

WHO DECIDES? A CRITICAL LOOK AT PROCEDURAL DISCRETION

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ABSTRACT

Federal civil procedure today relies extensively on trial judge discretion to manage litigation, promote settlements, and otherwise tailor process to individual cases. Even those rules with decisional standards leave trial judges considerable interpretive freedom to make case-specific determinations. This Article criticizes these choices and recommends stricter rules. Many judges and procedure scholars applaud the discretionary approach, and the Advisory Committee seems content to draft vague rules that implement it. The assumption seems to be that trial judges have the expertise and experience to do a good job of tailoring procedures to the needs of particular cases. The assumption is wrong, and this Article explains why.

After surveying how discretion operates in federal procedure and explaining how it came to dominate, the Article turns to developing the argument against case-specific discretion. It begins by identifying the primary purpose of procedure and explains why achieving quality settlements is as important as achieving quality judgments. The settlement quality and judgment quality objectives conflict, however, and designing procedures to balance them optimally is a difficult matter. The Article then identifies three serious problems that frustrate any effort by trial judges to strike an optimal balance in individual cases: bounded rationality limits, information access obstacles, and strategic interaction effects. These problems are particularly acute in procedure because of the highly strategic nature of litigation and the tightly integrated structure of a procedural system. The Article explains why the three problems are not as serious for committee-based rulemakers as for trial judges and why the cost-benefit balance therefore supports adopting stricter rules. The Article concludes by discussing four ways to limit discretion and illustrating each with concrete reform proposals in the areas of discovery, settlement promotion, and class action law.

I. Introduction

How much discretion should a trial judge have to design procedures for a given lawsuit? This is a difficult and important question for civil proceduralists today. Federal district judges exercise extremely broad and relatively unchecked discretion over many of the details of litigation.¹ They have extensive power to manage cases, and broad,

¹ See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIR. LEG. STUD. 459, 519 (2004) (“Modern procedure has conferred on trial court judges broader unreviewed (and perhaps unreviewable) discretion”); Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 963 (1998) [hereinafter *Changes in the Legal Profession*] (“the discretion of trial judges has expanded partly because

essentially unreviewable, power to promote settlements. Even when a procedural rule includes decisional standards, those standards often rely on expansive judicial discretion to make critical case-specific determinations.² Indeed, it is only a slight exaggeration to say that federal procedure, especially at the pretrial stage, is largely the trial judge's creation subject to minimal appellate review.

Many federal judges and procedure scholars favor maintaining and even expanding broad case-specific discretion, arguing that trial judges have the necessary expertise and experience to tailor procedures to the needs of particular cases.³ More skeptical scholars worry about the high costs and the legitimacy and accountability

of increased complexity but even more so from the multiplication of discretionary procedural, evidentiary, and management decisions”).

² See Edward H. Cooper, *Simplified Rules of Federal Procedure*, 100 MICH. L. REV. 1794, 1795 (2002).

³ See, e.g., Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005) (retrieving equity as a source of procedural discretion); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429 (2003) (arguing for broad use of equitable discretion); Jeffrey W. Stempel, *Complex Litigation at the Millenium: Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery “Reform”*, 64 LAW & CONTEMP. PROB. 197, 232-234 (Spring/Summer 2001) (advocating broad trial judge discretion to tailor discovery to individual cases); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1995-96 (1989) (approving trial judge discretion limited by “principles of preference” to guard against abuse). Cf. Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (2003) [hereinafter *Slouching*] (arguing that concerns about trial judge discretion are overblown).

problems that broad and relatively unchecked discretion can generate.⁴ The debate has even reached a global level.⁵

In this Article, I side with the skeptics, but for reasons that have not been fully explored before. Most critics focus on risk of abuse and give short shrift to competency concerns. This is a mistake. The pervasive assumption that expert trial judges can do a good job of tailoring procedures to individual cases is simply wrong. In fact, judges face serious problems choosing case-specific procedures to work well in the highly strategic environment of litigation, and these competency problems deserve much more serious attention.

If we were not so accustomed to broad trial judge discretion over procedure, we would probably think it a rather strange way to manage the litigation environment. Imagine hiring a manager to oversee a workplace where the employees are committed to achieving diametrically opposite results, encouraged to pursue their own self interest and not the interests of the firm, allowed to use a wide range of strategic tools to achieve their objectives, and permitted to conceal critical information from the manager and from one another. Even the best manager is likely to have great difficulty managing such a

⁴ See, e.g., Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L. J. 27 (2003) [hereinafter *Judicial Role*] (criticizing modern procedural developments for placing the trial judge in a highly discretionary management-type role that exceeds the bounds of judicial competence); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41 (1995) (arguing that the broad discretionary power trial judges have over pre-trial management creates an unacceptable risk of arbitrary power); Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 297-306 (1991) (criticizing the “trend toward overbroad discretion in complex litigation”); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) [hereinafter *Equity*] (arguing for stricter and clearer rules to discipline litigation and enhance outcome consistency); Judith A. Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 548 (1986) [hereinafter *Failing Faith*] (expressing reservations about the trial judge’s ability to exercise case-specific discretion fairly).

⁵ The topic of procedural discretion was the subject of an international conference held in 2000. See DISCRETIONARY POWER OF THE JUDGE: LIMITS AND CONTROLS 45 (Marcel Storme & Burkhard Hess, ed. 2003) (noting a global trend toward broader case-specific discretion over procedure).

fractious workplace environment. Indeed, when we think of an effective manager, we think of someone coordinating and inspiring employees hired to work for a common goal and usually eager to do so. The litigation environment, with its adversarial, self-interested, and strategic elements, is a far cry from this situation.

This Article carefully examines the efficacy of case-specific discretion, explains why general rules are often superior, and urges rulemakers to draft rules with more constraints. The argument begins by identifying the primary purpose of procedure, which is to produce a pattern of judgments and settlements that enforces the substantive law's incentive and justice goals optimally. Producing quality settlements and producing quality judgments are equally important objectives in achieving this overall purpose. These two objectives conflict, however, and balancing them entails complicated quality tradeoffs. This is significant because trial judges are likely to have special difficulties striking an optimal balance on a case-specific basis. In particular, bounded rationality, information access obstacles, and strategic interaction effects frustrate case-specific decisionmaking, especially in the highly strategic environment of litigation. Committee-based rulemakers are in a better position to evaluate the options and craft stricter rules that do a superior job across the class of cases to which they apply. Accordingly, rulemakers should be much more skeptical of delegating discretion to trial judges and should seriously consider adopting rules that limit or channel discretion more aggressively.

For example, discretionary control over discovery invites parties to contest discovery matters vigorously, which compounds litigation costs and creates opportunities for strategic abuse. As I shall argue, a trial judge with discretion becomes another

strategic player in the litigation game, which can increase the costs even further without any assurance of better results. Moreover, the broad discretion that trial judges exercise over settlement can make frivolous litigation more attractive and compound agency costs when attorneys deviate from their clients' wishes. And the lack of normative guidance in the class action rule has produced a discretionary regime that in many ways falls short of promoting class action goals effectively. I discuss all of these examples in later sections.

It is no easy matter to decide on the optimal degree of discretion or create rules to achieve it. Obviously, some measure of discretion is both inevitable and desirable, though not the broad discretion judges currently enjoy. I propose that the Advisory Committee justify in explicit terms how much discretion to delegate and in what form. In this regard, the Committee should review the various methods for limiting or channeling discretion. This Article discusses and illustrates four such methods, proposing concrete reforms to implement each approach: (1) eliminating discretion as much as possible with strict rules strictly enforced; (2) narrowing the range of options available to the trial judge; (3) channeling discretion by providing factors to balance coupled with guidance for assigning weights to the different factors, and (4) articulating general principles to help the trial judge make normative judgments among the competing adjudicative values at stake. These four alternatives are ordered from most limiting to least limiting, and they are appropriate in different situations.

The body of this Article is divided into four parts. Part II defines what is meant by procedural discretion and briefly surveys the way discretion operates in the Federal Rules of Civil Procedure today. Part III provides a brief history of how trial judge discretion became such a dominant feature of federal civil procedure and offers reasons

why it still persists. Part IV focuses on inherent problems with case-specific discretion – in particular, bounded rationality limits, information access obstacles, and strategic interaction effects – problems that should shake any naïve confidence in the ability of trial judges to exercise discretion well. Finally, Part V analyzes, with concrete examples, each of the four methods of limiting discretion in light of their costs and benefits.

II. The Nature of Procedural Discretion

A. The Concept of Discretion

It would be helpful at the outset to have a clear working definition of procedural “discretion.” Unfortunately, however, the concept is extremely difficult to define. At its core, discretion has to do with the freedom to choose.⁶ Beyond this, precise definition is elusive. Part of the confusion results from differences of perspective.⁷ From a psychological perspective, discretion refers to a subjective perception or belief on the part of a decisionmaker that she has freedom to choose. From a sociological perspective, discretion might refer to an empirically observable regularity in which officials make authoritative choices without being checked.

This Article focuses on the normative perspective. Roughly speaking, a decisionmaker has discretion in a normative sense when she is under no moral or legal obligation to make a particular choice and no one can authoritatively demand that she do so. There are degrees of discretion, of course, but they all must leave some zone for the

⁶ See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 144 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (“the power to choose between two or more courses of action, each of which is thought of as permissible”); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31-32 (1978) (distinguishing weak from strong discretion).

⁷ See KEITH HAWKINS, *THE USES OF DISCRETION* 13-19 (1992) (discussing different perspectives).

operation of free choice.⁸ It is also important to bear in mind that a decisionmaker can have broad discretion in the normative sense even when there are informal standards to criticize her choice and informal sources of guidance.⁹ In fact, most discretionary decisions take place within some guidelines, principles, or constraints.¹⁰ For example, a trial judge has broad discretion to schedule the starting date for trial, but even a reasonable and perfectly valid choice can be criticized for not serving the goals of adjudication as well as some other alternative.¹¹ Once extreme or impermissible options are excluded, however, no one can object to the choice of trial date on the ground that the judge had a duty to decide differently.

One can question how useful discretion is as an analytical concept. Perhaps it is not discretion itself that matters, but rather what agents actually do with the discretion they have.¹² For example, critics of case management at times seem less concerned

⁸ For example, a decision of a preliminary injunction motion is highly discretionary, but the choice of a trial date is even more so because there is less law to constrain. *See, e.g.,* Lawson Products, Inc. v. Avnet, Inc., 782 F.2d 1429, 1436-39 (7th Cir. 1986) (noting that conclusions about irreparable harm, the balance of interests, and the probability of success are reviewed under a very generous abuse of discretion standard, but the choice of legal standards is reviewed de novo).

⁹ *See* HAWKINS, *supra* note 7, at 38-44.

¹⁰ When someone has complete freedom to choose based purely on personal preference without any constraint, we do not usually refer to this as an exercise of “discretion” – a point Professor Kent Greenawalt made some time ago with the example of a child choosing the flavor of ice cream she wants. Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 365 n. 30 (1975).

¹¹ Indeed, the judge herself has reason to pay attention to these criticisms insofar as they appeal to the broader purposes of adjudication. She might even be persuaded that the choice she made was not the best under the circumstances. Still, the validity of her decision remains undisturbed.

¹² Professor Ed Rubin makes this point about administrative agencies. Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299 (1997). He argues that a focus on discretion in the abstract “contributes nothing to our understanding of the activities involved, and may in fact create unnecessary and avoidable confusion,” *id.* at 1311, by diverting attention from the more subtle ways agency decisions are constrained and from the things agencies actually do with the discretion they enjoy. *See id.* at 1311-13, 1317-18.

about trial judges exercising discretion in the abstract than about their using discretion to manage cases (instead of adjudicate) or promote settlements (instead of conduct trials).¹³

There is some merit to this point, but there is also something important to understand about procedural discretion in general. In the strategic environment of litigation, trial judge discretion to design case-specific procedures can create serious problems. Although these problems vary with context, they have common features, and it is important to understand what those features are and why and how the problems arise.

B. Procedural Discretion

Case-specific discretion has been at the heart of the Federal Rules of Civil Procedure ever since they were first adopted in 1938.¹⁴ There are two main ways discretion operates: a Federal Rule might delegate discretion explicitly, or it might facilitate discretion indirectly by using intentionally vague language that invites flexible interpretation.¹⁵

1. Explicit Discretion

¹³ See, e.g., Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000) [hereinafter *Trial as Error*].

¹⁴ See Cooper, *supra* note 2, at 1795 (“Yet time and again, the Rules adhere to a pervading characteristic. The effort is less to provide detailed controls and more to establish general policies that guide discretionary application on a case-specific basis... vast discretion remains at virtually every turn.”); Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 240 (Summer 1998) [hereinafter *Judging Rules*] (“At virtually every stage of the process ... the Rules grant judges enormous discretion in the conduct and resolution of disputes.”); Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 201 (1997) [hereinafter *Changing Practices*] (“The Federal Rules of the 1930s are founded upon judicial discretion.”). One commentator has identified thirty-six distinct Federal Rules that explicitly delegate case-specific discretion. Subrin, *Equity*, *supra* note 4, at 923 n.76.

