are increasingly abandoning crowded public courtrooms” in favor of for-profit dispute-resolution services).

into the public courts: despite public rules of procedure, judicial decisions increasingly are based on private rules of procedure drafted by the parties before a dispute has arisen.⁴ These procedures include the forum in which proceedings will be conducted,⁵ whether a jury will be involved in adjudicating the dispute,⁶ the scope of rights of discovery,⁷ and rules of evidence.⁸

The practice of “contract procedure”—by which we mean the practice of setting out procedures in contracts to govern disputes that have not yet arisen, but that will be adjudicated in the public courts when they do arise—has only recently begun to attract scholarly attention.⁹ We believe greater attention is warranted. First, contract procedure appears to be an important phenomenon in its own right. Second, without considering the implications of contract procedure it is difficult to gauge the ramifications of other forms of private involvement in dispute resolution, including arbitration and post-dispute procedural stipulations. Indeed, without

4. See David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 607 (2010) (“Rather than the government, private actors create procedural rules; rather than yielding to the merits, these rules generate litigation; and rather than marching in lockstep, cases follow their own ‘mini-codes of civil procedure.’”) (footnote omitted).

5. See Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT’L L.J. 51, 51-52 (1992).

6. See Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 494 (2007) (discussing ex ante jury trial waivers); Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 183-91 (discussing ex ante jury trial waivers); Armanda R. Szuch, Comment, *Reconsidering Contractual Waivers of the Right to a Jury Trial in Federal Court*, 79 U. CIN. L. REV. 435, 435 (2010) (arguing that “if federal law is to be applied [to determine the validity of ex ante jury waivers, then] the less rigorous standard” applied to arbitration agreements should be adopted as the standard); cf. Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 169-70 (2004) (discussing jury waivers that result from arbitration agreements).

7. See Norman T. Braslow, *Contractual Stipulation for Judicial Review and Discovery in United States-Japan Arbitration Contracts*, 27 SEATTLE U. L. REV. 659, 667-70 (2004).

8. See David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1086 (2002) (discussing ex ante contract terms that treat “what evidence may or may not be presented as proof”).

9. See Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 727-28 (2011) (collecting references to recent literature); Daphna Kapeliuk & Alon Klement, *Contractualizing Procedure 2* (Dec. 31, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1323056> (observing that contract and procedure scholars “have paid little attention” to ex ante contract procedure).

knowing how “public” the public courts will be, one cannot meaningfully assess allowing litigants to opt out of the public courts in favor of private processes. Even for its fiercest critics, arbitration may be the lesser of two evils in comparison to courts that private actors are free to reconfigure through contract procedure. Others may conclude that contract procedure represents the best way for the public courts to respond to the issues raised by arbitration and other private processes.¹⁰

Assessment of the practice of contract procedure is hampered by both the absence of a satisfactory framework for analysis and a lack of empirical data. Contract procedure is often seen as a form of private ordering. As such, we might expect the practice to promote self-governance, encourage innovation, and secure efficiency.¹¹ We believe, however, that the public effects of contract procedure also must be directly considered. In our view, these procedures effectively limit the decision making of courts, and their use in the public courts raises special concerns that go beyond the interests of the immediate parties. The existing literature does not fully appreciate these concerns, and, in the absence of data it is difficult to determine their significance.

We argue in this Article that contract procedure functions as a form of privatization—the outsourcing of government functions—and that it implicates the structure and design of public institutions.¹² Like other forms of outsourcing, contract procedure can be

10. Loïc Cadiet, *Les conventions relatives au procès en droit français: Sur la contractualisation du règlement des litiges*, 62 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 7, 10 (2008) (describing contract procedure as a response to the crisis of justice); Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts To Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 646 (2007) (“If we can remake litigation in arbitration’s image, we get the best of both worlds.”); see also *In re Prudential Ins. Co. of Am.* 148 S.W.3d 124, 132 (Tex. 2004) (“Even if the option [of an enforceable jury trial waiver] appeals only to a few, some of the tide away from the civil justice system to alternate dispute resolution is stemmed.”).

11. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 159-61 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (treating private ordering as the “primary process of social adjustment”); see also Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 1-2 (1981) (criticizing “legal centralism,” that is, “[t]he view that the justice to which we seek access is a product that is produced—or at least distributed—exclusively by the state”).

12. For discussion of the varieties of privatization, see Ronald A. Cass, *Privatization:*

expected to affect public confidence in the government institutions that endorse its use; its persistence and growth demand assessment not simply of its impact on the individual case but of its structural effect on the civil justice system as a whole. Yet unlike other forms of outsourcing used by government, contract procedure is subject to virtually no meaningful oversight by Congress, by agencies, or by the courts.

Our argument builds on two insights. The first is economic: private transactions presumptively are efficient only if there are no negative externalities, that is to say, no adverse effects on third parties.¹³ That the conduct of a civil proceeding might affect the interests of people beyond the immediate parties to the dispute—much less the subset of those parties who happen to be in a contractual relationship prior to the dispute—is not a novel idea.¹⁴ Moreover, it is commonplace in law-and-economics literature to characterize adjudication as a source of public goods, meaning goods

Politics, Law, and Theory, 71 MARQ. L. REV. 449, 456-62 (1988).

13. For the general principle, see Robert C. Clark, *Contracts, Elites, and Traditions in the Making of Corporate Law*, 89 COLUM. L. REV. 1703, 1706 (1989) (expressing the conventional view that “except when there are bad third-party effects (alias ‘negative externalities’), managers and investors should be free to change any ... default rules by mutual agreement”); see also Note, *A Law and Economics Look at Contracts Against Public Policy*, 119 HARV. L. REV. 1445, 1447 (2006) (“[T]he fact that a contracted-for activity will have negative effects on third parties does not make the transaction economically inefficient per se; this inefficiency occurs only if the net third-party harms exceed the net benefits to the contracting parties.”). For the concept applied to litigation, see, for example, Gillian K. Hadfield, *The Public and the Private in the Provision of Law for Global Transactions*, in CONTRACTUAL CERTAINTY IN INTERNATIONAL TRADE: EMPIRICAL STUDIES AND THEORETICAL DEBATES ON INSTITUTIONAL SUPPORT FOR GLOBAL ECONOMIC EXCHANGES 252 (Volkmar Gessner ed., 2009) (explaining this idea); William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 721 (2006) (“If litigation exchanges take place that benefit the parties but harm third parties, this spillover effect, or negative externality, demonstrates that the system is not in a Pareto optimal state; one might say it has exceeded it by producing too many detrimental exchanges.”); see also Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1130-31 (1986) (discussing situations in which law should interfere with private preferences in the absence of harm to third parties).

14. See Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1491-1501 (1994) (discussing the effect of settlement on third-party access to information). For elaboration of this insight in the context of bankruptcy proceedings, see Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197, 1254 (2005) (criticizing the “two-party contract model” of bankruptcy proceedings).

the benefits from which can be consumed by many actors without reducing the benefits to any one actor.¹⁵ Among the most important of those public goods, although not the only, are various kinds of information that help policymakers and members of the general public identify and respond to social problems.¹⁶ The practice of contracting for procedure can be conceptualized, therefore, as contracting over the production of public goods that play a critical role in shaping public policy, encouraging social trust, and supporting democratic values. Whether to tolerate the practice differs conceptually from debates about whether to permit private actors freedom to contract over the production or exchange of other goods and services; its effect goes well beyond the impact of the transaction upon the individual parties to the contract.¹⁷

The second insight is political: democratic institutions, including courts, ought to be preferred sites for effecting changes in law and public policy. This is not to ignore the lessons of “new governance” theory¹⁸ or popular constitutionalism,¹⁹ both of which credit private

15. See Bryan Caplan & Edward P. Stringham, *Privatizing the Adjudication of Disputes*, 9 THEORETICAL INQUIRIES L. 503, 504 (2008) (calling law a “perfect example of a public good that government simply must supply if order is to exist at all,” but recognizing criticism of the state-centric approach to law provision); see also Elizabeth Chamblee Burch, *CAFA’s Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2518 (2008) (defining a public good and explaining “that litigation itself is a public good”).

16. See Lisa Blomgren Bingham, *When We Hold No Truths To Be Self-Evident: Truth, Belief, Trust, and the Decline in Trials*, 2006 J. DISP. RESOL. 131, 154 (discussing “the relationship between changes in our relation to information, the resulting uncertainty and loss of trust, and its impact on the civil trial”); Dennis J. Drasco, *Public Access to Information in Civil Litigation vs. Litigant’s Demand for Privacy: Is the “Vanishing Trial” an Avoidable Consequence?*, 2006 J. DISP. RESOL. 155, 157 (discussing the role of public adjudication in generating information and social trust).

17. See Taylor & Cliffe, *supra* note 8, at 1100-04 (stating that judicial enforcement of a pre-litigation agreement “allows a private agreement to alter the procedural system established by statute and rule in a manner that is frequently inconsistent with the publicly constructed system”); Thornburg, *supra* note 6, at 206 (“[T]he public court system serves both private and public functions.”).

18. See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 267 (1998) (putting forward a system of directly deliberative polyarchy “in which power is decentralized to enable citizens and other actors to utilize their local knowledge ... but in which ... coordinating bodies require actors to share their knowledge”).

19. See, e.g., Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 959 (2004) (describing a legal order in which “the role of the people is not confined to occasional acts of constitution making”).

actors with an important lawmaking function. However, when power to make or to change policy is in the hands of private individuals, care must be taken to ensure transparency, participation, and the possibility for informed disagreement.²⁰ The practice of contract procedure lacks these qualities. By effect, it permits unelected and unaccountable contract drafters to reshape a function that reasonably is regarded as a core governmental function,²¹ and it does so, we argue, in ways that can be expected to suppress popular input and to inhibit alternative points of view.

Part I of this Article frames the discussion that follows. It briefly describes the scope of *ex ante* contract procedure and examines judicial treatment of the practice. Part II summarizes and assesses concerns about the effects of contract procedure on the immediate parties to the disputes it governs. Although contract procedure in theory affords flexibility, generates efficiency, and provides choice,²² *ex ante* agreements are not always mutually beneficial to the parties and in some cases inappropriately extinguish constitutional and statutory rights.²³ These concerns are the focus of much of the current literature. Part III reframes the discussion by characterizing contract procedure as a form of outsourcing that implicates the design of the public system of dispute resolution—a function that in contemporary parlance is inherently governmental. In our view, the outsourcing of this aspect of the civil justice system interferes with the production of a key byproduct of public adjudication—information. The resulting information deficit and biases impede and

20. See Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 221 (1937) (“Tolerated, covert monopolies—power exercised indirectly—may be much more difficult to attack or to ameliorate than the edicts of majorities arrived at openly and according to the forms of law.”).

21. See Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 167-68 (1989) (distinguishing between “the privatization of core governmental responsibilities—the making of laws and the adjudication of disputes” and “the privatization of specific governmental services such as garbage collection and public transportation”).

22. See Caplan & Stringham, *supra* note 15, at 528 (stating that these advantages may be secured through “the stern discipline of free competition”); see also Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 856-60 (2006) (explaining that *ex ante* contract procedure can “increase the incentive bang for the enforcement buck”).

23. See, e.g., Horton, *supra* note 4, at 607-08 (summarizing the arguments for and against contract procedure).

distort collective efforts to identify problems, to forge solutions, and to promote public values. Consequently, we argue, contract procedure has effects that spill over from the private world of the contracting parties and into a world in which more public modes of deliberation and decision making have traditionally prevailed. Our argument that these spillovers may well be negative draws from well-developed theoretical concerns about the potential inefficiency of private production of public goods, the potential threats to political competition posed by allowing economic actors to influence the exercise of public power, and Michael Walzer's account of the appropriate boundaries of the "spheres of justice."²⁴ Part IV suggests a package of reforms aimed at the system effects we have identified.²⁵ Our goal is to capture the benefits that are identified with outsourcing, while ensuring the transparency, public-regarding values, and information production that are essential to sound judicial administration. A conclusion briefly considers the potential "state-breaking function" of contract procedure, which, if left unchecked, we believe could produce a constitutional transformation that inappropriately reshapes the relation of citizen to government and of government to market.²⁶

I. AN OVERVIEW OF CONTRACT PROCEDURE

This Part describes the practice of contract procedure in the United States. To preview the discussion, those who wish to study the practice are inhibited by a lack of information: we know surprisingly little about the scope of the practice, the nature of the agreements, and the impact of particular contract terms on judicial

24. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY, at xiv (1983) (describing "a society where no social good serves or can serve as a means of domination").

25. See Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 4, 6 (2009) ("A *system effect* arises when the properties of an aggregate differ from the properties of its members, taken one by one.").

26. The term appears in Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. INT'L L. & POL. 1, 3 (2006). See Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIAMI L. REV. 507, 508-09 (2011) (stating that the use of private parties "in contexts ranging from national security to claims adjudication ... raises profound questions of constitutional propriety and democracy").

resolution. Contracts that contain procedural terms generally are not collected in a public database; unlike consent decrees, they are not published with conventional legal materials, such as judicial decisions, and they frequently elicit very little judicial discussion. In short, contract procedure, even as used within the public court system, appears to be flying beneath the radar and escaping oversight and empirical study.

A. Contract Procedure and Commercial Practice

There is a widespread perception that customized procedure is an increasingly important feature of contracting practice among U.S. firms, although writers disagree about whether the practice has gone too far or not far enough.²⁷ Writing in 1992, Michael E. Solimine pointed to the rise of forum selection clauses, choice-of-law clauses, and waivers of service of process.²⁸ To these provisions we can add waiver of the right to trial by jury,²⁹ contractual terms dealing with the evidentiary burden of proof,³⁰ and evidence stipulations.³¹ Yet information about the practice or extent of contracting for procedural terms is difficult to obtain; we lack empirical data

27. Compare Taylor & Cliffe, *supra* note 8, at 1161-62 (calling for congressional regulation of contract procedure), with Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514, 564, 570-71 (2009) (criticizing civil procedure for persisting as a system of “fixed rules” that fails to provide litigants with opportunities for “private choice”).

28. Solimine, *supra* note 5, at 52; see also Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware’s Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 118 (2009) (observing that parties “commonly” contract over choice of forum “in merger agreements and other highly negotiated corporate and commercial contracts”).

29. See, e.g., Jarod S. Gonzalez, *A Tale of Two Waivers: Waiver of the Jury Waiver Defense Under the Federal Rules of Civil Procedure*, 87 NEB. L. REV. 675, 678 (2009) (“Jury waivers in commercial agreements have been ubiquitous for many years.”); Brian S. Thomley, Comment, *Nothing is Sacred: Why Georgia and California Cannot Bar Contractual Jury Waivers in Federal Court*, 12 CHAP. L. REV. 127, 127 (2008) (“Federal courts have long recognized that the right to a civil jury trial may be waived in advance by private agreement.”).

