

# PROCEDURE AS CONTRACT

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## ABSTRACT

During much of the twentieth century, civil processes in the United States relied on a conceptual framework anchored in the constitutional and common law of due process. More recently, the case law looks to doctrines of contract and agency law to enforce contracts to preclude litigation and to encourage the entry of contracts to conclude litigation. While “bargaining in the shadow of the law” is a phrase often invoked, bargaining is increasingly a requirement of the law of conflict resolution, both civil and criminal. Therefore, analyses of the meaning of agreements, familiar features of the law of contract, are becoming central elements of the new law of Civil Procedure.

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My thanks to Jean Sternlight who, on behalf of the Section on Alternative Dispute Resolution (ADR), joined me as Chair of the Section on Civil Procedure in convening a joint program for the American Association of Law Schools in the winter of 2004 on the relationship between classes on Procedure and those on ADR. This article relates to ideas that I discuss in the chapter *Contracting Procedure*, forthcoming in *LAW MADE IN SKYBOXES: TRENDS IN AMERICAN LAW* (Paul D. Carrington & Trina Jones eds., NYU Press 2005) and in *Civil Processes*, *OXFORD HANDBOOK OF LEGAL STUDIES* 748 (Peter Cane & Mark Tushnet eds., 2003) as well as in the articles *Procedure's Projects*, 23 *CIVIL JUSTICE QUARTERLY* 273 (2004) (in a Symposium published in the United Kingdom by Sweet and Maxwell and edited by Adrian Zuckerman), *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 *U. MIAMI L. REV.* 1701 (2004), and *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 *HARV. L. REV.* 924 (2000). Thanks for research assistance are owed to Gene Coakley, whose librarian skills are unparalleled, and to Paige Herwig, Joseph Blocher, Andrew Goldstein, Alison Mackenzie, Jennifer Peresie, Bertrall Ross, and Steven Wu, all unusually able Yale Law School students. Discussions with Denny Curtis, Janet Alexander, Richard Brooks, Paul Carrington, Owen Fiss, Vicki Jackson, Lee Rosenthal, and Amy Schulman have helped me to sharpen the points engaged here, as did Helen Hershkoff's and Jean Sternlight's responses to an earlier draft of this article.

As a consequence, debate needs to center on what the law of “Contract Procedure” should provide. Central questions include whether parties ought to be able to contract for jurisdiction (both state and federal), for choice-of-law rules, and for privacy. Contract Procedure needs also to decide how to regulate the role of judges (who sometimes participate in shaping civil bargains) and what rights parties have when post-agreement conflicts arise either about the existence of a settlement or about the meaning of its terms. As Contract Procedure supplements and sometimes supplants “Due Process Procedure,” the rules of bargaining *for* legally binding judgments need to identify what bargains law cannot abide.

### TABLE OF CONTENTS

I.	THE LAW OF PROCESS AS A LAW OF BARGAINS .....	594
II.	EXPANDING THE FEDERAL JUDICIARY, PROMULGATING FEDERAL RULES, AND DEVELOPING DUE PROCESS PROCEDURE.....	600
III.	MOVING TOWARDS CONTRACT .....	606
	A. <i>Legislative Promotion of ADR</i> .....	609
	B. <i>Judicial Promotion of ADR</i> .....	610
	1. Internalization: Changing the Federal Rules and the Judicial Charter .....	610
	2. Outsourcing: The Changing Doctrine on Contractual ADR.....	619
	3. Devolution to Agencies.....	621
	C. <i>A New Civil Procedure</i> .....	622
IV.	CONTRACT PROCEDURE .....	626
	A. <i>Contracting for Jurisdiction</i> .....	627
	1. Consenting to a “Decree” or a “Judgment” .....	630
	2. Collapsing or Making Distinctions Among Consent Decrees, Judgments, and Settlements .....	632
	3. Keeping or Making Judicial Power.....	633
	4. The Nature of Judicial Power and the Propriety of its Exercise .....	638
	B. <i>Settling What? Binding Whom? Individual and Aggregate Problems</i> .....	645
	C. <i>The Bargain’s Terms</i> .....	648
	D. <i>Process Failures</i> .....	662
V.	LAW’S BARGAINS .....	665

#### I. THE LAW OF PROCESS AS A LAW OF BARGAINS

In the 1940s, in the wake of the promulgation of the Federal Rules of Civil Procedure, law professors began to fashion courses

around that then-new set of national rules.<sup>1</sup> Now, more than sixty years later, the Rules no longer suffice as a unifying theme. Court-based processes have come to incorporate what some style their “alternatives”—dispute resolution focused on negotiation rather than on adjudication. In addition to encouraging the entry of contracts as a means of concluding litigation without adjudication, courts also enforce contracts that preclude litigation. While “bargaining in the shadow of the law” is a phrase often invoked,<sup>2</sup> bargaining is increasingly either a requirement of the law of conflict resolution or the expected means of concluding disputes, both civil and criminal. As a consequence, today’s “Civil Procedure” classes need not only to understand rules focused on adjudication but also the rights and obligations of those who agree to settle cases. Further, both rules of process and courses about process need to address how court-based concilia-

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1 See James Wm. Moore, *The Place of the New Federal Rules in the Law School Curriculum*, 27 GEO. L.J. 884, 884–85 (1939); Mary Brigid McManamon, *The History of the Civil Procedure Course: A Study in Evolving Pedagogy*, 30 ARIZ. ST. L.J. 397, 402–03 (1998). Professor McManamon’s article was prompted by a 1998 Conference on Civil Procedure, sponsored by the American Association of Law Schools (AALS). In it, she traces the emergence of a federal rule-based course, supplanting the prior focus on pleading and equity. *Id.* at 397–422. From a contemporary lens, an interesting aspect of her account is the call, in the 1920s, by an AALS Committee on the Reform of Legal Procedure, for the development of a new course that would include various procedural models, both domestic and comparative. *Id.* at 426–27. Specifically, that Committee called for the teaching of “Modern Procedural Methods,” and that the Association help create a “Source Book on Modern Procedural Methods” to include English legislation, certain exemplary State procedural codes, the then-new Federal Equity Rules, and information on a range of courts, including Ecclesiastical and Equity Courts, as well as information on procedure in “Roman, Scotch, French, and German Courts.” *Report of the Committee on the Reform of Legal Procedure*, in HANDBOOK OF THE AMERICAN ASSOCIATION OF LAW SCHOOLS AND PROCEEDINGS 57, 59–60 (1920). The Committee also argued that law schools spent too much time on “adjective law,” but should continue to do so until procedural reform, that was “imperative,” had taken place. *Id.* at 57.

In McManamon’s account, Richard H. Field and Benjamin Kaplan are credited with creating the paradigmatic Civil Procedure casebook, published for the first time in the same year that Henry Hart and Herbert Wechsler published the first edition of their book, *Federal Courts and the Federal System*. McManamon, *supra*, at 435. Some of the history and philosophy of the development of the Federal Courts curriculum can be found in Judith Resnik, *Rereading “The Federal Courts”: Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1022–32 (1994), and in Richard Fallon, *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 956–69 (1993).

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

tion affects the role of the judge, the rights of the parties, and the functioning of courts.

Here, I offer a brief overview of the last six decades of civil procedural reforms to map the movement towards contract and to examine some of its implications. As I will detail, beginning after the promulgation of the Federal Rules of Civil Procedure in the late 1930s,<sup>3</sup> lawyers, judges, and law school classes centered on those Rules, which served as a basis for many state reforms as well. The Federal Rules both symbolized a national commitment to rights-seeking as a useful form of social norm development and constituted the great procedural reform project of the twentieth century. These trans-substantive rules offered uniformity across diverse subject matters and across the country.

As practitioners, judges, and teachers explored the Rules' text and purposes—outlining the steps by which parties litigated and judges decided cases—the conceptual backdrop was the constitutional and common law of due process. From questions about the standards to be applied when ruling on various motions to the standards for reaching judgments on the merits, the issues were the same: How could fair decisions be achieved? What kind and quantum of information sufficed to render binding judgments that had law's force behind them? How much process was due?<sup>4</sup>

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3 Rules of Civil Procedure, 308 U.S. 645 (submitted in 1937 to be effective in 1938) [hereinafter 1938 Federal Rules].

4 A series of decisions (some based on statutory provisions and others interpreting the “due process” requirements of the United States Constitution) have sorted litigants, offering some of them more process than others and justifying the allocations through estimations and intuitions about the costs, benefits, forms of error, and marginal utilities of oral presentations, written documentation, and legal representation. *See Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Further, the Supreme Court has elaborated different tests to decide what quantum of process is “due” by distinguishing between state criminal proceedings and administrative decisionmaking. *See, e.g., Medina v. California*, 505 U.S. 437 (1992); *see also Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2646 (2004) (applying the *Mathews v. Eldridge* test to assess the quantum of process to be provided to citizens alleged to be enemy combatants and doing so by comparing the private interest at stake, the Government's interests, and the burdens imposed by adding more procedural predicates).

Further, the Court has fashioned one test of the adequacy of process when a civil litigant claims a due process right to counsel and another when a civil litigant asserts a right to timely notice. *See Lassiter v. Dep't of Social Servs.*, 452 U.S. 18 (1981); *Dusenbery v. United States*, 534 U.S. 161 (2002). The analytic problems are many, as in some sense whatever amalgam of processes required is deemed that which is “due,” given the nature of the interests at stake. Further, much of the current approach is narrowly focused on only the value of achieving accuracy and moreover makes such assessments often without requisite information on the costs of current and additional

The practices of adjudication, however, have shifted.<sup>5</sup> As is also outlined below, alternative dispute resolution (ADR) or dispute resolution (DR) increasingly dominates the landscape of procedure. That such a change has occurred can be seen in amendments to the Federal Rules of Civil Procedure which, as initially promulgated in 1938, did not use the word “settlement” in their text. Today, that word appears four times, as judges are charged with encouraging litigants to end their disputes through contracts for dismissal or judgment. Processes of mediation and arbitration that rulemakers described as “extrajudicial”<sup>6</sup> only two decades ago have been brought inside courts, thereby changing that which is “judicial.”

In addition to the internalization of contract norms, judges who once were skeptical of devolution of judicial authority to agency factfinders now permit the reallocation of adjudication to government officials working outside courthouses. Further, federal judges who once had declined to enforce *ex ante* agreements to arbitrate federal statutory rights now generally insist on holding parties to such bargains, thereby outsourcing an array of claims. As a result, mini-codes of civil procedure are being created by courts, agencies, and a multitude of private providers. The aspiration for a trans-substantive procedural regime embedded in the Federal Rules has been supplanted by an array of contextualized processes.

With the predicate presumption that parties’ agreements validate outcomes, the attention paid to the quality and kind of process provided is waning. Instead of questions about the process “due,” the issues are about when an enforceable settlement has been achieved, who has the power to bind whom, whether courts should refuse certain of the bargains struck, and which court has jurisdiction to enforce settlements when disputes arise.

As a consequence, the distinctive elements of adjudication as a form of “social ordering” to be contrasted with other forms, such as contracts and elections (to borrow Lon Fuller’s categories),<sup>7</sup> are di-

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processes or of the costs and rate of errors under a given procedural regime. See generally Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

5 This phenomenon is not limited to the United States. See HILARY ASTOR & CHRISTINE CHINKIN, *DISPUTE RESOLUTION IN AUSTRALIA* (2d ed. 2002); Andrew J. Cannon, *A Pluralism of Private Courts*, 23 CIVIL JUSTICE QUARTERLY 273 (2004).

6 See FED. R. CIV. P. 16 (as amended in 1983) and its accompanying notes, discussed *infra* notes 66–77.

7 Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363 (1978). This essay was published posthumously and was based on materials written initially in the late 1950s.

minishing. While Procedure was once concerned about generating secondary rules by which to render judgment, today the task is to shape secondary rules for interpreting parties' agreements and, hence, my description of a shift from *Due Process Procedure* to *Contract Procedure*. I use the word "contract" here to refer both to government-based encouragement of dispute resolution through contract and to government enforcement of parties' agreements to contract out of litigation.

Questions of legitimacy and fairness—once raised in terms of how to render judgment—now need to be redirected towards bargaining processes promoted by courts, agencies, Congress, and private providers. Just as inequalities of access and disparities of resources between adversarial parties in court-based adjudication generate problems for the Due Process Model of Procedure, so do unequal bargaining positions raise questions for outcomes generated through contract. Further, Contract Procedure raises acute challenges to the very idea of the judge, asked not to decide ("to judge") but, as one appellate court recently explained, to "encourage settlements and to poke and prod reluctant parties to compromise, especially when their differences are not great and/or their claims or defenses are not airtight."<sup>8</sup>

In addition, in the context of class actions and certain other kinds of cases, those same judges are also asked to approve the settlements reached. Thereafter, if and when bargains fall apart, litigants return to the very same judge for enforcement. The pressures on trial judges to help bring about and to accept settlements are acute, as can be seen through major Supreme Court decisions disapproving large-scale settlements.<sup>9</sup> A spate of lower court cases (discussed below) also demonstrate that, in ordinary cases, comparable problems exist as negotiations occur in hurried, pressured settings in which discussions and conclusions reached by lawyers, judges, and the parties are not often recorded.

Judges are beginning to consider whether to structure bargaining, when to decline to enforce certain terms of settlement agreements, and what kind of process ought to be accorded—in which jurisdiction—when signatories to settlements disagree about whether and what agreements were forged. Similarly, case law is starting to emerge assessing the quality of process provided through private dispute resolution programs required by increasing numbers of contracts

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8 *Higbee v. Sentry Ins. Co.*, 253 F.3d 994, 995 (7th Cir. 2001).

9 *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

for a range of goods and services and for various types of employment.<sup>10</sup>

A good deal of the contemporary doctrine on Contract Procedure assumes the wholesale application of extant principles of contract law. In contrast, I argue that court-based bargaining ought not necessarily inherit ordinary rules of contract law. Rather, because court-based contracts have third-party effects (most readily apparent in the context of aggregate litigation but relevant in smaller scale cases as well), the task is to tailor contract principles to the particular and peculiar instance of contracts sparked by (and sometimes hammered out through) judicial advocacy of settlement.

Thus, my argument is fourfold. First, that which “is” Procedure and that which adjudication entails have changed, and contemporary scholars and teachers of Procedure need to focus on both Due Process and Contract Procedure in their work and courses. Second, law needs to address how contracts made through state-based promotion of conciliation differ from those reached by individuals or entities coming together before disputes arise. Third, the law that should evolve has to take on the job of regulating both judges and contracting parties. In light of the legal ability to use settlement contracts as vehicles to generate court enforcement, courts should refuse to sanction certain kinds of bargains. Moreover, the job of regulation ought not to be left only to case law. Given that statutory and rule-based mandates for judges to manage and to settle are plentiful and the normative questions substantial,<sup>11</sup> directions from state and federal legislators and rulemakers about how to do so for managerial and settling judges ought to articulate how “judicious” judges are to behave in these new roles.

Fourth, and finally, Contract Procedure cannot escape Due Process Procedure. Under doctrines licensing contracts to displace adjudication, judges are charged with assessing whether the alternatives provide fora in which disputants can effectively vindicate their rights.<sup>12</sup> As we are beginning to see from lower court cases challeng-

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10 See Linda J. Demaine & Deborah Hensler, “Volunteering” to Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55 (2004) (studying the frequency of such contracts in sectors of the economy); Jean R. Sternlight & Elizabeth J. Jensen, Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?, 67 LAW & CONTEMP. PROBS. 75 (2004) (evaluating such clauses that also seek to preclude class actions).

11 See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 391–403 (1982) [hereinafter Resnik, *Managerial Judges*].

12 See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28–32 (1991). Cases often arise when disputants seek to enforce arbitration obligations under the

ing the quality of privately-based arbitrations, the replacement of public processes with private ones brings judges into assessing the qualities of these alternative processes. To be acceptable, those processes have to look more like what courts do than not. Similarly, as court-based bargains fall apart and post-settlement disputes become more frequent, judges are beginning to articulate their obligation to return to a Due Process Model of Procedure to decide the respective rights of disputing settlers. In short, while the trans-substantive regime of the Federal Rules has ended, a trans-substantive role for judges—anchored in due process—remains.

## II. EXPANDING THE FEDERAL JUDICIARY, PROMULGATING FEDERAL RULES, AND DEVELOPING DUE PROCESS PROCEDURE

In 1922, Congress began a century-long project to expand federal judicial capacity through increasing the number of judicial officers, the kind and array of federal rights, and the power of the federal judiciary to make national procedural rules.<sup>13</sup> The Federal Rules of Civil Procedure gave federal judges a set of rules to share, moving their affiliation towards each other rather than conforming their practices to the different states in which they sat. National rules of criminal procedure, appellate procedure, and evidence followed in the decades thereafter.

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Federal Arbitration Act (FAA). The Supreme Court has developed a layered approach, requiring inquiry into whether parties in fact agreed to arbitrate, whether a particular dispute is covered under the FAA and if so whether, nevertheless, a particular federal statute provides an exemption to such coverage, and finally whether the alternative forum provides an adequate alternative for effective vindication of federal rights. Federal adjudication serves as a baseline, and substantial deviations (such as much greater impositions of costs on the party invoking federal statutory protection) can result in nonenforcement of arbitration contracts. Controversy currently centers about whether federal pro-arbitration policies preempt state contract law, including state rulings finding contracts to arbitrate unenforceable if they preclude class action arbitrations. Compare *Discover Bank v. Superior Court*, 129 Cal. Rptr. 2d 393 (App. 2003) with *Mandel v. Household Bank*, 129 Cal. Rptr. 2d 380 (App. 2003), both pending on review before the California Supreme Court. See *ADRWorld.com, Scrutiny of Class Action Bars in Arbitration Clauses Mounts*, at <http://www.adrworld.com> (Nov. 18, 2004); notes 226–227, *infra*.

<sup>13</sup> See Act of Sept. 14, 1922, ch. 306, Pub. L. No. 67-298, 42 Stat. 837. In 1934, Congress authorized the United States Supreme Court to promulgate federal procedural rules that had the power to displace local practices with national norms. Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2000)). The classic articles on their creation are Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 943–45, 955 (1987), and Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

While the Federal Rules of Civil Procedure are now both taken for granted and subject to substantial criticism, their creation was once an event of great import, widely celebrated and imitated. As Charles Clark, one of the drafters, claimed: “with its permeation into the daily professional life of all lawyers and its reshaping of law school curricula and teaching,” the creation of national federal procedural rules was a project of heroic proportions (“one of the major turning points of English and American legal history”).<sup>14</sup> The normative instruction provided by these rules shared themes with other legal projects of that era, welcoming of national government regulation and seeing fact-based inquiries as useful methods to achieve just results.<sup>15</sup>

As is familiar to Procedure teachers, in those then-new federal rules, lawyers and law professors shaped a trans-substantive code aimed at simplifying process, easing access to courts, and collapsing distinctions between law and equity.<sup>16</sup> With their flexible, equity-based approach and their diminished formalism, these rules endowed trial judges with a good deal of discretion to tailor processes to the circumstances of a particular case.

But the Rules also channeled and constrained that discretion.<sup>17</sup> In their initial formulation, judges were not much involved in supervising discovery, nor were they charged with structuring the timing of the filing of motions. Further, when parties sought judicial decision-making, judges were required to apply standards set forth in rules (often amplified by case law) to determine whether cases could proceed to adjudication. Dispositive decisions were to be explained by findings of fact and conclusions of law.<sup>18</sup>

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14 Charles E. Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. AM. JUDICATURE SOC'Y 250, 254 (1963).

15 See Judith Resnik, *Procedure's Projects*, 23 CIVIL JUSTICE QUARTERLY 273 (Adrian Zuckerman ed., Symposium Volume, Sweet and Maxwell 2004).

16 Congress had given the Supreme Court the power to make rules, and the Court in turn appointed a committee of lawyers and law professors who did the drafting. See *Appointment of Committee to Draft Unified System of Equity and Law Rules*, 295 U.S. 774 (1935). That Committee made the decision to create a uniform set of rules for both law and equity. See Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure Part I: The Background*, 44 YALE L.J. 387, 432–35 (1935); *Part II: Pleadings and Parties*, 44 YALE L.J. 1291, 1292–99 (1935). Over the decades, judges increasingly dominated the drafting process. See *infra* note 83 and the accompanying discussion.

17 As Sanford Kadish explained, the law and theory of due process entails “fixity” and “flexibility.” Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 320 (1957).

18 See FED. R. CIV. P. 12(b); FED. R. CIV. P. 56(d). See generally Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency*

The Rules also gave federal judges a new environment in which to work. These national processes united federal judges dispersed around the country by linking them through shared daily practices. The Rules helped lower federal judges to shape an identity as a distinctive cadre of legal actors gaining a high profile through rulings on school desegregation, antitrust, and criminal defendants' rights. As they shared a growing docket, elaborated doctrine, and worked under the same rules, federal judges came to see themselves as in need of their own management structure and as obliged to socialize new entrants into their distinctive ways. Institutions (such as the Administrative Office of the United States Courts and the Federal Judicial Center), programs (including "schools for judges"), and agendas (a *Long Range Plan for the Federal Courts*) all followed.<sup>19</sup>

The Rules, expressive of and coupled with an impressive investment in the infrastructure of the federal courts, represent a normative commitment to federal regulatory power. In the wake of the Depression, many saw federal governance as a necessary and desirable response to political and economic conditions. The expansion of federal jurisdiction and uniform federal processes were mechanisms by which to enforce the developing national legal regime. Time and again, Congress authorized government officials and private parties to bring lawsuits as a means of enforcing federal law. Federal procedure thus needs to be understood as a part of a larger national constitutional project, relying in part on equipping individuals and groups to come to court as rights-seekers and upon judges to determine the obligations of disputants.

That attitude towards process can be seen in the major wave of amendments to the Federal Rules that occurred in the 1970s. The expansion of the class action rule is exemplary of widespread affection for entrepreneurial rights-seeking. Not only did the Rules invite "private attorneys general" to bring lawsuits on behalf of groups to enforce public norms, but its approach was mirrored in a smorgasbord of other mechanisms. Congress gave government officials new authority to bring lawsuits, and private parties gained new incentives through fee-shifting statutes to pursue claims against both public and

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*Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

<sup>19</sup> See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 937-57 (2000); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 272-91 (2003).

private wrongdoers.<sup>20</sup> The 1966 class action rule, complemented by statutes authorizing consolidation across federal district courts<sup>21</sup> and fee-shifting provisions, reshaped ideas about what litigation might accomplish.<sup>22</sup>

The import of the Rules—as a vehicle for adjudication’s expansion—can be mapped through their facilitating implementation of new federal rights, the filing of more kinds of cases, the growing sizes of dockets, and the funding of the federal courts. Congress authorized litigants to bring lawsuits aimed at enforcing civil rights, environmental rights, consumers’ rights, and workers’ rights, and Congress enlarged the power of federal prosecutors to pursue criminal actions. Between the 1960s and the 1990s, caseloads within the federal system tripled, as hundreds of new statutory causes of action were enacted. In terms of budgets, Congress provided substantial resources to the federal courts, whose budget grew from about \$250 million in the early 1960s to its current \$4.2 billion.<sup>23</sup>

But even that largesse could not respond to all those eligible for adjudication under federal law. Further, neither Congress nor Article III judges were interested in augmenting the ranks of life-tenured Article III judges in numbers sufficient to decide all the kinds of cases that federal lawmakers had permitted. Leaders of the bench and bar instead created new kinds of judges and new venues for judging, both within and outside of the federal courts. Some of these auxiliary judges—magistrate and bankruptcy judges—are appointed by Article

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20 See generally Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000).

21 See Multidistrict Litigation Act, Pub. L. No. 90-296, 82 Stat. 109 (1968) (codified as amended at 28 U.S.C. § 1407 (2000)).

22 See FED. R. CIV. P. 23 (1966). See generally Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21 (1996); Judith Resnik, *From Cases to Litigation*, 54 LAW & CONTEMP. PROBS. 5 (1991).

23 See Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783 (2004) (discussing the wealth of the federal courts as compared to the state courts and administrative courts) [hereinafter Resnik, *Migrating, Morphing, and Vanishing*]; Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 501, 505 & fig.31 (2004) [hereinafter Galanter, *Vanishing Trial*] (discussing and graphing the growth of judicial expenditures on the federal courts from \$246 million in 1962 to \$4.254 billion—both in 1996 dollar values—over a thirty year span).

