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# RECONCILING CONTRACTUALIZED PROCEDURE IN LITIGATION AND ARBITRATION: A TEXTUAL AND POLICY-BASED APPROACH

## ABSTRACT

*This Comment examines the prospect of procedural contracts by comparing the text and policies of the Federal Arbitration Act (FAA) and the Federal Rules of Civil Procedure (Federal Rules). As the existing body of literature addressing the normative desirability and plausibility of contractualized procedure grows, this Comment seeks to add textual and policy-based reasons against uncritically redesigning litigation in arbitration's image. Private contracts already govern in the private dispute-resolution arena, particularly in arbitration. Should parties be equally capable of dictating the rules that govern litigation?*

*This Comment views freedom of contract along a spectrum, where on one end there are non-negotiable mandates set forth for the public to follow, and freely negotiable terms, such as arbitration agreements under the FAA, toward the other end. This Comment comports with existing scholarship in that it views procedure as negotiable to some extent. However, based on its analyses of the text and policies behind the FAA and the Federal Rules, this Comment ultimately concludes that parties should have less procedural modification freedom in litigation than in arbitration.*

## INTRODUCTION

The Federal Rules of Civil Procedure (Federal Rules) do not explicitly grant parties any freedom to contractually modify procedures in litigation.<sup>1</sup> However, the existing body of literature on the subject suggests that at least some of the Federal Rules either already are, or should be, negotiable.<sup>2</sup> Envisioning the rules as bargained-for commodities, some scholars suggest that a set of promulgated, one-size-fits-all rules, such as the Federal Rules, should be relegated to mere default status that would fulfill more of a gap-filling function.<sup>3</sup>

Granted, contractualizing dispute-governing procedure is hardly a new phenomenon. Disputants have been able to choose the rules under which they resolve their disputes, privately, for ages.<sup>4</sup> Today, the Federal Arbitration Act<sup>5</sup> (FAA) allows parties the contractual freedom to tailor their procedural rules as they see fit in private arbitration.<sup>6</sup> However, a fundamental dissimilarity

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<sup>1</sup> See FED. R. CIV. P. For the purposes of this Comment, wherever the Federal Rules of Civil Procedure are mentioned, it should be assumed that the litigation is in federal court.

<sup>2</sup> See, e.g., Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329 (2012); Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507 (2011); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723 (2011); Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103 (2011); David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389 (2014); Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461 (2007); 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 (2007); Colter L. Paulson, *Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure*, 45 ARIZ. ST. L.J. 471 (2013); Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181; Daphna Kapeliuk & Alon Klement, *Contractualizing Procedure* 12–14 (Dec. 31, 2008) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1323056](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323056).

<sup>3</sup> See, e.g., Kapeliuk & Klement, *supra* note 2, at 12 n.44 (“One of the hallmarks of the U.S. law is the extent to which the rules of procedure are ‘default’ rules, rules that govern if the parties have not agreed to something else.” (quoting STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 138 (7th ed. 2008))).

<sup>4</sup> Arbitration is an ancient method of dispute resolution. JAY FOLBERG ET AL., *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* 538 (2d ed. 2010). For example, in Biblical Times, King Solomon was famous for his wisdom as an arbitrator; archaeologists have found papyrus documenting arbitration among Phoenician grain traders; Native American tribes turned to wise elders to resolve disputes; and George Washington himself was an arbiter and even had an arbitration clause in his will. *Id.* at 538–39.

<sup>5</sup> 9 U.S.C. §§ 1–16 (2012).

<sup>6</sup> *Cf.* *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (noting that Congress’s intent in passing the Act was to enforce private agreements that parties willingly entered into). *But cf.* *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) (prohibiting parties from supplementing the FAA’s four grounds for arbitral award vacation).

separates arbitration from litigation: arbitration is a private means of dispute resolution, whereas our litigation system is public by design.<sup>7</sup>

This Comment addresses an open question emerging from the vast literature addressing procedural contracts: Should parties be allowed to modify the procedural rules of litigation with the same amount of freedom as in arbitration? This Comment answers this question by arguing that parties should be allowed to contractually modify procedure in litigation, but to a lesser extent than in arbitration agreements. It views freedom of contract along a spectrum, where on one end there are non-negotiable mandates set forth for the public to follow, and on the other end, freely negotiable terms, such as arbitration agreements under the FAA. Although other scholars have reached comparable conclusions,<sup>8</sup> this Comment seeks to add to existing scholarship by providing a novel textual and policy-based rationale.

First, Part I of this Comment provides a background on the relatively new concept of commoditized procedure. It explores existing literature and provides broad conceptual background for procedural contracts. Part I also examines the expansion of the FAA, vis-à-vis the freedom of contract principles the Supreme Court relied upon in authoring this expansion. Second, Part II of this Comment uses textual and policy-based reasoning to argue that parties should be able to contractually modify procedure in litigation, but only to a lesser extent than in arbitration. Finally, Part III of this Comment first discusses the implications that follow the judiciary's adaptation of either a broad, narrow, or mixed procedural freedom regime, and then applies textual and policy-based reasoning to determine the extent to which parties should be able to modify procedural terms common to arbitration in litigation.

## I. PROCEDURAL CONTRACTS AND THE FEDERAL ARBITRATION ACT

This Part serves primarily to provide background on the relatively new concept of commoditized procedure. Section A introduces procedural contracts. Section B then addresses the FAA: it explores the Supreme Court's

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<sup>7</sup> See Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30–32 (1979).

<sup>8</sup> Cf. Bone, *supra* note 2, at 1355 (positing that “[i]f it makes sense to bar some types of party rulemaking in adjudication even when those types are permissible in arbitration, it must be because adjudication is different in a normatively relevant way”). To be clear, Professor Bone writes in terms of “adjudication” and “arbitration,” whereas this Comment writes in terms of “litigation” and “arbitration.” For purposes of this Comment, the term “litigation” describes the adjudicative process of litigation in its entirety.

expansion of the FAA, and the principles upon which the Court relied in doing so.

### A. *Understanding Procedural Contracts*

The U.S. litigation system, while central to American democracy, has been rendered “slow, costly, and relatively inflexible” in part because of its coat of procedural protections.<sup>9</sup> In the 1960s, the notion of civil litigation changed; responding to civil unrest and general discontent, legislatures created new statutory causes of action, and, as a result, “[c]onflicts that in the past might have been resolved by deference, avoidance, or resignation were directed to the courts.”<sup>10</sup> Furthermore, caseloads increased, and resources were not proportionately allotted to the courts.<sup>11</sup> With courts struggling to manage their dockets, both judges and parties were in need of alternatives; judges assumed a more managerial role and began facilitating settlements, whereas parties began turning to private alternatives such as arbitration.<sup>12</sup> In fact, the percentage of federal cases that reached trial fell from 11.5% in 1962 to 1.8% by 2002.<sup>13</sup> And while this does not mean disputes have been going unresolved,<sup>14</sup> the fact is, “[t]he public spectacle of civil litigation gives life to the ‘rule of law,’” and this spectacle seems to be vanishing.<sup>15</sup>

Furthermore, over time, arbitration (in many contexts) has begun to look more and more like litigation, increasing in complexity and—concomitantly—in the demand for at least minimal due process guarantees.<sup>16</sup> In light of arbitration’s evolution, it is conceivable, and arguably normatively optimal, to reconfigure the familiar judicial system to represent the best of both worlds: a forum that allows parties efficient, inexpensive, just resolution that can be governed by rules chosen by the parties themselves.

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<sup>9</sup> FOLBERG ET AL., *supra* note 4, at 7.

<sup>10</sup> *Id.* at 7–8.

<sup>11</sup> *Id.* at 8.

<sup>12</sup> *Id.*

<sup>13</sup> Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, 30 A.B.A. J. SEC. LITIG., Winter 2004, at 1, 1, [http://www.americanbar.org/content/dam/aba/publishing/litigation\\_journal/04winter\\_openingstatement\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_openingstatement_authcheckdam.pdf).

<sup>14</sup> Indeed, ADR processes such as arbitration have seen steep growth since the 1960s. FOLBERG ET AL., *supra* note 4, at 7.

<sup>15</sup> Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Reshaping Our Legal System*, 108 PENN ST. L. REV. 165, 196 (2003).

<sup>16</sup> On injecting due process into arbitration, see PETER B. RUTLEDGE, *ARBITRATION AND THE CONSTITUTION* 127–70 (2013).

Procedural contracts are the new frontier.<sup>17</sup> Indeed, procedural contracts may enable the public court system to more proficiently accomplish the same two goals for which the Supreme Court has already specifically endorsed arbitration: efficiency and freedom of contract.<sup>18</sup> However, the question is whether, and to what extent, a court of law should allow parties to tailor the litigation process to their liking. And, if parties should try to modify procedure, should judges look to FAA jurisprudence for guidance where the Supreme Court has prescribed clear and potentially applicable principles for achieving efficient, party-driven resolution? This section addresses the current scholarly understanding of procedural contracts, including their enforceability and potential advantages and concerns associated therewith. Part II will then address whether the judiciary should look to FAA jurisprudence for guidance—and concludes that it should not because parties should have less procedural-modification freedom in litigation than in arbitration based on the text and policies underlying the FAA and the Federal Rules.

This section is divided into five sub-sections.<sup>19</sup> First, it explains what a procedural contract is and examines previous scholarship on the subject for background information. Second, this section describes the advantages of contractually modifying litigation procedure. Third, it offers an explanation as to why parties might choose court over an arbitral forum if they could modify litigation procedure. Fourth, beginning with forum-selection clauses, this section briefly surveys several types of procedural terms that parties may choose to modify in a pre-dispute contract. Finally, this section sets forth some predictable concerns that could arise if parties are allotted too much freedom to tailor the procedures that govern their dispute before any such dispute arises.

### *1. What Is a Procedural Contract?*

Procedural contracts, unsurprisingly, are contracts in which parties modify the procedures that govern any potential disputes between them.<sup>20</sup> An arbitration agreement is one such example of a procedural contract.<sup>21</sup> Other

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<sup>17</sup> See, e.g., Hoffman, *supra* note 2, at 391–92 (imagining litigation uniquely tailored to specific parties’ dispute).

<sup>18</sup> This Comment will further discuss why it is important to look at the policies behind arbitration when considering procedural contracts. *Infra* Part II.C.1.

<sup>19</sup> For much of the structure and content of this background section, I am indebted to the excellent discussion in Kapeliuk & Klement, *supra* note 2.

<sup>20</sup> See, e.g., Hoffman, *supra* note 2, at 397.

<sup>21</sup> Procedurally speaking, arbitration agreements remove cases from Article III forums.

common examples of procedural contracts include forum-selection clauses and jury-trial waivers.<sup>22</sup> Although contracts for such terms might not obviously affect litigants' substantive rights, several scholars believe that procedural contracts could be used to alter litigation procedures once thought to be untouchable, transforming civil procedure rules into mere default rules.<sup>23</sup> For example, some scholars, such as Professors Kapeliuk, Klement, and Hoffman, have suggested the theoretical potential for parties to contractually revert to a pre-*Twombly* pleading regime.<sup>24</sup>

Undoubtedly, reasonable procedural contracts could be advantageous in certain contexts.<sup>25</sup> However, lines must be drawn to maintain a balance between favoring party autonomy and giving parties unlimited power to control the rules that govern judges and the judicial process overall. One important question that arises in this context is to whom a dispute belongs. This question is addressed in Part II.C.2.

As a preliminary point, it should be explicated that this Part's background information sets up a tantalizing comparison between arbitration and contractualized procedure in litigation. Nevertheless, understanding the historical posture on commoditized procedure is the natural starting point. Bargaining for procedure is a relatively new concept. In 1972, the Supreme Court opened the door to the commoditization of procedure with its landmark decision in *The Bremen v. Zapata Off-Shore Co.*, where the Court enforced a forum-selection clause in a contract between two sophisticated merchants.<sup>26</sup> Lately, scholars have discussed the potential for expansive use of pre-dispute commoditization of procedure in litigation.<sup>27</sup> Because parties already "strategically employ procedure during the litigation process," the scholars' argument follows that, if given the latitude to do so, parties will seek to "use procedural terms to maximize strategic advantage in the same manner, trading

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<sup>22</sup> See, e.g., Paulson, *supra* note 2, at 485, 488.