¹⁵ There are three additional sources of discretion. First, trial judges have inherent discretionary power to manage litigation in situations not covered by statute or Federal Rule, although this power is quite limited. See *Link v. Wabash R. R. Co.*, 370 U.S. 626, 630-31 (1962); *Chambers v. NASCO*, 501 U.S. 32, 44-45 (1991); *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648, 651 (7th Cir. 1987). Second, trial judges have traditional equitable discretion to relieve parties from the apparent injustice of a strict rule. See *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 126 S.Ct. 980, 987 (2006) (Stevens, J., dissenting). Third, judges make procedural law by the common law method in areas not covered by statute or Federal Rule (although one might not call this discretion depending on how one views common law). However, common law procedure aims to generate norms of general application whereas the focus of this Article is on the power of trial judges to tailor procedures to the specific circumstances of individual cases.

Rule 16 is perhaps the most notable example of a Federal Rule that explicitly delegates broad discretion.¹⁶ Rule 16 authorizes judges to hold pretrial conferences and “take appropriate action” with respect to a wide range of matters, including pleading, discovery, settlement, summary judgment, and trial.¹⁷ It specifically contemplates broad case management and active settlement promotion.¹⁸ What limited guidance the Rule supplies is cast in terms of highly general goals that offer little constraint, such as “expediting the disposition of the action” and “discouraging wasteful pretrial activities.”¹⁹

Discretionary case management extends to the appointment of litigation committees in complex cases, sequencing of issues, scheduling of discovery, timing of summary judgment and trial, and much more.²⁰ As for settlement promotion, a judge can choose from a diverse menu of options depending on her settlement philosophy, including offering a preliminary assessment of the merits, interviewing lawyers privately, meeting with parties with or without their lawyers, recommending settlement ranges, nudging parties and their lawyers in the direction of what the judge believes is a fair agreement, and referring cases to court-annexed ADR.²¹ There are some legal

¹⁶ There are many other examples. To pick just two, Rule 24(b) gives the judge broad discretion to allow permissive intervention when the application is “timely” and the intervenor’s “claim or defense and the main action have a question of law or fact in common,” *see* 7C CHARLES A. WRIGHT, ARTHUR R. MILLER, & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE, § 1913 (2d ed. 1986) [hereinafter FEDERAL PRACTICE], and Rule 42(b) gives a judge extremely broad discretion to carve up a complicated lawsuit into separate trials, *see* 9 *id.* § 2388.

¹⁷ FED. R. CIV. P. 16(c).

¹⁸ *See* FED. R. CIV. P. 16(a)(2) (management), 16(a)(5) (settlement); 3 MOORE’S FEDERAL PRACTICE §§ 16.02, 16.03[1][a] (3d ed. 2002) (“Rule 16 is explicitly intended to encourage active judicial management. . . judges are encouraged to actively participate in designing case-specific plans to position litigation as efficiently as possible for disposition by settlement, motion, or trial.”).

¹⁹ FED. R. CIV. P. 16(a)(1), (3).

²⁰ *See* FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, THIRD (1995).

²¹ *See, e.g.,* D.M. PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES (Federal Judicial Center 1986); MOORE’S FEDERAL PRACTICE, *supra* note 18, § 16.55[9]; MANUAL FOR COMPLEX LITIGATION, *supra* note 20, §§ 23.11-23.13. Judges can also influence settlement in more indirect ways,

constraints, to be sure,²² but they are extremely loose and leave wide room for discretionary choice.²³

Other Rules delegate discretion but also list factors that a judge must balance when making a decision. Examples include Rule 19(b) on compulsory joinder and Rule 23(b)(3) on the class action.²⁴ However, the factors listed are usually very general and frequently just repeat what any sensible judge would consider anyway.²⁵ Moreover, none of these Rules specifies the weights to be assigned to the different factors or tell judges

such as by establishing early and firm trial dates, setting deadlines for discovery, and sequencing discovery to focus on the most salient issues first. *See, e.g.*, JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 88-92 (RAND 1996) [hereinafter EVALUATION OF CASE MANAGEMENT"].

²² For example, the Due Process Clause might impose some limits. *See Developments in the Law – The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1869-71 (2000). The Alternative Dispute Resolution Act limits the types of ADR that a judge can mandate on a case-specific basis in the absence of party consent. *See* 28 U.S.C. § 652(a) (allowing local rules to authorize judges to require ADR without party consent only for mediation and early neutral evaluation). Local Rules also impose limits, but these are fairly minimal. And of course there is some case precedent that constrains or guides the choice among settlement and management options. *See, e.g.*, *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988) (holding that trial judges have no power under Rule 16 or their inherent powers to order a summary jury trial without the parties' consent).

²³ It is important, however, not to confuse discretion with arbitrary decisionmaking. District judges can find guidance, if they wish it, from case management seminars and manuals and other publications. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, *supra* note 20; Judicial Conference of the United States, Committee on Court Administration and Case Management, CIVIL LITIGATION MANAGEMENT MANUAL (2001); Resnik, *Trial as Error*, *supra* note 13, at 943-49 (describing seminars). Still, none of these sources is binding, and in the end, a trial judge must address the specific circumstances of each particular case, which requires a great deal of open-ended discretionary judgment.

²⁴ Rule 19(b) lists four factors that must be considered by a judge deciding whether to dismiss a lawsuit when an absentee who should be joined cannot be. FED. R. CIV. P. 19(b). Rule 23(b)(3) authorizes a class action when common questions predominate over individual questions and the class action is superior to alternatives, and it lists four factors that the judge should consider when making the highly discretionary determinations of predominance and superiority. FED. R. CIV. P. 23(b)(3)(A)-(D); *see* 7B WRIGHT ET AL., *supra* note 16, § 1785. It is worth mentioning, however, that recent case law and rule amendments have limited discretion in the class action setting to some extent. *See* Marcus, *Slouching*, *supra* note 3, at 1602-04.

²⁵ For example, the four factors in 19(b) are not meant to be exhaustive, *see* 7 WRIGHT ET AL., *supra* note 16, § 1607, at 88, and they have been construed to require an obvious balancing of interests; *see* *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109-111 (1968). Moreover, 19(b) decisions in individual cases are highly fact-specific. *See* 7 WRIGHT ET AL., *supra* note 16, § 1607, at 90. *But see id.* §§ 1612-1624 (reviewing common factual situations that elicit fairly standard judicial responses which can function as presumptions).

how to strike the balance in close cases. These critical normative judgments are left for the trial judge to make in individual cases.²⁶

2. Interpretive Discretion

The other way the Federal Rules license discretion is by incorporating vague language inviting case-specific interpretation. Of course, language is seldom, if ever, clear enough to avoid the need for some interpretation. However, the Federal Rules I have in mind were *purposefully* written in vague language precisely so trial judges could adapt them to the circumstances of specific cases.

Two examples are Rule 19(a) dealing with compulsory joinder and Rule 24(a) dealing with intervention as of right. Both Rules use similar open-ended language, such as “interest” and “impair or impede,” to define the circumstances under which an absentee should be joined (Rule 19(a)) or has a right to intervene in the lawsuit (Rule 24(a)(2)). When applying the Rule to a particular case, a judge has wide latitude to decide whether the absentee’s interest qualifies and whether the impairment or impediment is sufficient, and she can consider a range of case-specific management considerations in making those decisions.²⁷

Moreover, case precedent offers little constraint in this area because balancing tests and discretionary decisions are normally too fact-specific to support generalizations.²⁸ In fact, the tradition of discretion is so strong in federal procedure that

²⁶ See, e.g., 7 WRIGHT ET AL., *supra* note 16, § 1608 (noting that Rule 19(b) “does not state what weight is to be given to each factor” and that this means that the judge must assign weights in light of the facts of the case and the equity-and-good-conscience test).

²⁷ Compare *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305 (5th Cir. 1986) (negative precedent risk is enough for Rule 19(a) impairment) with *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399 (3rd Cir. 1993) (negative precedent not enough).

²⁸ A noted treatise makes this exact point about Rule 24(b). See 7C WRIGHT ET AL., *supra* note 16, at 393-94 (“precedent is of very little value”). Furthermore, a leading procedure scholar has observed that the cases do little to limit discretion: “one usually finds in these [procedure] treatises a wide range of cases

even when a Rule or caselaw interpreting it imposes clear limits, judges sometimes circumvent those limits in an effort to do what they believe is best for an individual case. A notorious example is how district judges persist in requiring strict pleading despite two Supreme Court decisions declaring, in unmistakable terms, that Rule 8(a)(2)'s reference to a "short and plain statement" means notice pleading.²⁹ Indeed, some commentators applaud this practice, defending judicial power to interpret a Federal Rule flexibly even when doing so stretches the Rule beyond its clear bounds.³⁰

III. The History of Procedural Discretion

The pervasiveness of case-specific discretion prompts the two questions on which this Article focuses. First, how effectively can a trial judge exercise case-specific discretion in the highly strategic environment of litigation even armed with goals, multi-factor balancing tests, past experience, or customary "best practice" standards? Second, which is better and when: case-specific discretion, or more limiting rules that vary with different types of cases? Before addressing these two questions – the first in Part IV and the second in Part V – it is important first to explain how the procedural system became so dominated by case-specific discretion. Since I (and others) have recounted this history elsewhere,³¹ I provide only a brief summary here.³²

offering a baffling array of interpretations that usually provide no more certainty than the vague rule itself." Subrin, *Equity*, *supra* note 4, at 923 n.76.

²⁹ See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003). The two Supreme Court cases in point are *Swierkewicz v. Sorema N.A.*, 534 U.S. 506 (2002), and *Leatherman v. Tarrant Cty. Narcotics Intell. & Coord. Unit*, 507 U.S. 163 (1993). See also Shapiro, *supra* note 3, at 1995 (noting how district judges cleverly circumvented the then-recently-adopted mandatory scheduling conference under Rule 16(b) by stretching an express exemption in 16(b) to the breaking point).

³⁰ See Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1119 (2002) (citing and criticizing commentators who support broad judicial flexibility in interpreting the Federal Rules).

³¹ See, e.g., Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L. J. 887, 893-907 (1999) [hereinafter *Making Process*]; Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the*

A. 1930s Through the 1960s

The campaign for the original Federal Rules of Civil Procedure was waged for almost thirty years, beginning with Roscoe Pound's famous address to the American Bar Association in 1906³³ and culminating in congressional passage of the Rules Enabling Act in 1934 and eventual adoption of the Federal Rules of Civil Procedure in 1938. Advocates of the Federal Rules sought to promulgate a simple and uniform set of rules that would govern all civil suits in all federal district courts under a unified system that merged law and equity.³⁴

To the early twentieth century reformers, ideal procedural rules were not only general and uniform; they were also flexible and capable of being tailored to the requirements of individual cases.³⁵ This combination of simplicity, generality, and flexibility was achieved by delegating most of the procedural details to the discretion of trial judges. Moreover, delegating discretion in this way made sense within the prevailing view of the relationship between procedure and substantive law and the prevailing pragmatism of the period.

Roughly speaking, early twentieth century reformers envisioned procedure primarily as a value-neutral means to apply the substantive law. Procedure was a

Field Code to the Federal Rules, 89 COLUM. L. REV. 1, 78-104 (1989) [hereinafter *Mapping*]; Subrin, *Equity*, *supra* note 4; Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

³² I avoid detailed footnoting, since all the points are amply supported by the sources cited in note 31 *supra*.

³³ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906).

³⁴ They also sought to replace legislative rulemaking with court rulemaking. The court rule-making model, which assigned the task of making general procedural rules to the court rather than the legislature, was a reaction to the perceived failings of the procedure codes adopted by state legislatures during the latter half of the nineteenth century. See Bone, *Making Process*, *supra* note 31, at 893-897.

³⁵ Procedure reformers continually emphasized the values of simplicity and flexibility and the desirability of adapting procedures to individual cases. See Bone, *Mapping*, *supra* note 31, at 98-104.

“machine” or “tool,” which, like all machines and tools, was best designed by technical experts applying principles of sound engineering.³⁶ As trial judges were the technical experts, it made sense to delegate broad case-specific discretion to them.³⁷ Moreover, delegating discretion had no important substantive implications because substantive values were the stuff of substantive law while procedure was governed by technical process values, such as those implicit in Rule 1’s directive to “secure the just, speedy, and inexpensive determination of every action.”³⁸

The Federal Rules of Civil Procedure were celebrated throughout the 1950s and 1960s as a highly desirable, even ideal, system of rules, and made the centerpiece of most first year civil procedure courses.³⁹ The Federal Rules did have some detractors, but enthusiasm was widespread and with it came a strong commitment to trial judge discretion.⁴⁰

In addition, the dominant paradigm of party-controlled litigation likely helped to make discretion seem less troubling. This paradigm envisioned a fairly limited role for the trial judge as detached and neutral umpire and thus a limited domain over which

³⁶ The metaphor of procedure as “machine” or “tool” pervades the literature of the time. Bone, *Making Process*, *supra* note 31, at 895 n.35.

³⁷ It also made sense to delegate the general rulemaking power to judges (and lawyers), which is what the court rulemaking model did. *Id.* at 893-897. Thus, faith in judges as procedure experts operated on two levels: the level of making general procedural rules (hence the court rulemaking model) and the level of adapting those rules to the needs of particular cases (hence delegations of broad discretion).

³⁸ FED. R. CIV. P. 1. A similar theory was used to justify administrative agency discretion during the New Deal period and the rise of the administrative state. Supporters defended delegation with a theory of agency legitimacy based on expertise and the objectivity of scientific and technical analysis. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1677-78 (1975).

³⁹ Robert G. Bone, *Procedural Reform in a Local Context: The Massachusetts Supreme Judicial Court and the Federal Rule Model*, in THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692-1992, at 419-420 (Russell K. Osgood, ed. 1992).

