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The Limits of Procedural Private Ordering

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INTRODUCTION

THE right not only to a day in court, but to a fair day in court as defined by the court's procedural rules, once was a fundamental principle within the American system of justice: no man was permitted to bargain away his right to a fair hearing out of contractual benefit or necessity.[1] No longer. Contracts modifying the spectrum of procedure, from commonplace jury-trial waivers to sophisticated alterations of evidentiary obligations and burdens of proof, are now broadly enforceable.[2] Last Term, the Supreme Court further expanded the power of procedural contracts in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*[3] and *Stolt-Nielson*

[1] See, e.g., Wuchter v. Pizzutti, 276 U.S. 13, 19 (1928); Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) ("A man may not barter away his life or his freedom, or his substantial rights . . . . In a civil case . . . any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.").

[2] See 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, 612 (2007); Chris W. Sanchirico & George Triantis, Evidentiary Arbitrage: The Fabrication of Evidence and the Verifiability of Contract Performance, 24 J.L. Econ. & Org. 72, 72–73 (2008); Stephen J. Ware, Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights, 67 Law & Contemp. Probs. 167, 200–04 (2004).

[3] 130 S. Ct. 1431, 1443–44 (2010) (allowing a class action to proceed under Federal Rule of Civil Procedure 23 even though the class-action device was expressly unavailable under state law).

S.A. v. AnimalFeeds International Corp.,[4] indicating that broadly enforceable forum-selection agreements will now presumptively determine the availability of a class action—an outcome many thought was well beyond the ambit of private ordering.[5] Procedural private ordering holds immense promise, permitting corporations to use customized procedure not only to generate efficiency gains by precluding ex post escalation but also to reinforce ex ante conceptions about the parties' substantive obligations, adjusting enforcement to the parties' ex ante preferred level.[6] But set against these benefits are very real questions about the repercussions of permitting fine print terms in consumer, employment, or even clickwrap agreements to function as de facto liability waivers.[7]

The conversion of procedural rules from publicly created, mandatory guarantors of procedural justice to default rules subject to market forces alters the nature and function of civil procedure at a basic level. As exemplified by the party-created procedures at issue this Term in *AT&T Mobility v. Concepcion*,[8] the traditional con-

[4] 130 S. Ct. 1758, 1776 (2010) (holding that parties must specifically contract to create a class-action device in arbitration). The ability of parties to contract for procedure in the context of arbitration has been a source of continuing interest to the Supreme Court. See, e.g., Rent-A-Center, W. v. Jackson, 130 S. Ct. 2772, 2779 (2010) (upholding ex ante contractual delegation of unconscionability determination to arbitrator, thus overriding default procedure whereby the court would decide unconscionability).

[5] See *Stolt-Nielsen*, 130 S. Ct. at 1782 n.10 (Ginsburg, J., dissenting). In contrast to the facially evident impact of class-waiver provisions, a forum-selection provision can prevent the formation of a class (as in *Stolt-Nielsen*) or create an otherwise unavailable class action proceeding (as in *Shady Grove*) without expressly stating these secondary impacts. Because these unstated impacts are inherently concealed and potentially more uncertain, they may impede proper valuation and market functioning.

[6] See generally Louis Kaplow, The Value of Accuracy in Adjudication: An Economic Analysis, 23 J. Legal Stud. 307 (1994) (recognizing that heightened accuracy is typically obtained only at a cost and arguing that the balance between efficiency and accuracy, with its resulting impact upon deterrence, is best made on a case-by-case basis).

[7] 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, 427–30 (2006); Ronald J. Mann & Travis Siebeneicher, Just One Click: The Reality of Internet Retail Contracting, 108 Colum. L. Rev. 984, 990 (2008).

[8] 131 S. Ct. 1740, 1753 (2011) (holding that the Federal Arbitration Act preempted state unconscionability doctrine that would otherwise invalidate the parties' class arbitration waiver, and noting that the District Court had concluded that the plaintiffs were "better off" under the contractual provision than in a class action given the inherent delays and fractional recovery aggregate proceedings often generate).

ception of private enforcement as serving a dual public and private role is now being fundamentally challenged by this new generation of procedural contracting, as parties can create provisions that simultaneously provide superior remedies or even super-compensation to the parties,[9] while decreasing overall enforcement.[10] Fundamental normative questions about the role of civil procedure emerge from these types of conflicts between the traditionally defined concepts of public and private interest—questions whose resolution is prerequisite to determining the limits of procedural private ordering.

But the implications transcend civil procedure as the intrinsic relationship between procedure and substance allows contracting parties to use procedure to effectively limit or preclude enforcement of claims. Parties are now using procedural terms to opt out of non-waivable statutory obligations in contexts ranging from se-

[9] The AT&T provision waived aggregate procedures, utilizing the cost savings to increase net recovery for those individuals that chose to file claims. Among the most notable features of AT&T's provision were contractually created double attorneys' fees and a minimum recovery provision of $7,500 for any plaintiff that obtained more in arbitration than AT&T's last settlement offer, while simultaneously denying AT&T the ability to recover attorneys' fees, requiring AT&T to pay all costs for non-frivolous arbitration claims, and permitting telephonic hearings. Id. at 1744. While the Court's enforcement of the contract turned upon preemption grounds unique to arbitration and not upon these enhanced recovery provisions, corporations are increasingly including these provisions to ensure compliance with the fundamental-fairness and substantive-waiver requirements applied to procedural contract terms. See infra Section I.A.

[10] The class arbitration waiver upheld in *Concepcion* allows companies to avoid most—but not all—class actions, through simply contracting for arbitration. Even super-damages provisions like those of AT&T that provide for heightened damages are almost certain to result in lower total damages and litigation costs than an aggregate action would yield, as most low-value harms are ones that individuals bear without seeking recovery. This observation gives rise to the competing views that low participation rates are, on the one hand, evidence of sub-optimal over-enforcement under the current regime or, on the other hand, necessary to overcome a collective action problem with respect to small-value harms.

In the wake of *Concepcion* it seems certain that calls for reform of the Federal Arbitration Act—or, more realistically, intervention by the Consumer Financial Protection Bureau—will accompany reports of the demise of class actions and concerns that the deterrent function of private litigation has been eviscerated, leaving companies free to perpetrate individually small value harms with relative impunity. But, whatever the result with respect to arbitral provisions, these same issues must be confronted with respect to private ordering within litigation if these changes are to have any more effect than simply shifting aggregation waivers from arbitral to litigation forums.

curities to employment laws. Parties are also using procedural terms to reduce the value of substantive rights by increasing enforcement costs, decreasing available remedies, and changing the burdens of proof and rules of evidence. These modifications can be as devastating to the underlying substantive law as a complete waiver: the right to be paid the minimum wage or to be free of usury will be of little value to a day laborer in California if he must bring suit in Maine to enforce his rights, functionally barring pursuit of his claim. To the extent that we recognize either by dint of the Constitution or statute that some rights are non-waivable, so too must be the foundational right of resort to the courts unless the role of the public attorney general is to be vastly expanded.

The existing procedural-contracting scholarship has generally studied particular terms in isolation.[11] In the past few years, scholars have begun to contemplate the possibility of procedural private ordering across the full panoply of procedural rights.[12] These forays have focused upon the benefits of commercial contracting or the risks of consumer and employment contracting rather than undertaking a comprehensive study of the phenomenon of private ordering.[13] As a result, no systemic analysis has explored the contours of

[11] One line of commentary focuses upon the Court's specific approval of choice-of-law and forum-selection provisions, asking whether these procedural changes could impede substantive enforcement of the law. See, e.g., Janet C. Alexander, Unlimited Shareholder Liability Through a Procedural Lens, 106 Harv. L. Rev. 387, 388–89 (1992); G. Richard Shell, Contracts in the Modern Supreme Court, 81 Cal. L. Rev. 431, 452–62 (1993); Allan R. Stein, *Erie* and Court Access, 100 Yale L.J. 1935, 1940–41 (1991). Another line of scholarship analyzes the use of customized procedure in arbitration, asking whether this private ordering results in systemic biases against certain parties—notably consumers and employees. See, e.g., Aaron-Andrew P. Bruhl, The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law, 83 N.Y.U. L. Rev. 1420, 1422 (2008); Myriam Gilles & Gary B. Friedman, Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers, 155 U. Pa. L. Rev. 103, 154–55 (2006); David Horton, The Shadow Terms: Contract Procedure and Unilateral Amendments, 57 UCLA L. Rev. 605, 665–67 (2010); David Marcus, Some Realism About Mass Torts, 75 U. Chi. L. Rev. 1949, 1980–81 (2008).

[12] See, e.g., Michael L. Moffitt, Customized Litigation: The Case for Making Civil Procedure Negotiable, 75 Geo. Wash. L. Rev. 461, 462 (2007) (arguing "for a fundamentally different conception of the rules governing litigation . . . as default rules, rather than as non-negotiable parameters").

[13] For arguments, predominantly by commercial contract scholars, favoring broader procedural contracting, see, e.g., Noyes, supra note 2, at 599–638; Robert J. Rhee, Toward Procedural Optionality: Private Ordering of Public Adjudication, 84 N.Y.U.

procedural contracting or assessed the conditions under which private ordering should be denied enforcement due to an overriding public concern sufficient to trump the parties' contract.[14]

This Article seeks to take these next steps by evaluating the existing procedural contracting doctrine against the realities of modern procedural private ordering. In doing so, this Article has two objectives. The first is to examine the modern scope of procedural private ordering as juxtaposed with the Supreme Court's assumptions in this regard. This inquiry reveals a significant disconnect between the implicit ex ante content-neutral paradigm of procedure and the manifest potential for manipulation of substance through procedural contracting. This conclusion has two significant implications: First, in circumstances where individuals are uniquely unable to properly weigh the effect of procedural modifications, whether because of information costs or incorrect decisional heuristics, default allocations of rights may be waived without offsetting compensation, potentially undermining the plethora of enforcement schemes dependent upon private rights of action. Second, parties can evade substantive restrictions on the waiver or limitation of rights by using procedural terms to obtain the prohibited ends. The ability of contracting parties to rewrite substantive law to their own ends, not only with respect to waivable claims but also with respect to those fundamental rights designated as unalterable, encourages the use of procedure to contract around substantive rights.

L. Rev. 514, 518 (2009); Robert E. Scott & George G. Triantis, Anticipating Litigation in Contract Design, 115 Yale L.J. 814, 856–78 (2006). For arguments against a permissive approach to procedural contracting, offered predominantly by civil procedure and employment scholars, see, e.g., Estlund, supra note 7, at 427–30; Meredith R. Miller, Contracting Out of Process, Contracting Out of Corporate Accountability: An Argument Against Enforcement of Pre-Dispute Limits on Process, 75 Tenn. L. Rev. 365, 367–70 (2008); Judith Resnik, Procedure as Contract, 80 Notre Dame L. Rev. 593, 622–27 (2005); 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, 1085–87 (2002).

[14] See Scott & Triantis, supra note 13, at 857 ("Although arbitration and venue clauses are common in contracts and widely discussed in the literature, the fact that parties can vary the rules of litigation in their ex ante contract is relatively unexplored."); Daphna Kapeliuk & Alon Klement, Contractualizing Procedure 2 (Dec. 31, 2008) (unpublished manuscript, available at http://ssrn.com/abstract=1323056) ("[P]re-dispute arrangements to modify the rules of procedure have been essentially overlooked in contract law scholarship so far. Likewise, procedure scholars have paid little attention to the intriguing concept of pre-dispute contractualized procedure.").

The Article's second aim is to explore the normative implications of procedural private ordering. While the protective limits of civil procedure traditionally focused primarily upon protecting the individual's due process rights from public intrusion, I argue that we are on the precipice of the next generation of civil procedure, which should incorporate a corollary examination of the limitations upon procedural contracting necessary to protect the public interest. This public-private tension operates on two levels in procedural contracting. The first set of questions focuses upon the extent to which parties should be allowed to shape their adjudicative processes or, alternatively stated, commandeer the public litigation system. To the extent that procedure affects substance, procedural private ordering creates a second-order set of questions, engaging the broader debate over the extent to which substantive private ordering is permitted. While ex post procedural modifications and even settlement typically cannot affect parties' incentives to comply with their legal obligations, the rise of ex ante procedural contracts permits parties to adjust substantive obligations and expected liability. While the duality of private rights of action as simultaneously private and public is well-established, private ordering presses difficult questions about which interest is superior when the two conflict. The end of civil procedure as a mandatory guarantor of procedural justice and its replacement by market forces has the capacity to reshape not only the role of the private right of action between contracting parties but also the broad swath of statutory, constitutional, and common law obligations that rely upon it as a primary mechanism of enforcement.

Part I lays a doctrinal foundation for the exploration of procedural private ordering before examining the scope of existing procedural contracting. In contrast to the traditional assumption that procedural terms are primarily used to generate certainty and related efficiency gains in litigation, it argues that parties can strategically contract to manipulate substantive law and outcomes in a far more fundamental way than previously recognized. This occurs not only through traditional elections of systems of law, as with choice-of-law and forum-selection provisions (which I term "bundled procedure"), but also through the new phenomenon of "unbundled procedure" that allows parties to customize particular rules of procedure. The innovation of unbundled procedure per-

mits precise manipulation of procedure to further particular substantive goals, such as increasing overall enforcement while decreasing the possibility of nuisance or blackmail suits. This Part argues that the courts' embrace of increasing levels of commercial private ordering to obtain these efficiency gains has left the door open to equally broad consumer terms, which can limit the enforcement of even non-waivable statutory and constitutional rights.

Part II examines the traditional assumptions about the necessity and scope of limits upon procedural contracting and argues that the Supreme Court's existing doctrine fails to account for key features of a market for procedure, resulting in systemic enforcement failures with respect to both commercial and individual contracts. First, it employs an economic method of analysis to ex ante contracts for procedure to test the Rehnquist Court's functioning-market assumption—the cornerstone of the modern doctrine.[15] Its conclusion, that unique information cost asymmetries in procedural contracting increase the risk of market failure in certain circumstances, provides the first explanation for the oft-noted but under-theorized dichotomy between procedural terms in commercial contracts and those in individual contracts. Second, in contrast to traditional arguments that private ordering impairs judicial functioning, it argues that ex post restrictions upon private ordering already define the sine qua non of judicial functioning and that arguments for a more restrictive ex ante standard are actually misidentified concerns about market failure. Third, it identifies the hydraulic effect created by the discontinuity between the standards applied to procedural and substantive private ordering under the existing doctrine, such that procedural terms can be used to subvert statutory or constitutional prohibitions on bargaining.

In response to this framework of necessary limitations, Part III develops what I term the "symmetrical theory" of procedural contracting and provides examples of the manner in which the theory could be operationalized as a doctrinal approach. It argues that the proposed system is better tailored than the existing doctrine to the normative concerns animating both sides of the private-ordering

[15] The effect of procedural modification is often expressly excluded from economic analysis. See, e.g., Alan Schwartz & Louis L. Wilde, Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Securities Interests, 69 Va. L. Rev. 1387, 1450 (1983); Scott & Triantis, supra note 13, at 857.

debate and creates the starting point for a unified approach to procedural private ordering. In place of the Court's existing preclusion approach to procedural private ordering, this Article advocates the symmetrical theory of procedural contracting. This theory stems from the core presumption that procedure is intended to facilitate enforcement of substantive law; use of procedure to subvert the rule of law by contracting for prohibited outcomes is inconsistent with the proper function of procedure. Under this approach, those modifications of substantive law that are barred by the legislature are equally impermissible if obtained through procedural mechanisms. So too, if we prohibit the parties from making certain procedural modifications during litigation, those modifications should not be permitted by ex ante agreement. This approach, I argue, is commended by rigorous analysis of the normative goals justifying limitation upon private ordering, each of which is better served by the symmetrical approach than the preclusion approach.

I. THE RISE OF PROCEDURAL PRIVATE ORDERING

The existing doctrine affords parties substantial latitude in altering procedure, reasoning that allowing parties to tailor the process to their particular dispute can increase both certainty[16] and efficiency.[17] While this observation is true, it is incomplete as it neglects the effect procedure can have upon substance. Under federal law, procedural terms are currently enforced without regard to substantive consequences unless the term either directly contravenes a procedure *expressly* provided for in the statute upon which the claim is based or precludes a claim or defense altogether.[18] As a result, terms that substantially alter the parties' substantive obligations or the likelihood of liability are enforceable even with respect to non-waivable claims.[19] I argue that, as a result, parties are not merely bargaining for "better" procedure; they are selecting pro-

[16] See The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13–17 & n.15 (1972) (citing certainty six times as a justification for enforcing a forum-selection provision).

[17] See Carnival Cruise Lines v. Shute, 499 U.S. 585, 593–94 (1991) (enforcing forum selection as a method of reducing inefficiency through election of a single forum).

[18] See infra Section I.A.

[19] See infra Section I.A; cf. Kevin M. Clermont, Litigation Realities Redux, 84 Notre Dame L. Rev. 1919, 1921, 1926–29 (2009) ("Forum is worth fighting over because outcome often turns on forum . . . .").

cedure against the backdrop of the effect it will have upon their legal obligations and expected liability.

Building upon this foundation, I contend that parties are no longer merely selecting among systems of procedure through "bundled" elections of a forum, decision maker, and procedural rules. Instead, parties are contracting for "unbundled" procedure, selecting individual procedures to create a customized "mini-code of civil procedure."[20] Drawing upon law and economics and contract theory, I argue that procedural terms can be used to take advantage of the substance-procedure interaction, creating agreements that more precisely implement the parties' ex ante substantive enforcement preferences. Unbundling thus facilitates the development of procedural rules that reinforce the parties' ex ante preferred level of substantive obligation through careful adjustment of the numerous levers of procedure affecting litigation costs and accuracy, including shifting expected recovery or even de facto precluding the presentation of a claim or defense altogether.

While the existing doctrine permits beneficial procedural tailoring, it also leaves the door open to parties using procedure to contract around limitations on substantive private ordering. With respect to private enforcement actions, parties can in effect waive their non-waivable rights through procedural contracting, converting all private rights of action into mere default rules that can readily be bargained away even if the substantive statute deems the right inalienable.[21]

Having identified procedural contracting as a mechanism for modifying litigation outcomes, it becomes apparent that procedural contracting is a component of the broader debate over private ordering of the rules governing legal obligations. At one end of the

[20] See Resnik, supra note 13, at 597 (using the term "mini-codes of civil procedure" to refer to the creation of rules structures "by courts, agencies, and a multitude of private providers" where claims are "outsourc[ed]" from traditional adjudication).