<sup>23</sup> E.g., Hoffman, *supra* note 2, at 398.

<sup>24</sup> See Daphna Kapeliuk & Alon Klement, *Contracting Around Twombly*, 60 DEPAUL L. REV. 1, 18–20 (2010); accord Hoffman, *supra* note 2, at 391, 398.

<sup>25</sup> Kapeliuk & Klement, *supra* note 2, at 3 (listing advantages of pre-dispute procedural modification in litigation).

<sup>26</sup> 407 U.S. 1 (1972). Many courts were suspicious of forum-selection clauses before *The Bremen*, and viewed them as prohibited under the "ouster doctrine." Paulson, *supra* note 2, at 485. The "ouster" doctrine compelled courts to hold that "parties could not eliminate a court's jurisdiction to hear a case by private contract." *Id.* Many courts also applied this doctrine to arbitration agreements, for similar reasons. *Id.*

<sup>27</sup> E.g., Dodge, *supra* note 2, at 739.

off differences in expected outcome from procedural modification just as substantive terms exploit differences in valuation.”<sup>28</sup>

Today, “[c]ontract law’s sovereignty over litigation procedure is a radical and exciting idea,” and the “normative desirability” thereof has been called a “hot topic in the civil procedure academy.”<sup>29</sup> Because of its great importance, the remainder of this section explores the normative desirability of procedural contracts, beginning with their advantages and ending with concerns associated therewith.

## 2. *Advantages of Pre-Dispute Procedural Contracts*

Parties already have wide latitude in making post-dispute modifications under the Federal Rules.<sup>30</sup> Settlement agreements are perhaps the biggest example: by contractually settling a dispute after it arises, the involved parties waive the right to their day in court.<sup>31</sup> More generally speaking, however, because there may be a “possible divergence between . . . parties’ pre-dispute and post-dispute interests,”<sup>32</sup> the idea that parties modify procedure post-dispute illuminates the great need for such procedural tools pre-dispute.

In their leading manuscript, Kapeliuk and Klement explain how contractualized procedure can “further enhance [parties’] contractual gains by modifying procedural rules before the dispute arises,” rather than doing so afterward.<sup>33</sup> Although most contractual terms are substantive in nature,<sup>34</sup> parties might also benefit from altering the way their dispute will be litigated by contractually modifying procedure.<sup>35</sup> In a freely bargained-for, legally valid

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<sup>28</sup> *Id.*

<sup>29</sup> Hoffman, *supra* note 2, at 391.

<sup>30</sup> See Kapeliuk & Klement, *supra* note 2, at 12–14 (surveying some ways that parties make post-dispute procedural modifications under the Federal Rules, and in particular, post-dispute discovery stipulations).

<sup>31</sup> 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3901, at 18–19 (2d ed. 1992); *accord* Bone, *supra* note 2, at 1351.

<sup>32</sup> See Kapeliuk & Klement, *supra* note 2, at 13–14 (explaining that while post-dispute modifications are largely available, parties have different motives post-dispute, and post-dispute agreements “simply cannot address prior (and often joint) opportunities because they are already forgone by the time of dispute”).

<sup>33</sup> *Id.* at 6. Kapeliuk and Klement explain that “[c]ooperation is much more likely at the contracting stage,” *id.* at 17, possibly because parties operate behind a “veil of ignorance” regarding the many contingencies that may lead to a potential dispute, *id.*, and possibly because parties, at the time of contract, “enjoy a high degree of trust and cooperation.” *Id.* at 18.

<sup>34</sup> *Id.* at 14. On the substance–procedure spectrum, see Dodge, *supra* note 2, at 732–33.

<sup>35</sup> See Kapeliuk & Klement, *supra* note 2, at 14.

contract, parties can use contractualized procedure to reduce litigation costs,<sup>36</sup> prevent opportunistic behavior,<sup>37</sup> shape their pre-dispute behavior,<sup>38</sup> and provide themselves with an information signaling and sorting mechanism at the time of contracting.<sup>39</sup> Ultimately, Kapeliuk and Klement argue, “similar advantages cannot be realized after the dispute has arisen through modification or waiver of procedural rights.”<sup>40</sup>

### 3. *Why Not Arbitrate?*

Pre-dispute procedural contracts offer parties the ability to alter the rules of litigation in ways that can increase their joint welfare in future disputes.<sup>41</sup> Many pre-dispute procedural modifications, however, are already attainable through arbitration agreements.<sup>42</sup> Hence, understanding why parties choose to arbitrate disputes, and why they may prefer a public forum to an arbitral one is important. Some of the key advantages of choosing arbitration over litigation include disputing parties’ freedom to select their own decision-maker(s),<sup>43</sup> parties’ flexibility in designing the rules governing a dispute,<sup>44</sup> speed and cost benefits,<sup>45</sup> and the finality of an arbitral award.<sup>46</sup> Additionally, arbitration is

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<sup>36</sup> See *id.* at 16–19 (explaining how “[l]itigants can lower their costs by cooperatively limiting their investment in trial, refraining from discovery abuse, avoiding unnecessary motions, and negotiating a possible settlement in an open and collaborative manner”).

<sup>37</sup> See *id.* (noting that “parties enjoy a high degree of trust and cooperation” at the pre-dispute stage, and “[c]ooperation requires the litigants to negotiate the terms of any prospective arrangement to restrict their opportunistic behavior”).

<sup>38</sup> *Id.* at 19–23 (explaining how pre-dispute procedural agreements affect “parties’ incentives to comply with substantive law and to perform in accordance with their contractual obligations”).

<sup>39</sup> See *id.* at 23–25 (discussing how pre-dispute procedural agreements can “help resolve information asymmetries which substantive mechanisms cannot address”).

<sup>40</sup> *Id.* at 26.

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

<sup>43</sup> FOLBERG ET AL., *supra* note 4, at 542. Parties typically select either one arbitrator or a panel of arbitrators, generally based on their industry expertise. See *id.*

<sup>44</sup> *Id.* at 543. Arbitration affords parties the opportunity to “craft[] a private system of justice tailored to fit the needs of their specific dispute.” *Id.*

<sup>45</sup> Arbitration is generally viewed as less expensive and less time-consuming than litigation. *Id.* at 542. *But see* Kapeliuk & Klement, *supra* note 2, at 28–29 (positing that arbitration costs may not necessarily be lower than litigation, especially since upfront costs, including attorney’s fees and various administrative costs, are higher).

<sup>46</sup> See ABRAHAM P. ORDOVER & ANDREA DONEFF, ALTERNATIVES TO LITIGATION: MEDIATION, ARBITRATION, AND THE ART OF DISPUTE RESOLUTION 143–45 (2d ed. 2002).

less formal than litigation,<sup>47</sup> and—because of its private nature—is more easily kept confidential than litigation.<sup>48</sup>

While arbitration already offers procedural freedom in ways presently unthinkable in litigation,<sup>49</sup> there are significant reasons why arbitration is not a perfect substitute dispute-resolution forum for parties who wish simply to modify procedures.<sup>50</sup> Some reasons that make litigation preferable to arbitration include arbitration’s potentially higher costs,<sup>51</sup> avoiding the time and effort spent negotiating an arbitration agreement’s terms, and arbitrators’ vulnerability to market pressures.<sup>52</sup> Additionally, arbitrators have been shown to “split the difference” between the parties’ settlement offers, rather than finding in favor of a definitive winner.<sup>53</sup> Finally, as discussed in greater depth in Part II, potentially the most significant reason involves the judiciary’s role in serving public functions beyond mere dispute resolution.<sup>54</sup>

#### 4. *Enforceability of Procedural Contracts*

The prospect of transforming the American litigation system with procedural contracts is equally exciting and unnerving. Since the enactment of the Federal Rules in 1938, the federal judiciary has been governed by uniform rules that create a one-size-fits-all litigation system.<sup>55</sup> Some of the Supreme

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<sup>47</sup> *Id.* at 145.

<sup>48</sup> *Id.* at 143 (noting that arbitration is private and that everything done in arbitration can be kept confidential).

<sup>49</sup> See Moffitt, *supra* note 2, at 518 (remarking that “arbitration parties can reform pleading requirements, set their own calendar, and choose their own arbitrator”).

<sup>50</sup> See Kapeliuk & Klement, *supra* note 2, at 26–27; Moffitt, *supra* note 2, at 518–19.

<sup>51</sup> See, e.g., Kapeliuk & Klement, *supra* note 2, at 29 nn.105–06 and accompanying text (surveying reports and studies regarding cost differentials between arbitration and litigation, and concluding that arbitration costs, which parties internalize fully, may be significantly higher than litigation costs); see also Moffitt, *supra* note 2, at 518–19 (arguing that cost is one factor that makes arbitration not as accessible as the courts).

<sup>52</sup> See Kapeliuk & Klement, *supra* note 2, at 27 (arguing that market incentives “may lead arbitrators to compromise litigants’ pre-dispute interests for their post-dispute satisfaction”). Arbitrators have an incentive to maximize both parties’ satisfaction, so as to increase the likelihood they are re-appointed in the future. *Id.* at 30. On the other hand, disputants do not hire judges, and judges’ incomes are not affected by the quantity of cases they decide or decision they render. *Id.* Thus, judges are not similarly subject to such market pressures. *Id.*

<sup>53</sup> See, e.g., *id.* at 32 n.119 and accompanying text (citing David E. Bloom, *Empirical Models of Arbitrator Behavior Under Conventional Arbitration*, 68 REV. ECON. & STAT. 578, 585 (1986)). *But see id.* at 32 (conceding that “empirical literature cannot unequivocally corroborate the proposition that arbitrators tend toward finding middle grounds between parties”).

<sup>54</sup> See *infra* Part II.C.2.

<sup>55</sup> See, e.g., RICHARD D. FREER, CIVIL PROCEDURE 524 (3d ed. 2012).

Court's goals in promulgating the Federal Rules are explicit. First, as Rule 1 explains, the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."<sup>56</sup> Second, the Rules Enabling Act, which gives the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence," concurrently commands that "such rules shall not abridge, enlarge, or modify any substantive right."<sup>57</sup> Finally, as the 1993 Advisory Committee Notes explain, the judiciary has an "affirmative duty . . . to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay."<sup>58</sup> Hence, the explicit purposes of the Federal Rules are just, speedy, and inexpensive resolution of claims, and the separation of procedure and substance.<sup>59</sup>

Although the goals are transparent, the Federal Rules themselves do not explicitly address which rules are mandatory and which might be negotiable. The Federal Rules do not reflect any evidence that the drafters foresaw the commoditization of procedure.<sup>60</sup> Nevertheless, courts have held at least some Federal Rules to be negotiable.<sup>61</sup> Indeed, literature addressing the types of enforceable procedural contract terms is vast;<sup>62</sup> however, for clarity, the following survey briefly examines three general categories of procedural contract terms.

The Supreme Court opened the door to the commoditization of procedure in 1972 with its landmark decision in *The Bremen*, where the Court enforced a forum-selection clause in a contract between two merchants.<sup>63</sup> Thereby, the Court made it clear that at least some procedural terms can be treated as

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<sup>56</sup> FED. R. CIV. P. 1.

<sup>57</sup> Rules Enabling Act, 28 U.S.C. § 2072 (2012). Another goal, "uniformity," can be implied from the first principle of the Rules Enabling Act, which states that the rules are "general" and apply to all "cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals." See Paulson, *supra* note 2, at 479 (citing 28 U.S.C. § 2072(a) (2012)). The Rules Enabling Act also recognizes a distinction between procedure and substantive rights, preventing courts from creating rules that directly interfere with adjudication of the merits. See *id.*

<sup>58</sup> FED. R. CIV. P. 1 advisory committee's note to 1993 amendment.

<sup>59</sup> See Paulson, *supra* note 2, at 479–83 (discussing the purposes of the Federal Rules).

<sup>60</sup> *Infra* notes 179–81.