30. Scott & Triantis, *supra* note 22, at 857-58 (explaining that many contracts contain contractual burden-of-proof provisions).

31. See Taylor & Cliffe, *supra* note 8, at 1086 (discussing pre-litigation agreements, in which parties to a contract “designate what evidence may or may not be presented as proof”); cf. Noyes, *supra* note 10, at 607 (“It is generally acknowledged that ex ante contracts to alter the rules of evidence are enforceable.”).

about patterns in the use of procedural terms; and we know little about the distribution of the practice across different kinds of parties, claims, and industries. The absence of information about contract procedure cannot be explained by the fact that it is implemented through private contracts. Arbitration agreements are also private contracts, but, as a result of sustained judicial and academic attention,³² we know significantly more about when arbitration agreements are used³³ and the types of procedures they set out.³⁴

The few empirical studies about ex ante contract procedure in the publicly sponsored courts focus on agreements between corporate actors. In a study of 412 merger-and-acquisition contracts,

32. See, e.g., Martin H. Malin, *Privatizing Justice—But By How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 602-05 (2001) (summarizing empirical studies about arbitration). Clauses mandating arbitration in disputes between credit card companies or securities firms and their customers have attracted particular attention. See, e.g., Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 397-98 (2005); Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 158 (2006).

33. The available data suggest that arbitration clauses are particularly common in consumer contracts and that businesses often present them to consumers on a take-it-or-leave-it basis. See Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593, 1600-01 (2005); see also Linda J. Demaine & Deborah R. Hensler, “Volunteering” To Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55, 56-57 (2004) (examining the prevalence and form of arbitration clauses in businesses likely to be patronized by consumers); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 876 (2008) (documenting significantly higher use of arbitration clauses in consumer and employment contracts than in commercial contracts); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 989 (2000) (referring to “low voluntary usage” of ADR). In addition, Bernstein’s studies of contracting practices among groups such as diamond wholesalers and cotton growers and processors emphasize that many industry associations have adopted standard forms that mandate arbitration of disputes between members. See Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1724 (2001) (describing the cotton industry’s default arbitration provisions); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115, 143-57 (1992) (describing the diamond industry’s preference for arbitration).

34. See Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. (forthcoming 2011) (manuscript at 11, 17), available at <http://ssrn.com/abstract=1761407> (examining procedures specified in franchise agreements filed with the Minnesota Department of Commerce, joint venture agreements filed with the SEC, and credit card contracts filed with the Federal Reserve Board); see also Demaine & Hensler, *supra* note 33, at 65 (reporting proportion of arbitration clauses that permitted some form of interim relief to be sought from a court and prohibited class actions in arbitration).

Eisenberg and Miller found that 215 (53 percent) specified a forum for litigation.³⁵ They further report that only 20 percent of reporting companies waived the right of trial by jury.³⁶ Marotta-Wurgler's study of a sample of 597 software license agreements used in online transactions yields similar results.³⁷ She found that only 6 percent of the agreements in her sample included arbitration clauses and 28 percent of them included choice-of-forum clauses—mostly in favor of the state where the seller was headquartered.³⁸ None of them contained class action waivers.³⁹ Marotta-Wurgler also found that larger companies were somewhat more likely to use forum selection clauses but less likely to use arbitration clauses.⁴⁰ In these respects, there was little difference between agreements used in connection with business-oriented as opposed to consumer-oriented products. A study by Kapeliuk and Klement of contracts filed with the SEC found a range of predispute devices, involving venue selection, choice of law, waiver of the right to jury trial, specification of provisional remedies, agreement to service of process, and extension of the statute of limitations.⁴¹ These data provide insufficient information to form a complete picture of contract procedure and do not shed much light on how the practice functions in discrete settings, for example, when terms are freely negotiated rather than adhering to standard-form contracts.

35. Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1987 tbl.2 (2006). Of those contracts, 23.4 percent specified a federal rather than a state forum. *Id.* at 2000 n.54. The forum selected tended to be the state of incorporation of the acquirer, the state in which the acquirer did business, or the state in which the attorneys for the firm reporting the transaction were located. *Id.* at 2011; see also Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 348, 373-74 (2007) (presenting the results of a study of international contracts in Form 8-K filings by corporations in 2002 and suggesting a preference for a judicial, rather than an arbitral, forum).

36. See Theodore Eisenberg & Geoffrey P. Miller, *Do Juries Add Value? Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts*, 4 J. EMPIRICAL LEGAL STUD. 539, 539 (2007).

37. Florencia Marotta-Wurgler, "Unfair" Dispute Resolution Clauses: Much Ado About Nothing?, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 45, 47-48 (Omri Ben-Shahar ed., 2007).

38. *Id.*

39. *Id.* at 48.

40. *Id.* at 55.

41. Kapeliuk & Klement, *supra* note 9, at 7-10.

B. Contract Procedure and Judicial Review

The case law about *ex ante* contract procedure similarly provides only a narrow window into the practice, its distribution among cases and parties, and its specific effects. *Ex ante* stipulations of this sort appear to receive only limited judicial review; rather than assess the fairness or utility of customized procedural terms, many courts instead tend to acquiesce in these private arrangements.⁴² This pattern of acceptance follows a trend that G. Richard Shell identified almost twenty years ago in his study of contracts and the U.S. Supreme Court: the steady demise of the public-policy exception to contract enforcement and, in particular, of an exception to contractual autonomy that draws from the special attributes of judicial process.⁴³

It seems relatively certain that subject-matter jurisdiction remains a “mandatory” or “immutable” term⁴⁴—akin to the rules concerning fraud, duress, and unconscionability—so that a party cannot agree *ex ante* to waive a defect in subject-matter jurisdiction.⁴⁵ In a limited number of situations, the U.S. Supreme

42. See, e.g., Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 477 (1989). For an example of a state court taking a tougher approach to *ex ante* procedural stipulations, see Stevelman, *supra* note 28, at 118 (discussing the Delaware Court of Chancery’s refusal to accept forum selection clauses in merger agreements that place litigation involving Delaware corporations in courts outside Delaware).

43. G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 431, 452-56 (1993) (detailing Supreme Court treatment of judicial-access clauses and documenting judicial acceptance of *ex ante* forum selection clauses); see also Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 402 (tracing the Supreme Court’s acceptance of arbitration and calling the decisions “a trespass on the institutions of democratic government”). For the most recent example of the Court’s endorsement of agreements to arbitrate, even when they disallow classwide proceedings, see *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740 (2011) (holding that the Federal Arbitration Act preempted a California decisional rule that treated class waivers in consumer arbitration agreements as unconscionable if the agreement was one of adhesion, the damages involved were likely to be small, and the party with inferior bargaining power alleged a scheme to defraud).

44. For a definition of the distinction between mandatory and default terms, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989) (defining mandatory and default rules).

45. See, e.g., *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 389 (1998) (“No party can waive the defect or consent to jurisdiction.”); see Frederic M. Bloom, *Jurisdiction’s Noble Lie*, 61 STAN. L. REV. 971, 987 (2009) (“Parties may not waive, disguise, or stumble through subject-

Court has enforced ex post agreements that arguably indirectly enlarge the subject-matter jurisdiction of the federal courts.⁴⁶ In addition, the Court recently held that Federal Rule 17 may be contracted around before litigation in ways that effectively overcome the core requirement of standing under Article III of the Federal Constitution.⁴⁷ However, these departures from the mandatory rule

matter jurisdiction defects.”) It follows that Federal Rule 12(b)(1), governing the presentation of defenses based on a “lack of subject-matter jurisdiction,” may not be waived or altered by the parties. Similarly, Federal Rule 12(h), governing the waiving and preserving of defenses, does not permit litigant choice that goes beyond the limits of Article III of the Federal Constitution because courts retain the ability to dismiss the action when subject-matter jurisdiction is lacking. *But see* *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998) (noting that precedent has “diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question” to a decision on the merits); *see also* *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 430-31 (2007) (stating that *Steel Co.* “clarified that a federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of a claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)”); Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301, 314-15 (2011) (arguing that only Article III jurisdictional limits are “on the list of nonbypassable grounds”). The mandatory nature of subject-matter jurisdiction, including federal appellate jurisdictional limits, may explain the Court’s treatment of the grounds available for vacatur under the Federal Arbitration Act. *See* *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008); *see also* Christopher R. Drahozal, *Contracting Around Hall Street*, 14 LEWIS & CLARK L. REV. 905, 918-21 (2010) (discussing the possibility of contracting for state court review).

46. For example, in *Matsushita Electric Industrial Co. v. Epstein*, involving a collateral challenge to a class action settlement on grounds of inadequate representation, the Court accorded preclusive effect to a state court judgment that encompassed federal claims falling within the exclusive jurisdiction of the federal court. 516 U.S. 367, 386-87 (1996). And in *Caterpillar Inc. v. Lewis*, decided that same year, the Court unanimously held that the absence of diversity jurisdiction at the time of removal was not fatal when such jurisdiction existed at the time of entry of judgment following a settlement between defendants that resulted in the dismissing of the nondiverse party from the action. 519 U.S. 61, 64 (1996). In both of these cases, a settlement between the parties indirectly converted subject-matter jurisdiction from a mandatory into a default rule, in the sense of allowing the parties’ action to drive judicial deviation from the decisional rules that govern whether jurisdiction exists. Subsequently, in *Grupo Dataflux v. Atlas Global Group, L.P.*, the Court, dividing five to four, declined to extend the *Caterpillar* exception to encompass a partnership’s post-filing change in citizenship that cured a jurisdictional defect. 541 U.S. 567, 574-75 (2004). In addition, in *Kokkonen v. Guardian Life Insurance Co. of America*, the district court’s ancillary jurisdiction turned on the parties’ inclusion of specific terms in the stipulation of settlement that the court so ordered. 511 U.S. 375, 381-82 (1994).

47. *See* *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 285-86 (2008) (reading Article III to permit assignees to bring claims when assignee had contractually agreed to pay proceeds to assignor); Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 191-92 (endorsing the Court’s holding in *Sprint* despite the absence of class action

of subject-matter jurisdiction are notable as outliers and so are regarded as unusual.

Other than Article III requirements, no other federal constitutional provisions cut sharply into contractual autonomy. Due process rights of notice and an opportunity to be heard may be waived ex ante;⁴⁸ a cognovit note, by which a debtor consents to judgment in favor of the holder without notice or hearing, “is not, per se, violative of Fourteenth Amendment due process.”⁴⁹ Likewise, the civil jury right can be waived ex ante.⁵⁰ Although the Court has underscored that the standard for reviewing jury waivers is constitutional, not contractual, insisting that the waiver be “voluntary, knowing, and intelligently made,”⁵¹ contractual terms are upheld even when the facts point to an absence of true assent.⁵² Thus, other than subject-matter jurisdiction, the public rules of procedure function as default rules, akin to the rules of offer and acceptance that can be altered or customized according to the needs and preferences of the disputants.⁵³ Exceptions to the default rule are

procedural safeguards when the parties were repeat-player commercial entities).

48. *E.g.*, *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972) (“The due process rights to notice and hearing prior to a civil judgment are subject to waiver.”); *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964) (“[I]t is settled ... that parties to a contract may agree in advance ... to waive notice altogether.”).

49. *Overmyer*, 405 U.S. at 187. Justice Douglas emphasized in his concurring opinion that “[w]hatever procedural hardship the [contractual] ... scheme worked ... was voluntarily and understandingly self-inflicted through ... arm’s-length bargaining.” *Id.* at 189 (Douglas, J., concurring). *But see* Note, *Cognovit Judgments: Some Constitutional Considerations*, 70 COLUM. L. REV. 1118, 1125-29 (1970) (developing constitutional arguments against cognovit notes).

50. *See* Thomley, *supra* note 29, at 133 (discussing the federal standard for endorsing contractual jury waivers); *see also* David T. Rusoff, *Contractual Jury Waivers: Their Use in Reducing Lender Liability*, 110 BANKING L.J. 4, 9-14 (1993) (presenting policy arguments in favor of ex ante jury waivers).

51. *Overmyer*, 405 U.S. at 185. The Court has stated that “facts are important” to the constitutional inquiry, and that “where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue.” *Id.* at 178, 188.

52. *See, e.g.*, *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 993 (7th Cir. 2008) (reversing the district court’s refusal to enforce a jury waiver embedded in a sales contract on the view that “[a]s long as the price is negotiable and the customer may shop elsewhere, consumer protection comes from competition rather than judicial intervention”).

53. *But see* Noyes, *supra* note 10, at 612 (“[M]ost lawyers and potential litigants do not think of the rules of litigation as default rules.”).

associated with specific federal statutes; in addition, some state courts subject *ex ante* contractual waivers to heightened scrutiny—and even ban them in discrete categories of cases.⁵⁴

The Court's relaxed acceptance of *ex ante* contract procedure is best illustrated by its treatment of forum selection clauses.⁵⁵ U.S. courts, like common law courts abroad, traditionally accepted a defendant's waiver of objections to personal jurisdiction,⁵⁶ justified as a matter of consent. However, U.S. courts treated "ouster" clauses that withdrew judicial power from the public courts as unenforceable because "contrary to public policy,"⁵⁷ and the ouster concept informed the Court's analogous rejection of *ex ante* waivers of rules of evidence.⁵⁸ In 1972, the Court in *The Bremen v. Zapata Off-Shore Co.* shifted course: it not only ratified an *ex ante* forum selection clause, but also called the ouster concept a "vestigial legal fiction."⁵⁹ *The Bremen* was an admiralty case involving evenly

54. For a statutory exception to the general practice of accepting privately drafted procedural terms, see Jeremy Jones, Comment, *Forum and Venue Selection Clauses in Seamen's Employment Contracts: Can Contractual Stipulations Be Used To Defeat a Seaman's Choice of Forum or Venue in a Jones Act Claim?*, 85 TUL. L. REV. 519, 521-22 (2010) (discussing prohibition on forum selection clauses in contracts involving the Federal Employer's Liability Act). On the state level, California and Georgia treat jury waivers as unenforceable, citing state constitutional provisions. See Thomley, *supra* note 29, at 134-38. But see David F. Johnson, *The Enforcement of Contractual Jury Waiver Clauses in Texas*, 62 BAYLOR L. REV. 649, 650 (2010) ("Texas courts, and almost all other jurisdictions, have held that contractual jury waivers are permissible and enforceable under certain circumstances.").

55. For a comprehensive and critical discussion of these cases, see David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 988-1041 (2008).

56. *E.g.*, Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964) (endorsing consent-to-service clause contained in a contract of adhesion); see also Friedrich K. Juenger, *Supreme Court Validation of Forum-Selection Clauses*, 19 WAYNE L. REV. 49, 51 (1972) ("The ability of private parties to confer jurisdiction by consent has long been recognized in the English speaking world.").