[21] As I note elsewhere, this observation is limited to private enforcement; this limitation, however, simply results in a choice between lower levels of enforcement or an increase in public enforcement, undermining the legislature's decision to allow private enforcement to replace or mitigate the need for the deployment of public resources in the effectuation of these policy objectives. Cf. EEOC v. Waffle House, 534 U.S. 279, 287–88, 296–97 (2002) (holding that employee's agreement to arbitrate did not bar public action on his behalf or the pursuit of victim-specific relief, although victim-specific defenses would be valid defenses to the public enforcement action).

spectrum lie pure creations of substantive rights; this category can be further disaggregated into those terms that create substantive rights and duties by contract and those that modify preexisting substantive rights. Next are hybrid provisions, which use quasi-procedural terms as a pass-through for the modification of substantive rights. Choice-of-law provisions and, to a lesser extent, choice-of-forum provisions are familiar exemplars of this hybrid category. Finally, at the opposite end of the spectrum lie purely procedural terms. Within this category are two types of provisions with slightly different implications for judicial integrity: those that restrain or compel action by the parties and those that modify the judge's or factfinder's identity, conduct, or inquiry. While the primary focus here is upon the emergence of procedural terms, situating the analysis within this broader framework is a useful construct in understanding the doctrinal evolution described in this Part. With this background, this Part explores the current scope of procedural contracts, including the use of procedure to regulate substance.

The consequences of this investigation are significant. After a half-century of failed attempts to demarcate a line between substance and procedure,[22] it seems evident that procedure affects substance.[23] If this proposition is correct, then procedural terms are not intrinsically limited to content-neutral means of adjusting the cost-accuracy tradeoff to correspond to parties' ex ante preferences in light of the particular substantive rights at stake. Instead, procedural terms can adjust parties' ex ante expectations about the value of their underlying substantive rights and influence primary-activity conduct.[24] To the extent that procedural contracting is motivated by efficient truth-finding and only incidentally affects substantive rights, it may appear that strong enforcement is appropri-

[22] See, e.g., Gasperini v. Ctr. for Humanities, 518 U.S. 415, 427 (1996) (commenting that identification of the line between substance and procedure is a "challenging endeavor"); Hanna v. Plumer, 380 U.S. 460, 471 (1965) ("The line between 'substance' and 'procedure' shifts as the legal context changes.").

[23] See, e.g., Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1450 (2010) (Stevens, J., concurring in part and concurring in the judgment); *Gasperini*, 518 U.S. at 427; *Hanna*, 380 U.S. at 468 (noting that, in a sense, "*every* procedural variation is 'outcome-determinative'"); S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 310 (7th Cir. 1995) (Posner, J.).

[24] For discussion in the context of burden allocation, see Scott & Triantis, supra note 13, at 860–64.

ate absent any preclusive effect upon the underlying right—so long as both parties agree to the reallocation of cost and accuracy and so long as the risk of error is not so large as to impede the public interest in deterrence. But if parties instead may deliberately use procedure to modify substantive rights and deterrence, then the Supreme Court's strong deference may be an inadequate check upon market mechanisms. This concern is particularly acute where background law prevents direct modification of the substantive right, creating a "hydraulic effect" whereby parties use procedure to obtain prohibited substantive ends.[25] This Part addresses these possibilities.

A. Enforcement of Procedural Contracts

Throughout the nineteenth and early twentieth centuries, the Supreme Court's limitations upon ex ante procedural contracting derived from concerns with the public function of courts embodied in the English ouster doctrine and with the private individual's procedural rights as reflected in the nascent American conception of due process.[26] During this period, the Court limited the handful of attempts at ex ante private ordering, reasoning that

> [e]very citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. . . . In a civil case . . . any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.[27]

As ouster gave way to non-adjudicatory methods of dispute resolution[28] and as due process became recognized as a waivable

[25] See Samuel Issacharoff, Private Claims, Aggregate Rights, 2008 Sup. Ct. Rev. 183, 213–14 (discussing the "'hydraulic' effect" in aggregate litigation strategy).

[26] See Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874); see also Richard C. Reuben, Public Justice: Toward a State Action Theory of Alternative Dispute Resolution, 85 Cal. L. Rev. 577, 600 (1997); Taylor & Cliffe, supra note 13, at 1093.

[27] *Morse*, 87 U.S. at 451.

[28] See Reuben, supra note 26, at 601 (discussing the 1925 passage of the Federal Arbitration Act).

right,[29] the Warren[30] and Burger[31] Courts tentatively embraced procedural private ordering. The Court struggled, however, to articulate a test that captured its instinctive desire to enforce carefully bargained contracts between sophisticated corporations engaged in international commerce while also protecting consumers unaware of the magnitude of the rights they were waiving or unable to contract for alternative terms.[32]

The current chapter in the jurisprudence of procedural contracting began with the forum-selection provision of *Carnival Cruise Lines v. Shute*.[33] In *Carnival Cruise Lines*, the Rehnquist Court abandoned the endeavor to distinguish between sophisticated commercial and fine-print consumer contracts, creating a presumption of enforceability expressly premised upon an assumption of market functioning.[34] Enforceability first required that the term be "reasonable," an inherently vague standard satisfied by the selected forum's strong ties to the corporation, proper notice, lack of fraud, and an opportunity to reject the provision, which was embedded in the eighth of twenty-five fine-print paragraphs presented after the refund deadline.[35] The Court then articulated a second, constitutional requirement of fundamental fairness, which invalidated procedural terms intended to preclude enforcement of one's claim.[36] Since the adoption of this freedom-of-procedural-contracts

[29] For historical development, see *Boddie v. Connecticut*, 401 U.S. 371, 378–79 (1971). Cf. Fuentes v. Shevin, 407 U.S. 67, 82 (1972) (discussing the development of recognition of due process waiver in the context of a replevin dispute).

[30] See Nat'l Equip. Rental v. Szukhent, 375 U.S. 311, 315–16 (1964).

[31] See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13–15 (1972); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187–88 (1972).

[32] See *The Bremen*, 407 U.S. at 12–13 ("[A] freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as [the forum-selection clause] involved here, should be given full effect."); *Fuentes*, 407 U.S. at 95–96 (holding that a fine-print consumer replevin provision was not clear enough to waive constitutional due process rights); *Overmyer*, 405 U.S. at 186 (noting that the parties were sophisticated corporations represented by counsel, the bargaining power was not unequal, the terms were not adhesive, and the challenged term was specifically added in exchange "for substantial benefits and consideration to Overmyer").

[33] 499 U.S. 585, 587–88 (1991).

[34] See id. at 593–94. The Court did not adopt a market-function test or require any evidence to support its assumption of indirect compensation.

[35] Id. at 593–95; see also id. at 597 (Stevens, J., dissenting).

[36] Id. at 595 (majority opinion).

approach, the Supreme Court has been reluctant to find that a procedural contract violates fundamental fairness.[37] The courts of appeals have since held that choice-of-forum and choice-of-law clauses are enforceable even where enforcement would result in both waiver of a non-waivable statute and lesser remedies under foreign law.[38]

Although arbitration agreements are a special subset of procedural contracts, the Court applies essentially the same standard, denying enforcement to arbitration agreements that "operate[] . . . as a prospective waiver of a party's right to pursue statutory remedies."[39] As in the litigation context, the modern Court has interpreted this requirement minimally, refusing to deny enforcement of the arbitration agreement where the preclusion might or

[37] See, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 535–36 (1995) (applying *Carnival Cruise Lines* to reject the argument that enforcement would be impermissibly reduced by the high transaction costs of foreign arbitration where a statute provided that liability may not be "lessen[ed]"); *Carnival Cruise Lines*, 499 U.S. at 595–96 (rejecting arguments that the statutory prohibitions on waiving or lessening the substantive right to recover for personal injury or "purporting . . . to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction" precluded the forum-selection clause); see also Linda S. Mullenix, Another Easy Case, Some More Bad Law: *Carnival Cruise Lines* and Contractual Personal Jurisdiction, 27 Tex. Int'l L.J. 323, 358 (1992) (describing the "widespread support for forum-selection clauses in the federal courts" such that challenges based upon *The Bremen*'s factors "have been largely unsuccessful"); Michael E. Solimine, Forum-Selection Clauses and the Privatization of Procedure, 25 Cornell Int'l L.J. 51, 51–52 (1992).

[38] Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1295, 1297 (11th Cir. 1998); Richards v. Lloyd's of London, 135 F.3d 1289, 1293 (9th Cir. 1998); Allen v. Lloyd's of London, 94 F.3d 923, 929 (4th Cir. 1996); Bonny v. Soc'y of Lloyd's, 3 F.3d 156, 162 (7th Cir. 1993); Spradlin v. Lear Siegler Mgmt. Servs. Co., 926 F.2d 865, 869 (9th Cir. 1991).

[39] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 637 (1985); accord 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1474 (2009) ("[A] substantive waiver of federally protected civil rights will not be upheld . . . ."); *Vimar Seguros*, 515 U.S. at 540. Because of the statutory requirements of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16 (2006), and its state analogs, arbitration doctrine has evolved distinctly, culminating in this public-policy limitation upon enforcement. Yet its seemingly coextensive scope with fundamental fairness may not merely be normatively preferred; it may be constitutionally required: to the extent that the Court's fundamental fairness limitations upon procedural contracting are constitutionally derived, the FAA cannot override these limitations.

might not occur even though the uncertainty itself may be great enough to discourage pursuit of the claim.[40]

While courts permit hybrid procedural terms[41] and pure procedural terms that regulate party conduct,[42] the Supreme Court has not yet conclusively determined the enforceability of terms that regulate the courts directly.[43] One might speculate that the Court will continue its broad embrace of private ordering, reasoning that greater customization of terms will yield an optimal balance of truth-seeking and cost as defined by the parties' ex ante prefer-

[40] See, e.g., PacifiCare Health Sys. v. Book, 538 U.S. 401, 406–07 (2003) (enforcing the clause despite a limitation on punitive damages potentially precluding statutory treble damages); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90–91 (2000) (enforcing clause despite uncertainty about costs and fees of arbitration substantial enough to make pursuit of claim prohibitive); *Vimar Seguros*, 515 U.S. at 531–32, 541 (enforcing a clause despite likelihood of lesser remedies under foreign law in violation of non-waivable statutory protection). Although challenges will continue to be made, the recent opinion in *AT&T Mobility v. Concepcion* substantially cabins the ability of parties to invalidate an arbitration provision pre-arbitration pursuant to Section 2 of the FAA. 130 S. Ct. 1740, 1748 (2011). As a result, effective challenges must either show that the agreement met the exceedingly high standard of effectively waiving the substantive right, or must be made post-arbitration under the statutorily limited bases of Section 10.

[41] See, e.g., Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985) (noting the frequency and enforceability of forum-selection agreements); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13–15 (1972) (enforcing a forum-selection term that incorporated choice-of-law selection); cf. U.C.C. § 1-105(1) (2001) (providing for enforcement of choice-of-law clauses).

[42] See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975) (recognizing that parties may contract regarding attorneys' fees); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 184–86 (1972) (enforcing a cognovit note waiving notice and hearing); 7 Samuel Williston, A Treatise on the Law of Contracts § 15:12, at 264–67 (4th ed. 1997) (stating that statutes of limitations generally cannot be waived entirely but can be shortened); Noyes, supra note 2, at 607–08 ("Courts have enforced agreements that waive hearsay objections, objections to authenticity of documents, objections to qualifications of expert witness, and invocations of privileges."); Debra T. Landis, Annotation, Contractual Jury Trial Waivers in Federal Civil Cases, 92 A.L.R. Fed. 688, 691 (2003) (noting the uniform enforceability of jury waivers in federal court).

[43] But see United States v. Mezzanatto, 513 U.S. 196, 208 & n.5 (1995) (noting in the criminal context that evidentiary rules designed to ensure trustworthiness of evidence are "waivable beyond any question" and thus should be subject to contract to facilitate "negotiations without any arbitrary limits on [the parties'] bargaining chips"); Williston, supra note 42, § 15:13, at 272 ("There is a growing tendency for the courts to uphold the right of the parties to prescribe certain rules of evidence . . . so long as it does not unduly interfere with the inherent power and right of the court to consider relevant evidence.").

ences.[44] But would the Court permit parties to commandeer judicial officers in this manner? The Court's sole invalidation of a procedural term suggests the Justices may not find the practice antithetical to the judicial role: although the Court narrowly held in *Hall Street Associates v. Mattel, Inc.* that the Federal Arbitration Act specifically preempted the modification of the standard of review in the courts, the Court expressly noted that under state law or common law parties may be able to modify the standard of judicial review.[45] The Court then remanded the case for consideration of whether the contract could instead be enforced under Federal Rule of Civil Procedure 16.[46]

This survey of existing doctrine is not intended to contend that further restrictions on private ordering are impossible. To the contrary, the ability of parties to modify the Federal Rules of Civil Procedure is a particularly likely area of litigation, juxtaposing the Court's embrace of uniformity[47] with its strong support of private ordering of procedure.[48] Rather, this discussion seeks to emphasize that these (some might say intuitive) restrictions do not yet exist—underscoring the need for a systemic review of the existing scope of private ordering and the resulting normative implications.

B. The Commoditization of Procedure

Traditional civil procedure analysis has focused upon questions of which procedural rules create optimal results, however variously defined. The rise of procedural contracting creates a new set of inquiries that ask what range of rules should be permitted rather

[44] See *Mezzanatto*, 513 U.S. at 208; Bruce L. Hay, Procedural Justice—Ex Ante vs. Ex Post, 44 UCLA L. Rev. 1803, 1812 (1997); Scott & Triantis, supra note 13, at 857–78.

[45] 552 U.S. 576, 590–92 (2008); accord AT&T v. Concepcion, 130 S. Ct. 1740, 1752 (2011) (noting, in discussing AAA rules authorizing judicial review of class certification decisions, that under the FAA "parties may not contractually expand the grounds or nature of judicial review"). This suggestion that greater private ordering may now be more possible in litigation than arbitration—contrary to the original purposes of the FAA—is a stark illustration of the degree to which the courts' view of procedural contracting has changed in the last century.

[46] *Hall Street Associates*, 552 U.S. at 592.

[47] See, e.g., Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1444 (2010).

[48] See, e.g., Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1776 (2010).

than focusing upon selection of the best universal default rule. The view embraced by the Supreme Court and traditional scholarship treats procedural contracts as a method for generating procedural efficiencies and increased certainty of process, resulting in broad enforcement of procedural terms. I argue that this view is too narrow, as it focuses upon the procedural effect of contracting while overlooking the potential gains from the use of substance-affecting or behavior-shaping terms. As parties already strategically employ procedure during the litigation process, it should not be surprising that parties would use procedural terms to maximize strategic advantage in the same manner, trading off differences in expected outcome from procedural modification just as substantive terms exploit differences in valuation. Yet the ability of parties to use procedure as a method of shifting parties' obligations and primary-activity behavior has remained "relatively unstudied."[49]

1. Bundled Elections Between Public Systems

While applicable law and a forum must be selected in every dispute, parties should engage in bargaining for procedure only if the benefits of the term outweigh the transaction costs.[50] Certainty of obligation may itself provide an intrinsic benefit, but its value is not static. Instead, the benefit gained by certainty of obligation is inversely correlated with the degree of variation between the competing procedural regimes.

The degree of variance in outcome between competing systems has vastly expanded in the last century, dramatically increasing the potential gains derived from procedural contracting along both the traditional horizontal[51] and newer vertical axes.[52] As a result of the

[49] Chris William Sanchirico, A Primary-Activity Approach to Proof Burdens, 37 J. Legal Stud. 273, 273 (2008); accord Scott & Triantis, supra note 13, at 857.

[50] See Scott & Triantis, supra note 13, at 822–39 (discussing comparative front-end versus back-end costs of contracting).

[51] See Howard M. Erichson, CAFA's Impact on Class Action Lawyers, 156 U. Pa. L. Rev. 1593, 1612–14 (2008) (describing modern horizontal forum shopping).

[52] Compare Hanna v. Plumer, 380 U.S. 460, 463–64 (1965), with Conformity Act of 1872, ch. 255, §§ 5, 6, 17 Stat. 196, 197 (1872); see also Swift v. Tyson, 41 U.S. 1, 18 (1842). In passing the Class Action Fairness Act (CAFA), Pub. L. No. 109-2, § 2, 119 Stat. 4, 4–5 (2005) (codified in scattered sections of 28 U.S.C.), Congress expressly recognized the importance of vertical forum election, expanding defendants' ability to remove to federal court to avoid what Congress identified as over-enforcement of

Rehnquist Court's strong enforcement of procedural terms, horizontal selections as to forum and choice of law remain key strategic decisions because variations in state unconscionability law are increasingly dispositive in determining the enforceability of procedural terms.[53] The Roberts Court's rulings last Term further expanded the effect vertical forum selection could have on the substantive outcome of cases: in a federal forum, class actions are presumptively available and a class action can proceed notwithstanding a contrary state statute that would bar a class proceeding in a state forum.[54]

But is this degree of variance sufficient to shift substantive outcomes? The one-dimensional nature of ex post transfer and removal limits the degree of expected variation between forums as compared with two-dimensional ex ante contracting. Even with this limitation, studies have found that successful removal or transfer can reduce the plaintiff's likelihood of succeeding on the merits by fifty percent.[55] Parties' strategic ex post elections[56] and willingness

private rights of action by state courts. See Geoffrey C. Hazard, Jr., Has the *Erie* Doctrine Been Repealed by Congress?, 156 U. Pa. L. Rev. 1629, 1629 (2008); cf. Debra Lyn Bassett, The Defendant's Obligation to Ensure Adequate Representation in Class Actions, 74 UMKC L. Rev. 511, 529 & n.111 (2006) (describing corporate lobbying for CAFA as prompted by the sentiment that federal courts are "less receptive" to class actions than state courts).

[53] Against this backdrop, states have adopted widely ranging unconscionability doctrines, with some states supporting the minimal federal restraints and others adopting a stance against perceived federal over-enforcement. See Bruhl, supra note 11, at 1422.

[54] See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1444 (2010). In contrast, if parties elect arbitration, class actions are barred unless the parties expressly contract for them. See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1776 (2010).

[55] In a recent study, plaintiffs prevailed in 71% of original diversity cases but in only 34% of removed diversity cases; likewise, plaintiffs prevailed in 58% of all non-transferred federal cases but in only 29% of transferred cases. See Clermont, supra note 19, at 1921, 1926–29; see also 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, 593 (1998) (reviewing potential contaminating variables but concluding that removal may have an even stronger effect than attorneys realize notwithstanding the high degree of existing forum shopping).

[56] See Erichson, supra note 51, at 1612–14 (describing plaintiffs' shift from vertical forum shopping to horizontal forum shopping in the wake of defendants' success in passing CAFA).

to invest tens or even hundreds of thousands in forum battles,[57] in addition to the estimated $50 to $200 million spent by corporations lobbying for broader removal rights,[58] suggests a mutual perception that forum affects outcomes.

With these stakes, sophisticated parties are not merely contracting for the certainty of *any* forum as the Supreme Court suggested;[59] instead, parties make these investments in the shadow of expected substantive effect to control *which* forum.[60] Unsurprisingly, emerging empirical evidence increasingly demonstrates that substantive outcomes drive not only ex post forum selection but also ex ante selections of hybrid terms. Professors Eisenberg and Miller have demonstrated that choice-of-law elections occur in virtually all merger agreements, with the specific election of law having a substantial correlation with the selection of forum and citizenship.[61] Controlling for these factors, parties' selections often reflect preferences for a particular mutually preferred substantive law[62] and for particular forums' decisionmakers.[63] For example, Delaware law and courts are often selected by public companies anticipating internal governance disputes, while New York law and courts are favored for external matters.[64] In contrast to the potential for mutually beneficial selections of law and forum in the cor-

[57] Andrew R. Sebok, International Tort and Insurance Law and Practice: What Has Become of Our World?, 24 Tort & Ins. L.J. 390, 392 (1989) (reporting that $25 million was spent litigating the forum in the Bhopal disaster).

