

1-2018

Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion

Robin Effron

Brooklyn Law School, robin.effron@brooklaw.edu

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Civil Procedure Commons](#), and the [Litigation Commons](#)

Recommended Citation

98 B.U. L. Rev. 127 (2018)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

OUSTED: THE NEW DYNAMICS OF PRIVATIZED PROCEDURE AND JUDICIAL DISCRETION

ROBIN J. EFFRON*

INTRODUCTION	128
I. THE RISE OF PRIVATE PROCEDURAL ORDERING MEETS THE WORLD OF JUDICIAL DISCRETION	131
II. WHEN PRIVATE PROCEDURAL ORDERING AND JUDICIAL DISCRETION MEET AND COMPETE	140
A. <i>Private Procedural Ordering and Judicial Discretion in Civil Discovery</i>	140
1. The Design of the Federal Rules	141
2. Party Preference and Judicial Discretion in the 2015 Federal Rules Amendments.....	146
B. <i>Private Procedural Ordering and Judicial Discretion in Settlement</i>	151
1. Settlement in Class Actions.....	152
2. Settlement in Non-Class Mass Actions	155
C. <i>Judicial Discretion and Private Procedural Ordering in the Enforcement of Forum Selection Clauses</i>	158
III. PARTY CONTROL OF JUDICIAL DISCRETION? OR JUDICIAL CONTROL OF PRIVATE PROCEDURAL ORDERING?.....	164
A. <i>The “Elevation Theory”</i>	164
B. <i>Judges and Litigants as Co-Managers and Co-Interpreters</i>	168
1. The “Co-Management” Theory	169
2. The “Co-Interpretive” Theory	174
a. <i>Co-Interpretation Through Delegation</i>	176
b. <i>Co-Interpretation Through Deference</i>	179
C. <i>Co-Management, Co-Interpretation, and the Nature of Adversarialism</i>	183
CONCLUSION.....	186

* Professor of Law, Brooklyn Law School. Thanks to Bob Bone, Richard Freer, Maggie Gardner, Maria Glover, David Horton, Roberta Karmel, Alexandra Lahav, Jonathan Remy Nash, Andrew Pollis, Stephen Sachs, Liz Schneider, Matthew Shapiro, Jay Tidmarsh, and Adam Zimmerman for helpful comments. This paper benefited from the helpful suggestions of participants in the Emory Law School Faculty Workshop, the Notre Dame Law School Faculty Workshop, and the Second Annual Civil Procedure Scholar’s Workshop at the University of Washington School of Law. Leyla Salman provided excellent research assistance.

In litigation days of old, American courts jealously guarded their procedural powers through the doctrine of “ouster” and blocked most litigant efforts to create their own private procedural landscape. By the end of the twentieth century, the ouster doctrine was gone. Litigants now use an increasingly sophisticated set of contractual agreements that alter or displace standard procedural rules, a practice known as “private procedural ordering.” But this is not to say that judicial power has been displaced. In fact, the downfall of traditional ouster doctrine was accompanied by a rise in the scope and use of judicial discretion in procedural matters, culminating in the emergence of the “managerial judge” with administrative powers and responsibilities that would have seemed entirely foreign to a modern judge’s earlier counterpart.

This Article examines the link between the scope of judicial discretion and the acceptance (or even endorsement and encouragement) of private procedural ordering. Examples from civil procedure demonstrate the varying relationship dynamics between judicial discretion and private procedural ordering, from the uneasy compatibility found in the rules of discovery to the outright clash of values in the enforcement of forum selection clauses.

The relationship between judicial discretion and private procedural ordering is not coincidental. Rather, it reveals that the civil litigation landscape is one in which litigants are “co-managers” of litigation alongside the increasingly “managerial” judges. More controversially, this relationship also shows that litigants are “co-interpreters” of procedural rules alongside judges, sharing the authority to shape the contours of the meaning, scope, and application of many procedural rules.

INTRODUCTION

We are living in an era of robust privatized procedure. Arbitration and other private dispute resolution forums provide a complete exit from the procedure and personnel of the public courts. But even parties that remain in the federal or state courts have access to an increasingly sophisticated set of contractual tools that allow them to shape, change, and even opt out of many of the courts’ rules of practice and procedure.

In an earlier era, these practices were almost always forbidden, blocked by various manifestations of the “ouster” doctrine, which provided that parties may not “oust” the power or jurisdiction of a court by means of a private agreement. By the mid-twentieth century, the “ouster” doctrine had all but fallen away. Today, parties have become even more aggressive in their attempts to impose private or “bespoke” procedural rules on dispute resolution in public courts. This is known as “private procedural ordering,” sometimes referred to as “contract procedure,” “party agreement,” or “party preference.” The fall of ouster doctrine, however, should not be conflated with a displacement of judicial power. At the same time that parties began to flex their contractual procedural muscle, judges assumed a new and powerful managerial role accompanied by a broad scope of discretion for many procedural decisions.

In the recent decades of civil procedure scholarship, much has been written about both phenomena: the rise of private procedural ordering,¹ and the changing nature of procedural discretion.² Few scholars, however, have ventured a more

¹ See, e.g., H. Allen Blair, *Promise and Peril: Doctrinally Permissible Options for Calibrating Procedure Through Contract*, 95 NEB. L. REV. 787, 816-17 (2017) (noting that courts have gradually given parties more and more freedom to “tailor process and procedure”); Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 3-4 (2014) (stating that private parties “stand at the apex of the litigation hierarchy” with the law and courts below them); Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475, 1475 (2013) (“The practice of parties agreeing on the procedures that will govern the resolution of their dispute is an inherent characteristic of various private mechanisms for dispute resolution”); Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1793 (2014) [hereinafter Resnik, *The Privatization of Process*] (noting how “new procedural forms close off public access by sitting dispute resolution outside the public sphere”); W. Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 WASH. & LEE L. REV. 1865, 1871-72 (2015) (discussing how parties “alter the background rules of litigation”); see also Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 507 (2011) (“Judicial decisions of public courts increasingly are based on ‘contract procedure,’ private rules of procedure that the parties draft and assent to before a dispute . . . has arisen.”); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 731 (2011) (concurring that procedural private ordering “affords parties substantial latitude in altering procedure”); Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 462 (2007) (noticing that courts today accommodate great magnitude of private choices); 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, 581 (2007) (examining “limits on parties’ ability to design and implement through contractual agreements their own set of public dispute resolution”); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 594 (2005) [hereinafter Resnik, *Procedure as Contract*] (discussing whether parties should contract for jurisdiction, choice-of-law, and privacy as part of contract procedure); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 821 (2006) (discussing how parties can further improve benefits of “trading off front-end and back-end costs” by modifying procedural rules); David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluting Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1085-87 (2002) (discussing how pre-litigation agreements have redefined portions of public system); Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 181-82 (highlighting policy implications of “designer trial” and its intersections with freedom of contract).

² See, e.g., Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 3-5 (1989) [hereinafter Bone, *Mapping the Boundaries of a Dispute*] (accounting historical evolution of civil procedure); Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1971-75 (2007) [hereinafter Bone, *Who Decides?*] (introducing history of procedural discretion); Paul D. Carrington, *Making Rules to Dispose of Manifestly*

sustained inquiry into the connection between these two trends. This Article joins a nascent scholarly discussion that situates private procedural ordering within the larger context of litigation administration and the role of judges therein, with a particular focus on the role of judicial discretion.³

The scope of judicial discretion and the acceptance (or even endorsement and encouragement) of private procedural ordering are linked in many circumstances. In these instances, the amount of judicial discretion over the interpretation and application of procedural rules is related to the rulemakers' understanding of how much control litigants and other private parties can or should have over the litigation process. Rulemakers and courts consciously deploy the tools of judicial discretion and private party agreement. In some instances, rulemakers make a deliberate choice to employ them as complementary tools. In other circumstances, judicial discretion and party agreement are treated as clashing, or perhaps even mutually exclusive, values in which only one can emerge victorious.

Part II illustrates the relationship between judicial discretion and private procedural ordering by introducing examples from the rules regarding civil discovery and judicial involvement in settlement. In each of these instances, rulemakers have explicitly tied a broad scope of judicial discretion to the assumption (and even promotion) of party agreement. I then examine the enforcement of forum selection clauses to demonstrate a situation in which party agreements concluded outside of the scope of litigation can affect courts' understanding of judicial discretion. Here, the narrowing (and in some situations disappearing) scope of judicial discretion in 28 U.S.C. § 1404(a) transfers and forum non conveniens dismissals can be linked directly to an almost obsessive judicial focus on the existence of party agreement to the exclusion of judicial discretion—a value written into the text of § 1404(a) itself.

I then suggest three potential theories to explain the linkage between judicial discretion and private procedural ordering. The “Elevation Theory” posits that in recent decades judges and other rulemakers have put such a high premium on private procedural ordering that this concept trumps other principles, including broad judicial discretion. The “Co-Management Theory” suggests that the link between judicial discretion and private procedural ordering is not symptomatic

Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure, 137 U. PA. L. REV. 2067, 2069-74 (1989) (examining legislative background of Federal Rules of Civil Procedure); Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 698-701 (2014) (discussing intersection of regulation and discretion in general); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1972-81 (1989) (revisiting legislative history of Rule 16).

³ Professor Dodson's recent work has addressed this relationship. Dodson, *supra* note 1, at 7 (discussing how courts retain “largely unfettered discretion—cabined only by law—to disregard or override” parties' choices in respect to litigation decisions). I respond directly to many of Dodson's claims in Section III.A of this Article.

of a preference for contract procedure, but rather, is an expression of a desire to have litigants be “co-managers” of litigation alongside the increasingly “managerial” judges. The “Co-Interpretive Theory” theorizes that a world in which there is a dynamic relationship between the availability of private procedural ordering and judicial discretion is one in which many rules of civil procedure are subject to interpretation and development by judges and litigants together. When private procedural ordering and judicial discretion occur in conjunction within the outer boundaries of permissibility as expressed in the rules, the push and pull of both phenomena develop and delineate the content of the rules themselves. I conclude by suggesting that the “Co-Management” and “Co-Interpretive” theories together are the most plausible account of the relationship between private procedural ordering and judicial discretion.

I. THE RISE OF PRIVATE PROCEDURAL ORDERING MEETS
THE WORLD OF JUDICIAL DISCRETION

Procedural rules provide the framework under which disputes will be settled. The rules for public litigation come from a wide variety of sources, the most obvious of which are public and of non-litigant specific provenance: state and federal legislatures, administrative rules committees, local court systems, and individual judges who have chamber-specific procedures. Beyond this framework, the parties to a lawsuit in American litigation have always exerted a good degree of control over litigation and its rules.⁴

Although this state of affairs is not particularly new, the phenomenon has received heavier scholarly scrutiny in recent years. Parties have, with varying degrees of success, made choices that result in deviations from existing procedural rules or created new procedures or rules altogether. These choices can be unilateral or by agreement and can take place before the existence of a dispute or during the life of an existing lawsuit. These practices have come to be known under a few different names: “contract procedure,”⁵ “party choice,”⁶

⁴ See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 9 (2001) (describing strong and unique commitment to party control of litigation in American system); Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1330 (2012) (noting that private parties enjoy “wide latitude” of choices outside general procedural rules and judicial decisions).

⁵ See Davis & Hershkoff, *supra* note 1, at 511 (defining “contract procedure” as “practice of setting out procedures in contracts to govern disputes that have not yet arisen, but that will be adjudicated in the public courts when they do arise”); Resnik, *Procedure as Contract*, *supra* note 1, at 626 (outlining analytical questions specific to contract procedure).

⁶ See Bone, *supra* note 4, at 1330 (discussing “party choice” as another source of procedure).

“party preference,”⁷ “privatized procedure,”⁸ and “procedural private ordering.”⁹ In this Article, I refer to these practices collectively as “private procedural ordering” because that label best captures the wide range of conduct in which it is the actions of specific private parties, not those of public rulemakers or judges, who create or alter the procedures for dispute resolution.

Private procedural ordering can affect choice of forum and personal jurisdiction,¹⁰ applicable substantive law,¹¹ the timing and scope of discovery,¹² attorneys’ fees,¹³ and even the question of whether a case will be litigated in a public court at all instead of a private tribunal.¹⁴ To take a simple example, a party who is not otherwise subject to the court’s personal jurisdiction may

⁷ See generally Scott Dodson, *Atlantic Marine and the Future of Party Preference*, 66 HASTINGS L.J. 675 (2015).

⁸ See David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389, 391 (stating that privatized procedure is hot scholarly topic).

⁹ See Dodge, *supra* note 1, at 724 (describing expanded power of procedural contracts); Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514, 514 (2009) (discussing “private ordering” in procedure).

¹⁰ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991) (verifying that choice of forum clause in consumer contract is enforceable); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 6 (1972) (noting that choice of forum clause in commercial contract is enforceable and “should rarely be disturbed”). The two cases also stand for the proposition that a valid and enforceable forum selection clause also constitutes consent to the personal jurisdiction of the chosen court.

¹¹ See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 458-63 (5th ed. 2011) (discussing principles of choice-of-law clause enforceability).

¹² Kapeliuk & Klement, *supra* note 1, at 1476 (observing that parties can enter pre-dispute agreements to stipulate scope of discovery).

¹³ Rhee, *supra* note 9, at 562-68 (discussing private agreements for allocation of attorneys’ fees).

¹⁴ See *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 343-44 (2011) (holding that Federal Arbitration Act (“FAA”) preempts state laws that find arbitration class action waivers unconscionable); *Stolt-Nielson S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 664 (2010) (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)) (finding that FAA’s central purpose is to “ensure that ‘private agreements to arbitrate are enforced according to their terms’”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625-26 (1985) (holding that parties can contract for resolution of public law claims, including antitrust claims, in arbitration); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 669-72 (2001) (describing and critiquing enforcement of arbitration clauses); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 188-97 (2004) (explaining how forum selection clauses can waive constitutional rights through form contract).

consent to its jurisdiction.¹⁵ Although parties may alter a broad range of procedural rules, some rules lie beyond the reach of party preference; the most prominent example of this is the federal courts' subject matter jurisdiction.¹⁶ Some procedural rules may be waived or altered at any time, including prior to the existence of a lawsuit or even during a dispute. Others may only be waived after the initiation of litigation. Commentators refer to this distinction as *ex ante* versus *ex post* waiver or alteration of procedural rules.¹⁷

In recent years, the elevation and enforcement of party preference in litigation rules have come under increasing scholarly scrutiny. Some scholars support a robust regime of procedural contracting,¹⁸ while others caution that its use is already too expansive,¹⁹ and that total exit to arbitration allows parties to "create an alternative procedural universe."²⁰ Commentators have noted a strong uptick in the number of procedures that appear to be available to party modification or waiver,²¹ although not all agree that party preference is as dominant as some

¹⁵ See Bone, *supra* note 4, at 1345-47 (describing legal status of agreements to limit discovery both before and after commencement of litigation).

¹⁶ See *Chi., Burlington & Quincy Ry. Co. v. Willard*, 220 U.S. 413, 420 (1911) (highlighting that defects in subject matter jurisdiction cannot be waived).

¹⁷ See Bone, *supra* note 4, at 1339-42 (categorizing party-made procedure in four different types); Dodge, *supra* note 1, *passim* (discussing *ex ante* procedural contracts); see also Blair, *supra* note 1, at 789-93 (documenting advantages of pre-procedural and post-procedural contracting); Matthew A. Shapiro, *Delegating Procedure*, 118 COLUM. L. REV. (forthcoming 2018) (describing *ex post* policing strategy of many procedural rules).

¹⁸ See Moffitt, *supra* note 1, at 462 (arguing that "current set of procedural rules should be treated as default rules, rather than as nonnegotiable parameters"); Noyes, *supra* note 1, at 621 (arguing that public litigation with modifiable rules is often preferable to public litigation with fixed rules as well as arbitration); Scott & Triantis, *supra* note 1, at 821-22 (describing how efficiency gains can be improved by using contract to vary procedural rules that will apply to dispute).

¹⁹ See, e.g., Dodge, *supra* note 1, at 725 ("The conversion of procedural rules from publicly created, mandatory guarantors of procedural justice to default rules subject to market forces alters the nature and function of civil procedure at a basic level."); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3052 (2015) (discussing how expansion of private arbitration has negatively shielded cases from "judicial and public scrutiny"); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 5 (1997) (criticizing widespread use of arbitration agreements); see also Davis & Hershkoff, *supra* note 1, at 517-20 (noting that there is insufficient empirical data to draw concrete conclusions on how widespread use of contract procedure has been).

²⁰ David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 460 (2011).

²¹ See, e.g., Davis & Hershkoff, *supra* note 1, at 510-11 (listing procedural tools subject to potential contractual modification); Dodge, *supra* note 1, at 734-38 (describing rise in "private procedural ordering").

scholars have claimed.²² Even scholars who note that parties have been slow to adopt pre-dispute procedural customizations argue that “the current trend of doctrine could not be clearer: courts seem ready to enforce parties’ autonomous procedural choices.”²³

Scholars skeptical of private procedural ordering have leveled several criticisms against this trend. One of the oldest arguments raised is that enforcing such agreements “ousts” the power of the trial court and trial judge.²⁴ Modern critics see a newer form of ouster, in which private procedural ordering deprives a judge of the opportunity to apply uniform rules of procedure and case management, and deprives the forum of its ability to promulgate and “sell” a coherent package of procedural rules.²⁵ As the older ouster doctrine lost its force, arguments against privatized procedure were recast into a broader unease that the enforcement of private procedural agreements would lead to the displacement of the public judicial function. These policy-centered arguments suggest that, even if enforcing arbitration agreements or privatized procedure in public courts does not formally oust a court of its power, such enforcement nonetheless inflicts damage on the system of public dispute resolution as a whole due to a lack of transparency,²⁶ lack of common law development, and a threat to judicial legitimacy and integrity.²⁷

Private procedural ordering displaces the decisions of rulemakers (usually a legislature or rulemaking committee) and the decision-making authority of judges.²⁸ The concern over altering rules centers around a clash between public and private values. Critics contend that publicly promulgated rules represent public values that protect individual participants in a dispute and balance the

²² See Dodson, *supra* note 1, at 6-7 (arguing that party agreements are subordinate to judicial authority and power of law).

²³ Blair, *supra* note 1, at 791.

²⁴ *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 450 (1874) (holding that individual cannot “bind himself in advance by an agreement, which may be specifically enforced . . . to forfeit his rights at all times and on all occasions”). This older form of ouster doctrine has largely fallen out of favor.

²⁵ Jaime Dodge refers to this as “unbundled procedure.” Dodge, *supra* note 1, at 744.

²⁶ See Glover, *supra* note 19, at 3055-56 (describing loss of transparency in shift to widespread dispute resolution in arbitration).