57. *E.g.*, Carbon Black Exp., Inc. v. SS Monrosa, 254 F.2d 297, 300-01 (5th Cir. 1958); see also Vaden v. Discover Bank, 129 S. Ct. 1262, 1274-75 (2009) (discussing the out-moded view that "arbitration clauses [were] unworthy attempts to 'oust' [courts] of jurisdiction"); Juenger, *supra* note 56, at 51-54 (discussing the history of the ouster doctrine).

58. See Note, *Contracts To Alter the Rules of Evidence*, 46 HARV. L. REV. 138, 142 (1932) (discussing "a deep rooted prejudice" against ouster agreements and their application to bar *ex ante* waivers of evidence rules).

59. 407 U.S. 1, 12 (1972). Even earlier, courts of appeals had begun to question the ouster concept in cases involving forum selection clauses. See, e.g., Cent. Contracting Co. v. Md. Cas. Co., 367 F.2d 341, 345 (3d Cir. 1966) ("[S]uch a provision does not oust the jurisdiction of the courts; in effect it merely constitutes a stipulation in which the parties join in asking the court

matched commercial companies doing work in international waters; under the Court's new approach, a forum clause that was freely negotiated would be enforced unless "unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."⁶⁰ The Court later extended this analysis, at least in admiralty cases, to consumer contracts,⁶¹ and soon after federal courts sitting in diversity and many state courts began to follow suit.⁶² The fact that the forum selection clause appeared as an adhesive term in a standard-form contract generally provided no defense to the term's enforcement.⁶³ Diversity cases have produced a somewhat more complicated doctrinal approach, at least with respect to venue-selection clauses: 28 U.S.C. § 1404, the federal statute governing transfer of venue, trumps any conflicting state procedural rule.⁶⁴

to give effect to their agreement by declining to exercise its jurisdiction.").

60. *The Bremen*, 407 U.S. at 15.

61. *See, e.g.*, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991).

62. *See Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 512 (9th Cir. 1988) ("Although *The Bremen* was an admiralty case, its standard has been widely applied to forum selection clauses in general."); *Bense v. Interstate Battery Sys. of Am., Inc.*, 683 F.2d 718, 721 (2d Cir. 1982) (stating that although *The Bremen* "arose in an international context, we see no reason why this should preclude the application of *The Bremen* Court's reasoning to domestic suits"); *see also* Michael D. Moberly & Carolyn F. Burr, *Enforcing Forum Selection Clauses in State Court*, 39 SW. L. REV. 265, 276 (2009) ("Although *Bremen* arose under the federal courts' admiralty jurisdiction, the Supreme Court's analysis had an enormous influence on the enforceability of forum selection clauses in subsequent state court litigation." (internal citation omitted)); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 307 (1988) ("The current doctrine of consensual adjudicatory procedure enforced throughout the federal court system is based on Supreme Court pronouncements in *The Bremen*."); Jonathan L. Corsico, Comment, *Forum Non Conveniens: A Vehicle for Federal Court Enforcement of Forum Selection Clauses that Name Non-Federal Forums as Proper*, 97 NW. U. L. REV. 1853, 1863 (2003) ("Under the *Bremen* test, the forum selection clause is afforded almost dispositive weight.").

63. In *Carnival Cruise*, the Court ratified use of a forum selection clause in a standard contract between a large company and an elderly consumer who did not see the term before agreeing to the deal, holding that such provisions presumptively are acceptable. 499 U.S. at 593-94. This result ran counter to conflicts principles that withheld respect from private rules embedded in what Albert Ehrenzweig called "true adhesion contracts between unequal parties." Albert A. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072, 1076 (1953). Professor Ehrenzweig emphasized, "Whatever the status of the principle of party autonomy in the conflicts law of contracts in general, this principle has no place in the conflicts law of adhesion contracts." *Id.* at 1090; *see also* Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 90 (1992).

64. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988) (applying federal law in

Although this approach may appear to limit contractual autonomy,⁶⁵ in practice the federal test treats party agreements as effective even when a state court would withhold enforcement.⁶⁶

II. CONTRACT PROCEDURE AS A PRIVATE CONCERN

Although a few commentators have raised questions about the public impact of contract procedure, most of the debate over whether to permit the practice is concerned with its effects on the immediate parties to the contract.⁶⁷ Some commentators approach the issue from an economic perspective and ask whether the parties are likely to be better off than before they entered into the contract. Others ask whether the benefits and burdens of the transaction are fairly

a diversity action to determine the validity of a contractual forum selection clause designating venue and holding that a case could be transferred under federal law pursuant to a contractual venue clause unenforceable under state law); *see also* Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935, 1961-68 (1991) (criticizing the *Stewart* rationale).

65. *See* Maryellen Corna, Note, *Confusion and Dissension Surrounding the Venue Transfer Statutes*, 53 OHIO ST. L.J. 319, 324 (1992) (positing that the *Stewart* Court limited *The Bremen* and so “limited parties’ rights to contract for venue, and, by analogy, limited their ability to waive litigation rights”).

66. *See* Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 458 (1992) (explaining that *Stewart* “has the effect of making forum selection clauses generally enforceable in federal diversity actions even when the suit is heard in a state whose law refuses to enforce such clauses”). Whether state or federal law governs motions to dismiss on the basis of a venue selection clause remains an open question on which the circuits are divided. *See* Don Zupanec, *Forum Selection Clause—Diversity Action—Governing Law*, 25 FED. LITIGATOR 32, 32-33 (2010) (discussing circuit division on this issue); *see also* Ryan T. Holt, Note, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts*, 62 VAND. L. REV. 1913, 1945-51 (2009) (urging adoption of a federal rule to govern motions to dismiss and motions to transfer to enforce a forum selection clause in cases heard by a federal court sitting in diversity).

67. *But see* Resnik, *supra* note 2, at 799, 802 (predicting that contract procedure will have corrosive effects on the “public dimensions” of dispute resolution); *see also* Dodge, *supra* note 9, at 770-83; Kapeliuk & Klement, *supra* note 9, at 38-44; Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 549 (2006). For a “public justice” approach to ex ante arbitration agreements, *see* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1661-75 (2005) (summarizing and expanding a “public justice” critique with respect to mandatory arbitration), and Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279, 297 (2004). For other commentary recognizing the third-party negative effects of contract procedure, *see* Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 780-89 (2002). *See generally* Mullenix, *supra* note 62; Shell, *supra* note 43.

distributed between the parties. Still others ask whether enforcing the procedural terms of a contract manifests due respect for the parties' autonomy.

A. *Efficiency*

Some commentators ask whether enforcing ex ante agreements on procedural matters can be justified by the general principle that the law should encourage and facilitate agreements that contemplate mutually beneficial—or, as the economists say, Pareto-efficient—exchanges and discourage other agreements.⁶⁸ Defenders of contract procedure thus invoke the general presumption that voluntary agreements concluded by competent parties will be mutually beneficial. But there are several specific reasons to believe that the parties to a contract might benefit sufficiently from avoiding state-supplied procedural rules to offset the transaction costs entailed in creating a customized regime.⁶⁹ For instance, terms that specify the location in which disputes will be resolved can allow parties to minimize travel costs. Contractual provisions to curtail discovery might make sense, for example, in disputes that are expected to turn on a court's interpretation of a limited number of documents. Similarly, waivers of notice and hearing rights might be rationalized by the benefits of shared cost savings. Terms that designate a bench trial allow parties to choose adjudicators with professional expertise and avoid any additional delay or uncertainty associated with jury trials. Terms that provide for confidential proceedings allow parties to protect sensitive trade secrets. Terms that restrict class actions

68. See Clark, *supra* note 13, at 1706 (“To sum up the strong form of the contractual theory in a motto: Everything is negotiable.”); see also STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 446-47 (2004) (arguing that if parties to a contract both agree to have a private system resolve contractual problems that may arise “it must make each of them better off”); Moffitt, *supra* note 6, at 484 (“The litigants would only proceed with the search for customization as long as both litigants saw reason to continue.”).

69. Scott & Triantis, *supra* note 22, at 856 (arguing that in many cases contract procedure improves cost-effectiveness of contract enforcement). This argument dominates favorable discussion of ex ante arbitration agreements. *E.g.*, Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 9 (1995) (positing with respect to ex ante arbitration agreements that because the legal system cannot be made sensitive to the needs of every litigant, the “parties should be able to choose for themselves a better method of dispute resolution than the legal process would offer”).

allow parties to forestall frivolous litigation initiated by self-interested attorneys.

More generally, adopting clear procedural terms when the procedural law that would otherwise be applicable is unclear may allow parties to reduce their litigation costs.⁷⁰ In addition, adopting a single set of procedural terms across all their agreements allows parties who are exposed to litigation in multiple jurisdictions to avoid the costs of learning multiple bodies of procedural law and the litigation costs already mentioned.⁷¹ Finally, the cost of customization will predictably decline over time as later users free-ride on existing private terms.⁷² For all of these reasons, efficiency arguments suggest that courts and contracting parties alike ought to embrace procedural terms.

Critics of contract procedure resist accepting the presumption of an efficient exchange when there is reason to believe that one party to the agreement has inadequate information.⁷³ Concerns about inadequate information are particularly salient when individuals enter into standard-form contracts with business enterprises without any reasonable opportunity to consult an attorney.⁷⁴ The idea

70. See Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 366 (2003) (“Enforcing contract provisions that choose the law that applies to the contract can be efficient because these clauses reduce the uncertainty of vague conflict-of-laws default rules and help contracting parties avoid the application of inefficient mandatory rules.”). The significance of this factor may vary in different contexts. See Bruce H. Kobayashi & Larry E. Ribstein, *Delaware for Small Fry: Jurisdictional Competition for Limited Liability Companies*, 2011 U. ILL. L. REV. 91, 136 (finding that court quality is the most important factor in allowing states to retain and attract LLCs, taking account of firm size, statutory flexibility, statutory innovation, and debtor protection). For a discussion of procedural uncertainty with respect to juries, see Valerie P. Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 DEPAUL L. REV. 375, 390 (2011) (finding that the punitive damage variable bore the strongest relationship to jury predictability judgments).

71. *E.g.*, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972) (endorsing this rationale); see Giesela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT’L L. 801, 812 (2006) (discussing efficiency gains of forum selection clauses).

72. See Steven R. Salbu, *Evolving Contract as a Device for Flexible Coordination and Control*, 34 AM. BUS. L.J. 329, 376-77 (1997).

73. See Dodge, *supra* note 9, at 758-64; see also Shmuel I. Becher, *A “Fair Contracts” Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 U. MICH. J.L. REFORM 747, 748 (2009).

74. Taylor & Cliffe, *supra* note 8, at 1118 (“It is this concern for whether all parties to the agreement know and appreciate the effect of the agreement that is at the heart of concern for the judicial rush to embrace [procedural provisions].”). See generally Oren Bar-Gill, *The*

that those individuals will not understand the terms of their contracts is particularly plausible when it comes to procedural terms, because those terms often relate to subjects that no one other than a trial lawyer is likely to understand.⁷⁵ Moreover, because a procedural term often is embedded in a contract with other boilerplate terms, the practice of contract procedure raises a set of concerns associated with adhesion contracts generally.⁷⁶ As a general matter, U.S. contract law is reluctant to bind parties to terms, especially material ones, that the parties reasonably failed to understand.⁷⁷ This principle serves to protect parties who reasonably can argue either that they were unaware of material terms set out in their agreement or that they failed to understand the import of those terms. It also serves to encourage contracting parties to take reasonable steps to ensure that their counterparties are aware of and understand all of the material terms of the agreement. These

Behavioral Economics of Consumer Contracts, 92 MINN. L. REV. 749 (2008) (discussing, in the context of the credit card market, evidence of consumers' systematic errors and misperceptions).

75. See Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 585 (1990) (establishing that a "special characteristic" of consumer form contracts is the fact "that one party, the consumer, typically lacks information concerning the terms of the contract"); see also Dodge, *supra* note 9, at 759.

76. See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943) ("The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses."); see also Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1481 (2008) (distinguishing arguments that an arbitration clause is unconscionable "and a general charge that the entire contract was adhesionary"); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1176 (1983) (arguing that "the form terms present in contracts of adhesion ought to be considered presumptively (although not absolutely) unenforceable").

77. See Cass R. Sunstein, *A New Progressivism*, 17 STAN. L. & POL'Y REV. 197, 219 n.52 (2006) (arguing that government regulation of contractual terms as a response to "inadequate information ... may well make sense"). Debates about the enforcement of ex ante arbitration agreements raise questions about whether inadequate and asymmetrical information ought to be grounds for nonenforcement. Compare Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695, 765 (arguing for enforcement despite the fact that "individuals often will be poorly informed relative to corporations"), with Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 689 (1996) (urging nonenforcement given the fact that "the marginal cost of obtaining information about a particular contractual clause may exceed the expected marginal benefit from such information").

outcomes are—at least arguably—fair, efficient, and consistent with the idea that contract law should give effect only to truly autonomous decisions to assume contractual obligations.

Nonetheless, in many cases one would have to stretch traditional principles of contract law to justify striking down procedural terms on the basis of concerns about inadequate or even asymmetrical information. Consumers and employees often have at least as much information about the procedural terms of their agreements as they do about substantive terms, such as termination rights, that seem just as material; yet the substantive terms are routinely enforced, at least in the absence of evidence of fraud or a determination that the terms are substantively unconscionable.⁷⁸ The opposing view—what Professors Calabresi and Melamed famously termed “self paternalism”⁷⁹—has not gained traction in discussions about contract procedure.⁸⁰ It also is important to recognize that concerns about inadequate or asymmetrical information in contracting generally ought to diminish over time as reliance upon certain types of procedural boilerplate becomes more commonplace, resulting in changes in contracting parties’ knowledge and expectations.⁸¹

B. Substantive Fairness

Sometimes the debate about contract procedure is framed in terms of fairness. The question typically posed is whether particular procedural terms run afoul of the doctrine of unconscionability.⁸²

78. See, e.g., William L. Corbett, *Arbitrating Employment Law Disputes*, 68 MONT. L. REV. 415, 431 (2007).

79. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1113-14 (1972); see also Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 942-47 (2006) (discussing a theory of weak paternalism as applied to boilerplate contract terms).

80. See generally W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971) (setting out the argument for review in such circumstances).

81. See Moffitt, *supra* note 6, at 515 (“With arbitration, a relatively small set of standardized deviations has become popular and is routinely incorporated by reference.”). *But see* Horton, *supra* note 4, at 609 (arguing that unilateral modification of ex ante procedural terms makes “market discipline” impossible). In addition, “idiosyncratic” customized terms may reduce cost benefits to third parties. See Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401, 1431-32 (2009).