[58] Genevieve G. York-Erwin, Note, The Choice-of-Law Problem(s) in the Class Action Context, 84 N.Y.U. L. Rev. 1793, 1804 n.53 (2009).

[59] See Carnival Cruise Lines v. Shute, 499 U.S. 585, 593–94 (1991) (focusing upon the efficiency of selecting a single forum but not considering the possibility of a strategic election).

[60] See Theodore Eisenberg & Geoffrey Miller, Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements, 59 Vand. L. Rev. 1975, 1981 (2006); see also Erin A. O'Hara & Larry E. Ribstein, From Politics to Efficiency in Choice of Law, 67 U. Chi. L. Rev. 1151, 1152–53 (2000).

[61] See Eisenberg & Miller, supra note 60, at 1981, 2011–12.

[62] See Theodore Eisenberg & Geoffrey P. Miller, The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts, 30 Cardozo L. Rev. 1475, 1475–76 (2009).

[63] See Eisenberg & Miller, supra note 60, at 1982.

[64] See id.; Eisenberg & Miller, supra note 62, at 1475–76.

porate context, studies have suggested a uniformly one-sided selection of legal regimes favoring sellers in the consumer context.[65]

Strategic election of law has traditionally led to competition among states to capture the market.[66] In the procedural context, drafting parties' comparisons of expected substantive outcomes across arbitral forums led to charges of institutional capture—that arbitral institutions were competing to offer the best forum to repeat players[67] and creating asymmetries disadvantageous to one-shot litigants.[68] Disaggregating the role of judges in deciding individual cases from the creation of procedural rules demonstrates that even absent judicial capture, a market for procedure—and the risk of institutional capture—can persist at the rule-maker level. As parties have commoditized the election between public systems, the collective motivation for states to create favorable procedural rules has resulted in the nascent development of a market for procedure at the institutional level, analogous to the market for corporate substantive law.[69] It does not seem unreasonable to speculate that as the market becomes increasingly sophisticated, forums will

[65] Mann & Siebeneicher, supra note 7, at 999 (reporting that forum and choice-of-law provisions appeared in only thirty-two percent and forty percent of consumer contracts, respectively, but always favored the seller).

[66] For example, commoditization of substantive law led to competition among states—most notably between New York and Delaware—to win the battle for incorporation. See Lucian Arye Bebchuk, Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law, 105 Harv. L. Rev. 1435, 1443, 1452 (1992). The same trend occurred with respect to usury laws in the 1980s and 1990s. See Elizabeth R. Schiltz, The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation, 88 Minn. L. Rev. 518, 552 (2004).

[67] See, e.g., Myriam Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 Mich. L. Rev. 373, 410–412 (2005) (discussing repeat-player leverage in the context of institutions' class arbitration policies).

[68] See, e.g., Developments in the Law–Access to Courts, 122 Harv. L. Rev. 1151, 1174–75 (2009) (detailing concern with repeat-player bias).

[69] See, e.g., Erin A. O'Hara & Larry E. Ribstein, The Law Market 3–5 (2009); Eisenberg & Miller, supra note 60, at 1980 ("States engage in competition in the areas of choice of law and choice of forum that is analogous, in important respects, to the competition for corporate charters."); Timothy P. Glynn, Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom, 65 Wash. & Lee L. Rev. 1381, 1383–84 (2008) (describing the law-as-commodity trend with respect to substantive law); Geoffrey P. Miller & Theodore Eisenberg, The Market for Contracts, 30 Cardozo L. Rev. 2073, 2073–74 (2009) (detailing the modifications New York has made to compete for parties to commercial contracts to select New York's law and courts).

specialize—attempting to attract corporate operations, plaintiffs' counsel, or business-to-business litigation—with a resulting polarization of rules. Indeed, the innovation of the class-action waiver prompted such a response, with states codifying rules permitting or barring class-action waivers and further increasing the value generated by strategic forum shopping.[70] The rise of procedural private ordering is thus likely to affect not only those parties who engage in procedural contracting but also to shape the rules of procedure available to all litigants.[71]

The discussion to this point has reflected a traditional notion of "bundled forum selection." Yet, as I argue in the next Subsection, parties are beginning to customize aspects of procedure within a system, rather than simply electing between systems. To the extent that parties are able to unbundle procedure—electing a forum based upon its decisionmakers and then imposing customized rules—we should anticipate a shift in both the criteria for selection and the resulting market behavior of competing jurisdictions. In an unbundled system, we should not anticipate that parties will continue to select a forum based upon the default rules but instead upon the degree of customization permitted. This trend is already apparent with respect to the comparatively well-developed legal regime governing arbitration, as choice-of-law clauses are negotiated in the shadow of substantial state-by-state variations in the enforceability of the arbitration.[72] As litigation increasingly mirrors arbitration, there is little reason not to expect the same trend.

Against the backdrop of the existing "unconscionability game" unfolding among jurisdictions,[73] the effect upon public control of

[70] Compare Utah Code Ann. §§ 70C-3-104, 70C-4-105 (2009) (codifying enforceability of class-action waivers in arbitration), with N.M. Stat. §§ 44-7A-1(b)(4)(f), 44-7A-5 (2010) (establishing that class-action waivers in arbitration clauses are unenforceable and voidable).

[71] To the extent that one expects an asymmetry in the market—for example, forums attempting to attract corporate parties drafting provisions in contemplation of defending litigation—the rules of procedure could resultantly become asymmetric, yielding secondary effects in the ex post election of procedure.

[72] See Theodore Eisenberg & Geoffrey P. Miller, The Flight From Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies, 56 DePaul L. Rev. 335, 343–44, 358–59 (2007) (finding that twenty-four percent of contracts selecting the law of an arbitration-friendly state elected arbitration while only four percent of contracts selecting an arbitration-hostile state do so).

[73] See Bruhl, supra note 11, at 1421–22.

private ordering is substantial: if only one forum available to the parties permits unbundling, the parties can elect it and opt into an unbundled regime. This rule would give the promulgating state a substantial advantage in the market for procedure as each set of parties would be able to create its own preferred rules[74] free of the constraints of due process,[75] rather than selecting the closest match among prefabricated defaults. Given this preference, forum shopping based upon degree of procedural private ordering is likely in coming years and may trigger a race to private ordering in some states, with others holding the provisions void as unconscionable or against public policy to prevent intrusions upon public ordering.[76]

2. Unbundling Procedure

Procedural contracting offers an example of what I term an "unbundled" procedural regime in litigation, in which parties no longer select between complete sets of procedure and forum but instead bargain over individual procedural terms. Through unbundling, parties can adjust individual procedural rights based upon ex ante preferences, with resultant effects on the cost of enforcement of substantive rights, the likelihood of liability, and expected damages or available remedies—thereby privately adjusting the level of deterrence for each substantive term. In contrast to substantive terms ordinarily remedied by damages, procedural terms are remedied by specific performance, further broadening the array of options available to contracting parties in obtaining optimal terms and precluding subsequent defection—or efficient breach.[77]

[74] This flexibility is a distinct advantage in the market for procedure, as commercial contracts show a sustained and repeated ex ante desire for streamlined, low-cost procedure. See infra Subsection I.B.2.a. Moreover, if corporate parties have disproportionate control over procedural terms in contracts with individuals, then this baseline degree of preference for unbundled procedure could be increased by an ability to use procedural terms to affect substantive outcomes. See infra Subsection I.B.2.b; Section II.B.

[75] See Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (discussing variability of due process requirements); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185 (1972) (noting waivability of civil due process).

[76] For a discussion of the similar trend in state law in response to federal enforcement of arbitration provisions, see Bruhl, supra note 11, at 1443–64.

[77] See Taylor & Cliffe, supra note 13, at 1092.

a. Dimensions of Optimization

Procedural scholars have traditionally assumed that "[c]ontractual provisions [limiting discovery] are likely to be found only when there is inequality of bargaining power, and are hardly an appropriate means for disregarding rules of court devised to serve the public interest."[78] Contrary to this assumption, sophisticated commercial parties regularly modify the rules of civil procedure and evidence to improve substantive outcomes, whether through greater efficiency or greater accuracy.

Viewed from an efficiency standpoint, it is unsurprising that parties will contract toward minimizing litigation costs to prevent transfers of wealth to third parties.[79] Oftentimes these terms generate direct cost savings for both parties. Even where the benefit is one-sided or imposes a cost upon the other party—as with an agreement to limit document preservation obligations—the term should not be dismissed as reflective of bargaining power inequality. Rather, the parties can bargain for the allocation of the joint cost savings through other terms—for example, reducing the price of the product.

More interesting is the potential use of procedural terms as a sophisticated mechanism for tailoring or reinforcing the parties' substantive obligations. It is not unusual for parties to contract for substantive terms that more precisely assess compliance with their contractual obligations, even where these terms will increase litigation costs.[80] Generally, these terms are appropriately employed where the parties' valuation of improved accuracy exceeds the cost

[78] 8 Charles Alan Wright et al., Federal Practice and Procedure § 2005, at 52 (3d ed. 2010).

[79] See Developments in the Law, supra note 68, at 1170–71 (noting cost savings as a primary driver of arbitration's popularity).

[80] For discussion of the use of substantive terms that require more expensive evidentiary methods or the replacement of a rule with a standard, see Albert Choi & George Triantis, Completing Contracts in the Shadow of Costly Verification, 37 J. Legal Stud. 503, 504–09, 523–25 (2008) (discussing the election of more precise substantive obligations that entail higher verification or litigation costs, using the examples of expert testimony and subjective state of mind testimony); Louis Kaplow, A Model of the Optimal Complexity of Legal Rules, 11 J.L. Econ. & Org. 150, 150–63 (1995); Louis Kaplow & Steven Shavell, Accuracy in the Determination of Liability, 37 J.L. & Econ. 1, 1–15 (1994) (noting the problem of over-deterrence and excessive investment).

of litigation.[81] Procedural unbundling opens the door to a new realm of substance-reinforcing or substance-adjusting obligations. With respect to substance-reinforcing provisions, parties may increase procedural protections to obtain a greater degree of accuracy in outcome.[82] In contrast, substance-adjusting obligations are not intended to increase accuracy but instead to shift how the parties' obligations are defined.[83] At the extreme, parties may entirely abandon the pursuit of an accurate determination of their substantive obligations by using procedural terms to bar a claim[84] or defense.[85]

To the extent parties seek to optimize procedure, "almost limitless" methods of modification are available.[86] It is nevertheless useful to catalogue briefly the most common provisions within the existing scope of private ordering before turning to the strategic use of these terms. With respect to filing and pleading, parties do not merely select particular forums and waive objections to jurisdiction.[87] They instead modify the means, method, timing, and requirements of filing through waiver of particular claims or substantive defenses,[88] waiver of procedural defenses such as statutes of limitations[89] or laches,[90] and—in the extreme case of cognovit notes—waiver of the right to notice and a hearing.[91] At the discovery phase, contracts typically limit rather than expand discovery,[92]

[81] In the substantive law context, these terms may have the benefit of increasing deterrence where the increased accuracy enhances the ex ante differential in expected liability as between the comparative states of compliance and non-compliance for the prospective defendant notwithstanding the additional costs.

[82] For example, a provision decreasing the level of deference provided during appellate review might be within this category.

[83] For example, a provision specifying the type of evidence admissible with respect to a breach of contract action will de facto define the substance of the obligation.

[84] See supra text accompanying note 38.

[85] See D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187–88 (1972) (holding that delivery of a cognovit note waived rights to pre-judgment notice and hearing).

[86] Moffitt, supra note 12, at 465.

[87] See supra Subsection I.B.1.

[88] See Mann & Siebeneicher, supra note 7, at 999 (reporting that forty-nine percent of consumer contracts surveyed disclaimed implied warranties).

[89] Id. (noting that six percent of contracts surveyed modified the statute of limitations in favor of the seller).

[90] See Kapeliuk & Klement, supra note 14, at 7.

[91] See, e.g., D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187 (1972).

[92] See Kapeliuk & Klement, supra note 14, at 10.

using the shared ex ante preference for minimized litigation costs to prevent ex post defection and escalation of resource investment.[93]

Parties are also contracting to modify the decision-making process during motion practice and trial by, for instance, waiving the right to jury trial,[94] modifying the rules of discovery,[95] and shifting the burden of proof in either direction.[96] While class-action waiver provisions commonly appeared in consumer arbitration agreements prior to *Stolt-Nielsen*,[97] class-action waivers have almost never been employed in litigation.[98] Finally, parties are also attempting to contract to modify appellate rights.[99]

In addition to indirectly manipulating the cost and expected judgment in litigation, parties are directly modifying these variables through remedies provisions. One class of provisions limits remedies, as with damages caps, waivers, or clauses limiting plain-

[93] Cf. Hay, supra note 44, at 1811–12; Steven Seidenberg, International Arbitration Loses Its Grip: Are U.S. Lawyers to Blame?, 96 A.B.A. J. 50, 51 (2010) (citing survey results showing that in 2006 only eleven percent of in-house counsel preferred litigation over arbitration for international disputes but by 2008 the percentage rose to forty-one percent because of increasing discovery and extended motion practice mirroring American litigation). While evidentiary shifts may asymmetrically shift the facts presented, they do not necessarily do so. See Edward Brunet et al., Arbitration Law in America: A Critical Assessment 131 (2006).

[94] See infra Subsection I.B.2.b.

[95] Kapeliuk & Klement, supra note 14, at 10; Noyes, supra note 2, at 595–612; Taylor & Cliffe, supra note 13, at 1086.

[96] Taylor & Cliffe, supra note 13, at 1086. While this shifting is particularly useful with respect to contractual duties, it may also be used to adjust the burden upon the parties in enforcing statutory rights. Absent limitations on private ordering, a party could, for example, contract around the burden-shifting framework of employment discrimination claims or require an express statement of discriminatory intent before a guilty verdict could be returned. Such modifications could fundamentally alter the statutory protections provided by Title VII.

[97] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).

[98] See 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, 884–86 (2008) (finding that eighty percent of consumer contracts with arbitration provisions included a class-action waiver while no consumer contract subject to litigation included such a term).

[99] See, e.g., Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 584 (2008); Kapeliuk & Klement, supra note 14, at 12.

tiffs to declaratory or injunctive relief.[100] A second class of provisions adjusts the conditions surrounding injunctive relief by, for example, modifying the obligation to post a bond or consenting to the issuance of a preliminary injunction.[101] A third class of provisions modifies the default rule regarding attorneys' fees, increasing the stakes of litigation by, for example, adopting the English rule granting fees and costs to the prevailing party or creating an asymmetric arrangement allowing only one party to recover fees if it prevails.[102]

Careful drafting in light of anticipated liability risks, preferred enforcement levels, and cost-to-accuracy ratio or risk profile, as well as the degree to which the term will serve these goals, has generated substantial variation in the use of particular provisions across contracts.[103] Two key observations arise. First, contracts scholars have long debated the value of permitting parties to customize liability; for example, contracting to shift from unlimited to limited liability for low-valuation buyers in exchange for pricing discounts or other concessions and simultaneously permitting high-valuation buyers to contract for increased levels of precaution at higher prices.[104] The rise of unbundled procedure extends this principle to the often-correlated relationship between accuracy and cost. Consider, for example, the right to appeal. For low-value

[100] See Mann & Siebeneicher, supra note 7, at 999 (reporting that twenty-two percent of contracts surveyed placed a cap on damages); see also Kapeliuk & Klement, supra note 14, at 8.

[101] See Kapeliuk & Klement, supra note 14, at 9 (discussing asymmetric injunctive provisions).

[102] Id. at 8. One particularly egregious provision, provided in a medical consent form, required the patient to pay the doctor's hourly fee for each hour he spent preparing to testify and at the arbitration (even if he was found guilty of malpractice) if the patient received less than half of her original damages request—thereby increasing the potential cost of pursuing her claim and providing a strong incentive to minimize the damages sought to reduce this risk of payout. See Sosa v. Paulos, 924 P.2d 357, 359–60 (Utah 1996).

[103] For example, while arbitration provisions are common in construction contracts because of the ability to select an expert as the decisionmaker or in international disputes where the parties prefer the enforceability of the New York Convention to the less-certain enforcement profile of litigation awards, corporations generally prefer litigation to arbitration.

[104] See, e.g., Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87, 101–02 (1989); Lucian Arye Bebchuk & Steven Shavell, Reconsidering Contractual Liability and the Incentive to Reveal Information, 51 Stan. L. Rev. 1615, 1620–23 (1999).

claims, parties may prefer to contract ex ante to remove the right to appeal and bear the risk of an erroneous verdict, as essentially occurs in the default form of arbitration.[105] For high-value claims, however, parties are unwilling to accept even a low risk of catastrophic error and thus have shifted to litigation to ensure robust appellate rights.[106] This tradeoff can also be used to manipulate asymmetries: for instance, where the defendant has a high risk tolerance due to an ability to aggregate losses across cases and the plaintiff cannot, needing the damages to cover medical expenses or lost wages. The defendant is thus able to benefit from the reduction in litigation costs but may choose to use this provision to extract a blackmail settlement from a plaintiff willing to take a lower settlement to avoid a loss at trial. As a result, the decreased delta between compliance states due to both the heightened risk of error and the probability of extracting a blackmail settlement may decrease deterrence. To the extent that the plaintiff does not anticipate the risk asymmetry, this may also facilitate market failure.

Second, in each contract, terms may be used as a method for modifying party behavior ex ante rather than simply as a means of enhancing the efficiency or accuracy of truth-finding.[107] Again, asymmetries may be used to substantially affect outcome.[108] Consider an agreement to freely provide certain information to the plaintiff without the need for discovery requests in exchange for a waiver of broad discovery. While such a provision facially aids the plaintiff, it can functionally bar claims that require aggregate data—particularly if combined with a class-action bar. For example, disparate-impact discrimination claims, toxic-tort claims, and product-liability claims for pharmaceutical as well as consumer products may turn upon the ability to demonstrate that other individuals suffered the same harm. Absent special factors such as geographic proximity, identifiability of injured parties, social connect-

[105] See Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 584 (2008). Before *Hall Street*, provisions modifying the standard of review in arbitration were common enough that eight circuits had confronted the issue, including the Ninth Circuit, which reviewed the issue en banc. Id. at 583 n.5 (describing circuit split).

[106] See Samuel Issacharoff & Erin F. Delaney, Credit Card Accountability, 73 U. Chi. L. Rev. 157, 179 (2006).

[107] See Sanchirico, supra note 49, at 276–78.

[108] See Richard C. Reuben, Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice, 47 UCLA L. Rev. 949, 954 (2000).

edness, or exceedingly high damages, parties are unlikely to obtain the high levels of cooperation from other victims necessary to substitute for discovery. If low participation rates prevail, the small number of claims may result in a (potentially mistaken) belief that the harms suffered are within the normal baseline levels projected for society at large and thus are not evidence of a particular harm caused by the defendant's operations. Meaningful recovery would thus require discovery available only through a public enforcement action in which the discovery limit would be inapplicable[109]—underscoring the possibility that procedural private ordering will shift the burden of enforcement to public agencies.