²⁷ See, e.g., Bone, *supra* note 4, at 1378-80 (arguing that critics of party rulemaking should “ground their arguments in a theory of adjudicative legitimacy”); Davis & Hershkoff, *supra* note 1, at 556-63 (discussing lack of information disclosure as fallout of private procedural ordering); Resnik, *Procedure as Contract*, *supra* note 1, at 597-98 (“Questions of legitimacy and fairness . . . need to be redirected towards bargaining processes promoted by courts, agencies, Congress, and private providers.”).

²⁸ Horton, *supra* note 20, at 442 (noting that FAA “does not just allow private parties to engage in lawmaking—it allows them to engage in law revision, abrogating Congress’s procedural rulemaking duties and eroding substantive statutory and common law rights”).

competing values of efficiency in litigation and accuracy in outcomes.²⁹ Although parties have always been able to deviate from these rules in certain instances, private procedural ordering suggests an “inversion” of the typical inquiry in which “no longer is the primary question how the public rules structure should be designed to protect the private individual’s interest from public intrusion; instead, the question is what restrictions upon party-driven procedure must be incorporated to protect the public interest.”³⁰

Another worry is that private procedural ordering diminishes the fundamental essence of public litigation. If parties were truly free to customize procedures to their liking, there would be little difference between litigation in a public forum and private arbitration.³¹ To the extent that public tribunals are charged with enforcing substantive law, some uniform baseline of procedure and transparent reasoning must exist to distinguish public adjudication from private dispute resolution.³² In other words, too much privatized procedure would transform the public courts into little more than publicly available arbitral tribunals.³³ Adjacent to this criticism is the concern that procedural alterations or resolution via arbitration can change the nature of the underlying substantive rights about which the parties are litigating.³⁴ In the most extreme situations, procedural rules

²⁹ Dodge, *supra* note 1, at 748-50 (observing that private ordering could cause risk asymmetry and not necessarily enhance “the efficiency or accuracy of truth-finding”); Taylor & Cliffe, *supra* note 1, at 1099-1100 (arguing that privatized procedure may violate constitutional principle of separation of powers and, as policy matter, deprives deliberative bodies, such as Congress or Rules Advisory Committee, of opportunity to publicly debate and craft procedural rules).

³⁰ Dodge, *supra* note 1, at 765. Dodge focuses her critique on whether it is acceptable to classify and honor *ex ante* procedural alterations in the same way that courts have done with *ex post* modifications. *Id.* at 765-70. *But see* Bone, *supra* note 4, at 1333-34 (questioning whether it is possible to quantify and compare costs and benefits to procedural rules and alterations).

³¹ *See* Bone, *supra* note 4, at 1385-86 (explaining that, at its core, arbitration focuses on dispute resolution whereas adjudication focuses on principled reasoning).

³² *Id.* at 1387; Glover, *supra* note 19, at 3056-57 (“[T]he shift from dispute resolution in courts, the public realm, to dispute resolution in arbitration, the private realm . . . threatens both the transparency and mechanisms of *lawmaking*.”).

³³ This is true even if one adopts a primarily “dispute resolution” model for public litigation rather than a “norm-creation” or public law model.

³⁴ *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 535-37 (1958) (discussing issue of applicable law in worker’s compensation case); Dodge, *supra* note 1, at 771 (“[U]nlike most *ex post* procedural contracts, permitting *ex ante* modification allows parties to affect deterrence by affirmatively changing the expected average outcomes in the compliance and non-compliance states at the time of performance.”). This argument relies on the close relationship between procedure and substance and the recognition that the mode of enforcing a right can alter its value or even its existence. *See* Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1511 (1995)

can be so costly that they effectively erase a plaintiff's ability to bring a claim.³⁵ This is most notable in the class action waiver context. Many small claims are only viable if brought as a class action.³⁶ When a party utilizes a class action waiver in an ex ante contract, it can effectively insulate itself from liability by making a lawsuit nigh impossible to launch. Thus, although a substantive right may exist in theory, it has been all but eliminated in practice.³⁷

One of the biggest criticisms of private procedural ordering is that the agreements to limit procedure or opt out completely via arbitration are a result of unfair bargaining power between the parties. Therefore, according to this argument, these agreements do not reflect a state of affairs in which each party has meaningfully consented to procedural alterations. These concerns are most pronounced in the consumer context of contracts of adhesion and collective bargaining agreements, and special scholarly attention has been focused on arbitration agreements.³⁸

(finding that change of venue within federal system—a system of supposedly uniform practice and procedure—led to decrease from fifty-eight percent to twenty-nine percent in success by plaintiffs). A jury-trial waiver can drastically reduce the recovery of punitive damages, *see* Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Mandatory Arbitration for Customers but Not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts*, 92 JUDICATURE 118, 122 (2008) (arguing that firms utilize jury-trial waivers and aggregate claims in order to “avoid the risk of a large damage award” or avoid liability completely), and reduce liability in employment discrimination cases by up to ninety percent of the time, *see id.* at 121 (finding arbitration clause in ninety percent of employment contracts); Christian N. Elloie, *Are Pre-Dispute Jury Trial Waivers a Bargain for Employers over Arbitration? It Depends on the Employee*, 76 DEF. COUNS. J. 91, 96 (2009) (finding that ninety percent of employment discrimination cases that reach court are decided by jury).

³⁵ *See* Glover, *supra* note 19, at 3057 (noticing that arbitration using certain procedural rules can “have the foreseeable, indeed possibly intended, consequence of preventing certain claims from being asserted at all, rendering those claims mere nullities” (footnote omitted)).

³⁶ *See* Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1066 (2012) (“By assigning collective ownership of the claims to class counsel, the class action equalizes the stakes, thereby giving the class . . . the same incentives to invest in common issues as the defendant.”).

³⁷ *See* Bone, *supra* note 4, at 1368 (“[T]he problem in *Concepcion* was that the class waiver eliminated the most effective device for aggregating individual claims and attracting lawyers to serve as private attorneys general to enforce deterrence goals.”); Dodge, *supra* note 1, at 778-80 (“[T]o the extent that an ex ante class waiver is offered, an individual anticipating that others will prefer an upfront payment . . . will feel pressure to opt out . . .”).

³⁸ *See, e.g.,* Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55, 72-74 (2004) (discussing impacts of mandatory arbitration clauses vis-à-vis consumer protection); Horton, *supra* note 20, at 451-60 (describing decline of unconscionability as defense to arbitration clauses and rise of unilateral imposition of arbitration clauses in consumer contracts); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1648-58 (2005) (examining attacks and

Not all commentary on private procedural ordering has been negative. Some scholars have argued that party-made rules are more efficient than broadly applicable publicly drafted rules.³⁹ Others have suggested that private procedural ordering lessens the incentive for parties to forego public litigation at all in favor of arbitration.⁴⁰ Scholars have also countered the concerns over inequality in bargaining power by relying on traditional arguments of party autonomy and freedom of contract.⁴¹ Most importantly, a good deal of the criticism about private procedural ordering has focused on agreements made outside of litigation, or on the problems inherent in opting out in favor of arbitration. As I shall illustrate later, party agreement is already baked into some of our existing procedural tools. Understanding why and how this might be favorable could lead to a more nuanced evaluation of the larger problem of private procedural ordering.

Whereas private procedural ordering has been treated as a relatively new phenomenon by commentators in the past three decades, scholarly conversations about judicial discretion are well-worn. The basic question about how much latitude judges have to interpret and apply rules extends far beyond civil procedure.⁴² Judicial discretion refers to the permissibility of a judge to reach any number of equally acceptable outcomes when deciding a legal question or

defenses of mandatory arbitration); *see generally* Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761 (2002) (discussing evolution of mandatory binding arbitration in United States). Moreover, to the extent that these arguments are persuasive, they tend to have more to say about the state of modern contract doctrine than about issues particular to civil procedure.

³⁹ *See, e.g.*, Blair, *supra* note 1, at 802-13 (explaining gains from procedural customization); Kapeliuk & Klement, *supra* note 1, at 1475-76 (suggesting that private agreements on procedural issues could help reduce costs, lower risks, and promote fair outcomes); Moffitt, *supra* note 1, at 465 (arguing that “risks and uncertainties involved with the customization experiment would be manageable” and that “its enormous potential benefits make customization imperative for the future of litigation”); Rhee, *supra* note 9, at 566 (“Private ordering of a dispute is achieved when the parties are allowed to rearrange the procedural rules governing public adjudication of the dispute so as to reach an efficient result at the lowest individual and social cost. Because procedural rules can impose significant costs and risks on the parties, some rules should be subject to reordering by the parties.”).

⁴⁰ *See* Moffitt, *supra* note 1, at 490-91 (arguing that customization allows sophisticated parties to “recreate the litigation experience in a way that makes it more attractive”); Noyes, *supra* note 1, at 594 (“If ex ante contracts to modify the rules of litigation are enforceable, then contractually-modified litigation offers a superior alternative to arbitration.”).

⁴¹ *See* Moffitt, *supra* note 1, at 479-81 (discussing how “procedural justice” is best achieved when “principal is the party exercising control over the process”).

⁴² *See* Effron, *supra* note 2, at 695 n.35 (listing and summarizing broader literature on judicial discretion).

taking a particular action in a case.⁴³ These possible outcomes are not infinite, and the boundaries within which judges may come to their decision define the scope of discretion.⁴⁴ Discretion has been described as “primary and secondary,”⁴⁵ “substantive” and “procedural,”⁴⁶ and “explicit” and “interpretive.”⁴⁷ Most scholarly inquiries into the nature of judicial discretion struggle with determining the sources of authority for such discretion, determining the scope of discretion itself, and answering normative questions regarding the virtues of a system in which judges enjoy a range of discretionary flexibility.

In previous work, I have written about the “particular procedural role” that judicial discretion plays “with regard to procedural devices.”⁴⁸ The flexibility in decision-making that judicial discretion affords is the foundation of a judge’s ability to make the workaday, case-by-case procedural choices that shape the life of a lawsuit.⁴⁹ This fact is at the center of one of the bigger controversies surrounding broad procedural discretion, for it has enabled trial judges to become the managers or administrators of lawsuits, leading to intense debates over whether such managerial judging is desirable.⁵⁰ All in all, some measure of judicial discretion is accepted as an inevitable feature of the common law legal system,⁵¹ but the ongoing scholarly debate shows discomfort with its appropriate use and boundaries, particularly as a procedural tool of managerial judging.⁵²

⁴³ See Sarah M. R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIAMI L. REV. 947, 952 (2010) (examining judicial discretion “across contexts” to contemplate range of potential outcomes).

⁴⁴ *Id.* (“Within the bounds of discretion, any outcome may be considered ‘legal’ insofar as it has the imprimatur of legitimate authority as a permissible outcome.”).

⁴⁵ Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637 (1971).

⁴⁶ Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1567-74 (2003) (providing broader typology of discretion).

⁴⁷ Bone, *Who Decides?*, *supra* note 2, at 1967-70.

⁴⁸ Effron, *supra* note 2, at 695.

⁴⁹ See Bone, *Mapping the Boundaries of a Dispute*, *supra* note 2, at 80 (stating that procedural discretion was deliberate choice by drafters of federal rules); Carrington, *supra* note 2, at 2081-85 (describing procedural flexibility); Shapiro, *supra* note 2, at 1975 (discussing how judicial discretion, as deliberately provided for in federal rules, allows judges flexibility to deal fairly with case at hand).

⁵⁰ See *infra* notes 205-16 and accompanying text (discussing phenomenon of managerial judging and summarizing debate over its desirability); see also Effron, *supra* note 2, at 696 n.39 (collecting sources critical of managerial judging).

⁵¹ See Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 412 (2007).

⁵² Much of the debate concerns the specific problems of managerial judging in complex litigation, which has its own dynamics and underlying policy problems. See generally Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027 (2013) (analyzing managerial judging concerns in complex civil cases under bifurcated

It is interesting to note the extent to which some critiques of the broad or liberal use of judicial discretion in procedural decisions overlap with other criticisms leveled at private procedural ordering. For example, exercises of broad procedural discretion have been criticized for promoting inconsistency and unpredictability in rule applications and outcomes,⁵³ for failing to result in transparent decision-making,⁵⁴ for the inability to promote a reliable record of common law rulemaking and resist the boundaries of precedent,⁵⁵ for creating legal rules and outcomes outside the authority of elected or delegated rulemakers,⁵⁶ and for the fact that the decisions are unreviewable by another judicial authority, either as a matter of law or as a practical reality.⁵⁷

Looking at private procedural ordering and judicial discretion together, the larger questions come into focus: Who controls litigation and who authors the rules that control litigation? In one sense, these two concepts appear to be in opposition to one another. Judicial discretion is a tool by which a judge has broad authority to shape, interpret, and apply procedural devices during litigation. Private procedural ordering, by contrast, is a tool in which it is not the judge, but the parties who wield this power. That being said, the shared critiques of procedural judicial discretion and private procedural ordering reveal similar discomfort with procedural rules and devices that seem to lack consistency, transparency, known authorship, and meaningful authority. It is no surprise, then, that the existence of both of these procedural tools leads to both coexistence and conflict.

analysis of judicially supervised post-adjudication remedies, deemed “substantive,” and pretrial proceedings, deemed “procedural”).

⁵³ Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424-26 (1982); *see also* Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 301 (2010) (criticizing degree of variability in trial judges’ discretionary decisions).

⁵⁴ Bone, *Who Decides?*, *supra* note 2, at 1974 (criticizing managerial discretion for transparency problems); *see also* Carlos E. González, *Turning Unambiguous Statutory Materials into Ambiguous Statutes: Ordering Principles, Avoidance, and Transparent Justification in Cases of Interpretive Choice*, 61 DUKE L.J. 583, 627-38 (2011) (encouraging use of transparent justification in tandem with judicial discretion in interpretation of statutory materials).

⁵⁵ Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 76-77 (1995) (criticizing managerial district judges for, *inter alia*, being unconstrained by precedent and making up “their own rules on an ad hoc basis”).

⁵⁶ *Id.* at 79-81 (contesting that concentration of discretionary power in district courts removes checks on judicial power that Framers intended); Resnik, *Procedure as Contract*, *supra* note 1, at 597 (noting that government officials working outside courthouses are now delegated judicial authority).

⁵⁷ Resnik, *supra* note 53, at 425-26 (noting that managerial discretion leads to decisions beyond reach of appellate review).

II. WHEN PRIVATE PROCEDURAL ORDERING AND JUDICIAL DISCRETION MEET AND COMPETE

Procedural judicial discretion and private procedural ordering via party agreement are integral, if sometimes controversial, parts of modern civil procedure. The two concepts need to be considered in tandem because they both prompt questions about who should be in the driver's seat when it comes to promulgating, interpreting, and applying procedural rules.⁵⁸ Because judicial discretion and private procedural ordering can be used to ramp up or dial back procedural rulemaking in the absence of rules promulgated by drafters, rulemakers have utilized both concepts, either tacitly or formally. In some instances, a conscious choice to harness both phenomena can result in relatively clear and manageable rules. In other cases, a less deliberate use of both judicial discretion and private procedural ordering can result in rules or doctrines that might seem clear enough on first blush, but which have, in practice, resulted in doctrinal morass.

In this Part, I examine how rulemakers and courts can deliberately deploy the tools of judicial discretion and private procedural ordering, either alone or in tandem. In some instances, rulemakers choose to employ them as complementary tools. In other circumstances, judicial discretion and party agreement are viewed as clashing or perhaps even mutually exclusive values in which only one can emerge victorious.

This Part explores three areas of civil procedure that exemplify the interaction of judicial discretion and party agreement. It begins with civil discovery, an area in which rulemakers have made a conscious decision to deploy judicial discretion and party agreement as complementary tools. It then moves on to settlement, an area of procedure in which judicial discretion and party agreement coexist with far less stability. Finally, this Part concludes by examining the enforcement of forum selection clauses under 28 U.S.C. § 1404(a), a realm in which the Supreme Court has shown open hostility to the idea of judicial discretion and party agreement as compatible values.

A. *Private Procedural Ordering and Judicial Discretion in Civil Discovery*

The complementary relationship of judicial discretion and private procedural ordering is best on display in the federal rules of discovery; they are the day-to-day examples of how party and judicial control can affect one another. The federal discovery rules are far from uncontroversial, evidenced by both sustained critique and vigorous defense from the bench, bar, and scholarly communities. Even when contemplating major changes to the discovery rules, the rules' drafters have not strayed from the fundamental tools of party agreement and

⁵⁸ See Blair, *supra* note 1, at 802-03 ("[M]any of our public procedural rules delegate to judges the task of specifying precise obligations after a dispute has arisen. Perhaps more importantly, however, the rules also leave litigants with broad discretion in conducting their affairs throughout the litigation process.").

judicial discretion. Instead, the changes, including significant recent amendments, merely tweak and reallocate power as between these two mechanisms.

The lesson from this Section is more than simply repeating the oft-stated observation that American discovery is a system of party control with modest, often discretionary, judicial intervention. Rather, this Section uses the 2015 discovery amendments to show the depth of rulemakers' commitment to this system—when confronted with supposed problems of party behavior, their instinct is to adjust the balance between private procedural ordering and judicial discretion, rather than to think outside of that dynamic altogether to imagine a different system or solution.

1. The Design of the Federal Rules

The rules of discovery are part of a system in which rulemakers have harnessed, and recently repurposed, the relationship between private procedural ordering and judicial discretion to maximize the effects of both. On the private procedural ordering end, the rules' design encourages party agreement and preferences within certain boundaries. These boundaries exist not only in the text of the rules, but in the exercise of judicial discretion in a realm where such discretion is particularly prominent—case management.

Civil discovery occurs, for the most part, outside the courthouse and without continual supervision and direction of a judicial officer.⁵⁹ The parties to a dispute are expected to follow the rules of discovery delineated in the Federal Rules of Civil Procedure ("FRCP") and negotiate deviations from the rules without direct judicial intervention.⁶⁰ In other words, the FRCP not only tolerate private procedural ordering during discovery, but are designed to promote it.⁶¹ This Section reviews the preference for party negotiation and agreement prior to and during discovery as well as the extent of judicial discretion over these same issues.

⁵⁹ John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 518 (2000) (asserting that judges steer clear of getting involved in discovery matters as much as possible); Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 348 (1999) ("[D]iscovery is a self-executing process that takes place outside of the public view with a minimum of judicial involvement and oversight."); Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1255-57 (2005) (noting that judicial employment of inquisitorial masters, who are often unduly influenced by party, is extensive and not subject to public accountability).

⁶⁰ Doré, *supra* note 59, at 348-49 (explaining that discovery rules are "self-regulating" mechanism for litigants).

⁶¹ Kessler, *supra* note 59, at 1253 (stating that procedural devices like discovery "are now in control of the parties, rather than the court").