82. See, e.g., Lee Goldman, *My Way and the Highway: The Law and Economics of Choice*

Supporters of contract procedure claim that it makes litigants better off than the alternatives and so is compatible with contract law's minimum standards of substantive fairness. The counter is that those terms sometimes unfairly prejudice the interests of one party to a contract. The clearest examples are terms that are so prejudicial to one party that, looking at the matter at the time of the contract, it is clear that the party would have been better off not entering into the transaction.⁸³ In practice, the procedural terms that seem to raise concerns about unfairness include forum selection clauses that require plaintiffs to travel broad distances to litigate their claims; clauses that waive rights to participate in class actions in situations in which no other mode of proceeding is viable given the small stakes of each claim; and, more generally, any procedural term that effectively deprives one party of the ability to vindicate nonwaivable statutory rights.⁸⁴ These kinds of terms are particularly troubling when they are poorly understood.⁸⁵

As with criticisms of contract procedure that question the efficiency rationale, criticisms drawn from arguments about substantive fairness narrow the inquiry to the parties to the agreement.

C. Litigant Autonomy

The debate about whether to permit contract procedure also implicates whether it is appropriate for the government to regulate an individual's autonomous litigation decisions in favor of goals that are exogenous to the party's immediate self-interest.⁸⁶ As William

of *Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 700-01 (1992) (arguing that adhesive forum selection clauses should be presumptively unenforceable as unconscionable); see also Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 129 (2008) (“[A]s a general rule, a choice of law clause in an adhesion contract shall be presumed ineffective.”).

83. For an alternative approach to defining substantive fairness, see James Gordley, *Equality in Exchange*, 69 CALIF. L. REV. 1587, 1588 (1981) (proposing that contract law should provide relief from unequal exchanges, typically defined as exchanges on terms that deviate substantially from competitive market prices).

84. Dodge, *supra* note 9, at 724-34 (identifying the risk of procedural terms being used to derogate from nonwaivable rights).

85. On the other hand, there is often room for arguing that the risks created by procedural terms are offset by benefits embodied in other terms of the contract.

86. See Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 449 (2009) (“Party control over case presentation is a central tenet of the American adversarial legal system.”).

B. Rubenstein puts it, “Civil procedure’s private law orientation conceptualizes litigation decisions as individual ‘rights’ to be protected from governmental or centralized community control.”⁸⁷ The private law model of adjudication embraces a contractarian view of litigant choice and presumes that the parties are able to make voluntary and informed litigation choices,⁸⁸ notwithstanding differences in litigant identity and resource capability.⁸⁹ The individualist model associates litigant choice with expressive values and also views adjudicative participation as an essential feature of democratic self-governance.⁹⁰ Apart from decisions affecting mandatory features of the adversary system—the structural limits of subject-matter jurisdiction in courts defined by Article III of the Federal Constitution—individuals are afforded a broad range of discretion in deciding which litigation choices to make and which to avoid.⁹¹ Far from undermining the integrity of the litigation system, *ex ante* contract procedure instead is said to bolster the autonomous decisions that adversarialism requires.⁹² Within this framework individuals are free to waive legal protections, assuming their decisions are voluntary and informed. As Judge Easterbrook has

87. William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1644 (1997).

88. The structural features of the private law model of adjudication are described in Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). See also Issacharoff, *supra* note 47, at 203 (“For Chayes, the critical feature of a common law litigation was that it emerged from the autonomous conduct of the parties to the dispute.”).

89. See Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right To Protect One’s Rights—Part I*, 1973 DUKE L.J. 1153, 1163 (discussing the “equipment” needed to participate fully in litigation); see also Helen Hershkoff, *Poverty Law and Civil Procedure: Rethinking the First-Year Course*, 34 FORDHAM URB. L.J. 1325, 1328-39 (2007) (discussing adjudication and party wealth).

90. See Rubenstein, *supra* note 87, at 1645 (“Individuals can express themselves through the conflicts that they formalize into litigation and through the manner in which they wage these conflicts. By fostering this self-definition, individualism promotes engagement and avoids the alienation that can result when decisions are yielded to experts.”); see also Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1917 (2001) (discussing litigation choice and democratic processes).

91. See Moffitt, *supra* note 6, at 503-05 (discussing constitutional and statutory limits on *ex ante* contract procedure and observing that “the laws creating the courts and their procedures serve as an outer limit on the customization options for litigants”).

92. See *id.* at 479 (arguing that customized procedure supports procedural justice by giving litigants a “voice” in the design of dispute mechanisms).

explained, “One aspect of personal liberty is the entitlement to exchange statutory rights for something valued more highly.”⁹³

The private model of litigant autonomy is conceptually allied with an instrumental view of procedure: adjective law is the mere handmaid of substance and assumed to be value neutral and without substantive effect.⁹⁴ From this perspective, a forum selection clause is presumed to affect only where a dispute is resolved, not how the dispute will be resolved,⁹⁵ and so does not implicate autonomy concerns.⁹⁶

D. Fair Process

Another perspective on contract procedure looks to the fairness of the agreed procedure.⁹⁷ Although the literature does not clearly state what the appropriate criteria of fairness might be,⁹⁸ a typical view is that a fair process is efficient, in the sense of minimizing the sum of error costs and the costs of operating the procedural system, although the literature tends to emphasize overall costs to the litigant making the customized rule change.⁹⁹ Some commentators

93. *Metro E. Ctr. for Conditioning & Health v. Qwest Commc'ns Int'l, Inc.*, 294 F.3d 924, 929 (7th Cir. 2002). *But see* *Safranek v. Copart, Inc.*, 379 F. Supp. 2d 927 (N.D. Ill. 2005) (declining to enforce arbitration provision's waiver of recovery fees as violative of federal law). For a criticism of the Seventh Circuit's approach to the issue, see generally Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 *FORDHAM URB. L.J.* 803 (2009).

94. *See, e.g.*, Charles E. Clark, *The Handmaid of Justice*, 23 *WASH. U. L.Q.* 297, 297 (1938). *But see* Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 *DEPAUL L. REV.* 431, 452 (2010) (“[T]he transparent view of adjudication is in fact mistaken, a vestige of a formalist jurisprudence that is now discredited.”); *see also* Dodge, *supra* note 9, at 729 (“[P]arties can strategically contract to manipulate substantive law and outcomes in a far more fundamental way than previously recognized.”).

95. *See* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *see also* David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 *DEPAUL L. REV.* 371, 379 (2010) (discussing the argument that trans-substantive procedural rules are value free).

96. *Metro E.*, 294 F.3d at 927.

97. This reflects an outcome-based as opposed to a process-based understanding of procedural fairness. *See* Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 *B.U. L. REV.* 485, 509-11 (2003).

98. *Id.* at 488-89.

99. *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 549 (4th ed. 1992) (stating that the objective of a procedural system is to reduce the cost of erroneous judicial decisions and the cost of operating the procedural system).

do question whether systemic efficiencies will result from contract procedure, suggesting that the practice may increase costs to the public judicial budget if the parties stipulate to processes that exceed in significant ways the public system's existing way of doing business. Michael L. Moffitt uses the somewhat fantastic example of an *ex ante* term contemplating fact-finding by "a jury of 100 jurors," positing that "the public's subsidies are generally capped and are not a function of private litigants' decisions."¹⁰⁰ However, we do not have strong empirical evidence one way or the other to decide whether the practice achieves fair process in the sense of reduced costs to the parties or to the system overall.

III. THE PUBLIC DIMENSION OF CONTRACT PROCEDURE

In this Part we broaden the analytic focus to consider the system effects of contract procedure: we claim that contract procedure entails a transfer of public power to private contract drafters without an adequate specification of the service to be provided; without a mechanism for monitoring the outsourced relation; and without the accountability that competition is expected to bring. The interests of third parties in the structure and operation of the state-sponsored civil courts are affected by the outsourced relation, and it is these interests—not fully accounted for in the existing literature—that justify scrutiny of, and possibly even interference with, private parties' attempts to specify procedural norms by contract. Commentators have paid attention to the negative third-party effects of *ex ante* arbitration agreements and *ex post* settlement decrees. By contrast, procedure drafted in anticipation of litigation for use in the public courts has largely evaded scrutiny; we see this omission as a part of the problem that the practice presents.¹⁰¹

100. Moffitt, *supra* note 6, at 508.

101. There are some important exceptions to this statement. For example, Elizabeth Thornburg discusses whether contract procedure affects the production of public goods, including various forms of information. Thornburg, *supra* note 6, at 207. Michael L. Moffitt discusses the issue of whether contract procedure protects people who are not parties to the contract and uses the example of a procedural waiver of the appointment of a guardian ad litem for an infant nonparty. Moffitt, *supra* note 6, at 506-13. However, no commentator so far has treated the practice of contract procedure as a form of outsourcing that both captures

A. Contract Procedure and Outsourcing

Our claim is that contract procedure entails the de facto privatization of an important government function—the outsourcing of the development of rules of procedure for the public courts. Outsourcing is a form of privatization that delegates a government function to a market actor, rather than eliminating the function outright from the government’s portfolio.¹⁰² The practice seeks to capture the benefits of flexibility, innovation, and reduced costs that can result when discrete functions are “split” rather than “lumped” together in one firm.¹⁰³ Outsourcing can take a variety of forms, but every version shares a common goal: the government’s indirect provision of goods or services that are designed, manufactured, or otherwise produced by a market actor.¹⁰⁴ Outsourcing usually relies on a contractual relation between the government and a private actor.¹⁰⁵ As Paul R. Verkuil explains, this form of privatization “accepts the need for a government activity but sees advantages in shifting its operation to private hands.”¹⁰⁶

and undermines important state functions for private ends. Dodge argues that the system effects of ex ante and ex post contract procedure are identical. Dodge, *supra* note 9, at 35. She goes on to suggest that such effects are appropriately dealt with by subjecting ex ante and ex post contract procedure to the same constraints. *Id.* at 52. We do not necessarily disagree with this view, but we believe that additional information is required to determine what constraints should be imposed on either set of practices.

102. See DONAHUE, *supra* note 3, at 215 (explaining that privatization embraces two distinct concepts: “removing certain responsibilities, activities, or assets from the collective realm” and “retaining collective financing but delegating delivery to the private sector”).

103. See John D. Donahue, *The Transformation of Government Work: Causes, Consequences, and Distortions*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 41, 42-44 (Jody Freeman & Martha Minow eds., 2009) (discussing outsourcing as a way to disaggregate the value chain).

104. See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1370 (2003) (referring to “government use of private entities to implement government programs or to provide services to others on the government’s behalf”).

105. See Stan Soloway & Alan Chvotkin, *Federal Contracting in Context: What Drives It, How To Improve It*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 103, at 195.

106. PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 7 (2007).

1. *Dispute Resolution as an Inherently Governmental Function*

Describing contract procedure as outsourcing presumes that dispute-resolution services constitute an inherently governmental function, the touchstone for privatization decisions, and that the practice entails the delegation of an aspect of sovereignty to private contract drafters. Controversies about privatization often involve disagreements about whether a particular activity is public or private.¹⁰⁷ Those activities that involve “inherently governmental functions”¹⁰⁸ because they pertain to the setting of policy or the production of public goods are considered to be inappropriate subjects for private delegation.¹⁰⁹ One of President Obama’s early initiatives was to issue a Presidential Memorandum directed at curtailing outsourcing that involves inherently governmental activities.¹¹⁰

107. See Scott M. Sullivan, *Private Force/Public Goods*, 42 CONN. L. REV. 853, 857 (2010) (“The controversy inherent to privatization largely flows from a difficulty in identifying a definitive line separating core public responsibilities.”). As Martha Minow explains, these disagreements “contribute to ambiguity over what can or should be outsourced.” Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1015 (2005).

108. See Office of Fed. Procurement Policy (OFPP), Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227-42 (Sept. 12, 2011). An inherently governmental function is “a function that is so intimately related to the public interest as to require performance by Federal Government employees.” *Id.* at 56,236. The Policy Letter goes on to say, “The term includes functions that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government.” *Id.* Furthermore, “An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as ... to significantly affect the life, liberty, or property of private persons.” *Id.* An appendix to OFPP Policy Letter 11-01 provides an “illustrative list” of functions considered to be inherently governmental, including the “performance of adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution).” *Id.* at 56,240.

109. Soloway & Chvotkin, *supra* note 105, at 220 (discussing the concept “inherently governmental”); see also Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 421-32 (discussing federal restrictions on outsourcing).

110. Memorandum for the Heads of Executive Departments and Agencies (Mar. 4, 2009), 74 Fed. Reg. 9755, 9755-56 (Mar. 6, 2009) (“[T]he line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined. As a result, contractors may be performing inherently governmental functions. Agencies and departments must operate under clear rules prescribing when outsourcing is and is not appropriate.”); see Edward Rubin, *The Possibilities and Limitations of Privatization*, 123 HARV. L. REV. 890, 892-93 (2010) (book review) (discussing the Presidential Memorandum).

We elide the categorization difficulty by taking a pragmatic view: even if no particular function is inherently governmental,¹¹¹ dispute resolution in the public courts can comfortably be viewed as a governmental function in the United States today.¹¹² The Federal Constitution identifies courts as a feature of governance; state constitutions further support the public nature of judicial activity; and significant tax dollars are devoted to this service. Moreover, the development of rules of procedure for public courts involves discretionary policymaking that implicates constitutional and statutory concerns; such policymaking is likewise underwritten by public tax dollars; and the rules that are devised control the decision making of public judicial officials affecting liberty, property, and social order.¹¹³ The federal rulemaking process traces to the Rules Enabling Act, works through the Judicial Conference of the United States and its Standing Committee on Rules of Practice and Procedure, and is ratified both by Congress and the Supreme Court.¹¹⁴ In the usual course, the process for creating rules of procedure is arduous, and—without overly romanticizing it—is credited with important democratic benefits.¹¹⁵ Indeed, commentators reg-

111. See Rubin, *supra* note 110, at 895 (“[T]here are no particular sets of functions or responsibilities that are inherently public.”); see also RAYMOND GEUSS, PUBLIC GOODS, PRIVATE GOODS 85 (2001) (discussing the “relative” distinction between public and private as it affects analysis of government decisions to privatize public functions).

112. See Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMP. L. 277, 278 (2002) (“[T]he ‘official’ status of ... [disputing] rules reflects the sense that they are the right way to proceed when significant matter[s] are at stake and cannot be worked out privately.”).

113. See generally Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 919-32 (1999) (discussing competing U.S. models of public rulemaking and the current ascendancy of the court model).