III judges, work inside Article III courts, and serve fixed and renewable terms.<sup>24</sup>

Others, called Administrative Law Judges (ALJs), obtain their appointments by competitive exams and gain some degree of independence by virtue of the Administrative Procedure Act, first enacted in 1946 by Congress to regularize and unify federal administrative procedure.<sup>25</sup> Many agencies (including the Social Security Administration, the Veterans Administration, the Equal Employment Opportunity Commission, and the Immigration Service doing its adjudicatory work inside the Department of Justice) have become significant, albeit low visibility, adjudicatory centers employing hundreds of judges.<sup>26</sup> In terms of the number of cases, the filings of claims inside agencies are in the hundreds of thousands. In terms of the number of adversarial proceedings, my estimate from the dockets of the four high-volume federal agencies mentioned above is that, in total, these four agencies hold about three-quarters of a million hearings yearly.<sup>27</sup>

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24 See Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 614–15 (2002) [hereinafter Resnik, *Inventing the Federal District Courts*].

25 See Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706 (2000)).

26 Their numbers overshadow those of the life-tenured judiciary, as some 1500 to 2000 ALJs are joined by a roughly equal number of other agency employees ("administrative judges" or "hearing officers") who are line-employees and do their adjudicatory work outside the strictures of the APA. The growing powers of such judges have sparked controversy because these hearing officers lack structural independence, as well as interest in developing rules for adjudication by such judges. See Section of Administrative Law and Regulatory Practice, ABA, Amendments to the Adjudicative Provisions of the Federal Administrative Procedure Act (June 2, 2004) (Circulation Draft) (approved by the Section in August of 2004) (Rep't, Prof. Michael Asimow), available at [http://www.abanet.org/adminlaw/apa/Prescriptive\\_recommendations—6-02-04\\_revision.doc](http://www.abanet.org/adminlaw/apa/Prescriptive_recommendations—6-02-04_revision.doc). The Section has proposed that, at its mid-year 2005 meeting, the ABA recommend amending the APA to address "Type A" and "Type B" adjudication, with "Type B" referring to most of the adjudications in agencies undertaken by non-ALJs. The effort is to make a uniform set of procedural norms apply, including a prohibition on ex parte contacts by outsiders and rights to full disclosure of facts. See Section of Administrative Law and Regulatory Practice, ABA, Federal Administrative Adjudication in the 21st Century (Executive Summary of Oct. 12, 2004 and Recommendations of Oct. 9, 2004) (on file with the author).

27 See Resnik, *Morphing, Migrating, and Vanishing*, *supra* note 23, at 800 chart II. In contrast, in recent years, Article III judges have presided over about 5000 civil trials annually. See Galanter, *Vanishing Trial*, *supra* note 23, at 461. That number is generous, in that the Administrative Office of the United States Courts defines "district court trials as proceedings resulting in jury verdicts or other final judgments by the courts, as well as other contested hearings at which evidence is presented." ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2003 JUDICIAL BUSINESS OF THE UNITED STATES

Whether in courts or in agencies, these adversarial proceedings are governed by procedural rules that rely on a due process model; disputants marshal facts and arguments and an impartial third party is obliged to render judgment. The decisionmaker is limited to information adduced on a record and is often required to provide explanation for the judgment rendered. Thus, while each agency has its own rules, with processes varying in terms of the procedural options and the degree of formality, the system of rules is focused on obliging disputants to provide information to each other and to decisionmakers, both empowered and constrained as they render judgments that bind parties. The 1946 Administrative Procedure Act, *Goldberg v. Kelly*,<sup>28</sup> and the “due process revolution” of which that case is emblematic, took much from the template for adjudication provided by the Federal Rules and applied it throughout the administrative-adjudicative state.

That due process is at the center of this conception of Procedure can be seen by a review of the 2004 volume *Civil Procedure Stories*,<sup>29</sup> one of a series of books aimed at giving in-depth analyses of the “great” cases from various standard classes offered by law schools. Of the fourteen chapters in *Civil Procedure Stories*, the question of procedural due process is discussed specifically in three, analyzing the Supreme Court decisions in *Connecticut v. Doehr*,<sup>30</sup> in *Goldberg v. Kelly*,<sup>31</sup> and in

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COURTS: ANNUAL REPORT OF THE DIRECTOR 20 (2003), available at <http://www.uscourts.gov/judbus2003/contents.html>. On the other hand, it is not clear whether that the term “district trials” and the resultant numbers include trials over which magistrate judges preside, as the Administrative Office separately compiles that information. *Id.* at 22–23 (noting that civil trials by consent before magistrates numbered 13,811, a nine percent increase over the prior year); see also Galanter, *Vanishing Trial*, *supra* note 23, at 461, 474–76 (noting that magistrate judges conducted 959 civil trials in 2002 and asking a series of questions about whether magistrate judge trials are included as a part of the other federal trial numbers, as well as raising the difficulties of analyzing the data given that magistrate disposition and trial data are not disaggregated by the types of cases going to trial). Galanter also commented that the percentage of magistrate dispositions by trial has declined from a 1982 level of about one-third to a 2002 level of 7.5 percent. *Id.* at 475.

28 397 U.S. 254 (1970). While the Court subsequently limited the reach of that ruling, its conceptual frame remains central. See Judith Resnik, *The Story of Goldberg: Why This Case Is Our Shorthand* [hereinafter Resnik, *Why This Case Is Our Shorthand*], in *CIVIL PROCEDURE STORIES: AN IN-DEPTH LOOK AT THE LEADING CIVIL PROCEDURE CASES* 455 (Kevin M. Clermont ed., 2004) [hereinafter *CIVIL PROCEDURE STORIES*].

29 The volume was edited by Professor Kevin M. Clermont and published in 2004 as part of a series by Foundation Press.

30 501 U.S. 1 (1991), discussed in Robert G. Bone, *The Story of Connecticut v. Doehr: Balancing Costs and Benefits in Defining Procedural Rights*, in *CIVIL PROCEDURE STORIES*, *supra* note 28, at 153–92.

*Lassiter v. Department of Social Services*.<sup>32</sup> Due process is at the core of the chapter discussing *Shaffer v. Heitner*<sup>33</sup> and the power of courts to compel appearances in their jurisdictions. Due process is also central to the analyses of *Conley v. Gibson*<sup>34</sup> and *Celotex Corp. v. Catrett*,<sup>35</sup> both addressed to whether the information presented to courts suffices to grant motions to dismiss and for summary judgment. Similarly, due process is the framework for the inquiry about whether group-based litigation is legitimate (in the chapter devoted to *Hansberry v. Lee*)<sup>36</sup> and about whether one judgment can preclude subsequent decisions, discussed in chapters devoted to *Parklane Hosiery Co. v. Shore*<sup>37</sup> and to *Hilton v. Guyot*.<sup>38</sup> Further, the topic headings of the chapters—about jurisdiction, governing law, parties, pleadings, motions, juries, and res judicata—all highlight that Due Process Procedure is about the power and legitimacy of judgments by state officials as they rule on disputes brought by both public and private actors.

### III. MOVING TOWARDS CONTRACT

The volume of filings, the proliferation of adjudicatory processes, and the many forms of rights garnered praise from some quarters but also generated complaints. Whether Charles Clark's exuberant description in 1963 of the "success of the federal" rules as "nothing short of phenomenal" and without "criticism of major character"<sup>39</sup>

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31 397 U.S. 254 (1970), discussed in Resnik, *Why This Case Is Our Shorthand*, *supra* note 28, in *CIVIL PROCEDURE STORIES*, *supra* note 28, at 455–88.

32 452 U.S. 18 (1981), discussed in Elizabeth G. Thornburg, *The Story of Lassiter: The Importance of Counsel in an Adversary System*, in *CIVIL PROCEDURE STORIES*, *supra* note 28, at 480–528.

33 433 U.S. 186 (1977), discussed in Wendy Collins Perdue, *The Story of Shaffer: Allocating Jurisdictional Authority Among the States*, in *CIVIL PROCEDURE STORIES*, *supra* note 28, at 129–52.

34 355 U.S. 41 (1957), discussed in Emily Sherwin, *The Story of Conley: Precedent by Accident*, in *CIVIL PROCEDURE STORIES*, *supra* note 28, at 281–306.

35 477 U.S. 317 (1986), discussed in David L. Shapiro, *The Story of Celotex: The Role of Summary Judgment in the Administration of Civil Justice*, in *CIVIL PROCEDURE STORIES*, *supra* note 28, at 343–70.

36 311 U.S. 32 (1940), discussed in Jay Tidmarsh *The Story of Hansberry: The Foundation of Modern Class Actions*, in *CIVIL PROCEDURE STORIES*, *supra* note 28, at 217–80.

37 439 U.S. 322 (1979), discussed in Lewis A. Grossman, *The Story of Parklane: The "Litigation Crisis" and the Efficiency Imperative*, in *CIVIL PROCEDURE STORIES*, *supra* note 28, at 387–426.

38 159 U.S. 113 (1895), discussed in Louise Ellen Teitz, *The Story of Hilton: From Gloves to Globalization*, in *CIVIL PROCEDURE STORIES*, *supra* note 28, at 427–54.

39 Clark, *supra* note 14, at 254.

was accurate at the time can be debated,<sup>40</sup> but such a claim could not be made today. While the 1930s Federal Rules were once heralded as model solutions to so many procedural challenges, they are now identified as sources of problems. Some bemoan adjudication's failures to live up to its own promises, while others think that the rights-seeking made available through adjudication is excessive.<sup>41</sup> The trans-substantive framework of the Rules has been undermined from within, as special rules have been promulgated for prisoners<sup>42</sup> as well as for complex cases.<sup>43</sup> Further, Congress has imposed different procedural requirements on certain kinds of litigants such as prisoners and the purchasers of securities.<sup>44</sup>

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40 In 1963, Justices Black and Douglas filed a statement expressing their opposition to the submission to Congress of amendments to the Federal Rules. The justices argued that because many of the rules "determine matters so substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation which . . . the Constitution requires to be initiated in and enacted by the Congress and approved by the President." Statement of Mr. Justice Black and Mr. Justice Douglas, 374 U.S. 865, 865-66 (1963) (footnotes omitted).

41 See generally ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001). For analysis of how economic inequality diminishes the capacity of adversarial systems to produce results viewed as legitimate, see Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986). My focus is on developments in the United States. Parallels exist in other legal systems as well as in transnational justice. See, e.g., ASTOR & CHINKIN, *supra* note 5; Theodore J. St. Antoine, *ADR Without Borders*, LAW QUADRANGLE NOTES, Fall/Winter 2003, at 77; JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* (2002); MICHAEL ZANDER, *THE STATE OF JUSTICE* (2000); Adrian S. Zuckerman, *Lord Woolf's Access to Justice: Plus ça Change . . .*, 59 MODERN L. REV. 773 (1996); LORD WOOLF, *ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES* (1996).

42 See Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. app. (2000) (effective Feb. 1, 1977, Act of Sept. 28, 1976, Pub. L. No. 94-426, § 1, 90 Stat. 1334, and as amended thereafter); Rules Governing Section 2255 Proceedings for the United States District Courts, *id.* (effective Feb. 1, 1977, Act of Sept. 28, 1976, Pub. L. No. 94-426, § 1, 90 Stat. 1334, and as amended thereafter).

43 See, e.g., MANUAL FOR COMPLEX LITIGATION (4th ed. 2004); Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 28 U.S.C. app. § 1407 (providing for special procedures to handle cases consolidated across districts pursuant to 28 U.S.C. § 1407).

44 See, e.g., Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321 (1996) (codified in various parts of titles 18, 28, and 42, including 18 U.S.C. §§ 3634, 3636, and 42 U.S.C. §§ 1997-1997h of the United States Code), discussed in Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in 1998 by the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 77z-1, § 78a (2000)).

As a variety of different kinds of concerns have converged, the movement for ADR has succeeded in winning congressional attention and in altering court processes and doctrine. Entities such as the American Association of Law Schools (AALS) and the American Bar Association (ABA) have developed sections devoted to dispute resolution as distinct from Civil Procedure, Complex Litigation, and Federal Courts (in the context of the AALS) and from the Section on Litigation (in the context of the ABA).<sup>45</sup> Through energetic promotion by such proponents, ADR is making its way into legal practice and education as it is inscribed into statutes, rules, and case law. Indeed, the symposium in which this article sits is one marker of the success, for ADR is now a course taught in enough law schools to prompt the question about its relationship to the traditional first-year curriculum.<sup>46</sup> Below, I detail some examples of the incorporation of ADR in support of my argument that contemporary courses on Procedure need to include analyses of processes not limited to Federal Rules of

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45 The AALS's Section on ADR began in 1983. According to the 2003–2004 AALS Directory, some 540 people describe themselves as teachers of that subject. See AMERICAN ASSOCIATION OF LAW SCHOOLS, DIRECTORY OF LAW TEACHERS 2003–2004, at 1184–88 (2003). The Section on Civil Procedure was begun in 1973 and has more than 1200 persons listed as teaching it as a subject. *Id.* at 1193–1202. The Section on Federal Courts, began in 1988, has about 650 people listed as teaching its subject matter. *Id.* at 1313–18; see also E-mail from Tracie Thomas to Jennifer Peresie (Sept. 7, 2004) (providing information on the formal commencement dates of the three AALS sections described) (on file with the author).

In the ABA, a Section on Dispute Resolution was begun more than a decade ago and now has a membership of about 4000. It publishes a newsletter, entitled *Just Resolutions*, as well as a magazine, called *Dispute Resolution Magazine*. See Richard Cherrick, *From the Chair: The Dispute Resolution Section Comes of Age*, DISPUTE RESOL. MAGAZINE, Fall 2003, at 3.

46 Several casebooks and hornbooks provide materials. See, e.g., LAURA J. COOPER, DENNIS R. NOLAN & RICHARD A. BALES, ADR IN THE WORKPLACE (2000); STEPHEN B. GOLDBERG, FRANK E.A. SANDER & NANCY H. ROGERS, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES (3d ed. 1999); KIMBERLEE K. KOVACH, KOVACH'S MEDIATION, PRINCIPLES AND PRACTICE (2d ed. 2000); CARRIE J. MENKEL-MEADOW, LELA PORTER LOVE, ANDREA KUPFER SCHNEIDER & JEAN R. STERNLIGHT, DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL (forthcoming 2004); ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT PEPPET, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS (2002); LEONARD L. RISKIN & JAMES E. WESTBROOK, RISKIN AND WESTBROOK'S DISPUTE RESOLUTION AND LAWYERS (abr. 2d ed. 1998); KATHERINE VAN WEZEL STONE, ARBITRATION LAW (2003); KATHERINE VAN WEZEL STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION (2000); STEPHEN J. WARE, WARE'S HORNBOOK ON ALTERNATIVE DISPUTE RESOLUTION (2001). See generally Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681 (2005).

Civil Procedure and that the project of regulating Contract Procedure needs to be addressed by judges, legislators, and commentators.

### A. *Legislative Promotion of ADR*

ADR is a feature of agencies and court processes in part through support from Congress, which has enacted statutes authorizing court-annexed arbitration programs<sup>47</sup> and has mandated or licensed the use of ADR in agencies as well.<sup>48</sup> (One estimate is that some four hundred federal employees work full time on ADR and that agency budgets dedicate more than thirty-six million dollars annually to ADR programs.)<sup>49</sup>

Further, Congress has placed pro-settlement policies in other bodies of law. For example, tax provisions permit defendants who make payments into a settlement fund to deduct them at the time of the fund's establishment rather than when (or if) funds are distributed to claimants.<sup>50</sup> Other tax provisions accord favorable treatment to those who buy and sell (factor) "structured settlements," which involve a series of payments rather than a lump sum to an injured party.<sup>51</sup> Similarly, additions to the Bankruptcy Code have made feasi-

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47 See, e.g., Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651-658 (2000)).

48 See Administrative Dispute Resolution Act, Pub. L. No. 101-552, § 3(b)(1), 106 Stat. 944, 944 (1990) (codified as amended at 5 U.S.C. §§ 571-584 (2000)); Administrative Procedure Technical Amendments Act of 1991, Pub. L. No. 102-354, § 3(b)(1), 106 Stat. 944, 944 (1992) (codified at 5 U.S.C. §§ 571-584 (2000)); see also JEFFREY M. SENGER, *FEDERAL DISPUTE RESOLUTION: USING ADR WITH THE UNITED STATES GOVERNMENT 2* (2004) (describing the government's growing reliance on ADR and citing as examples that the Equal Employment Opportunity Commission uses mediation in 5000 workplace cases annually, that the U.S. Postal Service mediates about 10,000 claims, and that the Environmental Protection Agency employs eight full time staff members who do ADR and "pays private mediators millions of dollars in mediator fees each year").

49 SENGER, *supra* note 48, at 2. Senger is an ADR proponent, describing ADR as consistent with "the values of the country." *Id.* at 16.

50 For the requirements of a "qualified settlement fund" or a "designated settlement fund," see 26 U.S.C. § 468B (2000) (providing, for example, that payments must be made to extinguish a tort liability). See generally Richard B. Risk, Jr., *A Case for the Urgent Need to Clarify Tax Treatment of a Qualified Settlement Fund Created for a Single Claimant*, 23 VA. TAX REV. 639 (2004).

51 See Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859, 876-81 (describing tax provisions, including 26 U.S.C. § 130(d), that create incentives for defendants to pay structured settlements that involve the assignment to third parties to provide annuities to plaintiffs and arguing that the current regime places the United States Treasury in the position of subsidizing the defendants by its tax treatment of payments made by the companies to

ble certain kinds of settlements that result in establishing schedules of payments for present as well as future claims,<sup>52</sup> despite the due process problems raised by efforts to resolve such issues through adjudication.<sup>53</sup>

### B. *Judicial Promotion of ADR*

Ruledrafters, working in a process now dominated by federal judges,<sup>54</sup> have also reconfigured the Federal Rules of Civil Procedure to direct judges to promote alternative dispute resolution. Below, I explore three techniques: internalization, outsourcing, and devolution.

#### 1. Internalization: Changing the Federal Rules and the Judicial Charter

The concept of settlement was not foreign in the 1930s to ruledrafters, who knew well that many cases ended without adjudica-

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which such structured settlements are assigned). Special tax treatment is also now provided for factoring transactions if authorized by state law or made “primarily for the benefit of a tort victim.” See 26 C.F.R. pt. 157 (2004) (providing for implementation of 26 U.S.C. § 5891, the Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, 115 Stat. 2427, 2436–39 (2002)).

How payments are characterized (as compensatory or punitive damages) also affects tax treatment, and settlements permit parties (rather than adjudicators) to provide the initial description of damages in categories permitting tax exemptions. See 26 U.S.C. § 104(a)(2) (providing that non-punitive damage awards received on account of personal physical injuries or sickness are not part of income). The Internal Revenue Service may make reassessments, but settlement documents can help to support allocations. See Risk, *supra* note 50, at 646–65. For example, a debate exists about how to treat back pay awards made in Title VII cases. A Supreme Court ruling, *United States v. Burke*, 504 U.S. 229, 242 (1992), interpreted 26 U.S.C. § 104(a)(2), the pre-1991 provisions of that Act and concluded that back pay awards did not fall under the nontaxable treatment as “damages received on account of personal injuries.” A few lower courts have since suggested that amendments to Title VII permit that form of award to be exempt from taxation. Further, legislation has been proposed to reverse that decision. See Civil Rights Tax Relief Act of 2003, S. 557, H.R. 1155, 108th Cong.

52 See 11 U.S.C. § 524(g) (2000) (permitting prepackaged bankruptcies and a discharge of a company’s liability upon the creation of a trust approved by seventy-five percent of the claimants, which results in current claimants’ voting decisions affecting future claimants in ongoing litigations such as asbestos, referenced expressly in § 524(g)(2)(B)).

53 See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1998); Samuel Issacharoff, “Shocked”: *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1925–29 (2002).

54 See Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229 (1998).

tion. But their 1938 rules neither used the term “settlement” nor charged judges with the task of promoting settlements. The drafters did include a provision under one Federal Rule (68) for an “offer of judgment”<sup>55</sup> and, further, they prohibited class actions from being “dismissed or compromised without the approval of the court.”<sup>56</sup> In contrast, the 2004 version of the Federal Rules of Civil Procedure uses the word “settlement” in the texts of Rules 11,<sup>57</sup> 16,<sup>58</sup> 23,<sup>59</sup> and 26.<sup>60</sup>

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55 Rule 68 explained that if an adverse party failed to obtain a judgment more favorable than had been offered, a court had the power to award costs from the time the offer was made against a winning party. *See* FED. R. CIV. P. 68, 1938 Federal Rules, *supra* note 3, 308 U.S. at 746. The 1987 revisions substituted language of “offeree” for party but retained the model of the 1938 rules. The definition of “costs” varies depending on whether statutes also provide for shifting either costs or attorneys’ fees, sometimes defined as an element of costs and other times not. *See* 28 U.S.C. § 1920 (2000); *Marek v. Chesney*, 473 U.S. 1 (1985).

56 FED. R. CIV. P. 23(c), 1938 Federal Rules, *supra* note 3, 308 U.S. at 690.

57 The original Rule 11 was called “Signing of Pleadings.” *See* 1938 Federal Rules, *supra* note 3, 308 U.S. at 676. The current Rule 11, now called “Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions,” provides that monetary “sanctions may not be awarded on the court’s initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.” FED. R. CIV. P. 11(c)(2)(B). Further, the 1993 Advisory Committee Notes comment that Rule 11 motions should not be used to “exact an unjust settlement” and further explain that parties “settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case.”

58 *See* discussion *infra* notes 61–80 and accompanying text.

59 The 1938 version, “Class Actions,” prohibited dismissal or compromise without court approval. FED. R. CIV. P. 23(c), 1938 Federal Rules, *supra* note 3, 308 U.S. at 690. The 2004 Rule has a subsection entitled “Settlement, Voluntary Dismissal, or Compromise,” and under that subsection, the process of settlement for class actions is detailed to some extent, with more discussion in the Advisory Committee Notes. *See* FED. R. CIV. P. 23(e).

60 The word settlement was first used in the context of Rule 26 in the 1970 Advisory Committee notes to amendments promulgated at that time. As the Advisory Committee explained:

[D]isputes have inevitably arisen concerning the values claimed for discovery and abuses alleged to exist.

The Committee . . . invited the Project for Effective Justice of Columbia Law School to conduct a field survey of discovery. . . .

The Columbia Survey concludes, in general, that there is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules. No widespread or profound failings are disclosed. . . . The costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and

The addition of settlement to the set of activities assigned to judges is a change of recent vintage, as can be seen from considering the evolution of Rule 16. That Rule, initially denominated “Pre-Trial Procedure; Formulating Issues,” provided judges with discretion to convene a “pre-trial” meeting with lawyers.<sup>61</sup> The listed purposes of such a meeting included simplifying issues, amending pleadings, making admissions, limiting expert witnesses, references to masters, and such “other matters as may aid in the disposition of the action.”<sup>62</sup>

For roughly forty-five years, from the promulgation of the Federal Rules in 1938 to 1983, Rule 16 remained unchanged. But the practices of judges did change in that interval, as judges reconceived their role and adopted a more managerial stance.<sup>63</sup> Some of that shift came in response to what were then called “protracted cases” and are today called “complex litigation.” Desiring to gain “control” over the many-party, many-issue case, judges developed special procedures to do so. And then, the procedures crafted for the “big case” came to be applied across a broader spectrum of the docket.<sup>64</sup> Yet even as they began in the 1960s and 1970s to structure the course of lawsuits in an effort to control lawyers, judges debated whether it was appropriate for them to raise the question of settlement during pretrial conferences. Some jurists and lawyers argued that settlement was a “by-prod-

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thereby makes for a fairer trial or settlement. On the other hand, no positive evidence is found that discovery promotes settlement.

Advisory Committee Notes to the 1970 amendments to FED. R. CIV. P. 26. In 1993, Rule 26 was again amended to provide that the parties

must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case . . . .

See FED. R. CIV. P. 26(f) (“Conference of Parties: Planning for Discovery”) (1993).

In 1970, Rule 26(b)(2) made plain that parties could obtain discovery of insurance policies even though they were neither admissible nor likely to lead to admissible evidence. Rather, disclosure was appropriate to enable “counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation.” See FED. R. CIV. P. 26(b)(2) (“Insurance Policies”) and the Advisory Committee Notes to the 1970 amendments to FED. R. CIV. P. 26.