⁴⁰ Some states refused to revise their own procedures to follow the Federal Rules, but many did. See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash. L. Rev. 1367, 1377-78, 1428, 1434 (1986).

judicial discretion could operate.⁴¹ Moreover, the main focus of attention was on the judge's role in trying cases, not negotiating settlements.⁴² Today, by contrast, the judge has a much broader set of responsibilities, including actively managing litigation and directly encouraging settlement, and this creates much more room for discretion and thus more cause for concern.

B. 1970s Onward

In the late 1960s and 1970s, the excitement over the Federal Rules began to wane.⁴³ Lawyers and scholars became more concerned about the substantive effects of discovery, intervention, class action, and other procedural rules in the context of new and expanded forms of public interest litigation, such as civil rights, consumer protection, and environmental protection. Moreover, people began to realize how closely procedure was wrapped up with substance. Not only did procedural rules have substantive effects; they could – and many thought they should – be designed to promote substantive values.⁴⁴

Starting in the mid-1970s, concerns began to mount about the high costs of adversarial process. Critics complained of growing case backlogs, litigation delay, and huge litigation costs.⁴⁵ These developments undermined confidence in adversarial process as an ideal for adjudication. If procedure should be shaped in different ways for

⁴¹ The legal process school of thought was extremely influential and legal process theorists like Henry Hart, Albert Sacks, and Lon Fuller championed the adversarial model of litigation which vested control in the parties and their attorneys and left the judge mainly to supervise. See Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1301-1310 (1995).

⁴² For example, the influential legal process theorist Lon Fuller counseled against giving an adjudicator a role in settling cases as well as trying them. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 406-407 (1978). See also Resnik, *Trial as Error*, *supra* note 13, at 947 (describing the debate during the 1940s and 1950s over use of the pretrial conference to discuss settlement).

⁴³ For an overview of these developments, see Bone, *Making Process*, *supra* note 31, at 900-07.

⁴⁴ See, e.g., Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L. J. 718 (1971); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

⁴⁵ See Bone, *Making Process*, *supra* note 31, at 900-02.

different types of disputes, as ADR's supporters urged, the task of procedural design was much more complicated, more closely linked to substance, and potentially more controversial than had previously been assumed.

C. Today

One might expect that reliance on trial judge discretion would have declined as confidence in the supporting assumptions of expertise and value-neutrality waned and the substance-procedure divide blurred.⁴⁶ But this has not happened. In fact, with judges actively involved in settlement and case management and with most lawsuits disposed of at the pre-trial stage, the influence of case-specific discretion might well be stronger today than ever before.⁴⁷

What accounts for the relatively uncritical acceptance of discretion? Three factors play an important role. First, it is very likely that reliance on discretion is partly a byproduct of the enthusiasm for case management and settlement promotion today.⁴⁸ The flexibility conferred by discretion is essential to these developments, so there would be little reason for eager proponents to examine discretion carefully.

Second, delegating discretion allows rulemakers to dodge difficult and controversial normative choices by handing them to trial judges in individual cases, where they are less transparent and less likely to trigger public debate. Indeed, delegation

⁴⁶ As the line between procedure and substance blurs, rule of law concerns should loom larger on the procedure side of the divide. For example, imagine a system in which trial judges always tailored the rules of negligence or contract to the "needs" of specific cases in an effort to do individualized justice. Such a system would almost certainly be condemned on rule of law grounds. When a strict rule dictates the result, it is supposed to be followed (absent gross injustice) even if the trial judge believes that a different result would better fit the costs and benefits or moral stakes involved in a particular case. If procedure implicates substantive values and has substantive effects, one should worry about these same rule of law concerns when formulating procedure.

⁴⁷ See Marcus, *Slouching*, *supra* note 3, at 1589-90; Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WISC. L. REV. 631, 646-667 [hereinafter *Misunderstood Consequences*].

⁴⁸ See Resnik, *Trial as Error*, *supra* note 13, at 925-29, 944-49.

is an especially attractive strategy when, as has been increasingly true in recent years, rulemakers themselves are divided or face strongly conflicting interest group pressures.⁴⁹

It is much easier to compromise on a general rule that leaves the controversial issues to the discretion of the trial judge than to resolve the disagreement at the level of drafting the general rule itself.⁵⁰

Third, judges have come to dominate membership on the Civil Rules Advisory Committee in recent years and judges tend to favor broad discretion.⁵¹ Discretion gives them more control over their own courtrooms and cases,⁵² and makes judging more interesting and potentially more rewarding.⁵³

⁴⁹ For example, the 1993 amendments to the discovery rules that allowed for mandatory disclosure triggered a storm of controversy, pitting plaintiff's bar against the corporate bar, and so too did proposed changes to Rule 68's fee-shifting provisions and the 1983 amendments to Rule 11. *See Bone, Making Process, supra* note 31, at 902-07.

⁵⁰ *See id.* at 917-18 & n.156. *See also* Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 22074-79 (1989) (advocating general trans-substantive rules to prevent politicization of the committee process).

⁵¹ *See* Yeazell, *Judging Rules, supra* note 14, at 237-39 (observing that judges dominate Advisory Committee membership).

⁵² *See* Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 238 (1997) (noting judges preference for control); Resnik, *Changing Practices, supra* note 14, at 199-200 (noting that judges prize control over their own courtrooms). Indeed, when asked, trial judges often prefer broader discretion to formal constraint. *See, e.g.,* Marcus, *Slouching, supra* note 3, at 1586 (noting the "vehement objection" of many federal judges to the elimination of the local opt-out option in the mandatory disclosure rules); James S. Kakalik et al., *Just, Speedy, and Inexpensive?: An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, 49 ALA. L. REV. 17, 28, 40, 48 (1995) (reporting that federal trial judges resisted formal case-tracking in favor of individual discretionary case management).

⁵³ *See* Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEG. STUD. 627, 630-631 (1994); Mark A. Cohen, *Explaining Judicial Behavior, or What's Unconstitutional About the Sentencing Commission?*, 7 J. LAW, ECON. & ORG. 183 (1991). *See generally* RICHARD A. POSNER, *OVERCOMING LAW*, 117-123 (1995) (analyzing an appellate judge's utility function). *But see* Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules*, 23 J. LEG. STUD. 647 (1994) (criticizing aspects of Macey's analysis).

Thus, rulemakers do not have incentives to reflect carefully on the costs and benefits of discretionary rules. If they did, they would discover that there are strong reasons to be skeptical about broad delegations of discretion.⁵⁴ Part IV explains why.

IV. Problems with Procedural Discretion

According to some theories of common law evolution, the survival of a rule or practice over a long period of time is evidence of its efficacy.⁵⁵ The history recounted in Part III provides an important counter to any attempt to defend discretion on this basis. In the case of procedure, the current discretionary system results from deliberate committee choice rather than incremental common law evolution and persists today for reasons, such as politics and judicial self-interest, that have little to do with functional efficacy.⁵⁶

Without support of historical pedigree, case-specific discretion must be evaluated explicitly in terms of its costs and benefits. Unfortunately, there is very little systematic empirical evidence available to make this evaluation.⁵⁷ In 1996, the RAND Institute for

⁵⁴ I believe that rulemakers care about designing good rules but that they assume discretion works well and do not critically examine the assumption partly because it serves their political and practical interests. By clearly explaining why discretion is problematic and why strict rules and other types of limits can be superior, I hope to shake this naïve confidence, prompt more careful reflection on discretion's costs, and make it more difficult for rulemakers to defend the practice publicly and in public interest terms.

⁵⁵ For example, some commentators argue that the common law evolves toward efficient rules. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.5, at 614-615 (5th ed. 1998) (hereinafter *ECONOMIC ANALYSIS*). But see Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEG. STUD. 139 (1980) (arguing that common law evolution cannot guarantee efficient rules).

⁵⁶ It is true that discretion played a significant role in the procedure historically followed by courts of equity and also that the original drafters of the Federal Rules drew on this tradition. See Subrin, *Equity*, *supra* note 4. However, the Federal Rule's reliance on discretion is not simply a carryover from equity. The drafters viewed procedure quite differently than their predecessors and designed a more discretionary system that explicitly focused on the pragmatic expertise of trial judges. See Bone, *Mapping*, *supra* note 31, at 78-104.

⁵⁷ Very little reliable empirical research has been done in the procedure field, although interest seems to be on the rise in recent years. See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 135, 146-147 (2002); Deborah R. Hensler, *Researching Civil Justice: Problems and Pitfalls*, 51 LAW & CONTEMP. PROB. 56 (1988) (identifying practical obstacles to empirical research).

Civil Justice published a study of case management and ADR in federal court based on data compiled from the Civil Justice Reform Act's pilot program.⁵⁸ Those conducting the study had hoped to compare a case-specific discretionary approach with a "tracking model" that set predetermined procedures for different types of cases.⁵⁹ Unfortunately, the comparison could not be made because only one of the ten pilot districts implemented the tracking model in a significant way.⁶⁰ Interestingly, the authors explained the resistance to tracking by the desire of trial judges to "tailor case management to the needs of the case and to their style of management," further evidence that judges value their own discretion very highly.⁶¹

Still, the RAND study did test various case management techniques using a combination of quantitative analysis and qualitative survey results.⁶² The findings are mixed. Most techniques had no significant impact one way or the other on cost (measured in attorney time), time to disposition, participant satisfaction, or subjective views of the fairness of the process.⁶³ There were some exceptions. For example, early

⁵⁸ The Civil Justice Reform Act (CJRA) passed by Congress in 1990, created an experimental program to test the efficacy of case management and ADR techniques. See Pub. L. No. 101-650, 104 Stat. 5089 (1990). The program involved designating ten pilot and ten comparison districts, chosen to be representative of the federal judiciary along various dimensions. The CJRA required each designated district to develop and implement a case management plan with input from various constituency groups and required the ten pilot districts to incorporate certain principles and techniques. The Judicial Conference and Administrative Office of the United States Courts retained RAND to evaluate the resulting data, and the RAND study produced four published reports: KAKALIK ET AL., EVALUATION OF CASE MANAGEMENT, *supra* note 21; JAMES S. KAKALIK ET AL., IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS (RAND 1996) [hereinafter "IMPLEMENTATION"]; JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (RAND 1996); JAMES S. KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (RAND 1996).

⁵⁹ See KAKALIK ET AL., EVALUATION OF CASE MANAGEMENT, *supra* note 21, at xxii-xxiii (discussing the difficulties of comparing the "judicial discretion model" with the "tracking model").

⁶⁰ *Id.*

⁶¹ KAKALIK ET AL., IMPLEMENTATION, *supra* note 59, at 46.

⁶² See KAKALIK ET AL., EVALUATION OF CASE MANAGEMENT, *supra* note 21, at xviii-xx.

⁶³ *Id.* at 88-92.

case management intervention reduced the time to disposition but also increased costs.⁶⁴

In addition, setting a firm trial date early and sticking to it reduced the time to disposition, as did a shortened cutoff date for discovery, which reduced both time to disposition and cost.⁶⁵

Unfortunately, these findings shed very little light on the merits of case-specific discretion.⁶⁶ On the one hand, the fact that few techniques tested had any significant impact might suggest that the benefits of discretionary case management are exaggerated. On the other hand, some techniques, such as early judicial intervention to set a firm trial date and a shortened discovery cutoff, did show positive effects. Since case tracking was not tested, however, there is no way to tell whether the same or even stronger positive effects could be achieved by predetermined rules.⁶⁷ One result does weigh slightly in favor of constraining discretion: the benefits of a firm trial date and shortened discovery cutoff obviously depend on a judge being constrained from modifying the trial date or extending discovery later if the parties seek a change.⁶⁸

⁶⁴ *Id.*

⁶⁵ *Id.* But see Thomas W. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 581 (1998) (reporting other results that conflict with the RAND results). These findings led the authors to propose early intervention with a firm trial date (thereby reducing the time to disposition but increasing cost) combined with a shortened time to discovery cutoff (thereby offsetting the cost increase). KAKALIK ET AL., EVALUATION OF CASE MANAGEMENT, *supra* note 21, at 91-92.

⁶⁶ In another empirical study published in 1994, the Federal Judicial Center reported the results of a survey canvassing the views of federal district and appellate judges on a number of problems facing the federal judiciary. FEDERAL JUDICIAL CENTER, PLANNING FOR THE FUTURE: RESULTS OF A 1992 FEDERAL JUDICIAL CENTER SURVEY OF UNITED STATES JUDGES (1994) [hereinafter PLANNING FOR THE FUTURE]. The results show strong support among federal district judges for ADR and increased use of phased discovery in multiple-issue cases. *Id.* at 35, 43. However, the study did not ask about case-specific discretion versus more categorical case-tracking approaches, so it is not clear whether the judicial responses reflect approval of a discretionary approach.

⁶⁷ However, the study authors do point out that an effective tracking method could be difficult to design because “objective data available at the time of filing are not particularly good predictors of either time to disposition or cost of litigation. KAKALIK ET AL., EVALUATION OF CASE MANAGEMENT, *supra* note 21, at xxiii.

⁶⁸ See *infra* notes ** and accompanying text (discussing the importance of strict rules to support pre-commitment, given the difficulty of sticking with a decision *ex post* when conditions change).