Substantial room for innovation remains. For example, although parties commonly contract for fee-shifting provisions to disincentivize nuisance litigation or defenses, contracts have not yet begun to shift discovery costs even though these costs can be so burdensome to a defendant as to encourage nuisance-value settlements to avoid the costs of data and document preservation.[110] So too, parties could contract in advance for the designation of a joint expert witness whose report would not be challenged by either side in court—not only decreasing direct expert witness costs but providing a strong incentive toward early settlement once the report issues. Nonetheless, parties are frequently unwilling to cede this degree of ex post control over the outcome despite the litigation cost benefit. This presumed preference to pay a litigation cost premium across all cases to preserve the right to appeal an erroneous judgment is mirrored in the class arbitration context, as—notwithstanding the general preference to resolve single-plaintiff employment disputes in arbitration—corporations prefer class litigation to class arbitration because of the magnified risk of an adverse class arbitration award with no meaningful appellate rights.[111]

[109] Cf. EEOC v. Waffle House, 534 U.S. 279, 287–88, 295–97 (2002) (holding that an employee's agreement to arbitrate did not bar public action on his behalf or the pursuit of victim-specific relief but that victim-specific defenses would be valid defenses to a public-enforcement action).

[110] See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558–59 (2007).

[111] For a similar view, see Issacharoff & Delaney, supra note 106, at 179.

b. The Procedural-Contracting Dichotomy

Emerging evidence suggests a strong variation between commercial provisions and form consumer or employment provisions with respect to the frequency of many terms.[112] Given the presence of variation in mutually bargained for commercial terms that reflect a particular weighing of the benefit of the contract term against its cost, I am reticent to embrace the argument advanced by many that the mere existence of disparities is proof of exploitive practices by the drafting corporation.[113] The correlation here may instead reflect mutual assessments that the particular term is unlikely to be relevant or to shift behavior to a degree sufficient to justify the transaction cost, or an inability of the parties to agree upon a pricing term where the term has an asymmetric effect on the parties' anticipated claims or defenses. Where the terms asymmetrically favor one party—as preliminary research suggests certain consumer provisions do[114]—it may reflect a homogeneous market determination as to the optimal term offset by benefits in pricing or other terms. While I resist the conclusion that all procedural terms in consumer and employment contracts are inefficient, neither do I—for the reasons articulated in the next Part—believe the market is universally functioning.

Despite the plethora of highly individualized factors driving the use of a particular term in a particular contract, evidence does exist for a broader generalization: commercial contracts often modify default procedures through downward departures minimizing procedure but simultaneously enhancing liability provisions, shifting

[112] See, e.g., Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, Mandatory Arbitration for Customers but Not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts, 92 Judicature 118 (2008). For example, while more than seventy-five percent of consumer contracts and over ninety percent of employment contracts contain mandatory arbitration provisions, fewer than six percent of commercial agreements provide for arbitration. Id. at 121. Likewise, nearly eighty percent of consumer contracts and over ninety percent of employment contracts include a jury-trial waiver, in contrast with thirty percent of commercial contracts. Id. at 122. Surprisingly, while more than eighty percent of consumer contracts and less than thirty percent of commercial agreements waived class-action rights, none of the employment agreements did so. Id. at 121.

[113] See, e.g., id. at 118 (summarizing the arguments of opponents of mandatory arbitration clauses).

[114] Mann & Siebeneicher, supra note 7, at 999.

the burden toward the defendant.[115] In contrast, consumer and employment provisions typically decrease procedure and either make no modification to the default liability rules or shift liability in favor of the defendant.[116] The most sophisticated agreements go further, tailoring the provisions to diminish rights likely to be exercised by the individual while providing the default rules or enhanced rights with respect to claims the drafting corporation will be likely to raise.[117]

The example of jury-trial waivers suggests that this dichotomy may not reflect optimal variance as between these categories of contracts and may instead reflect market failure as to certain terms.[118] Jury-trial waivers offer some benefits across all types of litigation by decreasing litigation costs[119] and, for defendants, reducing the risk of an extremely large punitive damages award.[120]

[115] See Kapeliuk & Klement, supra note 14, at 7–9; Robert E. Scott, In (Partial) Defense of Strict Liability in Contract, 107 Mich. L. Rev. 1381, 1394–96 (2009) (cataloging direct and indirect procedural methods by which commercial parties routinely contract for strict liability).

[116] See Kapeliuk & Klement, supra note 14, at 7–9; cf. Scott, supra note 115, at 1395–96 (noting that strict liability is largely used between commercially sophisticated parties but assuming that claims for strict liability would have "less force" when applied to unsophisticated parties).

[117] See, e.g., Pony Express Courier Corp. v. Morris, 921 S.W.2d 817, 819 (Tex. App. 1996) (per curiam) ("If employed, I agree that all claims relating to my employment, other than worker's compensation claims or claims arising under a non-compete agreement, shall be settled exclusively by expedited arbitration, without discovery."); see also Eisenberg, Miller & Sherwin, supra note 98, at 888 (discussing one-sided provisions); Reuben, supra note 108, at 954 & n.8 (2000) (discussing explicitly and implicitly one-sided provisions disadvantaging consumers); Elizabeth Thornburg, Designer Trials, 2006 J. Disp. Resol. 181, 181 (2006) (describing the "nightmare" of ex ante jury-trial waivers).

[118] Under existing federal doctrine, jury-trial waivers are broadly enforceable because the waivers do not preclude the bringing of a claim or defense, notwithstanding the apparent substantial effect upon compensation and, likely, deterrence. See Noyes, supra note 2, at 604 n.107.

[119] Christian N. Elloie, Are Pre-Dispute Jury Trial Waivers a Bargain for Employers Over Arbitration? It Depends on the Employee, 76 Def. Couns. J. 91, 96 (2009) (noting that seventy-eight percent of bench trial cases have reached final judgment within two years of filing compared to only fifty-seven percent of jury-trial cases and reporting that bench trials last an average of 1.9 days compared with 4.3 days for jury trials).

[120] Of the fifty-three largest punitive awards between 1985 and 2002—those in excess of $100 million—fifty-two were awarded by juries. Id. at 95. But see Theodore Eisenberg et al., Juries, Judges, and Punitive Damages: An Empirical Study, 87 Cornell L. Rev. 743, 779 (2002) (discussing results showing similar relationship between compensatory and punitive damages awards whether issued by juries or judges).

But preliminary studies suggest that with respect to certain types of claims, including employment discrimination, systematic biases occur between bench and jury trials; for these claims, a jury-trial waiver can reduce projected liability by up to ninety percent.[121] For the corporation, while there is a moderate benefit across all disputes of avoiding the heightened litigation costs of jury trials, the benefit of a waiver from an individual, particularly in the consumer, employment, and securities contexts, is often particularly high. But, if the market is functioning, the ex ante payments for consumer and employee waivers should be equivalent to the individual's pro rata share of the differential in substantive outcome. Alternatively stated, because the relative corporate preference is a reflection not of efficiency gains but instead a reallocation of damages, accurate pricing should diminish this preference. As a result, the corporation should prefer these waivers at similar frequency in individual and commercial contracts. Instead, ninety percent of employment contracts and nearly eighty percent of consumer contracts contain jury-trial waivers, compared with thirty percent of non-consumer/non-employment contracts[122]—suggesting possible market failure with respect to pricing.[123]

As the example of jury-trial waivers illustrates, procedural terms can profoundly affect both the defendant's ex ante projection of gross litigation costs and damages and the plaintiff's net recovery. To the extent that modifications adjust the deterrent value of the substantive law, one might posit that it is important to know whether the adjustment appropriately avoids over-deterrence (due, for example, to uncertainty or strategic ex post decisionmaking by plaintiffs) or instead creates under-deterrence as compared with the legislative aims. This determination would seem to be highly individualized, requiring an attempt to infer the hypothetical intent of a diverse group of legislators with respect to the effect of the

[121] While there is not a significant divergence in outcomes before juries and judges in some employment disputes, discrimination claims yield a 47.6% success rate for jury-trial plaintiffs compared with only 26% in bench trials—nearly doubling the expected liability for the employer. Elloie, supra note 119, at 95. Successful plaintiffs received a median award of $218,000 from juries compared with $40,000 in bench trials. Id. at 96. Thus, the projected liability in a jury trial is $103,768 compared with $10,400 for a bench trial.

[122] Eisenberg, Miller & Sherwin, supra note 112, at 122.

[123] See infra Section II.B.

particular contractual modification given the facts of the particular case. Assuming a disparity arises, it presents the further question of whose interest should prevail where the public and private interests are in conflict. This inquiry in turn implicates the ongoing debate as to whether the quality of consent matters beyond the minimal requirements of contract formation. Given these divergent conditions, how can a system be created that balances these competing interests in a normatively preferred pattern without creating the ex ante uncertainty and ex post investment of resources inherent to subjective determinations? The next Part turns to the threshold examination of the concerns and resulting factors that might reflect our normative enforcement preferences respecting this public-private conflict.

II. A NORMATIVE FRAMEWORK FOR EX ANTE PROCEDURAL CONTRACTS

The existing doctrinal structure places only minimal restrictions upon parties' modification of the litigation process and, more broadly, their use of procedural innovation to adjust substantive outcomes. The question of which of these alterations are normatively desirable raises fundamental questions about the role of private litigation, predominantly derived from the inherent dual public-private role of private rights of action and courts more generally.[124] Civil procedure's central inquiry has long focused upon developing a set of rules providing the optimal balance of cost and accuracy against a background of (private) due process rights.[125] The rise of procedural private ordering inverts the traditional analysis by instead asking to what extent private ordering should be restrained to protect the public interest.

Yet, these questions have remained obscured in both doctrine and scholarship by the dichotomy between commercial parties engaged in sophisticated, value-maximizing bargains and the use of procedural fine print to prevent employees from vindicating their claims or consumers from challenging creditors' alleged balances

[124] Cf. Kerobo v. Sw. Clean Fuels, Corp., 285 F.3d 531 (6th Cir. 2002) (noting that the enforcement of procedural terms "is a matter of contract, not an issue of [civil procedure]").

[125] See Resnik, supra note 13, at 596 & n.4.

due. While scholars frequently draw upon these extremes in commenting on the relative advantages and disadvantages of private ordering, the basis (if any) for viewing procedural terms as more problematic than substantive contract terms remains undertheorized. As a result, the creation of a legal doctrine that can distinguish between these categories in enforcing procedural terms has proven elusive. By carefully explicating the distinctions between bargained-for commercial contracts and form consumer and employment contracts, this Part reveals the sources of the intuitive distinction, allowing development of a more normatively accurate doctrinal structure. This Part then turns to the more fundamental assessment of the public-private tension in procedural private ordering with respect to both procedural and substantive interests.

A. The Procedural-Contracting Dichotomy: An Economic Explanation

The enforcement of form consumer contracts has long divided the world into those who believe market functioning inures to the benefit of the consumer through lower prices obtained through tradeoffs in non-salient terms and those who believe sophisticated corporations exploit information asymmetries and erroneous decisional heuristics. This Part analyzes procedural contracts through an economic lens, concluding that unique features of procedural contracts can heighten the risk of error in form consumer and employment contracts as compared with bargained-for commercial contracts. As a result, as enforcement of procedural terms becomes increasingly certain, one should expect a shift by sophisticated corporations from using substantive terms to using procedural terms. This is not to say all contracts will include exploitive procedural terms. Drafting parties should include procedural terms only where these terms are expected to generate a greater net benefit to the drafter than alternative contract structures, such as a direct substantive waiver, would yield. The rise of procedural contracting thus provides a new, additional mechanism for the subset of sophisticated market actors seeking to exploit consumer mistakes and errors.

1. Commercial Transactions

In the classic commercial contract, parties retain counsel to negotiate non-salient terms and formalize the agreement; critically, the cost of bargaining over the proposed procedural terms is therefore roughly equal as between the parties. Depending upon the degree of complexity of the terms, this bargaining can add to the transaction costs or it can reduce transaction costs by providing additional dimensions for trade-offs, facilitating negotiation. Where parties expect that joint gains can be realized by customized procedure—for example, by reducing litigation costs through streamlined procedures, reducing nuisance claims or defenses, or improving accuracy of the liability determination—they should modify the default procedures.[126] The particular procedural provisions agreed upon should reflect the parties' differing assumptions about the likelihood and type of dispute that will arise, expectations about the probable course of discovery and strategic maneuvering within litigation, and resulting preference for trading these preferred procedural terms against substantive terms during the course of the litigation.

Despite a resulting tendency toward framing restrictions upon private ordering of procedure in relation to this commercial/non-commercial divide,[127] a careful analysis of bargaining conditions suggests this is a useful but imprecise heuristic. In many corporate transactions, one party presents form terms; these may be integrated terms presented on a take-it-or-leave-it basis or simply a starting point for negotiations.[128] The presentation of form terms

[126] For an economic analysis in the context of arbitration provisions, see Steven Shavell, Alternative Dispute Resolution: An Economic Analysis, 24 J. Legal Stud. 1, 2–3 (1995).

[127] See, e.g., Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 4 (2009) (proposing to render pre-dispute arbitration agreements unenforceable against consumers, employees, franchisees, and civil-rights plaintiffs).

[128] See Russell Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 U. Chi. L. Rev. 1203, 1203 (2003) (noting that the use of form terms "has increased in the intervening decades" such that "nearly all commercial and consumer sales contracts are form driven"); W. David Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv. L. Rev. 529, 529 (1971) (estimating that more than ninety-nine percent of contracts are based upon form terms).

does not itself create the potential for market failure;[129] rather, the threat in corporate transactions is largely limited to those circumstances in which one party is effectively unable to bargain for terms and must accept the deal on a take-it-or-leave-it basis. Uniformity of terms presents large corporations with scale efficiencies, while individualized terms add costs not only in drafting but also in enforcement. Although the bargain is for procedural terms rather than price, the bargaining dynamic and competitive response parallel the antitrust model of price-takers and price-setters: while these companies may have in-house counsel able to review the provision at almost no cost and conclude that the term is unfavorable, the price (or procedural term) setter may insist that the term is presented on a take-it-or-leave-it basis, leaving the company to accept or reject the market term. Where the entire market has settled on a sub-optimal term, the company may thus knowingly agree to the term because the benefits of the contract are superior to the alternative of not obtaining the good from any source. The next Section considers the circumstances that may cause markets to settle upon sub-optimal terms.

2. Form Contracts with Individuals

In *Carnival Cruise Lines v. Shute*, the Supreme Court abandoned the traditionally assumed distinction between the use of procedural terms in commercially bargained contracts and form agreements entered into by consumers on a theory of market functioning.[130] Many have chastised this transition, arguing that consumers and employees view themselves as unable to bargain and thus agree to whatever provisions are included in the contract. This critique is no different than that offered in the voluminous literature debating the merits of form contracts with individuals more generally: the same features that would impair the procedural term would impair a substantive waiver. Indeed, to the extent individuals fail to read certain types of contracts, corporations may prefer a direct sub-

[129] Although the party initially presenting the terms may benefit from some scale efficiencies, the opposing party may overcome any substantial differential in information costs relating to the procedural terms by presenting its own counterproposal on procedural terms. Each party will then be required to bear the costs of assessing and bargaining over each procedural term of both proposals.

[130] 499 U.S. 585, 585–86 (1991).

stantive waiver of rights to indirectly limiting the rights through procedural terms.

My goal is not to recapitulate this literature but instead to explore the unique consequences of applying its key tenets to procedural terms, asking whether the case for enforcement is stronger or weaker as contrasted with form substantive terms. I focus upon market functioning not because it is the only mechanism for weighing the validity of procedural terms but because I seek to engage the Court on the terms it has selected.[131] This analysis identifies the key factors that increase information asymmetries and bargaining power imbalances in form procedural contracts, making the case for enforcement weaker than the standard case for substantive terms. More broadly, I argue that with this understanding, the natural functioning of markets is able to explain the dichotomy in the use of procedural terms described in the preceding Part—as well as the failure of the market to self-correct.

Non-Salience of Form Procedural Terms: Asymmetries and Rational Risk Taking. The prototypical individual contract is based upon boilerplate terms even if terms like price or election of certain features remain open to bargaining or customization.[132] The drafting party thus makes a once-for-all investment in the information costs related to analyzing competing procedural terms, while the non-drafting party typically bears the full information costs as transaction costs of the single transaction. Drafting parties may further increase search and opportunity costs by withholding these terms until the sale has been completed[133]—a strategy the Supreme Court permitted in *Carnival Cruise Lines*.[134] Moreover, employment and consumer contracts increasingly permit unilateral modification of terms after formation, which can multiply these infor-

[131] For this purpose, I temporarily set aside questions of deontological or distributive justice before returning to them in Sections II.B and C.

[132] See Korobkin, supra note 128, at 1203–04.

[133] See Florencia Marotta-Wurgler, Are "Pay Now, Terms Later" Contracts Worse for Buyers? Evidence from Software License Agreements, 38 J. Legal Stud. 309, 333 (2009) (recognizing the frequency of post-sale terms but concluding that pro-seller bias is not stronger than it is for terms disclosed in advance of sale).

[134] See *Carnival Cruise Lines*, 499 U.S. at 585.

mation costs.[135] Non-drafting parties therefore rationally opt not to bear these information costs where the costs exceed the expected variability between potential contract terms.[136] While the non-drafting consumer may not have information related to the expected liability, if the projected liability exceeded the product's price, the company would be insolvent. Thus, the variation possible, even where the term reduces a claim from maximum liability to zero liability, should not exceed the purchase price. In an age where an hour of attorneys' fees exceeds the price of many consumer products, consumers rationally elect to bear the risk of not investigating the terms.[137] Because the individual cannot distinguish between the default and proposed terms, procedural terms in form contracts are often non-salient to the recipient.[138] The behavioralist literature adds further support to the claim that procedural terms are frequently non-salient.[139]

[135] See Horton, supra note 11, at 606 (discussing litigation in which AT&T had modified procedural terms governing litigation "so often . . . that even its own lawyers did not know which terms applied").

[136] The consumer's rational decision not to bear the costs of becoming informed about important risks is contrary to the baseline expectation of many scholars that individuals will bear the costs of becoming informed with respect to substantive provisions and then act upon this information. See, e.g., Schwartz & Wilde, supra note 15, at 1391.

[137] Michael I. Meyerson, The Efficient Consumer Form Contract: Law and Economics Meets the Real World, 24 Ga. L. Rev. 583, 585 (1990). Recognizing the powerful effect of non-negotiated form terms, under some states' contract laws "[a]n agreement or any portion thereof is procedurally unconscionable if 'the weaker party is presented the clause and told to "take it or leave it" without the opportunity for meaningful negotiation.'" Pokorny v. Quixtar, Inc., 601 F.3d 987, 996 (9th Cir. 2010) (quoting Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867 (2002)).

[138] See generally Shmuel I. Becher, A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law, 42 U. Mich. J.L. Reform 747, 773–74 (2009) (arguing that consumers cannot distinguish between competing products based on terms they do not understand).