61 FED. R. CIV. P. 16, 1938 Federal Rules, *supra* note 3, 308 U.S. at 684.

62 *Id.*

63 See Resnik, *Managerial Judges*, *supra* note 11.

64 See Resnik, *Trial as Error*, *supra* note 19, at 938–43; Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133 (1997) (discussing how procedural processes migrate from one kind of case to another).

uct” of pretrial conferences but ought not itself be an objective stated by judges convening those conferences.<sup>65</sup>

The 1983 amendments represent the triumph of those judges who sought to gain authority to press for settlement as well as to streamline trials. The judicial charter to manage and to settle cases became codified, as the discretionary possibility of a conference became an obligatory requirement that judges enter scheduling orders to frame the pretrial process.<sup>66</sup> As the drafters noted, the purposes were to make “case management an express goal of pretrial procedure” and to move away from a pretrial “conference focused solely on the trial and towards a process of judicial management that embraces the entire pretrial phase, especially motions and discovery.”<sup>67</sup> Further, Rule 16 listed as one of its goals “facilitating the settlement of the case.”<sup>68</sup> Rule 16 authorized participants “at any conference under this rule . . . [to] consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute.”<sup>69</sup> As the Advisory Committee’s commentary put it, that provision “explicitly recognizes that it has become commonplace to discuss settlement at pretrial conferences.”<sup>70</sup> Yet the Rule also classified certain kinds of activities—“extrajudicial procedures to resolve the dispute”<sup>71</sup>—as “adjudicatory techniques outside the courthouse.”<sup>72</sup>

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65 See Resnik, *Trial as Error*, *supra* note 19, at 947–49 (detailing the debates about whether, because settlement could be a “by-product” of conferences, judges ought to raise the topic).

66 See FED. R. CIV. P. 16(b) (1983); see also Resnik, *Managerial Judge*, *supra* note 11, at 399–402; Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981).

67 See Advisory Committee Notes to subsection 16(a), FED. R. CIV. P. 16 (1983).

68 FED. R. CIV. P. 16(a) (1983).

69 FED. R. CIV. P. 16(c)(7) (1983).

70 Advisory Committee Notes to FED. R. CIV. P. 16(c)(7) (1983).

71 FED. R. CIV. P. 16(c)(7) (1983).

72 As the Rule stated in the 1983 amendments, the purposes of a pretrial conference included consideration of “the possibility of settlement or the use of extrajudicial procedures to resolve the dispute.” FED. R. CIV. P. 16(b)(7) (1983). In 1993, the word “extrajudicial” was deleted; the Advisory Committee explained that the new language described

more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. . . .

See Advisory Committee Notes to the 1993 amendments to FED. R. CIV. P. 16(c)(9).

A decade later, those “extrajudicial procedures” officially moved inside the courthouse. In 1993, Rule 16 was again amended to detail more of the work and the power of the managerial judge, authorized to direct “a party or its representative” to “be present or reasonably available by telephone in order to consider possible settlement of the dispute.”<sup>73</sup> The 1993 amendments deleted the description of some techniques as “extrajudicial” and called them instead “special procedures.”<sup>74</sup> Added to the Rule’s text was that the goal of such intervention was to “assist in resolving the dispute,”<sup>75</sup> in contrast to the prior statement that the aim was “to resolve the dispute.”<sup>76</sup> Thus judges moved from resolution by *adjudication* to resolution by *negotiation*. As the drafters explained:

Even if a case cannot be immediately settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to the consensual resolution of the dispute without a full trial on the merits.<sup>77</sup>

Furthermore, although the notes explaining the 1983 amendment to Rule 16 had cautioned judges against imposing “settlement negotiations on unwilling litigants,”<sup>78</sup> the 1993 ruledrafters gave judges power (whose parameters are unclear)<sup>79</sup> to compel participation even when parties were reluctant to do so. As the Advisory Com-

73 FED. R. CIV. P. 16(c)(16) (1993).

74 FED. R. CIV. P. 16(c)(9).

75 *Id.* (emphasis added).

76 FED. R. CIV. P. 16(c)(7) (1983).

77 Advisory Committee Notes to the 1993 amendments to paragraph 16(c)(9), FED. R. CIV. P.

78 Advisory Committee Notes to FED. R. CIV. P. 16(c)(7) (1983).

79 *See, e.g., In re Atlantic Pipe Corp.*, 304 F.3d 135, 138 (1st Cir. 2002) (holding that a district court may order “an unwilling party to participate in, and share the costs of, non-binding mediation” either through local rules or statutory provisions or under its “inherent powers as long as the case is an appropriate one and the order contains adequate safeguards”); *In re Novak*, 932 F.2d 1397, 1407 (11th Cir. 1991) (concluding that courts have inherent authority to “direct parties to produce individuals with full settlement authority at pretrial settlement conferences”). The *Novak* court also concluded that such power extended to named parties or nonparty insurers in charge of a litigation but that a judge could not order an employee of a nonparty insurer to participate. *Id.* The appellate court also reminded lower court judges that they lack the power to compel parties to settle. *Id.* at 1405 (citing *Kothe v. Smith*, 771 F.2d 667 (2d Cir. 1985)); *cf. In re African-American Slave Descendants’ Litigation*, 272 F. Supp. 2d 755, 758 (N.D. Ill. 2003) (concluding that where a local rule provides only for voluntary mediation and no federal statute compels mandatory mediation, neither the Federal Rules nor a court’s inherent powers should be used to require mediation); *see also* discussion *infra* notes 166–204 and accompanying text.

mittee noted, the rule “acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties.”<sup>80</sup>

This approach has led to trial judges who energetically promote settlement. Evidence of their activities comes from descriptions of cases ranging from the many efforts to end the antitrust litigation against Microsoft through a mediation with Richard Posner (a judge on the Seventh Circuit but serving as a “mediator”)<sup>81</sup> to protests by litigants in more ordinary lawsuits, as they object to judicial insistence on the use of ADR.<sup>82</sup>

Increasingly, judicial commentary describes going to trial as a “failure of the system,”<sup>83</sup> but such “failures” are no longer common-

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*See generally* Jeffrey A. Parness & Lance C. Cagle, *Guiding Civil Case Settlement Conferences and Their Aftermath: The Need to Amend Illinois Supreme Court Rule 218*, 35 LOY. U. CHI. L.J. 779 (2004) (reviewing opinions on the enforceability of judicial insistence on requiring settlement discussions and calling for written rules for participants in pre-trial conferences); Morton Denlow & Jennifer E. Shack, *Judicial Settlement Databases: Developments and Uses*, 43 JUDGES' J., Winter 2004, at 19 (describing efforts to develop databases to use as parameters for “fair” settlements). For discussion about the possibility of coercive uses of settlement powers before the 1983 change, see Resnik, *Managerial Judges*, *supra* note 11, at 412–13.

80 *See* Advisory Committee Notes to FED. R. CIV. P. 16(b)(9) (1993).

81 *See* Steve Lohr, U.S. vs. Microsoft: *The Negotiations*, N.Y. TIMES, Apr. 4, 2000, at C1; Richard Posner, Mediation: Address for the Frank E.A. Sander Lecture before the American Bar Association, Section on Dispute Resolution (July 8, 2000) (June 12, 2000 manuscript on file with the author).

82 *See, e.g.*, *Pitman v. Brinker Int'l, Inc.*, No. CVO2-1886PHX-DGC, 2003 WL 23353478 (D. Ariz. Oct. 3, 2003) (upholding in part the imposition of sanctions by a magistrate judge on a defendant for failure to comply with a mandatory settlement conference order requiring that parties authorized to settle be physically present and prepared to engage in meaningful settlement negotiations); *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590 (8th Cir. 2001) (holding that the district court had the authority under Rule 16 and a local rule to impose sanctions on a litigant who did not participate in good faith in a mandatory referral to a mediation).

83 Resnik, *Trial as Error*, *supra* note 19, at 925. Of the various enthusiastic constituencies for ADR, the support from judges is puzzling, as one might have thought that judges could be counted among adjudication's loyalists. Yet judges have used both their doctrinal authority and their dominant position as revisers of the 1938 Federal Rules of Civil Procedure to press towards disposition without adjudication, thereby risking their own status by minimizing the reliance on their unique form of authority. *See* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (Richard Terdiman trans., 1987).

Why have jurists become intent on promoting ADR? Three explanations, based on differing analyses of events and of the desirability of adjudication, explain what I have elsewhere described as competing trends of proliferation and privatization. *See* Resnik, *Migrating, Morphing, and Vanishing*, *supra* note 23, at 785–89. A first presumes that adjudication's utility attracted many claimants, resulting in overload. Judges saw

place. Rather “a full trial on the merits” has become a rare event. In the early 1940s, about fifteen percent of federal civil cases ended with a trial.<sup>84</sup> In 1962, about twelve percent the civil docket was resolved by trial; today, trials are begun in about two percent of the civil docket.<sup>85</sup> While dispositions have risen significantly over these years (from 50,000 dispositions in 1962 to more than 260,000 in 2002),<sup>86</sup> even the absolute number of civil trials has decreased, from about 5800 in 1982

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too many cases, too long dockets, and too few decisionmakers, so judges used their powers over process to try to accommodate more claimants. Under this analysis, judges are attempting forms of triage, modifying adjudicatory services in an effort to meet demand.

A second, again presuming adjudication’s utility and specifically focused on its power, understands the changing attitudes to be a form of backlash rather than accommodation. As new kinds of claimants gained authority to make claims, new kinds of defendants were put to the burden of explaining their actions. See Judith Resnik, *The Rights of Remedies: Collective Accountings for and Insuring Against the Harms of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 247 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 LAW & SOC. INQUIRY 659 (2003); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

The procedural and substantive reforms that redistributed the power to use adjudication produced many institutional actors—both public and private—who were uncomfortable when labeled defendants and subjected to open examination. They did not like court-imposed remedies such as prison reform, affirmative action, or tort liability. Some of them had the ability to “play for the rules,” to borrow Marc Galanter’s now classic explanation of why the “haves” come out ahead.” See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 100 (1972) [hereinafter Galanter, *Why the “Haves” Come out Ahead*]. Repeat players, with an advantage over “one-shot” participants, gained sufficient control in the federal government to install like-minded people as the judges who have the authority to make the rules by which all are judged. See HERMAN SCHWARTZ, *RIGHT WING JUSTICE: THE CONSERVATIVE CAMPAIGN TO TAKE OVER THE COURTS* (2004); Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003) (both describing how, beginning in the 1980s, sequential Republican administrations relied on judicial appointments as a mechanism to change the law).

A third explanation is premised on adjudication’s limitations, resulting in a failing faith in adjudicatory procedures. From a variety of vantage points, the processes of courts seem too easily exploited, too labor intensive, and too unpredictable. Strategic manipulation, uncontrollable lawyers, and questionable outcomes have prompted judges, joined by many others, to rework liability and procedural rules to try to curb abuses and mitigate structural weaknesses.

84 See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 Wis. L. Rev. 631, 633 [hereinafter Yeazell, *Misunderstood Consequences*].

85 Galanter, *Vanishing Trial*, *supra* note 23, at 460 tbl.1, 462 fig.1, 464.

86 *Id.* at 462 tbl.1.

to about 4600 in 2002.<sup>87</sup> That declining percentage exists across various kinds of cases on the federal docket, with comparable falling rates of trial on the criminal side.

Such data have prompted Judge Patrick Higginbotham of the Fifth Circuit to title a lecture *So Why Do We Still Call Them Trial Judges?*,<sup>88</sup> and the Litigation Section of the American Bar Association to enlist a group of academics to assess the import of “*The Vanishing Trial*.”<sup>89</sup> The American Bar Association has also launched a project on state court funding.<sup>90</sup> The support of state courts generally accounts for less than three percent of state budgets.<sup>91</sup> Almost two-thirds of state courts have faced hiring freezes, and many have imposed new fees, cut back programs, and sometimes suspended certain operations.<sup>92</sup> Problems of staffing and support have also been identified and sometimes denoted a “crisis” within the federal system.<sup>93</sup>

Demands on courts and their budget shortfalls also help to explain the interest in alternative methods of and places for dispute resolution. And, in contrast to concerns about the “vanishing trial” and more generally about funding for courts, the market in ADR appears to be flourishing—with conferences (on topics such as “Court ADR”), services (through firms with names such as “EndDispute” or “JAMS”—

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87 *Id.* at 461.

88 See Patrick E. Higginbotham, The Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University: *So Why Do We Call Them Trial Courts?*, in 55 SMU L. REV. 1405, 1409–13 (2002).

89 See Galanter, *Vanishing Trial*, *supra* note 23; see also Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17 (2003).

90 See BLACK LETTER RECOMMENDATIONS OF THE ABA COMMISSION ON STATE COURT FUNDING (2004) [hereinafter ABA 2004 STATE COURT FUNDING REPORT], and *State Court Funding Crisis: ABA Commission on State Court Funding*, available at [http://www.abanet.org/jd/courtfunding/pdf/report\\_with\\_rec.pdf](http://www.abanet.org/jd/courtfunding/pdf/report_with_rec.pdf). Upon the recommendation of the Standing Committee on Judicial Independence, the ABA House of Delegates adopted the report and recommendations of the ABA Commission on State Court Funding as they were submitted. See Memorandum on the 2004 Annual Meeting from the Select Committee of the House, to Members of the House of Delegates 8 (Aug. 23, 2004).

91 ABA 2004 STATE COURT FUNDING REPORT, *supra* note 90, at 4.

92 *Id.* at 5.

93 See, e.g., Marcia Coyle, *This Time, Wolves at Justice's Door: Where Budget Woes in Federal Courts Are Not New, Latest Crunch Is Severe*, NAT'L L.J., Nov. 1, 2004, at S1 (detailing concerns about the inability to maintain services and discussion how, about four years ago, the federal judiciary went from a ten percent annual increase in its budget to increases of under five percent per annum, despite growing caseloads); *FY 2004 Appropriations Finally Ok'd; But Courts Still Face Fiscal Threat*, 35 THIRD BRANCH 1 (Feb. 2004) (describing an increase for the budget of federal courts as 4.7 percent, explained as 2.3 percent under what was needed to maintain services).

Judicial Arbitration and Mediation Services, Inc.), law school classes,<sup>94</sup> model rules,<sup>95</sup> and an ever-expanding literature addressing the progress and challenges.<sup>96</sup>

Fewer trials and more conciliation results in less appellate oversight of trial-level judges, which is (as Stephen Yeazell has put it) one of the “misunderstood consequences” of the 1930s reforms.<sup>97</sup> The various changes in statutes, doctrine, and court-based rules, coupled with educational programs for judges, have helped to redefine the “good judge” as a person focused on and able to achieve dispositions quickly. As one judge lectured his colleagues, “in most cases, the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement.”<sup>98</sup> What is judicial (and judicious) is no longer equated with adjudication, with public processes, and with reasoned deliberation.

Further, settlement pressures are not confined to the trial courts. Appellate courts have also changed their processes to aim for disposition through conciliation. Federal rules now permit appellate courts to “direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues

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94 See *supra* note 46 (listing several of the casebooks and hornbooks now available); *supra* note 45 (detailing the number of teachers listed as providing such classes).

95 See, e.g., UNIF. MEDIATION ACT, 7A pt. II U.L.A. (Supp. 94 2004) (approved by the National Conference of Commissioners on Uniform State Laws and recommended for enactment in all the states in 2001). Two states (Illinois and Nebraska) have enacted such statutes, effective in January 2004. *Id.* In 2003, the National Conference of Commissioners on Uniform State Laws approved an amendment to the Uniform Mediation Act to add a section to include “international commercial conciliation” and “international commercial mediation” within the purview of the act. See AMENDMENT TO THE UNIFORM MEDIATION ACT TO ADD AN ARTICLE REGARDING INTERNATIONAL COMMERCIAL MEDIATION (2003), available at <http://www.law.upenn.edu/b11/ulc/mediaticca/2003act.pdf>.

96 Many volumes are aimed at practitioners. See, e.g., HOW ARBITRATION WORKS (Alan Miles Ruben ed., 6th ed. 2003) (citing on its cover page the Committee on ADR in Labor & Employment Law of the ABA); HOW ADR WORKS (Norman Brand ed., 2002) (citing the Committee on ADR in Labor & Employment of the ABA as its sponsoring organization). See generally Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93 (2002).

97 Yeazell, *Misunderstood Consequences*, *supra* note 84, at 646–48.

98 Hubert L. Will, *Judicial Responsibility for the Disposition of Litigation*, *Proceedings of the Seminar for Newly Appointed United States District Judges*, 75 F.R.D. 203, 203 (1976). This comment from Judge Will was made in conjunction with a discussion in which Judges Robert R. Merhige and Alvin B. Rubin also spoke. See generally Judith Resnik, *Mediating Preferences: Litigants’ Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155.

and discussing settlement.”<sup>99</sup> More than half of the federal circuits run such a “civil appeals management program” (CAMP) and oblige attorneys for disputants to meet with staff members of the appellate court to negotiate settlements.<sup>100</sup>

## 2. Outsourcing: The Changing Doctrine on Contractual ADR

In addition to the internalization of ADR, judges have another means of promoting ADR—enforcing contracts that divest courts of jurisdiction. Organized alternatives to courts predate contemporary developments; various trade groups as well as some religious and ethnic communities have long provided their own stylized dispute resolution processes for conflicts arising within these self-contained communities.<sup>101</sup> But the law had been ambivalent about enforcing

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99 See FED. R. APP. P. 33. The rule is described as “entirely rewritten” in the early 1990s by the Advisory Committee Notes to the 1994 amendment.

100 See, e.g., 1ST CIR. R. APP. P. 33(b)(1), app. (2004) (discussing a pre-argument conference “to consider the possibility of settlement” with a person designated by the court as a “Settlement Counsel”); 2D CIR. R. APP. P. app., Guidelines for Conduct of Pre-Argument Conferences under the Civil Appeals Management Plan (2004) (describing the importance of an objective evaluation by Staff Counsel that considers “the possibility of settlement” as well as the simplification of issues, and that in many instances the result is “settlement or withdrawal of some appeals or particular issues”); 5TH CIR. R. APP. P. 33, Internal Operating Procedures: Appeal Conferences (1996) (describing referral of cases to an “appellate conference attorney” for a meeting at which settlement is one of the topics to be addressed); 6TH CIR. R. APP. P. 33(c)(1), Appeal Conferences—Mediation (2004) (requiring that all civil cases be reviewed by a “mediation attorney” to decide whether a pre-argument conference would be useful and permitting either a circuit judge or a staff attorney to serve as a “mediation attorney” to discuss settlement, and noting that if a judge serves, that judge may not sit on a panel but could participate in an en banc rehearing); 8TH CIR. R. APP. P. 33(a)(b) (2004) (providing that civil appeals may be sent to a prehearing conference program to enable discussions of a variety of matters, including settlement and authorizing either the program director or a senior district judge to conduct such conferences); 9TH CIR. R. APP. P. 33-1, Settlement Program (2004) (providing that the “primary purpose” of such conferences is “to explore settlement,” noting that either “the judge or court mediator” may require parties to attend, and that parties can also submit issues “to an appellate commissioner for a binding determination”); FED. CIR. R. APP. P. 33 (2004) (Appeal Conferences) (permitting the court to direct “attorneys—and when appropriate the parties—to participate in one or more conferences to address any matter . . . including . . . settlement” that aids in the disposition, permitting a judge or other person “designated by the court” to preside, and the court to issue orders thereafter “controlling the course of the proceedings or implementing any settlement agreement”).

101 See, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 132–33 (1992); see also ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

obligations to participate in private dispute resolution at the expense of access to public processes. Judges guarded their own monopoly power and regularly refused to enforce arbitration contracts.

Over the course of the twentieth century, the attitudes of legislators and court-based adjudicators changed. In 1925, Congress enacted the Federal Arbitration Act (FAA), recognizing arbitration contracts as enforceable obligations.<sup>102</sup> Yet judges sometimes declined enforcement if such agreements contained waivers of federal litigation rights and were made before actual conflicts arose. Jurists found arbitration too flexible, too lawless, and too informal when contrasted with adjudication, esteemed for its regulatory role in monitoring adherence to national norms.<sup>103</sup>

However, in the 1980s, the United States Supreme Court revised its earlier rulings and upheld broad grants of authority to arbitrators, even when federal statutory rights to bring lawsuits were claimed.<sup>104</sup> Instead of objecting to the informality of arbitration, judges praised its flexibility. But judges did not simply alter their attitudes towards arbitration; they also changed their views of adjudication, which came to be described as only one of several techniques appropriate for the resolution of disputes.<sup>105</sup> Today, law often sends contracting parties (including employees and consumers) to mandatory arbitration programs created by employers, manufacturers, and the providers of goods and services.<sup>106</sup> Many of the disputants pressed into these ac-

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102 See Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1-14 (2000)). As first enacted, it was called the "U.S. Arbitration Act," but it is now commonly referred to as the Federal Arbitration Act. Professors Michael Leroy and Peter Feuille argue that the claim of judicial hostility to arbitration is overstated. See Michael H. LeRoy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 OHIO ST. J. ON DISP. RESOL. 249 (2003).

103 See, e.g., *Wilko v. Swan*, 346 U.S. 427 (1953). See generally Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995) [hereinafter Resnik, *Many Doors? Closing Doors?*].

104 See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (both upholding ex ante arbitration agreements as sufficient despite claims of violation of federal securities and antitrust rights). Thereafter, the Court enforced arbitration clauses despite allegations of discrimination under federal or state law. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

105 Resnik, *Many Doors? Closing Doors?*, *supra* note 103, at 253-54; see also Paul D. Carrington, *Self-Deregulation, the "National Policy" of the Supreme Court*, 3 NEV. L.J. 259 (2002).

106 See, e.g., *Circuit City*, 532 U.S. 105; *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000); see also Demaine & Hensler, *supra* note 10. As noted *supra* note 12, when litigants challenge the obligation to arbitrate, courts inquire into the adequacy of

commodating negotiations are strangers to each other rather than participants in long-term commercial relationships or in communities of affiliation.<sup>107</sup>

### 3. Devolution to Agencies

Yet a third way in which Congress and courts have joined together to promote ADR is through the devolution of adjudicatory and conciliatory work from courts to public institutions such as agencies. Since the nineteenth century, executive officials have had the power to provide benefits (such as veterans' pensions),<sup>108</sup> but only during the twentieth century did these legislative grants gain the status of entitlements to which process rights became attached under Supreme Court elaboration of due process doctrine. In the early days of agency-based factfinding, enforcement powers rested primarily in the courts, which also retained authority to review factfinding.<sup>109</sup>

Over the decades, Congress gave more autonomy to agency adjudicators. While the Supreme Court once hesitated to uphold the delegation of too many attributes of federal judicial power to non-life-

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arbitral tribunals and sometimes find the process insufficient or the form of contracting unconscionable. See generally Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004). Additional concerns can be found in commentary by Paul D. Carrington and Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331; Richard C. Reuben, *Mandatory Arbitration: Democracy and Dispute Resolution*, 67 LAW & CONTEMP. PROBS. 279 (2004); and Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW & CONTEMP. PROBS. 253 (2004).

Further, in a rider to an appropriations bill in 2002, Congress created an exception to enforcement of predispute clauses for arbitration for automobile franchisers. See Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, Pub. L. No. 107-273, § 11028, 116 Stat. 1758 (2002) (codified at 15 U.S.C. § 1226). A recent comment on this provision argued that it was both the first to create an exemption from the FAA and benefitted "relatively sophisticated business interests rather than individual consumers or employees who have also sought exemptions." See Carl J. Chiappa & David Stoelting, *Tip of the Iceberg? New Law Exempts Car Deals from Federal Arbitration Act*, 22 FRANCHISE L.J. 219, 219 (2003). The effects of this act have been the subject of some litigation addressing what contracts are affected by it. See, e.g., *DaimlerChrysler Vans LLC v. Freightliner of N.H., Inc.*, Civil No. 03-304-B, 2004 U.S. Dist. LEXIS 316 (D.N.H. Jan. 8, 2004) ("not for publication"); *Pride v. Ford Motor Co.*, 341 F. Supp. 2d 617 (N.D. Miss. 2004).

107 Cf. Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW AND HUM. BEHAV. 121 (1982).

108 See generally THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992).

109 See *Crowell v. Benson*, 285 U.S. 22 (1932).

tenured federal factfinders,<sup>110</sup> in recent years the Court has embraced several congressional grants of jurisdiction to such judges and explained just how “judge-like” agency decisionmakers are.<sup>111</sup> Non-life-tenured federal adjudicators are now understood to be competent to rule on a range of issues with ever greater finality<sup>112</sup> and to develop their own systems of appellate review.<sup>113</sup> In short, a second set of “federal courts” has developed inside federal agencies that also promulgate rules of procedure and, as noted, often promote negotiated outcomes.<sup>114</sup>

### C. A New Civil Procedure

The insistence on the use of conciliation, whether inside courts or provided through processes based elsewhere, represents the emergence of a new mode of civil processing.<sup>115</sup> Aspects of privately-based

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110 See *id.* at 51, 62 (expressing concern about the delegation of “essential attributes of the judicial power” and refusing to accord finality to determinations by hearing officers of “jurisdictional facts”).