There is an even more serious problem with the RAND study, a problem that many other empirical studies share.⁶⁹ In evaluating a discretionary versus constrained approach, one important variable to measure is the quality of the judgments and settlements produced under the different schemes. But the RAND study does not measure outcome quality in any useful way.⁷⁰ Indeed, doing so is extremely difficult because of the huge obstacles to collecting and evaluating the relevant data.⁷¹

One might be tempted to extract lessons for civil process from the debate over the criminal sentencing Guidelines.⁷² During the 1980s, the United States Sentencing Commission promulgated Guidelines to constrain the open-ended discretion of trial judges at the sentencing stage.⁷³ These Guidelines, designed to enhance predictability and distributional fairness, have been subjected to heavy criticism, and most district judges chafe under the constraints.⁷⁴ However, the concerns have a lot to do with the serious costs of error in criminal cases, and especially the effect of an unfairly strict

⁶⁹ It is also worth mentioning that the RAND study has been heavily criticized for using flawed empirical methods. See, e.g., Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 770-71 (1995); cf. Kuo-Chang Huang, *Mandatory Disclosure: A Controversial Device With No Effects*, 21 PACE L. REV. 203, 251-268 (2000) (citing empirical deficiencies of the RAND and Federal Judicial Center studies related to mandatory disclosure).

⁷⁰ The study does survey the subjective reactions of parties and lawyers, see KAKALIK ET AL., EVALUATION OF CASE MANAGEMENT, *supra* note 21, at xviii-xx, but obviously this is not the same thing as measuring quality.

⁷¹ For example, one ideally would like to compare strong cases to strong cases and weak cases to weak cases under different case management regimes, but it is impossible to sort cases in this way without much more information about the underlying merits than is currently available and perhaps ever could be obtained.

⁷² See Rachel Barkow, *The Devil You Know: Federal Sentencing After Blakely*, 16 FED. SENT. REP. 312 (2004) (noting the intense controversy). For a recent attack on the sentencing guidelines that focuses on the morally problematic disparities they create, see Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005).

⁷³ See *Mistretta v. United States*, 488 U.S. 361, 363-370 (1989) (reviewing this history and upholding the constitutionality of the guidelines).

⁷⁴ See, e.g., PLANNING FOR THE FUTURE, *supra* note 66, at 37 (reporting that 71.8% of district judges strongly support and 14.6% moderately support changing the current sentencing rules to increase the discretion of the judge). Indeed, the United States Supreme Court recently restored a measure of case-specific discretion to federal sentencing. See *United States v. Booker*, 543 U.S. 220 (2005).

sentence in an individual case, and these concerns are not nearly as serious on the civil side.

Another possibility is to study procedural innovation on the state level, but here too useful data is limited.⁷⁵ Moreover, the few studies that do exist shed little light on the issue of case-specific discretion.⁷⁶ For example, although there has been a great deal of state innovation in discovery reform, much of it adopting stricter limits and some of it implementing case tracking, to the best of my knowledge no one has yet done the necessary empirical work to analyze the data in a systematic way.⁷⁷

Thus, proceduralists face a difficult problem. They must decide how much to rely on trial judge discretion without reliable empirical information about the likely effects. A tempting response to this kind of uncertainty is to reject change and stick with the status quo. Sometimes this makes sense, but it does not make sense in this situation, where the status quo itself is suspect, shaped by factors, such as politics and judicial self-interest, that have nothing to do with the policy merits.

⁷⁵ One state study deserves particular mention. From 2000 to 2002, the state of Colorado conducted a pilot study of simplified procedures designed to reduce delay and expense in smaller cases. See Richard P. Holme, *Back to the Future – New Rule 16.1: Simplified Procedure for Civil Cases Up to \$100,000*, 33 COLORADO LAWYER 11, 12 (2004). Of particular relevance to the issue of discretion, the simplified procedures imposed strict discovery limits by general rule without any provision for judicially granted exceptions. See Richard P. Holme, *Just, Speedy, and Inexpensive: Possible Simplified Procedure for Cases Under \$100,000*, 29 COLORADO LAWYER 5 (2000) (explaining that the Colorado judicial caseload was thought to be too heavy to leave much time for individual case management). Colorado trial judges enthusiastically received the new procedures, which were eventually adopted in a permanent rule. 33 COLORADO LAWYER, *supra* at 12-13 (noting that more than two-thirds of the civil caseload of the two county courts in the pilot study proceeded under the new rule and concluding that “the result of the pilot project was that [the new rule] proved more acceptable than even its most ardent advocates expected.”). Although these favorable results are suggestive, there is no way to tell how much the absence of discretion in itself made a difference and no way to draw any stronger conclusions without much more data.

⁷⁶ See Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 59 CASE W. RES. 813, 839-848 (2000) (studying the effect of various factors on time to disposition for a set of state court trial outcomes, but without any implications for discretion versus rule).

⁷⁷ See, e.g., Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1174, 1209-46 (2005); Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 611-637 (2002).

Under these circumstances, the only way to arrive at a sensible decision is to use whatever information is available to make plausible predictions about likely effects. The following analysis uses this approach. It applies current empirical and theoretical understandings of human decisionmaking and strategic interaction to what we know about the dynamics of civil litigation. The resulting predictions are necessarily imprecise and uncertain, but they are the best we can do.⁷⁸

The discussion focuses on three factors that interfere with case-specific discretion: (1) bounded rationality, which is a more serious problem when judges make decisions for specific cases; (2) information access obstacles, which are particularly acute when parties have incentives to be selective about information disclosure, and (3) strategic interaction effects, which multiply when judges try to manage the parties and become players themselves in the litigation game.

Furthermore, two aspects of litigation exacerbate the adverse effects of these three factors. First, procedure works as a tightly integrated system.⁷⁹ Choices made at the pleading stage, for example, affect the discovery stage and discovery affects summary judgment and trial. The interactions work the other way around too. If a judge has a reputation for using her discretion to deny summary judgment even when all the formal requirements are satisfied,⁸⁰ parties will take that fact into account much earlier, even as early as the pleading stage. These systemic interactions mean that a trial judge must

⁷⁸ See JOSEPH W. BARTLETT, *THE LAW BUSINESS: A TIRED MONOPOLY* 93-94 (1982) (“the lack of a study is not ... a necessary or sufficient reason for delaying change that experience and common sense recommends”); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 780-81 (1998) (noting the need for action despite uncertainty).

⁷⁹ See Yeazell, *Misunderstood Consequences*, *supra* note 47, at 676-77 (emphasizing the importance of a systemic perspective).

⁸⁰ See Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91, 104-105 (2002) (noting that the majority of federal courts allow this).

consider the likely impact on all stages of the litigation when she makes a choice at any one stage, and the complexity of that task only exacerbates the effects of bounded rationality, limited information, and strategic interaction.

The second reason why the three factors are particularly serious also has to do with the complexity of the judge's task, but in a different way. Not only must the judge anticipate effects at all stages of the litigation; she must also consider effects on settlement as well as on trial, and doing this requires complicated outcome quality tradeoffs. The current Federal Rules mandate attention to settlement, but my point runs deeper. Any well functioning procedural system *must* take account of settlement effects if it is to accomplish its purposes well. As we shall see, however, procedures that produce good settlements do not necessarily produce good trial judgments. As a result, judges must consider settlement effects explicitly in order to achieve an optimal tradeoff between the quality of settlements and the quality of judgments.

The following first explains why settlement quality and judgment quality often conflict. It then analyzes bounded rationality constraints, information access obstacles, and strategic interaction effects under conditions where the judge must choose procedures that work interactively with an eye to maximizing the tradeoff between settlement and judgment quality.

A. Settlement and Trial

1. The Normative Relevance of Settlement

Some critics of settlement come close at times to arguing that federal judges should focus exclusively on trial and pay no attention to settlement at all. This position, at least in its extreme form, is indefensible on any sensible normative account of

contemporary adjudication. The primary goal of procedure is to produce outcomes that enforce the substantive law, and all outcomes matter to furthering this goal – settlements as well as judgments – no matter how enforcement is valued, whether in terms of creating socially optimal incentives, protecting rights, or promoting distributive justice.

This point holds for both an economic theory and a rights theory of procedure.⁸¹ The economic theory values procedure as a way to reduce the risk of outcome error.⁸² Accurate outcomes are valuable in this theory because they deter potential wrongdoers. With accurate enforcement, rational individuals expect to face liability if and only if they behave unlawfully and as a result they conform their behavior to the substantive standard. It follows that as procedure reduces the risk of outcome error, it also reduces the incidence of unlawful behavior and thus the resulting social costs. At the same time, procedure adds costs of its own. The overall objective is to design a procedural system that minimizes the sum of expected error costs and expected process costs.⁸³

It is a simple matter to see that settlement and judgment quality are equally important in this theory. Rational actors consider all possible litigation outcomes – both judgments and settlements – when they evaluate the risk and cost of sanctions and compare it to the benefits of engaging in the activity. Thus, it is the overall pattern of outcomes that matters because it is the overall pattern that deters. So the procedural system must be judged by the pattern it creates.

⁸¹ For another discussion of some of these issues, see Robert G. Bone, *Settlement in American Civil Adjudication: The Role of Procedural Law and the Courts* 36 COMP. L. REV. 1, 31-36 (2003)

⁸² It is worth noting that the concept of accuracy does not imply that a uniquely correct outcome exists. It is enough that there is a range of equally valid outcomes, provided the range is limited and leaves out some possibilities. Moreover, accuracy is also meaningful for common law making as long it is possible to criticize some decisions as wrong.

⁸³ See POSNER, *ECONOMIC ANALYSIS*, *supra* note 55, § 21.1, at 559-602.

A rights theory also values procedure for reducing the risk of outcome error, but it values accuracy differently than an economic theory. Accurate outcomes are valuable in a rights theory because they protect individual rights or redress instances of unfair treatment, rather than because they deter.⁸⁴ The focus of a rights theory is on the individual, not the society-at-large, and the goal is to compensate for wrongful injury to an individual's rights, not to minimize social costs.⁸⁵ Nevertheless, the relevance of settlement quality is the same. It should not matter how adjudication vindicates rights, whether by judgment or by settlement: a rights theory should be concerned about any unjust outcome that fails to provide the correct level of compensation according to the substantive law.

There is a rub, however, and it has to do with the normative significance of consent. The question is whether consent alone can validate a settlement without having to consider its quality. The answer is clearly no from an economic perspective. Deterrence affects everyone, not just the settling parties, so there is sound reason to worry about settlement quality when the parties' private interests in settlement diverge from the public interest in optimal deterrence.⁸⁶ The question is more difficult in a rights theory,

⁸⁴ At least this is true for an outcome-based rights theory. There is also a process-based form of rights theory that focuses on how procedure itself, independent of outcome quality, treats individuals. For example, a party might be given certain participation rights because participation in an adversary setting is likely to produce a good outcome that protects rights (outcome-based), or because participation is entailed in what it means to respect the dignity of those affected by adjudication (process-based). It should be clear that the value of adjudicative procedure must be primarily outcome-based, whatever a process-based theory adds, since adjudication is designed mainly to produce outcomes that conform to the substantive law. See Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 508-516 (2003) [hereinafter *Agreeing to Fair Process*].

⁸⁵ An example is the corrective justice theory, which treats tort law as a system for correcting moral wrongs or redressing invasions of moral rights. See, e.g., JULES A. COLEMAN, *THE PRACTICE OF PRINCIPLE* 34 (2001); Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989).

⁸⁶ In fact, this divergence is quite common because litigating parties do not fully internalize the effects of trial and settlement on deterrence. Analyzing the resulting problems and their significance for settlement policy can get quite complicated. See Steven Shavell, *The Fundamental Divergence Between*

however, because ordinarily rightholders are free to waive, limit, or transfer their rights as they please, which is exactly what they do when they settle.

The reason one should worry about settlement quality in a rights theory has to do with the conditions for normatively valid consent. Consent alone cannot validate a choice if the consenting party's only other options are themselves unfair or unjust. When parties decide whether to settle and on what terms, they compare the proposed settlement to their next best alternative, which is a trial judgment, and they also factor in the costs of trial. Accordingly, if a procedural system produces trial judgments that are systematically unjust or distributes costs asymmetrically in a way that unfairly burdens one side, that system will also produce distorted settlements that reflect the normatively flawed trial baseline. Rational parties will consent to those settlements because they have no better alternative.⁸⁷ Simply put, a party who consents to an otherwise unjust settlement does not also consent to the trial procedures or pattern of judgments that bring that settlement about.⁸⁸ Therefore, consent alone cannot validate a settlement when it is induced by unjust trial outcomes or unfair cost allocations.⁸⁹

the Private and the Social Motive to Use the Legal System, 26 J. LEG. STUD. 575, 601-608 (1997). My point is simple, however: economic theory cannot rely on consent alone and ignore quality.

⁸⁷ There is another way to make this point. When litigating parties settle, they in effect buy and sell substantive and procedural rights. If there were many sellers and buyers in a deep market, we might be able to rely on market competition to regulate settlement quality. However, because of restrictions on selling claims imposed by the rules of professional responsibility, normally the plaintiff can sell her claim only to the defendant; that is, the transaction is a bilateral monopoly. For this reason, we cannot simply defer to consent uncritically without examining the bargaining conditions under which the purchase and sale take place. For more rigorous accounts of rights-based procedural theory, see Ronald Dworkin, *Principle, Policy, Procedure*, in A MATTER OF PRINCIPLE 72 (1985); Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 256-64 (1992) (distinguishing among different versions of a rights-based theory).