Most discovery devices, such as depositions, interrogatories, and requests for admission, are governed by rules that set default parameters on the exercise of that device. These defaults can be altered either by party agreement, with leave of the court, or both. For example, the rules limit the number of oral depositions that parties may take⁶² and the number of interrogatories a litigant may propound.⁶³ However, the parties are free to depart from these limitations by stipulation. If the parties cannot agree, the party seeking a departure may ask the judge for leave to conduct additional depositions or interrogatories.⁶⁴ The ability to vary from the default rules by party agreement extends to other discovery devices, such as the timing or place of discovery events.⁶⁵

The discovery rules are designed to foster planning and agreement by the parties on the minutiae of procedure that will govern civil discovery in any given case. The assumption is that the parties themselves are in the best position to know and negotiate how much discovery is needed, what materials fall within the scope of discovery, and when and where discovery events should take place. The Advisory Committee Notes to Rule 30 (oral depositions) states that one purpose of the default limit on the number of depositions is “to emphasize that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case.”⁶⁶ Inter-party negotiation and agreement is thought to produce the best and perhaps most efficient outcome, although there are some situations in which this logic breaks down. Most notably, there are worries that such agreements in class actions or other mass actions result in elaborate discovery plans that enrich the lawyers at the expense of their clients.⁶⁷

The private procedural ordering model permeates the entire discovery process. Rule 26(f) requires that the parties meet for a conference to develop a

⁶² FED. R. CIV. P. 30(a)(2)(A)(i) (setting default limit at ten depositions per party).

⁶³ *Id.* 33(a)(1) (setting default limit at twenty-five interrogatories per party).

⁶⁴ *Id.* 30(a)(2)(A) (requiring parties to obtain leave of court “if the parties have not stipulated to the deposition” and depositions exceed default limits of number or time); *id.* 33(a)(1) (limiting interrogatory number at twenty-five “[u]nless otherwise stipulated or ordered by the court”).

⁶⁵ *Id.* 31(a)(2)(ii) (deposing individual who has already been deposed in the matter); *id.* 33(b)(2) (setting default time to respond to interrogatory at thirty days, but parties may mutually agree on shorter or longer time); *id.* 34(b)(2)(A) (setting default time to respond to discovery request at thirty days).

⁶⁶ *Id.* 30(a)(2)(A) advisory committee’s note to 1993 amendment.

⁶⁷ Scholars have described this as an agency problem between class members and class action lawyers. See Alexandra D. Lahav, *Two Views of the Class Action*, 79 *FORDHAM L. REV.* 1939, 1948 (2011) (“The agent-principal problem is a crucial issue in the class context because neither the class as a whole nor its individual members exercise control over the lawyer.”); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 *VAND. L. REV.* 107, 120-30 (2010) (describing problem of attorneys’ fees and attorney self-enrichment in multiple-district litigations).

discovery plan before they meet for the judicially supervised scheduling conference provided for in Rule 16.⁶⁸ Although Rule 26(f) does not mandate that the parties reach an agreement, it does require that they “attempt[] in good faith to agree on the proposed discovery plan.”⁶⁹ Issues on which the parties cannot agree are reserved for later judicial involvement, either at the Rule 16 conference or by motions to compel or protect the disclosure of particular information.⁷⁰

The push for party agreement is pervasive even when the parties clash during the course of discovery. The rules encourage parties to resolve discovery disputes outside the judge’s presence. Disputes that cannot be resolved are, for the most part, set aside for later adjudication.⁷¹ The fact that the occasional select discovery device, such as a physical or mental examination, requires judicial intervention only serves to highlight that the use of other devices should not routinely incorporate judicial involvement.⁷² The rules do not encourage or reward parties for bringing their discovery disputes directly to the judge’s attention.⁷³ In fact, parties that eschew these rather obvious cues can be subject to judicial ridicule.⁷⁴ Although judges clearly retain the final authority on resolving discovery disputes, the rulemakers’ preference for resolution via party agreement is quite clear.

Much of what I have just described—the preference for fostering party agreement as to how civil discovery will be conducted in a given lawsuit—might not look much like party rulemaking, a point to which I return later.⁷⁵ For the

⁶⁸ FED. R. CIV. P. 26(f).

⁶⁹ *Id.* 26(f)(2).

⁷⁰ *Id.* 16(a), 37(a).

⁷¹ *See id.* 37(a) (giving parties option to make motion when parties cannot agree to sufficiency of other’s actions).

⁷² *See id.* 35(a)(1) (“The court . . . may order a party . . . to submit to a physical or mental examination by a suitably licensed or certified examiner.”). In some states, even physical and mental examinations do not require a court order. *See, e.g.*, N.Y. C.P.L.R. 3121 (McKinney 2012) (allowing “any party [to] serve notice on another party to submit to a physical, mental or blood examination”).

⁷³ *See* Beckerman, *supra* note 59, at 550 (explaining that motions to compel and motions for protective orders are rarely filed and granted because they “inevitably require fact-scrutinizing judicial interventions typically after full briefing, [and] the procedures are time-consuming and generate much fact-intensive, satellite litigation”); Timothy Wilson, *A Mandate for Failure: The Sedona Cooperation Proclamation and Modern Discovery Under the Federal Rules of Civil Procedure*, 35 U. LA VERNE L. REV. 165, 168 (2013) (noticing in general that federal rules encourage counsel to cooperate).

⁷⁴ *See* *Avista Mgmt., Inc. v. Wausau Underwriters Ins. Co.*, No. 6:05-cv-01430, 2006 WL 1562246, at *1 (M.D. Fla. June 6, 2006) (responding to latest in series of motions to resolve discovery disputes by ordering that “counsel shall engage in one (1) game of ‘rock, paper, scissors’” on the courthouse steps, “[t]he winner of [which] shall be entitled to select the location for the 30(b)(6) deposition”).

⁷⁵ *See infra* Section III.B.2.

time being, it is sufficient to note that civil discovery is an area of procedure in which rulemakers have made a conspicuous effort to draw out parties' preferences as to the content of procedural rules and implement these preferences as much as possible.

Although the promotion of private procedural ordering is a major goal of the rules of civil discovery, the use of judicial discretion is also of great importance. Judges have a good deal of discretion to make case-specific rulings about discovery on both the front and back ends of civil discovery.⁷⁶

On the front end, trial judges are involved in delineating the scope, timing, and methods of discovery.⁷⁷ While the parties are expected to negotiate many aspects of these boundaries before the Rule 16 conference, the judge retains a significant amount of authority to approve, reject, or refashion these decisions.⁷⁸ This authority is considered part of the court's broader discretion "in ruling on pre-trial management matters,"⁷⁹ and thus courts have "broad discretion in structuring discovery."⁸⁰ An appeals court will only disturb a trial judge's discovery rulings if they result in "fundamental unfairness in the trial of the case"⁸¹ or "manifest injustice."⁸²

Beyond issues of scope and timing, judges have broad discretion to fashion discovery limits that protect a party's interest. For example, a party may seek protective orders to block disclosure of sensitive materials such as trade secrets.⁸³ Trial judges have "substantial latitude to fashion protective orders" because of "[t]he unique character of the discovery process" and the fact that the trial judge is in the "best position to weigh fairly the competing needs and interests of parties affected by discovery."⁸⁴ While judicial discretion here is not

⁷⁶ Matthew Shapiro has characterized this model as an *ex ante* delegation of state power to conduct aspects of legal proceedings, such as discovery, that is policed by state power as an *ex post* manner. Shapiro, *supra* note 17 (manuscript at 16-19) (on file with author).

⁷⁷ Much of this happens at the Rule 16 scheduling conference.

⁷⁸ See FED. R. CIV. P. 16 advisory committee's note to 2015 amendment (noting that "[m]any judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case").

⁷⁹ Wells Real Estate Inv. Tr. II, Inc. v. Chardon/Hato Rey P'ship, 615 F.3d 45, 58 (1st Cir. 2010).

⁸⁰ Edmond v. U.S. Postal Serv. Gen. Counsel, 949 F.2d 415, 425 (D.C. Cir. 1991).

⁸¹ Voegeli v. Lewis, 568 F.2d 89, 96 (8th Cir. 1977).

⁸² Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 186 (1st Cir. 1989) (defining manifest injustice as "where the lower court's discovery order was plainly wrong and resulted in substantial prejudice to the aggrieved party").

⁸³ See Jordana Cooper, *Beyond Judicial Discretion: Toward a Rights-Based Theory of Civil Discovery and Protective Orders*, 36 RUTGERS L.J. 775, 784-85 (2005) (noting that when trade secret is at issue, court may, at its discretion, issue protective order).

⁸⁴ Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984).

unlimited,⁸⁵ the judge still retains a substantial ability to tailor the order and remedy to the specifics of a given case.

On the back end, judges have the discretion to control the timing of discovery, both in terms of scheduling and enforcing deadlines.⁸⁶ Judges also have broad discretion to enforce discovery orders and fashion remedies for discovery violations, where the extent of the judge's discretion is on full display. Many of the front-end decisions that judges make are so managerial that the judge functions more as an administrator than a prototypical legal adjudicator.⁸⁷ But the judge's role in resolving discovery disputes and enforcing discovery orders is much closer to the judicial discretion that judges utilize in interpreting and applying substantive legal rules.⁸⁸ For example, in using broad and open-ended language to regulate when a judge should impose sanctions and exactly what those sanctions should be,⁸⁹ rulemakers have delegated a hefty dose of interpretive discretion to trial judges. Rather than attempting to catalogue in advance the myriad iterations of discovery violations and how they should be sanctioned, rulemakers have left to judges the task of assessing the problem and fashioning remedies on a case-by-case basis.

Even accounting for the interpretive discretion that judges enjoy on the back end of discovery, the federal discovery rules taken as a whole enable judges to use their discretion so that they function as litigation managers.⁹⁰ This increasingly managerial role has been criticized over the years, most notably by

⁸⁵ See Cooper, *supra* note 83, at 779-84 (arguing that *Seattle Times* doctrine has been limited by lower court cases imposing high burden for obtaining protective orders in privacy cases).

⁸⁶ See *Chrysler Int'l Corp. v. Chemaly*, 280 F.3d 1358, 1360 (11th Cir. 2002) ("At the heart of this case is the authority of the district court to control the pace of litigation before it.").

⁸⁷ See Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 960 (1998) (explaining that many judges have adopted "'managerial judging' techniques aimed at containing costs and encouraging settlements" as result of federal discovery rules having altered litigation dynamics by making lawsuits more expensive).

⁸⁸ See Shapiro, *supra* note 17 (manuscript at 18) (on file with author) (stressing ex post policing power of judges in enforcing discovery processes initially controlled by parties).

⁸⁹ See FED. R. CIV. P. 37(b)(2)(A). Some of the language is a curious combination of seemingly mandatory but actually discretionary standards. For example, Rule 37(b)(2)(C) states that the court "must" order the sanctioned party to pay "reasonable expenses, including attorney's fees," but then allows a judge to decline to award such fees under the relatively open-ended standard that "other circumstances make an award of expenses unjust." *Id.* 37(b)(2)(C).

⁹⁰ See Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 671-72 (2010) ("[A] series of amendments have enshrined active judicial case management into the [FRCP] . . . [thereby] enabling it by giving district judges an ever-expanding set of case-management tools to be used in its pursuit.").

Judith Resnik,⁹¹ yet judges have also been subject to criticism that they either cannot or will not exercise enough authority to reign in so-called “discovery abuses.”⁹²

This state of affairs in which judges are simultaneously accused of being too managerial, yet are not imposing sufficiently strong controls over discovery is, in part, the result of a system designed to promote both private procedural ordering and judicial discretion. In this system, exercises of judicial managerial authority can just as easily be classified as belonging to the party agreement realm as they can to the judicial discretion realm. In considering the role of the judge in privatized procedure agreements, Professor Bone has observed that:

[W]e have . . . assum[ed] a bilateral agreement between two parties. However, the trial judge can be involved in the agreement as well. Trial judges have broad case-management powers and often “negotiate” with the parties to establish discovery limits, trial deadlines, and the like. While the arrangement is not exactly contractual—the judge has the final word and in theory, at least, can impose procedures unilaterally—the result can resemble a three-party contract when the judge has something to lose by thwarting the parties’ preferences (such as overseeing a more protracted litigation). Moreover, even when parties agree in advance, the trial judge often has power to check the agreement *ex post*.⁹³

In other words, judges and litigants occupy an uneasy space in discovery, tipping back and forth between the world of private procedural ordering, in which the public figure of the judge is an unexpected third party, and the world of judicial discretion and management, in which the parties are unusually robust participants.

2. Party Preference and Judicial Discretion in the 2015 Federal Rules Amendments

One of the difficulties in the “discovery abuse” debate has been in producing solid empirical data to back up claims that American litigation has a problem

⁹¹ Resnik, *supra* note 53, at 424-31 (criticizing judicial management for, inter alia, creating vast new powers and threatening impartiality).

⁹² Lindsey D. Blanchard, *Rule 37(a)’s Loser-Pays “Mandate”: More Bark than Bite*, 42 U. MEM. L. REV. 109, 110-11 (2011) (stating that in 1980 and 2008 studies conducted by American College of Trial Lawyers, “practitioners complained that judges were not adequately enforcing the discovery rules governing sanctions” and turning blind eye to discovery abuse); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 40 (2003) (stating that if judges do not intervene when suspecting discovery abuse, “overzealous litigants might not only inflict harm on their immediate adversaries, but also clog dockets and thereby deprive future litigants of their day in court”).

⁹³ Bone, *supra* note 4, at 1340.

with discovery that is “too much” or “too onerous” or “too expensive.”⁹⁴ These accusations have always had a denominator problem—what is the appropriate baseline against which one can make a credible argument about the “right” amount or cost of discovery? The federal rules have been notoriously vague about the normative underpinnings that might guide one towards a meaningful answer to that question, notwithstanding very general language directing judges and litigants towards rulings and actions that would “secure the just, speedy, and inexpensive determination of every action and proceeding.”⁹⁵ It is against this debate, and in the context of my arguments regarding the relationship between party agreement and judicial discretion, that I offer a few observations about the 2015 amendments to the federal rules.

Scholars and commentators have written in great detail about the substance of the 2015 amendments and the motivation behind the changes.⁹⁶ What I find interesting about the amendments is the extent to which they attack the details of the relationship of private procedural ordering vis-à-vis judicial discretion while leaving the basic structure of this arrangement in place.

⁹⁴ Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 798 (1998) (stating that Columbia researchers “divided the number of days spent in discovery by the total number of days spent on a case and found that the proportion of litigation time spent in discovery was about 43% for heavy discovery cases, but only 25-31% in the average case”); see also PAUL R. CONNOLLY, EDITH A. HOLLEMAN & MICHAEL J. KUHLMAN, FED. JUDICIAL CTR., JUDICIAL CONTROLS AND THE CIVIL LITIGATION PROCESS: DISCOVERY 34-44 (1978), cited in McKenna & Wiggins, *supra*, at 791, and Beckerman, *supra* note 59, at 506 (finding that about five percent of district court judges’ case-related time is spent on discovery matters, including scheduling and management efforts, as well as resolving discovery motions, protective orders, and the like); John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 463 (2010) (citing ABA surveys which show that significant number—seventy-six percent—of litigators in federal court believe discovery courts to be “excessive” and “draining” of parties’ resources); Emery G. Lee III & Thomas E. Willing, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 779 (2010) (arguing that empirical research “has not provided support for the prevailing view that discovery costs are necessarily the major cost driver in litigation”).

⁹⁵ FED. R. CIV. P. 1.

⁹⁶ See generally Amii N. Castle, *A Comprehensive Overview: 2015 Amendments to the Federal Rules of Civil Procedure*, 64 U. KAN. L. REV. 837 (2016) (explaining changes to 2015 amendments and analyzing advisory committee notes); Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083 (2015) (overviewing 2015 amendments and polarized reactions to them); Richard Briles Moriarty, *And Now for Something Completely Different: Are the Federal Civil Discovery Rules Moving Forward into a New Age or Shifting Backward into a “Dark” Age?*, 39 AM. J. TRIAL ADVOC. 227 (2015) (examining 2015 amendments, analyzing them as unacceptable, and criticizing committee appointment process that underlies said changes).

It must be stressed that this is an observation about the interplay of private procedural ordering and judicial discretion, and not a normative conclusion about this particular strategy. Just because rulemakers seem to have settled upon regulating civil discovery by exploiting some sort of equilibrium between party preference and judicial discretion does not mean that the resulting rules will always be fair or efficient. Several commentators have roundly criticized the new “proportionality” rule for discovery.⁹⁷ While I will leave the substantive critiques to these other scholars, it is worth noting here that such a rule was not simply a product of anti-plaintiff sentiment,⁹⁸ but perhaps the inevitable result of demanding that litigants and judges do the day-to-day work of filling in the details of the written default rules.

The purported aim of the 2015 amendments was to reduce the amount and cost of discovery in civil litigation.⁹⁹ Despite the alarmist reports of civil discovery as an abusive and ruinous part of the American litigation system,¹⁰⁰ it is worth noting what the amendments did not do. The amendments did not fundamentally reimagine the discovery system from the ground up.¹⁰¹ Even though litigants are repeatedly accused of engaging in excessive discovery practices, the fundamental structure of discovery remains unchanged—it is still overseen by the trial judge, with the details and execution being driven by the parties and taking place outside of direct judicial supervision. Judges still maintain a healthy amount of discretion to fashion discovery orders and tailor

⁹⁷ Moriarty, *supra* note 96, at 248-51 (advocating for courts to resist prioritizing certain discovery materials over others under Rule 26(b)(1)); Letter of 171 Law Professors Urging Rejection of Changing Federal Rules to Limit Discovery and Eliminate Forms, to Comm. on Rules & Practice Procedure (Feb. 18, 2014), <https://www.afj.org/wp-content/uploads/2014/02/FRCP-letter-with-signatures.pdf> [<https://perma.cc/6KUN-NPCT>] (voicing objections against amendments that “would limit the scope of discovery, [and] provide more restrictive presumptive discovery limits” out of concern of increased litigation costs and limiting access to courts). *But see generally* John J. Jablonski & Alexander R. Dahl, *The 2015 Amendments to the Federal Rules of Civil Procedure: Guide to Proportionality in Discovery and Implementing a Safe Harbor for Preservation*, 82 DEF. COUNS. J. 411 (2015) (defending 2015 amendments).

⁹⁸ *See* Moore, *supra* note 96, *passim* (discussing various driving forces behind 2015 amendments).

⁹⁹ Andrew S. Pollis, *Busting up the Pretrial Industry*, 85 FORDHAM L. REV. 2097, 2105 (2017).

¹⁰⁰ *See id.* at 2107.

¹⁰¹ *See id.* at 2105 (“[T]here are no substantive changes in the rules that will ensure significant change, so it is questionable whether the changes will make progress toward that objective.” (footnote omitted)).

sanctions on a case-by-case basis, and parties are still expected to more or less self-administer discovery.¹⁰²

It is not surprising that the Advisory Committee was not ready to completely revamp the entire discovery system. Such fundamental and systemic change would have required far more research, drafting, and debate than the Advisory Committee was likely willing to take on.¹⁰³ And given the criticism that ensued after the amendments, it is unlikely the Advisory Committee could have reached consensus on such a revamp. A complete rethinking of the basic structure of discovery would have seemed disruptive and revolutionary, although one should note that the basic private procedural ordering/judicial discretion model of regulation is not universal. As I argue in Section II.C, there are some areas of procedural law in which party agreement and judicial discretion are viewed as incompatible instruments, rather than the complementary foundations of an entire system.