<sup>61</sup> See Elliott-McGowan Prods. v. Republic Prods., Inc., 145 F. Supp. 48 (S.D.N.Y. 1956) (approving a pre-dispute contract modifying the rules of discovery).

<sup>62</sup> See Hoffman, *supra* note 2, at 391–93 & nn.7–14 and accompanying text for a breakdown of the normative positions taken by scholars on the subject.

<sup>63</sup> *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 444–45 (2011); see *supra* note 26.

commodities worth bargaining for.<sup>64</sup> Today, procedural terms can be grouped into three general categories.<sup>65</sup> The first category includes contracts that act as gatekeepers to a particular forum, such as forum-selection clauses,<sup>66</sup> jury waivers,<sup>67</sup> and appeal waivers.<sup>68</sup> The second category includes contracts that place limitations on available theories of relief, such as contractual limitation periods<sup>69</sup> and clauses limiting damages.<sup>70</sup> Agreements to waive class actions could fit in the second category as well.<sup>71</sup> The third category includes contracts that seem to affect the judge's ability to decide the merits of a case, such as rules that limit discovery<sup>72</sup> or the court's ability to consider and weigh evidence.<sup>73</sup>

However, while courts and commentators have addressed enforceability issues with respect to certain procedural terms, “the Supreme Court has not yet conclusively determined the enforceability of terms that regulate the courts directly.”<sup>74</sup> Furthermore, according to recent empirical studies, there is scant case law and empirical evidence supporting the notion that contractualized

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<sup>64</sup> See *The Bremen*, 407 U.S. 1. In its seminal decision, the Supreme Court held enforceable a forum-selection clause in a “freely negotiated international commercial transaction between [two corporations].” *Id.* at 17. The Court based its reasoning largely on “strong evidence that the forum clause was a vital part of the agreement,” and that it would be “unrealistic to think that the parties did not conduct their negotiations, including fixing monetary terms, with the consequences of the forum clause figuring prominently in their calculations.” *Id.* at 13–14. However, the Court used seemingly careful language to limit its decision to “freely negotiated” contracts. See *id.* at 12–13 (proclaiming that “[t]here are compelling reasons why a *freely negotiated* . . . agreement . . . should be given full effect” (emphasis added)); *id.* at 14 (“There is strong evidence that the forum clause was a vital part of the agreement . . .”). Nevertheless, shortly after *The Bremen*, the Court enforced a forum-selection clause in a non-freely-bargained-for contract between parties with unequal bargaining power. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 592–94 (1991). Curiously, the majority made no factual distinction between the contracts at issue in *The Bremen* and in *Carnival Cruise*. See *id.* Justice Stevens dissented on this ground, asserting that the adhesive nature of the contract begs special, and more suspect, treatment. *Id.* at 600–01 (Stevens, J., dissenting).

<sup>65</sup> For his applicable categorization of terms, I am indebted to Paulson, *supra* note 2, at 485.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 485, 488. While the “Supreme Court has not yet faced the issue of whether an ex ante contract to waive the right to a jury trial is enforceable in an action filed in federal court,” district courts and courts of appeals have uniformly held that such a clause is enforceable. See Noyes, *supra* note 2, at 604 (citing Debra T. Landis, *Contractual Jury Trial Waivers in Federal Civil Cases*, 92 A.L.R. FED. 688 (2003)).

<sup>68</sup> For a discussion on appeal waivers, see Paulson *supra* note 2, at 491–98.

<sup>69</sup> For a discussion on contractual statutes of limitations, see *id.* at 498–501.

<sup>70</sup> See *id.* at 501–11.

<sup>71</sup> Cf. Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 376 (2014) (noting that for many plaintiffs with small damage claims, individual vindication is economically unfeasible).

<sup>72</sup> See *Elliott-McGowan Prods. v. Republic Prods., Inc.*, 145 F. Supp. 48 (S.D.N.Y. 1956).

<sup>73</sup> For a discussion on contractually altering evidentiary rules, see Paulson, *supra* note 2, at 511–22.

<sup>74</sup> Dodge, *supra* note 2, at 737.

procedure is widespread.<sup>75</sup> Ultimately, however, assuming procedural contracts are forthcoming, the discussion must move beyond examples of terms and toward the problems associated with such contracts.

### 5. *Problems Associated with Contractualized Procedure*

Not all scholars are wholeheartedly in favor of a party-driven rulemaking regime.<sup>76</sup> Some fear that “virtually unregulated” contractualized procedure may threaten the legitimacy of the litigation system in various ways.<sup>77</sup> The first and most obvious issue is whether contractualized procedure might confuse, overwhelm, or unduly burden the court.<sup>78</sup> Other concerns include contractualized procedure’s potential for impeding information exchanges,<sup>79</sup> undermining judicial integrity,<sup>80</sup> creating problems associated with defective consent in non-freely-bargained-for contracts,<sup>81</sup> and allowing parties to inefficiently allocate and use public judicial resources.<sup>82</sup>

The first way contractualized procedure may adversely impact the litigation system is by limiting information exchanges.<sup>83</sup> Information about a dispute and information about the process of adjudication are considered public goods that are generated during the course of adjudicating a dispute.<sup>84</sup> Accordingly, Professors Davis and Hershkoff argue that “[c]ontractual provisions of some kinds tend to limit the flow of information to actors who would be entitled to receive that information under publicly sponsored rules of civil procedure.”<sup>85</sup>

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<sup>75</sup> See generally Hoffman, *supra* note 2, at 402–20 (exploring EDGAR database but failing to find sufficient evidence of many procedural contract terms).

<sup>76</sup> See, e.g., Bone, *supra* note 2, at 1384–97; Davis & Hershkoff, *supra* note 2, at 541–53 (arguing that “there are sound functional reasons to be concerned about the outsourcing of procedure”).

<sup>77</sup> See Davis & Hershkoff, *supra* note 2, at 541.

<sup>78</sup> Moffitt, *supra* note 2, at 514–15 (arguing that, despite the potential issues of confusing, overwhelming, and burdening the courts, “we have no reason to think that the costs would be so overwhelming that they would outweigh the potential benefits of customization”).

<sup>79</sup> See Davis & Hershkoff, *supra* note 2, at 541–53.

<sup>80</sup> Kapeliuk & Klement, *supra* note 2, at 42–44.

<sup>81</sup> *Id.* at 44–49.

<sup>82</sup> *Id.* at 39–42.

<sup>83</sup> Davis & Hershkoff, *supra* note 2, at 541.

<sup>84</sup> See *id.* Professors Davis and Hershkoff explain that “[r]ules that govern . . . pleadings . . . [and] discovery regulate the transmission of information . . . between the parties,” “[r]ules that provide for class actions . . . determine who is automatically entitled to receive the information generated as the dispute moves through [the litigation process],” and “rules that govern public access to proceedings and the publication of judicial opinions determine the extent to which all of this information is accessible to the public and to the courts.” *Id.* at 542.

<sup>85</sup> *Id.* at 542–43.

Also, “provisions that alter or stunt the flow of information to courts . . . could affect the quality of judicial decision making.”<sup>86</sup> They first argue that the “information blockage could affect . . . the court system’s ability to resolve disputes within the framework of existing law,”<sup>87</sup> and, second, that the “stunted flow of information can distort the creation of precedent and impede efforts by regulators, legislators, and other policymakers to identify social problems and devise public solutions.”<sup>88</sup>

The second way that contractualized procedure might adversely impact the litigation system is that too much party freedom may undermine the institutional integrity of the judiciary.<sup>89</sup> “The public court system serves both private and public functions,” whereby it “provide[s] a private dispute resolution service as well as produce[s] precedents and legal rules, which are public goods that benefit society at large.”<sup>90</sup> Thus, adhering to the rules of civil procedure “substantiate[s] [the court’s] judicial integrity and commitment to a fair and efficient process and to the search for a just and accurate judicial resolution of disputes.”<sup>91</sup> It should not be surprising, then, that pre-dispute procedural contracts, which alter the very rules that uphold judicial integrity, are capable of undermining the judiciary’s institutional integrity.<sup>92</sup> Kapeliuk and Klement identify two categories of procedural arrangements that could harm the court’s reputation:

[P]rocedural arrangements that change the mode of judicial decision-making, or impart such decision-making to non-judicial mechanisms, yet require the court to embrace the outcomes of these mechanisms and implement them;<sup>[93]</sup> and procedural arrangements

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<sup>86</sup> *Id.* at 543.

<sup>87</sup> *Id.* at 542; *see also* Bone, *supra* note 2, at 1375–78 (discussing the outcome-quality costs of party rulemaking).

<sup>88</sup> Davis & Hershkoff, *supra* note 2, at 544; *see also* Bone, *supra* note 2, at 1377–78 (discussing possible adverse impacts of party rulemaking on future suits by affecting the quality of legal precedent).

<sup>89</sup> *See* Kapeliuk & Klement, *supra* note 2, at 42–44.

<sup>90</sup> *Id.* at 42; *accord infra* Part II.C.2.

<sup>91</sup> Kapeliuk & Klement, *supra* note 2, at 42 (concluding that because “precedents, public trust and judicial integrity are all public goods whose benefits are enjoyed by all members of society,” and because “public courts . . . decid[e] their cases on the basis of substantive law,” “courts enjoy a reputational capital which litigants use and at the same time substantiate”).

<sup>92</sup> *See id.* at 44.

<sup>93</sup> *Id.* (explaining that arrangements in this category “mak[e] inefficient use of scarce judicial resources,” and are thus “inefficient irrespective of their reputational effect”).

that create an imbalanced process, adversely affecting the court's accuracy in a biased manner.<sup>94</sup>

Third, consent issues associated with altering procedural terms in standard-form contracts, contracts of adhesion, and contracts between parties with significantly disparate bargaining power may be cause for concern.<sup>95</sup> While it may be true that “the fact that a contract does not involve bargaining is not a reason by itself to condemn it,”<sup>96</sup> one major criticism of such contracts is that they do not reflect any meaningful consent from the weaker party where bargaining power is skewed.<sup>97</sup> However, the conversation regarding “defective consent” has mainly been directed at arbitration agreements.<sup>98</sup> Accordingly, some arguments against adhesive arbitration agreements would not be equally alarming in the procedural contract context.<sup>99</sup> For example, an oft-cited concern with mandatory arbitration of employment disputes is that adjudication in a court of law is “superior to arbitration for enforcing the broad public interest in statutory civil rights claims, such as Title VII claims, Age Discrimination in Employment Act claims, and the like.”<sup>100</sup> However, there would be no corresponding anti-adhesive argument against adhesive procedural contracts because procedural contracts are to be adjudicated in a court of law, where statutory civil rights claims were intended to be adjudicated.<sup>101</sup> Thus, while defective consent may be a cause for concern with respect to contractualizing procedure, it should not be so problematic that it needs to be banned.<sup>102</sup>

Finally, contractualized procedure's effect on public litigation costs poses another potential problem.<sup>103</sup> Unlike in private arbitration, parties do not internalize certain public costs of the court system when they litigate.<sup>104</sup> Because parties do not fully internalize the publicly subsidized costs of

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<sup>94</sup> *Id.* (noting that while these arrangements may indeed be efficient, they may have an adverse reputational effect on the court, and, for that reason, they may be undesirable).

<sup>95</sup> *See id.* at 44–49; Bone, *supra* note 2, at 1360–68.

<sup>96</sup> Bone, *supra* note 2, at 1363.

<sup>97</sup> *Id.* at 1360.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1362.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *See id.* at 1368–69.

<sup>103</sup> *Id.* at 1374–75.

<sup>104</sup> *Id.*

litigation, parties “might use more resources than are intended to be allocated to the dispute, or use the resources allocated inefficiently.”<sup>105</sup>

In sum, parties may realize various benefits by contractually modifying the procedure that governs their litigation.<sup>106</sup> While arbitration already allows parties to tailor their resolution process to their dispute, some parties may prefer to have their dispute resolved in the public judicial system but pursuant to their choice of procedures. However, allowing parties the freedom to modify litigation procedures may be problematic in significant ways,<sup>107</sup> perhaps most importantly because having a set of procedural rules largely legitimizes the judicial system.<sup>108</sup> Nevertheless, a paradigmatic shift relegating the one-size-fits-all set of rules to mere defaults would further the efficiency and freedom of contract initiatives that the Supreme Court has robustly endorsed in arbitration.