111 See, e.g., *Fed. Mar. Comm’n v. S.C. Ports Auth.*, 535 U.S. 743 (2002) (concluding that because that adjudicatory commission is so court-like, states enjoy immunity from privately-commenced proceedings within it). See generally Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985 (1991).

112 See, e.g., *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986); see also Resnik, *Inventing the Federal District Courts*, *supra* note 24, at 625–43 (detailing the shift in understanding and the doctrinal evolution about when life-tenured judges were required).

113 Within the federal courts, each circuit has the power to create “bankruptcy appellate panels” (BAPs) comprised of bankruptcy judges (who serve for fourteen-year, renewable terms). See 28 U.S.C. § 158(b) (2000). Rulings from BAPs can be appealed to the circuit courts but do not go, as may judgments of individual bankruptcy judges, to district courts. Within agencies, appellate structures vary. The recently created Court of Appeals for Veterans Claims has developed a single-judge appellate process in addition to using three-judge panels. See Sarah M. Haley, *Single-Judge Adjudication in the Court of Appeals for Veterans Claims and the Devaluation of Stare Decisis*, 56 ADMIN. L. REV. 535 (2004) (comparing that practice and the issuance by federal appellate courts of decisions that cannot be cited as precedent). For challenges to the process of state administrative procedures, see *Barcia v. Sitkin*, 367 F.3d 87 (2d Cir. 2004) (reviewing a request to modify a consent decree involving the practices of the New York State Unemployment Insurance Appeal Board, challenged for process failures under the Social Security Act and the Due Process Clause).

114 See *supra* notes 48–49 and accompanying text.

115 This phenomenon has attracted a good deal of attention within the academy. See, e.g., Robert G. Bone, *From Judgment to Settlement: The Changing Character of American Courts* (University Lecture, Boston University, 2000); Resnik, *Trial as Error*, *supra* note 19; Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of*

dispute resolution are now melded with public processes as the state itself embraces private dispute resolution for a wide array of conflicts brought to its courts and puts judges in the job of trying to resolve disputes through contracts. In many respects, the turning to and incorporating of ADR into federal adjudication represents the privatization of public processes—a development that is not unique to courts.<sup>116</sup> Just as the expansion of the Due Process Model of Civil Procedure rested on a normative framework welcoming of national regulation and rights-seeking, so the shift to contract is nested inside social and political attitudes less hospitable to government oversight.

The Contract Model of Procedure rests on analytic premises different from that of the Due Process Model. Adjudication is predicated on public and disciplined factfinding by judges and juries, licensed to inquire into specific problems to assess individual instances of alleged wrongdoing in order to enforce obligations.<sup>117</sup> Both judges and litigants are confined to particular roles. As Lon Fuller famously explained, the presentation of proofs by litigants and the determination based on reasons by judges are the “distinguishing” characteristics of adjudication, which puts individuals working inside its strictures to “a peculiar form of participation.”<sup>118</sup>

Support for such a process rests on a series of normative and political judgments: that the state is the appropriate central regulator of conduct, that norm enforcement through transparent decisionmaking by state-empowered judges is desirable, that public resources ought to be spent upon individual complaints of alleged failures to

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*Settlements*, 46 STAN. L. REV. 1339 (1994). The ABA project on the Vanishing Trial, *see* notes 23 and 89 *supra*, is an effort to bring the issues into focus more broadly.

116 Proponents praise such evolutions as forms of “governance” that meld public or private. *See, e.g.*, Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003). Opponents see this development as a form of colonization, although who is the colonizer and who the colonized is less clear. Some ADR loyalists worry about law undermining ADR’s values, and some adjudication loyalists worry that private authority is appropriating public power. Illustrative is the debate about the promulgation in 2001 of a Uniform Mediation Act, *see supra* note 95, and about revision of the 1994 Model Standards of Conduct for Mediators (put forth by the American Arbitration Association, the American Bar Association’s Section on Dispute Resolution, and the Society of Professionals in Dispute Resolution, and reprinted in *HOW ADR WORKS*, *supra* note 96, at 983–90). As one commentator explained his objections, the movement towards certification and standards undermines the “concept of party self determination” which, in his view, is at the core of mediation. *See* Harry N. Mazadoorian, *Conflicting Goals in National Developments*, CONN. L. TRIB., July 5, 2004, at 2.

117 *See* Resnik, *Trial as Error*, *supra* note 19, at 1024–31; Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 5–17 (1979).

118 Fuller, *supra* note 7, at 364.

comply with legal obligations, that litigants ought to be provided with opportunities to present proofs and reasoned arguments, that the power of adjudicators can be controlled by obliging them to rely on facts adduced on the record and to perform some of their duties in public, and that legitimate judgments thus result.<sup>119</sup> While ad hoc juries have little by way of obligations of explanation, full-time judges are supposed to provide rationales for their application of law to fact, and those decisions are in turn subjected to appellate review at the parties' behest. Direct participants and third parties benefit through the visible display of law's requirements applied to a myriad of specific situations.

Processes denoted as ADR or DR rest on other assumptions. Unlike adjudication's preference for adjudicators' pronouncements, ADR looks to the participants to validate outcomes through consensual agreements, sometimes fashioned by bilateral negotiation and sometimes facilitated through third parties.<sup>120</sup> But ADR has far fewer role constraints and does not commonly build in requirements of public explanation of the results obtained nor insist that such outcomes be justified in relationship to legal norms. ADR practitioners are free to "get it done" rather than obliged to explain how they "got it right." Indeed, ADR is often chosen because it has the advantage of private decisionmaking, made in the "shadow" rather than in the light. Public benefits are presumed to flow from the reduction of conflict and the resolutions predicated on parties' preferences.

Before turning to the problems of the law of Contract Procedure, let me be clear that while I believe Due Process Procedure to be in eclipse, it is surely not dead. As was evident from several decisions of the United States Supreme Court in the 2004 term, those justices (as well as lower court jurists) remain committed to procedural due process. *Hamdi v. Rumsfeld* and other 9/11 cases are exemplary in that most members of the Court insisted that the President lacked the unilateral power to confine individuals without affording them some kind of process.<sup>121</sup> A majority refused to permit complete reliance on what

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119 Several Supreme Court decisions address aspects of these premises. The public character of adjudicatory processes has been described in cases such as *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986).

120 See Amy Schulman, *Sidebar, Change of Venue*, in *THE FUTURE LITIGATION: SPECIAL REPORT, A SUPPLEMENT TO THE AMERICAN LAWYER AND CORPORATE COUNSEL* 26 (2003).

121 See *Rasul v. Bush*, 124 S. Ct. 2686, 2690 (2004) (concluding that federal courts had jurisdiction, pursuant to their statutory jurisdiction involving habeas corpus, 28 U.S.C. § 2241 et seq., to consider challenges brought to the legality of detention of "foreign nationals captured abroad in connection with hostilities and incarcerated at

could be characterized as a kind of ADR—the in-house programs offered by the Executive to detainees under the Executive Order establishing military commissions; rather, the majority insisted on some independence for the decisionmakers and some structure by which they were to make decisions.<sup>122</sup> Moreover, in *Tennessee v. Lane*, a majority held that access to courts was such a fundamental right that, whatever the scope of state sovereign immunity under the Americans with Disabilities Act, lawsuits against states were possible if states failed to enable the handicapped to enter their courthouses.<sup>123</sup>

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the Guantanamo Bay Naval Base, Cuba”); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635 (2004) (plurality opinion) (holding that “due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis of that detention before a neutral decisionmaker”). Justice Souter, joined by Justice Ginsburg, concurred in part and dissented in part, whereas Justice Scalia, joined by Justice Stevens, concluded that rather than vacating the lower court’s judgment, it ought to be reversed because absent a congressional suspension of habeas corpus, Mr. Hamdi had rights of access to the federal courts. *Id.* at 2660–61; *see also* *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (concluding that the habeas petition, filed by a United States citizen detained in South Carolina, could not be heard by a federal trial court in New York, where the petitioner once was).

122 *See Hamdi*, 124 S. Ct. at 2635 (describing the obligation to provide a neutral decisionmaker). The plurality insisted on impartiality but did not rule out the possibility that “an appropriately authorized and properly constituted military tribunal” could apply the minimal standards of process that it articulated, including individualized hearings for factfinding, an initial burden on the government to produce evidence of its decision to detain, with a rebuttable presumption in favor of the government’s evidence such that a petitioner could provide “more persuasive evidence” that he or she fell “outside the criteria” for detention. *Id.* at 2649–51. In the proceedings now ongoing, process demands have been reiterated. According to news reports, the result is “the possibility that the proceedings specifically established to provide a more efficient alternative to the nation’s civilian criminal courts could become as problem-ridden as” proceedings against terrorists in the federal district courts. *See* Neil A. Lewis, *Terror Tribunal Defendant Demands to Be Own Lawyer*, N.Y. TIMES, Aug. 27, 2004, at A14. Further, many critics complain that the procedures accorded violate both United States and international law. *See, e.g.*, Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1260–66 (2002).

123 124 S. Ct. 1978, 1988–92 (2004). George Lane, a paraplegic reliant on a wheelchair for his mobility, averred that he had to crawl up steps to a second floor courtroom in order to respond to criminal charges in a courthouse in Tennessee. Joined by others, Lane argued that Title II of the Americans with Disabilities Act (ADA), which forbids discrimination against the disabled in public services, programs, and activities, required that Tennessee make reasonable accommodations to enable access. These plaintiffs also sought monetary relief for their injuries. *Id.* at 1982–83. Tennessee, joined by a few other states, countered that Congress could not constitutionally apply the ADA’s obligations to states because they enjoyed immunity, as sovereigns, from such private enforcement actions. *Id.* at 1982–85. An earlier ruling, *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), had held

Above, I invoked the just-published book *Civil Procedure Stories* to illustrate how much the Due Process Model permeated the “great” procedural judgments of the twentieth century. I assume that, when the next version of that book comes into being, due process cases (perhaps such as *Hamdi v. Rumsfeld*) will be chosen for chapter-length analyses. But they will, in my view, be joined by rulings such as *Matsushita Electric Industrial Co. v. Epstein*,<sup>124</sup> *Martin v. Wilks*,<sup>125</sup> *Amchem Products, Inc. v. Windsor*,<sup>126</sup> *Ortiz v. Fibreboard Corp.*,<sup>127</sup> and *Circuit City Stores, Inc. v. Adams*.<sup>128</sup> Several of these opinions are not about whether court-based processes are accessible and fair. Rather, these decisions are about the jurisdiction of courts to settle cases, the scope of the issues settled, the power to bargain, the obligations of judges to oversee bargaining, and the enforceability of contracts to divest courts of jurisdiction. In short, *Civil Procedure Stories* need now to incorporate a new plot line—of contract.

#### IV. CONTRACT PROCEDURE

My purpose in this section is to outline some of the analytic questions with which Contract Procedure has to deal. Proceduralists have become aware of the complexity of achieving or appraising the fairness of settlements in the context of class actions, where the challenges of representative litigation make vivid the difficulties of monitoring those charged with providing consent on behalf of absentees.<sup>129</sup> As I detail below, comparable problems exist in smaller-scale

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that Title I of the ADA, involving non-discrimination in employment, could not constitutionally be applied by private parties seeking monetary damages from the states. Further, under current Supreme Court doctrine, Congress may use its Fourteenth Amendment enforcement powers to authorize private actions, but only if the legislation is an “appropriate remedy for identified constitutional violations” and exhibits “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997); see also *Lane*, 124 S. Ct. at 1998; *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003). In the 2004 decision, the five-person majority did not announce a broad rule about Title II’s applicability to the states but instead relied on the special stature of rights of access to courts, protected by the Due Process Clause, to conclude that Congress had the power to authorize Mr. Lane’s lawsuit against Tennessee. *Lane*, 124 S. Ct. at 1994.

124 516 U.S. 367 (1996).

125 490 U.S. 755 (1989).

126 521 U.S. 591 (1997).

127 527 U.S. 815 (1999).

128 523 U.S. 105 (2001).

129 The strategic behavior of attorneys for plaintiffs, coupled with defendants in search of “global peace” and judges eager to dispose of problems, has sometimes yielded settlements criticized for sacrificing the interests of the injured and the pub-

litigation, filled with conflicts over attorneys' authority to negotiate deals and about the content of agreements reached under the aegis of judges eager to obtain dispositions.

From the technical questions (how does one enter a settlement agreement) to the constitutional (are settlement contracts "cases" over which federal courts have jurisdiction) to the conceptual (ought a law of contracts about agreements made under the auspices of courts differ from contract principles in general), issues abound. As some of the resultant disputes illustrate, the shift to contract has yet to be accompanied by clear rules to guide lawyers or judges or by exploration of the normative implications of the nascent doctrines. The problems to be addressed include judicial oversight of alternative processes that now are located in court-based programs,<sup>130</sup> in contractual ADR,<sup>131</sup> and in agencies.<sup>132</sup> My focus below is on one aspect—the shape of lawmaking about settlements sparked by court-based bargaining.

### A. Contracting for Jurisdiction

One issue, familiar to proceduralists, is the power of courts to enter and then to enforce settlements. What a series of cases reveals is that through settlement, litigants can obtain jurisdiction in either state or federal court that would not or might not exist were litigation the only alternative. I describe this phenomenon as "contracting for jurisdiction." Choice of venue clauses, permitting parties to specify in

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lic. See, e.g., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835 (1997); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996). See generally DEBORAH R. HENSLER, NICHOLAS M. PACE, BONITA DOMBEY-MOORE, BETH GIDDENS, JENNIFER GROSS & ERIK K. MOLLER, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000).

130 See, e.g., *In re Atlantic Pipe Corp.*, 304 F.3d 135, 138 (1st Cir. 2002) (discussing what a mandatory mediation order should entail and the need for local rulemaking on ADR programs); Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999).

131 See, e.g., *Faber v. Menard, Inc.*, 367 F.3d 1048, 1055 (8th Cir. 2004) (concluding that a district court had to learn more about the costs of arbitration to determine whether the agreement to do so was unconscionable); *Campbell v. General Dynamics Gov't Sys. Corp.*, 321 F. Supp. 2d 142, 143 (D. Mass. 2004) (addressing the quality of notice of a mandatory arbitration agreement and finding e-mail notification insufficient to permit the extinction of a right to a jury trial).

132 See, e.g., *Dia v. Ashcroft*, 353 F.3d 228, 238 (3d Cir. 2003) (reviewing the "streamlined" regulations issued by Attorney General Ashcroft for permitting affirmation without opinions of rulings by Immigration Judges).

contracts where a dispute will be heard, are one such example that has been approved by the courts.<sup>133</sup>

Another example, resulting in expanding the jurisdiction of state courts, is *Matsushita Electric Industrial Co. v. Epstein*.<sup>134</sup> There, the question was whether the Delaware Chancery Court, with jurisdiction over a state securities case, had the power through a settlement to bar further litigation of shareholders' federal securities claims arising out of the same transactions but raised in cases filed in the federal courts in California. In a ruling that surprised many,<sup>135</sup> the Supreme Court held that although the federal courts had exclusive jurisdiction over the federal claims, a Delaware judgment was entitled to full faith and credit and could therefore preclude subsequent litigation—so long as the representation was adequate.<sup>136</sup> In other words, although Delaware did not have jurisdiction to try such cases, it had (through the “alchemy of settlement”)<sup>137</sup> the authority to dispose of them.

In *Matsushita*, settlement became the means to create *state* jurisdiction more far-reaching than would otherwise be available. In its wake, the problem of “nationwide” state class actions has grown, as have debates about the power of federal judges to use the All Writs Act and the Anti-Injunction Act to stop competing class actions.<sup>138</sup> In addition to generating state court powers, settlements can also be a vehicle for the creation of ancillary *federal* jurisdiction. Further, even given the strictures of the Eleventh Amendment, federal jurisdiction

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133 See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590–95 (1991).

134 516 U.S. 367 (1996).

135 See Marcel Kahan & Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219.

136 On remand, the Ninth Circuit initially held that the representational structure was inadequate. *Epstein v. MCA, Inc.*, 126 F.3d 1235, 1241–42 (9th Cir. 1997). Commentary on that decision can be found in a series of articles published in New York University's Law Review, including William T. Allen, *Finality of Judgments in Class Actions: A Comment on Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 1149 (1998). However, after a rehearing with one judge substituted for Judge William Norris, who had by then resigned from the federal bench, a new majority found that the absent class members had been adequately represented. *Epstein v. MCA, Inc.*, 179 F.3d 641, 642–44 (9th Cir. 1999), *cert. denied*, 528 U.S. 1004 (1999). See generally Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998).

137 This phrase comes from a section of the casebook, ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE 699–754 (2003), that Owen Fiss and I co-authored.

138 See, e.g., *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 34 (2002) (holding that the All Writs Act did not provide federal courts with the authority to remove state cases unless federal jurisdiction existed independently over the original subject matter of the lawsuit).

can through consent decrees impose obligations on state officials that could not flow from adjudicated orders.<sup>139</sup> (In 1996, Congress created an exception sharply limiting federal courts' continuing jurisdiction over consent decrees in prison reform litigation.)<sup>140</sup>

Moreover, federal district courts can also—through settlement—gain decisional authority over multidistrict cases that they currently have no statutory power to try.<sup>141</sup> And a debate exists about whether contracts to arbitrate can give judges more power over arbitrators' decisions than is provided by statutes insulating arbitration outcomes from court review.<sup>142</sup> Thus, if lawyers are careful when they write set-

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139 See *Frew v. Hawkins*, 124 S. Ct. 899, 901–03 (2004) (holding that a 1996 consent decree signed by state officials and obliging them to implement Medicaid provisions on behalf of children in Texas eligible for Early and Periodic Screening, Diagnosis, and Treatment programs under federal law was enforceable despite state officials' claims that to do so undermined state sovereign interests).

140 See Prison Litigation Reform Act, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (1996) (codified as amended at various sections of titles 18, 28, and 42 U.S.C.). An aspect of its constitutionality was addressed in *Miller v. French*, 530 U.S. 327, 350 (2000) (upholding the provision requiring an automatic stay against a challenge that Congress had unconstitutionally intruded on the courts' domain).

141 See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (interpreting the Multidistrict Litigation Act's provision in 28 U.S.C. § 1407(a) for the transfer of civil cases for pretrial proceedings and their remand thereafter to preclude retention of such cases for trial). In contrast, if the case settles during the period of multidistrict litigation (MDL) supervision, no remand is required. Legislation has been proposed to reverse this decision by authorizing the judge assigned to a case through the MDL process to retain jurisdiction for trial, but, as of this writing, this aspect of bills relating to multi-party jurisdiction has not yet been enacted. See Multidistrict Litigation Restoration Act of 2004, H.R. 1768, 108th Cong. (2004).

142 Some of the circuits have stressed that contracts for arbitration should not be used as a pathway to more litigation through parties' contracts authorizing courts to review awards. Other courts have taken the view that the federal policy for arbitration means that contracts can be shaped to reflect parties' preferences, including an agreement to expand the authority of courts to review awards. Compare *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 789 (8th Cir. 2003) (describing that circuit's law as providing that if parties can impose a heightened review standard on arbitrator's findings, they must do so "clearly and unmistakably"), *cert. denied*, 124 S. Ct. 1414 (2004), and *Rivera v. Thomas*, 316 F. Supp. 2d 256, 259–60 (D. Md. 2004) (noting that judicial review of awards is "severely circumscribed" and describing the circumstances under the Federal Arbitration Act and case law when courts may vacate an arbitrator's award), *with* *Gateway Tech., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995) (interpreting the FAA as not precluding parties' decisions to expand federal court review). More recently, the Fifth Circuit described its rule as permitting parties to "modify the FAA's standard of arbitration review." See *Action Industries, Inc. v. U.S. Fidelity & Guaranty Co.*, 358 F.3d 337, 340–41 (5th Cir. 2004) (concluding that in the absence of "clear and unambiguous" contractual language, FAA rules apply). See generally Michael H. LeRoy & Peter Feuille, *The Revolving Door of Justice: Arbitration Agreements That Expand Court Review*, 19 OHIO ST. J. ON DISP. RESOL. 861 (2004); Ste-

tlement documents and when they craft dispute resolution programs, they can succeed in conferring authority on state and federal judges.

But, as the case law illustrates, confusion exists about how to craft contracts to settle lawsuits. The word “settlement” now appears in the Federal Rules but no federal rule currently has as its title either the word “settlement” or the terms “consent decrees” or “consent judgments,” nor do rules detail how to craft the relevant documents. Rather, the parties are left to figure out—by looking at rules about dismissal and about judgments<sup>143</sup> and by relying on local customs—how to end a case with an enforceable agreement.<sup>144</sup> Not all succeed.

### 1. Consenting to a “Decree” or a “Judgment”

Start with the linguistical and normative puzzle of whether consent decrees, consent judgments, consent orders, and settlements are or ought to be all the same. The term “decree” comes from equity practice whereas the term “judgment” comes from law. Whether historically decrees and judgments were themselves different was a question discussed by treatise writers. But even if different, the “distinction between decrees and judgments [had] not always been strictly preserved in American practice.”<sup>145</sup> When the 1938 Federal Rules of Civil Procedure created a single “form of action” and thereby combined the practices of law and equity, drafters picked the word

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phen J. Ware, “Opt-In” for Judicial Review of Errors of Law under the Revised Uniform Arbitration Act, 8 AM. REV. INT’L ARB. 263 (1997). Yet another question is the ability to contract out of law altogether. See Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523 (2005).

143 See FED. R. CIV. P. 41 (Dismissal of Actions); FED. R. CIV. P. 54 (Judgments; Costs); FED. R. CIV. P. 58 (Entry of Judgment).

144 For suggestions as to how to write new rules and examples of rules from states about settlement contracts, see Jeffrey A. Parness & Matthew R. Walker, *Enforcing Settlements in Federal Civil Actions*, 36 IND. L. REV. 33 (2003).

145 1 HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS 4–5 (1891) (also noting that, in states where “all distinction between law and equity, as far as it relates to pleading and practice, is abolished, . . . the difference between judgments and decrees is also swept away”); see also ROBERT MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 356 (1952). Black also drew a distinction between judgments and decrees (on the one hand) and orders—defined as “the mandate or determination of the court upon some subsidiary or collateral matter . . . not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceeding.” BLACK, *supra*, at 5. Moreover, in Black’s lexicon, judgments were exclusively those decisions made by a court “organized under the laws of the particular sovereignty.” Decisions by “arbitrators or of any self-constituted tribunal” were not “judgments.” *Id.* at 7.

“judgment” to use to describe a case’s conclusion.<sup>146</sup> But when doing so, as explained in Part II above, the 1938 drafters were not focused on involving judges in settlement.

Courts did, however, have a longstanding practice—one dating back centuries—of entering agreements that parties made. Pollack and Maitland describe the “seisen under a fine” to be the “final concord levied in the king’s court”; it was “in substance a conveyance of land and in form a compromise of an action.”<sup>147</sup> They report that sometimes that conclusion came from “serious litigation” and other times from compromise.<sup>148</sup> The recordation in courts created proof of the fact of the obligation and facilitated enforcement, given that “contractual actions, actions on mere covenants, were but slowly making their way to the royal court.”<sup>149</sup> Moreover, compromising without approval was an offense because removing cases from courts’ dockets required permission.<sup>150</sup> According to Pollack and Maitland, sometimes judges provided some supervision prior to granting permission and refused “irregular fines.”<sup>151</sup>

Moving centuries forward and across an ocean, commentary and case law in the United States generally assumed without much analysis that consent decrees were available. Debate existed about whether consent decrees were better understood as private contracts or as judicial acts.<sup>152</sup> As federal courts became more involved in the structural injunctions produced through antitrust, school desegregation, employment, and prison reform litigation, the Supreme Court developed more doctrine around this genre of decisionmaking. As the Court explained, consent decrees have “attributes both of contracts and judi-

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146 See FED. R. CIV. P. 54; FED. R. CIV. P. 58, 1938 Federal Rules, *supra* note 3. In lectures explaining those rules, William D. Mitchell (the Chair of the Advisory Committee and a former Attorney General) explained that the term judgment “includes a decree and any order from which an appeal lies.” See Hon. William D. Mitchell, Third Lecture, in Lectures Analyzing and Explaining the New Federal Rules of Civil Procedure, in *RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, ANNOTATED AND APPENDIX* at 155, 200 (1938) (also noting that “[w]herever you see the word ‘judgment’ in these rules, it includes an appealable order”).