Given the tacit decision to maintain the basic private procedural ordering/judicial discretion foundation, the Advisory Committee had two possible avenues through which they could make changes to the discovery rules: alter the boundaries of private procedural ordering or alter the boundaries of judicial discretion. Although the Advisory Committee considered proposals in both areas, they ultimately drafted amendments that were aimed primarily at judicial discretion.

Changes to Private Procedural Ordering. The Advisory Committee had, at various points, considered tightening up the baselines for some aspects of party agreement. For example, the original proposal included cutting “the allowed number of depositions from ten to five; reduc[ing] the allowed duration of a deposition from seven hours to six; reduc[ing] the allowed number of interrogatories from twenty-five to fifteen; and limit[ing] requests to admit for the first time ever to twenty-five.”¹⁰⁴ The Advisory Committee later withdrew these proposals but not the new limits imposed by applying the “proportionality” rule to the administration of these discovery devices.¹⁰⁵ Although these

¹⁰² The existence of judicial discretion does not necessarily ensure that judicial supervision is of high quality. As Professor Andrew Pollis has observed, “the very nature of discovery disputes renders them vulnerable to poor judicial oversight.” *Id.* at 2104.

¹⁰³ Moreover, suppose that such an overhaul had involved eschewing some of the broad and open-ended discovery standards for longer and more precise rules. These rules would have needed some sort of empirical and normative grounding that would allow rulemakers, judges, or both to delineate the right amount of discovery. As I have already noted, the existing research is thin and, at best, presents conflicting results. *See supra* note 94 and accompanying text (describing difficulty in producing empirical data on discovery). Nonetheless, the decision to maintain the status quo of the discovery system’s basic design was not inevitable, especially given the tone of crisis-proportions that many critics took.

¹⁰⁴ *See* Moore, *supra* note 96, at 1122.

¹⁰⁵ *Id.*

amendments would not have changed the structure of the rules in which parties can agree to depart from the default, by narrowing the baseline, the rules might have effectively narrowed the world of possibilities over which the parties could negotiate and agree. Still, having considered changing the negotiating context for parties conducting discovery, the Advisory Committee chose instead to tighten the scope of judicial discretion on the back end. Although parties will undoubtedly bargain in the shadow of the new proportionality rule, it is significant that the Advisory Committee left the party agreement defaults unchanged.

If anything, the 2015 amendments stressed the prominence of the private procedural ordering model. An amendment to Rule 1 added “the parties” to “the court” as persons whose conduct should promote “just, speedy, and inexpensive” resolution of lawsuits.¹⁰⁶ The Committee Notes make an explicit appeal to the parties to cooperate with each other to achieve these ends,¹⁰⁷ and Chief Justice Roberts called attention to this emphasis on cooperation in his 2015 Year End Report.¹⁰⁸ Of course, casting this model as “cooperation” can whitewash a system in which “agreement” or “cooperation” are euphemisms for the exercises of unequal bargaining power or manipulative behavior.¹⁰⁹ Accordingly, a preference for private procedural ordering in the form of encouraging party agreement during discovery can replicate many of the concerns that commentators have expressed about ex ante agreements that alter litigation rules.

Changes to Judicial Discretion. The biggest change to the discovery rules in the 2015 amendments was to the standard that governs the scope of discovery, as well as the standard that governs permissible deviations from the default

¹⁰⁶ FED. R. CIV. P. 1 advisory committee’s note to 2015 amendment (“Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way.”).

¹⁰⁷ *Id.* (“Effective advocacy is consistent with—and indeed depends upon—cooperative . . . use of procedure.”); see also Moore, *supra* note 96, at 1100-06 (discussing how Advisory Committee considered value of party cooperation in drafting 2015 amendments).

¹⁰⁸ 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6 (2015), <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> [<https://perma.cc/EAQ8-X3D9>] (stating Rule 1 “make[s] express the obligation of judges and lawyers to work cooperatively”).

¹⁰⁹ As Pollis has noted:

the meet-and-confer requirement actually provides additional incentives not to provide discovery in the first instance because the responding party knows that its adversary cannot move to compel discovery without having first attempted these promotion negotiations; the withholding party can thus eventually retreat from unreasonable positions with impunity, depriving the requesting party an opportunity to expose the recalcitrance to the court.

Pollis, *supra* note 99, at 2104.

number of discovery tools, such as depositions and interrogatories. Under the old rules, the standard for the scope of discovery was “relevant to any party’s claim or defense” and a trial judge had the discretion to broaden the scope of discovery to include “any matter relevant to the subject matter involved in the action.”¹¹⁰ The 2015 amendments added a significant qualification to the “relevant to any party’s claim or defense” standard by appending “and *proportional* to the needs of the case” to the text of Rule 26(b).¹¹¹ This means that, although the 2015 amendments gave judges a more prominent role in determining the content of the rules regarding the scope of discovery, such as the availability of additional depositions, interrogatories, and the like, they did so by narrowing the scope of discretion that judges can exercise in determining the appropriate boundaries of discovery. Judges have been instructed to take a more active role, but only within the confines of a stricter standard imposed by the rulemakers.

The 2015 amendments, then, show how deeply ingrained the private procedural ordering model is in the discovery process. The rulemakers built on, and then designed, a system of party control reinforced by broadly discretionary judicial authority. As critics lodged increasingly loud complaints about party behavior in discovery, the rulemakers did almost nothing to address the parties themselves, nor did they reassign authority and managerial responsibility back to the court in any meaningful way. Rather, they pulled on the lever of judicial discretion—narrowing the scope of permissible judicial answers rather than beefing up actual judicial involvement or directly policing the parties. While parties must now bargain in the shadow of a new rule, the emphasis of the rule remains on *bargain* rather than on the *shadow*.

B. *Private Procedural Ordering and Judicial Discretion in Settlement*

Settlement is one of the oldest forms of privatized procedure. At its core, a settlement is simply a way of ending a lawsuit by party agreement rather than by judicial disposition. As such, settlements have long been a relatively unregulated area of civil procedure. The lack of regulation rests on background assumptions that parties have the right to agree on an out-of-court settlement and that courts have the inherent power to permit such agreements, even if a judicial disposition would have led to an alternative outcome.¹¹² A court order is not even necessary for the formal dismissal of a settled case.¹¹³

For the most part, settlements are unregulated. There are, however, a few situations in which settlements are in fact governed by judicially or legislatively

¹¹⁰ FED. R. CIV. P. 26(b)(1) (2012).

¹¹¹ FED. R. CIV. P. 26(b)(1) (emphasis added).

¹¹² See J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1718-25 (2012).

¹¹³ FED. R. CIV. P. 41(a)(1) (stating that plaintiff may dismiss action without court order by adhering to certain filing requirements).

promulgated rules.¹¹⁴ Given the tight relationship between the permissibility of privately resolving a dispute and the inherent powers of the court, settlement is an excellent place to examine the interplay of party agreement and judicial discretion. The types of claims that require judicial approval of settlements—for example, bankruptcy claims, antitrust consent decrees, claims asserted in class actions, and cases involving minors and incompetents—implicate “certain interests—either specific interests of parties not personally before the court or broader public interests” that the rulemakers have singled out for special protection.¹¹⁵ To illustrate the relationship between the rules governing judicial approval of certain settlements and the exercise of judicial discretion, I shall focus on two of the more prominent examples: the settlement of class actions, and the settlement of non-class mass actions. I argue that judicial discretion and private procedural ordering have an uneasy coexistence in the law of settlements. While the values are not necessarily incompatible, they do not enjoy the complementary status that I have described in the realm of civil discovery.

1. Settlement in Class Actions

In federal court, class action settlements require judicial approval. According to Rule 23(e)(2), a federal judge must hold a hearing to determine if a settlement is “fair, reasonable, and adequate” if it would bind class members.¹¹⁶ This rule makes sense in the context of other rules (or lack thereof) concerning judicial involvement in settlement. In ordinary situations, parties can always come to an agreement to settle a dispute without formal judicial involvement. There is no obligation to resort to the courts (or any dispute resolution tribunal) in the first place. Thus, if parties can reach such an agreement in the pre-suit context, there is very little reason to limit their ability to do so once a suit has been filed.¹¹⁷ But in the class action context, a settlement binds absent class members, and it is not clear that such individuals could have or would have made such agreements, thus there is a need for heightened judicial involvement.¹¹⁸

¹¹⁴ See Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 130-38 (2012) (detailing areas of law in which federal judges must approve settlements).

¹¹⁵ *Id.* at 131.

¹¹⁶ FED. R. CIV. P. 23(e)(2).

¹¹⁷ This tracks the ex ante/ex post reasoning about privatized procedure described earlier. See *supra* note 17 and accompanying text. But see Shapiro, *supra* note 17 (manuscript at 24) (on file with author) (arguing that “[e]ven settlements that aren’t memorialized in a court order generally end up functioning in practice much more like formal judgments than ordinary contracts”).

¹¹⁸ See Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 69 (2003) (“Notwithstanding the judge’s role in overseeing class actions, fair results are far from guaranteed.”); see also Grabill, *supra* note 114, at 126 (“[M]ass tort

The text of Rule 23(e)(2) reads: “If the [settlement] proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.”¹¹⁹ This process has become known as the “fairness hearing.”¹²⁰ The Rule contains both non-discretionary and discretionary elements. It is clear from the text that the judge does not have the discretion to decide whether to hold a hearing and make a finding—doing so is mandatory. However, the broad language of “fair, reasonable, and adequate” bestows a good deal of discretion on the judge to make factual and context-specific findings.¹²¹ A district court’s findings approving (or rejecting) a class settlement are reviewed under an “abuse of discretion” standard.¹²² In interpreting the requirements of Rule 23(e)(2), courts have devised a multifactor inquiry into the procedural and substantive fairness of the settlement.¹²³ As

litigation requires active judicial involvement and oversight due to the sheer size and complexity of such matters.”).

¹¹⁹ FED. R. CIV. P. 23(e)(2).

¹²⁰ William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1437 (2006) (“The bridge linking the agency-cost literature’s concern with monitoring class counsel and the collateral-attack literature’s concern about revisiting this monitoring is the peculiar juridical moment known as the fairness hearing.”); see also Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 2002 (1999) (stating that in class action settlements, judges perform functions different from their adjudicative functions to ensure fair result); Lahav, *supra* note 118, at 91 (“The judge’s role in class actions ranges from the traditional responsibility to evaluate and determine cases, to the more modern responsibilities to manage the interaction of various actors, monitor agents, determine the extent of plaintiff participation, and encourage the case’s resolution.”).

¹²¹ *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 317 (3d Cir. 1998) (explaining that courts must be “even more scrupulous than usual” in conducting fact finding when they examine the fairness of the proposed settlement (quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 805 (3d Cir. 1995))).

¹²² E.g., *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (“We review a district court’s approval of a proposed class action settlement . . . for abuse of discretion.”); *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000) (stating that in appellate courts, trial judge’s views should be given great weight).

¹²³ The nine factors of substantive fairness, known as the *Grinnell* factors, are: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). Most circuits have adopted these considerations as a multifactor test. See, e.g., *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 117 (2d Cir. 2005); *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1241 (9th Cir. 1998); *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d

several commentators have observed, judges are not particularly keen to genuinely scrutinize or actually reject a class action settlement.¹²⁴

Looking at trial and appellate decisions concerning the approval or rejection of class actions, one sees a familiar pattern. Courts pay a good deal of lip service to the idea of judicial discretion, especially when exercising such discretion leads to the approval of a party agreement. However, when the exercise of such discretion appears to disturb the process or outcome of the underlying party agreement, the district judge's action receives far more scrutiny. Specifically, the Third Circuit has described Rule 23(e) as giving district courts a "restricted, tightly focused role . . . requiring them to act as fiduciaries for the absent class members, but that does not vest them with broad powers to *intrude upon the parties' bargain*."¹²⁵ Courts have held that the parties' agreement should not be disturbed, even when there is a change in law or a ruling on a dispositive motion in one party's favor,¹²⁶ even though these changes could have significant effects on the outcome of a case that a settlement might or even should reflect if it is "fair, reasonable, and adequate."¹²⁷ These changes could also inform the inquiry into counsel's "appreciation of the merits of the case before negotiating."¹²⁸ The language of many opinions reveals the struggle between two intuitions: the sense that the district court's fairness hearing should be thorough and searching,¹²⁹ and

305, 314-15 (7th Cir. 1980), *overruled on other grounds by* *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *New Eng. Carpenters Health Benefits Fund v. First DataBank, Inc.*, 602 F. Supp. 2d 277, 280-81 (D. Mass. 2009).

¹²⁴ See *Erichson*, *supra* note 120, at 2004 ("Some judges have approved settlement class actions upon troublingly limited inquiries."); *Grabill*, *supra* note 114, at 126 (stating that courts have struggled to apply established principles of judicial authority to evaluate and oversee class actions); *Lahav*, *supra* note 118, at 91 (arguing that judges do "not do enough to review settlements"); *Rubenstein*, *supra* note 120, at 1444-46 (describing deficits in judicial oversight of class action settlements).

¹²⁵ *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 593 (3d Cir. 2010) (emphasis added).

¹²⁶ See *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008) (holding that trial court erred in ruling on motion for summary judgment after parties agreed to settlement).

¹²⁷ FED. R. CIV. P. 23(e)(2).

¹²⁸ *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004) (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001)).

¹²⁹ *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 298 (3d Cir. 1998) (describing fairness hearing that included oral argument from all parties, including objectors and appearances by amicus curiae); see also *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279 (7th Cir. 2002) (stating that district courts must "exercise the highest degree of vigilance in scrutinizing" whether settlements were fair); *In re Cendant Corp. Litig.*, 264 F.3d 286, 296 (3d Cir. 2001) ("The fiduciary duty [the district court has] to the class exists because the very nature of the class action device prevents many who have claims from directly participating in the litigation process."); *In re Warner Commc'ns Sec. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986) ("[A] district court has the fiduciary responsibility of ensuring that the settlement is fair . . .").

the competing idea that a proposed settlement is “[e]ntitled to a [p]resumption of [f]airness.”¹³⁰

The above analysis suggests that even though judges have been given explicit authority and direction to use their discretion as a check against party agreement, they are reluctant to use this power in a robust way. One explanation for this phenomenon is that judges are inherently uncomfortable inserting themselves into a realm that has traditionally been so completely dominated by private ordering.

Another explanation is that class action settlements actually resemble civil discovery in one crucial way—judges “suffer from a remarkable informational deficit in the fairness-hearing process.”¹³¹ Just as the parties in discovery are in a better position to know and negotiate on the minutiae of who should be deposed, when and where it should happen, and for how long,¹³² the parties to a class action have spent infinitely more time with the factual record of the lawsuit and its relationship to the details of the settlement than the judge. Presumably, the point of a fairness hearing is to force the judge to make such an acquaintance. But the private procedural ordering model is already so strong that it is easy, as a matter of theory and practice, for judges to shrink from the full scope of their discretion.

As I explain Part III, the deliberate choice of rulemakers to insert judges into the settlement process and the ensuing judicial reticence to engage routinely and meaningfully in such agreements is not an accidental or quirky feature of class action litigation. It is not a decision to have a standard by which settlements are measured (a standard that does not exist in ordinary litigation), but a decision to make enforcement of that standard sufficiently discretionary that judges can allow the parties themselves to become co-interpreters of this rule.

2. Settlement in Non-Class Mass Actions

Formal judicial approval of settlements outside the class action context is rare. Most of the action and commentary in this area has developed in non-class mass actions. In 2010, Judge Alvin K. Hellerstein made headlines when he rejected a settlement between 9/11 first responders and the City of New York and other defendants.¹³³ The first responders’ lawsuits were a mass action consolidated

¹³⁰ *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (stating this presumption “may attach to a class settlement reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery” (quoting FED. JUDICIAL CTR., *MANUAL FOR COMPLEX LITIGATION* § 30.42 (3d ed. 1995))).

¹³¹ Rubenstein, *supra* note 120, at 1445.

¹³² See Pollis, *supra* note 99, at 2104-05 (“The fact-intensive nature of the disputes is often a serious impediment to timely judicial attention, particularly because of other, ostensibly more pressing, obligations judges must fulfill.”).

¹³³ Mireya Navarro, *Judge Rejects Deal on Health Claims of Workers at Ground Zero*, N.Y. TIMES, Mar. 20, 2010, at A12.

pursuant to a federal statute, but they were not a class action. Commentators criticized Judge Hellerstein for overstepping his authority, arguing that no such judicial approval was needed,¹³⁴ and expressed disapproval for other recent examples of judicial involvement in the settlement of mass actions.¹³⁵ An examination of these arguments reveals some of the deeper difficulties in untangling the relationship between private procedural ordering and judicial discretion.

A primary criticism of judicial approval of non-class settlements is that there is no promulgated rule that actually grants judges such authority.¹³⁶ The absence of such rules has led to the conclusion that “courts generally lack the authority to evaluate and/or oversee the implementation of settlements” because “an active role for the trial court in approving the adequacy of a settlement is the exceptional situation, not the general rule.”¹³⁷ Moreover, the fact that the federal rules allow the parties to dismiss the case at any time by stipulation makes it “[p]rocedurally . . . impossible for the judge to become involved in overseeing a settlement.”¹³⁸ The upshot is that, outside of the specifically delineated cases governed by Rule 23 and other federal statutes, there is no general rule or statutory authorization of judicial review of settlements, and the structure of the federal rules strongly suggests that such review is prohibited.

The other criticism stresses the relationship between consent and settlement. In explaining why the rulemakers require judicial approval of class actions, commentators note the mandatory nature of the class and the binding nature of the settlement on absent class members.¹³⁹ In a non-class mass action, there are

¹³⁴ See, e.g., Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015, 1016 (2013) (“What I wonder is where [Judge Hellerstein] got the power to ‘approve’ or ‘reject’ the settlement.”); Grabill, *supra* note 114, at 147-53 (discussing Judge Hellerstein’s management of settlement); Alexandra N. Rothman, Note, *Bringing an End to the Trend: Cutting Judicial “Approval” and “Rejection” out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319, 321 (2011) (“Judge Hellerstein was expanding upon a recent trend in non-class mass litigation where judges have been ‘approving’ non-class mass settlement, even though the Federal Rules do not authorize such a practice.”). The Second Circuit eventually issued a tacit approval of Judge Hellerstein’s fairness evaluation, although it remanded and vacated several issues related to the enforcement of the settlement terms. *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d 114, 128 (2d Cir. 2014).

¹³⁵ See Grabill, *supra* note 114, at 140-46 (describing litigation and settlements of *Baycol* and *Vioxx* cases in addition to 9/11 cases); Rothman, *supra* note 134, at 335-43 (discussing multidistrict litigations in which judges approved or reviewed proposed settlements).