⁸⁸ Defining what constitutes an unjust settlement in a precise way is beyond the scope of this Article. Fortunately, nothing in what I argue here depends on having a precise definition. The argument assumes only that there is a basis for criticizing the amount of a settlement or pattern of settlements, which should be intuitively obvious. Indeed, there is good reason to associate a just settlement with the ideal expected trial award. See Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 GEO. L. J. 61, 76 (1995). By "ideal" expected trial award, I mean the trial award that parties would expect in a

2. The Conflict between Judgment and Settlement

Even with settlement and judgment quality counting equally, it might still be possible to focus exclusively on trial judgments if procedures designed to produce the best judgments also happened to produce the best settlements. But this happy convergence is not likely. The reason has to do with the strategic nature of litigation. A procedural rule that is beneficial from the perspective of trial can become harmful from the perspective of settlement because settlement opens up new strategic options that parties can exploit to gain bargaining leverage.⁹⁰

To illustrate, consider the problem of designing optimal discovery rules. Someone who focuses exclusively on trial is likely to favor broader discovery than someone who also considers settlement. Broad discovery helps to uncover evidence useful for trial. This benefit remains the same but the costs of discovery increase substantially when settlement is added to the mix, because settlement opens up new opportunities for strategic abuse. For example, a more powerful party might threaten to

litigation system that does not distort trial judgments or skew litigation costs. If both parties are rational and risk-neutral, expect to spend the same amount on litigation costs, and have equal bargaining power, settlement theory predicts that they will settle for the expected trial award. *See generally* POSNER, *ECONOMIC ANALYSIS*, *supra* note 55, §21.5, at 607-610. Thus, the expected trial award is associated with a litigation system that has attractive fairness properties – equal risk-preferences, equal litigation costs, and equal bargaining power.

⁸⁹ For this reason, it is simply wrong to believe that settlements are exclusively the private business of the parties. Adjudication exists to serve social ends, and its outcomes, whether judgments or settlements, must be measured against the ends that the institution is meant to serve.

⁹⁰ The point can be stated more precisely in game theory terms. Litigation can be modeled as a game between lawyers (and the parties they represent) with the feasible strategies defined by the procedural rules and the possible payoffs determined by the substantive law. *See* ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* 10-14 (2d ed. 1994) (describing the elements of a game). In these terms, the reason why settlement quality does not correlate with judgment quality is that the set of feasible strategies, and thus the game itself, changes dramatically when the players are allowed to make settlement not just trial moves. Since procedural rules control strategic behavior, it should not be surprising that different litigation games would require different rules.

escalate its opponent's costs by engaging in abusive discovery unrelated to the merits.⁹¹ If the opponent believes that it will have to endure costly discovery in the absence of settlement or face revelation of marginally relevant but highly embarrassing facts that a settlement would conceal, the opponent should be much more willing to settle and on terms more favorable to the threatening party. Thus, discovery is more costly from a settlement perspective, and as a result the cost-benefit balance is likely to support more limited discovery rules in order to control bad settlements, even if those rules sacrifice some measure of judgment quality by reducing the evidence available for trial.⁹²

This is a pervasive phenomenon – procedures designed to maximize the likelihood of quality judgments will not necessarily maximize the likelihood of quality settlements, and vice versa.⁹³ This means that someone designing a procedural system must not only balance the costs and benefits for settlement and for judgment separately, but must also balance settlement effects against judgment effects.

B. Obstacles to Effective Exercise of Procedural Discretion

Neither defenders nor critics of procedural discretion appreciate the magnitude of the problems broad discretion creates. Many commentators focus on arbitrariness, bias, or

⁹¹ See, e.g., John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569, 584-93, 615-28 (1989).

⁹² More precisely, someone concerned only about judgments might still consider the added litigation costs produced when parties use broad discovery strategically, but would ignore the social costs associated with the bad settlements.

⁹³ Another example is the appropriate degree of pleading specificity. A liberal notice pleading rule facilitates meritorious suits but also facilitates frivolous suits; a more onerous strict pleading rule screens frivolous suits but also screens meritorious suits. See *Ackerman v. Northwestern Mutual Life Ins. Co.*, 172 F.3d 467, 470 (7th Cir. 1999); ROBERT G. BONE, *THE ECONOMICS OF CIVIL PROCEDURE* 125-157 (2003) [hereinafter *ECONOMICS OF CIVIL PROCEDURE*]. A rulemaker or judge concerned only about judgment quality should favor a liberal notice pleading rule because that rule maximizes the likelihood that meritorious suits will be filed and reach trial. As for frivolous suits, they are usually settled or dropped before trial so have little impact on the quality of trial judgments. On the other hand, a rulemaker or judge concerned about settlement quality is likely to favor a stricter pleading rule. To be sure, a strict pleading rule reduces judgment quality by screening some meritorious suits, but it also improves settlement quality by screening frivolous suits. Thus, the choice of pleading rule requires a tradeoff between judgment quality and settlement quality – no single rule maximizes both simultaneously.

other forms of potential abuse.⁹⁴ But the most serious problems lie elsewhere. They are endemic to the exercise of discretion itself and arise even when trial judges do their very best to choose optimal procedures for the particular case. The following discussion focuses on three such problems: bounded rationality constraints, information access obstacles, and strategic interaction effects. Given that the task of procedural design requires a complicated assessment of judgment and settlement effects within the context of a tightly integrated system, these problems, taken together, make a powerful case for greater caution in delegating discretion to the trial judge.

1. Bounded Rationality

There is an extensive literature in cognitive psychology examining the way human beings make complex decisions. Studies show that people have bounded rationality; they employ heuristics and schema to process complicated information, which introduce systematic biases into the decisionmaking process.⁹⁵ Professors Jeff Rachlinski, Chris Guthrie, and others have explored some of the implications for procedure, and in recent work they have enlarged their focus to include decisionmaking by judges as well as by parties and their lawyers.⁹⁶ When a judge chooses optimal procedures for a case, she makes an extremely complex decision involving complicated

⁹⁴ See, e.g., Peterson, *supra* note 4, at 44-46 (noting the focus on arbitrariness); Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 465 n. 287 (1989) (characterizing critics of broad discretion as raising concerns about judicial bias and arbitrariness); Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933, 951-52 (1991) (criticizing how judges exercised the broad discretion granted by the 1983 amendments to Rules 11, 16, and 26 to the detriment of civil rights plaintiffs). Occasionally critics mention competency concerns but usually only in a rather general way. See Resnik, *Failing Faith*, *supra* note 4, at 548.

⁹⁵ See Russell Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000).

⁹⁶ See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Jeffrey Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998); W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. L. & ECON. REV. 26 (1999). For sources discussing bounded rationality effects on parties and lawyers, see Jeffrey Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996); George Lowenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 222 J. LEG. STUD. 135 (1993).

facts, great uncertainty, and difficult predictive judgments. It would be natural for her to rely on the same heuristics and schema that inform complex decisionmaking outside the courtroom – and with similar adverse effects.

For example, in a recent study of magistrate judges that tested for several common heuristics (or as they are also called “cognitive illusions”) in different litigation contexts, the results showed statistically significant biasing effects, with the strongest for anchoring, hindsight, and egocentric biases.⁹⁷ It is important, however, to exercise caution in generalizing from data like this because none of the studies test actual courtroom conditions. As the authors of the magistrate study note, judges are probably more motivated to arrive at good decisions when they are in the courtroom than when they are participating in an experiment, and they certainly have more time to deliberate.⁹⁸

Nevertheless, judges still must process complex factual information and make difficult predictions, and these tasks invite the use of heuristics and schema.⁹⁹ Moreover, while their expertise might help to some extent, it cannot cure all the problems and may exacerbate some.¹⁰⁰ The adversary interaction of a lawsuit can help somewhat

⁹⁷ Guthrie et al., *supra* note 96, at 787-816 (testing three scenarios: calculating a damage award, evaluating a proposed settlement offer, and assessing the strength of evidence). Anchoring bias refers to the tendency to use a known fact to anchor estimates of an unknown, with the result that estimates tend to be lower when the anchor is lower and higher when the anchor is higher. *See id.* at 787-89. Hindsight bias refers to the way people tend to “Monday morning quarterback” decisions by allowing their knowledge of the actual outcome to affect their *ex ante* predictions about whether that outcome will occur. *See id.* at 799-801. Egocentric bias refers to the tendency people have to be more confident of their own abilities and prospects than the objective evidence warrants. *See id.* at 811-813.

⁹⁸ *Id.* at 819-20.

⁹⁹ *Id.*

¹⁰⁰ See Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Governmental Design*, 87 CORNELL L. REV. 549, 558-61 (2002) [hereinafter *Optimal Government Design*]; Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance and Adaptation*, 79 ORE. L. REV. 61, 63-64 (2000) [hereinafter *Heuristics and Biases*] (reporting on psychological studies that reveal “biases plaguing experts’ judgments” and speculating that courts might suffer from impediments to effective institutional adaptation).

by forcing the judge to consider different perspectives, but it is not likely to eliminate all sources of bias.¹⁰¹

Perhaps the most obvious area where these factors have a distorting effect is in judicial settlement promotion. The egocentric bias (sometimes called the overconfidence bias) can inflate a judge's confidence in her ability to predict settlement effects, which in turn can cause her to take bolder steps than she should given the actual likelihood of success and the potential costs of failure. In addition, the anchoring bias can distort the judge's estimate of what is a fair settlement. If the judge hears the plaintiff's settlement offer first, for example, the figure she hears can anchor her own estimate of what is fair, influencing her to push the parties toward the high (pro-plaintiff) end of the settlement range.¹⁰² Finally, several different biases can affect the judge's estimate of the likelihood of plaintiff's success as part of calculating a reasonable settlement amount, including the representativeness heuristic and the framing effect, both of which lead people to worry more about losses than gains.¹⁰³

Settlement promotion is not the only area where biases can have distorting effects. Consider a decision about how much discovery to allow. An assessment of the discovery needs of a particular case is susceptible to the distorting influence of yet another heuristic known as the availability heuristic. The availability heuristic refers to the human

¹⁰¹ See Guthrie et al., *supra* note 96, at 822-23.

¹⁰² The anchoring effects of opening offers on the parties' settlement expectations has been demonstrated in the experimental literature. See Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 139-142 (1994). One might expect similar anchoring effects for judges as well.

¹⁰³ The representativeness heuristic is rather complex, but it describes the way people tend to ignore base rate statistics when making estimates of probability. See Guthrie et al., *supra* note 96, at 805-808. The framing effect refers to the way people are affected by how a choice is framed. For example, people tend to choose differently when the identical tradeoff is framed in terms of losses than when it is framed in terms of gains. See *id.* at 794-796. Another factor plays a role as well. Most judges are not trained experts in settlement facilitation or ADR. Thus, if expertise provides any corrective to cognitive bias, it is likely to operate more weakly in the settlement context than in other procedural settings.

tendency to make predictions based on particularly salient and memorable examples that are in fact statistically aberrational.¹⁰⁴ For example, a judge might more easily recall cases where discovery was abused, leading her to assign an excessively high probability of abuse in the case before her and therefore choose stricter discovery limits than the case warrants.

Indeed, many of the discretionary procedural decisions judges make are likely to be influenced by the judge's prediction of likely success and her estimate of the stakes and litigation costs, all of which are susceptible to cognitive bias. So too, much of what a judge does when making predictions involves comparing the case before her with similar cases that she has handled in the past, and this process is likely to be infected by the availability heuristic and other biases. Finally, to assure an efficient and fair system overall, the judge should make an effort to predict the effect of her procedural choices on later litigation events, such as the effect of a discovery choice on later settlement bargaining or the effect of a pattern of summary judgment decisions on filing and litigation incentives in future cases. These predictions too are prone to cognitive bias.¹⁰⁵

If errors induced by these biases were randomly distributed about a mean of zero, a party deciding how to behave *ex ante* might simply average out the likely effects. As long as the variance was not too great and party risk aversion not too strong, any adverse impact could be ignored from an efficiency perspective. However, cognitive biases tend to produce systematic, not random, errors and operate similarly in most human beings.¹⁰⁶ Furthermore, in any given case, the bias will be realized in a particular direction, and the party who is burdened would have reason to object on fairness grounds.

¹⁰⁴ See Korobkin & Ulen, *supra* note 95, at 1087-1090.

¹⁰⁵ See Rachlinski, *Heuristics and Biases*, *supra* note 100, at 93-99.

¹⁰⁶ See Korobkin & Ulen, *supra* note 95, at 1085.

The fact that trial judge discretion is infected by cognitive bias is no reason to limit that discretion, however, unless the alternative – rules created in advance by an advisory committee process – is less susceptible to the problem. Obviously cognitive illusions affect all forms of complex decisionmaking, but some institutional settings do a better job than others of managing the effects.¹⁰⁷ There are reasons to believe that the advisory committee process is superior in this regard, at least compared to decisionmaking by individual judges.¹⁰⁸

The advisory and standing committee structure, coupled with further layers of review by the Judicial Conference, the Supreme Court, and ultimately Congress, helps to assure that multiple perspectives are brought to bear on the choice of procedural rules, thereby reducing the influence of the framing effect.¹⁰⁹ This hierarchical system of review also assures that ample time is taken for discussion and deliberation, thereby reducing the influence of the availability heuristic and other cognitive illusions. The process also forces rulemakers to examine procedural design from an outsider perspective viewing the system as a whole, rather than from an insider perspective focusing on procedural design in a particular case.¹¹⁰ Studies show that the effects of cognitive bias can be reduced when a decisionmaker adopts an outsider perspective.¹¹¹ Finally, public input into the process can help correct for the availability bias by exposing rulemakers to

¹⁰⁷ Rachlinski & Farina, *Optimal Government Design*, *supra* note 100, at 561-562.