[139] By definition, procedural terms only become relevant if a dispute arises and the parties are unable to amicably resolve the dispute without resort to litigation. Yet heuristic substitutes create a systematic bias with respect to the estimated likelihood of harm, with individuals typically displaying risk-seeking tendencies for low-cost but high-probability losses—even though they are risk averse with respect to low-probability but high-cost losses. See Dan M. Kahan, Two Conceptions of Emotion in Risk Regulation, 156 U. Pa. L. Rev. 741, 746–47, 753–54 (2008) (describing the biasing effects of information heuristics generally); Timur Kuran & Cass R. Sunstein, Availability Cascades and Risk Regulation, 51 Stan. L. Rev. 683, 715–35 (1999) (describing circular reinforcement between public and private risk judgments, risk preferences, and risk policy preferences); Sarah Lichtenstein et al., Judged Frequency of Lethal

Racing to the Bottom/Creating a Market for Lemons. The deterrent value of a law depends in part upon the delta in expected costs as between the compliance and non-compliance states. But in the tort and class-action contexts, litigation costs form a substantial portion of the monies paid by defendants.[140] Using the $2 payout by defendants to $1 received by plaintiff ratio of tort liability as an example, in a bilateral commercial negotiation a shift to ex ante compensation permits full aggregate compensation, while generating a 50% aggregate cost savings for division between the parties. In regimes in which compensation is sufficient to create optimal deterrence, the over-deterrence resulting from the incorporation of defense costs may thus be eliminated and the litigation costs can be deployed toward alternative uses. In regimes that already possess optimal deterrence, however, diminished litigation costs may result in suboptimal deterrence and inefficient risk taking.

Where the procedural terms are non-salient boilerplate, the rational drafting party should impose the term most favorable to itself, shifting the gains to salient terms (or profits or executive compensation, depending upon market dynamics).[141] Other

Events, 4 J. Experimental Psychol. 551, 551 (1978) (reporting the systematic overestimation of the frequency of death from unlikely occurrences while underestimating the frequency of death from more common events).

With respect to many types of claims, the "rose-colored glasses" phenomenon—a prospective subset of the self-serving bias phenomenon—makes an individual susceptible to appraising his own abilities as superior to those of the average person, causing a misperception that the individual's own skills and talents make his odds of suffering misfortune far less than the general statistical probability of harm. See generally Susan T. Fiske & Shelley E. Taylor, Social Cognition 215 (2d ed. 1991); Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 Cal. L. Rev. 1051, 1091 (2000).

As a result, as to most claims, individuals will not view procedure as a salient term because the prerequisite harm is not itself salient. For discussion of the behavioralist critique in the context of consumer arbitration agreements, see Jean R. Sternlight & Elizabeth J. Jensen, Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?, 67 Law & Contemp. Probs. 75, 96–99 (2004).

[140] Only forty-six percent of direct costs in the tort system reach the victims, with the remaining fifty-four percent being lost to transaction costs such as expert-witness and attorneys' fees. Congressional Budget Office, The Economics of U.S. Tort Liability: A Primer 20 (2003).

[141] For a discussion of the prerequisites to market functioning and perfect competition in the analogous consumer arbitration context, see Sternlight & Jensen, supra note 139, at 93–94.

manufacturers should also adopt not only the minimal procedural protections but also decrease expenditures on prevention to remain competitive—absent a concurrent increase in public enforcement actions—creating a race to the bottom, as the greater the reduction in procedural terms the greater the competitive benefit. The manufacturers that derive the greatest savings from the provision are those that have the highest liability and litigation costs in the default system, creating a traditional lemons problem. Non-salient procedural terms thus risk eviscerating the deterrent value of private enforcement actions, absent other systemic modifications.

In the substantive term context, the manufacturer may nevertheless provide the consumer's preferred term to capture the subset of informed consumers, allowing the rest to free ride.[142] In the procedural context, however, reverse signaling occurs: the cost of litigation can often exceed by orders of magnitude the price of the good purchased, and thus the company would prefer not to sell to the subset of individuals likely to file suit if they could be identified in advance. Where the projected costs fit this pattern, the corporation may prefer to sell to those consumers that do not view procedural rights as valuable but prefer not to sell to those keenly concerned with litigation terms, as this signals a higher than average likelihood of injury or self-assessed litigiousness. To the extent that public accounts of injury and litigation can harm corporate reputation, the company may further prefer to reduce sales to these individuals.

Barriers to Effective Consumer Education. To the extent that information costs are a substantial impediment to consumer decisionmaking, education by consumer groups is typically expected to occur with respect to substantive terms. As a threshold matter, while education can occur with simple messages like "more megapixels in a camera is good," complex product dimensions are

[142] See Schwartz & Wilde, supra note 15, at 1450; Alan Schwartz & Louis L. Wilde, Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis, 127 U. Pa. L. Rev. 630, 637–38 (1979). In limited, exceptional cases, the corporation can discriminate, offering the preferred term to only the informed consumers and the standard term to all others. See Oren Bar-Gill & Elizabeth Warren, Making Credit Safer, 157 U. Pa. L. Rev. 1, 21–22 (2008) (offering examples from the consumer-credit market of sellers able to tailor products to each customer and thereby prevent the informed minority from driving the market).

frequently not susceptible to this form of aggregate education.[143] Procedure is particularly complex because it requires a comparison of the particular term selected with the baseline procedural regimes that would have been available to this particular consumer. Aggregation can therefore only occur among consumers in a particular jurisdiction as the default terms available will vary from state to state. Moreover, the enforceability of these modified terms will also vary by state because state courts and legislatures have begun to develop their own standards for when public policy permits or precludes the enforcement of a term. As a result of this complexity, although market interactions can inform a consumer's future purchasing decisions—whether through direct experiences or anecdotal reports[144]—the effect of procedural terms appears to be too attenuated to be an effective educator.

Competitors might fill this gap by proclaiming superior terms across all jurisdictions. However, such a campaign would inherently require indirectly advertising the possibility of harm from a product. Indeed, it is difficult to imagine Toyota running an advertisement proclaiming that its brake problems have been repaired, but if they fail, the consumer's heirs will have a better statute of limitations or jury pool than Honda provides in a wrongful-death claim. Rather, advertising typically focuses on the threshold issue of quality of the product or the strength of warranties, which diminish the perceived likelihood of harm, rather than on comparative advantages in litigation as between competing products.

Not only is it uniquely difficult to educate consumers about procedural harms, but corporations may use cognitive biases and information asymmetries to manipulate consumer perceptions about procedural terms.[145] Moreover, because the term is contained in

[143] See Bar-Gill & Warren, supra note 142, at 20 (describing the Citi universal default education initiative and its failure).

[144] See Samuel Issacharoff, Disclosure, Agents and Consumer Protection 3–4 (Law & Econ. Research Paper Series, Working Paper No. 10-33, 2010), available at http://ssrn.com/abstract=1640624 (discussing the role of customer-review websites in consumer education).

[145] For a general discussion of the use of individual behavioral biases to the corporation's advantage in the context of substantive terms, see Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: The Problem of Market Manipulation, 74 N.Y.U. L. Rev. 630, 643–93 (1999). For arguments that this shortfall may require government intervention, see Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: Some Evidence of Market Manipulation, 112 Harv. L. Rev. 1420, 1425

boilerplate, even if education is successful, it will take only hours for competitors to change terms in their online contracts (or perhaps weeks for paper contracts). This reality dramatically limits the potential return on the substantial costs of an educational initiative.[146]

Conclusion. The natural functioning of markets explains not only the dichotomy in the types of procedural private ordering provisions and outcomes in a way consonant with the intuitions of scholars and the courts as to which contracts are normatively preferred, but also the failure of the market to self-correct. First, in contrast to a substantive waiver of rights, the effect of procedural waivers is not facially evident—as exemplified by expecting consumers to know that agreeing to arbitration implicitly waives one's class-action rights and in turn makes small-value claims functionally difficult to pursue.[147] Second, in contrast to the traditional assumption of educated consumers, the costs of information are uniquely high with respect to legal terms, such that a rational consumer will not investigate the term. Moreover, corporations can use unilateral amendment provisions to multiply this cost, a feature common to only limited areas (like credit terms) and uncommon to traditional products (like car purchases). Third, customer-review websites such as Yelp and published ratings from the likes of C-Net and Consumer Reports are unlikely to take hold as the balance of competing sets of rights is highly geographically specific, creating high costs but low spreading. Fourth, because consumers are resultantly rationally uninformed, not only should corporations create waiver provisions for low-value harms but they should select forums and terms that consumers are likely to mistake as neutral or even wrongly perceive as beneficial to the consumer with respect to high-value claims. Fifth and finally, in contrast to the traditional model in which uninformed consumers can free ride upon the benefits obtained by informed consumers, corporations will affirmatively prefer to use the disfavored term as a mechanism for screening out informed consumers in many circumstances.

(1999) [hereinafter Hanson & Kysar, Evidence]; Christine Jolls, Cass R. Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471, 1473 (1998).

[146] Hanson & Kysar, Evidence, supra note 145, at 1425.

[147] See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1776 (2010).

To the extent that the dichotomy is derived from unique information cost asymmetries and erroneous decisionmaking heuristics that are exacerbated for procedural waivers beyond the ordinary asymmetries relating to warranties or substantive waivers, a system of private ordering should seek to correct this imbalance or deny enforcement. Yet, since *Carnival Cruise Lines*,[148] federal law has not imposed a heightened standard upon these contracts but has instead applied the same fundamental fairness and reasonableness inquiries to all claims—over-enforcing those claims subject to unique information cost asymmetries, while under-enforcing commercial bargains not subject to asymmetric costs.

Even with perfect information, certain consumers may be particularly willing to exchange their rights for short-term, immediate compensation. These tradeoffs are likely to be made by the weakest and most disempowered individuals, who are the most willing to accept inferior terms to shift resources toward other, more valuable necessities.[149] This observation implicates the broader normative purposes of civil procedure, forcing us to consider whether an individual should have the right to trade access to the court system for a superior pricing term or whether access to courts is an inalienable right in our system—the questions addressed by the remainder of this Part.

B. Judicial Integrity, Legitimacy, and the Sine Qua Non of Procedure

Traditionally, civil procedure has been concerned with ascertaining the optimal balance of cost and efficiency while also ensuring that the public structure has safeguards sufficient to protect the individual.[150] Procedural due process doctrine represents the apo-

[148] Carnival Cruise Lines v. Shute, 499 U.S. 585, 591–95 (1991).

[149] See Angela Littwin, Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers, 86 Tex. L. Rev. 451, 464–75 (2008).

[150] See, e.g., Mathews v. Eldridge, 424 U.S. 319, 347–48 (1976); Goldberg v. Kelly, 397 U.S. 254, 266 (1970); cf. Robert G. Bone, Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness, 83 B.U. L. Rev. 485, 487–93 (2003) (describing and analyzing the "ex ante" approach to procedural fairness, in which procedure is viewed through the lens of what parties would contract for ex ante).

theosis of this trend,[151] undergirded primarily by two normative values: the public interest in adversarial presentation as necessary to preserve the judicial function[152] and the private interest in meaningful participation as the sine qua non of judicial legitimacy.[153] While the structure of the rules of civil procedure ensured both of these values, the individual retained the right to waive the private interest in due process by waiving his right to participate ex post.[154]

The rise of a market-based system of procedure inverts this inquiry. Under such a system, no longer is the primary question how the public rules structure should be designed to protect the private individual's interest from public intrusion; instead, the question is what restrictions upon party-driven procedure must be incorporated to protect the public interest.

The quintessence of the inversion lies in the definition of the irreducible core of the public interest in procedure. As a threshold matter, it is self-evident that contractual provisions can neither provide for procedures that are forbidden by the Constitution or statute nor extend the judicial power beyond its existing authority.[155] For example, parties could not contract for three-judge district court tribunals, for a particular district-court judge to hear the case or to waive the amount-in-controversy requirement of diversity jurisdiction—as these would directly conflict with existing

[151] While the original American view of private ordering as limited by due process has dominated the conception of these limitations, the modern ability of parties to knowingly and voluntarily waive due process rights reduces the effectiveness of a due-process-based restriction on contractual procedure. See, e.g., United States v. Raddatz, 447 U.S. 667, 698 (1980) (Marshall, J., dissenting) (arguing that "flip[ping] a coin" as a mechanism for judicial decisionmaking "is forbidden by the requirements of fair adjudicative procedure that the Due Process Clause reflects").

[152] See, e.g., Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 382 (1978).

[153] See, e.g., Lawrence B. Solum, Procedural Justice, 78 S. Cal. L. Rev. 181, 273–312 (2004).

[154] See John Leubsdorf, Constitutional Civil Procedure, 63 Tex. L. Rev. 579, 580 (1984) (arguing for broader constitutional limitations on civil procedure); Solum, supra note 153, at 275 ("Only an option or right is required [to satisfy the normative goal of meaningful participation] because participation may be voluntarily forsworn.").

[155] See generally U.S. Const. art. III, §§ 1–2; Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." (quoting United States v. Cotton, 535 U.S. 625, 630 (2002))).

mandatory limitations upon the form and function of the courts. But beyond conflicts with mandatory rules deciding the identity and composition of the judicial body, what restrictions upon procedural contracting are necessary to protect judicial integrity and functioning?

Although the procedural private ordering debate is nascent, the fault lines are already clear as the questions are far broader than the enforceability of ex ante procedural contracts. But to the extent that the question is narrowly presented as in what circumstances public concerns override the private interest in modifying a particular procedure, the well-developed existing restrictions upon parties' ex post revision of procedure provide a logical starting point. The existing tripartite structure of limitations upon ex post private ordering—derived from the plain language of the Federal Rules of Civil Procedure, constitutional limitations, local rules, and judicial standing orders[156]—categorizes procedural modifications made through ex post stipulation as either immediately enforceable,[157] enforceable with court approval,[158] or void *ab initio*.[159] Within this structure, the courts have already weighed almost every procedural right not expressly placed in one of these categories, balancing the competing public and private rights in the context of ex

[156] Notwithstanding the well-developed body of district-court rulings on the waivability of individual procedures, scholarly debate continues as to whether the rules are presumptively mandatory or default procedures. Compare Stephen C. Yeazell, Civil Procedure 138 (7th ed. 2008) ("One of the hallmarks of U.S. law is the extent to which the rules of procedure are 'default' rules."), with Taylor & Cliffe, supra note 13, at 1103 (arguing that the Rules are mandatory).

[157] See, e.g., Fed. R. Civ. P. 4(d) (waiver of notice); Fed. R. Civ. P. 15(a)(2) (consent to late amendment); Fed. R. Civ. P. 29 (stipulation of deposition and discovery procedures); Fed. R. Civ. P. 30 (stipulations regarding deposition testimony); Fed. R. Civ. P. 33(a)(1) (stipulation of the number of interrogatories); Fed. R. Civ. P. 38(d) (jury trial waiver).

[158] Typically, this designation reflects concerns with the court's administration of its cases, public externalities, or in the case of class actions, the heightened protection provided to absent class members. See, e.g., Fed. R. Civ. P. 23(e) (settlement of class action); Fed. R. Civ. P. 29(b) (discovery extensions that modify court deadlines); Fed. R. Civ. P. 30(a)(2)(B) (deposition of incarcerated deponent).

[159] See, e.g., Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988) ("Rule 52 is . . . as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions."); Smith v. Gulf Oil Co., 995 F.2d 638, 645–46 (6th Cir. 1993) (stating that the mandatory language of Rule 47's jury composition requirement cannot be overcome by court order but finding harmless error).

post stipulations made during the litigation process. By their essential nature, these individualized determinations reflect the particular competing interests with respect to the term at issue in a way that a per se rule broadly applicable across all procedural terms cannot.

From this default assumption of symmetry between ex ante and ex post procedural contracts, arguments can be made for deviation in both directions. On the one hand, one might argue for stronger public control of ex ante contracts to avoid evisceration of the public purposes and aims embodied by the rules of procedure. On the other hand, one might argue for lesser controls on ex ante contracts, either from the view that disputes are inherently private and thus that parties should have broad control over the mechanisms of dispute resolution or as a method of enhancing private ordering of law generally.

The assumption of the first perspective, which I term "ex ante exceptionalism," is that engrafting the litigation system's restrictions applicable to ex post procedural contracts would fail to obtain the desired normative outcomes with respect to ex ante contracts. Ex ante exceptionalism has a powerful intuitive appeal. Indeed, it is for this reason that some states invalidate ex ante jury-trial waivers[160] while allowing one to waive his rights ex post not only affirmatively but by merely failing to affirmatively demand a jury.[161] But what distinguishes the ex post and ex ante settings? The effect on the judicial proceeding of a pro se litigant is constant whether the individual waives representation through a pre-dispute waiver, post-dispute stipulation, or simply decides not to retain counsel.[162] Thus, we cannot justify a prohibition upon ex ante procedural contracting on the basis of the imposition placed upon the judiciary, since our judicial system already countenances these modifications in the ex post context. Instead, the overriding concern presented by ex ante procedural contracting is that the individual may not zealously represent his own interests ex ante, making concessions that he would not make ex post—whether due to cognitive biases, a

[160] See Landis, supra note 42, at 691–92 (recognizing enforcement in all federal circuits).

[161] Fed. R. Civ. P. 38(d).

[162] See Fuller, supra note 152, at 383 (using pro se litigation as an example of intrusion upon the judicial role).

lack of understanding about the legal effect of his decision, or the substantial shift in valuation that occurs when the probability of harm and litigation changes from a fractional percentage to a certainty.[163] Yet these are the concerns of market failure, not the concerns of judicial integrity.

Once these concerns are bifurcated, having permitted party autonomy ex post, the execution of identical waivers or modifications ex ante should be of little concern between sophisticated commercial actors—underscoring that the concern is a manifestation of perceived market failure and paternalism rather than of the functioning of the judiciary. To be sure, market failure may be so severe that it undermines the individual's conception of the legitimacy of the judiciary, but this legitimization-loss is a byproduct of the market failure rather than a direct concern of judicial integrity. Thus, by regulating these concerns as ones of market failure, the system can more precisely target the particular circumstances of market failure and avoid under-enforcing bargains made in functioning markets that are not a threat to judicial integrity.

To test this assertion, consider two challenges frequently offered to procedural private ordering. First, parties should not have the opportunity to create their own procedural rules in a publicly provided litigation system; rather, they should obey the rules placed before them or opt out into arbitration. The two subsidiary concerns of the added cost related to "mini-codes of civil procedure"[164] and the loss of meaningful precedent[165] are oft-cited examples. To the extent that these provisions are permitted ex post, the system has already determined that these specific provisions are harmful neither to the judge's ability to adjudicate the case in an efficient fashion nor to the establishment of meaningful precedent. One might argue that over time ex ante stipulations may be more frequent and thus provisions that are currently de minimis in their effect could harm the judicial system in the aggregate. Even granting

[163] See, e.g., Wright et al., supra note 78, at 52 (noting that certain ex ante terms "are likely to be found only when there is inequality of bargaining power, and are hardly an appropriate means for . . . serv[ing] the public interest").

[164] Resnik, supra note 13, at 597.

[165] See David Rosenberg, Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases, 115 Harv. L. Rev. 831, 852 (2002) (discussing the judicial efficiency of reliance upon precedent).

the accuracy of the underlying quantitative assumption, this argument does not make a functional distinction between ex ante and ex post contracts; rather, this critique simply advocates more careful consideration of whether additional procedural stipulations should be subject to court approval.