¹³⁶ See Grabill, *supra* note 114, at 165 (“[N]o statute or rule authorizes or requires judicial review of private mass tort settlements.”).

¹³⁷ *Id.* at 129 (quoting *United States v. City of Miami*, 614 F.2d 1322, 1331 (5th Cir. 1980)).

¹³⁸ *Id.* at 167 (quoting *City of Miami*, 614 F.2d at 1330).

¹³⁹ See *supra* note 118 and accompanying text (discussing how judicial involvement protects individuals not party to class action but nevertheless bound by settlement).

no absent class members, so each plaintiff is technically “at the table” and must agree in order to be bound by the judgment.¹⁴⁰ Commentators who have argued for extending judicial authority to approve or reject settlements have thus made their argument within the confines of settlements of mass torts. While they acknowledge that judges probably do not have the authority to approve or reject settlements,¹⁴¹ commenters nevertheless base their arguments on several possible grounds. First, they advocate for extending the class action rule by arguing that the similarity between mass actions and class actions demands judicial involvement in settlement along the lines of the provisions of Rule 23(e).¹⁴² Second, commenters reason judicial involvement can be expanded by the particular statutory scheme authorizing compensation, such as the 9/11 statute.¹⁴³ Finally, they argue that judicial involvement in settlement approval results is an information-forcing mechanism that affects the behavior of both the litigants and the judge in complex litigation.¹⁴⁴ In other words, those seeking to defend judicial involvement do so not based on any normative powers of the court, but on a perceived lack of agency or consent by effectively-absent litigants—the same critique levied against private procedural ordering in other

¹⁴⁰ Grabill, *supra* note 114, at 127 (“[P]rivate mass tort settlements . . . are essentially analogous to settlements in private one-on-one litigation because . . . each affected litigant must affirmatively agree to be bound by any settlement.”).

¹⁴¹ Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 394-95, 420-21 (2007) (discussing limitations of judicial oversight in mass tort suits); Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835, 854 (1997) (“[C]ourts . . . have neither obligation nor permission in individual civil litigation to scrutinize the adequacy of settlements.”).

¹⁴² See L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 248 (2004) (proposing “liberal reading of Rule 23 that permits courts to approve collective settlements with class allegations regardless of their certification status”); Lahav, *supra* note 141, at 432 (“[J]udicial approval [under Rule 23(e)] should also be required in aggregative settlements . . .”).

¹⁴³ See Wolff, *supra* note 52, at 1029-30 (“Judge Hellerstein acted within the proper scope of his authority in employing such forceful tactics with the litigants before him. His authority was not that of a generic ‘managerial judge.’ It was the authority to use case management and procedural innovation as tools for carrying into effect the distinctive liability policies enacted by Congress in the comprehensive statutory scheme that defined and limited the relief available to first responders.”).

¹⁴⁴ See Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1288-92 (2017) (arguing judges should use multidistrict litigation process to force disclosure of information to allow parties to make informed decisions in deciding whether to settle); David M. Jaros & Adam S. Zimmerman, *Judging Aggregate Settlement*, 94 WASH. U. L. REV. 545, 552 (2017) (“[J]udicial review would mean . . . demanding more information about the parties’ competing interests in settlement . . .”).

contexts.¹⁴⁵ Thus, a judge might use procedural judicial discretion in its broadest sense—the ability to use the court’s inherent powers to try and intervene in relatively uncharted territory—as a counterbalance to private procedural ordering that the judge believes has gone too far.

The reality is that the federal rules and federal procedural statutes do little if anything to regulate settlement outside of the few exceptions discussed above. Some commentators have argued that this vacuum is a result of a misplaced (or outdated) emphasis on trials or judicial adjudication.¹⁴⁶ But that explanation misses the dynamic role of private procedural ordering. Perhaps a more meaningful explanation would be that the absence of such rules implies an ambivalence by the rulemakers as to the intersection of judicial discretion with party private procedural ordering as expressed through settlement. Given the tepid nature with which parties and courts exercise some of the few existing options for exercising judicial discretion and involvement with settlement, it seems unlikely that one could expect either the rulemakers or judges to flex more muscle in the judicial discretion realm.

C. *Judicial Discretion and Private Procedural Ordering in the Enforcement of Forum Selection Clauses*

Sections II.A and II.B showed the varying degrees of at once comfortable but also uneasy harmony in which private procedural ordering and judicial discretion coexist. In this Section, I turn to an example in which Congress has promulgated a rule that directly and explicitly grants broad judicial discretion, but in which the prominence of party agreement has crowded out discretion. The enforcement of forum selection clauses under 28 U.S.C. § 1404(a) has shown that, in some cases, judges are wary that judicial discretion and party agreement can safely coexist. This is an example in which the existence and scope of discretion is more controversial than the text or origin of the rule would suggest.

Some procedural rules are explicit in their grant of judicial discretion. For example, Rule 51(b)(3) grants a district court judge discretion in choosing when

¹⁴⁵ In another high-profile example, Judge Jed S. Rakoff of the Southern District of New York rejected a consent settlement between the SEC and Citigroup in the aftermath of the 2008 banking crisis. *SEC v. Citigroup Glob. Mkts. Inc.*, 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011). The Second Circuit reversed Judge Rakoff’s decision, emphasizing the importance of respecting the agreement between the parties. *SEC v. Citigroup Glob. Mkts., Inc.*, 752 F.3d 285, 295 (2d Cir. 2014). Although this case is somewhat instructive, its value is complicated by the fact that the Second Circuit was also concerned with the administrative law issue of deference to an agency decision as well as deference to party agreement. *Id.* at 296-97 (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984)).

¹⁴⁶ Glover, *supra* note 112, at 1727-44 (discussing how current procedural rules do not encourage settlements aligned with merits of case).

to charge the jury. The Rule provides that the court “may instruct the jury at any time before the jury is discharged”¹⁴⁷ and the Advisory Committee Notes reiterate that the purpose of the rule is “to give the court *discretion* to instruct the jury either before or after argument.”¹⁴⁸ It would be hard to imagine an interpretation or application of Rule 51(b)(3) that would rigidly constrain a judge’s ability to choose the timing of a jury charge without running afoul of the text of the rule.¹⁴⁹

Although not every discretionary rule is as explicit as Rule 51 (or some of the other examples given in the previous Section), there are still rules that look relatively uncontroversial on the discretion front. And yet, the extent of that discretion has been narrowed to the point of making the discretion itself look like an illusion. This is what has happened with 28 U.S.C. § 1404(a).

Section 1404(a) codifies one of the federal transfer of venue provisions. It allows transfer from an otherwise proper venue under the following standard: “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”¹⁵⁰ Although this statute is meant to confer a healthy dose of discretion on the district judge, recent jurisprudence shows how sharply private procedural ordering can curb such discretion.

Broad judicial discretion is built into the very text of § 1404(a). A judge “may transfer” a case, meaning that transfer under the rule is a permissible but not a mandatory outcome of a transfer motion.¹⁵¹ Because the statutory language is quite broad, courts have developed a framework of public and private factors that judges should use when assessing whether to order a transfer.¹⁵² These factors are similar, though not identical, to the factors that a court uses to

¹⁴⁷ FED. R. CIV. P. 51(b)(3).

¹⁴⁸ FED. R. CIV. P. 51 advisory committee’s note to 1987 amendment (emphasis added).

¹⁴⁹ Indeed, the few direct citations to Rule 51(b)(3) in published opinions reaffirm the district judge’s broad discretion in timing jury instructions. *See, e.g.,* Heimlicher v. Steele, 615 F. Supp. 2d 884, 933 (N.D. Iowa 2009); Vialpando v. Cooper Cameron Corp., 92 F. App’x 612, 621 (10th Cir. 2004) (noting that this timing discretion coexists with mandate to inform parties of any proposed instructions before charging jury).

¹⁵⁰ 28 U.S.C. § 1404(a) (2012).

¹⁵¹ *Id.*; 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3847 (4th ed. 2013) (stating that trial judges have broad discretion in deciding whether to transfer case).

¹⁵² For a typical formulation of the public and private factors, see *Royal Bed & Spring Co. v. Famossul Industria e Comercio de Moveis Ltda.*, 906 F.2d 45, 52 (1st Cir. 1990) (listing private interests that need to be considered, including relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; cost of obtaining attendance of willing witnesses; possibility of view of premises; and all other practical problems that make trial of a case easy, expeditious, and inexpensive, and public interest factors to be considered, including administrative difficulties, jury duty imposed on community, and local interest to decide controversy at home).

evaluate a motion to dismiss for forum non conveniens.¹⁵³ This broadly promulgated standard and judicially created multifactor test undergirds the interpretation and application of § 1404(a). Its purpose is to guide judges in considering the fact- and context-specific nature of each case and in deciding whether and where to grant a transfer based on a holistic view of all the factors.¹⁵⁴ Commentators and judges alike routinely describe the § 1404(a) inquiry as one in which the district judge can and should exercise broad discretion.¹⁵⁵

Despite these platitudes, discretion under § 1404(a) has come under attack from a different corner—the enforcement of forum selection clauses. Forum selection clauses have long posed a problem for federal litigation. It is unclear what legal authority a federal court sitting in diversity has to enforce a forum selection clause because of the *Erie* problem inherent in using a procedural tool that involves interpreting and enforcing a contract.¹⁵⁶ This problem leads courts to rely on an awkward patchwork of the federal venue statutes and venue provisions in the FRCP as the federal law basis for applicable law.¹⁵⁷ Even in non-diversity cases, courts could not agree on the proper mechanism for enforcing forum selection clauses.¹⁵⁸ This confusion led to a circuit split that the Supreme Court resolved in *Atlantic Marine Construction Co. v. United States*

¹⁵³ For a full account of the differences between these two doctrines, see generally Robin Effron, *Atlantic Marine and the Future of Forum Non Conveniens*, 66 HASTINGS L.J. 693 (2015).

¹⁵⁴ *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (“A motion to transfer under § 1404(a) thus calls on the district court to weigh in the balance a number of case-specific factors.”).

¹⁵⁵ See Effron, *supra* note 153, at 703-06 (collecting sources describing broad discretion under § 1404(a)).

¹⁵⁶ See Adam N. Steinman, *Atlantic Marine Through the Lens of Erie*, 66 HASTINGS L.J. 795, 802-04 (2015) (indicating that “mere existence of diversity jurisdiction” should not “dictate the substantive rights”).

¹⁵⁷ See Effron, *supra* note 153, at 700-01.

¹⁵⁸ Possibilities included §§ 1404(a), 1406(a) (transfer or dismissal from improper venue), Rule 12(b)(3) (motion to dismiss for improper venue), and the federal common law of decisions such as *Carnival Cruise* and *The Bremen*. 28 U.S.C. §§ 1404(a), 1406(a) (2012); FED. R. CIV. P. 12(b)(3); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Scholars such as Professor Stephen Sachs had suggested that courts should use a Rule 12(b)(6) motion for failure to state a claim for which relief can be granted. See Brief of Professor Stephen E. Sachs as Amicus Curiae in Support of Neither Party at 28-34, *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568 (2013) (No. 12-929) (arguing that Rule 12(b)(6) motion should be used to enforce forum selection clause because court inherently cannot grant relief for a claim that parties agreed would be litigated in another forum). The *Atlantic Marine* Court declined to consider this possibility because the question had not been raised by the parties. *Atl. Marine*, 134 S. Ct. at 580.

District Court.¹⁵⁹ In its unanimous opinion, the Court held that § 1404(a) is the proper mechanism for enforcing a forum selection clause when the plaintiff has filed a case in an otherwise proper venue.¹⁶⁰ This holding made sense on a superficial level—holding otherwise would have meant that a forum selection clause rendered an otherwise proper venue improper, a reading that conflicts with the plain language and agreed meaning of the general venue statute.¹⁶¹

But choosing § 1404(a) left the Court with a different problem, namely, how to ensure the uniform (or at least consistent) enforcement of forum selection clauses in federal court under a statute designed for judicial discretion and a wide range of outcomes under a multifactor test.¹⁶² The Court answered this challenge by essentially gutting the discretionary heart of § 1404(a), at least with regard to forum selection clauses.¹⁶³

The balancing test that courts have developed over the years for deciding transfer of venue includes private and public factors that are meant to flesh out the broad standard in the text of § 1404(a).¹⁶⁴ The *Atlantic Marine* opinion directs courts to depart dramatically from the normal practice of “weigh[ing] the relevant factors and decid[ing] whether, on balance, a transfer would serve ‘the convenience of parties and witnesses’ and otherwise promote ‘the interest of justice.’”¹⁶⁵ In his opinion, Justice Alito instructs district court judges that they “should not consider arguments about the parties’ private interests” because the court “must deem the private-interest factors to weigh *entirely* in favor of the preselected forum.”¹⁶⁶ As I observed in an earlier article, the Court essentially allowed private parties to fashion contract language overriding the statutory language that confers discretion on judges:

According to the Court, the enforcement of a forum-selection clause is so paramount that it crowds out any other possible interests. . . . The Court thus transformed forum-selection enforcement—undoubtedly *an* interest of justice—into *the only* private interest cognizable under the § 1404(a) standard. The Court also conveniently did away with convenience. Although the text of § 1404(a) reads “[f]or the convenience of parties and witnesses, in the interest of justice,” Justice Alito announced that “the interest of justice” is the “overarching consideration under § 1404(a).” He

¹⁵⁹ 134 S. Ct. 568, 575 (2013) (addressing procedure through which plaintiff can enforce forum selection clause).

¹⁶⁰ *Id.* at 577.

¹⁶¹ *Id.* at 577-78 (arguing that because “[venue] cannot be ‘wrong’ if it is one in which the case could have been brought under § 1391,” allowing a forum selection clause to dictate otherwise would contradict “[t]he structure of the federal venue provisions”).

¹⁶² For more detail on this problem, see Effron, *supra* note 153, at 712-17.

¹⁶³ *See id.* at 713.

¹⁶⁴ *See supra* note 152 and accompanying text.

¹⁶⁵ *Atl. Marine*, 134 S. Ct. at 581 (quoting 28 U.S.C. § 1404(a) (2012)).

¹⁶⁶ *Id.* at 582 (emphasis added).

provided no further insight as to why such a parsing of the language is the best or even a plausible reading of § 1404(a).¹⁶⁷

Atlantic Marine thus swept away any judicial discretion to consider private interest factors under § 1404(a) in cases concerning forum selection clauses. The decision also seriously undermined a judge's ability to exercise much discretion in considering the public interest factors. The public interest factors "generally coalesce around considerations of whether a case would clog the docket or burden the resources of a jurisdiction with little connection to the case, and the relative interests of the two forums,"¹⁶⁸ particularly with regard to problems with a different forum applying new or unfamiliar law. Prior to *Atlantic Marine*, courts followed the Supreme Court's rule from *Van Dusen v. Barrack*¹⁶⁹ that a § 1404(a) transferee court must use the choice of law rules of the transferor court.¹⁷⁰ The fact that the transferee court might have to apply new or unfamiliar law was one public factor that the transferor court might weigh in deciding whether or not to transfer a case.¹⁷¹ The *Atlantic Marine* decision, however, created an exception to this rule for transfers made to enforce a forum selection clause, holding that in these cases, "a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules."¹⁷² This leaves very little room for judges to exercise discretion in considering the public interest factors because "[a]ll that is left are the worries about administrative costs and burdens to the public, and because these factors often concern the interests of the transferor court, only a small number of situations remain"¹⁷³ that would fall within the realm of the public interest factors.

As I previously observed, *Atlantic Marine* transformed § 1404(a) into a "Multifactor Test with One Factor, [a] Balancing Test with No Balance, [a] Discretionary Standard with but One Permissible Outcome."¹⁷⁴ Although it might be easy to write off the forum selection clause situation as *sui generis*, and the enforcement of such clauses as a foregone conclusion, these observations emphatically would not have accurately depicted the state of play prior to *Atlantic Marine*. Recall that the Supreme Court based its entire justification for use of a federal rule to govern forum selection clause enforcement in federal court on its statement in *Stewart Organization, Inc. v. Ricoh Corp.*¹⁷⁵ that

¹⁶⁷ Effron, *supra* note 153, at 713-14 (quoting *Atl. Marine*, 134 S. Ct. at 581).

¹⁶⁸ *Id.* at 715.

¹⁶⁹ 376 U.S. 612 (1964).

¹⁷⁰ *Id.* at 639 ("[T]he transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue.").

¹⁷¹ See *Atl. Marine*, 134 S. Ct. at 584.

¹⁷² *Id.* at 582.

¹⁷³ Effron, *supra* note 153, at 716.

¹⁷⁴ *Id.* at 717.

¹⁷⁵ 487 U.S. 22 (1988).

“Congress has directed that *multiple considerations* govern transfer within the federal court system,” and that “focusing on a single concern or a subset of factors identified in § 1404(a) would defeat that command.”¹⁷⁶ In other words, the *Atlantic Marine* Court harnessed the power of the *Stewart* decision, only to repudiate its basic rationale.

It is true that the standard for transfer of venue inquiries that do not involve forum selection clauses are unaffected by *Atlantic Marine*. They remain, at least for now, committed to the discretion of the district court within the bounds of § 1404(a).¹⁷⁷ But the transformation of § 1404(a) from a discretionary into a mandatory standard is still an important lesson in how private procedural ordering can disrupt ordinary and accepted interpretations and applications of procedural rules.

Atlantic Marine also shows how the Court implicitly decided that favoring the parties’ access to private procedural ordering should be accomplished by adjusting its relationship to the counterbalance of judicial discretion, rather than by simply allowing parties to override a statutory default by private agreement.¹⁷⁸ Recall how the Supreme Court arrived at § 1404(a) as the proper mechanism in the first place: the Court concluded that using § 1406(a) or Rule 12(b)(3) would render an otherwise proper venue (as defined under § 1391) improper.¹⁷⁹ However, given the pride of place that courts otherwise give to private procedural ordering, who is to say that the parties could not alter § 1391 by contract? The Court did not accomplish much by avoiding that reading of § 1391 because it simply displaced its discomfort with the plain language of § 1391 onto an awkward reading of § 1404(a)—a reading that not only disregards the discretion granted in the statute, but conflicts with the Court’s own earlier holding that § 1404(a)’s *Erie* value rests precisely on its nature as a discretionary statute.¹⁸⁰ It would have been easy enough to interpret § 1391 as a default rule subject to party modification. But the Court chose instead to utilize the push and pull of the private procedural ordering and judicial discretion levers to reach its desired result. In this case, the balance between the two values spelled the obliteration of judicial discretion.¹⁸¹

¹⁷⁶ *Id.* at 31 (emphasis added).

¹⁷⁷ *See Atl. Marine*, 134 S. Ct. at 581 (indicating that in case not involving forum selection clause, district court should exercise discretion under § 1404(a)).