147 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 94–97 (2d ed. 1898).

148 *Id.* at 98.

149 *Id.* at 100–01.

150 *Id.* at 98.

151 *Id.* at 99.

152 See 3 A.C. FREEMAN, *A TREATISE OF THE LAW OF JUDGMENTS* 773–74 (Edward W. Tuttle ed., 5th ed. 1925); WILLIAM MEADE FLETCHER, *A TREATISE ON EQUITY PLEADING AND PRACTICE* 724–25 (1902); BLACK, *supra* note 145, at 3–4.

cial decrees,”<sup>153</sup> embodying an agreement of the parties “that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.”<sup>154</sup> Some constraints on judicial entry have followed, including that such decrees must “be directed to protecting federal interests,” “spring from, and serve to resolve, a dispute within the court’s subject matter jurisdiction; must come within the general scope of the case made by the pleadings; and must further the objectives of the law upon which the complaint was based.”<sup>155</sup>

## 2. Collapsing or Making Distinctions Among Consent Decrees, Judgments, and Settlements

Less clear is whether those rules ought to apply to what some judges have called “private settlements.” The Fourth Circuit recently suggested that consent decrees are a special kind of resolution that often entails both some oversight prior to their entry by the rendering court and then ongoing enforcement by that rendering court. The court gave class action, shareholder derivative, and bankruptcy cases as examples. In contrast, runs this distinction, a private settlement “ordinarily does not receive the approval of the court.”<sup>156</sup> In the case making that distinction, the Fourth Circuit undertook an independent inquiry into whether a document designated by a district court as a “consent decree” fit that circuit’s parameters.<sup>157</sup>

Further muddying the waters are other efforts to distinguish among *kinds* of consent decrees as well as between those aspects of a

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153 See Local No. 92, *Int’l Ass’n of Firefighters v. Cleveland*, 478 U.S. 501, 519 (1986) (quoting *United States v. ITT Continental Banking Co.*, 420 U.S. 223, 235–37 (1975)).

154 See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992). Returning to the nineteenth century, Black argued that Blackstone originated the idea of a judgment as a contract, arguably one that could not be impaired by law, but that the opposite view, “supported by numerous and respectable American authorities,” was that judgments were not “in any sense a contract.” BLACK, *supra* note 145, at 11–13.

155 *Frew v. Hawkins*, 124 S. Ct. 899, 903 (2004) (reiterating these criteria from earlier decisions).

156 *Smyth v. Rivero*, 282 F.3d 268, 279–81 (4th Cir. 2002). The court explained that our “federal courts have neither the authority nor the resources to review and approve the settlement of every case brought in the federal system.” *Id.* at 280 (quoting *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 835 (3d Cir. 1995)).

157 *Id.* at 282–85 (concluding that it did not, making attorneys ineligible for attorneys’ fee awards as prevailing parties under the Fourth Circuit’s application of *Buckhannon Board & Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001)).

judgment predicated upon adjudication and those aspects concluded by consent. For example, the Second Circuit has proffered a delineation between “a true ‘consent judgment’” (defined as one in which “all of the relief is agreed to by the parties”)<sup>158</sup> and a “settlement judgment” (defined as one in which, while the “parties have agreed on the components of the judgment,” they have not agreed on all the details or “the wording of the judgment,” and the judge “is obliged to determine the detailed terms of the relief and the wording”<sup>159</sup>). Another variation on the theme comes from the Supreme Court decision in *Martin v. Wilks*,<sup>160</sup> in which the majority and the dissent disagreed about what aspects of the litigation about employment discrimination in the Birmingham, Alabama, fire department had been adjudicated and what settled.

### 3. Keeping or Making Judicial Power

The Fourth Circuit’s effort to set “consent decrees” apart from “private settlement” sits uneasily with the approach suggested by the Supreme Court in the 1994 decision of *Kokkonen v. Guardian Life Insurance Co. of America*.<sup>161</sup> There, in a unanimous decision by Justice Scalia, the Court held that by agreeing to dismiss the lawsuit, the parties had not settled their case in a manner that permitted federal judges to enforce the oral agreement allegedly made. The Court also discussed how parties and courts could craft settlement documents that would generate enforcement powers in the federal system.<sup>162</sup>

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158 *Janus Films, Inc. v. Miller*, 801 F.2d 578, 582 (2d Cir. 1986).

159 *Id.*; see also *Manning v. N.Y. Univ.*, 299 F.3d 156, 163–64 (2d Cir. 2002) (rebuffing a pro se litigant’s disagreements with two provisions of a settlement and invoking *Janus Films* for judges’ authority to “implement the framework settlement it endorsed”). In a different context, the Fifth Circuit invoked the distinction drawn in *Janus Films*. See *United States v. Spruill*, 292 F.3d 207, 217–18 (5th Cir. 2002) (vacating a conviction because of the lack of a holding of a hearing on an indictment, as required by a statute, and quoting *Janus Films* for its delineation of a “true ‘consent judgment’ [in which] all of the relief to be provided by the judgment and all of the wording to effectuate that relief is agreed to by the parties” from a “‘settlement judgment’ [in which] the parties have agreed on the components of a judgment . . . but have not agreed on all of the details or wording of the judgment”).

160 490 U.S. 755 (1989). In Justice Stevens’s dissent, *id.* at 774–75, he characterized the lower court activity as a “genuine adversary proceeding” followed by the entry of consent decrees that were based on and influenced by facts found. The majority opinion by Chief Justice Rehnquist focused instead on the entry of the consent decrees and did not discuss the district court’s factfinding on the underlying claims of discrimination. *Id.* at 759–60.

161 511 U.S. 375 (1994).

162 *Id.* at 376–81.

The *Kokkonen* litigation had been predicated on diversity jurisdiction. Once dismissed, no independent bases of federal jurisdiction supported a second lawsuit.<sup>163</sup> While concluding that no ancillary jurisdiction existed, the *Kokkonen* Court offered two possible routes to creating such jurisdiction. The parties either could include a “separate provision” to retain jurisdiction or they could incorporate “the terms of the settlement agreement” in the order of the dismissal. Yet, because the Court used tentative and suggestive phrases in its dicta exploring these options, the *Kokkonen* ruling gave no guarantees.<sup>164</sup>

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163 That fact has proved important in other decisions. See, e.g., *Board of Trustees of the Hotel & Rest. Employees Local 25 v. Madison Hotel*, 97 F.3d 1479, 1480 (D.C. Cir. 1996) (concluding that regardless “of whether ancillary jurisdiction existed over the second suit after the stipulated dismissal of the first suit, the court was endowed with independent subject matter jurisdiction over the second suit under ERISA”). Another opinion from that circuit, *Shaffer v. Veneman*, 325 F.3d 370 (D.C. Cir. 2003), concluded that an agreement that “merely settles” federal claims for specified consideration and does not require any interpretation of the provisions of federal rights does not provide an independent basis for subject matter jurisdiction. In that case, the D.C. Circuit also concluded that ancillary jurisdiction was unavailable because the order of dismissal failed to provide for it. *Id.* at 373–74. *Shaffer* involved a claim by an African-American farmer, Lloyd Shaffer, against the United States Department of Agriculture. Mr. Shaffer had been a named plaintiff in a class action, *Pigford v. Glickman*, a lawsuit alleging that the Department of Agriculture had discriminated against black farmers in violation of both the Equal Credit Opportunity Act and the APA. Mr. Shaffer’s settlement required that he opt out of the *Pigford* settlement, and Mr. Shaffer filed for enforcement when the Department of Agriculture denied his 2000 loan application. *Id.* at 371.

The settlement in *Pigford* also did not conclude the conflict. See Shaila K. Dewan, *Black Farmers’ Refrain: Where’s All Our Money?*, N.Y. TIMES, Aug. 1, 2004, at 14. That article described the 1999 settlement, including payments of about \$814 million to more than 13,000 farmers but the rejection of some 80,000 other claims due to failures to file within the time limits required by the settlement. Further, according to the report, plaintiffs’ lawyers believe the Department of Agriculture had too vigorously opposed the filing of timely applications. Some faulted the settlement agreement for its terms, such as that, while the Department of Agriculture admitted discrimination, black farmers continued to have the evidentiary burdens of showing where they had farmed during the last decades of the twentieth century and that they had complained about discrimination.

164 *Kokkonen*, 511 U.S. at 381. The decision states that if the parties “wish to provide for the court’s enforcement of a dismissal-producing settlement agreement, they can seek to do so.” *Id.* (emphasis in the original). As the Court explained, if parties contract between themselves to settle a case and file a notice of dismissal (under Rule 41—Dismissal of Actions—of the Federal Rules of Civil Procedure) and do no more, then the withdrawal of the lawsuit ends the jurisdiction of the federal courts unless an independent basis for jurisdiction exists. *Id.* But the Court suggested that parties could use the provision in Rule 41(a)(2), specifying that no action shall “be dismissed at the plaintiff’s instance save upon order of the court and upon such terms and conditions as the court deems proper,” to require that compliance with a settlement

One way to read the speculative language of the opinion is as a request to ruledrafters to clarify the processes of settlement. Another is that the Court was unprepared to decide definitely how and when ancillary federal jurisdiction was to be available for post-settlement conflict resolution.<sup>165</sup>

Whatever prompted the Court's lack of specificity, as a technical matter, exactly how to establish federal jurisdiction after *Kokkonen* remains unclear. Several decisions demonstrate that many lawyers are not adept at drafting agreements that result in federal courts' retention of jurisdiction and, further, that many lower court judges disagree about what *Kokkonen* requires.<sup>166</sup> As the Third Circuit put it, "painful lesson[s] result"; a "frequently-encountered situation" is that litigants, "having agreed on the terms of a settlement but not having fully implemented" those terms, "obtain a dismissal from the district court" and then are trapped by losing the enforcement power of the federal courts.<sup>167</sup>

The consequence is that a cluster of decisions now rehearse who said what to whom during negotiations, who wrote what thereafter,

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or retention of jurisdiction was a term of the dismissal—thereby protecting the future enforcement power of the court. *Id.* at 381–82. Further, the Court said "we think the court is authorized to embody the settlement contract in its dismissal" if the parties agree to the retention of jurisdiction and the court does so pursuant to Rule 41(a)(1)(ii). *Id.* at 381.

165 Another is to read that language as creating a presumption against federal jurisdiction, as Judge Wallace argued in dissent in *Re/Max International, Inc. v. Realty One, Inc.*, 271 F.3d 633, 650–52 (6th Cir. 2001), *cert. denied*, 535 U.S. 987 (2002).

166 See, e.g., *Hehl v. City of Avon Lake*, 90 Fed. Appx. 797, 802 (6th Cir. 2004) (not for publication) (reversing a district court for enforcing a settlement agreement and holding that the settlement agreement and order did not include language sufficient for retention of jurisdiction); *Cranshire Capital, L.P. v. CBTV-STAR, LW, Inc.*, 70 Fed. Appx. 434, 435–37 (9th Cir. 2003) (not for publication) (deciding, over a dissent by Judge Stephen Reinhardt, who argued that jurisdiction had been lost, that "jurisdiction retaining" language in the settlement agreement sufficed to keep enforcement power); *Re/Max*, 271 F.3d at 650 (holding, over a dissent by Judge Clifford Wallace arguing that the Court had lost jurisdiction, that enforcement jurisdiction existed and requiring enforcement).

167 See *Shaffer v. GTE N., Inc.*, 284 F.3d 500, 501 (3d Cir. 2002) (explaining that the publication of the decision was aimed at instructing lawyers on how to keep jurisdiction if they so desired or to delay the loss of jurisdiction until it was no longer needed). The Third Circuit held that the phrase "pursuant to the terms of the Settlement" in a dismissal order was "insufficient to incorporate the terms of the settlement agreement and therefore did not confer subject matter jurisdiction over settlement enforcement." *Id.* at 503 (citing *In re Phar-Mor, Inc. Sec. Litig.*, 172 F.3d 270, 274 (3d Cir. 1999)). Further, the Third Circuit clarified that permitting the reinstatement of the action is not sufficient because that revives the "underlying claim" rather than permitting enforcement of the bargain reached. *Id.* at 503–04.

and whether district court orders of dismissal used the words “enforce,” “alter,” “reopen,” or “reinstate.” Courts then determine which of those words or other provisions suffice to permit enforcement of settlements by the federal judges that entered them.<sup>168</sup> Federal enforcement problems also arise because of concerns for comity in the federal system. In some instances, even when ancillary jurisdiction exists, certain kinds of enforcement efforts—such as preventing parallel state actions—may be unavailable.<sup>169</sup>

Under the current doctrinal regime, trial judges do have some methods by which to exercise power. If trial judges respond to post-settlement disputes by vacating dismissal orders, those reinstatement rulings cannot be appealed immediately. That rule emerged in *Digital Equipment Corp. v. Desktop Direct, Inc.*,<sup>170</sup> decided in the same year that the Court announced *Kokkonen*. In *Digital Equipment*, The Court held that an order vacating a dismissal predicated upon a settlement agree-

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168 See, e.g., *Re/Max*, 271 F.3d at 637–40, 638 n.3 (reproducing dialogue about the settlement negotiations and detailing the exchange of correspondence as well as the provisions of a status conference and concluding that references to “settlement talks” did not suffice to incorporate the terms of a settlement agreement but that the order’s language sufficed to retain jurisdiction even though it did not do so expressly, with a dissent by Judge Wallace that the dismissal order noted the power to “alter” the terms of an agreement but not the power to “enforce” such terms) (emphasis in the original); *McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491, 502 (6th Cir. 2000), cert. denied, 532 U.S. 905 (2001) (concluding that the incorporation in a dismissal order of “only a single term of the parties’ 20-page settlement agreement” was insufficient to retain ancillary jurisdiction to enforce the agreement); *Schaefer Fan Co. v. J & D Mfg.*, 265 F.3d 1282, 1287, 1291–93 (Fed. Cir. 2001) (concluding that the words “pursuant to a confidential settlement agreement” manifested intent to retain jurisdiction, over a dissent by Judge Dyk arguing that under *Kokkonen* the language was insufficient); *In re Bond*, 254 F.3d 669, 676 (7th Cir. 2001) (holding that the apparent intent of the district court to keep jurisdiction was not the “deliberate retention” required); *In re T2 Medical, Inc. Shareholder Litig.* (Bender v. Allegra), 130 F.3d 990, 991, 995 (11th Cir. 1997) (upholding a district court refusal to take jurisdiction based on a view that the effort to enforce was an effort to modify the settlement and occasioning a dissent from Judge Anderson, concluding that enforcement was at issue); *Bell v. Schexnayder*, 36 F.3d 447, 449 n.2 (5th Cir. 1994) (relying on the term “reopen” to find jurisdiction); *Scelsa v. City Univ. of N.Y.*, 76 F.3d 37, 40–42 (2d Cir. 1996) (holding that a dismissal order that neither incorporated the settlement agreement nor retained jurisdiction over the entire agreement was not enforceable in federal court). See generally Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9, 52–61 (1996) (also raising the possibility of using Federal Rule of Civil Procedure 60 as another route to federal jurisdiction).

169 See *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 33–34 (2002) (holding that federal court retention of jurisdiction over a settled class action through its ancillary jurisdiction did not give judges the power to use the All Writs Act to remove parallel state cases, even when settlement provisions required dismissal of such cases).

170 511 U.S. 863, 865 (1994).

ment did not fit within the “collateral” order doctrine that permits a non-final decision to be reviewed upon its entry.<sup>171</sup> In addition to being able to revive cases, judges enforcing consent decrees have the power to order their modification.<sup>172</sup>

Return then to the Fourth Circuit’s twin criteria for a “consent decree” as contrasted with a “private settlement”—that consent decrees require ongoing oversight prior to entry of the decree and ongoing enforcement powers after entry.<sup>173</sup> The Supreme Court’s decision in *Kokkonen* and the evolving practice under the Federal Rules undercut the coherence of both distinctions. Specifically, lawyers drafting stipulations in light of *Kokkonen* are well advised to put in requirements for ongoing enforcement authority. Further, lawyers might go further, for one way to try to avoid the problem illustrated by *Kokkonen* is to seek the entry of a consent judgment instead of a stipulation of dismissal.<sup>174</sup> Moreover, if the distinctive feature of a “private settlement” is the absence of the judge (ex ante and ex post), that distinction is blurred by the Federal Rules, which direct judges to be a presence in pretrial settlement procedures.

Consider also the question of the allocation of power between the state and federal systems. Over the decades, as judges have promoted the entry of settlement, they have also generated interest in having post-judgment enforcement proceedings in the same courts that entered judgment. Should federal ancillary jurisdiction grow under the rationale that federal interests are served by creating settlement incentives through facilitating the subsequent enforcement of settlements?<sup>175</sup> For some, such a proposal would be unappealing because it

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171 *Id.* The doctrine is built on earlier decisions, focused on whether an issue was important, discrete, separate from the merits, and most importantly, not remediable readily, were a litigant required to wait until the conclusion of the lawsuit. The decision of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546–47 (1949), is an example; there the Court held that a refusal of “security for expenses”—the posting of a bond by a shareholder bringing a derivative action—could be appealed immediately. The doctrine is called “*Cohen* appealability,” but it has been narrowed through subsequent applications.

172 *See* *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992) (providing a more flexible standard for modification when institutional reform litigation is involved).

173 *See* *Smyth v. Rivero*, 282 F.3d 268, 279–81 (4th Cir. 2002), discussed *supra* notes 156–57.

174 *See* Morton Denlow, *Federal Jurisdiction in the Enforcement of Settlement Agreements: Kokkonen Revisited*, 2003 FED. CTS. L. REV. 2, at [http://www.fclr.org/articles/2003\\_fedctsrev2.pdf](http://www.fclr.org/articles/2003_fedctsrev2.pdf). Magistrate Judge Denlow provided a set of suggestions for retaining jurisdiction, including properly worded consent decrees. *Id.* at 18–19.

175 *Cf.* Class Action Fairness Act of 2004, S. 2062, 108th Cong. (2004) (proposing to federalize many state class actions).

would take such contract disputes out of state courts where in this federated polity, they “ought” to be, especially if the obligations of *Erie Railroad v. Tompkins*<sup>176</sup> require the application of state substantive contract rights. But, as I discuss below, what is developing is a federal common law of such contracts, implicitly justified as appropriate form in light of the “federal interests” in the enforcement of the bargains struck.<sup>177</sup>

#### 4. The Nature of Judicial Power and the Propriety of Its Exercise

Questions also relate to the very idea of federal judicial power. When parties withdraw or settle a lawsuit, does a “case or controversy” required by Article III of the United States Constitution remain, or does the agreement to withdraw the case extinguish the power of the federal courts to act to enter the settlement? In 1983, (then) Justice Rehnquist so suggested when dissenting from a summary affirmance of the settlement in the AT&T antitrust litigation.<sup>178</sup> However, as I detailed in Part III above, during the decades since, members of the judiciary and of Congress have generally embraced judicial settlement in both civil and criminal litigation—making unlikely any ruling that would render them unavailable mechanisms by which to conclude lawsuits. The power of judges to “act without judgment” has grown, as purportedly foundational principles of federal jurisdiction recede in favor of claims for what such contracts can accomplish.<sup>179</sup> As the insistence on judicial settlement activities makes plain, the utility of (or infatuation with) contract has carried the day.<sup>180</sup>

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176 304 U.S. 64 (1938).

177 See, e.g., *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18, 29 (1994) (holding that a settlement does not justify vacatur of a judgment for mootness).

178 *Maryland v. United States*, 460 U.S. 1001, 1004 (1983) (Rehnquist, J., dissenting, joined by Burger, C.J., White, J.).

179 See Judith Resnik, *Judging Consent*, 2 U. CHI. LEGAL F. 43, 63–84, 99–102 (1987) [hereinafter Resnik, *Judging Consent*].

180 According to a recent study by the Federal Judicial Center, analyses of dispositions for civil cases terminated between 1997 and 2001 indicate that “22% were dismissed as settled and 2% were terminated on consent judgments. Another 10% were voluntary dismissals, and some of those probably were settled. An additional 20% are coded as ‘other’ dismissals.” ROBERT TIMOTHY REAGAN, SHANNON R. WHEATMAN, MARIE LEARY, NATACHA BLAIN, STEVEN S. GENSLER, GEORGE CORT & DEAN MILETICH, FED. JUDICIAL CTR., *SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT 1 n.1* (2004) [hereinafter *SEALED SETTLEMENT AGREEMENTS*]. These data are yet further evidence of the confused state of the procedure for settlement, since the techniques by which cases are “dismissed as settled” as contrasted with “terminated by consent judgments” are not specified.

Atop the issue of the existence of judicial power is a related problem of what obligations judges should or do shoulder when involved in settlements.<sup>181</sup> As the discussion of litigants' confusion about keeping federal jurisdiction suggests, judges might see their job as including efforts to avoid misperceptions about agreements as well as clarifying or facilitating access to return to the court that entered the settlements if disputes about its meaning erupt thereafter. One could seek to require jurists, when considering either dismissals or consent decrees, to scan the terms to ensure that all participants in the settlement share the same understanding about the terms of an agreement and the availability of post-settlement relief in federal court. Further, in an effort to avoid post-settlement conflicts, one could impose on judges an obligation to review draft contracts to check for vague terms and unclear provisions so as to learn about whether a true "meeting of the minds" has taken place or whether "mutual mistakes" animate an agreement.<sup>182</sup> Additional inquiry could be required: that judges ensure that settling parties were knowledgeable about the risks and advantages of continuing to litigate when they agreed instead to settle claims. Yet another option would be to rely on the judge to be a source of information about the quality of a proposed agreement.

Were such responsibilities to flow, the model of consent judgments in class actions would be transposed in some respects to the individual "private" context. In aggregate litigation, the judge is enlisted to protect absent class members from misbehavior by their designated representatives. Judges sit as a kind of "fiduciary" for the absentees,<sup>183</sup> first to decide if a proposed settlement is sufficiently

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181 These issues are not unique to the law of the United States alone. *See, e.g.,* *Halsey v. Milton Keynes General NHS Trust and Conjoined Cases*, [2004] EWCA Civ. 576, 4 All E.R. 920 (Eng. Ct. App. Civ. Div. 2004) (addressing whether a court may impose sanctions on a successful litigant who refused to participate in an ADR process). Given the "uncertainty" about the issue, materials were supplied by several intervenors (the Law Society, the Civil Mediation Council, the ADR Group, and the Center for Effective Dispute Resolution). The Court held that the court's role was to "encourage, not to compel," *id.* para. 11, and that whether a party unreasonably refused ADR depends on the individual case, including but not limited to the merits, the degree to which alternatives might impose either cost or delay, and the probability of success. *Id.* para. 16.

182 Those terms are common in contract law.

183 The term "fiduciary" can be found in several cases in which judges discuss their work on behalf of absent class action members. *See, e.g.,* *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975) (describing the district court as a "fiduciary who must serve as a guardian of the rights of absent class members"). *See generally* Lisa L. Casey, *Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 BYU L. REV. 1239 (arguing that judges ought not and cannot take on that role in that kind of case).

plausible so as to notice the class and then to conduct a hearing in order to decide whether a proposed settlement is fair, reasonable, and adequate. The challenge for jurists is to serve (at least temporarily) as the protector of one party to a lawsuit that might switch from a conciliatory posture to an adversarial one. Not only may that role be awkward for a judge otherwise chartered to treat both sides of a lawsuit equally, but the assignment to judges to assess the adequacy of consent (and therefore to be open to rejecting settlements and insisting on litigation) is also in tension with the judicial promotion of settlement. In theory, judges of consent ought to be agnostic about whether litigants either settle or insist on adjudication. But judicial “priors”—mandated by federal rules—put them in the mode of being “pro-consent” and therefore at risk of discounting information that makes it problematic.

Further, judges have limited capacity to insist that disputants intent on settling return instead to adversarial litigation. In the criminal context, that difficulty is translated into a doctrine requiring judges generally to assent to prosecutorial requests to dismiss criminal indictments.<sup>184</sup> Moreover, the practical job of judging consent is challenging. As is exemplified by the case law on class actions and plea bargaining, judges depend upon parties for information, and when those parties seek to settle lawsuits, judges have a difficult time obtaining knowledge about why a proposed outcome ought to be rejected. Even in instances when objectors come forth, judges must be attentive to the strategic opportunities presented by “holding up” a settlement; some who complain seek to be “bought off.”