Second, procedural private ordering risks imposition of an incorrect ruling on third parties who did not consent to the modifications.[166] This problem is not unique to procedure. Parties suboptimally invest with respect to disputes more broadly, with procedure becoming just one facet of this under-investment—along with under-investment in fact development, motion practice, and other aspects of the litigation process. To the extent that the rules governing preclusion, intervention, and real parties in interest do not supply adequate protections, the problem is not one unique to procedural private ordering; rather, procedural under-investment is simply one manifestation of a broader problem. The better solution is to increase these protections with respect to both procedural and substantive investments rather than to modify procedure alone. Indeed, generating substantial third-party protections for procedure in isolation—such as voiding any ex ante procedural contract if a non-party to the contract is involved in the litigation—would create its own incentives for abuse by encouraging sham plaintiffs or defendants in a fashion akin to the wrangling prompted by complete diversity requirements.

Converse to the ex ante exceptionalist approach, some might argue that ex ante contracts should be permitted even as to matters that are not permitted ex post, as ex ante the parties retain the option to contract with another supplier or buyer, whereas ex post the parties always possess a bilateral situational monopoly. Moreover, ex post certainty of outcome may further divorce the individual's private interest from that of the collective, as contrasted with the ex ante baseline. Consider the example of confidentiality agreements, which have been cited as an example of ex post agreements in violation of the public interest.[167] In the midst of settlement, the plaintiff may have some moral or vindication interest in public disclosure, but this interest is unlikely to price the term properly from

[166] See Issacharoff, supra note 25, at 186; Resnik, supra note 13, at 599.
[167] See Resnick, supra note 13, at 650–58.

a deterrence perspective as the already-harmed plaintiff has no direct personal stake in the signaling value of the information. In contrast, ex ante each individual possesses an interest in disclosure that will, in the aggregate, more closely approximate the defendant's stakes. While this example seems to lend support to a more permissive standard for ex ante contracting, a review of the Federal Rules of Civil Procedure reveals this example as an anomaly. Most ex post restrictions upon private ordering do not reflect this concern with power imbalances or market failure but instead insulate the court's internal housekeeping authority—a public interest that would be harmed to the same extent ex ante or ex post.[168]

The existing restrictions upon ex post private ordering represent the combined wisdom of the legislature and courts as to the limitations necessary to ensure judicial integrity with respect to both the individual and third parties. The discomfort with ex ante procedural contracting is not that the term's effect upon the proceeding is qualitatively different if entered into ex ante but that pre-dispute the parties may lack the information to make informed judgments about the litigation process. In exceptional circumstances, this pattern is inverted with ex ante uncertainty generating superior results as contrasted with the ex post settlement market. Both sets of concerns overlap with those of the market to the extent that situational monopolies, cognitive biases, and information-cost asymmetries deprive the individual of meaningful opportunity to consider the provision and determine whether to accept it. But, if these asymmetries can be corrected, then a default rule of symmetry would reduce litigation costs through the incorporation of substantial existing precedent while simultaneously providing a baseline rule with a high degree of accuracy. Moreover, this rule would facilitate alteration by the rules committee or legislature as individual procedures are identified as warranting a greater or lesser degree of modification ex ante or as best practices change and evolve.

C. The Public Interest in Private Rights of Action

Despite the potential tension inherent to the duality of private rights of action as simultaneously public and private mechanisms for justice, these roles were traditionally consonant. The public in-

[168] See supra text accompanying notes 156–159.

terest in deterrence suffered only minimal intrusion from allowing individuals to retain absolute ex post control of their claims with respect to litigation strategy and settlement because the deterrent effect of a law is an ex ante calculation based upon the likely comparative effects of compliance and non-compliance.[169] The procedural rules comport with this understanding, presumptively permitting plaintiffs broad control over the prosecution of their private rights of action subject to limited exceptions.[170]

The existing procedural private ordering doctrine extends this control to ex ante contracts, enforcing procedural modifications across all manner of civil claims unless the challenging party can conclusively demonstrate that the provision prevents vindication of her rights. Mere risks of preclusion or impairments must be borne—even where there is a substantial effect on the viability or existence of the underlying substantive claim[171]—unless there is a direct conflict with the statutory language as narrowly construed.[172] Yet unlike most ex post procedural contracts, permitting ex ante modification allows parties to affect deterrence by affirmatively changing the expected average outcomes in the compliance and non-compliance states at the time of performance.[173] The most sophisticated procedural contracts are able to sever the tie between compensation and deterrence interests, thus creating a choice for

[169] For a discussion of the relative deterrence effects of public and private enforcement regimes, see Amanda M. Rose, Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5, 108 Colum. L. Rev. 1301, 1349–62 (2008).

[170] Indeed, the most frequent outcome in litigation is settlement, in which the parties waive all remaining process. See Herbert M. Kritzer, Adjudication to Settlement: Shading in the Gray, 70 Judicature 161, 163 (1986) (reporting that sixty-three percent of cases are settled, seven percent are tried, and the remainder are dismissed, arbitrated, or resolved by motion); Stephen C. Yeazell, The Misunderstood Consequences of Modern Civil Process, 1994 Wis. L. Rev. 631, 638 (1994) (indicating that the percentage of cases settled more than doubled between 1940 and 1990).

[171] See, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 540 (1995); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 637 & n.19 (1985).

[172] See, e.g., Carnival Cruise Lines v. Shute, 499 U.S. 585, 595–96 (1991).

[173] There is, of course, no reason that compensation and deterrence need to be intertwined, as David Rosenberg has repeatedly argued; rather, this selection was simply one from many possible alternatives. See, e.g., David Rosenberg, Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss, 88 Va. L. Rev. 1871, 1916–19 (2002).

the individual between the public and private interest in litigation.[174] As a result, procedural private ordering not only diminishes the natural consonance between public and private aims but can be used to place these two interests in direct conflict.

It may well be argued that the same dynamic exists with respect to substantive terms: private parties often waive particular substantive rights in pre-litigation agreements. But with respect to substantive waivers, parties are only permitted to waive rights created by default rules; mandatory rights are, by definition, non-waivable. In contrast, in the procedural context, the courts are allowing parties to contract around even non-waivable laws if the waiver is effectuated through a procedural election rather than a direct substantive waiver.[175] In this way, procedural private ordering reshapes the public role of law, making even purportedly non-waivable, mandatory laws a mere default among contracting parties rather than a means of enforcing public policy.

This Section explores the public-private tension, comparing the competing claims of interest and offering a method for determining in which circumstances public or private interests should prevail and, resultantly, when ex ante procedural contracts should be enforceable.

1. Contracting Around Non-Waivable Rights

The Constitution, Congress, and states have deemed certain rights so paramount, whether because of the public values or public interests they implicate, that they are removed entirely from the bargaining table; no waiver or even impairment of these rights is permitted.[176] Since *Erie Railroad Co. v. Tompkins*, the Supreme

[174] See supra Section I.B.

[175] See, e.g., Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1292 (11th Cir. 1998) (enforcing a clause that would force a claim to be brought in London under English law despite "the plain language of the anti-waiver provisions" in federal securities statutes).

[176] These rights that cannot be waived ex ante cover many of the areas considered most fundamental to daily life, including family law, employment law, and labor law, as well as areas of fundamental public economic concern, such as antitrust law, securities law, and tort law, to name a few. Within these spheres, certain areas may be carved out as non-waivable (such as parental rights, slavery, minimum wage, overtime, and safe working conditions) while other areas remain conditionally or freely waivable (such as alimony and overtime for salaried employees).

Court has readily acknowledged that the line between substance and procedure cannot be drawn with any certainty.[177] Yet, if procedural waivers and modifications are permitted where substantive waivers are expressly prohibited, the notoriously indistinct boundary between substance and procedure becomes determinative, prompting a hydraulic pressure toward the use of the less-restricted method; in this case, the use of procedure to accomplish the prohibited substantive ends.

By designating certain rights as non-waivable, the legislature removes alienability from the bundle of rights associated with the private right of action. It may well be that certain designations of inalienability are made in part for demonstrative reasons—as with the prohibition of slavery. But to the extent that these designations are intended to have a behavior-shaping role, it is effectuated through the expected comparative costs of non-compliance. As with a substantive waiver or limit, because a procedural modification is known to both parties prior to performance, it can alter performance and compliance with the statutory obligation. To the extent that the defendant estimates its exposure as less under the terms of the provision than under the baseline no-contract state, the defendant will be willing to bear a lesser degree of cost to avoid liability, and thus deterrence and compliance with the statute may decrease.[178]

For illustrative purposes, consider a jury-trial waiver applicable to an employment-discrimination claim that reduces plaintiff's expected recovery from $104,640 to $10,400 through a combination of decreased likelihood of liability and decreased damages.[179] From a deterrence perspective, the corporation should now be willing to bear only minimal costs to avoid litigation and thus may fail to invest in expensive but formerly cost-effective anti-discrimination

[177] 304 U.S. 64, 92 (1938) (Reed, J., concurring) ("The line between procedural and substantive law is hazy . . . ."); Gasperini v. Ctr. for Humanities, 518 U.S. 415, 427 (1996) (describing the identification of the line between substance and procedure as a "challenging endeavor"); Hanna v. Plumer, 380 U.S. 460, 471 (1965) ("The line between 'substance' and 'procedure' shifts as the legal context changes.").

[178] See supra Section I.B.

[179] For purposes of simplicity, I exclude litigation costs from the analysis, recognizing the interrelated nature of litigation costs and nuisance-value suits, which may marginally decrease as the litigation costs decrease with waiver, altering the gap between the compliance and non-compliance states.

training or monitoring of trends in pay, promotion, or performance reviews for indicia of ongoing discrimination. So too, from a compensation perspective, the expected recovery for any particular plaintiff is now reduced by ninety percent, substantially reducing the performance of the compensation function as against the no-contract state. In comparison, a damages cap should not affect the likelihood of liability, but the level of the cap could be adjusted to result in the same ninety percent decrease in expected damages. These prohibitions would have different effects upon likelihood of suit and ultimate recovery at trial, with the procedural waiver providing a greater disincentive toward weak claims but greater compensation if liability were to be found. In a world of settlement, however, the two restrictions have commensurate effects upon the defendant's expected gross payout in each of the two compliance states and thus similar effects upon deterrence.[180] The same symmetry of effect upon the statutory aims occurs with respect to procedural alterations that de facto waive a claim rather than simply limiting it.

Permitting ex ante procedural contracting thus effectively restores to the bundle of rights the alienability that the legislature expressly removed. Yet it does so in a more opaque manner, which I argue should be even more normatively disfavored than a direct substantive waiver. Bundled elections require an understanding of the comparative expected liability and costs across all potentially applicable systems of law that is not facially evident in the contracting language. Likewise, unbundled elections require speculation as to the interaction of provisions with the expected cause of action and litigation strategy. Thus, in contrast to a substantive waiver, which facially makes apparent the substantive right that is being waived, a procedural waiver is a probabilistic instrument, which focuses upon procedural effects and thus makes no mention of the effect upon the underlying substantive right.

[180] So, too, while there may be some small difference in settlement values in particular cases under the competing regimes, the discovery costs that would be required to identify the comparative merits of each claim prerequisite to a differential in payout would likely vastly exceed the net differential in settlement values between claims. As a result, actual settlement values are unlikely to vary substantially enough to affect the compensatory function of the law.

If procedural waivers result in the constitutionally or statutorily barred substantive outcome, is there any justification for the existing doctrine's broad enforcement with respect to non-waivable claims? One potential explanation for the doctrine's deference toward private ordering is a belief that the parties will select modifications that enhance efficiency and promote underlying enforcement. Surely, there are cases in which procedural terms would not violate the public interest that motivated the non-waivability determination, just as there are substantive modifications that could be made by contract that nevertheless do no violence to the public interest. But this subjectivity does not comport with the clear legislative directive that these rights are not subject to private contract. A second potential explanation is that courts view procedural modifications as de minimis. This explanation, however, is inconsistent with the existing legal standards for invalidating a procedural provision based upon conflict with the purposes of the underlying statute, which require a relatively high degree of certainty that the provision will preclude enforcement even as to non-waivable rights.[181]

Troublingly, the situations in which market failure or heightened public interest prompted the prohibition on private bargaining are precisely the situations in which the parties are most likely to use procedural terms to subvert substantive law. In those circumstances in which the parties would have reached the publicly desired outcome, the statutory bar on contract has relatively less effect as the parties would have contracted for the same outcome in the absence of the statute. In contrast, in those situations in which the substantive law has the greatest effect by precluding parties from reaching arrangements in contravention of the legislatively determined public interest, allowing private ordering creates a mechanism for parties to reach their preferred outcome notwithstanding the statutory prohibition.[182] As the panoply of procedural

[181] See supra Section I.B (illustrating that many routinely approved provisions, like forum selection, have a substantial rather than de minimis effect upon substantive outcomes).

[182] Minimum-wage laws follow this paradigm: workers who have sufficient bargaining power will contract for greater than minimum wage; those who do not have enough bargaining power, and thus rely upon the law, will still lack bargaining power to mandate a term that facilitates enforcement. The employer, who would be a price-setter but for the statute, is thus able to use this power to mandate procedural terms

rights subject to private ordering expands and parties' sophistication in crafting customized procedural provisions increases, parties can use provisions in tandem through "procedural stacking" of unbundled terms, making the effect far more opaque and uncertain—and thus difficult to monitor under the existing doctrine.

2. Procedural Waivers and Enforcement of Waivable Rights

By definition, waivable rights are those for which the legislature has issued no pronouncement that the public interest should trump the private interest and has only designated a right to one party, facilitating private bargaining.[183] Yet, the private right of action is an important component of obtaining enforcement under many statutory frameworks, alleviating the burden upon public enforcement mechanisms.[184] Against this backdrop, procedural private ordering necessitates determination of whether, if the right is itself fully waivable, any justification exists for limiting the lesser waiver of the appurtenant procedural rights.

Ex ante procedural contracts necessarily apply only between contracting parties. As a result, broad enforcement creates a bifurcated world in which parties may engage in procedural private ordering—and thus readjust the deterrent effect of laws—in contractual relationships even though other claims remain governed by the default rules. Thus, contracting parties are able to shift compensation and enforcement to fit their private interests, while the publicly set defaults protect those individuals who have no relation to one another or who have not elected to contract with each other. This naturally arising dichotomy has some intuitive appeal: where parties are entering into a contractual relationship, they have the opportunity to assess the other's reputation and their own interests and to decide upon the level of assurance they prefer for their obli-

undermining the enforceability of the minimum-wage law. Absent defenses to the enforcement of these terms, the employee must rely upon a public enforcement action to vindicate his rights, having de facto waived the ability to prosecute through agreement to the procedural terms.

[183] For early discussions of the power of legislative default rules, see Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87 (1989); Cass R. Sunstein, Switching the Default Rule, 77 N.Y.U. L. Rev. 106 (2002).

[184] For a discussion of the dual nature of public and private enforcement regimes, see generally Rose, supra note 169.

gations. In contrast, where the parties are brought together by the liability-inducing event, ostensibly without the opportunity for due diligence, a stronger need for state protection is apparent.

Notwithstanding this intuitive appeal, many lower courts and state courts have attempted to use contract doctrine—most notably, unconscionability—to avoid enforcement of procedural terms.[185] For purposes of analyzing the validity of the unconscionability critique of private ordering, I have selected the example of the class waiver as it exemplifies the broader public-private tension and is one of the most contested procedural devices.[186] Because the potential conflict between the individual's pursuit of compensation and society's interest in deterrence and enforcement appears with varying degree depending upon the particular procedural modification, this analysis is a mere exemplar of the nature of this conflict.

The Rational Private Interest in Ex Ante Waiver. Individuals typically underestimate the risk of high probability events, resulting in risk-seeking tendencies.[187] Moreover, because these harms tend to be minor, there is less concern with the risk of error as these are the types of harms and slights we typically bear in life without resorting to litigation. Indeed, negative-value actions are those which, if caused on a one-off rather than a class basis, would not be pursued.[188] Thus, as to this class of small-value claims, most individuals will readily accept compensation in exchange for even the de facto waiver of claims resulting from a class-waiver provision.[189]

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[185] See Bruhl, supra note 11, at 1422.

[186] For a comprehensive review of literature addressing the normative questions raised by and tension between the individual and the collective, see David L. Shapiro, Class Actions: The Class as Party and Client, 73 Notre Dame L. Rev. 913, 914 & n.2 (1998).

[187] See, e.g., Lichtenstein et al., supra note 139, at 574–77 (reporting systematic overestimation of the frequency of death from unlikely occurrences and underestimation of the frequency of death from more common events); Michael S. Wogalter et al., Risk Perception of Common Consumer Products: Judgments of Accident Frequency and Precautionary Intent, 24 J. Safety Res. 97, 100 (1993).

[188] See A. Mitchell Polinsky & Steven Shavell, The Uneasy Case for Product Liability, 123 Harv. L. Rev. 1437, 1442 (2010) (arguing that for products as to which market forces and regulation are strong, product liability is unnecessary but that product liability serves a useful purpose for harms to non-buyers like, presciently, "fishermen harmed by an oil spill").

[189] Psychological phenomena, including risk aversion, vary in strength between individuals. See generally Jason Scott Johnston, Paradoxes of the Safe Society: A Rational Actor Approach to the Reconceptualization of Risk and the Reformation of

In contrast, individuals are likely to overestimate the risk of high-value, low-probability claims, taking a risk-averse position.[190] Because these high-value claims threaten potentially catastrophic or ruinous liability, the individual may seek to preserve the claim as an imperfect form of warranty or insurance. Cognitive biases will prompt the individual to demand a premium to surrender this particular set of claims—a demand that could exceed the value of the waiver to the corporation. The class waiver avoids this problem as the individual waives the right to participate in a class action but not the right to litigate; this affords him the opportunity to pursue his own (by definition, monetarily viable) claim rather than being swept into a class that he may or may not expect will best represent his interests.

Notwithstanding the behavioralist undertones I ascribe to consumers' assent to these waivers, these are precisely the same decisions rational individuals with perfect information should make—preferring a class-action waiver even to the extent that it functions as a de facto waiver of small-value claims.[191] For the individual, if a waiver is offered at a value that exceeds the expected future recovery, he should rationally accept the term. This condition is easily satisfied: the parties will spend more than a dollar disputing every dollar recovered, generating a large zone of potential agreement in which both parties will be in a superior position for settling rather than litigating the dispute.[192] By agreeing to ex ante compensation, the individual will receive a greater pro rata share of compensation than if he litigated ex post. Moreover, the immediate availability of these funds permits the individual to obtain insurance that provides objectively superior coverage—it is universal rather than limited to a particular claim, provides compensation without the delay inherent in a liability determination, and diminishes the substantial risk of recovering nothing before an unpredictable jury.

Risk Regulation, 151 U. Pa. L. Rev. 747 (2003). While the phenomena described here are robust and widely accepted, they will apply to "most" of the population—a dynamic sufficient to impact the market in the manner described herein.

[190] See Lichtenstein et al., supra note 139, at 574–77.

[191] To distinguish the normative considerations here from those of market failure previously discussed, I assume that the individual has perfect information and is not subject to the information asymmetries and sources of market failure previously identified except as otherwise noted.