¹⁰⁸ *Id.* at 572-574, 586 (describing some of the advantages of committees in mitigating cognitive bias).

¹⁰⁹ On multiple perspectives and the framing effect, *see* Guthrie et al., *supra* note 96, at 822-823.

¹¹⁰ *See, e.g.*, Rachlinski, *Heuristics and Biases*, *supra* note 100, at 65-66, 99-101 (discussing the difference between outsider and insider perspectives).

¹¹¹ *See, e.g., id.*; Rachlinski & Farina, *Optimal Government Design*, *supra* note 100, at 578 (noting that judges deciding cases one at a time are likely to have trouble adopting an outsider perspective).

a full range of empirical data. The egocentric bias remains, but it should help that the committee includes different egos with different points of view.

The advisory committee process is also better structured to obtain systematic feedback on the efficacy of procedural rules in practice, and this facilitates adaptive learning that can help correct initial cognitive error.¹¹² Systematic feedback is much more difficult for a single judge. The only effective way a judge can evaluate her own discretionary choices is to compare them with those of her fellow judges, but it is unlikely that one judge will learn systematically from others without a formal method for gathering information.¹¹³ Judges do have some access to informal sources, such as seminars and informal publications, but they have no comprehensive or systematic way to learn what their colleagues have done, debate the merits of the different choices, and even test the efficacy of their own (especially with regard to outcome quality).

2. Information Access

Even if a judge is able to process information without cognitive bias, her choice of procedure is only as good as the information she receives.¹¹⁴ However, much of the case-specific information the judge needs is in the private possession of the parties and their lawyers. This creates two major problems. First, extracting the information can be costly, especially when an adversary hearing is required. Second, the parties and their

¹¹² See Rachlinski, *Heuristics and Biases*, *supra* note 100, at 63-64.

¹¹³ And in the absence of strong feedback, a combination of framing, the escalating commitment effect, and the egocentric bias can cause a judge to lock into a routine set of practices even when those practices are suboptimal or flawed. See Rachlinski & Farina, *Optimal Government Design*, *supra* note 100, at 604-06 (discussing the “stickiness” of imperfect regulatory solutions). Decentralized decisionmaking can have advantages in some settings by allowing experimentation and harvesting of local knowledge, but these benefits can be achieved only with some mechanism for correcting errors and facilitating the evolution of decisions toward optimality, which is largely absent from the current procedural system.

¹¹⁴ See, e.g., Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1042 (1975) (“Without an investigative file, the American trial judge is a blind and blundering intruder, acting in spasms as sudden flashes of seeming light may lead or mislead him at odd times.”).

lawyers have incentives to conceal their private information and mislead the court. It is true that these incentives exist throughout the litigation, but they are much more likely to reap benefits early in a case before parties have a chance to use discovery to force disclosure. And it is early in the case that the trial judge makes many of the critical scheduling and management decisions that shape the direction of the suit and the bargaining conditions for a future settlement.

The conventional assumption underlying the commitment to adversarial fact-finding is that competition between adversaries is likely to ferret out the truth. One might assume then that adversarial argument at a scheduling conference or hearing would give the judge a reasonably accurate picture of the lawsuit. But this assumption is excessively optimistic. The truth-finding efficacy of adversary process depends on both sides knowing the truth and having equal access to the same body of evidence. However, these conditions are not likely to hold early in the case before discovery is completed, when each side has private information.

While these points are intuitively plausible, they also find support in the economic literature on evidence production. The classic game-theoretic models that demonstrate the truth finding properties of adversarial process assume: (1) that parties will conceal but not mislead, (2) that both parties know the truth, and (3) that both parties are able to sample from the same evidence distribution.¹¹⁵ The assumption that parties will not mislead is extremely naïve, especially when those parties know that a future settlement

¹¹⁵ The classic in the field is an article by Milgrom and Roberts. Paul Milgrom & John Roberts, *Relying on the Information of Interested Parties*, 17 RAND J. ECON. 18 (1986). Their model assumes that the parties cannot fabricate evidence and that both sides know the truth (and know that one another knows the truth). Other contributions to the literature make similar assumptions. See, e.g., Luke M. Froeb & Bruce H. Kobayashi, *Naïve, Biased, Yet Bayesian: Can Juries Interpret Selectively Produced Evidence*, 12 J. L. ECON. & ORG. 257 (1996).

could prevent discovery of the lie.¹¹⁶ Moreover, both sides do not necessarily know the truth early in the case and neither can sample from the other's private information before conducting discovery.¹¹⁷

To illustrate the problem, consider a judge who is dealing with a reasonably complicated construction case. The parties meet and confer soon after service of the complaint as required by Rule 26(f), but are unable to reach agreement on key aspects of a discovery plan, including the total number and sequencing of depositions. The judge holds a Rule 16(b) scheduling conference to resolve these issues and frame a scheduling order.¹¹⁸

As for the number of depositions, the plaintiff argues that the case is so complicated that it should be allowed to exceed the presumptive limit of ten depositions prescribed by Rule 30 of the Federal Rules of Civil Procedure.¹¹⁹ The defendant responds that, for its part, it is willing to stay within the ten-deposition limit and the plaintiff should be able to do so as well by carefully selecting deponents. The defendant insists that plaintiff's deposition plan will impose high costs on the defendant and that the plaintiff has no intention of actually taking all the depositions but just wants to be able to threaten onerous deposition discovery in order to force an early settlement. On the other side, the plaintiff argues that defendant's willingness to accept a deposition limit is purely strategic: the plaintiff has very little information that the defendant needs while the

¹¹⁶ See Chris Sanchirico, *Evidence Tampering*, 53 DUKE L. J. 1215, 1230-1247 (2004) (reviewing the data on evidence tampering).

¹¹⁷ See generally, Andrew F. Daughety & Jennifer F. Reinganum, *On the Economics of Trial: Adversarial Process, Evidence, and Equilibrium Bias*, 16 J. L. ECON. & ORG. 365 (2000) (showing how asymmetric sampling costs, differences in the information each side can access, or asymmetric stakes can bias the ultimate factual determination).

¹¹⁸ The 16(b) conference varies in degree of formality. See 3-16 MOORE'S FEDERAL PRACTICE, *supra* note 18, § 16.11[2][a]. Here we assume the case is complex and contentious enough to warrant a formal hearing.

¹¹⁹ See FED. R. CIV. P. 30(a)(2)(A).

defendant has a great deal of information that the plaintiff needs. The plaintiff also argues that the defendant is trying to restrict deposition discovery in order to impede plaintiff's success at trial and thus extract a more favorable settlement for itself.

As for sequencing, the plaintiff insists that certain top-level officers of the defendant were probably involved deeply in the events and are key sources of information, so their depositions should be taken first. The defendant argues to the contrary, that these officers know very little about the case and that the sequencing should begin with others. The defendant insists that the plaintiff wants to use the depositions of top officers to create bad publicity for the company and embarrass top management into agreeing to an early settlement. The plaintiff argues in response that the defendant wants to delay the key depositions in order to create settlement leverage for itself.

How is the judge supposed to decide these issues? Rule 16(b) gives her broad discretion to decide the sequencing issues, and Rule 30 grants discretion to authorize more than ten depositions if the judge finds that additional depositions are “consistent with the principles stated in Rule 26(b)(2).”¹²⁰ The 26(b)(2) principles, in turn, invite the judge to assess the need for additional discovery and balance its costs against its benefits. In determining need, the judge is supposed to consider whether the discovery sought is “unreasonably cumulative or duplicative,” whether the plaintiff has already had ample opportunity to obtain the information, and whether the discovery could be obtained in a less costly manner from some other source.¹²¹ In weighing costs and benefits, the judge is supposed to take into account “the needs of the case, the amount in controversy, the

¹²⁰ *Id.*

¹²¹ FED. R. CIV. P. 26(b)(2)(i), (ii).

parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.”¹²²

These determinations require a great deal of case-specific information. Only with a fairly good grasp of the facts can the judge reliably assess the “needs of the case” and the “amount in controversy” and determine which witnesses are duplicative and which will provide significant new information. The judge might rely to some extent on her experience with similar cases, but she will likely be met with strong arguments that the particular case before her is different.¹²³

For example, suppose our judge guesses initially, based on experience with construction cases, that the high level officials the plaintiff seeks to depose early probably have core information about what was going on with the project. Expecting this initial position, the defendant will be prepared to distinguish its case from the norm. Ordinarily, the judge could rely on the plaintiff to make strong counter-arguments and the adversarial interplay to get closer to the truth. But which officials know what is likely to be the defendant's private information at this early stage, so the plaintiff is not in a good position to make a convincing counter-argument.

This example illustrates an important general point. When judges make decisions early in a case, those decisions can significantly affect settlement bargaining, the efficacy of summary judgment and other pretrial options, and the quality of a judgment should the case be tried. To predict these effects, the judge has to know a great deal about the case

¹²² FED. R. CIV. P. 26(b)(2)(iii).

¹²³ The judge might hold views of typical party behavior, such as that plaintiffs' lawyers always inflate their need for discovery or defendants' lawyers always complain about bad publicity. Generalizations of this kind are particularly susceptible to cognitive bias, especially when opportunities for feedback are limited. *See supra* notes 95-106 & accompanying text (discussing the effect of bounded rationality factors). However, in this section, I focus on the information access problem exclusively, so I assume that the judge is able to make a perfectly rational decision with sufficient information.

and the parties. However, early in the case, when many of these determinations must be made, the parties have little incentive to reveal their private information and strong incentives to prevaricate and even mislead. Concealing information is advantageous because it makes the opposing party pay to obtain it, and a strategy of misleading further exploits the informational asymmetry. These information access obstacles interfere with one of the main benefits supposedly conferred by procedural discretion – tailoring procedures to the unique conditions of the particular case.

One might argue that the judge in our hypothetical can modify her original scheduling order as the litigation progresses, incrementally adjusting and readjusting in light of new information and experience with what has already been tried.¹²⁴ But this rosy scenario is excessively optimistic for several reasons.

First, judges are not in a good position to make the most effective use of an incremental approach. This approach works best when the agent is in regular contact with the activity and can make adjustments rather smoothly and with little cost. This is not true for judges. They do not maintain regular contact with lawsuits on their dockets, nor can they easily modify their scheduling orders without significant cost. In fact, modification *has to be* difficult in order for the scheduling order to accomplish one of its primary objectives, forcing the parties to proceed expeditiously with pretrial activities and settlement negotiations. If the parties believed at the time a scheduling order was entered that modifications would be readily granted *ex post*, the parties would not invest as much in getting a desirable order in the first place or try very hard to meet its deadlines and abide by its other requirements.

¹²⁴ Rule 16(b) allows the trial judge to make modifications “upon a showing of good cause.”

Second, and even more serious, the judge cannot be sure that she will have an opportunity to correct her earlier errors before the case settles. The original scheduling order or other decision does much more than simply organize and expedite the pretrial stage: it frames the parties' bargaining game and thus influences the ultimate settlement. An incremental approach might work reasonably well if all lawsuits went to trial, for then the judge could make alterations and correct her earlier planning mistakes.¹²⁵ But the prospect of settlement changes this picture dramatically. One of the main goals of a Rule 16 scheduling conference is to encourage early settlement,¹²⁶ but if the case settles, the judge will have no opportunity to modify her order.

To illustrate this point, return to our construction hypothetical. Suppose the judge accepts the defendant's position on the number and sequencing of depositions. Facing a ten deposition limit and unable to depose high-level officials early, a rational plaintiff should revise its estimate of discovery costs upward and scale back on the estimate of trial success.¹²⁷ These factors should increase the likelihood of a settlement and on terms more favorable to the defendant. If the judge's decisions are mistaken and the case settles soon after the scheduling order, the judge will have no opportunity to correct these errors, and the result will be an outcome erroneously skewed in defendant's favor.

One might respond to the information access argument by pointing out that judges should be able to use standard protocols for different types of cases if pretrial matters fall into predictable patterns. In that case, however, there would be no reason for case-

¹²⁵ It is worth noting that even this happy scenario is not quite as rosy as it seems. A party might use the modification option strategically to impose asymmetric evidence gathering costs and thereby place its opponent at a disadvantage for trial

¹²⁶ See *supra* notes 16-23 & accompanying text.

¹²⁷ It is worth mentioning as well that if the judge's pro-defendant decisions are interpreted as a signal that the judge might not be favorably disposed to plaintiff's case as the litigation proceeds, plaintiff's attorney will reduce her estimate of likely success even further.

specific discretion. If cases are sufficiently homogenous to fit a protocol, the better approach would be to codify the protocol. Doing so would ease the burden on trial judges and reduce the risk of mistakes. The reason to rely on trial judge discretion is to address the special cases that do not readily fit a protocol. But it is in these cases that the trial judge is likely to have difficulty accessing case-specific information.¹²⁸

This then is the informational advantage rulemaking has over case-specific discretion: rulemakers are better situated to gather and process empirical information on broad classes of cases and design general rules for the average case. If a group of cases is too heterogeneous for a single rule, the group can be divided into more homogeneous subgroups and different rules designed for different subgroups. To be sure, there is a limit to this approach. At some point, the cost of subdividing further – both the cost of gathering and processing the necessary information when making the rule and the cost of assigning a case to the right category when applying the rule – exceeds the benefit of more refined rules.¹²⁹ This represents the point of optimal subdivision, and rulemakers should resist efforts to subdivide further.¹³⁰

3. Strategic Effects – The Judge as a Strategic Player

The traditional view of the judge as passive umpire does not fit a procedural system pervaded by case-specific discretion. When the trial judge adapts procedures to specific cases, she almost inevitably becomes another strategic player in the litigation

¹²⁸ See Yeazell, *Judging Rules*, *supra* note 14, at 241-42 (noting another reason why information access is limited – much of what happens at the pretrial stage takes place outside the judge’s view).