Concerns within the judiciary about the quality of the bargaining and the adequacy of representation in large-scale cases have become so profound that, in 2003, rulemakers amended the class action rule to give trial judges more authority to police the appointment of class counsel, to learn about side settlements that give better terms to individuals than to the class, and to evaluate the fairness of settlements.<sup>185</sup> These amendments may not be optimal given the tensions created when judges are asked to judge consent.<sup>186</sup> But they represent a view

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184 See FED. R. CRIM. P. 48(a); *United States v. Garcia-Valenzuela*, 232 F.3d 1003, 1008 (9th Cir. 2000) (reiterating the standard that judges may refuse dismissal only if “clearly contrary to manifest public interest”); *United States v. Hamm*, 638 F.2d 823, 828 (5th Cir. 1981) (obliging deference to prosecutorial discretion unless “clearly wrong”).

185 See FED. R. CIV. P. 23(g), (h), and the Advisory Committee’s Notes (explaining the 2003 amendments).

186 See Resnik, *Judging Consent*, *supra* note 179, at 85–102.

that when courts create vehicles for binding absent parties, obligations to the absentees arise.

Other concerns about the exercise of judicial power in civil settlement are beginning to appear in case law, rules, and commentary. One issue, debated through variations in local rules, is about *which* judge should participate in negotiations. Some districts advise that the judge assigned to the case (especially if a bench trial is anticipated) may or ought not (absent parties' consent) also serve as a settlement judge.<sup>187</sup> In addition to assignment to either another district judge or to a magistrate judge, delegation to special masters is an option—especially since 2003, when the rule governing appointment of special masters expressly embraced assignment of pretrial activities including some tasks “that a judge might feel not free to undertake.”<sup>188</sup> Implicitly, the various practices address due process concerns that information gained through settlement negotiations may affect decisions rendered through adjudication or that judicial involvement in settlement undermines its volitional qualities. A different kind of objection to judicial involvement comes from experts on mediation who argue that a judge assigned a case cannot “mediate”—in the true meaning of that term—because the judge has too much official power to function as required in that facilitative role.<sup>189</sup>

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187 See, e.g., E.D. CAL. CIV. LOCAL R. 16-270(b)(2) (2004) (“Unless all the parties affirmatively request that the Judge or Magistrate Judge assigned to try the action participate in the conference . . . the Judge or Magistrate Judge assigned to try the action shall not conduct the settlement conference . . . .”); S.D. CAL. CIV. LOCAL R. 16.3 (2003) (“The judge conducting the settlement conference will be disqualified from trying the case unless there is an agreement by all the parties to waive this restriction.”); D. HAW. LOCAL R. 16.5(a) (2004) (requiring a written stipulation by counsel if “the judge trying the case conducts the settlement conference”); D. IDAHO LOCAL CIV. RULE 16.4(b) (2004) (providing as “a general rule” that the assigned judge not conduct settlement conferences and that “matters or information discussed during the conference” not be communicated to the assigned judge); LOCAL CIV. R. E.D. OKLA. 16-3 (2004) (“The Settlement Judge will take no part in adjudicating the case subsequent to the settlement conference.”); E.D. TENN. LOCAL R. 68.3(e) (2004) (“The judicial officer participating in the settlement conference shall be a neutral mediator and facilitator and shall play absolutely no role in the adjudication of the case once he is designated as settlement judge.”).

188 Advisory Committee Notes to the 2003 Amendments to FED. R. CIV. P. 53(a)(1) (noting that “[s]ome forms of settlement negotiations, investigations, or administration of an organization are familiar examples of duties that a judge might not feel free to undertake”).

189 My thanks to the Honorable Nancy Atlas, United States District Court for the Southern District of Texas, for explaining this approach to me. See also Scott Atlas & Nancy Atlas, *Potential ADR Backlash: Where Have All the Trials Gone? To Mediation or Arbitration*, DISP. RESOL. MAG., Summer 2004, at 14; Edward J. Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232 (2002).

If judges participate, how they are to behave is at issue. Do the norms of judicial behavior, such as prohibitions on discussions outside the hearing of opponents and proceedings in open court and on the record—all developed in the context of adjudication—apply? For example, should all parties (in person and/or through lawyers) be present whenever a judge is involved? Reflecting general attitudes against *ex parte* communications,<sup>190</sup> some judges do not negotiate individually with parties unless the parties agree otherwise. (Whether, in the midst of a discussion, a lawyer is well-advised to reject a judge's offer to talk separately with either side is another question.) In contrast, some districts have local rules specifically licensing judges to meet "jointly or individually" with opponents, with and sometimes without their lawyers.<sup>191</sup> Further, in general, the custom appears to be that such meetings are rarely "on the record." As Richard Posner (writing for the Seventh Circuit) has commented, "[n]o one supposes that there is any impropriety in a judge's conducting settlement discussions off the record," as he also noted that such a practice is commonplace.<sup>192</sup>

But the fact that such a custom has evolved does not necessarily validate its desirability. As Judge Posner noted in an oft-cited opinion (*In re Rhone-Poulenc Rorer, Inc.*) using the extraordinary power of mandamus to review a class action certification, settlement pressures are a substantial problem that law should address.<sup>193</sup> His focus in that deci-

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190 See, e.g., COLO. D.C. LOCAL R. 77.7 (2004) (prohibiting lawyers from approaching judges *ex parte*, in writing or orally); M.D. GA. LOCAL R. 9(a) (2004) (requiring lawyers to avoid *ex parte* communications to judges about pending cases); NEV. LOCAL R. 7-6 (2004) (prohibiting *ex parte* communications). See generally AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT CANON 3(B)7 (1999). One of the exceptions listed on when *ex parte* communication may occur is that a judge may "with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge." *Id.* Canon 3(B)(7)(d).

191 See, e.g., LOCAL R. E.D. OKLA. 16-3 (2004) ("The Settlement Judge has the right to meet jointly or individually with the parties and/or the corporate representatives without the presence of counsel."); LOCAL R. N.D. OKLA. 16.2 (2004) (The settlement judge may . . . meet jointly or individually with counsel, alone or with the parties or persons or representatives interested in the outcome of the case without the presence of counsel."); LOCAL ADR R. E.D.N.C. 101.1 (2004) ("During the settlement conference, the settlement judge or magistrate judge may also confer *ex parte* with any parties . . .").

192 *Lynch, Inc. v. SamataMason Inc.*, 279 F.3d 487, 491 (7th Cir. 2002) (holding that a plaintiff who did not request that a settlement agreement reached at a conference with a judge be recorded was bound by that magistrate judge's recollection of its terms).

193 51 F.3d 1293 (7th Cir. 1995), *cert. denied*, 516 U.S. 867 (1995). Whether class certification does put defendants in a coercive position is a subject of debate. See

sion was on what he viewed as improper judicial authorization for plaintiffs to proceed in the aggregate, thereby altering the stakes and incentives of defendants. Such concern about the distribution of power ought also to apply when the source of settlement pressures is the judiciary. That some judges exert such pressure can be seen from the admonition in the notes to Rule 16 cautioning judges against forcing settlement on the unwilling<sup>194</sup> as well as in the case law reversing judges for entering settlements too quickly,<sup>195</sup> and in commentary on how judicial “nudging” of litigants towards settlement ought to occur.<sup>196</sup> Further, as some case law describes, judges may help to shape agreements and, in situations of conflict, also decide who had agreed to what.<sup>197</sup> Indeed, Judge Posner suggested that if “judicial recollection” was the “only means of resolving such a dispute satisfactorily,” then judges could take the stand or offer to be questioned by parties.<sup>198</sup> As the embeddedness of judges in civil settlement negotiations becomes increasingly clear, the need to regulate the judicial role should be acknowledged.

My argument is that two options are available. If the law insists that parties engage in settlement discussions and place judges in those interactions, then regulation is required. A burden parallel to that imposed on judges in class actions and under a few statutory provisions such as the Fair Labor Standards Act<sup>199</sup> ought to flow from the new mandates to judges to bring about settlements in small-scale cases. Further, national rules should prohibit the judge assigned to try a case from participating in the negotiations about its disposition. Alternatively, national rules could retreat from the commitment to requiring parties to negotiate and from placing judges in that process.

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Charles Silver, *We're Scared to Death: Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).

194 See Advisory Committee Notes to the 1983 amendments to then-Rule 16(c)(7).

195 See, e.g., *Higbee v. Sentry Ins. Co.*, 253 F.3d 994 (7th Cir. 2001); *Kothe v. Smith*, 771 F.2d 667 (2d Cir. 1985).

196 See Denlow & Schack, *supra* note 79, at 22 (describing efforts by federal magistrate judges in Chicago to collect data on settlements to provide “objective data on cases that actually settle” and thus to be “used as a tool to nudge parties toward settlement”). For discussion of the problems of judicial pressures to settle, see also Atlas & Atlas, *supra* note 189; Brunet, *supra* note 189.

197 On the growth of judicial power, see Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (2003).

198 *Lynch, Inc. v. SamataMason Inc.*, 279 F.3d 487, 491–92 (7th Cir. 2002).

199 See 29 U.S.C. § 216(b) (2000); see also *Stalnaker v. Novar Corp.*, 293 F. Supp. 2d 1260, 1262 (M.D. Ala. 2003) (explaining that a judge is to “scrutinize the settlement for fairness” and ensure that it reflects a “reasonable compromise”).

A model of disengagement (itself not wholly satisfactory) is provided by the criminal side, with constitutional doctrine and rules addressing the judicial role in plea bargaining. Federal judges are generally enlisted only *after* the prosecutor and defendant have concluded their bargaining.<sup>200</sup> The entry of a plea bargain is conditioned upon a judicial determination that a defendant deliberately waived a variety of constitutional rights. Judicial engagement at that stage serves to buffer the imbalance of power between criminal defendant and the state by protecting a defendant from misinformation coming from either the prosecution or from a defense lawyer failing to debrief a client on all the options and risks.<sup>201</sup> Federal judges are precluded from participating in the negotiations to avoid either the fact or impression that they favor settlement in general or a particular agreement.<sup>202</sup> The goal is to protect judicial capacity to inquire into whether a criminal defendant entered into an agreement “knowingly” and “voluntarily.”<sup>203</sup> In practice, some of those inquiries are pro

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200 See FED. R. CRIM. P. 11(c)(1) (“The court may not participate in these discussions.”); *United States v. Werker*, 535 F.2d 198 (2d Cir. 1976) (granting a petition for mandamus to prevent a judge from participating in plea bargain agreements), *cert. denied sub nom. Santos-Figueroa v. United States*, 429 U.S. 926 (1976); *United States v. Olesen*, 920 F.2d 538, 541 (8th Cir. 1990) (concluding that district judges may not “intervene in the plea agreement process absent a showing of fraud” and refusing to rely completely on an analogy between plea bargains and contract law that might have permitted a judge to intervene to clarify that a mutual agreement, based upon a shared understanding, had been achieved); see also C.D. CAL. LOCAL CRIM. R. 57-3.1 (2004) (providing that the judge “assigned to preside over a complex criminal case . . . may ask if parties desire a settlement conference but shall not participate in facilitating settlement”); Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 136–37 (1999) (discussing the limited role of federal judges in plea bargaining).

A few courts have read Rule 11 as precluding the judge presiding to participate but permitting “other judges to serve as facilitators for reaching a plea agreement between the government and the defendant.” See Advisory Committee Notes to the 2002 amendments to FED. R. CRIM. P. 11(c)(1)(A) (citing *United States v. Torres*, 999 F.2d 376, 378 (9th Cir. 1993)). The Advisory Committee left the language in place “with the understanding that doing so was in no way intended either to approve or disapprove the existing law interpreting that provision.” *Id.*

201 See generally GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003); King, *supra* note 200.

202 As one court explained, the criminal rules’ prohibition on judicial participation in plea bargaining is to protect the “parties against pressure to settle criminal cases on terms favored by the judge”—implicitly someone who might seek to influence either prosecution or defense to alter their positions. See *United States v. Larios*, 39 F.3d 986, 989 (9th Cir. 1994).

203 Federal criminal rules operationalize these obligations, imposed by the Supreme Court as a predicate to judicial acceptance of a guilty plea. See FED. R. CRIM. P.

forma yet serve thereafter to insulate criminal settlements from subsequent attacks through habeas corpus petitions seeking to vacate pleas.

This constrained posture has the advantage of not placing the weight of judicial authority behind the obligation to bargain or a particular deal offered. Yet it can also challenge jurists, as is illustrated by a case in which a trial judge worried about a defendant's declining a proposed plea and being exposed to a much harsher sentence if he insisted on going to trial. The Ninth Circuit vacated the plea because the participation by the judge, while "rational and humane" as well as "compassionate and well-motivated" ("qualities important to the proper performance of one's judicial duties") was nonetheless "coercive."<sup>204</sup> But it is that very form of coercion (again, also justifiable as rational, human, and well-motivated) that the federal rules and judicial practices now embrace on the civil side, which licenses judicial promotion of and involvement in settlement.

### *B. Settling What? Binding Whom? Individual and Aggregate Problems*

The lack of clarity about how to effectuate a settlement is mirrored by the muddiness of many settlement negotiations. Examples come from the increasing number of cases debating the existence and meaning of settlements. While some state procedural rules specify that a binding settlement requires a signed writing or an agreement made in "open court,"<sup>205</sup> the federal courts do not currently have an equivalent national rule. Questions emerge repeatedly about whether agreements have in fact been made. Some federal courts have enforced some oral agreements despite the absence of a written agreement. Further, some enforcement rulings rely on information from trial judges who add their own language to or recollections about the bargains made.<sup>206</sup>

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11(b); *McCarthy v. United States*, 394 U.S. 459 (1969); *Boykin v. Alabama*, 395 U.S. 238 (1969). Voluntariness can be found even when various forms of coercion—such as the risk of far greater punishment if an agreement is not accepted—are present. See *infra* notes 270–76 and accompanying text.

204 *United States v. Bruce*, 976 F.2d 552, 557 (9th Cir. 1992).

205 See *e.g.*, NEB. COUNTY CT. GEN. R. 4 (2004); N.Y. C.P.L.R. 2104 (McKinney 2004); WA. SUP. CT. CIV. R. 2A (2004); WIS. STAT. § 807.05 (2004).

206 See, *e.g.*, *Monaghan v. SZS 33 Assocs.*, 73 F.3d 1276, 1283 (2d Cir. 1996) (noting that the parties' agreement had not been reduced to writing nor signed in open court but that the reasonable reliance upon it made its enforcement appropriate); *Brockman v. Sweetwater County Sch. Dist. No. 1*, No. 93-8052, 1994 U.S. App. LEXIS 10095, at \*5–6 (10th Cir. May 5, 1994) (denoted "not binding precedent") (affirming a district court's order holding enforceable a settlement of an employment discrimination claim—despite the plaintiff's claim that no final agreement on all the terms had been reached—when the agreement came from an oral agreement between a teacher and

For example, the Seventh Circuit has concluded that a magistrate judge's recollection of an oral agreement to settle a lawsuit prevented a party from reinstating that case.<sup>207</sup> On the other hand, [the] Circuit, when material issues have been left unresolved, district judges ought not to yield to the "temptation to dismiss a case prematurely before a settlement has truly been finalized."<sup>208</sup> The Sixth Circuit has overruled a judge insisting that a settlement was reached when parties disagreed about the drafts reducing that agreement to writing and the district court judge chose one version.<sup>209</sup> Similarly, the Third Circuit found unenforceable an agreement after a litigant argued that her attorney did not have the authority to settle and that the judge failed to ensure her assent when conducting a brief hearing on the question of whether a settlement had occurred and had ignored her letters "personally disavowing" her attorney's authority.<sup>210</sup>

Such problems—about the authority to bind, the terms of the agreement, and the roles of lawyers and judges—mirror those seen in large-scale cases, when factions of lawyers representing different cohorts of clients either seek to control outcomes for their own subset of clients, challenge the power of others, or contest judicial approval of settlements.<sup>211</sup> *Amchem Products, Inc. v. Windsor*<sup>212</sup> and *Ortiz v.*

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a school district and a transcript of a discussion of its drafting with a magistrate judge); *Pratt v. Philbrook*, 38 F. Supp. 2d 63, 69–70 (D. Mass. 1999) (detailing the course of an alleged repudiation of a settlement and the lack of agreement).

207 *Lynch, Inc. v. SamataMason Inc.*, 279 F.3d 487, 491–92 (7th Cir. 2002) (noting also that the parties did not contest the recollection); *see also Laserage Tech. Corp. v. Laserage Labs., Inc.*, 972 F.2d 799, 802–04 (7th Cir. 1992) (upholding a district judge's conclusion that a binding settlement agreement existed).

208 *Higbee v. Sentry Ins. Co.*, 253 F.3d 994, 995 (7th Cir. 2001).

209 *Therma-Scan, Inc. v. Thermoscan, Inc.*, 217 F.3d 414, 419 (6th Cir. 2000).

210 Brief for the Appellant at \*5–6, 10–15 (filed Sept. 19, 2000), *Shaffer v. GTE N., Inc.*, 284 F.3d 500 (3d Cir. 2002) (Nos. 01-1486, 01-1707). The Third Circuit held that the federal district court lacked jurisdiction to enforce the agreement. *Shaffer v. GTE N., Inc.*, 284 F.3d 500, 504–05 (3d Cir. 2002). In contrast, the Eleventh Circuit has permitted enforcement when a litigant challenged an agreement. *See Murchison v. Grand Cypress Hotel Corp.*, 13 F.3d 1483, 1486 (11th Cir. 1994) (enforcing a settlement read in open court and noting that the party protesting the authority of his lawyer to settle was an "educated man who understood the terms of the settlement agreement," knew his attorney was negotiating, and should have objected at the time). Another variation comes from a Third Circuit case addressing a dispute between an insured and an insurance company about the company's authority to enter into a settlement of a Title VII claim to which the individual defendants objected for its failure to clear them. The district court had enjoined the settlement and the circuit reversed. *See Caplan v. Fellheimer Eichen Braverman & Klaskey*, 68 F.3d 828 (3d Cir. 1995).

211 *See generally* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Carrie Menkel-Meadow, *Ethics and the Settle-*

*Fibreboard Corp.*<sup>213</sup> are placeholders for these problems. In each, the Supreme Court found unsatisfactory district court approval of agreements to conclude an asbestos class action. Several other decisions—*Ticor Title Insurance Co. v. Brown*,<sup>214</sup> *Adams v. Robertson*,<sup>215</sup> and *Deulin v. Scardelletti*<sup>216</sup>—offer variations on the theme, with objections raised by some members of classes to the agreements generated by others.<sup>217</sup> Whether on the grand scale or the individual, bargaining is complicated, and bargaining for preclusion and the power of judicial enforcement ups the stakes.<sup>218</sup>

In addition to questions about the existence and legitimacy of settlements, several cases address disputes about the terms agreed upon. The facts of the 1994 *Kokkonen* case are illustrative. In *Kokkonen*, the underlying dispute was between an insurance agent and a company for whom he had worked. After a trial had concluded but before the judge had instructed the jury, an agreement was forged

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*ment of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159 (1995); see also Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiff's Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998).

212 521 U.S. 591 (1997).

213 527 U.S. 815 (1999).

214 511 U.S. 117, 122 (1994) (dismissing the writ—over a dissent by Justice O'Connor joined by Chief Justice Rehnquist and Justice Kennedy—in part because of the possibility that the question about a constitutional right to opt out of a primarily monetary class action was hypothetical and in part because of a “settlement designed to moot the petition”).

215 520 U.S. 83, 85 (1997) (dismissing as improvidently granted the writ on the question of whether the Alabama courts' approval of a class action settlement under which all class members were not permitted to exclude themselves violated due process because the question had not been properly presented to the state courts).

216 536 U.S. 1, 14 (2002) (holding that non-named class action members who made timely objections to a class action settlement had the “power to bring an appeal without first intervening” at the trial level).

217 See also *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001) (ruling on the ability of a settlement to preclude claims allegedly not extant at the time of its conclusion), *aff'd in part by an equally divided court*, 539 U.S. 111 (2003); *Keystone Tobacco Co. v. U.S. Tobacco Co.*, 238 F. Supp. 2d 151, 157–58 (D.D.C. 2002) (describing efforts by plaintiffs to prevent settlement discussions with individuals in a proposed class action). Controversy about settlements entered by the Equal Employment Opportunity Commission (EEOC) have also been met with challenges by individual employees, disputing the propriety of an agreement. See, e.g., *Binker v. Pennsylvania*, 977 F.2d 738 (3d Cir. 1992).

218 Illustrative are a few cases recognizing that nonparties, with stakes in an outcome that are “discernible from the record,” and who participated at the trial level, may, if the equities warrant, be heard on appeal to challenge the enforcement of a settlement. See, e.g., *Northview Motors, Inc. v. Chrysler Motors Corp.*, 186 F.3d 346, 349–50 (3d Cir. 1999).

and “summarized . . . on the record in chambers.”<sup>219</sup> Guardian later claimed that Mr. Kokkonen’s failure to “return certain files” breached that agreement.<sup>220</sup> Mr. Kokkonen argued that the agreement had not “required him to turn over his personal ‘agent’ client files or prohibited him from servicing his clients by forwarding certain insurance forms and claims to Guardian on behalf of his clients who were Guardian policyholders and insureds.”<sup>221</sup> Further, the parties debated whether the trial judge expected to retain jurisdiction. Guardian, the party seeking enforcement, claimed that the judge had taken an “active role . . . in clarifying” the terms of the agreement and “plainly anticipated that any proceeding to enforce the settlement agreement would require an appearance before him and not in state court.”<sup>222</sup> The trial judge agreed, relying on his own personal recollection of the settlement agreement when rejecting Mr. Kokkonen’s arguments.<sup>223</sup> As noted above, the Supreme Court nevertheless concluded that, given the dismissal of the action without more, the federal court lacked jurisdiction to enforce the agreement. These various examples of bargaining confusion demonstrate again the need for regulation—from requirements that agreements be recorded in open court to different rules for contracts entered into under the aegis of courts, as I address below.

### C. *The Bargain’s Terms*

Another kind of question is about the substantive provisions of settlements made under courts’ wings. As the history of criminal plea bargaining demonstrates, courts set conditions under which bargain-

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219 Brief of the Merits of Petitioner at \*5, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994) (No. 93-263), *available at* 1993 WL 639313.

220 *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Guardian Life argued that Mr. Kokkonen

in bad faith breached material terms of the settlement agreement by refusing to return certain Guardian files, despite having agreed unequivocally to return all Guardian files or files containing information about Guardian policyholders . . . [and that] Kokkonen also breached the settlement agreement by communicating with Guardian on behalf of a client and Guardian policyholder, which he specifically had agreed not to do.

Brief for Respondents at \*4, *Kokkonen* (No. 93-263), *available at* 1994 WL 137026.

221 Brief on the Merits of Petitioner at \*6 n.9, *Kokkonen* (No. 93-263), *available at* 1993 WL 639313. Kokkonen also argued that the “oral settlement agreement between the parties was never reduced to writing, at the insistence of Guardian.” *Id.* at \*5.

222 Brief for Respondents at \*4, *Kokkonen* (No. 93-263), *available at* 1994 WL 137026.

223 *Id.* at \*5 (citing the Joint Appendix at 181, *Kokkonen* (No. 93-263)).

ing occurs.<sup>224</sup> One could assume that settlement contracts are like any other, with parties' bargaining limited by whatever constraints reside in doctrines of unconscionability and public policy limitations.<sup>225</sup> Public policy of course is dynamic, as is evidenced by the shift in attitudes towards *ex ante* contracts to arbitrate federal statutory claims that are now, in the main, enforceable<sup>226</sup> with arbitrators often given the initial opportunity to interpret their terms.<sup>227</sup> The question then is what public policy ought to be.

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224 See FISHER, *supra* note 201; King, *supra* note 200; see also Stephanos Bibas, *Pleas' Progress*, 102 MICH. L. REV. 1022 (2004) (reviewing FISHER, *supra* note 201, agreeing with his analysis that prosecutors and judges have incentives to support a system of plea bargaining, and arguing that defense attorneys also have institutional incentives that help that system to dominate); Anup Malani, *Habeas Bargaining* (Sept. 6, 2004) (advocating that Rule 35 of the Federal Rules of Criminal Procedure be modified to permit judges to amend sentences to facilitate settlement of habeas corpus petitions, and that such settlements be subjected to supervision by the court as it does under Rule 11 of the Federal Rules of Criminal Procedure), available at <http://ssrn.com/abstract=617361> (manuscript on file with author).