### *B. The Federal Arbitration Act*

This section sets the topic of procedural contracts aside to preview the relevance of recent arbitration jurisprudence to the discussion in Part II. In doing so, this section illustrates the Supreme Court’s commitment to expanding freedom of contract in arbitration, setting up an analogy to come in Part II. This section first discusses the FAA as enacted, and then briefly catalogs the expansion principles used by the Supreme Court to develop its modern doctrine.

#### *1. FAA as Enacted*

For centuries, courts in the United States and England employed anti-arbitration measures such as the doctrines of ouster and revocability to “nullify contracts to arbitrate.”<sup>109</sup> The FAA “was enacted in 1925 in response to widespread judicial hostility to[ward] arbitration,”<sup>110</sup> and it did so by placing arbitration agreements “upon the same footing as other contracts, where [they]

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<sup>105</sup> For a discussion on allocation and efficiency concerns associated with contractualized procedure, see Kapeliuk & Klement, *supra* note 2, at 40–42.

<sup>106</sup> See *supra* notes 51–54 and accompanying text.

<sup>107</sup> See *supra* Part I.A.5.

<sup>108</sup> See, e.g., Kapeliuk & Klement, *supra* note 2, at 42.

<sup>109</sup> Horton, *supra* note 63, at 444–45, 445 n.34.

<sup>110</sup> Anjanette H. Raymond, *It Is Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion*, 91 NEB. L. REV. 666, 668 (2013) (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008)).

belong[.].”<sup>111</sup> Indeed, “[i]n the most general sense, if a contract dealing with interstate commerce contains an agreement to arbitrate, the FAA requires that the arbitration agreement be enforced, unless generally applicable contract principles render the agreements unenforceable.”<sup>112</sup> Thus, the FAA “forbids courts called upon to enforce agreements to arbitrate from imposing special burdens on arbitration agreements, but permits courts to hold those agreements to the same standards that all contracts must meet.”<sup>113</sup>

## 2. *Expanding the FAA*

It was not until several decades after the FAA’s enactment that the Supreme Court began enthusiastically endorsing arbitration.<sup>114</sup> Cases prior to the 1960s illustrate the Supreme Court’s reluctance in finding disputes arising under federal statutes—such as the securities laws, the antitrust laws, and the civil rights laws—arbitrable.<sup>115</sup> However, by the 1970s and 1980s, the Court began robustly enforcing arbitration agreements under the FAA.<sup>116</sup> For example, in the 1980s, the Supreme Court determined that the FAA created federal substantive law,<sup>117</sup> governed in state courts;<sup>118</sup> preempted conflicting

<sup>111</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 15–16 (1984) (noting congressional intent for the FAA to place “[a]n arbitration agreement . . . upon the same footing as other contracts, where it belongs” (alteration in original) (quoting H.R. REP. NO. 68-96, at 1 (1924))); *see also* Horton, *supra* note 63, at 445 (citing Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14)).

<sup>112</sup> Raymond, *supra* note 110, at 668 (footnotes omitted). Section 2 of the FAA provides,

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2012).

<sup>113</sup> Raymond, *supra* note 110, at 668. *See generally* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (rejecting the California *Discover Bank* rule for discriminatorily applying against arbitration agreements and not contracts generally).

<sup>114</sup> *See* Drahozal & Rutledge, *supra* note 2, at 1112–13 (detailing the “[d]emise of the [n]on-[a]rbitrability [d]octrine” and explaining that “proliferation in the types of arbitrable claims created greater opportunities to regulate procedure by contract”).

<sup>115</sup> *Id.*; *see, e.g.*, *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 205 (1956); *Wilko v. Swan*, 346 U.S. 427 (1953) (refusing to compel arbitration of a statutory rights claim under the Securities Act).

<sup>116</sup> Drahozal & Rutledge, *supra* note 2, at 1113 (noting that in the 1970s and 1980s, “most claims (including federal statutory ones) became arbitrable”).

<sup>117</sup> *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). Notwithstanding the FAA’s creation of federal substantive law, “the Court affirmed the absence of federal question jurisdiction over cases invoking” the FAA. Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of*

state law;<sup>119</sup> and established that arbitrability issues “would be decided as a matter of federal law in accordance with the federal policy favoring arbitration.”<sup>120</sup> Most significantly, however, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Supreme Court unequivocally proclaimed, “Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements,”<sup>121</sup> assuring lower federal courts that the FAA demands the advancement of a pro-arbitration policy.

Additionally, until the 1980s, “courts uniformly held that a plaintiff could not be compelled to arbitrate statutory causes of action.”<sup>122</sup> Instead, claims arising under federal securities, labor, antitrust, patent, pension, and civil rights laws were only decided in a judicial forum.<sup>123</sup> In its seminal 1985 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* decision, however, the Court expanded upon its holding in *Moses H. Cone*,<sup>124</sup> holding that, “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”<sup>125</sup> Today, it is well settled that the Court will permit the

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*Arbitration Law*, 71 VA. L. REV. 1305, 1307 (1985). *But see* Horton, *supra* note 63, at 445–46 (noting that the “vast majority of scholars believe” that the FAA was never meant to be a substantive preemptive statute).

<sup>118</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

<sup>119</sup> In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the Court concluded that the FAA is based on “the incontestable federal foundations of ‘control over interstate commerce and over admiralty,’” 388 U.S. 395, 405 (1967), “linking the FAA to Congress’s plenary power to regulate interstate commerce,” and thereby laying “the doctrinal groundwork for transforming the FAA into preemptive substantive law.” Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm?*, 42 SW. L. REV. 131, 138 (2012). The *Southland Corp.* Court recognized that the *Moses H. Cone* decision “expressly stated what was implicit in *Prima Paint*, *i. e.* [sic], the substantive law the Act created was applicable in state and federal courts.” *Southland Corp.*, 465 U.S. at 12 (citing *Moses H. Cone*, 460 U.S. at 25 & n.32); *see also* *Moses H. Cone*, 460 U.S. at 24. Since its decision in *Southland Corp.*, the Supreme Court has consistently followed this anti-federalist policy, favoring a preemptive FAA. *See, e.g.*, *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (concluding that the California statute’s requirement for a judicial forum was in “unmistakable conflict” with the FAA); *see also* Horton, *supra* note 63, at 453–54.

<sup>120</sup> *Hirshman*, *supra* note 117, at 1307.

<sup>121</sup> 460 U.S. at 24.

<sup>122</sup> Horton, *supra* note 63, at 451.

<sup>123</sup> *See id.* at 451–52 & nn.78–83; *see also* *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56 (1974) (“Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII.”).

<sup>124</sup> *See Moses H. Cone*, 460 U.S. at 24–25 (“[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . .”).

<sup>125</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). In a scathing dissent, Justice Stevens accused the majority of resting “almost exclusively on the federal policy favoring arbitration of commercial disputes.” *Id.* at 641 (Stevens, J., dissenting). He asserted that the “federal policy favoring arbitration” should not “be read to encompass a claim that relies, not on a failure to perform the contract, but on an independent violation of federal law.” *Id.* at 645. Additionally, Justice Stevens noted that

arbitration of statutory rights claims,<sup>126</sup> furthering the “principal purpose” of the FAA, which is to “ensur[e] that private arbitration agreements are enforced according to their terms.”<sup>127</sup>

Today, federal courts enforce arbitration agreements more zealously than ever before. By placing an arbitration clause in a standard form contract,<sup>128</sup> a service provider (or employer, or franchisor, etc.) can strip from its customers (or employees,<sup>129</sup> or franchisees,<sup>130</sup> etc.): (1) a jury trial,<sup>131</sup> (2) the protections of the Federal Rules of Civil Procedure and the Federal Rules of Evidence;<sup>132</sup> (3) a decision based on precedent;<sup>133</sup> (4) the ability to aggregate claims of those similarly situated for a class or collective action,<sup>134</sup> (5) their ability (or rational economic willingness) to seek cost-effective vindication,<sup>135</sup> and (6) virtually any judicial review on the merits.<sup>136</sup> However, as Part II will make clear,

“[n]othing in the text of the 1925 Act, nor its legislative history, suggests that Congress intended to authorize the arbitration of any statutory claims.” *Id.* at 646. Finally, he emphasized the distinction between arbitrating contractual claims and statutory claims, since an arbitrator’s “task is to effectuate the intent of the parties rather than the requirements of enacted legislation.” *Id.* at 648 (quoting *Alexander*, 415 U.S. 36).

<sup>126</sup> See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (recognizing that “[i]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA”). However, if “Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue,” then it is improper for a court to compel arbitration. *Id.* (quoting *Mitsubishi Motors Corp.*, 743 U.S. at 628) (noting that “if such an intention exists, it will be discovered in the text of the [statute], its legislative history, or an ‘inherent conflict’ between arbitration and the [statute’s] underlying purposes”).

<sup>127</sup> See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989)); see also *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312–13 (2013) (Thomas, J., concurring) (compelling arbitration for antitrust claim because plaintiff “voluntarily entered into a contract containing a bilateral arbitration provision” and cannot “escape its obligations merely because the claim it wishes to bring might be economically infeasible”).

<sup>128</sup> While arbitration agreements in form contracts are presumptively enforceable, strong counterarguments exist. See, e.g., *Horton*, *supra* note 63, at 447–48 (arguing that “even a cursory review of the FAA’s legislative history reveals that Congress did not want the statute to apply to contracts between parties with unequal bargaining power”).

<sup>129</sup> See, e.g., *Circuit City Stores v. Adams*, 532 U.S. 105, 109–10 (2001).

<sup>130</sup> See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 10–11 (1984).

<sup>131</sup> See, e.g., *RUTLEDGE*, *supra* note 16, at 170–88, 201 (concluding that “[t]he majority of courts rightly conclude that general consent to an arbitration clause should be deemed sufficient to waive the jury right”).

<sup>132</sup> *FOLBERG ET AL.*, *supra* note 4, at 592.

<sup>133</sup> See, e.g., *id.* at 541.

<sup>134</sup> See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684–85 (2010).

<sup>135</sup> See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (holding a contractual waiver of class arbitration enforceable under the FAA even when the claimant’s cost of individually arbitrating a federal statutory claim exceeded his potential recovery).

<sup>136</sup> An arbitral award may be vacated only

- (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were

despite the judiciary's commitment to making arbitration customizable, its justifications for expanding the FAA do not always apply equally to litigation.

## II. TEXTUAL AND POLICY CONSIDERATIONS SUPPORT LESS FREEDOM FOR MODIFYING PROCEDURES IN LITIGATION THAN IN ARBITRATION

The scholarly debate over procedural contracts appears to be in response to the evolution of arbitration.<sup>137</sup> Moreover, several arguments have been made comparing adjudication via litigation and arbitration.<sup>138</sup> One argument is that “party-made procedures cannot be unfair or inefficient if they are tolerated in arbitration.”<sup>139</sup> Another argument is that “there is little point in disallowing party rulemaking if the result will be that parties exit adjudication and create the same procedures in arbitration.”<sup>140</sup> Finally, a third argument is that it is a “good idea to allow parties to design their own procedures in adjudication as a way to discourage them from escaping adjudication for arbitration.”<sup>141</sup> However, because these arguments are flawed,<sup>142</sup> an open question remains among the existing literature.

This Comment seeks to fill the gap in existing scholarship by arguing that textual and policy-based interpretations of the FAA and the Federal Rules do not support freeing parties to modify procedure as broadly in litigation as in arbitration, where the FAA allots parties a tremendous amount of freedom to modify procedure. Rather, party freedom in contracting for procedure in litigation should be more constrained than in arbitration.<sup>143</sup>

This Part argues that procedural rules should be less negotiable in litigation than in arbitration, but still negotiable to some extent. Parties should have less freedom to modify procedure in litigation than in arbitration for three reasons.

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guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10 (2012).

<sup>137</sup> Hoffman, *supra* note 2, at 391.

<sup>138</sup> Bone, *supra* note 2, at 1354–55.