¹⁷⁸ *See supra* notes 165-67 and accompanying text (discussing how Court claimed to maintain § 1404(a) balancing test despite essentially allowing forum selection clauses to override § 1404(a)).

¹⁷⁹ *Atl. Marine*, 134 S. Ct. at 577.

¹⁸⁰ *See Van Dusen v. Barrack*, 376 U.S. 612, 638 (1963) (“[The] purpose [of *Erie*] would be defeated . . . if nonresident defendants . . . could invoke § 1404(a) to gain the benefits of the laws of another jurisdiction . . .”).

¹⁸¹ Thanks to Andrew Pollis for helping to clarify this point.

III. PARTY CONTROL OF JUDICIAL DISCRETION?
OR JUDICIAL CONTROL OF PRIVATE PROCEDURAL ORDERING?

As the examples in Part II demonstrate, private procedural ordering has assumed an increasingly privileged role in federal civil procedure, and its rise has been accompanied by changes to the scope of procedural judicial discretion. While many commentators have either critiqued or lauded this development on the merits, few have stopped to consider why this is happening. In this Part, I suggest three possible explanations for this phenomenon. My suggestion is that the prominence of private procedural ordering goes beyond basic assumptions of party control and direction of litigation in the American system. Rather, the rise of private procedural ordering and concurrent fluctuations in the scope of judicial discretion show a deeper normative commitment to parties as co-managers of litigation and co-interpreters of legal rules.

A. *The “Elevation Theory”*

One theory for the rise of private procedural ordering is simply that rulemakers and judges have decided to prize private procedural ordering over other procedural values. Several scholars who have most vigorously criticized the rise of privatized procedure in recent years have drawn this inference. Professor Dodson is the first to thoroughly critique this model on both descriptive and normative grounds.¹⁸² While I agree with Dodson that the private procedural ordering model has not necessarily achieved “dominance” over the competing values of judicial discretion and governing law, it is worth examining the elevated status of private procedural ordering.

The examples from Part II demonstrate that the basics of the private procedural ordering model are one (but not the sole) foundation of the American adversarial litigation system, and the past few decades have provided several examples where fostering private procedural ordering has taken precedence over other values. Given this trend, it is not surprising that some scholars have concluded that the value of private procedural ordering currently enjoys an elevated status among judges and rulemakers—elevated both with respect to how party agreements once were viewed and in comparison to other procedural values. Dodson seems to agree with the first statement in the sense that he does not contest the trend toward the prominence of valuing private procedural ordering relative to where it had once been, but he does believe that the second part of the elevation thesis has been vastly overstated, if not downright wrong.¹⁸³ Unpacking Dodson’s arguments against the elevation theory will help clarify the elevation theory itself. Dodson has overstated the case against elevation, but the subtler and more nuanced version of the elevation theory left in Dodson’s wake shows that our understanding of private procedural ordering is still incomplete.

¹⁸² See Dodson, *supra* note 1, *passim* (arguing party agreement is actually subordinate value).

¹⁸³ *Id.* at 13-25.

In that sense, he is correct to argue that elevation cannot and should not be the complete descriptive or normative account of the prominence of the party agreement model.

Dodson argues that, even though private procedural ordering might appear to be powerful, especially considering its rise in recent decades, this assertion simply does not comport with logical inferences and empirical facts about our judicial system.¹⁸⁴ Party preference is actually at the bottom of a hierarchy in which “judicial discretion [is] in the middle, and governing law [is] at the top,”¹⁸⁵ and there are many areas in which judges still retain the power “to act *sua sponte* or in contravention of party choice.”¹⁸⁶ These observations undoubtedly reinforce the important work of scholars who have sought to present a more complete and balanced picture of how parties are actually using privatized procedure in practice and how courts respond to such efforts.¹⁸⁷ Professor Blair, for example, has observed that most parties engage in “coarse pre-dispute customizations” but that “it does not appear that parties regularly attempt more precise [contractual] calibrations of procedure.”¹⁸⁸

This argument, however, gives short shrift to the enforceability of arbitration agreements.¹⁸⁹ Because arbitration agreements allow parties to sidestep the public dispute resolution system entirely, they would appear to be a far more efficient way of obtaining privatized procedure. Why would parties engage in piecemeal and uncertain *ex ante* contracts around the default rules of federal civil procedure when they can buy themselves the procedural blank slate of private dispute resolution?¹⁹⁰ Arbitration agreements thus exert an outsized

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 13. This is consistent with other scholars’ observation that privatized procedure is still confined to a few discrete areas of procedure and is relatively limited in practice, even by the parties who are in the best position to strike *ex ante* bargains for privatized procedure. See Hoffman, *supra* note 8, at 393-94 (countering conventional assumption that privatized procedure is widespread); Weidemaier, *supra* note 1, at 1887-93 (describing limited evidence of widespread use of procedural customization).

¹⁸⁶ Dodson, *supra* note 1, at 9.

¹⁸⁷ See Stephen E. Sachs, *The Forum Selection Defense*, 10 DUKE J. CONST. L. & PUB. POL’Y 1, 7 (2014) (“Courts don’t recognize these [agreements] because contract law somehow trumps procedure, or because the parties are somehow entitled to override whatever the law actually requires. Rather, our procedural law just happens to recognize a role for private understandings when allowing rights to be waived.” (footnote omitted)).

¹⁸⁸ Blair, *supra* note 1, at 790.

¹⁸⁹ By this I mean he does not give arbitration enough analytical credit, not that he does not sufficiently analyze arbitration. His article devotes a number of pages to a keen analysis of the FAA. *Id.* at 822-23.

¹⁹⁰ See Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1200 (2000) (stating that in arbitration, “party consent is the nearly exclusive guiding principle for process design” and parties control many aspects of process); Pollis, *supra* note 99, at 2104-05 (arguing that

effect on privatized procedure. As long as they are easily available, they provide an alternative to the more complicated world of retail privatized procedure. This means that procedural alterations will be (or will seem) easier and cheaper to obtain by exiting the public system entirely and engaging in alternative dispute resolution. Thus, evidence of widespread use of a large number and variety of procedural contracts in public tribunals will look artificially low. However, the critiques of private procedural ordering that focus almost exclusively on the problems with arbitration will dominate much of the discourse.¹⁹¹

There is a second way in which arbitration agreements loom large in the party agreement picture. Although Dodson rightly points to the many areas in litigation in which judges can and do assert independent authority, these opportunities for judicial dominance disappear when parties exit the public dispute resolution system entirely.¹⁹² For Dodson, this fact solidifies his views on the general nature of party subordination. He argues that, because party dominance is so clearly codified in the Federal Arbitration Act (“FAA”) and confirmed by judicial interpretation, it is a “counterexample” to “the principle of party subordination in most litigation-based contractual provisions.”¹⁹³ This argument, however, obscures the larger point about arbitration. The enthusiasm with which Congress, the Supreme Court, and the lower courts have embraced the broad enforceability of arbitration agreements indicates the extent to which rulemakers and judges are happy to maintain a veneer of party subordination in the courtroom, but offer a cheap ticket to the land of party dominance.¹⁹⁴ It is hard to describe this in a way that does not highlight the modern elevation of the value of private procedural ordering, especially given that the FAA has been around since 1925 but expansive use and vigorous enforcement have been much more recent phenomena.¹⁹⁵

Judicial discretion cannot be fairly characterized as resting solidly atop party choice. Judges can and do assert their authority to override private procedural ordering, particularly when it comes to the use of the “inherent powers” of the court.¹⁹⁶ However, these exercises of authority are complicated by counter examples, such as those that I presented in Part II. These are prominent examples of courts narrowing and limiting the availability of judicial discretion in the face

pretrial disputes often prolong trial and make it costlier).

¹⁹¹ But see Blair, *supra* note 1, at 790 (describing it as “puzzling . . . that few parties explore the full range of customization theoretically available to them”).

¹⁹² Dodson, *supra* note 1, at 16 (arguing that judges have broad authority to override party waivers, forfeitures, and stipulations).

¹⁹³ *Id.* at 25.

¹⁹⁴ See Horton, *supra* note 20, at 456 (noting that FAA “gave firms broad discretion . . . to shape the path of proceedings and dictate the rules under which they must be conducted”).

¹⁹⁵ See *id.* at 444-53 (recounting history of FAA’s expansion).

¹⁹⁶ See Cole, *supra* note 190, at 1212 (observing that federal court has used its “inherent powers to justify mandatory participation in summary jury trials”).

of private procedural ordering, even when Congress appears to have intended that judges exercise it vigorously; this is the main lesson of the forum selection clause story.

The difficulty with Dodson's argument is that he sometimes conflates increased judicial intervention with robust judicial discretion. As the discovery example shows, the rulemakers can address perceived problems with litigant behavior by directly targeting judges instead of litigants.¹⁹⁷ Despite the many accusations of poorly behaved litigants, the party agreement model retains pride of place in the 2015 amendments, backed up, as it is, by a diminished discretionary standard that requires tighter judicial control.¹⁹⁸ To make this observation is not necessarily a criticism or a "gotcha" moment for the Advisory Committee. In fact, it reveals that the rulemakers believe that most parties to lawsuits can, do, and should regulate their own discovery processes by negotiation and agreement with the default rules as a framework and with guidance from the trial judge at a few key intervals.

This state of affairs is subject to a few alternative interpretations. One is that the Advisory Committee was less convinced about the evils of party behavior than the rhetoric about discovery abuse suggests.¹⁹⁹ If private procedural ordering is the norm and judicial intervention (through the exercise of a discretionary standard) is the backstop, then the rulemakers chose to adjust the judicial discretion backstop on the theory that most run-of-the-mill cases will be just fine under the private procedural ordering model, and that the backstop of increased judicial intervention will nudge the parties' negotiations just enough in the right direction to "correct" for low-level discovery "abuses."²⁰⁰ Another interpretation is that the Advisory Committee simply responded to political pressure in the rulemaking process and dropped the proposals for direct changes to the party-controlled aspects of discovery, such as tightening the default numbers of depositions, interrogatories, etc., as part of a larger compromise.²⁰¹ But a third interpretation is that, even while believing that poor party behavior

¹⁹⁷ See *supra* Section II.A.

¹⁹⁸ See *supra* Section II.A.2.

¹⁹⁹ A few scholars recently have made excellent arguments that many of our procedural rules and decisions are driven by disproportionate attention to "outlier" cases or litigation by exceptionally wealthy and well-armed litigants. See, e.g., Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1006-07 (2016) (arguing that "one percenters" exercise disproportionate control over the civil litigation system much like they do "over our nation's economic and political landscape").

²⁰⁰ See *id.* at 1010, 1041-42 (observing that addition of proportionality requirement in Rule 26(b)(1) reflected Advisory Committee's desire to correct discovery abuses in complex litigation and, although this would also affect run-of-the-mill litigation, rulemakers reasoned that change would be insignificant).

²⁰¹ See Moore, *supra* note 96, at 1122 (noting that proposals for decreasing default numbers of depositions and interrogatories were dropped after "fierce resistance").

is largely to blame for so-called discovery abuses, it is preferable to reign in the ability of judges to exercise discretion rather than to tinker in any significant way with the party agreement model of discovery.

This implicit recognition of a need to strike the right balance shows, however subtly, the elevation of private procedural ordering over that of judicial discretion, but it also calls into question Dodson's model of judicial dominance over party preference. On one level, Dodson's observation makes total sense—the discovery amendments show the rulemakers asking judges to take a more active role in policing party behavior and scrutinizing the scope of party choice. But on another level, it's not clear which value is in the driver's seat here. Rulemakers and judges seem to be harnessing the tool of judicial intervention to enable continued private procedural ordering and limit the scope of discretion.²⁰² All of this is to say that neither a pure "elevation theory" nor a party subordination theory completely captures what is really going on in the world of private procedural ordering and judicial discretion.²⁰³

It would be wrong to say that courts and rulemakers have devoted themselves singularly to the task of elevating party choice and privatized procedure. At the same time, I cannot agree with Dodson that private procedural ordering stands at the bottom of a hierarchy below judicial discretion. Instead, I believe that my analysis in Part II shows that party agreement and judicial discretion exist in a dynamic relationship. For this reason, a theory beyond a simplistic "elevation theory" is necessary to explain the rise to prominence in party agreement. The following Section attempts to provide such a theory.

B. *Judges and Litigants as Co-Managers and Co-Interpreters*

As the previous Section illustrates, private procedural ordering is ascendant but it is difficult to place it in a rigid hierarchy with other procedural values, particularly judicial discretion (or its close cousin, judicial intervention). This dynamic relationship leaves one to puzzle over the significance of the increased prominence of private procedural ordering. In this Section, I propose a two-pronged theory to explain the ascendance of private procedural ordering, one that suggests an evolving view of the role of both parties and judges. I propose

²⁰² See Shapiro, *supra* note 17 (manuscript at 34) (on file with author) (characterizing this as delegation of state power to litigants that is policed ex post by judicial actors).

²⁰³ I should say a word here about the third piece of Dodson's argument, namely, that governing law is at the top of the hierarchy. Although I agree with this analysis, I also believe that it is trivially true. Dodson spends a good deal of his article explaining that party choice cannot really be a dominant force because it is only via governing law that such party agreements and choices are respected and enforced. It is hard to argue with that point, but it is also true of every other contractual scheme. Parties' abilities to contract around default rules or statutory schemes are always subject to the enforceability strictures of governing law, but that does not deprive them of significant status in creating unique legal relationships. Therefore, I take governing law as an assumed background condition of any legal contracting scheme, rather than something that has a special place at the top of a procedural hierarchy.

that rulemakers and judges have come to see litigants as “co-managers” of litigation and “co-interpreters” of procedural rules.

As a descriptive matter, these theories provide a more complete and nuanced account of the role of private procedural ordering in modern litigation. But one might hesitate before accepting or endorsing the normative implications of these theories, particularly the co-interpretive theory. If the first step in the private procedural ordering story is to identify co-management and co-interpretation as a satisfactory descriptive account, the second step would be to pause before accepting this state of affairs as a welcome development. While the elevation theory is unnecessarily alarmist, somewhat inaccurate, and overstates the role that private procedural ordering has come to play in litigation, the co-management and co-interpretive theories suggest that the ascendance of private procedural ordering and its dynamic relationship with judicial discretion have had a profound effect on the management of litigation and the development and interpretation of procedural rules.

1. The “Co-Management” Theory

Litigants and judges have assumed roles as co-managers of litigation. It is important to note that the idea of judges as managers of litigation is itself a modern development,²⁰⁴ and one that is not without controversy.²⁰⁵ As Professor Steven Gensler observed in 2010, “[j]udging changed thirty years ago. That was when everyday federal pretrial practice evolved to assimilate the active case-management approach originally developed for use in cases that were protracted or complex.”²⁰⁶ With the implementation of the 1983 amendments to Rules 16 and 26, judges assumed a more robust managerial role in the pretrial process.²⁰⁷ This proactive administrative approach goes hand-in-hand with the exercise of judicial discretion because it is the fact-specific approach to decision-making

²⁰⁴ Professor Resnik’s 1982 article identified and named this phenomenon and kicked off the modern debate. Resnik, *supra* note 53, at 378 (highlighting that judges have referred to their work as “case management” and coining term “managerial judges”). As of this publication it has been cited over eight hundred times.

²⁰⁵ Resnik herself wrote the *Managerial Judges* article to criticize this practice. *Id.* at 380 (“In short, managerial judging may be redefining *sub silentio* our standards of what constitutes rational, fair, and impartial adjudication.”). In the following three decades, a vigorous scholarly debate has developed over descriptive accounts of the phenomenon and normative evaluations of the practice. Professor Gensler provides an excellent summary and survey of these arguments. Gensler, *supra* note 90, at 678-80 (describing Resnik’s critiques of, and Congress’s statutory support of, judicial case-management techniques).

²⁰⁶ Gensler, *supra* note 90, at 670 (footnote omitted).

²⁰⁷ See *id.* at 676-77 (arguing that 1983 amendments represent “turning point” of increased judicial involvement in case management).

that allows judges to manage litigation on a case-by-case and day-to-day basis.²⁰⁸

Thus, the standard narrative that has emerged in the past three decades is that judges have transformed from relatively hands-off background players in pretrial process²⁰⁹ to active managers of discovery and other pretrial activities. While this is undoubtedly a true account of the rise of managerial judging, it is interesting to lay this story side-by-side with the narrative of the rise of party agreement and private procedural ordering. In roughly the same time period that judges became “managerial,” parties became “procedural contractors,” with courts and rulemakers eagerly embracing and encouraging this activity. This is the core of the “co-management” thesis: litigation became something that needed to be managed, and judges and parties each assumed increasingly prominent roles in such management.

The analysis of civil discovery in Section II.A contains the most direct example of co-management. The text of the rules (particularly Rules 16 and 26), as well as their applications and interpretations, instruct the judges to manage pretrial process and direct the litigants to cooperate, plan, and execute much of the discovery process outside of the courthouse itself.²¹⁰ One way of viewing this directive is to see judges as an additional party to the litigants’ agreements of private procedural ordering.²¹¹ Another way of viewing this relationship structure is to see parties as additional managers to pretrial litigation. These views are not mutually exclusive. In fact, exploring both angles highlights the dynamic interplay of judicial discretion and private procedural ordering in the discovery process. Professor Richard Freer views this as “an embarrassing minimization of traditional judicial functions” because it shows a movement toward a world in which “district judges are not meant to ‘adjudicate’ or even ‘resolve’ cases, but . . . merely to ‘assist in the resolution’ of cases.”²¹² But perhaps co-management simply reflects a world in which case management itself is new, and the traditional judicial functions of the judge are those outside of the managerial and administrative realm.

The administration of civil discovery is a relatively straightforward example of co-management. Co-management is baked into the text and structure of the

²⁰⁸ See Kim, *supra* note 51, at 412 (arguing that discretion is inevitably part of judicial decision-making because law cannot “anticipat[e] future scenarios in which a rule of decision might be required”).

²⁰⁹ This, of course, was with the exception of the standard “big legal” moments in pretrial practice of motions to dismiss, motions for summary judgment, and adjudication of jurisdictional issues.

²¹⁰ FED. R. CIV. P. 16, 26 (discussing pretrial conferences and duty to disclose).

²¹¹ See Bone, *supra* note 4, at 1340 (describing judges’ case-management as “resembl[ing] a three-party contract”).

²¹² Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491, 1510 (2016).

discovery rules themselves, and leads to the dynamic interplay of private procedural ordering and judicial discretion described in Section II.A, in which neither value truly dominates because each places a check on the other. Thanks to the backstop of robust judicial involvement, including the exercise of a good deal of discretion, the prominence of the party agreement model persists, even if that discretion might be narrower than what managerial judges once enjoyed.²¹³ But because co-management might then be a feature unique to discovery, we must search for other examples of co-management.