225 See, e.g., *United Commercial Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992) ("A settlement agreement is treated as any other contract for purposes of interpretation."); *Brockman v. Sweetwater County Sch. Dist. No. 1*, No. 93-8052, 1994 U.S. App. LEXIS 1009, at \*5-6 (10th Cir. May 5, 1994) (denoted "not binding precedent").

226 See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (holding that the FAA applied to employment contracts and that arbitration agreements involving employees seeking to pursue state-based discrimination claims could be enforced). Only signatories are bound. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (holding that, although an individual signing a form job application may be barred from pursuing discrimination claims, the EEOC's independent statutory cause of action is not barred). See generally Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000); Civil Rights Procedures Protection Act of 2001, H.R. 1489, 107th Cong. (2001) (proposing to exclude litigation under various federal discrimination claims from arbitration agreements made before disputes arise).

227 See, e.g., *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (requiring that the question of whether arbitration contracts preclude class actions is one to be decided initially by an arbitrator rather than by judges). Further, the burden of showing that financial costs of arbitration or other forms of contractual ADR undermine their sufficiency as a means of vindicating statutory rights rests with opponents to those processes. See *Green Tree Fin. Servs. v. Randolph*, 531 U.S. 79, 92 (2000). In the wake of this ruling, some lower courts have authorized discovery into the processes provided by particular contractual ADR programs. One complexity is the relationship between state and federal law. State law typically governs questions of unconscionability of contracts, prompting a question about whether federal law, through the FAA, preempts state law doctrine. See, e.g., *Armendariz v. Found. Health Psychcare Servs.*,

My view is that bargaining required by courts ought to result in limitations on the kinds of bargains that courts endorse. That approach is starting to be reflected in law, with examples including constraints on parties' abilities to contract for courts to vacate prior (otherwise valid) rulings, warnings about enforcement of "most favored nations' clauses," limitations on parties' capacity to bargain for sealed records, and efforts to force honesty in negotiations through enforcement of only those settlements accompanied by good faith disclosure of relevant facts. Below, I detail some of the debates about what lines should be drawn.

The question of bargaining over statutory rights to attorneys' fees prompted a spate of case law in the 1980s. The Third Circuit banned the practice,<sup>228</sup> but the Supreme Court subsequently ruled that negotiating about fee waivers was not inconsistent with the legislative provision of rights to fees for prevailing parties, and that lower courts could approve class settlements with such provisions.<sup>229</sup> A lawyerly response has followed in which public interest lawyers warn clients about this possibility to inhibit their interest in agreeing to settlements contingent on their lawyers not obtaining statutorily-authorized fees.<sup>230</sup>

Another term in some bargains—vacatur of lower court orders—caused heated exchanges in the 1990s. In one state, an appellate judge was threatened with sanctions by a disciplinary body for refusing to condone the practice of permitting parties to enter settlements that required vacatur of orders that had neither factual nor legal errors.<sup>231</sup> Some jurists promoted that practice as reflective of the public policy in favor of settlements and as giving appropriate control to parties (conceived as owning the litigation). Other judges objected that vacatur created incentives to delay settlements until after judges or juries

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Inc., 6 P.3d 669 (Cal. 2000) (declining to enforce an arbitration clause); *Sutton's Steel & Supply, Inc. v. Bellsouth Mobility, Inc.*, 776 So. 2d 589 (La. App. 2000) (finding the arbitration clause unenforceable under state law because the contract was adhesive); *Sutton Steel & Supply, Inc. v. Bellsouth Mobility, Inc.*, 875 So. 2d 1062 (La. App. 2004) (upholding, in a subsequent decision, the class certification); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002). See generally Stempel, *supra* note 106.

228 See *Prandini v. Nat'l Tea Co.*, 557 F.2d 1015 (3d Cir. 1977).

229 *Evans v. Jeff D.*, 475 U.S. 717 (1986).

230 To do so, retainer agreements describe defendants' interest in having fees waived as well as the organization's dependence on statutorily-authorized fees.

231 See, e.g., Henry Weinstein, *Appeals Judge Denied "Willful Misconduct" in Writing Dissent*, L.A. TIMES, Sept. 5, 1998, at A22. The disciplinary action was subsequently dismissed. See *Panel Dismisses Judicial Misconduct Charges*, L.A. TIMES, Aug. 20, 1999, at A28.

had ruled, that it imposed unfair costs on third parties, and that it undermined public confidence in the legal system.<sup>232</sup>

The federal system has come to frown on such agreements,<sup>233</sup> as have some state legislatures. After the California Supreme Court required courts to implement vacatur of trial court decisions absent extraordinary circumstances,<sup>234</sup> the California legislature enacted a provision precluding appellate courts from reversing or vacating “a duly entered judgment upon an agreement” absent findings of “no reasonable possibility that the interests of nonparties or the public will be adversely affected” and that the reasons for reversal outweighed “the erosion of public trust that might result” as well as the risk that “the availability of stipulated reversal will reduce the incentive for pre-trial settlement.”<sup>235</sup>

A different kind of term—common in certain kinds of cases—is a “most favored nations clause,” which comes in a few forms. The idea motivating these provisions is the interest in achieving settlements with some litigants even when other similarly situated litigants have either not yet agreed to do so or may not even have filed claims. To address inter-litigant disparity arising in sequences of cases involving separately-filed lawsuits against the same party, a settlement agreement can include a provision (a “most favored nations clause”) that, if later settling litigants do better, the originally-settling individual or group may have their awards adjusted upwards. Thus, these clauses can enable a series of settlements with similar terms applied to compa-

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232 *Compare* Nestle Co. v. Chester’s Mkt., Inc., 756 F.2d 280, 284 (2d Cir. 1985) (Winters, J.) (defending the practice), *with* Manufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381, 384–85 (2d Cir. 1993) (Easterbrook, J.) (objecting to the practice), *and In re* Memorial Hosp., 862 F.2d 1299, 1302 (7th Cir. 1988) (Easterbrook, J.) (again objecting). *See generally* Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994); Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589 (1991); Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033 (1993).

233 *See* U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship, 513 U.S. 18 (1994) (concluding that a settlement cannot, absent extraordinary circumstances, be the basis for vacatur of a judgment under review). A few courts have nonetheless found “exceptional circumstances” justifying vacatur of a judgment. *See, e.g.*, Major League Baseball Props. v. Pac. Trading Cards, 150 F.3d 149 (2d Cir. 1998). The presumption against withdrawing opinions has also been applied at the district court level. *See, e.g.*, Avellino v. Herron, 181 F.R.D. 294 (E.D. Pa. 1998).

234 *See* Neary v. Regents of the Univ. of Cal., 834 P.2d 119 (Cal. 1992).

235 *See* CAL. CIV. P. CODE § 128(a)(8)(A)–(B) (West 2004).

rable litigants.<sup>236</sup> Some courts frown on unconditional most favored nations clauses; judges debate whether the clauses facilitate or create disincentives for subsequent settlements because they potentially require additional payments to earlier settlers.<sup>237</sup> Further, depending on the wording, parties may disagree about when obligations arise under these clauses and turn to judges to resolve such disputes.<sup>238</sup> Judicial enforcement—or refusal to do so—of these kinds of terms create another technique for influencing the kinds of agreements made, albeit one dependent upon after-the-fact party protest.

More generally, courts may refuse to enforce entire agreements. For example, in the *Digital Equipment* case (the Supreme Court ruling mentioned above, holding that a district court's refusal to enforce a settlement was not an immediately appealable order), a post-settlement dispute emerged from allegations of fraud in the settlement process. One of the parties obtained a vacatur of the settlement agreement because of what the trial court concluded was a failure "to disclose material facts . . . during settlement negotiations which would have resulted in rejection of the settlement offer."<sup>239</sup> Expanding on that approach, an ex ante regulatory intervention could require forms of disclosure either between the parties (akin to discovery rights) or to the court (akin to obligations under Rule 11 of the Federal Rules of Criminal Procedure and when settling class actions under Rule 23 of the Federal Rules of Civil Procedure), so that court-based bargaining is predicated on better information than is bargaining in other settings.

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236 An example of such a clause can be found in *In re Corrugated Container Antitrust Litigation*, 752 F.2d 137, 140 n.3 (5th Cir. 1985). Commentators have argued both the desirability and the costs of these clauses. See, e.g., Kathryn E. Spier, *Tied to the Mast: Most-Favored Nation Clauses in Settlement Contracts*, 32 J. LEGAL STUD. 91 (2003); MANUAL FOR COMPLEX LITIGATION § 13.23 (4th ed. 2004).

237 See *Fisher Brothers v. Phelps Dodge U.S. Indus., Inc.*, 614 F. Supp. 377, 381–82 (E.D. Pa. 1985).

238 See, e.g., *Cintech Industrial Coatings, Inc. v. Bennett Industries, Inc.*, 85 F.3d 1198 (6th Cir. 1996). That court also noted that some courts disfavor these clauses because they can be "disruptive in the orderly disposition" of complex litigation, *id.* at 1203, which is to say that the clauses can generate more requests for adjudication.

239 *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 833, 866 (1994) (quoting the petition for a writ of certiorari at 13a). According to the brief submitted by Desktop Direct, Digital's chief executive officer had led Desktop's chief executive officer to believe that the alleged infringement had been an "innocent mistake" and that by settling "without the involvement of attorneys," the problem could be handled simply and without complications. Brief of Respondent at \*3, *Digital Equip.* (No. 93-405), available at 1994 WL 249425. Desktop's CEO later allegedly learned that Digital's chief officer had used the Desktop Direct name against counsel's advice and that the case for "willful infringement" was strong. *Id.* at \*4.

Third-party access to information about court-contracts is another question to be addressed. Different forms of confidentiality and of secrecy about events or information produced in or through litigation are possible.<sup>240</sup> Parties may conclude agreements by dismissals and, in separate contracts that are neither filed with courts nor referenced in notices of dismissal, they may agree to terms that no other people can readily access and they may also agree (in “confidentiality clauses”) to refuse disclosure of the terms to others. A good deal of case law and commentary refers to the existence of such “confidential settlement agreements,”<sup>241</sup> suggesting that they occur with some frequency. In addition to party-negotiated terms, confidentiality requirements may also come through rules that emanate from privately-provided dispute resolution programs, from claim payment systems created through mass tort settlements, and from ADR programs sponsored by the public.<sup>242</sup>

A question for courts is whether to enact rules regulating such provisions or, if breaches are alleged, whether to enforce such terms.<sup>243</sup> Courts can also have doctrine that is information-forcing.

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240 See generally Arthur R. Miller, *Confidentiality, Protective Orders and Public Access to Courts*, 105 HARV. L. REV. 427 (1991); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457.

241 See, e.g., *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206 (9th Cir. 2002) (discussing access to confidential settlement materials); *Hasbrouck v. BankAmerica Housing Servs.*, 187 F.R.D. 453 (N.D.N.Y. 1999) (finding good cause to protect disclosure of a settlement that the plaintiff had reached in a prior lawsuit with a different defendant).

242 For example, the Dalkon Shield litigation concluded with a trust authorized to make payments to claimants. See Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617 (1992) (describing the trust’s insistence on evaluating each case individually); Georgene M. Vairo, *The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L.A. L. REV. 79 (1997). The trust did not provide to the public information about the amounts paid to individuals; claimants represented by lawyers who appeared repeatedly may have gathered information through informal networks. According to one of the trustees, the decision not to disclose was to ensure that each claimant’s payment was individualized. See E-mail from Professor Georgene Vairo to the author (Oct. 22, 2004) (on file with the author).

243 See, e.g., *Llerena v. J.B. Hanauer & Co.*, 845 A.2d 732 (N.J. Super. Ct. Law Div. 2002) (permitting one employee, alleging sexual harassment by an employer, access to a settlement agreement between that employer and another employee that those parties had deemed confidential). The court provided limited access, accompanied by a protective order, authorizing only the plaintiff, her lawyers, and her experts access to information about the prior settlement. *Id.* at 739.

Enforcement questions intersect with obligations to accord full faith and credit to judgments of other jurisdictions. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222 (1998) (concluding that a Michigan injunction, entered as part of a settlement of a

Under *Kokkonen*, for example, incorporation of settlement terms into notices of dismissal or into consent judgments is useful (and perhaps necessary) to maintain federal jurisdiction. Once filed, the presumption of public access to court records comes into play. A question for legislators is whether to enact regulations about these practices. For example, in some states, parties' confidentiality agreements are overridden by laws requiring that professionals or insurance companies disclose settlements made for certain kinds of claims, such as those involving medical malpractice and settled for more than a fixed amount.<sup>244</sup>

These regulations have emerged in part in response to public outcry about "secret" settlements in cases involving sexual abuse of children by priests, exposure to toxic wastes, and injuries from design defects.<sup>245</sup> One federal district—the District of South Carolina—has responded with a local rule prohibiting sealed settlements,<sup>246</sup> while another district—the Eastern District of Michigan—limits the duration for sealing.<sup>247</sup> Statutory responses include "Sunshine in Litigation Acts" found in some states<sup>248</sup> with comparable proposals made, but not enacted, federally.<sup>249</sup>

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lawsuit between a former employee and General Motors and providing that the employee not testify about a particular product "without the prior written consent of General Motors Corporation, either upon deposition or at trial, as an expert witness, or as a witness of any kind, and from consulting the attorneys or their agents in any litigation already filed or to be filed in the future" did not shield any witness from the subpoena power of Missouri in another lawsuit involving persons not parties to the first case).

244 See, e.g., CONN. GEN. STAT. § 19a-17a (2003) (requiring that, "upon entry of any medical malpractice award or upon entering a settlement of a malpractice claim" against those licensed under other provisions, the entity making payment or the party are to notify the Department of Public Health of "the terms of the award or settlement" as well as providing a copy and the complaint and answer). Efforts to block New Jersey's statute providing for public disclosure of the dates and amounts of malpractice judgments were recently refused in *Medical Society of New Jersey v. Mottola*, 320 F. Supp. 2d 254 (D.N.J. 2004).

245 See Joseph F. Anderson, Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711 (2004).

246 See D.S.C. LOCAL R. 5.03(E) (2004) (providing that "no settlement agreement filed with the Court shall be sealed pursuant to the terms of this Rule"). In addition, any party seeking to "file documents under seal" must file a motion to do so and specify the documents sought to be sealed, explain the necessity for sealing, and whether "less drastic alternatives" would not "afford adequate protection. *Id.* See generally Symposium, *Court-Enforced Secrecy*, 55 S.C. L. REV. 711 (2004).

247 See E.D. MICH. LOCAL R. 5.4 (2003).

248 See, e.g., FLA. STAT. ANN. § 69.081 (West 2004).

249 See, e.g., Sunshine in Litigation Act of 2003, S. 817, 108th Cong. (2003).

These proposals, focused on discovery and settlement processes, may well assume the availability of information on outcomes in adjudicated cases. In some respects that assumption is apt, albeit with caveats. Between seventy and eighty percent of the federal appellate decisions made annually are designated as either not “published” and/or not available for citation by other litigants except under narrow circumstances.<sup>250</sup> Whatever the restrictions on use, many of those “unpublished” decisions are made available by online databases and more recently in their own federal “reporter”—West’s *Federal Appendix*—begun in 2001.<sup>251</sup>

The possibility of federal regulation of “secrecy in courts” has prompted the Federal Judicial Center (FJC), which is a research arm of the federal judiciary, to attempt to ascertain the frequency and distribution of such provisions in federal litigation. That task is hard because, as the case law discussed above illustrates, notices of dismissal may incorporate settlements but not specify their terms. FJC researchers examined court records to learn how often docket sheets themselves revealed sealing of settlements.<sup>252</sup> From a sample of fifty-two of the ninety-four federal district courts, researchers culled more than 280,000 docket filings and found court-sealed settlement agreements

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250 Under the rules of some federal circuit courts, “unpublished” decisions cannot be invoked as precedent, a practice some argue is unconstitutional. See *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot* 235 F.3d 1054 (8th Cir. 2000) (en banc). Although vacated, that decision helped to develop a critique. See generally Stephen R. Barnett, *From Anastasoff to Hart to West’s Federal Appendix, The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1 (2002); Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002); *Unpublished Judicial Opinions: Hearings Before the House Subcomm. on Courts, the Internet, and Intellectual Property*, 107th Cong. (2002).

In 2003, the Advisory Committee on Civil Rules proposed amending Rule 32 of the Federal Rules of Appellate Procedure to prohibit the limitation on citation of decisions for precedent. The American Bar Association supported this change to “promote transparency” and to “help level the playing field between large litigants and smaller parties that lack the resources to perform exhaustive legal searches.” But in June of 2004, the federal judicial committee in charge decided that more study was needed on the proposed rules’ potential effects on the time to disposition. See *Appellate Rule Revision Postponed*, 72 U.S.L.W. 2767 (June 22, 2004) (describing the decisions of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States); see also Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004).

251 As to state decisions, see Arthur G. Scotland, *The Filing and Publication of Appellate Opinions: A Survey of the Council of Chief Judges of Courts of Appeal*, JUDGES’ J., Winter 2004, at 31.

252 SEALED SETTLEMENT AGREEMENTS, *supra* note 180.

in a small number—227 cases or under one-half of one percent.<sup>253</sup> The researchers found examples of sealing in a range of kinds of cases (including personal injury, employment, civil rights, and contract cases) with higher rates of confidentiality in certain kinds of cases, such as those filed under the Fair Labor Standards Act.<sup>254</sup> The researchers concluded that in at least two-fifths of the cases identified, sealing occurred when cases had features making them of “special public interest.”<sup>255</sup>

One might infer from the relative rarity of docket sheets that mention sealing that the practice is itself rare. An alternative explanation is that sealing court dockets is not the predominant mode of maintaining the confidentiality of the terms of agreements. Rather, parties may rely heavily on contracts that require confidentiality and leave whatever conflicting allegations are on court records to the public realm.

The difficult problem of ascertaining the frequency of confidential settlements ought not to obscure the normative question of whether legislators or judges should put the possibility of confidentiality “off the table”—as an item that cannot be bought and sold when lawsuits are concluded. The question in turn requires thinking about whether the public dimensions of an adjudicatory model (with trials as its most vivid expression) that make possible scrutiny of both the facts prompting conflict and of the resolution<sup>256</sup> should be extrapolated to the new litigation system in which much is done through motions, pretrial processes, and settlement. The clearest statements of right of public access come in the context of the criminal trial.<sup>257</sup>

On the civil side, constitutional commitments anchored in the First Amendment and the Due Process Clauses, coupled with common

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253 *Id.* at 3. Summaries of the cases are provided in Appendix C.

254 *Id.* (noting that Fair Labor Standards Act cases had a rate of sealing almost six times the overall average).

255 *Id.* at 7. That such cases are ones in which sealing occurs can also be seen from the non-random production of case law. The Ninth Circuit, for example, recently reviewed a blanket protective order making secret a good deal of discovery related to alleged fraud by an insurance company. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003). The circuit court held that a “presumption of access” attached to discovery materials submitted in conjunction with dispositive motions and remanded for the trial court to revisit its ban on access. *Id.* at 1136; *see also Stalnaker v. Novar Corp.*, 293 F. Supp. 2d 1260 (M.D. Ala. 2003) (approving a settlement in a Fair Labor Standards Act case but ordering that it be unsealed).

256 *See* Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987); Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL’Y REV. 155 (1999).

257 *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 488 U.S. 555 (1980).

law rights of access to judicial proceedings, secure public access to at least court-based hearings. Some commentators argue further that a general presumption of public access exists for all documents filed with the court.<sup>258</sup> Under that rubric, some courts have assumed that access to filed settlements is generally required.<sup>259</sup> As the Eleventh Circuit explained, it is

immaterial whether the sealing of the record is an integral part of a negotiated settlement between the parties, even if the settlement comes with the court's active encouragement. Once a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case. Absent a showing of extraordinary circumstances . . . , the court file must remain accessible to the public.<sup>260</sup>

In contrast, some judges have denied access to settlement agreements that are not filed with courts; as the Second Circuit recently explained, "honoring the parties' express wish for confidentiality may facilitate settlement."<sup>261</sup> Further, courts have distinguished among the kinds of documents in a court's file, for example providing access to discovery material annexed to substantive motions but ruling that "material filed with discovery motions is not subject to the common-law right of access."<sup>262</sup>

But even a rule making entire files "accessible" does not guarantee public knowledge but rather depends upon what is filed with courts. Amendments to Rule 5 of the Federal Rules of Civil Procedure now provide that parties do not have to file discovery.<sup>263</sup> Only if materials obtained through discovery are reflected in motions or affi-

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258 SEALED SETTLEMENT AGREEMENTS, *supra* note 180, at 1.

259 *See* Bank of America Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339 (3d Cir. 1986); Herrnreiter v. Chicago Housing Auth., 281 F.3d 634 (7th Cir. 2002); Jessup v. Luther, 277 F.3d 926 (7th Cir. 2002); Enprotech Corp. v. Renda, 983 F.2d 17 (3d Cir. 1993).

260 *Brown v. Advantage Engineering, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992); *see also* *Jessup*, 277 F.3d 926 (requiring disclosure of a settlement because it had been filed with the court).

261 *See, e.g.*, *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 143-44 (2d Cir. 2004) (concluding that when settlements are conditioned on confidentiality and do not include information on amounts paid, no disclosure was required). *Gambale* also concluded that despite the dismissal of the action (without any *Kokkonen*-like jurisdiction vesting language), courts retained jurisdiction to deal with materials in their files. *Id.* at 141; *see also* *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994) (remanding for the district court to consider the utility of confidentiality).

262 *See, e.g.*, *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312 (11th Cir. 2001).

263 *See* FED. R. CIV. P. 5(d) (as amended in 2000).

claims does the information have the potential to become public. And, we know that parties bargain to hide the information that they unearth in discovery. A headline-grabbing example comes from recent litigation involving sex discrimination at a Wall Street brokerage firm. As one report put it about the settlement of a sex discrimination case against Morgan Stanley, although the Equal Employment Opportunity Commission (EEOC) had

planned to introduce statistics about women's pay and promotion at trial, details on the alleged disparities between the firm's male and female employees were never made public. . . . As part of the settlement, the parties agreed to honor a pre-existing confidentiality order, designed to keep many of the documents under wraps.<sup>264</sup>

In short, information suppression can occur through settlement, through agreements entered into during the course of litigation (including that discovery be "buried" or "burned"), and through bargains that require a lawyer to decline to represent other similarly situated plaintiffs (in other words, buying the lawyer off of a genre of cases). Further, ADR can also serve as a means of limiting access to information, as many states have created a privilege for information obtained in mediations. Federal law providing for mediation has a similar feature.<sup>265</sup> Conflicts are now emerging about whether, through bringing documents and information into a mediation, parties can successfully shelter them from subsequent disclosure in litigation.<sup>266</sup> Critics of such practices propose turning to state ethics laws to

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264 See Kate Kelly & Colleen Debaise, *Morgan Stanley Settles Bias Suit for \$54 Million*, WALL ST. J., July 13, 2004, at A1; see also Susan Antilla, Op-ed, *Money Talks, Women Don't*, N.Y. TIMES, July 21, 2004, at A19 (arguing that "Morgan Stanley, and all of Wall Street, scored" by keeping the statistics private). Antilla raised concerns about the EEOC's agreement to the settlement with that as a condition. In contrast, in advance, the focus was on the public disclosures that were to come. See Patrick McGeehan, *The Women of Wall Street Get Their Day in Court*, N.Y. TIMES, July 11, 2004, § 3 (Business), at 5.

265 See 5 U.S.C. § 574 (2000) (requiring confidentiality, and specifically for discovery, of voluntary exchanges by a "neutral" or by parties of alternative dispute resolution in administrative processes); 28 U.S.C. § 652(d) (2000) (requiring district courts to provide local rules for confidentiality in ADR); cf. *FDIC v. White*, 76 F. Supp. 2d 736 (N.D. Tex. 1999) (concluding that this section does not prevent use of evidence disclosed at mediation to challenge a settlement agreement). See generally Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation—Worldwide*, 80 NOTRE DAME L. REV. 553 (2005); Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441 (1984).

266 See, e.g., *Rojas v. Superior Court*, 93 P.3d 260, 270–71 (Cal. 2004) (holding that a mediation privilege applied to "writings" that include analyses of test data and photographs prepared "for the purpose of, in the course of, or pursuant to a mediation" and that a "good cause exception" did not apply). Several courts have concluded that

constrain lawyers from restricting public access to information that might pose “substantial danger to the public health or safety.”<sup>267</sup>

Such bargaining about information reflects a more general concern about unequal power. Inequality of resources between litigants is a familiar problem inside courts. Constitutional doctrine has imposed obligations to equip poor criminal defendants as well as a small sliver of civil litigants—those faced with termination of parental rights.<sup>268</sup> Further, as noted, federal rules insist on judicial oversight of guilty pleas because of the fear that the state could overreach and that the defendant might be poorly counseled. One might, therefore, have thought that such concerns would also have resulted in judicial efforts to limit the kinds of bargains that prosecutors can make with defendants.<sup>269</sup> However, judges have instead shaped doctrines notably tolerant of bargaining inequality on both the criminal and the civil side.