<sup>139</sup> *Id.* at 1354; accord Noyes, *supra* note 2, at 594, 620.

<sup>140</sup> Bone, *supra* note 2, at 1354–55.

<sup>141</sup> *Id.*

<sup>142</sup> See *id.* (explaining why these arguments are weak).

<sup>143</sup> See *supra* notes 128–36 and accompanying text.

First, the text of the FAA contemplates party choice over a wide array of terms, whereas the Federal Rules do not. Second, the policies behind having a one-size-fits-all set of rules for litigation concern more than simply the immediate disputants to a particular lawsuit. Federal Rule 1 uses the term “just . . . resolution,” suggesting that parties “own” their dispute to a lesser degree in litigation than in arbitration. “Just” resolution must account for the reality that litigation serves both private and public functions. For example, satisfying parties by allowing them freedom to contract for procedure is not sufficiently “just” because doing so fails to account for the public functions litigation serves. Third, because courts cannot constitutionally resolve certain issues, they have an incentive to maximize procedural freedom in arbitration so that when an arbitral decision is rendered for such an issue, the court will have a neutral ground upon which to review the issue’s resolution. This theory explains why courts might uniquely be willing to broadly enforce certain procedural terms in arbitration, and not to correspondingly do so in litigation. Finally, this Part provides support for why parties should be free to modify litigation procedure to some extent, but not to the same extent as in arbitration.

*A. An Attractive, Yet Inappropriate Analogy*

Some would argue that because procedural freedom enhances arbitration, it is desirable in litigation too.<sup>144</sup> Indeed, when parties opt for arbitration, they contract out of the public court system.<sup>145</sup> As a result of exiting the public system, the public rules of procedure no longer apply.<sup>146</sup> Had the parties not entered an arbitration agreement, the Federal Rules would govern in federal court.<sup>147</sup> Despite this distinction, and despite the differences within both private and public dispute-resolution fora, commentators have analogized contractually modifying procedure in litigation to customizing private arbitration.<sup>148</sup> However, different federal directives, with different text and underlying policies, govern the processes differently. The litigation process is governed by rules promulgated by the judiciary, prescribed in the Federal Rules.<sup>149</sup> Conversely, arbitration is governed by the FAA,<sup>150</sup> which provides

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<sup>144</sup> See, e.g., Noyes, *supra* note 2, at 594 (arguing and concluding that modified procedures that are acceptable in arbitration are not repugnant to modified litigation).

<sup>145</sup> FOLBERG ET AL., *supra* note 4, at 592.

<sup>146</sup> *Id.*

<sup>147</sup> See FED. R. CIV. P. 1.

<sup>148</sup> E.g., Noyes, *supra* note 2, at 620.

<sup>149</sup> See FED. R. CIV. P. 1 (decreeing that the rules will “govern the procedure in all civil actions and proceedings”).

parties with a great deal of flexibility in customizing their own set of rules to govern their dispute.<sup>151</sup>

However, unlike the litigation process, arbitration is a creature of contract; it is entered into—and governed—by contractual agreement.<sup>152</sup> Accordingly, the rules that govern disputants' arbitration will be stated in a written, contractual agreement to arbitrate.<sup>153</sup> Moreover, unlike the Federal Rules, which are uniquely designed to “govern the procedure in all civil actions and proceedings in the United States district courts,”<sup>154</sup> the FAA is not particularly designed to govern arbitration procedures. Rather, the FAA is an enforcement statute.<sup>155</sup> It requires that courts enforce arbitration agreements in a broad array of contracts, to the extent that such agreements do not violate state contract law.<sup>156</sup>

Nevertheless, such a distinction between the procedure-governing Federal Rules and the agreement-enforcing FAA is no more than superficially important. Because the FAA is an enforcement statute, it can be functionally similar to the Federal Rules.<sup>157</sup> For instance, where parties include procedural terms in their arbitration agreement, the FAA indiscriminately requires enforcement.<sup>158</sup> In other words, whether an arbitration agreement's terms are procedural is immaterial for enforceability purposes. Thus, the FAA can function as a set of procedural rules by requiring the enforcement of any and all valid procedural terms set out in the parties' arbitration agreement.<sup>159</sup> For

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<sup>150</sup> 9 U.S.C. §§ 1–16 (2012).

<sup>151</sup> See, e.g., FOLBERG ET AL., *supra* note 4, at 544, 557.

<sup>152</sup> See, e.g., AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011).

<sup>153</sup> FOLBERG ET AL., *supra* note 4, at 562.

<sup>154</sup> FED. R. CIV. P. 1.

<sup>155</sup> See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (noting that the “preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate”).

<sup>156</sup> See 9 U.S.C. § 2 (2012).

<sup>157</sup> See *id.*

<sup>158</sup> See *id.* FAA enforcement is subject to some limitations, though. First, the arbitration provision must be written and contained in “any maritime transaction or a contract evidencing a transaction involving commerce.” *Id.* Additionally, state contract law limits enforceability. See *id.* Finally, the FAA does not apply to “contracts of employment of seamen, railroad employees, or any other class of worker engaged in foreign or interstate commerce,” *id.* § 1, which has been narrowly interpreted. See *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) (confining the exemption to transportation workers rather than exempting all employment contracts from the FAA).

<sup>159</sup> See *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003) (en banc) (“Pursuant to *Volt*, parties have complete freedom to contractually modify the arbitration process by designing whatever procedures and systems they think will best meet their needs. . . .”); cf. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) (determining that “[j]ust as [private

instance, arbitration agreements in the consumer and employment context will often incorporate by reference the rules and procedures of for-profit and not-for-profit institutions such as the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services (JAMS).<sup>160</sup> Undoubtedly, arbitration agreements containing procedural rules so incorporated are enforceable to the extent that they are in accordance with the FAA.<sup>161</sup> Hence, even though the FAA does not set out comprehensive procedural guidelines for arbitration,<sup>162</sup> the Act can function as a procedural set of rules by requiring the enforcement of any procedural terms agreed upon by the parties.

*B. An Analysis of Both Texts Supports Less Procedural Modification Freedom in Litigation than in Arbitration*

This section posits that textual interpretations of the FAA and Federal Rules support less procedural modification freedom in litigation than in arbitration. The FAA makes it clear that the FAA is a creature of contract, whereas the Federal Rules do not obviously contemplate the *ex ante* commoditization of procedure at all. On one hand, the text of § 2 of the FAA makes it clear that arbitration is a creature of contract. By referring to “a written provision” in a “contract,” and by expressly using the term “agreement,”<sup>163</sup> the FAA undoubtedly places parties in the driver’s seat in tailoring their arbitration. Indeed, under the FAA’s broad protections, parties have the freedom to customize their arbitration virtually anyway they see fit.<sup>164</sup> Among myriad other possibilities, parties can agree to arbitrate individually

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parties] may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted”).

<sup>160</sup> FOLBERG ET AL., *supra* note 4, at 566. There are a wide variety of arbitration rules for different trade groups or practices areas, such as securities disputes, commercial disputes, construction matters, etc. *Id.*

<sup>161</sup> *Cf.* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985) (“The preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered . . .”).

<sup>162</sup> If the FAA did, it would seriously hinder the parties’ ability to customize the process by which their dispute is resolved, which undermines the idea of arbitration altogether.

<sup>163</sup> 9 U.S.C. § 2 (2012).

<sup>164</sup> The FAA is only as broad as courts interpret it to be, and over the last forty years, the trend has been expansive interpretation. On judicial expansion of the FAA, see David L. Gregory, Michael K. Zitelli & Christina E. Papadopoulos, *The Fiftieth Anniversary of the Steelworkers Trilogy: Some Reflections on Judicial Review of Labor-Arbitration Decisions—Will Gold Turn to Rust?*, 60 CATH. U. L. REV. 47, 47–48 (2010) (noting that the Supreme Court’s 1960’s FAA decisions “granted private arbitrators significant power and set forth principles governing presumptive judicial deference to labor-arbitration decisions”); Hirshman, *supra* note 117, at 1305–06 (cataloguing the FAA’s expansion through 1980s Supreme Court decisions); and Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT’L ARB. 323, 324–25 (2011) (cataloguing some of the Supreme Court’s most recent, pro-arbitration decisions).

and thereby forgo any potential class suit,<sup>165</sup> they can agree to arbitrate statutory claims;<sup>166</sup> and they can even agree to delegate arbitrability questions to the arbitrator herself, rather than let a court decide.<sup>167</sup>

However, while the Supreme Court and lower federal courts zealously endeavor to enforce arbitration agreements as written,<sup>168</sup> the Court has not yet adopted wholesale a theory of unlimited party freedom in arbitration.<sup>169</sup> The Court's treatment of judicial review of arbitral awards illuminates this point.<sup>170</sup> The FAA addresses arbitral awards in §§ 9, 10, and 11.<sup>171</sup> The pertinent section, § 10, enumerates four grounds for vacation.<sup>172</sup> In 2008, the Supreme Court settled a circuit split regarding the exclusivity of § 10's vacation grounds in *Hall Street Associates v. Mattel, Inc.*<sup>173</sup>

Taking a strictly textual approach, Justice Souter and a majority of five other Justices issued a pro-arbitration decision that concomitantly limited parties' freedom of contract.<sup>174</sup> Responding to the petitioner's argument that the FAA is "motivated, first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered,"<sup>175</sup> the majority acknowledged that the "FAA lets parties tailor some, even many, features of arbitration by

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<sup>165</sup> *E.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

<sup>166</sup> *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (compelling individual arbitration of a claim arising under the Sherman Act); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (compelling arbitration of federal antitrust claims). The Court was not always willing to compel the arbitration of statutory claims. *See, e.g.*, *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (denying a motion to compel arbitration for a claim arising under the Securities Act of 1933), *overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989).

<sup>167</sup> *See Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63, 80 (2010) (permitting arbitrators to resolve challenges to arbitration agreements where parties agree, clearly and unmistakably, to delegate to the arbitrator the power to do so). In accordance with separability doctrine, a delegation provision gives the arbitrator the ability to decide not just the validity of the substantive contract, but also the validity of the arbitration agreement within that contract. *Drahozal & Rutledge, supra* note 2, at 1121–22.

<sup>168</sup> *See Concepcion*, 131 S. Ct. at 1748 (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989)).

<sup>169</sup> *Cf. Hall St. Assocs., v. Mattel, Inc.*, 552 U.S. 576 (2008) (limiting parties' ability to supplement the FAA's grounds for vacation).

<sup>170</sup> *Cf. Paulson, supra* note 2, at 493 (noting that "[m]ost cases involving pre-dispute appellate waiver are in the context of the waiver of appellate review of judgments confirming arbitration awards").

<sup>171</sup> *See* 9 U.S.C. §§ 9–11 (2012). "Under the terms of § 9, a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in §§ 10 and 11. Section 10 lists grounds for vacating an award, while § 11 names those for modifying or correcting one." *Hall St. Assocs.*, 552 U.S. at 582.

<sup>172</sup> *See supra* note 136.

<sup>173</sup> 552 U.S. at 578.

<sup>174</sup> *Id.* at 586 (explaining that "the text compels a reading of the §§ 10 and 11 categories as exclusive").

<sup>175</sup> *Id.* at 585 (alteration in original) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985)).

contract,” but instead relied on its textual interpretation of the FAA to limit party autonomy.<sup>176</sup> The Court held that the four enumerated grounds were exclusive—thus denying parties the ability to add supplemental grounds for judicial review in their arbitration agreement.<sup>177</sup> Moreover, applying reasoning similar to the majority in *Hall Street Associates*, the Ninth Circuit has also interpreted the FAA to preclude parties from waiving or eliminating the § 10 vacation grounds with a non-appealability clause.<sup>178</sup> Thus, an arbitration agreement must neither supplement nor eliminate the limited vacation grounds set out in § 10.

In stark contrast to the FAA—notwithstanding the limitations in § 10—the Federal Rules are not obviously subject to contractual modification. The Federal Rules do not ostensibly contemplate the possibility of agreed-upon, *ex ante* procedural modifications.<sup>179</sup> Instead, the Federal Rules are largely written in terms of what parties “must” do,<sup>180</sup> and specific occasions in which parties “may” do something.<sup>181</sup> However, the fact that the text of the Federal Rules does not seem to contemplate party modification is inconclusive; courts should also consider the policies underlying the rules in litigation before comparing procedural modification in arbitration to litigation.