114. See Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1664-75 (1995) (describing the federal rulemaking process). Judge Mark R. Kravitz describes the federal rulemaking process as “slow, deliberate and utterly transparent—and purposely so.... ‘Today’s process requires more steps to amend a Federal Rule of Civil Procedure than it does to amend the U.S. Constitution.’” Mark R. Kravitz, *To Revise, or Not To Revise: That Is the Question*, 87 DENV. U. L. REV. 213, 216 (2010) (quoting Stephen C. Yeazell, *Judging Rules, Ruling Judges*, LAW & CONTEMP. PROBS. 229, 235 (1998)).

115. *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 609 (2009) (“[T]he rulemaking process has important virtues. It draws on the collective experience of bench and bar, and it facilitates the adoption of measured, practical solutions.” (citation omitted)).

ister concern when judges use inherent authority to create procedural rules that circumvent the formal rulemaking process.¹¹⁶

2. Outsourcing Can Be a Planned or De Facto Regulatory Practice

The government's decision to outsource can be "planned" or "de facto."¹¹⁷ Planned outsourcing takes place within a regulated process that calls for planning, publicity, solicitation, competitive offers, evaluation, and accountability mechanisms.¹¹⁸ Planned outsourcing thus is easy to identify; in its most familiar form, legislation establishes a policy, and an administrative agency chooses to carry out the mandate through publicly developed market-based devices or through service-delivery contracts with private providers.¹¹⁹ Examples include a municipality hiring a private sanitation company to remove trash or the federal government procuring helicopters from private defense contractors. In these settings, the contract between the government and the private company specifies the good or service to be provided, the government monitors the private company's performance, and competition is expected to generate an efficient outcome.¹²⁰ In addition, government contracts can include clauses that protect individual rights, provide for access to information, and prohibit discrimination.¹²¹

116. See, e.g., Samuel P. Jordan, *Situating Inherent Power Within a Rules Regime*, 87 DENV. U. L. REV. 311, 318-19 (2010) (raising concerns about "the use of inherent authority to bypass the requirements reflected in ... rulemaking"); Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1148 (2006) (criticizing the "inherent powers" justification for judicial treatment of forum non conveniens as a housekeeping rule).

117. See ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* 87 (2004).

118. See Mathew Blum, *The Federal Framework for Competing Commercial Work Between the Public and Private Sectors*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY*, *supra* note 103, at 63-89.

119. *Id.* at 63-65 (discussing legislative, administrative, and contract-based privatization and referring to the latter as outsourcing).

120. See DONAHUE, *supra* note 3, at 44-45 (discussing the importance of specification, evaluation, and competition to the outsourced activity). Outsourcing is said to work best with "[c]ommodity jobs—tasks that are well defined, relatively easy to evaluate, and available from competitive private suppliers." *Id.* at 49.

121. See Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contract Management Perspective*, in *GOVERNMENT BY CONTRACT: OUTSOURCING*

In contrast to planned outsourcing, de facto outsourcing is less visible, takes a variety of forms, is subject to fewer conventional oversight mechanisms, and raises the most problematic issues of accountability and legitimacy. In some settings, the government directly enters into contracts with private entities or piggybacks on the activities of private entities to carry out regulatory goals. Thus, for example, during the federal government's emergency response to Hurricane Katrina, private companies such as Walmart and Home Depot served as food and supply centers.¹²² In other contexts, the government licenses or certifies private actors that assist in monitoring regulatory entities, developing enforcement standards, and certifying compliance. For example, Massachusetts licenses private professionals to review and approve hazardous waste cleanup efforts; the scope of the licensed private professional's work is defined by a contract with the regulated entity and not with the Commonwealth.¹²³ As yet another example, the government may depend on medical determinations made by private physicians or private facilities to determine payment levels under government social service programs.¹²⁴ In this sense, commentators have characterized class action settlements as a form of privatization that substitutes the litigation decisions of entrepreneurial lawyers for the policy-making decisions of administrative agencies.¹²⁵

AND AMERICAN DEMOCRACY, *supra* note 103, at 183 (discussing the benefits and disadvantages of "contract clauses incorporating public law protections").

122. See Daniel B. Prieto III, *Information Sharing with the Private Sector: History, Challenges, Innovation, and Prospects*, in SEEDS OF DISASTER, ROOTS OF RESPONSE: HOW PRIVATE ACTION CAN REDUCE PUBLIC VULNERABILITY 404, 405 (Philip E. Auerswald, Lewis M. Branscomb, Todd M. La Porte & Erwann O. Michel-Kerjan eds., 2006) (discussing the role of the private sector during Hurricane Katrina in serving as "key distribution points for food, water, clothing, generators, and other supplies").

123. See Miriam Seifter, *Rent-a-Regulator: Design and Innovation in Environmental Decision Making*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 103, at 93-94 (explaining that the professionals "are not government contractors; once licensed they are selected and hired by regulated parties").

124. Gillian Metzger has discussed the Department of Health and Human Services' reliance on transfer decisions by private nursing homes of Medicaid-eligible patients in determining the level of support to be provided by the federal government as a form of privatization of eligibility decisions that otherwise would be made by government personnel as part of the Medicaid program. Gillian E. Metzger, *Private Delegations, Due Process, and the Duty To Supervise*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 103, at 295 (discussing *Yaretsky v. Blum*, 457 U.S. 991 (1982)).

125. See Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899,

In each of these outsourcing settings, the government retains regulatory authority in an administrative area but indirectly relies on a private actor to make the discretionary decisions that are the hallmark of policymaking, as in the class action settlement context; to carry out compliance review, as in the Massachusetts environmental waste context; or to make eligibility determinations, as in the Medicaid nursing home context. In some de facto outsourcing settings the government enters into a contract with the private entity for the delivery of the good or service. In other settings, however, the privatized activity is the subject of a contract that is not between the government and a private actor but rather between a regulated entity and another private actor, as, for example, in Massachusetts's use of licensed private professionals for environmental compliance efforts. De facto outsourcing also includes what Michael P. Vandenbergh has called "private second-order regulatory agreements," defined as contracts between private actors that are made "in the shadow of public regulations" and enable an administrative agency indirectly to enlist private actors in establishing or enforcing regulatory standards.¹²⁶ Finally, whether outsourcing of a governmental function is carried out in a planned administrative

900-04 (1996); see also Timothy D. Lytton, *Using Tort Litigation To Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1837 (2008) (discussing the role of tort litigation "to influence regulatory policy"); Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 694 (2007) (addressing the argument that "regulation through litigation" ... is often considered to be an illegitimate end-run around the political process rather than a supplemental institutional mechanism for making products safer").

126. Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2030-31 (2005). An example of a second-order agreement is an indemnity contract that shifts the costs of enforcement from a regulated entity onto another private firm. The contract by effect deputizes the potential indemnifier as a monitoring and enforcement agent of the regulated entity's conduct. *Id.* at 2049-50. Looking at environmental regulation, Vandenbergh underscores the range of such agreements—including credit agreements, commercial real estate agreements, and lease agreements—that incorporate "embedded environmental provisions" and indirectly deputize firms to "serve many of the functions typically considered the province of public agencies, including monitoring and enforcement, implementation, standard setting, and dispute resolution." *Id.* at 2045-47. We can add examples: landlord-tenant leases that effectively deputize the tenant to monitor the landlord's compliance with health and safety requirements, and employment contracts that similarly enlist the employee to monitor the employer's compliance with antidiscrimination and workplace conditions rules. See, e.g., Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379 (2006).

context or a de facto setting, the practice can make use of either single or multiple actors. In a single-actor setting, the government contracts exclusively with one provider; when multiple actors are involved, significant coordination and oversight issues emerge. Overall, the combination of practices has made private participation in public administration pervasive and ubiquitous.¹²⁷

3. *Contract Procedure as De Facto Outsourcing*

In our view, contract procedure shares many of the attributes of de facto outsourcing, in which the private company carries out or even defines regulatory standards. A contract that includes ex ante procedural terms simultaneously involves an economic transaction and a legal act that amends, or at least adapts, the public rules of procedure in the specific context of any dispute between the parties.¹²⁸ The contractual terms govern not only the parties but also the decision making of government-supplied judges in public courts, whose decisions, in turn, will affect third parties through enforcement orders, precedent, and the effect of stare decisis. Indeed, every contractual procedural term, like every public procedural rule, effectively regulates three distinct relations: that of government to disputant, that of the disputants *inter se*, and that of the disputants to strangers.¹²⁹ In contrast to planned outsourcing, but typical of de facto outsourcing, the government stands only as a silent party to a contract that agrees to customize procedure.¹³⁰ The terms of the

127. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000) ("Private participation in governance is neither marginal nor restricted to the implementation of rules and regulations."); see also David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 443 n.333 (2003) (discussing private lawmaking and raising delegation questions).

128. See Thornburg, *supra* note 6, at 206 ("[T]he public court system serves both private and public functions.").

129. We rely here on Gunther Teubner's conceptualization of hybrid contracts as instantiations of interdiscursive relations. See Gunther Teubner, *In the Blind Spot: The Hybridization of Contracting*, 8 THEORETICAL INQUIRIES L. 51, 52-53 (2007) (disaggregating contracts into economic, productive, and legal acts that transform the economic, legal, and social context).

130. Cf. Steven Lukes, *Invasions of the Market*, in FROM LIBERAL VALUES TO DEMOCRATIC TRANSITION: ESSAYS IN HONOR OF JÁNOS KIS 7, 75 (Ronald Dworkin ed., 2004) (arguing that "marketization has enabled politicians to divest themselves of responsibility and, crucially, accountability for the provision of public services").

contract circumvent the national rulemaking process, and unlike procedural stipulations made during the pendency of a lawsuit, *ex ante* procedural terms receive little judicial oversight. In an inversion of Professors Mnookin and Kornhauser's evocative term "bargaining in the shadow of the law,"¹³¹ contract procedure produces law in the shadow of bargaining without significant mechanisms to assure accountability or compliance with public norms.¹³²

B. Contract Procedure and Negative System Effects

In this Section we argue that there are sound functional reasons to be concerned about the outsourcing of procedure. Like many governmental functions, the creation of procedure is an important way of furthering public goals, including the production of public goods.¹³³ The virtually unregulated use of contract procedure raises concerns because of the practice's predictable negative effects on adjudication understood as a system of precedent and regulation.¹³⁴ In particular, adjudication is an important source of information, the classic public good. In the course of adjudicating a dispute, a court generates information about (1) the dispute and (2) the process of adjudication.¹³⁵ The procedural rules employed by the court influence the production and dissemination of both kinds of information.¹³⁶ Moreover, both kinds of information affect people beyond the immediate parties to the dispute and potentially impact the participants' sense of dignity, their perception of procedural fairness, and their respect for democratic values, especially if the

131. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

132. See Galanter, *supra* note 11, at 23 n.36 (referring to "law in the shadow of [collective] bargaining" (citing J.G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 917 (1979))). The phrase "bargaining in the shadow of the law" and variants on it appear in many articles. See, e.g., Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957 (2010).

133. See Thornburg, *supra* note 6, at 207.

134. *Id.* at 206-09.

135. *Id.* at 207.

136. See Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 3 J. EMPIRICAL LEGAL STUD. 783, 831 (2004) (observing that "public access to and information about dispute resolution have historically been achieved through locating those processes inside courthouses").

procedural terms are implicitly certified or endorsed by publicly sponsored courts.¹³⁷ We recognize that the negative system effects of contract procedure may work through pathways other than the production and dissemination of information. Our focus on one pathway should not suggest that we regard other lines of inquiry as unimportant.

1. Information About the Dispute

It is widely acknowledged that the quality of a court's decision making depends on the facts and law provided by the parties through the adversarial process.¹³⁸ Many procedural rules either directly or indirectly shape the production of information in ways that are relevant to judicial determination. Rules that govern the form and content of pleadings obviously regulate the transmission of information about the parties' claims to the parties themselves and to the decision maker charged with resolving the dispute. Rules that govern the scope of discovery regulate the transmission of information about the background of the dispute between the parties. Rules of evidence determine the kinds of information that the parties can present to the decision maker. Jurisdictional rules and rules governing the use and composition of juries determine which decision makers receive all of this evidence. Rules that provide for class actions define the parties to the dispute and thereby determine who is automatically entitled to receive the information generated as the dispute moves through pleadings, discovery, and trial. Finally, rules that govern public access to proceedings and the publication of judicial opinions determine the extent to which all of this information is accessible to the public and to the courts.

Contractual provisions of some kinds tend to limit the flow of information to actors who would be entitled to receive that in-

137. Thornburg, *supra* note 6, at 208; cf. Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Spheres*, 5 LAW & ETHICS OF HUM. RTS. 2, 6 (2011) (discussing the importance but limitations of information derived from public judicial processes).

138. See Albert Yoon, *The Importance of Litigant Wealth*, 59 DEPAUL L. REV. 649, 649-50 (2010) (stating that "the information provided by the lawyers will influence the decision that the court reaches" and emphasizing the "different incentives" of the plaintiff, the defendant, and the court).

formation under publicly sponsored rules of civil procedure. Confidentiality clauses prevent information about a dispute from flowing to anyone other than the parties to any resulting proceedings and any third parties they choose to involve. Class action waivers limit the number of parties to any given proceeding. Forum selection clauses prevent members of the publicly designated forum from learning about even the existence of a dispute, much less its nature. Finally, jury trial waivers limit the flow of information to members of the general public.¹³⁹

Contractual provisions that alter or stunt the flow of information to courts—whether through evidentiary stipulations, discovery waivers, or other devices—could affect the quality of judicial decision making in at least two significant ways. First, information blockage could affect opportunities to build up judicial expertise, by which we mean the court system’s ability to resolve disputes within the framework of existing law. That expertise can manifest itself in several ways. For example, judges who have previously sat through hours of expert testimony on a particular subject—whether it is

139. Commentators who advocate customizing procedure to limit information flow and reduce litigation costs focus on the massive amounts of information production required by the generally applicable rules of civil procedure and the limited net benefits it entails for the parties. Offsetting the costs of producing information are the private benefits of reducing the likelihood of an error being made in the resolution of the dispute. But it is not unreasonable to believe that those benefits are often outweighed by the purely informational costs associated with pleadings, discovery, trial, and appeals under the public rules of procedure. More fundamentally, it is reasonable to estimate that contracting parties are better placed than public officials to determine whether the private benefits of any given form of information production outweigh the private costs, and there is no particularly good reason to believe that the public interest will be reflected fully in the contracts written by private actors.