¹²⁹ See generally Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L. J. 557, 590-592 (1992).

¹³⁰ The proposal assumes that there are reasonably effective criteria for sorting cases. One must remember, however, that sorting need not be perfect. The goal is to minimize total costs: the error and process costs of case-specific discretion must be compared to the error and process costs of imperfect rules.

game.¹³¹ Imagine a baseball umpire who has discretion to decide how many strikes or outs to allow or to decide whether a runner has to tag third base before heading home on a fly ball. The umpire's discretion would make him a player in the game, for then each team would try to influence the umpire's decisions at the same time as he tried to influence theirs.

The judicial shift from umpire to strategic player is most apparent for settlement promotion and case management. The whole point of those activities is to influence party behavior. To be effective, the judge must predict party response and adjust her decisions accordingly. At the same time, the parties know that the judge will do this, so each behaves in a way that tries to induce an optimal response from the judge (for that party). But it does not stop there. The judge knows that parties will react in this way, so the judge takes account of that possibility in advance. And so on.¹³²

The fact that judges often act strategically is important for two reasons. First, even perfectly rational actors with complete information sometimes have trouble achieving good outcomes in a strategic environment, as the game-theoretic literature demonstrates. The Prisoners' Dilemma is perhaps the most famous example.¹³³ The players in a Prisoner's Dilemma game have complete information but still end up with a bad result, because they are unable to commit to cooperative strategies in advance.

Second, it is naïve to assume that trial judges can use their discretionary management

¹³¹ For a critical analysis of discretionary judicial case management that recognizes the way it transforms the judicial role and some of the resulting strategic costs, especially for attorney behavior and settlement quality, see Molot, *Changes in the Legal Profession*, *supra* note 1, at 1003-05, 1019-29.

¹³² This description is a standard account of strategic interaction. See RASMUSEN, *supra* note 90, at 9-10. When choosing a strategy, each player must consider how her choice will affect other players, taking account that the other players will do the same to her. So from the perspective of any given player, every other player is a moving target. The trick to predicting what will happen is to find a set of mutual best responses, which is called an "equilibrium." See *infra* note 141 (describing the Nash equilibrium).

¹³³ On the Prisoners' Dilemma, see DOUGLAS A. BAIRD, ROBERT H. GERTNER, & RANDAL C. PICKER, *GAME THEORY AND THE LAW* 33 (1994).

tools to overcome these obstacles. Again, the game theoretic literature shows that efforts to solve problems in a strategic environment often produce new problems that can make matters even worse.

Proceduralists are not accustomed to thinking of judges as strategic players. Even the critics of settlement promotion and case management, while perhaps influenced by a lingering sense that it is inappropriate for a judge to act strategically, mostly ignore the strategic dimension. Moreover, there is very little empirical work on judges as strategic actors,¹³⁴ and most of the theoretical literature on the economics of litigation focuses on the strategic interaction between parties and treats the judge as a detached decisionmaker simply reacting to party behavior.¹³⁵

This Article is not the place to analyze the detailed effects of judicial strategic behavior. Doing so is far too complicated, and the effects will vary with different contexts in any event. Still, it is possible to illustrate in general what might happen. The following concrete example is highly stylized and simpler than any actual litigation scenario. Yet it is sufficiently realistic to highlight the way strategic interaction can complicate any effort to manage litigation. The central problem is that the parties are moving targets. If the judge decides to do X on the assumption that the parties will do A,

¹³⁴ Most of the empirical work is in the political science literature, and much of it focuses on the United States Supreme Court's interaction with Congress and administrative agencies. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); CORNELL W. CLAYTON & HOWARD GILLMAN, *SUPREME COURT DECISIONMAKING: NEW INSTITUTIONAL APPROACHES* (1999). This literature examines whether Supreme Court Justices decide cases strategically. A Justice who thinks strategically on this view would decide the case in a way that is not ideal given her own policy preferences, but that is likely to yield an ultimate outcome closer to her ideal after other governmental entities, such as Congress or administrative agencies, respond. However, these other entities know that the Justices will do this, so they react in ways that try to influence decisions that are easier for those entities to deal with or more likely to yield an ultimate result closer to their (the entities') policy preferences.

¹³⁵ More precisely, the game theoretic models treat a judicial decision or trial as a random event (like the flip of a coin) with exogenously fixed probabilities assigned to each possible result. This means that the judge and jury cannot influence, or be influenced by, the parties' behavior and therefore are not players in the game.

then the parties, anticipating that the judge will do X, might change from A to B, frustrating what the judge hoped to accomplish with X.

Imagine a tort suit involving a single plaintiff and a single corporate defendant and a judge who is trying to conduct the lawsuit so as to produce an optimal settlement or trial judgment taking account of error and process costs. Suppose that early in the case the judge must decide whether to refer the lawsuit to mediation.¹³⁶ The judge's decision will turn on a number of characteristics of the suit, some of which will be apparent to the judge and some of which will not. One of the hidden characteristics has to do with how contentious the parties truly are.¹³⁷ Mediation is much less likely to work for highly contentious parties, but judges cannot determine contentiousness directly. They can only infer whether a party is truly contentious by observing the party's behavior.

Suppose that our corporate defendant is not truly contentious and would actually cooperate if the case were referred to mediation.¹³⁸ However, the defendant would rather the case not be referred because it believes that its superior resources and ability to handle risk give it a comparative advantage in ordinary litigation and thus improve its chance of obtaining a favorable settlement. Under these circumstances, our defendant (or

¹³⁶ For a strategic analysis of the effect of hidden information on mediation and the tools a mediator might use to reduce adverse selection problems, see Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 331-71 (1994). The authors focus on the process of mediation itself and their recommendations, especially sequential caucusing, would be difficult for a judge to implement on her own, especially a judge without a lot of mediation training. For a strategic account of court-annexed arbitration that can be adapted to include the judge as a strategic party, see Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169 (1993).

¹³⁷ Other hidden characteristics include each party's valuation of the case, each party's bargaining power, and the relative risk aversion. I could run the example for each of these characteristics with similar results.

¹³⁸ There are a number of reasons why the defendant would cooperate. The defendant might decide that settlement is better than prolonging the litigation when prolonging also includes paying for mediation, or it might be concerned about judicial hostility if it resists mediation after the judge orders it. Indeed, the judge might have a reputation for punishing parties that do not cooperate in mediation when the case returns to regular litigation. Furthermore, the judge might take active steps to cultivate this reputation by being hard on parties who resist mediation after it is ordered.

more precisely its lawyer) might act strategically by behaving contentiously at an early hearing in an attempt to deceive the judge into believing that it is in fact contentious (when it is not).

What is the judge supposed to do when she observes the defendant being contentious, but also knows that the defendant might be trying to deceive her? At one extreme, the judge might just take the behavior at face value and never send a case to mediation when the defendant behaves contentiously. At the other extreme, she might assume every contentiously behaving defendant is faking and send all cases to mediation. Neither of these extreme approaches is optimal, however. If the judge always refused to send a case to mediation whenever the defendant behaved contentiously, defendants would always behave contentiously and escape mediation, a costly result that gives defendants a great deal of power and undermines the goals of court-annexed mediation. On the other hand, if the judge always ordered mediation without any concern for defendant's behavior, truly contentious defendants would end up in mediation, thereby creating wasted costs when mediation proves unsuccessful.¹³⁹

It is possible to construct a formal game-theoretic model of this strategic interaction and solve for a Nash equilibrium.¹⁴⁰ A Nash equilibrium is a set of strategies,

¹³⁹ Furthermore, it would be extremely difficult for the judge to stick with an always-refer-to-mediation strategy. If the judge always referred cases to mediation, there would be no reason for cooperative defendants to fake contentiousness, as they would gain nothing from doing so. Thus, only truly contentious defendants would behave contentiously. But then the trial judge, observing a defendant behaving contentiously, would have to conclude that the defendant must be truly contentious, in which case the judge would be sorely tempted to deviate from her always-refer-to-mediation strategy and not refer the case. And if the judge did that, then the cooperative defendants would revert to pretending to be contentious – and the cycle would start all over again. More generally, beliefs and actions must be rationally consistent in equilibrium: each player's beliefs about how the other will act must be consistent with how the other actually does act. In our mediation example, this means that a rational judge must refuse to refer when she believes that every contentiously behaving defendant is truly contentious. See BAIRD ET AL., *supra* note 133, at 126-130 (illustrating this point).

¹⁴⁰ See *id.* at 19-28 (explaining the Nash Equilibrium).

one for each player, such that when each player plays its equilibrium strategy it does the best it can given that other players play their equilibrium strategies.¹⁴¹ In the equilibrium of our mediation-referral game, the judge sometimes – but not always – refers cases to mediation when the defendant behaves contentiously, and cooperative defendants sometimes – but not always – pretend to be contentious.¹⁴²

The judge knows that a defendant who behaves cooperatively is not truly contentious, but she does not know whether a defendant who behaves contentiously is truly contentious or just pretending. As a result, some cases will go to mediation that should not (i.e. cases involving truly contentious defendants that the court sends to mediation by mistake), and some cases will be directed away from mediation that should have been referred (i.e. cases involving truly cooperative defendants faking contentiousness that the court declines to send to mediation by mistake). Both types of mistake are costly. Indeed, the social costs in this equilibrium might even exceed those generated when judges act non-strategically by naively accepting the defendant's conduct as genuine.¹⁴³

¹⁴¹ Consider a game between players A and B. Suppose that if A uses strategy X, B's best response is strategy Y. Suppose the converse is also true: if B uses strategy Y, A's best response is strategy X. X and Y then are mutual best responses. If A plays X, B plays Y; and if B plays Y, A plays X. This means that neither A nor B has an incentive to deviate once they start playing X and Y. We say the Nash equilibrium of this game consists of A playing X and B playing Y and that the outcome of the game is the result that follows when the two strategies are played against one another.

¹⁴² Technically, the strategy of never referring contentious-appearing defendants to mediation can be part of an equilibrium only if most defendants who behave contentiously are in fact not faking. If instead most are faking – and the incentives to fake would be very high when faking is always successful – the refusal strategy misses too many opportunities for successful mediation. Also, for the reasons discussed in note 139 *supra*, always referring contentious-appearing defendants to mediation cannot be part of an equilibrium either. Thus, the equilibrium must consist of mixed strategies, where the judge acts one way sometimes and the other way the rest of the time. See RASMUSEN, *supra* note 90, at 67-83 (explaining mixed strategies).

¹⁴³ Whether the total costs are greater depends on the relative costs of the two types of error (mistakenly referring and mistakenly not referring) and the relative number of truly contentious defendants.

There are many other situations like this. For example, a judge might decide to be tough against plaintiffs and generous to moving party defendants at the summary judgment stage in order to deter the filing of weak cases. The prospect of facing a hostile judge at summary judgment then might deter the filing of meritorious suits, or more likely, cause plaintiffs to settle prior to summary judgment on terms favorable to defendants.

It is important to recognize that in all these examples social costs are created even though the judge is a purely public-regarding actor who does everything she can to further legitimate procedural policies and goals. Recall that our hypothetical judge cared about producing quality settlements, which is one of the reasons she was so concerned about sending the right cases to mediation. Suppose, however, that the judge's utility function is such that she cares much more about the *quantity* of settlements than their quality. In that case, the judge might prefer not to refer some cooperative defendants even when she knows they are cooperative. If the additional leverage of ordinary litigation increases the chance that the plaintiff will capitulate and capitulate sooner than in mediation, then the judge might prefer to keep the case in litigation. The resulting equilibrium would change: fewer cooperative defendants would pretend to be contentious; more cases involving cooperative defendants would remain in ordinary litigation, generating higher costs, and there would be more bad settlements involving cooperative defendants.¹⁴⁴

¹⁴⁴ Matters only get worse if we assume a judicial utility function that also includes private values. Suppose, for example, that a judge's political views lead her to be suspicious of civil rights plaintiffs. Civil rights lawyers expecting a hostile reception will adopt strategies that try to prevent it, say, by falsely portraying the facts in their particular cases as especially egregious. The judge will anticipate these strategies and adopt counterstrategies to minimize the effects. The resulting strategic interaction can produce bad outcomes in a number of different ways.

Insofar as strategic effects are concerned, the advisory committee process has an advantage over the trial judge since committee rulemakers are detached from the intensely strategic fray of individual litigation. To be sure, they are involved in other types of strategic interaction, such as with the practising bar, private interest groups, and Congress, but those interactions are likely to be less intense, more diffuse, and potentially more manageable.¹⁴⁵ For example, rulemakers are in a better position than individual trial judges to gather information, which should mitigate the adverse strategic effects of asymmetric information. Moreover, a particular rule might be good for an interest group in some cases and bad in others, which makes strategizing for private benefit more difficult at the rulemaking stage than in an individual suit. And public-regarding rulemakers should be able to resist lobbying pressures to a considerable extent.