### C. A Policy-Based Approach Also Shows the Analogy Is Inappropriate

This section compares the policies behind the Federal Rules with those underlying the FAA. Three reasons support the conclusion that parties’ procedural modification freedom in litigation should not be as broad as in arbitration. First, this section compares the policies behind the FAA and the

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<sup>176</sup> *Id.* at 586–87 (explaining its use of the *ejusdem generis* canon of construction). The Court also reasoned that the language of § 9 carries “no hint of flexibility.” *Id.* at 587. Section 9 provides that the court “must grant” an order confirming an arbitration award “unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.” 9 U.S.C. § 9 (2012).

<sup>177</sup> *Hall St. Assocs.*, 552 U.S. at 583–84. Justice Stevens attacked the majority’s decision for being incompatible with the FAA’s purpose. *Id.* at 593–96 (Stevens, J., dissenting) (positing that §§ 10 and 11 are “best understood as a shield meant to protect parties from hostile courts, not a sword with which to cut down” parties’ agreements).

<sup>178</sup> *In re Wal-Mart Wage & Hour Emp’t Practices Litig. v. Class Counsel & Party to Arbitration*, 737 F.3d 1262, 1268 (9th Cir. 2013).

<sup>179</sup> *See, e.g.*, FED. R. CIV. P. 12(a) (using seemingly inexorable language: “unless [otherwise specified] . . . the time for serving . . . is as follows”).

<sup>180</sup> *E.g.*, FED. R. CIV. P. 7(b) (“A request for a court order *must* be made by motion.” (emphasis added)); FED. R. CIV. P. 8(b)(1) (“In responding to a pleading a party *must* state its defenses and admit or deny allegations” (emphasis added)).

<sup>181</sup> *E.g.*, FED. R. CIV. P. 23(a) (“One or more members of a class *may* sue . . . on behalf of all members *only if* [four requirements are met]” (emphasis added)).

Federal Rules. It will focus on how the Supreme Court has demonstrated its commitment to enforcing parties' arbitration agreements by the agreements' terms, using class arbitration waiver as an example. In justifying class waiver, the Court pointed to the "overarching purpose" of the FAA,<sup>182</sup> which is to facilitate "efficient, streamlined proceedings."<sup>183</sup> The purposes of the Federal Rules are more holistic, however. Thus, promoting efficient resolution by the terms of private parties' agreement is not, by itself, a sufficient reason to allow parties to modify federal procedure by contract—it fails to account for the litigation's public identity.

Second, because of the court's dual identities as a dispute-resolution forum and as a policymaker,<sup>184</sup> litigation must achieve justice beyond the mere resolution of litigants' disputes.<sup>185</sup> For this reason, this section concludes that parties "own" their dispute to a lesser extent in litigation than in arbitration, and thus have less freedom to contractually modify litigation procedure.

Third, because the FAA serves as a neutral enforcement ground for federal judges to "keep their hands clean" from unconstitutionally resolving certain types of disputes,<sup>186</sup> courts have a unique incentive to maximize procedural freedom in arbitration.

Finally, this section argues that although parties should have less freedom to modify procedure in litigation than in arbitration, policies that lead state legislatures to sanction expedited adjudication initiatives support at least some degree of party autonomy in contracting for litigation procedure. Nevertheless, state-sanctioned, expedited adjudication measures are more closely analogous to one-size-fits-all procedure than party-driven, contractualized procedure.

### *1. A Policy Comparison Supports Less Procedural Freedom in Litigation than in Arbitration*

The FAA, unlike the Federal Rules, does not expressly announce its objectives. Fortunately, the Supreme Court has articulated the FAA's purpose

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<sup>182</sup> AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1743 (2011).

<sup>183</sup> *Id.* at 1749.

<sup>184</sup> See Bone, *supra* note 2, at 1388–90 (noting that viewing courts as performing two separate functions—resolving disputes and making the law—is "very common," but arguing that resolving disputes and making law are better viewed as "two integrated aspects of a single function").

<sup>185</sup> *Cf. id.* at 1389 (explaining that "courts do not, and are not supposed to, merely resolve disputes").

<sup>186</sup> *Cf.* Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 OHIO ST. L.J. 983, 1016 (2011) (explaining courts' attempts to resolve disputes under the Establishment Clause).

time and time again: enforcement of private arbitration agreements according to their terms.<sup>187</sup> Additionally, in 2011, the Court explained that the overarching objective of the FAA is to facilitate “efficient, streamlined proceedings.”<sup>188</sup> The Court’s recent class arbitration decisions are illuminating. Before holding that an arbitrator may not infer the availability of class arbitration where the parties’ arbitration clause is silent on that point,<sup>189</sup> the Court assessed the issue on freedom of contract and efficiency grounds.<sup>190</sup> The Court explained that class arbitration “changes the nature of arbitration” from a simple, bilaterally agreed-upon process to a more formal process that purports to bind potentially hundreds or thousands of non-consenting parties.<sup>191</sup>

Furthermore, in *Concepcion*, the Court concluded that class arbitration is not aligned with the FAA’s efficiency objective.<sup>192</sup> The Court explained, “[C]lass arbitration *requires* procedural formality”<sup>193</sup> and makes the process “slower, more costly, and more likely to generate procedural morass than final judgment.”<sup>194</sup>

When compared, the three purposes expressed in Rule 1 of the Federal Rules—just, speedy, and inexpensive resolution<sup>195</sup>—appear strikingly similar to the objectives of the FAA—the facilitation of efficient, streamlined proceedings.<sup>196</sup> Indeed, speedy resolution and inexpensive resolution are two key reasons for parties to choose arbitration over litigation.<sup>197</sup> If “speedy” and “inexpensive” are equated with “efficient,” one can see that the only outlying purpose of the Federal Rules that is not overtly shared with the FAA is “just” resolution. Further, unlike the FAA, the Federal Rules show no textual commitment to contractual freedom.<sup>198</sup> The next subsection deals with this dissimilarity; specifically, it argues that “just” resolution demands that courts do more than simply enforce parties’ contracts by their terms.

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<sup>187</sup> *Concepcion*, 131 S. Ct. at 1748 (quoting *Volt Info. Scis. Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989)).

<sup>188</sup> *Id.* at 1749.

<sup>189</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 683–85 (2010).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 685.

<sup>192</sup> *See Concepcion*, 131 S. Ct. at 1751.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> FED. R. CIV. P. 1.

<sup>196</sup> *See Concepcion*, 131 S. Ct. at 1749.

<sup>197</sup> *See supra* note 45 and accompanying text.

<sup>198</sup> *See supra* Part II.B.

2. *The Difference in the Nature of the Processes Supports Less Procedural Modification Freedom in Litigation than in Arbitration*

Because both litigation and arbitration aim for speed and cost efficiency, and because allowing parties freedom to tailor the procedures to their dispute promotes efficiency, one might argue that litigation ought to follow in arbitration's footsteps.<sup>199</sup> However, this conclusion cannot be so quickly drawn; the Federal Rules expressly strive for "just" resolution, whereas the FAA makes no mention of justice.

This subsection makes two policy-based arguments that suggest why the parties ought to have less procedural modification freedom in litigation than in arbitration. First, the court's dual private and public roles suggest that parties "own" litigated disputes to a lesser extent than they do arbitrated disputes. The closer parties come to full ownership of their dispute, the stronger the right to alter the rules that govern said dispute. Second, the wide latitude for party freedom under the FAA could be attributable to the fact that arbitrators can resolve disputes that Article III judges are precluded from resolving. By allowing parties more freedom to design their arbitration, courts give parties the tools to effectuate durable arbitral awards. A court may then review the arbitral award, giving deference to the arbitrator, on neutral contract grounds.

First, the court's schismatic identities—one public and one private—suggest that parties "own" litigated disputes to a lesser extent than they do arbitrated disputes.<sup>200</sup> In her 2006 article, Professor Thornburg remarked, "The implications of [contractualized procedure] are complex, because the public court system serves both private and public functions."<sup>201</sup> In their private capacity, she explained, courts react to, and help resolve, private disputes.<sup>202</sup> In their public capacity, courts produce public goods, serve public functions,<sup>203</sup> and also serve as important cultural icons.<sup>204</sup> Moreover, Thornburg argued that categorizing procedural components as private, and therefore easy to contract

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<sup>199</sup> Like this Comment, Professor Bone's article argues that this conclusion is flawed. *See* Bone, *supra* note 2, at 1354–55.

<sup>200</sup> *See* Noyes, *supra* note 2, at 620–21 (envisioning litigation's role as a "dispute resolution process that is owned by the parties, but subject to Congress's ultimate power to curb abuses," but noting some commentators' contrary argument that "judicial decisions are 'owned' by the public and provide a public benefit").

<sup>201</sup> Thornburg, *supra* note 2, at 206.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 207.

<sup>204</sup> *Id.*

for, or public, and therefore subject to greater scrutiny, is not possible because most features of civil procedure exist for both reasons.<sup>205</sup>

Arbitration, on the other hand, serves one true function—private dispute resolution.<sup>206</sup> Because some disputes simply do not threaten or implicate any public values, arbitration may be a more appropriate resolution forum.<sup>207</sup> Parties choose, pay for, and enjoin arbitrators by a set of chosen practices.<sup>208</sup> And unlike a judge, an arbitrator is not a public officer.<sup>209</sup> Finally, arbitrators need not concern themselves with following or generating precedent for cases outside the immediate dispute.<sup>210</sup>

For the aforementioned reasons, and considering the broad party freedom the FAA affords parties in arbitration, the idea that parties “own” their dispute to a greater extent in arbitration than in litigation should be self-evident.<sup>211</sup> Arbitration is virtually an entirely private process, whereas litigation might actually be more public than private.<sup>212</sup> It should follow, then, that because parties “own” their dispute to a greater extent in arbitration than in litigation, they should not be entitled to the same amount of autonomy over the procedures that govern their litigation. Thus, for instance, even if a court enforces a class arbitration waiver under the FAA, the fact that the FAA allows parties such freedom should not determinatively stand to enforce a contract purporting to waive class action in litigation.

Second, courts may have an incentive to offer parties broad procedural freedom in arbitration because arbitral awards are reviewable in court, and thus serve as neutral grounds for courts to oversee issues that would otherwise be unconstitutional for them to resolve. Consider, for example, the First Amendment’s Establishment Clause, which forbids the U.S. government from

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<sup>205</sup> *Id.* at 208 (explaining how pleadings rules, discovery rules, joinder rules, juries, and appeals serve both public and private functions).

<sup>206</sup> Fiss, *supra* note 7, at 30–31.

<sup>207</sup> *Id.* at 30.

<sup>208</sup> *Id.* at 30–31.

<sup>209</sup> *Id.*

<sup>210</sup> FOLBERG ET AL., *supra* note 4, at 541 (explaining that “arbitration awards do not establish precedent in most circumstances” and that “the absence of published reasoning . . . ensures that awards in one dispute are not used as precedent in similar situations”).

<sup>211</sup> For a discussion about the benefits of a party’s feeling of ownership over his dispute, see Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871 (1997).

<sup>212</sup> See Fiss, *supra* note 7, at 30–32. *But see* Noyes, *supra* note 2, at 621 (noting that even though “[s]ome commentators argue that judicial decisions are ‘owned’ by the public,” contractually modified litigation rules will generate precedents that will provide guidelines for future parties designing their own rules).

making any law “respecting an establishment of religion.”<sup>213</sup> In accordance with the First Amendment, civil courts are prohibited from deciding matters of religious law.<sup>214</sup>

However, a judge may resolve a religious dispute on neutral legal grounds.<sup>215</sup> An arbitral award generates a neutral legal ground for judicial resolution. Because arbitrators are not considered state actors,<sup>216</sup> they may resolve religious disputes without offending the U.S. Constitution.<sup>217</sup> And even though the FAA does not mention religious arbitration, the FAA provides neutral grounds for the enforcement of arbitral awards derived therefrom.<sup>218</sup> Thus, although a judge may be constitutionally precluded from directly resolving certain issues, her ability to review an arbitral award enables her to review the issue on neutral FAA grounds.