These concerns are perhaps most salient when contracts contain provisions that restrict the flow of information about a dispute to people who are not parties to the contract but who are parties to what is essentially the same dispute. This is the effect of both broad confidentiality provisions and class action waivers when firms use them to prevent consumers from jointly pursuing product-related claims. Sharing information generated in the course of discovery and trial among additional potential plaintiffs does not affect the costs of producing the information in the first place. But it does benefit the recipients of the information by allowing them to avoid the costs of producing it themselves—a simple illustration of why information is considered to be the classic public good. *See, e.g.*, Chris A. Carr & Michael R. Jenks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 Ky. L.J. 183, 220 (2000) (positing that maintaining filings under seal or undisclosed to the public “precludes third parties from obtaining such information and imposes substantial costs on future litigants”).

financial accounting or deep-sea drilling—are likely to require less time to be brought up to speed on the subject in a subsequent dispute. Similarly, judges who work regularly in a particular area of the law will have a better knowledge of the applicable statutes and precedents and so are likely to require less time to resolve disputes that bring those bodies of law into play. They also are likely to find it easier to avoid rendering rulings that are inconsistent with existing law. Finally, judges who regularly hear disputes arising from a particular industry may have a better sense of the range of potential disputes and thus a better sense of the implications of their rulings for other parties.

Second, a stunted flow of information can distort the creation of precedent and impede efforts by regulators, legislators, and other policymakers to identify social problems and devise public solutions.¹⁴⁰ Economists have emphasized that the different incentive structures of public and private judges tend to inhibit legal innovation in private dispute-resolution systems.¹⁴¹ This criticism has been applied to arbitration,¹⁴² and Owen Fiss famously extended this rationale to settlement agreements.¹⁴³ The argument has bite

140. See Timothy F. Malloy, *Regulation, Compliance and the Firm*, 76 TEMP. L. REV. 451, 481-82 (2003) (discussing the importance of “information flow” to theories of legal deterrence); see also Lynn M. LoPucki, *Court System Transparency*, 94 IOWA L. REV. 481, 494-510 (2009) (discussing how increasing accessibility of information from court files would help legislators, judges, and the public to monitor judicial corruption, determine how statutes are being implemented by courts and whether revisions are necessary, and predict the outcomes of cases); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1075 (2010) (“When organizations gather and analyze retrospective information, they are better able to make informed decisions at improving future behavior.”).

141. See Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LIT. 1067, 1093 (1989) (“Private judges maximize their own incomes by deciding disputes so as to maximize the demand for their services. If a judge’s decision were not on the Pareto frontier, a rival judge could lure away the former’s customers by offering decision that both parties prefer. There is, then, a strong incentive for private judges to achieve Pareto efficiency with respect to the disputants. However, the parties to a dispute who hire a private adjudicator do not internalize all the benefits of improving the law. Better rules will benefit future cases to which current disputants are not a party. Thus the incentives of private judges for creating new laws may be deficient.”).

142. See, e.g., Christine Godsil Cooper, *Where Are We Going with Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 214-15 (1992).

143. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984); see Symposium, *Against Settlement: Twenty-Five Years Later*, 78 FORDHAM L. REV. 1117 (2009).

whenever any private agreement limits the flow of information to courts, whether by reducing the number of disputes that enter a particular court system or by filtering important information about those disputes from the courts.

From this perspective, forum selection clauses and limitations on discovery are obvious sources of concern. In the first case, selecting one forum rather than another will make it relatively difficult for some members of the public—typically those farther from the chosen forum—to access information that might help them to identify the source of their injuries or to translate their harms into legal claims. At least in relation to those people, the courts will be deprived of the steady flow of cases upon which common law development depends¹⁴⁴—what Karl N. Llewellyn called the “raw material which ... serves as grist for [legal] institutions.”¹⁴⁵ As for limitations on discovery, a large body of literature emphasizes the importance of full discovery to judicial decisions in such areas of the law as employment discrimination and consumer protection, in which claims, legal theories, and evidentiary proofs cannot be developed without a rich factual base.¹⁴⁶ Similarly, commentators point to the relevance of tort actions for improving federal agency policymaking by encouraging the disclosure of information.¹⁴⁷ In

144. See A.T. von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies, and Practices of Common- and Civil-Law Systems*, in 295 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 13, 57 (2002) (explaining the concern in common law systems “to ensure that courts have available the raw materials—namely, disputes—through which law can be developed”).

145. Richard D. Schwartz, *Law and Normative Order*, in LAW AND THE SOCIAL SCIENCES 63, 69 (Leon Lipson & Stanton Wheeler eds., 1986) (quoting KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 279 (1941)) (alterations in original).

146. See Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 818 (1981) (discussing the importance of discovery to “the evolution of substantive law”).

147. See, e.g., Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 32 (2011) (describing tort actions as “helping federal regulators identify where to target their regulatory efforts”); see also Margo Schlanger, *Against Secret Regulation: Why and How We Should End the Practical Obscurity of Injunctions and Consent Decrees*, 59 DEPAUL L. REV. 515, 515-16 (2010) (explaining that “democracy” warrants disclosure of injunctions and consent decrees in part because their terms “can serve as models for broader regulation or legislation and can set the boundaries of a regulatory agency’s enforcement efforts”).

other words, certain forms of contract procedure may reduce the quality and effectiveness of regulation, a significant potential social cost.¹⁴⁸

We acknowledge that public disclosure of information about a dispute is not always warranted.¹⁴⁹ One danger is that of encouraging disputants to make irresponsible allegations for strategic reasons,¹⁵⁰ a practice that tends to diminish the overall quality of information available to the public. There is also the danger of discouraging innovation by forcing the disclosure of information that represents the product of costly investments in research or development.¹⁵¹ Finally, there are dignitary interests in privacy that ought to be considered.¹⁵²

We also recognize that contract procedure in some settings does not limit the flow of information but instead redirects it in potentially fruitful ways. For instance, whereas forum selection clauses limit flows of information to some courts they tend to concentrate experience and knowledge in other courts. In principle, a handful of expert judges might be preferable to many dilettantes. We do not deny this possibility: our claim is simply that there is no reason to presume that unconstrained freedom of contract over the disclosure of dispute-related information will strike the right balance among the competing factors that deserve to be considered.¹⁵³

148. See Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 9 (2008) (“Bad courts harm not just individual litigants, but the welfare of society as a whole [W]hile correlation is not the same as causation, substantial evidence in the literature indicates that a well-functioning judiciary is an important contributor to—rather than simply a consequence of—robust economic growth.”).

149. Compare Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to Courts*, 105 HARV. L. REV. 427 (1991) (arguing against procedural reforms premised on a presumption of public access to court information), with LoPucki, *supra* note 140 (arguing in favor of a presumption of public access to court information).

150. See John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 522-23 (2000) (arguing that litigants use the cost of discovery as a strategic weapon).

151. Miller, *supra* note 149, at 467-74.

152. See Richard L. Marcus, *A Modest Proposal: Recognizing (At Last) that the Federal Rules Do Not Declare that Discovery is Presumptively Public*, 81 CHI.-KENT L. REV. 331, 332-33 (2006) (discussing the need for confidentiality in legal proceedings).

153. See generally Adrian Vermeule, *The Invisible Hand in Legal and Political Theory*, 96 VA. L. REV. 1417, 1418 (2010) (questioning whether spontaneous and uncoordinated market activity will generate relevant goods or information in all cases).

2. *Information About the Adjudicative Process*

In addition to shaping the informational basis for decisions about substantive law, contract procedure can also influence flows of information about the adjudicative process to members of the general public and to lawmakers. Society has strong interests in these flows of information. Public perceptions of the fairness of the courts in turn determine perceptions of the legitimacy of those courts and impact levels of trust in law. Meanwhile, lawmakers' ability to make effective revisions to procedural rules depends on access to information about how those rules work in practice.

By enforcing the procedural rules chosen by private parties, the courts give those procedural rules prominence and send a signal that the legal system "accepts" or even embraces them. We do not think it is far-fetched to believe that members of the general public who receive those signals will equate contract procedure with "normal" procedure, in the sense of procedure that has been filtered and ratified through democratic channels. Yet there is no reason to believe that the drafters of such terms will take justice concerns into account. If we are right, then it is important to consider the follow-on consequences. Considerable empirical evidence suggests that people use the fairness of judicial procedures as criteria for forming beliefs about the trustworthiness and legitimacy of the courts.¹⁵⁴ Trust and legitimacy are, in turn, key factors in determining citizens' willingness to abide by judicial decisions and to obey legal rules.¹⁵⁵

We worry that contract procedure will diminish rather than enhance the perceived legitimacy of the courts. This is likely to happen if contract procedure derogates from, rather than reinforces or supplements, protective features of publicly formulated procedures. Suppose we grant that these stripped-down procedures are advantageous to the parties who select them, at least at the time of

154. E. ALLAN LIND & TOM R. TYLER, *SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 66 (1988) ("A number of studies have found evidence of either direct or indirect enhancement of evaluations of legal outcomes when procedures are viewed as fair.").

155. See, e.g., Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) ("[J]udicial authority to enforce the Constitution, like the authority of all government officials, ultimately depends on the confidence of citizens.").

the contract. Even then it is doubtful that other parties will consider the diminished procedures to be fairer than the publicly designed rules: the contracting parties themselves, or at least one of them, may be dissatisfied with the procedures after experiencing them firsthand. Consequently, the result of permitting contract procedure would be to reduce overall perceptions of legitimacy.

In the absence of data on the nature of contract procedure or how it is perceived, this line of argument is necessarily speculative. It may be the case that anyone sufficiently engaged with the judicial process to be aware of contract procedure will also appreciate the fact that it represents a deviation from the normal rules. Or they may focus on the opportunities it creates to use their own contracts to fit their own needs. Either way, such sophisticated observers will not use contract procedure as a basis for drawing inferences about the general nature of public adjudication. Yet another possibility is that people who see contract procedure in action will like what they see, and they may draw only favorable inferences about the fairness, legitimacy, and trustworthiness of the courts. Any of these outcomes will belie dire predictions about the effects of contract procedure on judicial legitimacy.

Finally, contract procedure also influences the flow of information to judges and lawyers, and through them policymakers, about how procedural rules work. It is unclear whether those effects are positive or negative. On the one hand, contract procedure prevents people from observing the consequences of invoking the rules that parties have contracted around. As a result, it disguises the effect of procedures that have become dysfunctional or arbitrary; it obscures the need for innovation to adapt to changed circumstances; and it may lead to adaptations that are not well designed.¹⁵⁶ On the other hand, contract procedure allows private actors to bring to light new procedural options, some of which may prompt further innovation or even be adopted by public actors.

156. Clark, *supra* note 13, at 1733 (discussing “out-of-touch” costs”).

C. Contract Procedure and Democratic Decision Making

Locating contract procedure within the framework of outsourcing forces the question of whether the drafters of procedural terms are faithless agents whose interests are misaligned with public goals.¹⁵⁷ When the government is deciding what role it ought to play in providing dispute-resolution services, the fact that private actors prefer particular configurations of services, or will even opt for privately provided services if given the choice, is relevant but should not be conclusive. This is because the public rules of procedure are not only private entitlements—bargaining endowments that parties may leverage for private benefit—but also generators of public goods. The benefits that claimants derive from the public rules of procedure are not cashed out in a single transaction but rather overall and over time: individual contract drafters are likely to devalue the long-term positive social externalities of judicial procedure and, instead, will seek to extract short-term rents.¹⁵⁸ Conversely, they will externalize negative effects without regard to system-wide concerns.¹⁵⁹ Moreover, the effects of contract drafters' decisions in the public sphere lack visibility in any individual case; assessment must instead be made on a system-wide basis.

There are several dimensions along which the negative effects of contract procedure might be measured. We begin with the economic dimension. In the presence of externalities there are no particular reasons to assume that contracting parties will draft agreements that fully reflect the public interest in enhancing economic wel-

157. See Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1431-33 (2003) (discussing the role of externality and public goods to profit-maximizing enterprises). We note the similarity between our argument and that of Thomas W. Merrill regarding the unconstitutional conditions doctrine. See Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859 (1995).

158. See Viktor J. Vanberg, *Market and State: The Perspective of Constitutional Political Economy*, 1 J. INST. ECON. 23, 29 (2005) (explaining that the benefits that market actors derive from constitutional commitments “are not derived from *specific* anticipated outcomes, but are the *overall benefits* that result *over time* from having the continuing process of interaction and cooperation bound by suitable constraints”).

159. See Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 388 (2010) (discussing the procedural “evils” that can result from “attorney motivations, not the least of which is income maximization”).

fare.¹⁶⁰ For example, when contract procedure affects the allocation of expertise across publicly sponsored courts, there is no reason to believe that the uncoordinated contractual choices of private actors will result in an efficient or fair distribution of experience, and thus expertise, among decision makers. All other things being equal, private actors will choose to have their disputes resolved by the institution that already has the requisite expertise, not the one upon which conferring the experience will do the most good. For instance, left to their own devices, parties may be inclined to select a distant forum that currently has the edge in terms of expertise over local courts. They will do this even if over the long-term it would be preferable, given travel costs and the benefits of adjudication by judges familiar with local conditions, to build up local expertise by choosing a local forum.

The effects of contract procedure on the quality of the political process should also be measured. We fear that contract procedure could interfere with democratic deliberation by effectively permitting the drafter of a procedural term to “lock up” political discussion and short circuit legislative processes. Litigation is a multifaceted public process that resolves individual disputes and also creates incentives, distributes wealth, and generates norms.¹⁶¹ The rules and institutions of adjudication create opportunities for regulatory activity that elsewhere in the world would be undertaken by legislatures and administrative agencies.¹⁶² Adjudication thus functions as a form of political competition, and such activity, as the literature

160. See, e.g., Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 265 (1985); Henry T. Greely, *Contracts As Commodities: The Influence of Secondary Purchasers on the Form of Contracts*, 42 VAND. L. REV. 133, 160-61 (1989); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (Or “The Economics of Boilerplate”)*, 83 VA. L. REV. 713, 717 (1997); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 758 (1995).

161. See Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 937-40 (1975) (ascribing a “dispute resolution” and a “behavior modification” role to litigation); see also Cooter & Rubinfeld, *supra* note 141, at 1070 (“Adjudication by the courts has two distinct products: dispute resolution and rulemaking. From the private viewpoint, trials are a method of resolving disputes between rational self-interested plaintiffs and defendants.”).