A powerful and poignant example of the acceptance of bargaining among unequals comes also from the 2004 decision of *Blakely v. Washington*,<sup>270</sup> in which a majority concluded that judges lacked the power to enhance sentences if the underlying facts had not been proved to a jury or stipulated to by the defendant.<sup>271</sup> As Justice Scalia explained for the majority: “Our Constitution and the common-law traditions it entrenches . . . do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury.”<sup>272</sup> This decision has profound implications for deter-

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statements made in mediation are privileged. See, e.g., *Foxgate Homeowners Ass’n v. Bramalea Cal., Inc.*, 25 P.3d 1117 (Cal. 2001); *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Price*, 78 P.3d 1138 (Colo. Ct. App. 2003); *State Bd. of Labor Relations v. Freedom of Info. Comm’n*, 709 A.2d 1129 (Conn. 1998); see also Deason, *supra* note 265 (proposing more protection for confidentiality in mediation). A few examples of narrow construction of the privilege can be found. See, e.g., *Ala. Dep’t of Transp. v. Land Energy, Ltd.*, 886 So. 2d 787, 796 (Ala. 2004).

267 See, e.g., Richard A. Zitrin, *Written Testimony to the American Bar Association’s Center for Professional Responsibility*, at <http://www.abanet.org/cpr/zitrin.html> (Oct. 5, 2001) (proposing this amendment to Model Rule of Professional Conduct 3.2(B) but the change was not enacted).

268 See, e.g., *Lassiter v. Dep’t of Social Servs.*, 452 U.S. 18 (1981); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). See generally Resnik, *Money Matters*, *supra* note 20, at 2120–43.

269 See King, *supra* note 200, at 136 (arguing for much greater judicial involvement). The tension in part comes from the view that, given separation of powers, judges ought not infringe upon executive decisionmaking.

270 124 S. Ct. 2531 (2004).

271 *Id.* at 2537–38.

272 *Id.* at 2543. In contrast, in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), the Court had permitted judges to consider, at sentencing, evidence of conduct of which a defendant had been acquitted.

minate sentencing schemes, with more decisions by the Supreme Court soon to come,<sup>273</sup> but my interest is in what the Court had to say about negotiation —about contract—as an alternative to jury factfinding. Even as Justice Scalia’s majority decision insisted on the constitutional requirement of factfinding, it also embraced the option of contracting out of such rights.

The discussion of the alternative option to contract out of rights was accompanied by an acknowledgment of the significant imbalance of power between prosecution and defense. The majority explained, “nothing prevents a defendant” from agreeing in a plea bargain with the prosecutor to waive rights to jury factfinding, to stipulate relevant facts, or to consent to factfinding by judges on questions related to sentencing.<sup>274</sup> While the dissenters objected that the majority’s holding would increase prosecutorial discretion in a system in which adjudication is functionally unavailable and more than ninety percent of the cases are settled through plea bargaining, the majority replied that its insistence on rights to adjudication did not affect the respective bargaining positions of prosecutor and defendant. As the Court put it, for the prosecutor, “there is already no shortage of *in terrorem* tools.”<sup>275</sup> That reference is to an array of current legal doctrines permitting prosecutors to drop and to add charges including those in-

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The dissenters interpreted the majority to require that “any fact that increases the upper bound of a judge’s sentencing discretion is an element of the offense.” *See id.* at 2546 (O’Connor, J., dissenting, joined by Justice Breyer and in part by Chief Justice Rehnquist and Justice Kennedy). Justice Kennedy filed a separate dissent, joined by Justice Breyer, to point out that the majority insisted on a separation of functions rather than appreciating sentencing guidelines as a “collaborative process.” *Id.* at 2550–51. Justice Breyer, joined by Justice O’Connor, also wrote separately and discussed how the decision “threaten[s] the fairness of our traditional criminal justice system.” *Id.* at 2552. Note that downward departures, awarding more lenient sentences, do not raise that problem.

Some lower courts have since concluded that the federal sentencing guidelines are unconstitutional as well as called upon the Supreme Court to provide a rapid response to the growing conflict, while others have limited their sentences only to facts proven or stipulated, sometimes resulting in sentences within, and sometimes below, guideline ranges. *See, e.g.,* *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004); *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *cert. granted*, 125 S. Ct. 11 (2004). An expedited schedule for Supreme Court review has followed.

273 The Court so noted. *See Blakely*, 124 S. Ct. at 2540. Several Supreme Court decisions, relating to distinctions between sentencing factors and elements of crimes, are not all easily aligned and have sometimes prompted sharp divisions within the Court. *See Harris v. United States*, 536 U.S. 545 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Edwards v. United States*, 523 U.S. 511 (1998); *United States v. Watts*, 519 U.S. 148 (1997) (*per curiam*); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

274 *Blakely*, 124 S. Ct. at 2541.

275 *Id.* at 2542.

volving the death penalty, permitting judges to impose harsher sentences on remands from appeals won by defendants as long as judges identify facts supporting the additional punishment, and recognizing the waiver of appellate rights as acceptable for prosecutors to extract when bargaining.<sup>276</sup> Thus, contemporary interpretations of “our Constitution and the common-law traditions it entrenches” are complacent about putting defendants to the choice of insisting on a trial at the risk of receiving a far greater punishment than would have resulted from agreeing to a bargain.

Parallels exist on the civil side. For example, in *Carnival Cruise Lines, Inc. v. Shute*, decided in 1991, the Supreme Court upheld a forum selection clause that sent two passengers from Washington State who brought a negligence claim against a cruise line to Florida—all because the ticket they bought included (“at its lower left-hand corner”) a requirement that its acceptance obliged passengers to agree to litigate claims there.<sup>277</sup> While the Court reserved some modicum of “judicial scrutiny for fundamental fairness,”<sup>278</sup> unequal bargaining positions, the lack of bargaining altogether, and the provision of the clause upon receipt of a purchased ticket did not persuade the majority, who argued the utility of organizing and centralizing litigation.<sup>279</sup>

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<sup>276</sup> For example, the Advisory Committee on the Criminal Rules explained a 1999 amendment as made “to reflect the increasing practice of including provisions in plea agreements which require the defendant to waive certain appellate rights.” See Advisory Committee Notes to the 1999 amendments to FED. R. CRIM. P. 11(c)(6). The 2002 amendments reorganized the rule and deleted that subdivision.

Current federal sentencing guidelines also facilitate negotiations of particular kinds, for example by making available sentence reductions for defendants who accept responsibility by pleading guilty. See UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 3E1.1 (2003).

<sup>277</sup> *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587 (1991).

<sup>278</sup> *Id.* at 595.

<sup>279</sup> *Id.* at 594–95. Justice Stevens, joined by Justice Marshall in dissent, concluded that disparate bargaining positions, the adhesive nature of the contract, and concern about limitations imposed on courts’ jurisdiction, ought to have made the contract unenforceable. *Id.* at 597, 600–07.

In the case’s wake (pun intended), many courts have enforced forum selection clauses, including those that send litigants to venues far from their homes. See, e.g., *Fireman’s Fund Ins. Co. v. M.V. DSR Atlantic*, 131 F.3d 1336 (9th Cir. 1997) (requiring litigation in Korea); *M.B. Restaurants, Inc. v. CKE Restaurants, Inc.*, 183 F.3d 750 (8th Cir. 1999) (upholding the obligation under a contract, alleged to have been procured through fraud, that franchisees from South Dakota bring complaints in Utah, which would provide an opportunity to present the claim); see also *Carbajal v. H & R Block Tax Serv., Inc.*, 372 F.3d 903, 906–07 (7th Cir. 2004) (enforcing such a clause mandating that arbitration occur in Minnesota and leaving the question of whether “any particular federal statute overrides the parties’ autonomy and makes a given entitlement not waivable” to the arbitrator).

As these concerns about efficiency in the management of both civil and criminal litigation illustrate, the turn to Contract Procedure comes from many sources including—as *Blakely*'s dissenters underscore—that while individual adjudication is a protected right, most people cannot afford its pursuit either because of a lack of resources or because of its high risks. Yet in this arena of vivid inequality, one can find little interest in judicial oversight of the deals struck. What *Blakely*, *Carnival Cruise*, and arbitration cases such as *Circuit City*<sup>280</sup> teach is that courts are willing to rely on individual consent even as they know that such consent is given under conditions of profound inequality.<sup>281</sup>

In short, bargaining per se is no panacea. At times, distress about certain terms in bargains have prompted some rules for Contract Procedure, mostly working at the margins and coming from episodic statutory enactments, amendments to rules, and by case law. In the law of settlement as judges have made it thus far, courts have been a source of the growing obligation to bargain but not of many means to improve the ability of litigants to bargain.

#### D. Process Failures

Yet other problems arise when deals fall apart. As noted above, some settlement agreements are oral, not written. Under the contract law of many jurisdictions, oral agreements are enforceable, and courts have relied upon that premise to enforce settlement contracts that are

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A few cases do provide, however, that factfinding may be a prerequisite to enforcement to determine whether the party opposing enforcement can meet the “heavy burden of proof” that enforcement would be “unreasonable and unjust or that the clause was invalid for such reasons as fraud or over-reaching.” See *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2003) (citing *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12, 15 (1972)).

280 See notes 104–06, *supra*.

281 Administrative schemes (represented in *Blakely* by the example of sentencing guidelines) generate presumptive outcomes across categories of claimants and thereby reduce some of the transaction costs which in turn may reduce some of the problems of the inequality of resources of the disputants. Parallels on the civil side include compensation systems such as those for disabilities, illnesses from vaccines, and for Black Lung disease. See, e.g., National Vaccine Program, 42 U.S.C. § 300aa-12 (2000) (creating a special set of masters, sitting under non-life tenured judges in the Court of Federal Claims, to do factfinding in cases involving such injuries); Black Lung Benefits Act, 30 U.S.C. §§ 901–945 (2000) (providing a program for injuries from coal mining dust). While such processes offer some reduction in expense and some regularization of discretion, they do so at the price of vivid instances of unfairness because of the refusal to invest resources in individualization.

not reduced to writing.<sup>282</sup> On the other hand, some states require signed written agreements as a predicate to enforcement.<sup>283</sup> But even when agreements are written, differences of interpretation can result, raising the problem of the role of the court in choosing how much information to entertain.

In 1969, when faced with a failure to comply with a settlement agreement, the D.C. Circuit stated that a “motion to enforce a settlement contract is neither ordinary nor routine.”<sup>284</sup> Now, more than thirty years later, such motions are increasingly common.<sup>285</sup> Thus, one question is what process is required when courts face such motions and which judges ought to rule on them. The D.C. Circuit answer, circa 1969, was that, when facts were in dispute, entitlements to evidentiary hearings follow.<sup>286</sup> In short, Contract Procedure requires

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282 See, e.g., *Michigan Regional Council of Carpenters v. New Century Bankcorp*, 99 Fed. Appx. 15, 21 (6th Cir. 2004); *Brock v. Scheuner Corp.*, 841 F.2d 151, 154 (6th Cir. 1988).

283 See MICH. CT. R. 2.507(H). That section requires that an agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by the party’s attorney.

*Id.* Similar provisions can be found in several states. See, e.g., N.D. R. CT. 11.3 (2004); WIS. STAT. § 807.05 (2003); S.C. R. CIV. P. 43(k) (West Supp. 2003); N.Y. C.P.L.R. 2104 (McKinney Supp. 2004). Arizona provides that, if disputed, agreements are binding only if made in writing or in open court and recorded. See ARIZ. R. CIV. P. 80(d) (2004). Missouri has provided that all ADR is nonbinding absent parties’ written agreements. See MO. SUP. CT. R. 17.01(d) (2004).

284 *Autera v. Robinson*, 419 F.2d 1197, 1203 (D.C. Cir. 1969).

285 See generally Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediations—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL 509 (2004); James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of Emerging Case Law*, 54 ARK. L. REV. 171 (2001); Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33 (2001).

286 *Autera*, 419 F.2d at 1203; see also *TCBY Systems, Inc. v. EGB Assocs., Inc.*, 2 F.3d 288 (8th Cir. 1993) (noting the “general rule” that evidentiary hearings are required when “the existence or terms of the settlement agreement” are in dispute); *Fisher Brothers v. Phelps Dodge Indus., Inc.*, 614 F. Supp. 377 (E.D. Pa. 1985) (holding an evidentiary hearing to interpret a “most favored nations” clause); cf. *Michigan Regional Council of Carpenters*, 99 Fed. Appx. at 18–19 (declining to hold an evidentiary hearing in part because of information that the judge had received at a status conference). The court held that no evidentiary hearing was required, despite some “facial inconsistency” between a court order noting that the parties were “near settlement” and another indicating that the matter had settled. *Id.* at 21 n.5. Parties who do not request such hearings are not provided them as of right. See *Calcor Space Facility*,

some oversight, through the lens of Due Process Procedure, because court-based decisionmaking entails opportunities to be heard.<sup>287</sup>

At least three sticking points have become plain in the years since the D.C. Circuit's identification of the right to procedural due process when disputes arise about the meaning of court-based settlements. A first is the judgment call about when evidence is needed and whether, even if evidence is needed, affidavits suffice.<sup>288</sup> One possibility is to apply the approach of Rule 56 on summary judgment and to require judges either to find that no material facts are in dispute or to take evidence.<sup>289</sup> A second question is about the scope of the inquiry and the kind of information understood to be relevant.<sup>290</sup> The Federal Rule on execution of judgments makes provisions for discovery,<sup>291</sup> raising issues about how much and what discovery will be permitted. Yet another question is whether any rights to jury trials exist.

A third interrelated problem is the complexity of the position of the judge who helped to settle a case and is then asked to rule on a motion about a settlement. From case law reports, we know that trial

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*Inc. v. McDonnell Douglas Corp.*, 5 Fed. Appx. 787 (9th Cir. 2001); *Vaughn v. Sexton*, 975 F.2d 498 (8th Cir. 1992).

287 Several decisions have required evidentiary hearings when disputes exist about either the existence or material facts on the terms of settlements. *See, e.g.*, *Millner v. Norfolk & W. Ry. Co.*, 643 F.2d 1005, 1009 (4th Cir. 1981); *Mid-South Towing Co. v. Har-Win, Inc.* 733 F.2d 386, 390 (5th Cir. 1984); *United States v. Hardage*, 982 F.2d 1491, 1496 (10th Cir. 1993); *see also* FED. R. CIV. P. 69(a) (providing that, in aid of execution, judgment creditors may obtain discovery); *FDIC v. LeGrand*, 43 F.3d 163, 172 (5th Cir. 1995); *Nat'l Serv. Indus., Inc. v. Vafila Corp.*, 694 F.2d 246, 250 (11th Cir. 1982).

288 *See, e.g.*, *Bandera v. Quincy*, 344 F.3d 47, 51–55 (1st Cir. 2003) (requiring evidence if material facts are in dispute and evaluating the evidence taken but also noting that sometimes resolution may occur without evidence being taken); *Stewart v. M.D.F., Inc.*, 83 F.3d 247, 251 (8th Cir. 1996) (declining to require a hearing given affidavits that an attorney lacked authority to settle and little likelihood existed that the settlement would be enforced).

289 For concern that judges are too readily granting summary judgment and hence that a question exists about "which" summary judgment approach would be appropriate, *see* Miller, *The Pretrial Rush to Judgment*, *supra* note 18, at 1044–57.

290 For example, courts have considered statements made by parties to the press and communications to others as evidence of the fact and terms of settlements. *See, e.g.*, *Re/Max Int'l, Inc. v. Realty One, Inc.*, 271 F.3d 633, 638–39 (6th Cir. 2001) (considering the public posture taken by parties, including press releases and communications to others); *United Commercial Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853 (9th Cir. 1992) (providing, with a majority and dissent, very different assessments of the relevance and weight of information and documents and implications of the background facts of the litigation options).

291 *See* FED. R. CIV. P. 69.

judges often take an “active role . . . in clarifying” settlement terms.<sup>292</sup> Some judges serve as mediators and, after discussions, dictate the terms of an agreement into the record.<sup>293</sup> One view is that, given such intimate involvement, such judges should recuse themselves from enforcement proceedings since that posture may put them in the position of being both witness and judge. Similarly, should a judge who helps to bring a settlement about subsequently make findings about its existence and enforceability? If so, then appellate review of those decisions (if sought) could rely on an exacting standard of review that gives little or no deference to the position taken by the settling judge.<sup>294</sup> Whether judges should formally be called as witnesses (as Judge Posner has suggested)<sup>295</sup> is another question, although one must wonder whether that suggestion was a rhetorical flourish that the realities of the power of the trial judge make implausible or useless.

## V. LAW'S BARGAINS

I hope that this overview has made plain that Contract Procedure is now an integral aspect of contemporary civil litigation. The obligation to discuss settlement is imposed in national and local rules, shifting the focus from adjudication to negotiation. The many problems described above should also make plain that Contract Procedure cannot avoid facing disputing parties. The challenges that the Federal Rules of Civil Procedure were designed to solve, more than sixty years ago, have not disappeared but rather returned in the context of sorting out the facts and meaning of bargains. As judges rule over bargaining, their legitimacy is put into question. How are they to justify the interventions they make?

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292 Brief for Respondents at \*4, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994) (No. 93-263), available at 1994 WL 137026.

293 See *Re/Max Int'l*, 271 F.3d at 637 (describing the initial appointment of another judge “to mediate settlement discussions with the parties,” and that when such efforts “proved unsuccessful,” the judge assigned to the case “conducted mediation sessions with the parties on” three days); *id.* at 639 (referring to the “transcript dictated by Judge Gwin and agreed to by counsel and the parties in court” as the “complete settlement of the parties”). Thereafter, the trial judge also gave a lengthy explanation of why, in that judge’s opinion, one party had settled after all the others. *Id.* at 637 n.2.

294 Cf. *Therma-Scan, Inc. v. Thermoscan, Inc.*, 217 F.3d 414 (6th Cir. 2000) (applying a standard of clear error to findings of the existence of a settlement and a standard of abuse of discretion to rulings on enforcement of settlements).

295 *Lynch, Inc. v. SamataMason Inc.*, 279 F.3d 487, 491–92 (7th Cir. 2002). We (my research assistants and I) have not found a reported case in which such a procedure took place, although in *United States v. Newman*, the decision describes a judge making such an offer. See 982 F.2d 665, 670 n.6 (1st Cir. 1992).

The growing law of settlement often reveals judges resorting to type—returning to their role as adjudicators by providing opportunities for evidence and finding facts. But in many cases, the allure of settlement overwhelms jurists, insisting on the existence of bargains over parties' objections and ignoring their own investments in dispositions without trial. Instead, when conflicts emerge either about settlements made in or because of courts or about the qualities of privately provided or agency-based processes, Contract Procedure has to return to Due Process Procedure.<sup>296</sup> Here, my argument is that even as much of the trans-substantive premises of the 1938 Federal Rules of Civil Procedure have been eroded, at least one aspect of that trans-substantive project needs to be preserved. The task of judging has to be bounded by Due Process Procedure, for it offers the best account of how to legitimate judicial action.

What I hope this review of current facets of Contract Procedure also reveals is the need to do more than rely on the haphazard decisionmaking, much of it in decisions marked “not for publication or citation as precedent.” Instead, a project like that which produced the 1930s creation of the Federal Rules of Civil Procedure has to be undertaken to face the normative questions so as to begin to sort categories and cases, to write rules captioned “settlement,” to explain the forms and kinds of bargains permitted, and to detail the position of the judge over the life span of a settlement (as contrasted to the life span of a lawsuit).

While these proposals implicate ambitions akin to efforts in the 1920s and 1930s to develop what was then a new form of civil procedure, those working in the twenty-first century cannot assume the autonomy of decisions about process from substantive agendas about the meaning of justice. The deployment of process to achieve substantive goals is deeply entrenched in the Constitution and regularly practiced by politicians and rulemakers alike; ignoring the political and distribution consequences of procedural rulemaking is not possible now (if it ever was).<sup>297</sup> Given the stakes of judge-induced contracts, collective

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<sup>296</sup> Indeed, some proponents of ADR suggest that its deployment ought to be accompanied by incorporation of due process rights. See, e.g., Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 960 (2000) (seeking to require “minimal but meaningful due process standards in those dispute resolution hearings that are driven by state action” such as court-enforced arbitration obligations).

<sup>297</sup> See 28 U.S.C. § 2072(b) (2000) (requiring that procedural rules “shall not abridge, enlarge, or modify any substantive rights”). See generally Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Effi-*

discussion is needed about both the content and the sources of the law of Contract Procedure.

A central question for this federation is whether to support the current trend—a federal common law of contract emerging through the accretion of decisions on the law of settlement<sup>298</sup>—or whether other bodies of government, state or federal, should make more of the decisions.<sup>299</sup> Several years ago, Professors Carrington and Haagen raised concerns that the Supreme Court had unwisely taken on the task of federalizing arbitration law, weakening enforcement of federal statutory rights and hence of national law more generally, and over-legalizing commercial arbitration.<sup>300</sup> During an era when the Supreme Court had appeared particularly attentive to state authority, it nonetheless preempted state litigation rights, which were interpreted to conflict with federal obligations to arbitrate. Similarly, Professor Nancy King has drawn attention to the “remarkable development” in criminal procedure that “rights and requirements previously considered inalienable, have become bargaining chips.”<sup>301</sup> Yet several of the

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*ciency*, 87 GEO. L.J. 887 (1999); Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219 (1989).

298 See, e.g., *Monaghan v. SZE 33 Assocs.*, 73 F.3d 1276, 1283 (2d Cir. 1996) (assuming without deciding that state law governed and determining that state law would enforce a settlement that did not comply with state law provisions because of one party’s reliance upon it); *United Commercial Ins. Serv., Inc. v. Paymaster*, 962 F.2d 853, 856 (9th Cir. 1992) (concluding that even when federal causes of action are concluded by settlement, interpretation of settlement agreements should be governed by state law).

Arbitration contracts governed by the FAA are interpreted under state law, except when federal law preempts state law. See *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (concluding that the FAA created “a body of federal substantive law of arbitrability” that preempts contrary state law). The Court there noted that state law is used “to govern issues concerning the validity, revocability, and enforceability of contracts generally.” *Id.* at 492. The Court also noted that state courts could not rely on the “uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.” *Id.* The recent spurt of federal and state decisions addressing enforcement of arbitration contracts makes plain the complexity of the question of what issues are for state and which are for federal lawmakers.

299 See, e.g., David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085 (2002) (calling for federal legislation to regulate the enforcement and use of pre-litigation agreements).

300 See Carrington & Haagan, *supra* note 106, at 331–33.

301 King, *supra* note 200, at 114. There, King advocated that judges ought to be required to identify third-party effects of bargains, such as concerns about too much power residing in the Executive or the imposition of punishments that are disproportionate to the offense. *Id.* at 154–82.

cases I have described and much of the commentary cited provide evidence of unease about some of the consequences of that posture.

This body of material provides a means for policymakers to return to the question of whether, how much, and how to preclude access to adjudication. Relevant sources of lawmaking include the state-based Commissioners on Uniform Laws, federal rule drafters (making new rules or borrowing state practices), specially-chartered commissions, and state and federal legislators. Regulators need also to attend to the obligations of lawyers, again an arena associated with the law of agency and state-based ethical rules but today replete with law stemming from a variety of sources and, increasingly, the federal rules and statutes.<sup>302</sup>

That more input into and more collective elaboration of the processes of Contract Procedure are needed are the easy conclusions from this analysis. The hardest issues for Contract Procedure (as they are for Due Process Procedure) will be whether to try to craft a trans-substantive set of answers, whether to respond to inter-litigant disparity in process options and outcomes, and whether to try to curb the power of repeat players (civil and criminal) to set the parameters of law's bargaining.<sup>303</sup>

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302 See generally Jeffrey A. Parness & Austin W. Bartlett, *Unsettling Questions Regarding Lawyer Civil Claim Settlement*, 78 OR. L. REV. 1061 (1999).

303 See Galanter, *Why the "Haves" Come out Ahead*, *supra* note 83; see also IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? (Herbert M. Kritzer & Susan S. Silbey eds., 2003).