From a practical standpoint, the FAA’s broad grant of freedom for tailoring arbitration terms could be attributable to the fact that arbitrators can resolve disputes that federal judges are precluded from resolving. By allowing parties greater freedom in designing the rules of their arbitration, courts give parties the tools to effectuate satisfactory—and therefore enduring—arbitral awards. Judges keep their metaphorical “hands” clean by reviewing the arbitral award on the FAA’s neutral grounds. The need for similarly broad party freedom in designing dispute-governing procedures does not arise in the case of procedural contracts because a procedural contract cannot bestow upon an Article III judge the ability to resolve otherwise constitutionally prohibited types of disputes.<sup>219</sup> In other words, such a contract would not enable a judge to keep her hands clean because she would still lack a correspondingly neutral ground upon which to resolve the dispute.

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<sup>213</sup> U.S. CONST. amend. I.

<sup>214</sup> See *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709–10 (1976).

<sup>215</sup> Cf. Volokh, *supra* note 186, at 1020 n.264 (explaining that “[k]osher fraud enforcement schemes are uncontroversial when they are mere trademark enforcement” (citation omitted)).

<sup>216</sup> See, e.g., RUTLEDGE, *supra* note 16, at 131–44.

<sup>217</sup> Cf. Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 VT. L. REV. 157, 164–66 (2012) (explaining that “courts routinely enforce the decisions of religious tribunals under the general authority of civil arbitration law”).

<sup>218</sup> *Id.* at 165.

<sup>219</sup> See *supra* note 213 and accompanying text.

### 3. *Recent Expedited Adjudication Initiatives Support Some Degree of Procedural Optionality in Litigation*

Finally, while this Comment has argued that parties should have less contractual freedom to modify the procedural rules of their dispute in litigation than in arbitration, it does not suggest that parties should be wholly precluded from modifying litigation procedure. To the contrary, the existence of state-sanctioned expedited adjudication rules suggests that society is open to modified procedure in litigation as a means of achieving efficient dispute resolution. The New York State Commercial Division's Rule 9 is the most recent expedited adjudication initiative and is illustrative.<sup>220</sup>

Rule 9 allows commercial litigants to contractually opt out of typical, prolonged, and seemingly incessant litigation procedures without forgoing a public dispute-resolution forum. In fact, "by matching its primary benefit (speed and efficiency) while still protecting the parties' rights in a manner unique to the judiciary," the New York Commercial Division's Rule 9 is designed to compete with commercial arbitration and manifests the state's recognition of the necessity of avoiding the perpetuation of years-long litigation.<sup>221</sup> Rule 9(b) explains that all pre-trial proceedings shall be ready within nine months.<sup>222</sup> To achieve such a goal, Rule 9(c) sets out alternative and expeditious procedural rules that govern any ensuing litigation between signatories.<sup>223</sup> By subscribing to Rule 9's expedited adjudication procedures, parties "irrevocably" waive "any objections based on lack of personal jurisdiction or . . . forum non conveniens"; the right to a jury trial; "the right to recover punitive or exemplary damages"; and "the right to any interlocutory appeal."<sup>224</sup> Parties also "irrevocably" waive "the right to discovery," unless they either agree otherwise or conduct very limited discovery prescribed by the statute.<sup>225</sup>

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<sup>220</sup> See N.Y. COMP. CODES, R. & REGS. tit. 22, § 202.70(g) (2015) (Accelerated Adjudication Actions).

<sup>221</sup> See David Ball & Daniel Meyers, *Expedited Procedures in New York Courts Guarantee Trial in Just Nine Months*, JD SUPRA: BUS. ADVISOR (June 20, 2014), <http://www.jdsupra.com/legalnews/expedited-procedures-in-new-york-courts-48104/>.

<sup>222</sup> See N.Y. COMP. CODES, R. & REGS. tit. 22, § 202.70(g).

<sup>223</sup> See *id.*

<sup>224</sup> See *id.*

<sup>225</sup> See *id.*

Interestingly, Rule 9 does not govern unless the disputing parties contractually consent to the Rule's application.<sup>226</sup> Essentially, Rule 9 enables parties to enter into a procedural contract that generates an alternative set of rules pre-approved by the New York state legislature. While New York's expedited adjudication initiative demonstrates the state's commitment to providing an option for efficient, tailored litigation, Rule 9 provides only limited freedom in the sense that parties can choose to substitute one state-sanctioned set of procedural rules for another.

By comparing a Rule 9 agreement with an arbitration agreement under the FAA, this Comment's core argument is brought to life. Along the freedom of contract spectrum, where arbitration is toward the full-freedom end and non-negotiable rules are on the other end, Rule 9 illustrates that parties can contractually modify procedures in litigation, but only to an extent sanctioned by the legislature, and not to the same extent as in an arbitration agreement that is controlled by the parties.

In sum, this Part has argued that parties ought to have less procedural modification freedom in litigation than in arbitration. Both the text of—and policies underlying—the FAA and the Federal Rules support this conclusion. However, this is not to say that parties should have no procedural modification freedom at all; on the contrary, state-expedited adjudication initiatives such as the New York Commercial Division's newly enacted Rule 9 demonstrate society's approval of some degree of procedural optionality in litigation.

### III. A PROCEDURAL FREEDOM CONUNDRUM: THE AMOUNT OF PROCEDURAL MODIFICATION FREEDOM MATTERS

Based on both textual and policy reasons, this Comment has argued that parties should have less freedom in modifying procedure in litigation than they

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<sup>226</sup> Eric Fishman, Andrew C. Smith & Shriram Harid, *Client Alert: New York Creates Rocket-Docket for Commercial Disputes—But Accelerated Adjudication Comes With Trade-Offs*, PILLSBURY (June 2, 2014), <http://www.pillsburylaw.com/siteFiles/Publications/AlertJune2014LitigationNYCreatesRocketDocketforCommercialDisputes.pdf>. The model language for such a contractual provision states as follows:

Subject to the requirements for a case to be heard in the Commercial Division, the parties agree to submit to the exclusive jurisdiction of the Commercial Division, New York State Supreme Court, and to the application of the Court's accelerated procedures, in connection with any dispute, claim or controversy arising out of or relating to this agreement, or the breach, termination, enforcement or validity thereof.

*Id.* (quoting N.Y. COMP. CODES. R. & REGS. tit. 22, § 202.70(g)).

do in arbitration. Building on this argument, this Part unfolds in two sections. First, it asserts the general implications of a broad procedural-freedom regime, a no-freedom regime, and a mixed-freedom regime.<sup>227</sup> Second, it applies the textual and policy-based reasoning in Part II to procedural terms which are already common in arbitration, and which may correspondingly begin arising in contracts that modify litigation.

*A. Implications Based on the Amount of Procedural Freedom Courts Permit*

As procedural contracts become more common, the judiciary will be tasked with adopting a broad procedural-modification-freedom regime, a no-freedom regime, or a mixed-freedom regime. Each regime will have significant implications on notions of “just” resolution. This section examines the implications that follow the adaptation of each of these regimes.

First, if the judiciary broadly enforces parties’ procedural modifications—akin to arbitration—litigation will appear to serve more of a private dispute-resolution function than a public function. Because litigants would have more flexibility in tailoring their dispute-resolution process, they would likely modify procedures in ways that are cost and time efficient for them.<sup>228</sup> Moreover, this efficiency could benefit the public by lessening the burden on the judicial system and preserving judicial resources unnecessarily spent under a one-size-fits-all regime.<sup>229</sup> The implication under this broad-freedom regime, therefore, would be that the judiciary’s grant of freedom hews closely to “just” resolution.<sup>230</sup>

However, enhancing parties’ freedom to contractually modify procedure comes with costs and negative externalities to the public. For instance, judicial integrity and legitimacy concerns such as those raised in Part I are most troublesome under a broad-freedom regime. Specifically, one example is the potential for distorted precedent: besides simply distinguishing cases based on

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<sup>227</sup> As evidenced by forum-selection clauses, jury-trial waivers, arbitration clauses, and expedited adjudication mini-codes of procedure, a mixed-freedom regime seems most likely.

<sup>228</sup> See, e.g., Kapeliuk & Klement, *supra* note 2, at 41–42 (explaining that “[t]he efficiency of contractualized procedures depends on whether the total expected litigation costs, public and private, justify the efficiency gains in performance incentives”).

<sup>229</sup> Noyes, *supra* note 2, at 632.

<sup>230</sup> This Part’s reference to “just” resolution refers to the explicit purpose statement in Rule 1 of the Federal Rules. See FED. R. CIV. P. 1.

their facts, in a broad-freedom regime, cases may become distinguishable based on the specific procedures followed.<sup>231</sup>

Indeed, the judiciary could adopt a strictly textual view of the Federal Rules. Under this view, it would not be far-fetched for the judiciary to simply strike down procedural contracts where there is a Federal Rule on point. The implication of a virtually non-negotiable set of rules is that party freedom and private dispute resolution do not equate closely to “just” resolution. Instead, “just” resolution would appear to depend more closely on the public functions of the court, such as crafting durable precedents.

However, a strict no-modification regime seems unlikely, especially in light of the Supreme Court’s recent developments. For example, in *Carnival Cruise Lines*, the Court made it clear that forum-selection clauses are presumptively enforceable.<sup>232</sup> Moreover, the New York State Commercial Division’s Rule 9 is an example of a legislature’s prerogative in tailoring litigation for efficiency purposes.<sup>233</sup> By providing an alternative, efficiency-driven set of procedural rules for commercial disputants, Rule 9 may make litigation more desirable to parties who would otherwise exit the public system for arbitration.

Finally, another—and more realistic—possibility is a mixed-freedom regime, where the judiciary would allow the modification of some, but not all, procedural terms, and to differing extents based on the term.<sup>234</sup> Professor Bone’s argument is enlightening on this point. He argues that judges employ a distinctive form of reasoning in litigation.<sup>235</sup> At litigation’s core, he asserts, is a “commitment to reasoning from general principle and doing so in a way that engages the facts of particular cases.”<sup>236</sup> Thus, he argues, parties should be able to contractually modify procedure *ex ante*, but only to the extent that their

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<sup>231</sup> See, e.g., Bone, *supra* note 2, at 1377–78.

<sup>232</sup> See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595–96 (1991) (noting the “heavy burden of proof” required to set aside the [forum-selection] clause,” thus creating a presumption in favor of enforcing forum-selection clauses (citation omitted) (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972))).

<sup>233</sup> See N.Y. COMP. CODES, R. & REGS. tit. 22, § 202.70(g) (2015).

<sup>234</sup> See Bone, *supra* note 2, at 1385–94.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 1388.

modifications do not undermine the capacity of judges or juries to engage in what he calls “principled reasoning.”<sup>237</sup>

However, as Bone recognizes, ascertaining which procedural alterations unduly interfere with principled reasoning is by no means a simple task.<sup>238</sup> Furthermore, his argument leaves open the question of how courts should treat terms that are common to arbitration but not in litigation. The next section will discuss this point in more detail.

### *B. Applying Textual and Policy-Based Reasoning to Procedural Terms Common to Arbitration Agreements*

Terms that are common to arbitration but not so common in litigation, such as class and appeals waivers, do not readily appear to interfere with the principled reasoning at the core of litigation.<sup>239</sup> In determining the extent to which parties should be able to modify these procedural terms in litigation, courts should look to the text of the federal directive on point as well as the policies underlying those directives.

#### *1. Terms Modifying Class Action*

It is not difficult to imagine that many commercial entities and employers that already utilize class arbitration waivers might prefer litigation to arbitration if they were equally able to insulate themselves from potential class actions.<sup>240</sup> Indeed, textually, Rule 23 does not bestow any substantive right upon individuals to aggregate a class;<sup>241</sup> rather, it sets out the procedures that govern potential class actions.<sup>242</sup> While the text does not provide much

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<sup>237</sup> *Id. But cf.* Noyes, *supra* note 2, at 626–29 (positing that truth-seeking is not the primary purpose of the Federal Rules and that “society is content if courts get it right somewhat more often than not” (quoting Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 741 (2004))).