162. Robert A. Kagan, *On Surveying the Whole Legal Forest*, 28 LAW & SOC. INQUIRY 833, 837 (2003) (“[T]he structures, institutions and rules of adversarial legalism ... create opportunities and incentives for angry disputants, organized political and ideological interest groups, and entrepreneurial lawyers.”).

on elections makes clear, “does not exist except in the context of state-created rules and regulations, and any discussion that presumes the contrary is simply misguided.”¹⁶³ So, too, a system of public dispute resolution—aimed at apportioning liability in the individual case and at establishing precedent for future cases—derives at least some of its legitimacy from publicly determined rules that are exogenous to the parties. Consistent with this idea, the Federal Rules of Civil Procedure build on a principle of trans-substantivity, requiring that all “civil actions” be subject to the same procedural rules, with adaptation of those rules confined to the general framework of a national rulemaking process, which, in turn, allows for local variation, distinct court rules, and *ex post* procedural waivers under judicial supervision.¹⁶⁴

Contract procedure bypasses the public rulemaking process by altering judicial processes one case at a time. As industry norms take root, contractual provisions—through the accretion of precedent and the development of judicial practice—may cause the dilution or elimination of procedural rules on a system-wide basis without any public discussion. Procedural change will thus occur not through a democratically prescribed reform process that assesses overall needs and weighs different values but rather through contractual decisions that value efficiency above other social goals and possibly favor the drafter’s interests over those of other parties—and certainly over third parties—to the agreement. In effect, contract procedure could produce a court system in which the rules of the game reflect a set of narrow interests and not the overall welfare.¹⁶⁵ The judiciary’s rubber stamping of the practice

163. Samuel Issacharoff, *Oversight of Regulated Political Markets*, 24 HARV. J.L. & PUB. POL’Y 91, 91 (2000).

164. See Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1280-85 (1997) (discussing the proliferation of local rules, congressional rulemaking, optional rules, and the apparent rejection of centralization as a procedural norm in the last two decades). We acknowledge that the public procedural system tolerates broad variation in the litigants’ adjudicative capacity. As Frank I. Michelman and others have noted, the disputants bring to the public courts highly divergent “equipage” capacity; although the Federal Rules make some effort at equalization—as, for example, with the waiver of court fees, the court appointment of experts, judicial questioning of witnesses, and the appointment of magistrate judges focused on assisting *pro se* claimants—no more than formal equality is demanded. See Michelman, *supra* note 89, at 1163.

165. Rakoff, *supra* note 76, at 1264 (suggesting that in the context of contracts of adhesion the design of certain procedural rules “raises issues more appropriately handled by official

might be seen as the adjudicative equivalent of democratic “lockup” elegantly described by Samuel Issacharoff and Richard H. Pildes in their writing about elections, in that it inadvertently creates “pathways for private motivations to capture the use of governmental processes.”¹⁶⁶

On the other hand, contract procedure may have a beneficial effect on the quality of public rulemaking processes if it serves as a signal of procedural defects that are in need of reform and locates the problem on a political agenda. Here we draw from Albert Hirschman’s theory of exit, voice, and loyalty.¹⁶⁷ Contract procedure can be seen as a form of exit from the public rules of procedure. This modest form of exit may forestall more radical forms of exit in favor of private processes such as arbitration. However, the potential benefits of exit can only be realized if the signal being sent by litigants is received by relevant actors and triggers a political response.¹⁶⁸ Our concern is that by permitting exit, contract procedure will discourage litigants from seeking reform of dysfunctional rules. In other words, by tolerating exit the legal system may inhibit voice—the litigants’ willingness as extra-judicial actors to seek political change—and suffer further deterioration. Indeed, contract procedure may make the exercise of voice more difficult by camouflaging the need for procedural reform. A complicating factor is that even those who exit retain some stake in the quality of the public courts; even private processes like arbitration depend on precedents and judicial enforcement at some point. In summary,

authorities than by form draftsmen”). Alexander Volokh’s argument that, in the prison setting, privatization will produce collective action problems that reduce the direct benefit each provider derives from private advocacy and so will produce an overall reduction in private advocacy underscores the need for empirical study of the effect of outsourcing on political advocacy. See Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197, 1204-05 (2008) (contending that “privatization can reduce the industry’s advocacy by introducing a collective action problem”).

166. Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 129 (2010). See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); see also Issacharoff, *supra* note 163, at 96 (“The lockup problem plays the same role in political markets that monopoly or oligopoly power plays in economic markets.”).

167. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

168. See Dammann & Hansmann, *supra* note 148, at 9-10 (discussing the effect of exit on a system’s ability and motivation to respond to problems).

contract procedure may strain litigants' loyalty to the public courts with ambiguous implications for the possibility of reform.

We also would take into account the distributional implications of contract procedure. In his book, *Spheres of Justice: A Defense of Pluralism and Equality*, Michael Walzer puts forward what he calls "an open-ended distributive principle": "No social good x should be distributed to men and women who possess some other good y merely because they possess y and without regard to the meaning of x."¹⁶⁹ We apply this principle to the practice of contract procedure on the view that the private act of contracting for procedural terms ought not easily be convertible into the public act of revising the court system "without regard" to the content and effect of the contractual provisions adopted. Rich and poor claimants come before the federal courts, and in any particular lawsuit the merits may indeed turn on a party's superior ability to hire white-shoe lawyers, top-flight experts, and an army of paralegals. But Walzer's argument suggests that market ordering ought not dominate the entire sphere of procedural justice. It is one thing to delegate to private organizations the responsibility of producing regulatory standards that are then reviewed and endorsed, refined, or rejected.¹⁷⁰ It is quite another to permit contracting parties to end-run the public rulemaking process in favor of selective private interests.¹⁷¹ As Laurence Tribe explains, "The problem is *not* that X has more money than Y, but that the law allows X's superior position in the material sphere to translate in to a superior position in all other spheres as well."¹⁷² The market is an important mechanism for providing and allocating certain kinds of goods; but it ought not be the exclusive or dominant mechanism for apportioning procedural justice.¹⁷³

169. WALZER, *supra* note 24, at 20.

170. *See generally* Verkuil, *supra* note 109, at 432 (discussing "the use of standard setting organizations to produce off-the-shelf legislative enactments").

171. *See* Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 295 (2010) (acknowledging the argument that "[i]f choice of procedure affects the distribution of power in society by advantaging some at the expense of others ... procedural lawmaking ought to be transparent and democratically accountable"); *see also id.* at 296 ("Procedural choice necessarily involves controversial value choices and difficult tradeoffs among competing goals.").

172. LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 242 (1985).

173. *Cf.* Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953, 984-85

D. Summary

It is not unusual for commercial entities and others to devise private arrangements to resolve disputes or to order relations when public processes and rules are regarded as suboptimal. Moreover, commentators recognize that in many circumstances these private arrangements, over time, will be absorbed into the public system of laws. Louis L. Jaffe's classic article, *Law Making by Private Groups*, explains and illustrates the myriad ways in which private commercial practices transform into government-sanctioned rules.¹⁷⁴ Public law may respond to private procedural orderings by addressing deficiencies in those arrangements, or it may ratify private orderings through legislative codification or the adoption of judicial standards.¹⁷⁵ Undoubtedly, the public rules of procedure could benefit from the lessons of some private alternatives. But contract procedure should not be permitted to change the rules of the game on a case-by-case basis without serious public attention to the practice's implications for the continuing vitality of the overall adjudicative structure.¹⁷⁶

(2011) ("The fact that the market is a powerful and important method for the allocation of resources need not imply that it is the only distributive mechanism. In fact, many goods are distributed according to other principles.").

174. Jaffe, *supra* note 20, at 220 ("[T]he great complexes of property and contract which constitute our modern industrial machine, the monopolistic associations of capital, labor, and the professions which operate it, exert under the forms and sanctions of law enormous power of determining the substance of economic and social arrangement."); *see also* Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1233-34 (2006) ("The law of the legislature is being superseded by the law of the firm."); *cf.* David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 483 (2011) (arguing that the Court's interpretation of the Federal Arbitration Act impermissibly delegates law-making authority to private contract drafters).

175. *See* Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 93 (2009) ("Sometimes publicly made law addresses private ordering's purported deficiencies; other times, it codifies privately made law (such as *lex mercatoria*), business custom, and business institutional developments (such as alternative dispute resolution) into national statutes, regulations, and institutional practices.").

176. *See* Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOY. L.A. L. REV. 691, 697 (2006) (positing that civil justice became privatized "not in a great burst of purposeful activity but in a series of steps that included procedural reform, bar deregulation, and changes in financing—all of which interacted with exogenous developments in economic life"); *see also* Marcus, *supra* note 95, at 395-98 (discussing the importance of institutional legitimacy to the procedural rulemaking process).

The previous sections have highlighted some problems with contract procedure that so far have not been fully explored in the literature about litigant choice. Boiled down, our claim is that the practice makes it difficult for individuals to obtain information about judicial processes and commercial performance; it may increase the likelihood that unwarranted weight will be given to the views of those who draft contract terms; and over time it may increase skepticism about the truth of all information about publicly provided adjudicative services. These negative externalities cross over the boundaries of the private market into the public market for ideas; as such, the practice may dampen competition in the ideas market about how best to design legal procedures and suppress respect for democratic norms. In our view, these political externalities are insidious because of their potential to distort public discourse and political participation. At a minimum, the possibility of these system effects warrants closer inspection of contract procedure as used in the public courts.

IV. CHALLENGES IN DEFINING THE LIMITS OF CONTRACT PROCEDURE

Characterizing contract procedure as an aspect of privatization gives the practice a different cast: at the more abstract level, contractual agreements become a feature of a “market-state” that stands in competition and perhaps in conflict with the nation state that previously held a monopoly on law and adjudication.¹⁷⁷ The norms of contract procedure emerge outside formal political or judicial processes, and they reflect market rather than constitutional imperatives.¹⁷⁸ In theory, these emergent procedural norms could offer—as new governance and popular constitutional theorists suggest—“a welcome grass-roots expression of regulatory goals that traditional democratic processes have failed to identify”;¹⁷⁹ alternatively, they might reflect only the narrow self-interest of economic

177. David J. Bederman, *Diversity and Permeability in Transnational Governance*, 57 EMORY L.J. 201, 204 (2007).

178. *Id.* at 204-05 (maintaining that private law reflects market imperatives and not political values).

179. Caruso, *supra* note 26, at 21-22 n.67.

elites. As we have emphasized throughout this discussion, part of the difficulty in assessing contract procedure is the lack of information that currently is available about the practice. In this Part, we propose three complementary approaches to overcome those information deficits.

A. *Securing Transparency Through Information Disclosure*

Private procedural ordering may bring advantages to the parties and to society at large. Without information, however, assessing the practice of contract procedure is impossible. At a minimum, the public system of law needs to know more about the patterns and scope of *ex ante* procedural clauses. Indeed, critics of outsourcing frequently turn to information disclosure remedies as a way to foster accountability and to ensure legitimacy of the privatized function.¹⁸⁰ Thus, for example, it is not unusual to see recommendations that require a contracting party to disclose information about its performance and to require the government to disclose its decision to outsource a particular function.¹⁸¹

Because our concern is systemic, so is our recommendation: we urge that the parties to a dispute be required to disclose to the court whether they intend their lawsuit to be resolved according to private rules of procedure that displace the public rules of procedure. We offer a simple and efficient mechanism to effect this disclosure. Our proposal piggybacks on a form that already is used in the federal courts—the civil cover sheet. A lawsuit is commenced in federal court through the filing of a complaint and an accompanying summons. Plaintiffs also must file with the clerk of the court a document known as the “civil cover sheet,” or “Form JS 44.”¹⁸² The

180. See Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1092-93 (2007) (characterizing disclosure as “a ‘soft’ form of intervention”); Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 781 (2006) (“Under a regime of informational regulation, what is imposed on regulated entities is not a restriction on the targeted conduct itself but rather an obligation to disclose certain information relating to that conduct.”).

181. See, e.g., Alfred C. Aman, Jr., *Privatization and Democracy: Resources in Administrative Law*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 103, at 276 (discussing the relation of information disclosure and accountability).

182. A copy of Form JS 44 is attached as an appendix to this Article.

civil cover sheet was adopted in 1974 as part of a civil docket package pursuant to Federal Rule of Civil Procedure 79(a).¹⁸³ Courts may, by local rule, provide for the electronic filing of that sheet, as well as for all other papers filed with the court.¹⁸⁴ The federal civil cover sheet provides important information about the source of the court's jurisdiction, the nature of the lawsuit, and the identities of the parties, and it publicizes whether a jury demand is made.¹⁸⁵ Numerous empirical studies have mined the civil docket documents for information about civil litigation as it actually exists in the federal courts.¹⁸⁶

We propose a direct information disclosure device: that the civil cover sheet be amended to require plaintiff to disclose whether the parties are subject to an *ex ante* contract that specifies the displacement of a public rule of civil procedure.¹⁸⁷ The parties would have to specify the Federal Rule that the contract has waived and the

183. See FED. R. CIV. P. 79(a)(1); see also ADMIN. OFFICE OF THE U.S. COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 50 (1974) (stating that "the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States" may prescribe the form and style of the district court's civil docket); Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439, 452 n.71 (2006) (discussing adoption of the civil docket sheet by the Judicial Conference in 1974).

184. See FED. R. CIV. P. 5(d)(3) ("A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States.").

185. See *infra* Appendix. The form provides: "Check YES only if demanded in complaint: JURY DEMAND: YES NO."

186. See, e.g., Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 430-32 (2004) (discussing results of study based on examination of terminated cases as traced through the civil docket sheet); Reagan, *supra* note 183, at 447 (discussing results of study of settlement agreements based on examination of all electronically filed docket sheets). Some district courts digitize only the docket sheet. See Schlanger, *supra* note 147, at 521 (2010) (discussing practical problems with locating docket sheets).

187. The question would have to be adapted for cases removed from state court. See Elizabeth Herbst Schierman & Katie Ball, *Civil Procedure in Idaho: An Examination of Significant Differences Between the Rules of Procedure of the Idaho State and Federal Courts*, 46 IDAHO L. REV. 13, 19 (2009) (describing the federal civil cover sheet and explaining that Idaho state courts do not mandate this filing); see also Patricia W. Hatamyar, *The Effect of "Tort Reform" on Tort Case Filings*, 43 VAL. U. L. REV. 559, 569-71 (2009) (discussing tort cases in Oklahoma state court based on examination of case classifications as listed on the state civil cover sheet). For removed cases, we propose that *ex ante* contract procedure be a mandatory topic of discussion at the pretrial conference pursuant to Federal Rule 16(c)(2) ("Matters for Consideration").

language of the private rule to which they have agreed. The cost of disclosure is minimal in terms of lawyer time and litigant resources and, in any event, in our view the cost is out-balanced by the important public interest in ensuring the integrity of a publicly funded forum to resolve the parties' disputes.¹⁸⁸

We further recommend that the issue of procedural waiver be treated as a mandatory topic of discussion at the pretrial conference held pursuant to Federal Rule of Civil Procedure 16 and scheduled early in the litigation before significant pre-motion practice has taken place.¹⁸⁹ At the conference, defendant would be required to inform the court of any customized procedural rule of which plaintiff was unaware at the time of filing the civil cover sheet; this information should be collected and included in the Administrative Office database. The Rule 16 conference aims to improve judicial supervision of civil litigation and authorizes the judge to adopt "special procedures" in categories of cases; it also encourages tighter judicial oversight of the pleadings, information exchange, and summary adjudication.¹⁹⁰ Repeated amendments to Rule 16 reflect the increasingly acknowledged importance of early judicial involvement in the lawsuit—as Judge Lee H. Rosenthal has explained, "early enough to make the involvement most helpful."¹⁹¹

We offer these twin recommendations as a way to shed light on the procedural rules actually used in the public courts; to assure that the judge specifically considers whether the parties have elected to use customized procedures; and to require explicit attention to whether privately drafted procedural rules will negatively impact the court's ability to reach an informed determination

188. See Hershkoff, *supra* note 89, at 1328 (2007) (referring to litigation as "a state-sanctioned process that uses public money and is subject to constitutional constraints").