[192] See text accompanying supra note 140.

In practice this stark choice is becoming less common. Corporations have limited the effect of the waiver on small-value claims by providing for streamlined dispute resolution and super-compensation or incentive payments[193] to avoid an allegation that the waiver rendered the claim non-viable in contravention of *Carnival Cruise Lines*.[194] These provisions have generated substantial cost savings for corporations while still providing full—or even super—compensation to individuals who have an interest in pursuing their claims by reallocating funds from third-party attorneys or absent class members to the handful of individuals who pursue relief. Thus, whether an individual expects litigation to ensue or not, a one-shot player should rationally elect the waiver.

If the procedural terms are salient proxies for quality, the individual's self-interest could result in an interest functionally analogous to the deterrence interest, notwithstanding the temporal distortion between the two situations. If a warranty term is simultaneously provided, however, this term may be perceived as a more direct proxy for quality than a procedural term. Thus, the corporation can disaggregate the present interest in the quality of this item from a prospective interest in deterrence relating to the production of future items.[195] This subjugation of deterrence is especially strong with one-shot players such as appliance or car purchasers who do not expect to make another purchase for many years.

Even if an individual expects to be a repeat player, the rational decision may nevertheless be to accept ex ante compensation for the procedural waiver. To the extent the pricing concession offered exceeds the predicted litigation recovery, the single individual's rejection will not be sufficient in isolation to promote or deter behavior and thus the ex ante payment should be accepted. In the class-waiver context, this concern is particularly poignant: the strength of the class action device lies in its numbers. Individual plaintiffs pos-

[193] See, e.g., AT&T Mobility v. Concepcion, 130 S. Ct. 1740, 1744 (2011) (noting that AT&T Mobility's arbitration clause provided for streamlined procedures plus an incentive award up to $7,500 and double attorneys' fees to plaintiffs receiving arbitral awards that exceeded the last settlement offer made by AT&T).

[194] Carnival Cruise Lines v. Shute, 499 U.S. 585, 591–95 (1991).

[195] Cf. Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1173, 1227–28 (1983) (arguing that individual buyers make purchasing decisions based upon corporate reputation rather than fine print).

sess fractional stakes and thus cannot benefit from the scale efficiencies that inure to a defendant who has an incentive to optimally invest in all phases of the discovery and litigation process. The class-action device corrects this investment asymmetry by providing both sides with equal and total stakes in the litigation outcome. Yet once a class exists, each individual has an incentive to opt out. If the class prevails, the individual can pursue a litigation strategy piggybacking on the class's work product or use the class's recovery as a benchmark for his own settlement without bearing his full share of the litigation costs. If the class loses, the individual retains clean hands to pursue his own individual litigation or attempt to extract a nuisance-value settlement—particularly where the company seeks peace after an exhausting and financially draining litigation battle with the class. However, as each plaintiff rationally opts out, the asymmetric investment incentives gradually increase until the class collapses. Thus, to the extent that an ex ante class waiver is offered, an individual anticipating that others will prefer an upfront payment—whether as a function of rational cost calculation, cognitive bias, or a simple desire to pay less today—will feel pressure to opt out as the value of remaining in the class dwindles.

The realities of modern class-action litigation only underscore this phenomenon. Class actions increasingly target minimal harms to broad classes of individuals,[196] resulting in cy pres distributions to charity that have only the most tenuous and indirect effect on the absent class members.[197] A second breed of class action targets harms suffered by classes of substantially unidentifiable individuals. In these cases, the injured individuals often receive no direct compensation or only a modest sum if they complete a claim form. Notice of the settlement and the claims procedure is then provided through websites or papers that everyone recognizes absent class members are unlikely to read, completing the legally necessary fiction of notice and compensation.[198] Against this backdrop, scholars

[196] See Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 99 (2009) ("The paradigmatic application of the modern class action . . . is to make civil claims marketable that otherwise would not be brought on an individual basis.").

[197] See In re Pharm. Indus. Average Wholesale Price Litig., 588 F.3d 24, 33–34 (1st Cir. 2009) (noting the realities of cy pres distributions "in lieu of a class payout").

[198] See, e.g., Azizian v. Federated Dep't Stores, 243 F. App'x 311, 312–13 (9th Cir. 2007) (affirming the certification of a class of cosmetics purchasers and simultaneous

are increasingly recognizing compensation as a fiction such that deterrence is the primary goal of the class action.[199] Against this reality, a rational and informed individual (and potential future absent class member) will quite properly prefer some modicum of compensation today over no compensation some day.

The Public Interest. To the extent that parties are rationally contracting for class waivers that make them both better off, the trend toward invalidation begs the question of what public interest justifies this intervention. At the outset, there is surely an argument that parties are without authority to mandate that the publicly funded legal system hear each claim individually without resort to either class aggregation or a multi-district litigation proceeding. For the moment I set aside these judicial-integrity and efficiency considerations[200] to explore the underlying public-private conflict. Indeed, most of the class-waiver provisions examined by the courts arose in the context of class arbitration waivers,[201] illustrating that the courts' concern is not one of judicial integrity but of something more fundamental.

If an individual could rationally prefer these agreements ex ante in a completely free and non-coerced setting, how can these terms be so one-sided as to be deemed unconscionable? There may be an argument that the unconscionability is not in the result but in the presumption that a just level of ex ante compensation was not provided.[202] This explanation, while intuitive, runs afoul of unconscionability's traditional eschewal of any role in determining the "fairness" of price, instead limiting its focus to non-pricing terms.[203]

settlement based on newspaper notification, details of which are provided in Defendants-Appellees' Answering Brief at 1–3, Wilkinson v. Federated Dep't Stores, No. 05-15847 (9th Cir. May 25, 2006), 2006 WL 3014493); Mirfasihi v. Fleet Mortgage Corp., 356 F.3d 781, 785–86 (7th Cir. 2004) (vacating a court-approved settlement that "sold these 1.4 million claimants down the river" but also recognizing that newspaper notice was the best available option given unidentifiability of absent class members).

[199] See, e.g., John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1355 (1995); Shapiro, supra note 186, at 924.

[200] For discussion, see supra Sections II.A & II.B.

[201] Bruhl, supra note 11, at 1450 & n.117.

[202] Korobkin, supra note 128, at 1274–76.

[203] See E. Allan Farnsworth, Contracts § 4.28, at 315–16 (3d ed. 1999).

Many states hold that provisions precluding aggregate prosecution of negative-value consumer claims are unconscionable.[204] The narrow focus on low-value and negative-value claims is paradoxical from the perspective of the private litigant, who would be permitted to waive large-value, catastrophic liability claims but not small-value or de minimis claims for minor harms or slights—inverting the individual's preference for deterring or compensating large harms and accepting trivial or incidental harms.

This observation suggests that the courts perceive deterrence itself as a public good. There may be some truth to this concern. To the extent that private waivers diminish the cost of statutory violation, the public must make an offsetting accommodation to ensure a consistent level of deterrence, whether through enhancement of available penalties or reallocation of public resources to public enforcement to supplement decreased private enforcement.[205] However, to the extent that the parties retain the legal authority to directly waive the underlying substantive claim, the system creates the same deterrence effects. Thus, to the extent that the legislature perceives ex ante waiver—whether procedural or substantive—as too great a threat to its statutory scheme to bear, these waivers are banned. But where the legislature has expressly approved bargaining, the courts have failed to articulate a permissible policy justification for limiting waiver absent market failure. This conclusion is reinforced by the predominant approach with respect to procedure that presumptively permits individuals to opt out or requires them to affirmatively opt in for cases involving damages.[206]

Analogous to the private right of action, civil procedure has always served a dual role, ensuring both the public and private interest. For some, the advent of procedural private ordering raises fundamental questions about whether parties should have the authority to dictate how the courts should proceed. For adherents of this view, once parties decide to use a court rather than arbitration to settle a dispute, they should be bound to play by the court's rules. For others, procedural contracting should be permitted to

[204] See Charles L. Knapp, Taking Contracts Private: The Quiet Revolution in Contract Law, 71 Fordham L. Rev. 761, 796 n.118 (2002) (citing cases).

[205] See Rose, supra note 169, at 1349–62.

[206] See Fed. R. Civ. P. 23(c)(2) (opt-out); see also, e.g., 29 U.S.C. §§ 216(b), 626(b) (2006) (opt-in).

the fullest extent, consistent with the broader principle of freedom of contract. With the recognition of the multifold duality of procedural private ordering, scholars have become mired in intractable efforts to outline the appropriate contours of ex ante procedural contracting while the Court's doctrine remains underdeveloped and unable to serve any of the underlying normative justifications for limiting the parties' contractual terms. Part III offers an alternative approach consonant with the normative constraints offered above.

III. A SYMMETRICAL APPROACH TO PROCEDURAL PRIVATE ORDERING

This Article has argued that parties can strategically contract to manipulate substantive law and outcomes in a far more robust way than previously recognized, contravening well-established normative aims of civil procedure. The consequences of this shift toward procedural private ordering raise fundamental questions about the nature of procedural rights and justice and extend the debate about the limits of private ordering from the substantive to the procedural arena. These questions are far too broad and complex for any single article to address comprehensively; rather, this Part seeks only to commence the dialogue about this new generation of procedural contract terms.

This Part considers the viability of a rule of symmetry as a starting point in distinguishing effectively between those procedural terms that promote legitimate private—and in turn public—interests and those that instead undermine these interests. Specifically, the symmetrical theory seeks to preclude the use of procedure to evade existing substantive limitations upon the alienation of rights. In addition, the framework invalidates attempts to use ex ante procedural contracts to obtain procedural modifications that are not permitted ex post—whether due to constitutional or jurisprudential concerns. The theory also seeks to effectuate and extend the private interest in freedom of procedural contract by providing greater enforcement to valid uses of procedural contracting than is afforded under the existing doctrine, including permitting de facto preclusion of claims where no public interest is impinged by the waiver.

The symmetrical theory of procedure proposes accommodating the competing interests in accuracy and efficiency by relying upon determinations about the amenability of terms to modification by private contract that already exist within the law. This Part proposes two substantial limitations upon private ordering, reflecting those narrowly tailored areas in which the public interest has been determined, under existing law, to require a restriction upon private contracting. First, under existing law, certain rights are designated as beyond the ambit of ex ante bargain. It follows that if the right cannot be directly impaired by a substantive limitation, it should not be impaired by a procedural modification that has an equally great effect on the effectuation of the underlying right. A rule to the contrary would create hydraulic pressure toward the use of procedure to contract away those rights the legislature has already designated as non-waivable. Second, parties are permitted to bargain for certain alterations to the governing procedural rules through ex post stipulation; however, other modifications require court approval or are prohibited entirely. Application of these same restrictions to ex ante stipulations would yield the normatively preferred result, permitting parties to bargain for those aspects of procedure that do not intrude upon judicial integrity while barring those modifications that would affect court functioning.

The challenge for procedural private ordering is not merely to balance the competing policy values favoring broad and narrow limitations, respectively; it is to reach an accommodation of the competing interests in a manner that provides ex ante certainty of contract and ex post judicial efficiency such that procedural wrangling does not predominate over substance. Looking to the waivability of the substantive right provides an attractive accommodation of all of the contractual, constitutional, statutory, and procedural concerns. The symmetrical theory of procedure proposed here provides the individualized balancing of policy concerns inherent to ensuring that procedural values are satisfied, incorporating both the preeminence of public interest over private interest in select substantive areas. My argument, I should emphasize, is not that any of these factors uniquely requires a focus upon substantive law as the starting point of procedural private ordering. Rather, it is that even if we reform our approach to private ordering away from the flawed test of outcome determination and to-

ward a direct inquiry into each of the values at stake, the inquiry becomes so elaborate and resource-intensive that it collapses under its own weight, becoming a wholly impractical solution to procedural private ordering's unique amalgamation of contract, civil procedure, and constitutional law. It is the ability of the symmetrical theory of procedure to provide an efficient yet robust default rule across the numerous value domains that provides its claim to acceptance.

A. Returning to Procedure as the Handmaiden of Substance

Procedure's central aim is to function as the handmaiden of substance, creating procedures that optimally facilitate its enforcement.[207] But over the last century, the handmaiden's power to overshadow its master has become clear.[208] The Supreme Court established and just as quickly retreated from the outcome-determinativeness test for distinguishing substance and procedure,[209] recognizing that "*every* procedural variation is 'outcome-determinative'" in some sense.[210] The Court is not alone—legislatures have embraced the use of procedural provisions as a sophisticated method of obtaining their intended substantive policy goals.[211] Granting the power to modify procedure inherently includes the power to modify litigation outcomes and, in turn, the effectuation of statutory objectives.[212]

Against the backdrop of this interaction between substance and procedure, the *Carnival Cruise Lines* doctrine synthesized the disparate standards applicable to commercial and consumer contracts,

[207] See David M. Trubek, The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure, 51 Law & Contemp. Probs. 111, 115 (1988).

[208] See Issacharoff, supra note 25, at 184–85.

[209] See Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945).

[210] Hanna v. Plumer, 380 U.S. 460, 468 (1965).

[211] See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1450 (2010) (Stevens, J., concurring in part and concurring in the judgment) ("[W]ere federal courts to ignore those portions of substantive state law that operate as procedural devices, it could in many instances limit the ways that sovereign States may define their rights and remedies."); S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 310 (7th Cir. 1995).

[212] Cf. Gasperini v. Ctr. for Humanities, 518 U.S. 415, 430 (1996) (recognizing that a difference between state and federal remittitur standards would result in "substantial variations between state and federal money judgments") (punctuation and alterations omitted).

enforcing all procedural terms so long as they did not completely and necessarily preclude the presentation of a claim or defense.[213] The new doctrine dramatically reduced the protections for individuals[214] but also limited commercial parties' long-standing power to use procedural mechanisms to completely preclude claims or defenses.[215] The Court offered no legal justification or authority for its conclusion that preclusion violated fundamental fairness nor for the analog that near-preclusion—whether due to an increase in litigation costs, decrease in likelihood of liability, or decrease in damages—would not violate fundamental fairness or, in the case of non-waivable rights, statutory or constitutional strictures. Throughout this Article, I have argued that this approach not only lacks legal justification but is simultaneously over- and under-inclusive, giving content to the intuitions of the Warren and Burger Courts.

The alternative I posit stems from the conventional assumption that due process rights, like substantive rights, are waivable absent an extrinsic limitation on bargaining. As a result, unlike the traditional approach which deploys (theoretically) static constitutional limitations, the symmetrical theory allows for careful alteration from the baseline by Congress—facilitating both upward and downward departures, consistent with due process. Thus, the question is presented whether, where substantive statutes preclude ex ante waiver, this prohibition merely refers to direct substantive waivers or to all forms of waiver, including procedural waiver. If statutes creating non-waivable rights expressly barred or permitted the waiver of "any procedural right provided by the rules of procedure or the courts," the inquiry would be at an end, as the statute would expressly comport with the structure that best ensures the

[213] See Carnival Cruise Lines v. Shute, 499 U.S. 585, 595 (1991).

[214] This occurred not only directly but through a change in the method of interpretation used for determining substantive limitations upon alienability. Historically, the Court was far more willing to apply a purposive interpretation to broadly preclude waiver of those private rights of action important to the public interest, in contrast with the Rehnquist Court's strict textualist approach. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) (broadly interpreting Title VII to preclude prospective waiver of discrimination claims without citation to any language in Title VII so stating).

[215] See The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17 (1972); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 188–89 (1972).

role of procedure as furthering substance. But if, as more commonly occurs, the legislature has simply created a right and recognized it as non-waivable without defining the term more particularly as barring substantive or procedural waivers (or both), a question of statutory interpretation arises. The existing doctrine implicitly assumes the legislature intended to bar substantive limits on recovery but was unconcerned by procedural terms that have the identical consequence of minimizing net recovery.[216] The alternative statutory reading, promoted by the symmetrical theory of procedure articulated here, posits that the legislature intended to preclude bargaining that would limit or bar recovery whether obtained through substantive or procedural means.

To the extent that the plain language of the particular statute is ambiguous and susceptible to either interpretation,[217] we must re-

[216] Courts therefore enforce procedural terms with respect to even non-waivable claims, applying a presumption in favor of enforcement overcome only by showing that the plaintiff would be entirely deprived of his day in court and not merely that he would face excessive costs or a reduced probability of success under the contract term as compared with the non-waivable default rule. See, e.g., Manetti-Farrow, Inc. v. Gucci Am., 858 F.2d 509, 511, 515 (9th Cir. 1998) (civil conspiracy, unfair trade practices); Shell v. R.W. Sturge, Ltd., 55 F.3d 1227, 1228, 1230–31 (6th Cir. 1995) (securities); Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1356, 1363 (2d Cir. 1993) (RICO); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 954, 956–57 (10th Cir. 1992) (securities); Stewart Org. v. Ricoh Corp., 810 F.2d 1066, 1069–71 (11th Cir. 1987) (antitrust); Exceptional Urgent Care Center v. Protomed Med., No. 5:08-CV-284, 2009 WL 2151181, at *10 (M.D. Fla. July 13, 2009) (unfair trade practices); Pods, Inc. v. Paysource, Inc., No. 8:05-CV-1764, 2006 WL 1382099, at *1, *4 (M.D. Fla. May 19, 2006) (misrepresentation and deceptive practices).

[217] While statutory interpretation is by its nature individualized, the text of a number of statutes may prompt the argument that the prohibition on waiver should be narrowly interpreted to refer only to substantive waiver to the exclusion of procedural waivers. As Justice Kagan has noted, this reliance upon the canon of "expressio unius est exclusio alterius" is "notoriously capable of producing errors." Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2328–29 (2001). While the principle may be useful in determinations as between equals, the provision is of little use where the comparison is within an "essentially superior-subordinate relationship," as with substance and its procedural handmaiden. Moreover, to the extent that the legislature did view these limitations as within the same category, it may have intended its language precluding limitation of the right as a general principle, containing the subcategories of prohibitions on direct substantive limitations and indirect procedural limitations upon the effectuation of substantive rights. Congress's language may therefore embody a directive to refuse enforcement of any contractual term limiting the newly created statutory right, in any form. Thus, in many statutes, the scope of the prohibition on waiver or limitation may be ambiguous as to whether procedural or substantive waivers, or both, are barred.

sort to the contextual cues embedded within the statute itself.[218] By definition, the statutory texts at issue are those which remove newly granted legal rights from the ambit of ex ante bargaining. We need not proceed into the difficult question of why the particular right was deemed unsuitable for the free market—whether it was due to market failure, an overriding public interest, or even a personal motivation. Instead, the very fact that the market was perceived to fail with respect to substantive waivers—for whatever reason—provides a strong indication that the legislature would have perceived the same failure with respect to procedural terms operating within the same market.[219]

Indeed, to read statutory or constitutional limitations on the waiver or limitation of rights or remedies as merely precluding express substantive waiver promotes the use of procedural methods to obtain the prohibited substantive outcomes. It seems unlikely that the legislature would prefer to incentivize or even mandate these opaque methods of obtaining the substantive ends over more transparent waivers. To the extent that its prohibition is intended either to protect a public normative ideal or respond to an identified or perceived category of market failure, procedural contracting not only undermines these functions but affirmatively results in more deleterious outcomes for these normative structures than if no substantive restriction existed at all—thus inverting the ostensible legislative purpose. Against this recognition, it is difficult to conceive of any meaningful policy aims that would be furthered by the process of precluding substantive waivers of a claim while permitting the same outcome by alternative methods such that the ultimate outcome is not modified, merely the conduit.