Settlement is another example of co-management in action. As the description of class action settlement fairness hearings under Rule 23(e) shows, district court judges have been hesitant to take firm control of class action settlements to conduct the sort of searching fairness hearings that would result in more frequent rejections of proposed settlements.²¹⁴ This behavior looks quite deferential, especially considering the counter-narrative of managerial judging in the realm of complex litigation. It makes more sense, however, under the co-management theory.

Class action settlements are extraordinarily complex and fact specific, and judges thus operate with an information deficit. This deficit alone should not justify deference to or co-management with litigants, as judges are frequently called upon to evaluate complex and difficult factual situations when making other legal decisions, for example, at summary judgment. But class action settlements have a particular administrative aspect—the value of the settlement is linked to how it will be structured and administered.²¹⁵ Indeed, the administration of settlements is a complex enough task that it is generally farmed out to firms that specialize in the task.²¹⁶ When judges exhibit what appear to be timid tendencies toward strong involvement in evaluating settlements, it might be the administrative aspect of settlement that drives their reticence. In other words, the structure of Rule 23(e) is somewhat at odds with how it is actually practiced. Rule 23(e) suggests a neatly divided two-step process: first, the litigants use party agreement to negotiate a settlement; then, the judge evaluates

²¹³ See *supra* notes 97-110 and accompanying text (discussing that while trial judges had “discretion to broaden the scope of discovery,” amendments to discovery rules have now encouraged cooperation between litigants).

²¹⁴ See *supra* notes 123-30 and accompanying text (discussing how judges have to balance fairness hearings and presumed fairness of proposed settlements).

²¹⁵ See Rubenstein, *supra* note 120, at 1439-40 (explaining that judge, through “two-part fairness hearing,” will assess “the value of the claims and regulatory assessment of the process of settlement”).

²¹⁶ See Allison Frankel, *3rd Circuit Appeal Throws Light on Shadowy Class Action Claims Process*, REUTERS (Oct. 8, 2013), <http://blogs.reuters.com/alison-frankel/2013/10/08/3rd-circuit-appeal-throws-light-on-shadowy-class-action-claims-process/> [<http://perma.cc/VXX7-ATJ5>] (discussing role of class action administration firms in administration and settlement of class actions).

that settlement under the 23(e) fairness standard.²¹⁷ In practice, however, the process is not so neatly divided. Instead, the parties and judge are involved in a more dynamic process in which they are jointly tasked with devising the settlement and ensuring some degree of fairness in its terms and administration.

The settlement example extends beyond class actions and beyond a story of weak judicial involvement where discretion might have been stronger. In Section II.B, I described the long history of settlements being free of judicial oversight. This narrative, however, needs some refinement. Although there is a strong tradition of settlements being free of judicial approval, judicial involvement is another story altogether. In fact, one of the criticisms of managerial judging and the 1983 amendments to Rules 16 and 26 is that they encourage judges to take an active role in promoting and brokering party settlements.²¹⁸ Throughout the pretrial process, judges, encouraged by both rules and the trends of modern practice to be an active participant in settlement negotiations between the parties, often take on a role that looks more like mediator than umpire.²¹⁹ Sometimes judges even go beyond the role of mediator and drift into arm-twisting and other pressure tactics to broker a settlement.²²⁰ This is evidence of the two-way street of the co-management theory. While examples like class action settlement fairness hearings indicate that judges invite litigants to be co-managers of a delegated judicial function, other examples, such as judges' pretrial involvement, show judges managing a process that is ostensibly the province of private party agreement.

The enforcement of forum selection clauses provides one of the strongest challenges to the coherence of the co-management theory. As I detailed in Section II.C, the Supreme Court in *Atlantic Marine* viewed broad judicial discretion and party agreement as more or less incompatible values and held that judges' discretion must give way to private procedural ordering when it comes to decision-making under the federal transfer of venue statute. Again, it is worth emphasizing that this reasoning was not foreordained by prior Supreme Court analysis; when the Court first held that federal procedural law could be used to trump state laws that limited the enforceability of forum selection clauses, Justice Marshall pointed to the discretionary nature of § 1404(a) as the very basis for his holding and stressed the "flexible and individualized analysis Congress

²¹⁷ FED. R. CIV. P. 23(e).

²¹⁸ See, e.g., Cole, *supra* note 190, at 1212-14 (noting inherent powers of court to facilitate settlement); Resnik, *supra* note 53, at 399-403 (describing possibility of bias in judicial involvement in settlement negotiations); Laura M. Warshawsky, Comment, *Objectivity and Accountability: Limits on Judicial Involvement in Settlement*, 1987 U. CHI. LEGAL F. 369, 371-74 (discussing dangers of coercion with judicial involvement in settlement negotiations).

²¹⁹ See Warshawsky, *supra* note 218, at 371 (describing judicial involvement in settlement negotiations).

²²⁰ *Id.* at 372 (explaining concern about how judges in role of mediator and adjudicator may still be biased and try to force settlement).

prescribed in § 1404(a).”²²¹ Such an example might tempt one back into adopting the elevation theory.

Curiously, however, § 1404(a) also contains a great example of the recent codification of the co-management theory. In the Federal Courts Jurisdiction and Venue Clarification Act of 2011,²²² Congress amended § 1404(a) to permit transfer “to any district or division to which all parties have *consented*.”²²³ Of course, it had long been the case that parties could consent to any venue prior to a lawsuit using a forum selection clause.²²⁴ Absent a forum selection clause, however, the Supreme Court had interpreted § 1404(a) to bar the transfer of cases to districts that did not have an independent basis of personal jurisdiction and venue.²²⁵ Congress decided to eliminate this barrier so that parties could consent to a transfer “even if the action could not have been brought in that district or division originally.”²²⁶ Although the express purpose of the amendment was to abrogate the holding in *Hoffman*, it is notable that the text of § 1404(a) now includes an express invitation for parties to use private procedural ordering to choose a venue during the life of the lawsuit.²²⁷ This encouragement now sits side-by-side with the rest of § 1404(a), which grants district judges (purportedly) broad discretion to make transfer of venue decisions.

Section 1404(a) might then be one of the best encapsulations of the co-management theory and its attendant difficulties. It directs judges to take an active managerial role by using broad discretion to make case-specific decisions about venue, and invites litigants to come to an agreement about an optimal venue, even if such venue would otherwise be improper. Yet the Court’s interpretation of the statute now contains the puzzling example of vanishing discretion in the face of forum selection clauses. In one statute we find that rulemakers are eager to promote co-management, but the idea of co-management does not prevent judges from finding that private procedural ordering and judicial discretion sometimes make for an uncomfortable fit.

The above examples show that courts and rulemakers have been moving toward a co-management model of litigation, but not without troubling conflicts. Moreover, these examples exist alongside plenty of other instances of old-fashioned judicial decision-making that would be hard to characterize as

²²¹ *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988).

²²² Pub. L. No. 112-63, 125 Stat. 758.

²²³ § 204, 125 Stat. at 764 (emphasis added).

²²⁴ *See Stewart Org., Inc.*, 487 U.S. at 28-29 (holding that “28 U.S.C. § 1404(a)[] governs the parties’ venue dispute” and using that statute to find that parties’ forum selection clause was enforceable).

²²⁵ *Hoffman v. Blaski*, 363 U.S. 335, 343-44 (1960) (explaining that under § 1404(a), power of district court to transfer claim to another district is limited by whether action “might have been brought” by plaintiff in that other district).

²²⁶ H.R. REP. NO. 112-10, at 24 (2011).

²²⁷ 28 U.S.C. § 1404(a) (2012).

managerial, let alone “co-managerial.” Prior to 1983, any “co-management” theory would have been completely foreign because no one viewed ordinary cases as “litigation” that needed to be “managed.”²²⁸ As judges asserted their power and inserted themselves into the administrative and substantive details of pretrial practice, commentators warned that these practices were less visible, a judge’s reasoning was less transparent, and the managerial approach provided too many opportunities to use discretionary decisions as a vehicle for achieving a judge’s desired substantive legal outcomes.

Notice that the co-management theory does not necessarily allay any or all of these concerns. Private procedural ordering does not make judicial reasoning more visible, transparent, precedential, or consistent. In fact, private procedural ordering has itself been criticized on precisely these grounds, with the added worry that when parties make these decisions in private and outside of a public tribunal, they are in some way “ousting” or diluting the power of the federal courts.²²⁹ In other words, co-management might dilute the power that either the judge or the parties have in controlling public decisions and outcomes about procedural decisions, but it does little to address these real and significant concerns.

2. The “Co-Interpretive” Theory

The co-interpretive theory posits that judges are not the sole interpreters of some procedural rules. Instead, they share interpretive authority with litigants. For obvious reasons, this theory is far more limited in scope than the co-management theory, and is also more controversial. Although both judges and litigants have always tended to the administrative tasks of case management in one way or another, the job of interpreting and applying the law is soundly in the judicial province. In a trivial sense, litigants have always been “co-interpreters” of the law to the extent that they shape judicial reasoning and opinions by framing the facts and legal arguments in their briefs and oral arguments. What I am suggesting here is that, in limited circumstances, litigants are co-interpreters of rules in a much more direct manner than this; namely, that the relationship between private procedural ordering and judicial discretion reveals a tacit admission that, in a few procedural areas, litigants have assumed some interpretive authority over procedural rules.

The task of locating interpretive authority for procedural rules in federal courts is already complex, even prior to introducing the idea of co-interpretation. Some procedural rules featured in this Article were promulgated by Congress and codified in the U.S. Code,²³⁰ while others were judicially promulgated

²²⁸ See *supra* notes 207, 218 and accompanying text (explaining changes made in 1983).

²²⁹ See *supra* note 24 and accompanying text (noting “older form of ouster doctrine”).

²³⁰ For example, the transfer of venue statute, 28 U.S.C. § 1404(a).

products of federal common law.²³¹ These rules are subject to the traditional (if controversial in their own right) interpretive methods as other statutes and common law rules. The FRCP, however, present special interpretive problems because their promulgator, the Supreme Court, is the same body that has terminal interpretive authority over them,²³² and their drafter, the Advisory Committee, consists of federal judges who will be future interpreters of the rules. This complication should not be overstated for purposes of this Article. After all, I am proposing that the co-interpretive theory applies to several procedural rules, only some of which are found in the FRCP. However, it is important to note that, as far as the FRCP are concerned, courts are already in the unique position of interpreting rules that have been drafted and promulgated by various members of the judiciary.

In this sense, the interpretation of the FRCP has a good deal in common with the interpretative efforts of administrative agencies in which Congress has tasked administrators with promulgating, interpreting, and applying a set of rules that govern their given area of administration.²³³ In the case of courts, where the administrative and managerial function of judges has grown in prominence, these judges-qua-litigation administrators are the analogues of other government

²³¹ For example, the enforceability of forum selection clauses in non-diversity cases. *Supra* note 10.

²³² This authority is delegated in the Rules Enabling Act, 28 U.S.C. § 2072(a). The Supreme Court uses a set of advisory and rules committees to draft rules and rule amendments. *See id.* § 2073(a). After the Supreme Court approves the rules, it reports to Congress by the following May 1st. *See id.* § 2074. Unless Congress takes specific action, the new or amended rules go into effect on December 1st of that year. *See id.* Several scholars have written comprehensive accounts of the rulemaking process and the role of the judicial conference and advisory committees. *See* Joseph P. Bauer, Shiavone: *An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720, 727 (1988) ("The reality of rulemaking is that the Supreme Court itself did not, and still does not, actually draft the Rules."); David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 931-32 (explaining process under Rules Enabling Act and role of Supreme Court, Congress, and Advisory Committee); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1049-50 (1993) (noting Court's power to promulgate rules under Rules Enabling Act and Supersession Clause); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1105-06 (2002) (explaining that Rules Enabling Act originally identified only two decision makers, Supreme Court and Congress, but that Court started to employ Advisory Committee).

²³³ *See* Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1190 (2012) (addressing question of whether Supreme Court should promulgate procedural rules through adjudication or more formal rulemaking).

regulators.²³⁴ This interpretive complication is already a wrinkle on the traditional story of legal interpretation in which judges enjoy relatively exclusive authority over the interpretation of legislatively enacted materials. The co-interpretive theory goes further by suggesting that rule interpretation is not uniquely the province of a traditional judge or even an administrator, but that regulated parties who are not judicial actors have an explicit role to play in interpretation that extends beyond mere participation in the form of oral or written advocacy.²³⁵

Perhaps the easiest way to explain co-interpretation is by way of illustration. In the following two subsections, I give two examples of co-interpretation in practice. They show that the conditions for co-interpretation exist in either of two circumstances: when there has been an implicit delegation of interpretive authority, or where there is surprising deference to litigant interpretations of a rule.

a. *Co-Interpretation Through Delegation*

Co-interpretation through delegation is when rulemakers have structured a procedural rule to delegate interpretive authority to litigants alongside judges. One example of co-interpretation via implicit delegation is in the rule governing the scope of discovery.²³⁶ In the course of normal litigation, litigants are the first parties to make decisions about the scope of discovery—that is, to interpret what is “relevant to any party’s claim or defense” and, since December 2015, what it means for the cost of discovery to be “proportional to the needs of the case.”²³⁷ Litigants reveal their interpretations through the discovery requests they make to other parties and through their decisions about what material to disclose to their adversaries. That is, they take the first interpretive cut at the meaning of the rule in their particular case. Although this interpretation clearly takes place in the shadow of any judicial decision that comes after a challenge, the structure of the rule still suggests co-interpretation because judicial resolution to discovery disputes are meant to be the exception rather than the norm. Parties are encouraged to make their own decisions and agreements about disclosable materials, and these decisions are left undisturbed in the absence of a call for judicial resolution.²³⁸

²³⁴ *Id.* at 1202-05 (describing analogy between administrative agencies and courts in “civil procedure context”).

²³⁵ The closest analogue to this might be the practice of negotiated rulemaking in administrative law. *See* 5 U.S.C. §§ 561-570 (2012). However, I am suggesting a particular interpretive role for parties, and not necessarily a role in promulgating formal written rules themselves.

²³⁶ FED. R. CIV. P. 26(b).

²³⁷ *Id.*

²³⁸ Here again, class actions provide a nice foil for the workings of ordinary litigation. One of the concerns about the management of class actions is that lawyers might be all too happy

The world of discovery is a world of numerous decisions, large and small, that will impact the direction and outcome of litigation. In the same way that a trial judge makes frequent (and often spontaneous) decisions about evidentiary and other procedural matters on the record during a trial or at pretrial hearings, litigants engaged in discovery must constantly make decisions or resolve disputes about what sort of material or conduct is permissible within the boundaries of the federal rules. In fact, the time spent in discovery far outweighs the time that most litigants will ever spend in front of a judge.²³⁹ It is simply not possible for a judicial officer to oversee or adjudicate each of these interpretive decisions or negotiations about the boundaries and meaning of the discovery rules. Rather, the parties are the ones that engage in the ongoing process of rule interpretation and application.

The fact that judges can and do involve themselves in rule interpretation via the resolution of some discovery disputes does not change the fact that the parties, without judicial intervention, are making the vast majority of interpretive decisions about discovery. Many of these actions and decisions are stunningly mundane, but that fact does not take away from the co-interpretive theory. In the courtroom, many of the rulings from the bench made by a judge are similarly mundane, relatively uncontroversial, and unlikely to be reviewed by a higher court.²⁴⁰ But one would not say that the judge is not performing her judicial function of interpretation and application of rules by making such rulings.²⁴¹ Similarly, the breadth of decisions made by parties during discovery ranges from the very routine to the more controversial, and not every discovery action will entail judicial resolution, even if it is on the more controversial side.

to engage in lengthy and costly discovery, to the extent that the claimants (and even defendants) are too removed from the action and cannot exert proper discipline over their lawyers. This is one of the justifications for increased managerial judicial involvement in the pretrial processes of class actions (or other mass actions) as compared to ordinary discovery in ordinary cases.

²³⁹ See Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1332-35 (2005).

²⁴⁰ Effron, *supra* note 2, at 701-08 (describing procedural devices that are effectively insulated from appellate review).

²⁴¹ In fact, Professor Elizabeth Porter has proposed a theory of interpretation of the FRCP in which the Supreme Court has engaged in “managerial interpretation,” a method of interpretation in which the Court uses equitable principles and theory to make case and fact-specific decisions about the interpretation of rules. Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 136-42 (2015). She suggests that when engaged in this type of interpretation, the Supreme Court should defer to the fact and interpretive decisions of managerial district court judges. *Id.* at 175-78. This deference suggests models of interpretation in which the “highest” judicial or interpretive authority should not necessarily be the final or only word on interpretation, and that for some procedural rules interpretation is an ongoing, dynamic, and multiparty process.

In this world of discovery, the parties have interpretive authority not only because of the number of effectively unreviewed interpretive decisions, but because the lawyers engaged in discovery are repeat players in the litigation process. This means that when the parties are making their interpretive decisions about the boundaries or meanings of the rules, they are really bargaining in the shadow of two outside sources of information. The more obvious source is written judicial opinions on the rules, or accumulated observations about judicial behavior toward certain issues. The other source is the accumulated wisdom about how given parties behave and have behaved with regard to the interpretation and application of the rules. These norms do not emanate directly from any judicial or statutory source, but they undoubtedly influence how parties interpret the boundaries of the rules and how they reach negotiated decisions with their adversaries about rule boundaries. This accumulated experience and wisdom become sources, albeit diffuse, of interpretive authority.

This state of affairs reflects a deliberate decision by rulemakers to delegate interpretive authority to the parties because the structure of discovery sets the default of decision-making and action with the litigants rather than with a judicial officer. One could imagine a different world of discovery that is designed to avoid co-interpretation. In this world, discovery would take place entirely within the close supervision of a judicial officer, perhaps one of a large corps of magistrate judges.²⁴² Alternatively, it would be a world in which rulemakers promulgate a set of rules that are far more detailed and specific than the current discovery rules. In this scenario, the possibilities for party interpretation would be much narrower, and a set of detailed and nitpicky rules would necessitate far more frequent judicial intervention.

The key question here is why I characterize the discovery rules in particular as “co-interpretative,” when the law is replete with instances of party decisions that will stand unless formally challenged—a principle that lies at the heart of most waiver and forfeiture doctrines.²⁴³ I believe that the discovery rules are different because the rulemakers have designed a system in which the parties are not just expected, but almost obligated to make interpretive decisions about the scope of the rules. Moreover, although judicial resolution is available, it is not the expected culmination of litigant decisions. Resorting to judicial intervention in discovery is not just occasional, but is the expressly disfavored outcome of discovery disputes. Waiver doctrine, on the other hand, functions more as a

²⁴² See generally Kessler, *supra* note 59 (describing alternative models of discovery and pretrial litigation that might have emerged out of “our quasi-inquisitorial equity tradition”).

²⁴³ For example, parties waive the right to invoke evidentiary privileges if they disclose otherwise privileged material, leading to a complicated network of waiver doctrines. See Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1607 (1986) (“Thus focused, the principal concern is selective use of privileged material to garble the truth, which mandates giving the opponent access to related privileged material to set the record straight.”).

penalty for failing to take the expected steps to ask a court to resolve a question of law.