189. For a discussion of the history and aims of Rule 16, see generally Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules—And the Extent of Convergence with Civil-Law Judging*, 36 SW. L. REV. 191 (2007).

190. See *id.* at 195-96.

191. Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 236 (2010) (offering this comment in the context of judicial supervision of electronic discovery); see also Charles R. Richey, *Rule 16 Revisited: Reflections for the Benefit and Bar*, 139 F.R.D. 525, 527 (1992) (explaining that amendments to Rule 16 have "replaced the historical model of the passive judge ... with a model of a managerial, more active judge, who is involved with every aspect of a lawsuit from start to finish").

of the facts and the law. The proposal is thus aimed at protecting the integrity of the judicial system. Because the recommendation is part of a larger package of reform, we believe it avoids problems identified in the literature with judicial discretion during the case management process.¹⁹²

B. Encouraging Procedural Accountability Through Rulemaking Oversight

Revising the civil cover sheet in the way that we recommend will provide basic information essential to the study of ex ante contract procedure as it is applied in particular kinds of cases. Information culled from the civil docket sheet forms a part of the extensive database that the Administrative Office of the U.S. Courts maintains about terminated cases in the federal system.¹⁹³ Commentators have highlighted various gaps in the Administrative Office database¹⁹⁴ (it does not, for example, code for the identity of the judge¹⁹⁵); our proposal would integrate information about contract procedure into the database and allow it to be an object of study along with the public rules of procedure. Empirical research now plays an increasingly important role in civil rulemaking and procedural reform, and our recommendation enlarges the focus of study to include privately designed procedural rules.¹⁹⁶

192. See Bone, *supra* note 113, at 917-18 (raising concerns about the case management model of rulemaking).

193. For a description of the Administrative Office database, see INTER-UNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, FEDERAL COURT CASES: INTEGRATED DATA BASE, 1970-2000, STUDY NO. 8429 (1998). Theodore Eisenberg of the Cornell Law School has made the database easily accessible. See Theodore Eisenberg & Kevin M. Clermont, *Courts in Cyberspace*, 46 J. LEGAL EDUC. 94, 94-96 (1996) (describing the Judicial Statistical Inquiry Form which provides access to the database).

194. For a discussion of these omissions, see Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 585-87 (1998).

195. See Frank B. Cross, *Comparative Judicial Databases*, 83 JUDICATURE 248 (2000) (pointing out this "lacuna").

196. See Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1141-44 (2002) (describing fourteen recent empirical studies of civil rulemaking by the Advisory Committee on Civil Rules); see also Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 501-07 (1989) (discussing the "litigation explosion" thesis by examination of trial and appellate disposition of constitutional tort cases).

We thus propose an oversight mechanism under the umbrella of the Rules Enabling Act¹⁹⁷ that can holistically examine the effects of contract procedure and evaluate whether the practice raises concerns for judicial legitimacy.¹⁹⁸ We urge that private rules of procedure be studied not as individual contract terms but as structural features of the civil justice system. Empirical studies may show that some procedural rules have important public effects, whereas others can comfortably be treated as default rules without posing significant negative risks to the overall judicial system. Moreover, it will be useful to determine whether the parties' ability to customize procedure creates incentives or disincentives for the channeling of disputes into the public courts, rather than into privately run dispute-resolution centers. Our recommendation aims at capturing from contract procedure its potential for efficiency and flexibility, while protecting against agency costs and overreaching.

Commentators often treat the Federal Rules of Civil Procedure as a "New Deal" project developed through a centralized, elite process that depends essentially on command-and-control regulation.¹⁹⁹ But the Rules Enabling Act assumes a dynamic process by which the federal rules of practice and procedure may be monitored, evaluated, adapted, and reformed. As Charles E. Clark, the primary architect of the Federal Rules of Civil Procedure, observed in 1938:

[T]he first thing which experience teaches us is that our rules should be continually changed and improved.... [W]hile there should be rules clear enough to be understood and applied, yet these should be changed as soon as they are found by experience to be hampering. Even good rules may become a nuisance when lawyers discover how to use them as instruments of delay.²⁰⁰

It is conceivable that contract procedure, as a privatized solution to procedural ordering, will provide the existing system of public procedural rules with important insights about participation, informa-

197. See 28 U.S.C. § 2072 (2006).

198. Cf. Nagareda, *supra* note 125, at 904 (recommending an oversight process for class action settlements under the Negotiated Rulemaking Act of 1990, and emphasizing the lack of delegated authority given to the mass tort bar "to effect binding regulation").

199. See Walker, *supra* note 164, at 1272.

200. Clark, *supra* note 94, at 304.

tion gathering, collaboration, and the development of new solutions through the uncovering of “best practices.”²⁰¹ On the other hand, contract procedure may be shown to be insufficiently attentive to power relations, to provide inadequate protection to vulnerable groups, and to create systemic biases that undermine procedural justice.²⁰² Our proposal would assist the Judicial Conference of the United States in its efforts to highlight federal rules that are in need of reform;²⁰³ it would help to identify intra-circuit issues; and it would serve the salutary function of alerting Congress of the need for legislative solutions.²⁰⁴

The questions we raise about contract procedure bear a family resemblance to those asked more than a generation ago by Marc Galanter when he invited attention to the potential benefits of “indigenous” law—law created by private groups outside the formal structure of public institutions. Galanter’s hope was that indigenous law would expand the legal system’s normative resources and liberate law from the heavy hand of centralized government. His questions about private ordering may similarly be asked about the practice of contracting for procedure: questions including “under what conditions and in what locations” the terms emerge; “the features” that contract procedure displays; and the interaction of contract procedure “with a larger complex legal order.”²⁰⁵ It remains to be seen whether contract drafters enjoy a comparative advantage—relative to “experts, leaders, or persons in authority”²⁰⁶—in devising procedural rules, or whether they are mere rent seekers capturing public resources for narrow private ends.

201. Dorf & Sabel, *supra* note 18, at 316 (describing organizational structures for stakeholder participation modeled on industrial projects).

202. See Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons from Chicago’s Public Housing Reform Experiment*, 16 GEO. J. ON POVERTY L. & POL’Y 117, 133 (2009) (describing the “missing analysis of power” in new governance theory that supports some proposals for private ordering).

203. See Jacob Scott, Comment, *Article III En Banc: The Judicial Conference as an Advisory Intercircuit Court of Appeals*, 116 YALE L.J. 1625, 1625 (2007) (describing the origin and mission of the Judicial Conference).

204. See ROBERT A. KATZMANN, COURTS AND CONGRESS 101 (1997) (“When the Judicial Conference makes a recommendation about proposed legislation, it has special weight.”).

205. Galanter, *supra* note 11, at 31.

206. Clark, *supra* note 13, at 1712.

*C. Promoting Legitimacy Through Choice-of-Law Inspired
Judicial Review*

Finally, we consider a role for the court in questions concerning the enforcement of *ex ante* contract procedure. As the previous sections have shown, many features of private procedural ordering implicate the legitimacy of the judicial system and not simply fairness to the individual parties. From a systemic perspective, the boundary between contract and public procedure may be recast as a jurisdictional struggle between two sovereigns—the “market-state” and the public state—and understood in conflict-of-laws terms.²⁰⁷ As such, a presumption of enforcement should not attach to the contract-procedure terms if they interfere with a court’s ability to reach a fair and informed decision in the case or if they cause more than incidental effects on substantive norms.²⁰⁸

Even within an adversarial system, the judge has an obligation to ensure—at some level—the integrity of the court system and not simply to endorse the procedural preferences of the parties. As Judith Resnik has written, “Courts are not ‘servants’ of the parties; courts have an independence from the parties, not only as the voices of other parties’ interests, but as institutions expressive of and accountable to the public.”²⁰⁹ Aspects of this principle thread through a number of doctrines. Policing the boundaries of Article III—through the various justiciability doctrines that demand adversity to ensure development of a record—is the most obvious example of “the limits of advocacy,” to borrow Amanda Frost’s pithy phrase.²¹⁰ Similarly, in a class action, the court is tasked with ensuring fairness of the proceeding to ensure fairness to third-party interests. The court resists vacatur of judgments on the consent of the parties, and although here efficiency and waste of public capital clearly are at issue, the perception of the parties’ gaming the court’s production of precedent seems equally significant. In the Federal Rule 19

207. Cf. John E. Coons, *Private Wealth and Public Schools*, 4 STAN. J. C.R. & C.L. 245, 274-75 (2008) (suggesting that “the jurisdictional boundary between State and parent less resembles an inquiry about ‘due process’ than it does that cluster of enduring puzzles known as the ‘conflict of laws’”).

208. For similar proposals for judicial review of contract procedure, see Thornburg, *supra* note 6, 209-10.

209. Resnik, *supra* note 14, at 1527.

210. See Frost, *supra* note 86, at 447.

context, the court has an obligation of jurisdictional dimension to ensure the presence of all parties needed to design and carry out full and fair relief.²¹¹ One can multiply examples. And although a party may forfeit or waive a procedural right,²¹² the appeals court retains the safety valve of plain-error review,²¹³ which should be considered, we suggest, whenever the litigant's omission or commission interferes with the integrity of the system.

The U.S. Supreme Court's acceptance of contract procedure reflects a marked contrast to its treatment of state rules of procedure that conflict with the Federal Rules of Civil Procedure. A federal court sitting in diversity generally will decline to apply a state rule of procedure that conflicts or cannot be reconciled with a federal rule that is on point.²¹⁴ Indeed, the Court's latest foray into this doctrinal field indicates the federal system's unwillingness to enforce state procedural rules that conflict with federal rules even when important state regulatory interests may be at stake.²¹⁵ Should the court's approach be radically different if the parties incorporate the state's rule into an ex ante contract? At the least, the question suggests that greater attention ought to be paid to contract procedure and to its implications for the health of the civil justice system.

CONCLUSION: A CONSTITUTIONAL TRANSFORMATION TOO FAR?

This Symposium has focused on the question of constitutional transformations and how they might affect the relation of govern-

211. FED. R. CIV. P. 19.

212. See, e.g., Conference, *Jurisdiction, Justice, and Choice of Law for the Twenty-First Century*, 29 NEW ENG. L. REV. 517, 569 (1995) (argument by Allan R. Stein that "federal law seems to be quite comfortable with waivers of federal jurisdiction"). Forfeiture refers to a litigant's "failure to make the timely assertion of a right, waiver is 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (discussing these terms in the criminal law context).

213. See HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL COURTS STANDARDS OF REVIEW: APPELLATE COURT REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 55-56 (2007) (discussing plain-error review in civil cases involving waiver or forfeiture).

214. See *Hanna v. Plumer*, 380 U.S. 460 (1965).

215. See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010); Helen Hershkoff, *Shady Grove: Duck Rabbits, Clear Statements, and Federalism*, 74 ALBANY L. REV. (forthcoming 2011) (discussing the Court's treatment of state regulatory interests when assessing state procedural rules).

ment to individual. In this Article, we have raised concerns about a constitutional transformation too far—concerns that changes in the relation of public courts to private actors will fundamentally alter bedrock principles of procedural fairness and judicial independence. We fear that the practice of contracting for procedure, if left unchecked, will contract both fairness and democratic values by exposing the public courts, so “central to our constitutional scheme,” to the risk of “incremental erosion.”²¹⁶ We recognize that this Article has raised more questions than it has answered, but our hope is that our line of inquiry will encourage others to go further. Ideally, the next step in this area would be to undertake an integrated analysis of all forms of private involvement in the design of dispute-resolution mechanisms, on the understanding that procedure is a “seamless web” composed of interwoven threads that affect the whole of which each is merely a part.²¹⁷ It is critical that this assessment take into account the public as well as the private interests at stake and that it look beyond immediate benefits to the long-term health of the system of civil justice.

216. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 861 (1986) (Brennan, J., dissenting).

217. The metaphor of law as a seamless web apparently first appeared in F.W. Maitland, *A Prologue to a History of English Law*, 14 *LAW Q.R.* 13, 13 (1898) (“Such is the unity of all history that any one who endeavours to tell a piece of it must feel that his first sentence tears a seamless web.”).

APPENDIX

JS 44 (Rev. 09/11)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM)

I. (a) PLAINTIFFS DEFENDANTS
(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES) County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
(c) Attorneys (Firm Name, Address, and Telephone Number) Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
U.S. Government Plaintiff U.S. Government Defendant
Federal Question (U.S. Government Not a Party) Diversity (Indicate Citizenship of Parties in Item III)
Plaintiff Defendant
Plaintiff Defendant
Citizen of This State Incorporated or Principal Place of Business in This State
Citizen of Another State Incorporated and Principal Place of Business in Another State
Citizen or Subject of a Foreign Country Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)
CONTRACTS
PERSONAL INJURY
PERSONAL PROPERTY
REAL PROPERTY
CIVIL RIGHTS
PERSONAL FREEDOMS
LABOR
SOCIAL SECURITY
PROFESSIONAL RIGHTS
FEDERAL ACTIONS
OTHER STATUTES
110 Insurance
112 Marine
113 Miller Act
114 Negotiable Instrument
115 Recovery of Overpayment & Enforcement of Judgment
116 Medicare Act
117 Recovery of Defendant's Student Loans (Excl. Veterans)
118 Recovery of Overpayment of Veteran's Benefits
119 Stockholders' Suits
120 Other Contract
121 Contract Product Liability
122 Franchise
PERSONAL INJURY
310 Airplane
315 Airplane Product Liability
320 Aircraft, Label & Slander
330 Federal Employees' Liability
340 Marine
345 Marine Product Liability
350 Motor Vehicle
355 Motor Vehicle Product Liability
360 Other Personal Injury
362 Personal Injury - Med. Malpractice
365 Personal Injury - Product Liability
370 Other Fraud
371 Trench in Loading
380 Other Personal Property Damage
385 Property Damage Product Liability
420 Appraisal
423 Withdrawal
425 Drug Related Seizure of Property
426 USCA 11
427 USCA 9
428 USCA 10
429 USCA 11
430 USCA 12
431 USCA 13
432 USCA 14
433 USCA 15
434 USCA 16
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V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Remanded from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from another district
6 Multidistrict Litigation
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

VI. CAUSE OF ACTION
Brief description of cause:

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

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