<sup>238</sup> Bone, *supra* note 2, at 1391–94 (applying legal theorist Lon Fuller’s views on adjudication to draw normative distinctions between modifying rules that “alter pleading standards,” for example, and those that might “instruct the judge to decide the case solely on the basis of written submissions without any oral argument”); accord Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364, 366 (1978).

<sup>239</sup> See Bone, *supra* note 2, at 1385–94.

<sup>240</sup> *Cf.*, e.g., Jean Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 724–25 (2012) (positing that *Concepcion* will lead to a significant decrease in class actions filed in state and federal court due to the availability of arbitral class action waivers).

<sup>241</sup> Of course, a Federal Rule is not supposed to bestow substantive rights on parties. See Rules Enabling Act, 28 U.S.C. § 2072(b) (2012).

<sup>242</sup> FED. R. CIV. P. 23.

guidance on whether waiver should be acceptable in litigation,<sup>243</sup> the text clearly does not support, for example, modification of the prerequisites to aggregate a class.<sup>244</sup> Thus, although the procedures that govern putative or pending class actions appear non-negotiable, the text is wholly inconclusive regarding whether parties should be able to waive class actions in litigation in an *ex ante* procedural contract.

On the other hand, from a policy standpoint, class actions pose numerous controversial “access to justice” and fundamental fairness questions that are well beyond the scope of this Comment.<sup>245</sup> However, for the purposes of this Comment, recall that the Supreme Court relied heavily on the FAA’s primary objectives of freedom of contract and efficiency in holding arbitral class waivers enforceable.<sup>246</sup>

Class action waivers should not be as freely negotiable in litigation as in arbitration because the goals of the Federal Rules are best achieved by protecting class actions from unlimited, pre-dispute waiver in private procedural contracts. While one could argue that broad party freedom to waive class action in litigation would be more efficient,<sup>247</sup> Rule 1’s demand for “just” resolution should outweigh such an argument.<sup>248</sup> Class actions produce public goods in the sense that they are forceful enough to cause societal change in ways that individual litigation cannot.<sup>249</sup> And, considering that in many instances parties that would be interested in insulating themselves from class liability have the ability to arbitrate their disputes, allowing these parties to do so in litigation could essentially eradicate this valuable public, justice-seeking device.

## 2. *Terms Modifying Appeals*

On the other hand, parties should have broad freedom to enter into pre-dispute contracts that waive appeal in litigation, even though they do not

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<sup>243</sup> Both Rule 23(a)’s “may sue or be sued” language and 23(b)’s passive “may be maintained if” language are ambiguous in this respect. *See id.*

<sup>244</sup> *See id.* (using “only if” language to make four explicit prerequisites necessary).

<sup>245</sup> On the “romantic class action narrative,” see Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking The American Class Action*, 64 EMORY L.J. 399 (2014).

<sup>246</sup> *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748–49 (2011).

<sup>247</sup> *See* FREER, *supra* note 55, at 771.

<sup>248</sup> *See* FED. R. CIV. P. 1.

<sup>249</sup> *See* Elizabeth J. Cabraser, *Enforcing the Social Compact Through Representative Litigation*, 33 CONN. L. REV. 1239 (2001) (arguing class suits bring social change).

have such broad freedom in arbitration. Scholars largely agree that parties should be able to waive appeals in a pre-dispute procedural contract,<sup>250</sup> and the textual and policy-based reasoning in Part II further supports this conclusion. First, a textual analysis of 28 U.S.C. § 1291 and the Federal Rules of Appellate Procedure supports broad party freedom in waiving signatories' ability to appeal<sup>251</sup>—unlike the text of the FAA.<sup>252</sup> Second, because parties already can and do waive their ability to appeal, allowing parties to do so in an *ex ante* procedural contract would not raise significant policy concerns.

The texts governing civil litigants' ability to appeal support broad party freedom in agreeing to waive appeals in an *ex ante* procedural contract. Indeed, civil litigants in federal court have a statutory right, under 28 U.S.C. § 1291, to appeal a federal district court's final judgment.<sup>253</sup> While this statute provides that “[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States,”<sup>254</sup> the text of the Federal Rules of Appellate Procedure makes indisputably clear that parties need not appeal, and in fact, forgo appeal without affirmatively and timely filing for an appeal.<sup>255</sup> Because the Federal Rules of Appellate Procedure contemplate that parties may choose not to appeal, the text, by implication, suggests that parties could agree in advance not to appeal.<sup>256</sup>

Furthermore, policy supports broad party freedom in waiving the ability to appeal in an *ex ante* procedural contract. Although the case law regarding appeals waivers is “quite thin,” parties already ubiquitously forgo appeal in settlement agreements,<sup>257</sup> and virtually waive any merit-based appeal the instant they sign an arbitration agreement.<sup>258</sup> Eliminating appeals is efficient for at least two reasons. First, federal courts of appeals dockets are heavily

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<sup>250</sup> See, e.g., Noyes, *supra* note 2, at 612–13; Thornburg, *supra* note 2, at 201–02 (positing that parties should be able to eliminate prospective appeal in a pre-dispute contract).

<sup>251</sup> See *infra* notes 254–55.

<sup>252</sup> See *supra* Part II.B. Comparing waiver of judicial review in litigation to arbitration is inappropriate because although the FAA contains textual evidence that arbitration is meant to be a creature of contract, it nevertheless provides exclusive grounds for judicial review. See 9 U.S.C. § 10 (2012). The Federal Rules do not.

<sup>253</sup> 28 U.S.C. § 1291 (2012).

<sup>254</sup> *Id.* (emphasis added).

<sup>255</sup> See, e.g., FED. R. APP. P. 3(a)(1) (“An appeal permitted by law as of right from a district court to a court of appeals may be taken *only by* filing a notice of appeal with the district clerk within the time allowed by Rule 4.” (emphasis added)).

<sup>256</sup> See *supra* note 255.

<sup>257</sup> Bone, *supra* note 2, at 1351.

<sup>258</sup> Thornburg, *supra* note 2, at 201–02.

burdened.<sup>259</sup> Second, waiving appeal also eliminates the possibility of remand.<sup>260</sup> Furthermore, eliminating appeals would naturally make litigation less expensive because parties would spend less time litigating. While one counterargument to this is that parties may spend more money making sure that courts with original jurisdiction get it right the first time, this is highly conjectural and hard to determine.

Finally, justice concerns, while split, can be viewed to support broad party freedom in waiving appeals. Viewing Rule 1's demand for "just" resolution as more concerned with public justice than private contractual fulfillment, one may argue that appeals serve the public by creating better, more authoritative precedent and by providing a systematic safeguard to fix potentially "absurd" district court decisions.<sup>261</sup> However, even this public justice argument can be discounted; as a matter of public policy, one could argue that appellate waivers "encourag[e] litigants to accept as final decisions of courts of original jurisdiction."<sup>262</sup>

Thus, courts will ultimately decide how much procedural modification freedom parties should have when they either enforce or reject contracts with procedural terms. A broad-freedom regime would imply that "just" resolution can be fulfilled by enforcing parties' agreements by their terms—albeit procedural terms—in litigation. A no-freedom regime would do the opposite, and emphasize that "just" resolution is fulfilled on a more public level. Finally, even with a mixed-freedom approach, courts may deal with class or appeal waivers that do not interfere with a judge's ability to apply principled reasoning. These terms should be assessed by the federal directive's text and underlying policies before the judiciary uncritically follows arbitration's guidance in litigation.

## CONCLUSION

Ultimately, parties should have less freedom in modifying procedure in litigation than they do in arbitration. In coming to this conclusion, this Comment journeyed through background information regarding procedural contracts and the similarly principled arbitration alternative. Having focused

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> See Paulson, *supra* note 2, at 496–98; see also *Rodriguez v. Villarreal*, 314 S.W.3d 636, 645–46 (Tex. Ct. App. 2010); *C.G. Horman Co. v. Lloyd*, 499 P.2d 124, 127 (Utah 1972) (Crockett, J., dissenting).

<sup>262</sup> Paulson, *supra* note 2, at 498 (quoting *Harmina v. Shay*, 101 N.J. Eq. 273, 274 (1927)).

exclusively on pre-dispute agreements, this Comment proceeded to list the advantages of procedural contracts and offered a brief explanation as to why parties might prefer contractually modified litigation to arbitration.

By entering a bargained-for, legally valid, pre-dispute procedural contract, signatories can reduce litigation costs,<sup>263</sup> prevent opportunistic behavior,<sup>264</sup> shape their pre-dispute behavior,<sup>265</sup> and acquire an information signaling and sorting mechanism at the time of contracting.<sup>266</sup> These advantages are unique to pre-dispute procedural contracts, for parties' incentives may significantly realign after a dispute arises.<sup>267</sup> Moreover, although parties might choose arbitration for various reasons,<sup>268</sup> arbitration could be prohibitively expensive, difficult to negotiate, and may subject parties to a final ruling by an arbitrator, whose incentives may be tainted by extraneous market pressures.

However, unencumbered procedural-modification freedom may pose significant problems in litigation. Customized litigation procedure might confuse, overwhelm, or unduly burden the court,<sup>269</sup> impede information exchanges;<sup>270</sup> undermine judicial integrity;<sup>271</sup> create problems associated with defective consent in non-freely-bargained-for contracts;<sup>272</sup> and allow parties to inefficiently allocate and use public judicial resources.<sup>273</sup>

Nevertheless, while case law involving procedural contracts in litigation is largely lacking, the Supreme Court's doctrinal endorsement of arbitration has created a tempting comparison between arbitration and modifiable litigation. The Court's consistent reliance on freedom of contract and efficiency principles in arbitration<sup>274</sup> may be analogously impactful in the face of procedural contracts in litigation. However, for textual and policy-based reasons, making this comparison uncritically is inappropriate.<sup>275</sup>

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<sup>263</sup> See Kapeliuk & Klement, *supra* note 2, at 16–19.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 19–23.

<sup>266</sup> See *id.* at 23–25.

<sup>267</sup> *Supra* notes 32–35 and accompanying text.

<sup>268</sup> *Supra* notes 42–48 and accompanying text.

<sup>269</sup> *Supra* note 78.

<sup>270</sup> *Supra* note 79 and accompanying text.

<sup>271</sup> *Supra* note 80 and accompanying text..

<sup>272</sup> *Supra* note 81 and accompanying text.

<sup>273</sup> *Supra* note 82.

<sup>274</sup> See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748–49 (2011).

<sup>275</sup> See *supra* Part II.

Instead, parties should have less freedom to modify procedure in litigation than in arbitration for three reasons. First, the text of the Federal Rules does not contemplate parties' contractual modification, whereas the FAA is clearly consent-driven, even where procedural terms are at issue.<sup>276</sup> Second, the court's dual private and public roles suggest that parties "own" litigated disputes to a lesser extent than they do arbitrated disputes. The closer parties come to full ownership of their dispute, the stronger the right to alter the rules that govern said dispute. Third, the wide latitude for party freedom under the FAA could be attributable to the fact that arbitrators can resolve disputes that Article III judges are precluded from resolving. Essentially, by providing parties with great latitude to tailor their arbitration, courts give parties the tools to effectuate durable arbitral awards. Finally, it is worth reiteration that this Comment does not mean to imply that parties should not have any procedural modification freedom in litigation. To the contrary, state-expedited adjudication initiatives illustrate both judicial pushback against arbitration and implicit endorsement of party-driven procedural optionality.<sup>277</sup>

Realistically, by either enforcing or rejecting procedural contracts as they arrive on the scene, courts will determine how much freedom parties have in modifying procedure in litigation. Allowing parties broad freedom will have profound implications on notions of "just" resolution by highlighting the judiciary's private identity; offering very little freedom, on the other hand, would embolden its public identity. Ultimately, courts should look at the text and policies behind rules that parties seek to contractually modify in litigation—uncritically accepting arbitration as perfectly analogous is simply inapposite.

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<sup>276</sup> See *supra* Part II.B.

<sup>277</sup> See Ball & Meyers, *supra* note 221.

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