Discovery, however, has a different structure; in ordinary circumstances, the parties are expected to agree on an interpretation of the rule and live with that outcome unless, and until, they reach an impasse and need a second interpreter—the judge. Just because the judge has the final interpretive authority does not mean that the parties have not been given some significant initial interpretive powers that govern the course of their litigation. Similarly, just because the parties’ interpretations do not carry precedential value does not mean that they are doing interpretive work. Many of the discretionary decisions made by judges, particularly in pretrial orders, are unwritten or are short summary orders that are of little or no value to future litigants or judges looking to use prior cases as precedent or a guide for future decisions. In other words, interpretive status does not depend on the future authoritative weight of any given decision.

b. *Co-Interpretation Through Deference*

As the discovery example shows, co-interpretation can be the result of an implicit delegation of interpretive authority to litigants via the systemic design of a set of rules. Co-interpretation can also emerge through patterns of judicial behavior in which judges constrain their own exercise of discretion by deferring to the private procedural ordering actions of litigants. Inherent in such actions are interpretive conclusions about the meaning and application of a procedural rule. The two examples of co-interpretation by deference are in class action settlement fairness hearings and in the enforcement of forum selection clauses in § 1404(a) transfers.

Section II.B.1 of this Article documented how many judges are notably hesitant to engage in the sort of robust fairness hearing followed by a settlement denial that many commentators have hoped would result from Rule 23(e)(2).²⁴⁴ This reveals that judges are actually exercising a sort of deference to the parties’ settlement decision, not just deference to the factual grounding of the settlement, but also to the parties’ conclusion of what is “fair, reasonable, and adequate” under the 23(e) standard.²⁴⁵

A settlement agreement is, at heart, a bargain, and courts tend to proceed from the assumption that an agreement that is free of fraud, coercion, or overweening is presumptively fair and adequate, even if other parties might have come to different conclusions or different numbers.²⁴⁶ The limited availability of unconscionability doctrine in traditional contract law shows the extent to which judicial actors are hesitant to upset presumptively adequate or reasonable

²⁴⁴ See *supra* note 124 and accompanying text.

²⁴⁵ FED. R. CIV. P. 23(e)(2).

²⁴⁶ *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13 (1972) (“There are compelling reasons why a freely negotiated private . . . agreement, unaffected by fraud, undue influence, or overweening bargaining power, . . . should be given full effect.” (footnote omitted)).

bargains.²⁴⁷ Unconscionability traditionally has been divided into “procedural” and “substantive” doctrines.²⁴⁸ Procedural unconscionability refers to contracts that are unenforceable because of unacceptable “unfairness in the formation of the contract,” and substantive unconscionability refers to contracts that are unenforceable because of “excessively disproportionate terms.”²⁴⁹ While unconscionability is not a widely used tool for finding contracts unenforceable, the doctrine of procedural unconscionability has been used with a limited amount of success in a few jurisdictions, particularly with regards to contracts of adhesion.²⁵⁰ A pure finding of substantive unconscionability—a bare assertion that the terms of the contract are simply unfair with no reference to the bargaining process—are rare.²⁵¹

It is no surprise, then, that a directive for a judge to scrutinize a bargain for fairness, adequacy, and reasonableness makes for an uncomfortable fit. This is especially true when the judge has been involved in the process that leads to the settlement agreement in the form of managing the litigation.²⁵² The judge might also believe that she has been able to influence the content of the settlement through information-forcing mechanisms inherent in litigation management.²⁵³

²⁴⁷ See Brett M. Becker & John R. Sechrist II, Note, *Claims of Unconscionability: An Empirical Study of the Prevailing Analysis in North Carolina*, 49 WAKE FOREST L. REV. 633, 634 (2014) (explaining that “unconscionability is a contract theory that rarely prevails.”).

²⁴⁸ *Id.* at 635.

²⁴⁹ *Id.* at 636 (quoting *Sitogum Holdings, Inc., v. Ropes*, 800 A.2d 915, 921 (N.J. Super. Ct. Ch. Div. 2002)); see also Larry DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1072-75 (2006) (discussing doctrinal history of procedural and substantive unconscionability).

²⁵⁰ See Sierra David Sterkin, Comment, *Challenging Adhesion Contracts in California: A Consumer’s Guide*, 34 GOLDEN GATE U. L. REV. 285, 297 (2004).

²⁵¹ See Becker & Sechrist, *supra* note 247, at 641 (“Courts require both procedural and substantive unconscionability and will typically find substantive unconscionability after finding procedural unconscionability.” (emphasis omitted)); Craig Horowitz, Note, *Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts*, 33 UCLA L. REV. 940, 946 (1986) (“Courts usually invoke substantive unconscionability in conjunction with procedural unconscionability to invalidate a contract.”).

²⁵² See *supra* notes 218-21 and accompanying text (explaining how modern trends and amendments to FRCP have pushed judges into taking active role in settlement negotiations). This is certainly less true of settlement classes in which the parties ask for both certification and settlement simultaneously. In these situations, the judge has had far less (if any) managerial involvement with the parties. See Howard M. Erichson, *The Problem of Settlement Class Actions*, 84 GEO. WASH. L. REV. 951, 981-82 (2014) (explaining implications of parties simultaneously proposing certification and settlement on litigation process).

²⁵³ See Bradt & Rave, *supra* note 144, at 1265 (explaining unique features of federal multidistrict litigation and how “information-forcing intermediary function grows naturally out of the [judge’s position]”); Jaros & Zimmerman, *supra* note 144, at 551-52 (noting that

In this sense, co-management has led to co-interpretation. The judge, having sufficient faith in the bargaining and litigation process that resulted in a settlement proposal, is willing to take seriously the parties' own assessment that a settlement is fair, reasonable, and adequate. This sort of deference does not mean that the judge has cast aside her role as interpreter of Rule 23(e)—she will still conduct a hearing and make her own findings. But the timidity described in Section II.B.1 reflects co-interpretation. Although the judge will not defer automatically and absolutely to the parties' assessment, she is accounting for the parties' conclusions of fairness when making her own. Moreover, that timidity fades when judges make settlement decisions that are not so much related to the fairness of the bargain, but concern the court's own authority. For example, the Fifth Circuit rejected the enforcement of a settlement agreement that appeared to include putative class members who "had not sustained losses at all, or had sustained losses unrelated to [the mass accident subject of the class action]." ²⁵⁴ The court reasoned that the parties could not use the vehicle of class settlement to compensate for claims that could not have been pled in the first place. ²⁵⁵ So while judges might constrain their discretion and defer to parties on the question of interpreting "fairness" within the meaning of Rule 23, the last vestiges of what used to be the ouster doctrine will motivate a court to reassert its authority when the nature of a valid claim is at issue.

Let me be clear about the descriptive nature of this claim. I am in no way suggesting that the use of co-interpretation by deference in the interpretation and application of Rule 23(e) is normatively desirable, or even authorized by the text and structure of Rule 23. Scholars have criticized judicial timidity in some Rule 23(e) decisions because they believe that judges are complicit in authorizing settlements that, at best, undercompensate plaintiff classes, and, at worst, enrich class action lawyers at the expense of both compensation to plaintiffs and fairness to potentially overpaying defendants. ²⁵⁶ This suggests that if the rulemakers are concerned about policing the fairness of class action settlements, then Rule 23(e) is a misguided choice. Leading, as it has, to deference driven co-interpretation, perhaps the rulemakers should invest more heavily on the case

there is no "theoretical foundation for judges to supervise aggregate settlement" and therefore role of judicial review should be to "alert and press other institutions . . . to reform their institutional approach to settling cases").

²⁵⁴ *In re Deepwater Horizon*, 732 F.3d 326, 343 (5th Cir. 2013).

²⁵⁵ *Id.* at 344.

²⁵⁶ See Erichson, *supra* note 120, at 2011-15 (discussing role of judges in process and noting that judges are failing to fully use inquisitorial tools); Grabill, *supra* note 114, at 126 (indicating that courts have struggled to exert judicial authority in mass tort settlements); Lahav, *supra* note 118, at 86 (criticizing how courts review fairness of settlements and how this affects preferences of class members); Rubenstein, *supra* note 120, at 1446 (noting that judges could be more "efficacious at the fairness hearing stage").

management end and demand better process based bargaining, rather than substantive evaluations of outcomes.

Beyond class action settlements, this Article contains an example of co-interpretation that may have gone too far. As outlined in Section II.C, the Supreme Court has gutted judicial discretion to make transfer of venue decisions under § 1404(a) in the presence of a presumptively valid forum selection clause. In *Atlantic Marine*, the Court instructed judges to consider only one factor in a supposedly multifactor test—the fact that the parties have made a presumptively valid agreement to litigate the case in a particular forum.²⁵⁷ The idea of co-interpretation is evident in Justice Alito's opinion which explains that the forum selection agreement itself already contains the parties' assessments of the private interest factors that a judge would normally consider in deciding a transfer of venue motion.²⁵⁸ Thus, this agreement requires complete deference by the district judge, who should not replace or enhance the parties' analysis with her own. While this is technically co-interpretation insofar as the Court allows the judge a narrow area in which to consider very limited public interest factors,²⁵⁹ the Court all but acknowledges that it is requiring nearly total deference to the parties' assessment of the optimal forum. It is one thing to announce a general policy of favoring forum selection clauses, as the Court did in *Stewart*.²⁶⁰ It is another thing entirely to suggest that forum selection clauses are so powerful as to displace almost any opportunity for the judge to exercise her discretion, given explicitly in a statute, to conduct independent scrutiny of a transfer of venue motion. This is hardly co-interpretation; rather, it is ceding the interpretation of a statute almost entirely to contracting parties, usually at a time when they are not engaged in a live dispute and often do not anticipate that they ever will be. Co-interpretation, to the extent that it is a normatively desirable practice at all, should reflect a dynamic interplay between judge and parties. A regime of extreme deference demonstrates the potential for a very slippery slope.

The co-interpretive theory is clearly much narrower than the co-management theory, explaining far fewer instances of difficulties in the relationship between private procedural ordering and judicial discretion. Nevertheless, it is significant that in a few situations, rulemakers and judges seem to be comfortable with litigants sharing the job of rule interpretation, just as they appear now to share the task of case management. To the extent that co-interpretation is an even more radical departure from traditional allocations of authority than co-management, its use should be acknowledged and its normative implications further explored.

²⁵⁷ *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 581 (2013).

²⁵⁸ *Id.* at 581-83 (explaining that because valid forum selection clause has been bargained for, private-interests are present).

²⁵⁹ *Id.* at 582.

²⁶⁰ *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988) (asking district court to consider factors under § 1404(a)).

C. *Co-Management, Co-Interpretation, and the Nature of Adversarialism*

The relationship between private procedural ordering and judicial discretion has created two new dynamics of civil litigation: co-management and co-interpretation. The emergence of co-management and co-interpretation is evidence of how judges and litigants are grappling with a changing litigation landscape in the American adversarial system, which is characterized by norms of party control and passive judging.²⁶¹ According to the standard narrative, parties exploit procedure and forum in an adversarial system to produce a record of facts and arguments of law, and from those clashing accounts, the parties can expect clarity and finality.²⁶² Judges are not active in the production of such facts or the generation of legal arguments. Rather, they are passive players whose active work is in response to the actions of the litigants in an unfolding dramatic battle.²⁶³ The adversarial system is most often contrasted with the inquisitorial system in most European countries, a system in which the judge actively controls and directs the factual and legal path of the litigation.²⁶⁴

²⁶¹ See, e.g., Erichson, *supra* note 120, at 2012 (indicating that American adversarial system is party-oriented); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 830 (1985) (comparing German procedural system to Anglo-American procedural world, including “partisan presentation of evidence to a passive and ignorant tier”); Franklin Strier, *What Can the American Adversary System Learn from an Inquisitorial System of Justice?*, 76 JUDICATURE 109, 109 (1992) (outlining characteristics of adversary system, including “decision making by lay jurors” and “party-controlled procedures”).

²⁶² See, e.g., Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT’L & COMP. L. 1, 23-24 (1997) (“Among the most admirable features of American court procedure is that it does promote multiple perspectives through the adversary control of the process.”); Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 735-36 (1987) (comparing German and American systems with regard to pretrial discovery); John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987, 990 (1990) (explaining that in Germany “judge plays the central role in building the record of the witnesses’ testimony, and the parties’ attorneys are quite restricted in what they can do to influence the shape of that record”); Robert S. Thompson, *Decision, Disciplined Inferences, and the Adversary Process*, 13 CARDOZO L. REV. 725, 737 (1991) (“Adversarial adjudication . . . places an emphasis on participation of the parties through their advocates affording the opportunity to persuade to an impressionistic individualized decision.”).

²⁶³ See Won Kidane, *The Inquisitorial Advantage in Removal Proceedings*, 45 AKRON L. REV. 647, 658-68 (2012) (describing history and nature of adversarial justice in Anglo-American tradition).

²⁶⁴ Thompson, *supra* note 262, at 740 (explaining inquisitorial system as “while requiring neutrality of the judge, allocates to her an active role”); see also David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1635-36 (2009) (contrasting adversarial and inquisitorial models in criminal law context).

Scholars have, of course, contested this simplistic descriptive account of American adversarial legal norms.²⁶⁵ Particularly in the realm of complex litigation, the active role of the managerial judge is a serious challenge to the traditional adversarial ideal.²⁶⁶ But even in the more tempered view, the basic adversarial model still holds—parties assume the burden of producing factual and legal materials, and do so in a competitive environment that relies on a neutral and relatively removed (if not entirely passive) adjudicator.

What is interesting about co-management and co-interpretation is that they are anti-adversarial trends that move beyond the adversarial/inquisitorial binary. Take, for example, the adversarial norm of party control of litigation. Private procedural ordering is, on the one hand, completely emblematic of party control. After all, it is parties that are not just running the conveyor belt of litigation, but constructing the machinery alongside it.²⁶⁷ Agreements by parties to modify procedural rules made by rulemakers and judges is clearly party control. On the other hand, private procedural ordering, with its emphasis on party agreement (however fictional), is the antithesis of adversarial. In this model, party control does not serve the larger function of producing a clash of information that will result in a procedurally (or even substantively) acceptable outcome, but instead rests on the notion that the parties can be the co-authors of their own bespoke tribunal.²⁶⁸

Procedural judicial discretion also fits uncomfortably within the adversarial norm. As many commentators have noted, the growth in procedural discretion has accompanied the rise of the managerial judge. But this also fits outside of the adversarial/inquisitorial binary. When rulemakers carve out a larger role for judges in a process like discovery, this does not push toward a genuinely inquisitorial model of marshalling information.²⁶⁹ Instead, judges function more as gatekeepers of adversarialism, using their discretion to either push the parties back toward private ordering or fashion individual remedies. And when courts

²⁶⁵ See, e.g., Edward F. Sherman, *The Evolution of American Civil Trial Process Towards Greater Congruence with Continental Trial Practice*, 7 TUL. J. INT'L & COMP. L. 125, 126 (1999) (stating that there are “significant trends that defy [the adversarial and inquisitorial] paradigms”).

²⁶⁶ See, e.g., Erichson, *supra* note 120, at 2010-11 (noting trend toward managerial judging and what that would mean in “mass tort litigation”); Resnik, *supra* note 53, at 376-77 (explaining that judges have shifted towards taking more active role, particularly with encouraging settlements).

²⁶⁷ See Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1808 (2015) (noting that tension between party-led norms of discovery and obligations of adversarial system led to increased judicial involvement, especially in managerial capacity).

²⁶⁸ See Davis & Hershkoff, *supra* note 1, at 542-48 (explaining role of judges and parties with procedural rules).

²⁶⁹ See Thompson, *supra* note 262, at 773-75 (discussing how discovery in civil litigation is used more as function of “wear[ing] down the adversary” rather than process of gathering information).

or rulemakers conclude that private procedural ordering must prevail, such as in the forum selection clause cases, they remove discretion entirely, making adjudicative adversarialism nigh impossible.

The standard critiques of the adversarial/inquisitorial binary do not take the phenomena of private procedural ordering and judicial discretion together. The advantage of looking at these phenomena as related and dynamic is that the co-management and co-interpretive theories come into focus. While these theories show that the challenge to traditional adversarial norms comes not only from the fact that the strict view of judges and litigants are too simplistic to account for “active” judges and “cooperating” or “contracting” litigants, they do not account for the extent to which judges and litigants are bound together in the larger project of co-management and co-interpretation.

The co-management theory shows that the parties and the judge share in the project of managing litigation in order to keep such management above the adversarial/inquisitorial binary. The figure of the managerial judge has been rightly criticized because of the outsized role that the judge plays, a role that can look more like an inquisitorial judge.²⁷⁰ But when private procedural ordering is added to the mix, the co-managerial role of the litigants tempers the inquisitorial blow. Notice that it does not make things more adversarial, but it does explain how a move to a managerial approach to litigation can exist outside of both adversarial and inquisitorial norms.

Similarly, the agreement-based foundation of private procedural ordering looks decidedly non-adversarial. Rather than producing clashing materials and arguments through a system of fixed rules and before a neutral and passive adjudicator, the parties generate materials (through co-management) and even legal rules (through co-interpretation) via a collaborative process. This is not to say it is an uncontentious process, but it is also not an adversarial environment. This, however, does not mean that the respect for and encouragement of private procedural ordering is a move away from adversarialism. This is because, as this Article has shown, private procedural ordering is often tied to the deployment of judicial discretion and judicial intervention. Rulemakers and judges use broader and narrower scopes of judicial discretion to signal when judges should depart from private procedural ordering (for example, using broad discretion to be very deferential to class action settlements), and move toward more adversarial stances (for example, rejecting a class action settlement). As the litigation landscape has moved further away from a system that results in trials,²⁷¹ co-management and co-interpretation are phenomena that allow parties to cooperate while preserving the basics of adversarial litigation, and allow judges to manage litigation without tipping into full scale inquisitorial practices.

²⁷⁰ See *supra* note 266 and accompanying text.

²⁷¹ See Glover, *supra* note 112, at 1723 (noticing that most cases end in settlement, especially class actions); Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 140-41 (2007) (arguing that use of summary judgment is one reason for “dramatic decline in the number of jury trials in civil cases in the federal courts”).

CONCLUSION

Discussions of the merits and scope of private procedural ordering and judicial discretion have dominated recent procedural scholarship and with good reason—they both strike at the heart of questions about the power to author the rules governing dispute resolution and the relative powers of the players within that process. The analysis in this Article demonstrates the range of dynamic interactions between the two concepts and also shows that both litigation management and rule interpretation must be viewed in a more holistic manner. A focus exclusively on judicial behavior and opinions misses much of what parties contribute to management and interpretation, while a focus exclusively on privatized procedure obscures a larger judicial role in that process as well. Co-management and co-interpretation are but first steps in recognizing the dynamics of this process, and towards making normative evaluations of these practices themselves.