For some, given the rarity of express legislative intent with respect to procedure—and the strong likelihood that the legislature

[218] See John F. Manning, What Divides Textualists from Purposivists?, 106 Colum. L. Rev. 70, 75–76 (2006).

[219] For an excellent discussion of the use of textualism as a response to the realist and public choice critique of legislation as a compromise between stakeholders, such that no single animating intent beyond that of the text may be discerned, see id. at 73–75. See also Frank H. Easterbrook, Foreword: The Court and the Economic System, 98 Harv. L. Rev. 4, 46 (1984) ("What Congress wanted was the compromise, not the objectives of the contending interests."); Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517 ("[T]he quest for the 'genuine' legislative intent is probably a wild-goose chase anyway.").

failed to consider the possibility of procedural private ordering—the adoption of either presumption of congressional intent may bear a somewhat fictive quality.[220] Where the text is inconclusive, the role of the Court is to select the default rule that best comports with the expressed normative and policy considerations.[221] The restriction upon ex ante substantive contracting creates a system in which parties may freely contract away rights through ex post settlement but may not limit these rights by ex ante contract. The congressional concern thus is not that the individual is an incompetent custodian of the right sufficient to justify a complete bar upon contracting or investiture of the prosecutorial right exclusively with a public attorney general. Instead, the apparent concern is that permitting ex ante waiver or limitation will uniquely impede the substantive aims of the statute. Again, we need not engage in speculation over legislative intent in an attempt to determine whether Congress's concern is with ex ante undervaluation or with preservation of public interest, whether the concern is with ensuring compensation or instead promoting deterrence. Rather, it is sufficient for this purpose to state that Congress determined that, in this particular context, permitting ex ante contractual limitations upon the right would preclude effectuation of its underlying policy aims.[222]

The question of whether or not procedural terms are best seen as a component of the non-waivable rights or a distinct category of rights thus turns upon whether the same ex ante/ex post effect on party behavior—and in turn fulfillment of the statutory objectives—applies in this context. It is not seriously contested that mere election between systems of public ordering through ex post forum selection during litigation can have substantial effects on the enforcement of substantive rights, just as settlement can. Because the election is made ex post, however, compliance is driven by the party's ex ante expectations about the aggregate average outcome

[220] Cf. David J. Barron & Elena Kagan, *Chevron*'s Nondelegation Doctrine, 2001 Sup. Ct. Rev. 201, 212 (making this argument with respect to standards of review of agency actions).

[221] Cf. id. (arguing the same in the context of standards of review for agency actions).

[222] See generally John F. Manning, Statutory Pragmatism and Constitutional Structure, 120 Harv. L. Rev. 1161, 1162, 1168 (2007) (describing the trend toward pragmatic textualism by judges).

in light of expected ex post preferences rather than by the actual ex post election. I have argued that the same ex ante/ex post dynamic exists with respect to procedure. If this is correct, then in the absence of contrary statutory language, applying the same limitation upon ex ante waiver of both procedural and substantive rights is more consonant with the purposive distinction made by the legislation. Adopting the opposite approach would, almost inevitably, result in contractual gamesmanship capable of eviscerating the protections the bar was intended to secure. As a result, whether because of market failure or a mutual desire to contract around substantive law, the parties will rationally invest resources in the creation of procedural terms that limit liability or act as de facto waivers—reducing express legislative attempts to preclude ex ante bargaining into little more than mere obstacles that necessitate careful contracting.

B. Assessment of the Particular Term

In addition to restrictions upon the substantive categories of rights subject to private ordering, the existing law limits the ability of parties to modify particular procedural terms. The existing tripartite structure reflects a careful accommodation of the parties' interest in ordering their dispute, with necessary checks evolved over time to prevent modifications that would impose burdens or externalities upon the court, third parties, or the public.

This Article posits that creating symmetry between ex post and ex ante agreements provides the best accommodation between obtaining the benefits of private ordering and protecting the public interest. Advocates of tighter restrictions upon private ordering may argue that notwithstanding the ability of litigants to make these modifications ex post, permitting ex ante contracting may impose substantial costs on the judiciary to learn the parties' specifically created rules of evidence and procedure or harm the formation of precedent to the extent that these procedural rules become the basis for distinguishing one case from another. To the extent that a provision interferes with judicial integrity and functioning, however, the harm occurs when that provision is thrust upon the court—without respect to whether the parties concocted the provision at the time of contract or during the litigation process. It may well be the case that there is a quantitative difference in

the number of provisions violative of the public interest at each of these two points of contract, but qualitatively, the effect upon the court typically remains constant. This symmetry in the effect of the provisions argues persuasively for the imposition of the same limitations.

Treating ex ante procedural contracts as stipulations—which may be self-enacting, require court approval to become effective, or be completely invalid—offers a number of benefits. First, it offers a customized level of protection with respect to each type of procedural modification, derived from decades of experience. Second, because of the symmetry between ex ante and ex post contracting under this approach, parties are not given increased power to intrude upon public ordering by simply shifting the timing of the contract. Third, it provides clarity to the parties ex ante regarding the enforceability of the provision and a ready and familiar test to the court ex post, harnessing the power of established rules and precedent. Finally, it diminishes forum-selection concerns to the extent that, where particular provisions are important enough to the parties to prompt forum shopping, they may directly contract for the provision to apply in any court subject to these judicial-integrity limitations. Indeed, under this new system, forum-selection clauses will be incentivized, as the promulgating party can ensure that its modifications will be enforceable as stipulations under the applicable procedural rules.

C. The Problem of Market Failure

To this point, this Part has posited that the symmetrical theory of procedural contracting permits commercial parties to benefit broadly from bargaining for procedure, while properly identifying the limited circumstances in which the public interest necessitates denial of enforcement. But are additional limitations necessary where the assumption of sophisticated parties bargaining with the assistance of counsel is relaxed, as with form terms embedded in a consumer or employment contract?

A robust literature has identified the multiplicity of sources of error in contracting that affect bargaining for substantive terms, many of which are equally applicable to procedural terms. For example, systematic bias with respect to the likelihood of harm will affect the price demanded for both a direct waiver of the substan-

tive right and a waiver of appurtenant procedural rights.[223] Yet precisely because these sources of error apply equally to substantive and procedural rights, they are already addressed by the symmetrical theory. If the legislature believes that consumers will not read form terms in certain circumstances and that the unknowing waiver of these rights is problematic, then the substantive right should not be waivable. It therefore follows under the symmetrical theory that an embedded procedural term is likewise invalid. Alternatively stated, to the extent that we can identify cases in which individuals are not reading terms and market failure is resulting, the complaint is not one to be remedied by procedure but instead is an error of substantive law. If this error is corrected with respect to substance, the symmetrical theory automatically corrects the error with respect to procedure. Thus, my goal is not to add to this extensive literature or debate the sufficiency of the existing protections; it is to explore the unique areas in which procedural terms diverge from substantive contract terms, necessitating special additional protections beyond baseline contract law.

By incorporating the statutory determination of the waivability of the right at issue and the background law of contract, supplemental procedural limits beyond the symmetrical theory need only focus on the narrower question of which specific types of market failure are uniquely heightened by procedural contracts. The addition of narrowly tailored limitations to bring procedural contracts into parity with substantive contracts is then sufficient to create optimal enforcement as determined by our existing doctrinal structure.

To the extent that the courts and legislature have determined that the substantive right can be waived through form contracts, is there any reason to preclude waiver of the pendent procedural rights? The existing doctrine answers that no additional protections are needed; procedural waivers are no different from those of substance.[224] To the extent that unique information cost asymmetries emerge, one might argue the asymmetries are irrelevant; if most consumers do not make buying decisions based upon these terms

[223] See Christine Jolls et al., A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471, 1541–47 (1998).

[224] See Carnival Cruise Lines v. Shute, 499 U.S. 585, 591–95 (1991).

and therefore may often decide to not even read the fine print, then the greater cost of understanding procedural terms is not actually affecting consumer behavior. Yet, the justification for unrestricted bargaining is the presence of a functioning market; while not every consumer needs to make informed choices, a sufficient quantity of informed consumers must be present for a functioning market to exist. To the extent that these asymmetries prevent the development of informed consumers capable of generating competition, restrictions upon the market become necessary. This concern with market failure is particularly acute as procedural waivers relatively uniquely encourage the precise behaviors Congress sought to restrict by statute.

Given these critiques, a second approach restricts the incorporation of procedural terms within form contracts.[225] To the extent that procedural terms are non-salient terms embedded in form terms rarely read by the consumer or employee but which rationally maximally favor the defendant and preclude the consumer's or employee's rights to the greatest extent possible, the argument is that these terms should not be enforced. But many of the arguments embedded in this approach are equally valid as applied to substantive terms. The unique distinguishing feature of procedural bargaining is the creation of substantial information cost asymmetries. If this asymmetry can be corrected, then there is no longer a distinction between procedural and substantive waivers. If this distinction can be removed, the question reverts to the traditional debate as to whether markets function in the normatively preferred manner where unilaterally drafted form contracts shift resources from non-salient to salient features. To the extent one favors restrictions upon these contracts, these restrictions should be applicable to all contract terms, not merely those of procedure.

A third approach could seek an accommodation of the principles embodied by the two prior approaches, correcting the unique information cost asymmetries of procedure as a condition of enforcement. This approach begins from the premise that there are four potential information cost states with respect to procedural and substantive contract terms. First, both substantive terms and

[225] For a seminal formulation of this argument, see Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1173, 1227–28 (1983).

procedural terms may be subject to information costs that the party is willing to bear in contracting; traditional sophisticated commercial contracts are an archetypal example of this state. Second, the information costs of both substantive terms and procedural terms may be so high that a party is unwilling to bear these costs; this failure to investigate terms is often argued to exist with respect to form consumer contracts, which individuals often fail to read. Third, the party may be willing to bear the costs related to substance but not procedure. Finally, the costs of procedural but not substantive terms may be borne, but I would argue this category is largely theoretical and thus best addressed in the circumstances in which it arises (if any) by specific, targeted legislation.

In either of the first two states, the symmetrical rule inherently provides the optimal level of enforcement. To the extent that the information costs do not preclude bargaining, these terms should readily be enforced—as in the first information cost state. Likewise, if the type of contract is one as to which asymmetries preclude market functioning as to substantive terms such that the parties are prohibited from bargaining, then the rule of symmetry extends this prohibition to procedural terms as well. Thus, in the classic case in which one contends that the consumer will not read the terms, the rule of symmetry grants procedural terms equal dignity to substantive terms. This symmetry is particularly important to the extent that information asymmetries are not the sole source of market failure and, indeed, may be mitigated such that a functioning market exists even as to non-salient terms. Because these factors are highly individualized, the rule as to substantive terms is likely to be a far more accurate baseline than adopting a per se rule of either enforcement or non-enforcement of procedural terms.

The necessity of a supplement to the symmetrical theory should thus focus upon the special third category, in which the costs of understanding procedural terms are uniquely higher than those for substantive terms. Recognizing that procedure is uniquely resistant to market-based solutions, requiring the development over time of particular tribunals with reputations for fair dealing or certification-mark systems capable of weighing competing provisions as to the multiplicity of jurisdictions in which a product or service is sold,

a disclosure regime may well provide a potential solution by directly reducing the gating information costs.[226]

The oft-cited problems with disclosure include the incentive of corporations to overwhelm consumers with fine print that discourages consumers from reading required disclosures and the failure even of terms disclosed in good faith to educate consumers.[227] A successful regime might therefore need to realign corporate incentives to be consistent with those of the consumer. For example, one might require that for a term in a non-bargained agreement to be enforceable, the drafting corporation must establish that the term was disclosed such that the average consumer of that product would be aware of the term and understand its significance in a time and manner that permits comparison shopping. This requirement would not require that the corporation convert the term into a salient one for purposes of the purchasing decision and would instead place the burden on the corporation to conduct preliminary consumer studies to ensure that the term is understood by the average targeted purchaser if the company intends to seek enforcement. As a practical matter, such a requirement might be satisfied where the recipients are sophisticated corporations, but it will likely be difficult to enforce as against unsophisticated individuals or businesses.

Alternatively, one might rely upon government agencies to approve procedural terms on behalf of individuals in lieu of direct education. Government agencies are tasked with protecting the two groups most commonly cited as potential victims of form contracts—consumers and employees. Thus, one could alternatively create a system in which form terms modifying procedure are not enforceable unless the individual consents with the assistance of counsel. A corporation seeking to modify procedure, however, could seek approval from the agency tasked with the administration of the statute at issue, on behalf of the consumers or employees. In this system, just as corporations seek opinion letters to gain approval for proposed actions, they could obtain approval of provisions that they believe will truly inure to the benefit of the consumer or employee. While this system would impose a far greater

[226] See supra Section II.A.

[227] See Bar-Gill & Warren, supra note 142, at 20; Issacharoff, supra note 144, at 2–5.

restriction upon contracting, and intrusion into private ordering between the parties, corporations may deem it preferable to a complete bar should corporate abuse of procedural terms warrant intervention. Yet precisely because such solutions should only be deployed in those limited cases in which market failure exists with respect to procedural but not substantive terms, any such regime will likely need to be created on a one-off basis through targeted legislation rather than through a universal, one-size-fits-all solution.

While companies have experimented with procedural modifications, a lingering uncertainty about the enforcement of procedural terms has temporarily diminished the perceived benefit relative to direct substantive waivers in form contracts. As this uncertainty is resolved through additional experience, this bulwark against adoption should subside, resulting in more frequent use of procedural terms. As these provisions are more fully utilized, the need for and the viability of an intermediate solution—whether disclosure, agency approval, or other alternatives to a complete prohibition on the inclusion of procedural terms in form agreements—will become clear based upon the ways in which procedural modification is used and the response of consumers thereto. The symmetrical theory of procedure will automatically incorporate these solutions into the framework of limitations on procedural contracts, to the extent that these insights are ultimately either engrafted into legislation or become part of the broader law of general contract.

D. The Theory Applied

A careful consideration of the courts' recent jurisprudence on ex ante procedural contracts gives some measure of the practical effect of replacing the preclusion approach with the symmetrical theory of procedure.

In *Carnival Cruise Lines*, the case that inaugurated broad enforcement of ex ante procedural contracts, the statutory scheme expressly invalidated any provision relieving or capping liability, as well as any provision that "purport[ed] . . . to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability . . . or the measure of damages

therefor."[228] Moreover, it expressly directed that such provisions were void as against public policy, indicating that an expansive reading should be given to the prohibition in light of the purpose of the statute.[229] The Court held this language insufficient to invalidate the waiver of a distant forum since the term merely limited the plaintiff's selection from among the available forums.[230] In contrast, under the symmetrical approach, because the statute not only provided that a plaintiff could not waive or avoid the right to a competent court but further specified that the right could not be weakened or lessened—terms that would be superfluous if read to refer to waiver—the term would be invalid. This comports with an intent to ensure that injured plaintiffs are compensated, since the net compensation could otherwise be vastly undermined so as to avoid meaningful compensation. Moreover, this reduction in net compensation could be significant enough to disincentivize the commencement of suit more generally, thus undermining the alternative purpose of ensuring deterrence by preventing the lessening of liability or frequency of private enforcement.

Consider this doctrine as applied to an employee who, as a condition of hire, agrees to a jury-trial waiver. Seeking to invalidate the provision, her lawyer presents evidence that the waiver will reduce the expected recovery by ninety percent but admits that the discrimination claim remains viable, just less valuable. Should the waiver be enforced notwithstanding a provision in the discrimination statute that precludes ex ante terms "waiving or lessening" damages? Applying the Court's post-*Carnival Cruise Lines* method of interpretation, the statutory bar would not prohibit enforcement of the procedural term, because while the term will reduce value in the aggregate across cases, it is impossible to ascertain whether the term has that effect in this particular case. As a result, while a damages cap is prohibited, a jury-trial waiver is not. In contrast, under the symmetrical approach, because the parties are without authority to modify the available damages ex ante, the provision is unenforceable—thus ensuring that the compensation and deter-

[228] Carnival Cruise Lines v. Shute, 499 U.S. 585, 595–96 (1991) (quoting 46 U.S.C. App. § 183c (1988)).
[229] Id. at 596.
[230] Id.

rence functions remain at the baseline level set by the legislature with respect to this non-waivable right.

Alternatively, consider the situation of an industry wracked by class-action claims under a succession of waivable consumer protection laws that result in nuisance-value settlements comprised of substantial attorneys' fees and residual cy pres charitable distributions rather than payments to the consumers. The company offers to allow consumers to waive the right to bring a class action in exchange for a discount on the product. Is the provision enforceable in federal court? Under the existing doctrine, two hurdles exist. First, because the waiver could be shown to economically preclude prosecution of the claim, it could fail the *Carnival Cruise Lines* test.[231] Second, the court might extend the analysis of *Shady Grove* to hold that the provision impermissibly contracts around Rule 23.[232] In contrast, under the symmetrical theory, because the claim is waivable, the parties have full authority to enter into a waiver. Likewise, because parties retain the discretion to bring an individual claim or a class claim under Rule 23, they can contract not to do so. However, the parties would lack the authority to prevent the court from sua sponte consolidating individual claims raising common questions as that power is reserved to the court. Thus, to the extent that the legislature has granted substantive or procedural rights fully to the parties, the parties retain the authority to modify or waive those rights—only where the contract transcends this power and intrudes upon those areas removed from its sole discretion should private ordering be limited.

CONCLUSION

While pre-dispute procedural contracts have historically elected between systems of public ordering, or opted out into arbitration, this Article has attempted to demonstrate that parties are engaging in private ordering by contracting for customized civil procedure. These contracts not only allow parties to select the optimal level of enforcement and features of litigation for their particular antici-

[231] Id. at 596–97 (suggesting that a waiver would be invalid if it effectively precluded liability).

[232] See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1444 (2010).

pated dispute but also to use procedure to buttress their expectations about the substance of their contractual rights and obligations. Given the indisputable ability of procedure to diminish or preclude pursuit of substantive rights, allowing parties to create their own procedures inherently includes the de facto right to rewrite substantive law, absent increased public enforcement.

A clear framework carefully tailored to the normative concerns imposed by permitting ex ante procedural contracting is long overdue. While many procedural contracts provide optimal terms, the door remains open to contracts that de facto preclude consumers and employees from pursuing claims, waive non-waivable statutory rights, or burden the functioning of the legal system. Recognizing that a completely individualized approach to procedural private ordering is unworkable, the symmetrical theory of procedure focuses upon adapting the existing law of contract and procedure to the unique challenges of procedural private ordering. This new approach thus looks to whether the substantive law is subject to bargaining and whether the particular term is one that parties are permitted to contract for ex post.

By adopting this approach, ex ante procedural private ordering can be brought into alignment with the existing limitations upon substantive and ex post procedural contracting rather than, paradoxically, granting parties greater ability to engage in private ordering in contravention of existing law.

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