V. Limiting Procedural Discretion

Let us recap the argument so far. We have seen that case-specific discretion is a defining feature of modern federal procedure, and for reasons that have little to do with its efficacy. We then examined the efficacy question directly. We first defined the goal that judges should aim to achieve when they design procedures for a specific case, which is to strike an optimal balance between achieving good judgments and achieving good settlements. We then examined how effectively trial judges armed with case-specific discretion can achieve this goal working within a tightly integrated system of procedure, and we identified three major obstacles to success.

This much should be enough to shake any naïve confidence in trial judge discretion. The lesson is clear: Rulemakers should treat case-specific discretion as an

¹⁴⁵ See Bone, *Making Process*, *supra* note 31, at 921-926 (describing the advantages of a court-based, committee-centered rulemaking process).

explicit policy choice rather than an implicit default, evaluate its costs and benefits in each procedural context, and make a considered judgment about how much discretion to grant and what controls or guidelines to include.

As the literature on rules versus standards teaches, there are many factors relevant to this analysis, including the administrative costs of formulating rules in advance, the error costs of applying rules strictly (given the inevitable over- and under-inclusion), the administrative and error costs of case-specific discretionary decisions, and so on.¹⁴⁶

These factors, however, have different implications for procedure than for substantive law because of the highly strategic nature of the litigation environment, the tightly systemic character of procedural rules, and the special challenges facing judges when they try strike an optimal balance between settlement and judgment effects. The following discussion develops these points by considering four different ways discretion can be limited and illustrating each with concrete rule reforms.

A. Eliminating Discretion (As Much As Possible)

One approach is to impose a strict rule that (virtually) strips trial judges of all case-specific discretion. Even strict rules must be interpreted, of course, and interpretation introduces some flexibility.¹⁴⁷ Yet language is not so indeterminate that relatively clear and strict rules cannot be drafted.¹⁴⁸ Furthermore, one should not assume

¹⁴⁶ See, e.g., FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995); Kaplow, *supra* note 129; Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L. J. 65 (1983); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEG. STUD. 257 (1974).

¹⁴⁷ Professor Sunstein argues that the possibility of an exceptional case always makes it necessary for judges to formulate ex post normative judgments interpreting a rule. See Sunstein, *supra* note 146, at 984-987. However, the point of a strict procedural rule strictly enforced is that trial judges do not make the exceptions; rather, the rulemaking committee decides whether an exception is warranted.

¹⁴⁸ See SCHAUER, *supra* note 146, at 214.

that trial judges will routinely ignore clear rules when they understand why strict enforcement is necessary and appellate courts actively review every opportunity they get.

Some current rules leave no (or very little) room for case-specific discretion. A notable example are the rules governing pleading specificity. The United States Supreme Court has made clear that trial judges cannot tailor stricter pleading standards to the circumstances of specific cases, such as by requiring more factual specificity to control for a higher risk of frivolous suits.¹⁴⁹ Trial judges instead must apply a liberal notice pleading standard unless a Federal Rule or congressional statute provides otherwise.¹⁵⁰ The Supreme Court justified its holding as an interpretation of the Federal Rules,¹⁵¹ but given the vague and flexible language of the Federal Rules governing pleading,¹⁵² it is

¹⁴⁹ Whatever residual uncertainty might have remained after *Leatherman v. Tarrant County Narcotics Intell. & Coord. Unit*, 507 U.S. 163 (1993) was virtually eliminated by *Swierkewicz v. Sorema N.A.*, 534 U.S. 506 (2002). The recent case of *Pelman v. McDonald's Corp.*, 237 F.Supp.2d 512 (S.D.N.Y. 2003) (*Pelman I*), 2003 U.S. Dist. LEXIS 15202 (S.D.N.Y. 2003) (*Pelman II*) is a good example of judicial tailoring. The *Pelman* plaintiffs filed a consumer class action for damages, alleging that McDonald's sales practices encouraged children to eat too much fatty and unhealthy food. In *Pelman I*, the district judge granted defendant's 12(b)(6) motion to dismiss on the ground that the plaintiffs failed to plead elements of their claims with sufficient factual specificity. The judge's published opinion reads as if he on his own decided stricter pleading was appropriate for the particular case because of the risk and burden of frivolous litigation. See *Pelman I, supra*, at 518. The plaintiffs then filed an amended complaint, and the judge once again dismissed on the ground of insufficient specificity, this time with prejudice. *Pelman II, supra*, at *40-*41. The Second Circuit reversed as to some claims on the strength of *Swierkewicz, supra*, holding that the plaintiffs need only satisfy a liberal notice pleading standard. *Pelman v. McDonald's Corp.*, 396 F.3d 508, 511-12 (2d Cir. 2005).

¹⁵⁰ See *Swierkewicz, supra*, at 512-14; *Conley v. Gibson*, 355 U.S. 41 (1957). But see *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (suggesting alternatives to a 12(b)(6) motion that would seem to circumvent liberal notice pleading indirectly). An example of a Federal Rule authorizing strict pleading is Rule 9(b) ("the circumstances constituting fraud or mistake shall be stated with particularity") and an example of a statute doing so is the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b) ("the complaint shall...state with particularity facts giving rise to a strong inference that the defendant acted" with the state of mind required by the claim).

¹⁵¹ See *Leatherman, supra*, at 168. The Court argued that since the rule drafters went to the trouble of expressly requiring strict pleading for fraud and mistake in Rule 9(b), they must have meant Rule 8(a)(2) to be very generous notice pleading.

¹⁵² The language of the rules is consistent with considerable case-specific tailoring. For example, Rule 9(b) might be interpreted as simply an effort to be clear about certain issues without excluding stricter pleading for others. Moreover, one can easily interpret Rule 8(a)(2)'s somewhat vague language – "short and plain statement showing the pleader is entitled to relief" – to support more detail for elements that are more difficult to infer from highly general allegations. See, e.g., Richard A. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEXAS L. REV. 1749, 1755 (1998). In fact, lower courts prior to

reasonable to assume that the Court was also influenced by an implicit policy judgment that pleading specificity is a matter better handled by rulemaking committees (and Congress) than by individual trial judges.¹⁵³

It is instructive to examine why such a policy judgment might make sense for pleading because the same reasons apply to other rules as well. The choice of pleading specificity standard involves balancing two conflicting goals: screening frivolous suits (which favors stricter pleading) versus facilitating meritorious suits (which favors more liberal notice pleading).¹⁵⁴ It follows that one should reject trial judge discretion in favor of a general rule if one believed that rulemaking committees (and Congress) were in a superior position to strike the optimal policy balance.

The Advisory Committee has substantial advantages in this regard (as does Congress). The Committee is in a much better position than the trial judge to collect and process empirical data on the likelihood of frivolous suits for different types of litigation. In addition, adopting a clear pleading rule in advance provides notice to prospective plaintiffs about what they need to plead. It is certainly possible to implement a pleading standard after the fact through amendments to the complaint, but an amendment process consumes litigation resources.

Furthermore, striking the optimal policy balance involves much more than estimating the frequency of frivolous suits; it also involves comparing the costs of

Leatherman, supra, interpreted these Rules to allow trial judges to fashion stricter pleading rules for particular types of cases. *See, e.g.,* *Cash Energy, Inc. v. Weiner*, 768 F.Supp. 892 (1991).

¹⁵³ *See* *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) (“our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process”).

¹⁵⁴ *See supra* note 93.

mistakenly screening meritorious suits with the costs of allowing frivolous suits.¹⁵⁵ This comparison can implicate controversial value judgments, especially when the litigation involves strong public interests, as in civil rights cases. Arguably, these value judgments are more legitimately made through an open and public participatory process like the one that the Advisory Committee uses to draft the Federal Rules.¹⁵⁶

Finally, the choice of optimal pleading rule is part of a much larger problem of designing an integrated system of rules that deals as a whole with the frivolous suit problem optimally. This means that pleading rules should be evaluated in conjunction with other devices for reducing frivolous suits, such as Rule 11 sanctions, summary judgment, fee shifting, and discovery controls.¹⁵⁷ Judges who tailor specificity standards to individual cases are not in a good position to adopt such a global perspective, but the Advisory Committee is.

The pleading example is meant to illustrate the kind of analysis that should be undertaken and some of the factors that should be considered when the Advisory Committee decides whether to delegate case-specific discretion or instead use a strict rule approach. My second example – discovery – involves an area in which trial judges currently exercise “enormous discretionary power”¹⁵⁸ and in which a strict rule might well be superior.¹⁵⁹ The advantage of strict discovery rules has to do with the benefits of

¹⁵⁵ See BONE, *ECONOMICS OF CIVIL PROCEDURE*, *supra* note 93, at 130-132.

¹⁵⁶ See 28 U.S.C. § 2073(c).

¹⁵⁷ See *Leatherman*, *supra*, at 168-69.

¹⁵⁸ Yeazell, *Misunderstood Consequences*, *supra* note 47, at 651-52.

¹⁵⁹ *But see* Stempel, *supra* note 3, at 232-234 (recommending eliminating even the presumptive limits and restoring broad case-specific discretion over discovery).

facilitating credible pre-commitment in the complex high-stakes, high-conflict cases that generate most of the discovery problems.¹⁶⁰

Sometimes parties are better off when they can firmly commit in advance to a course of conduct and strip themselves of the freedom to change their minds later on.¹⁶¹ The classic example from literature is Ulysses, who had his men tie him to the mast so he could avoid the Sirens' call. An example from game theory is the Prisoners' Dilemma, in which both parties end up better off in equilibrium when they can credibly commit in advance to cooperate.¹⁶²

One likely reason litigating parties engage in excessive and abusive discovery is that they are locked into a Prisoners' Dilemma game, fearful that their opponent will abuse discovery and gain a litigating advantage.¹⁶³ For example, each side has an incentive to spend more than it otherwise would out of fear that the other side will overspend and gain a marginal advantage at trial. Furthermore, each side has an incentive to withhold discovery to exploit a relative cost advantage by forcing the other

¹⁶⁰ See Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597, 599-603 (1998) (noting that problems are confined to a relatively small group of high-stakes, high-conflict cases).

¹⁶¹ For an intriguing account of different situations in which parties benefit from their ability to precommit, see JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 1-87 (2000).

¹⁶² See BAIRD ET AL., *supra* note 133, at 33.

¹⁶³ See John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 571-78 (2000); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 514-522 (1994); Setear, *supra*, note 91, at 584-593. But see Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618, 1623-24 (1996) (questioning the Prisoners' Dilemma account and treating discovery abuse as a problem of moral development). There are other reasons in addition to the Prisoners' Dilemma. For example, lawyers hired on a fee-for-services basis have incentives to overdo discovery in order to run up fees; see, e.g., Lawrence M. Frankel, *Disclosure in the Federal Courts: A Cure for Discovery Ills*, 25 ARIZ. ST. L. J. 249, 258-59 (1993); and risk-averse young associates in large law firms might err on the side of excessive discovery out of fear that doing too little and overlooking something could elicit the wrath of more senior attorneys; cf. Yablon, *supra*, at 1639. Strict limits will do a better job than presumptive limits in controlling these incentives. Presumptive limits invite motions that run up costs and encourage young associates to seek more discovery. Some commentators point to cost-externalization as another factor. See Cooter & Rubinfeld, *supra* note 88, at 62-68. The optimal solution is to internalize the external costs, but setting strict limits also helps by limiting opportunities to externalize.

side to bring motions to compel. And each side might be inclined by the same dynamic to conduct abusive discovery with no informational value, intended only to increase its opponent's costs and thereby leverage a more favorable settlement.¹⁶⁴ If one side expects the other to do any of these things, it will do them as well so as to avoid ending up a “sucker.”¹⁶⁵

However, if both sides invest more in discovery than they ordinarily would simply to counter anticipated investments by the other side, the result will be wasteful expenditures on litigation.¹⁶⁶ Consequently, both parties should be willing to commit in advance not to overspend if only they could do so in a binding way, for then each would save the litigation costs of responding to its opponent's overspending. The problem, however, is that without some way to make commitments binding, each party has an incentive to renege on its promise not to overspend.¹⁶⁷ Strict rules strictly enforced do the same work as a binding commitment and thus solve the collective action problem when parties are unable to do so on their own. On the other hand, strict rules are

¹⁶⁴ See Setear, *supra* note 91, at 581. More precisely, the favorable settlement effects result from being able to credibly threaten to impose abusive discovery, but the party making the threat must actually engage in abusive discovery sometimes in order to make the threat credible.

¹⁶⁵ See Gilson & Mnookin, *supra* note 163, at 514-522.

¹⁶⁶ There is another strategic possibility. There is reason to believe, both on empirical and theoretical grounds, that when one party (A) knows the other (B) will adopt an aggressive strategy, the optimal response for A is to adopt a strategy of retreat rather than counter-aggression as the Prisoners' Dilemma theory assumes. See Avery Katz, *Judicial Decisionmaking and Litigation Expenditure*, 8 INT'L REV. L. & ECON. 127 (1988); George B. Shepherd, *The Economics of Pretrial Discovery: An Empirical Study*, 19 INT'L REV. L. & ECON. 245, 259-60 (1999). The reason is complicated, but the intuition is easy to explain. It is not necessarily rational for both parties to be aggressive in equilibrium because being aggressive is costly and mutual aggression cancels out. This means that one party will be aggressive and the other party will retreat. These equilibrium strategies make sense. When A adopts a strategy of retreat, B counters by adopting a less aggressive strategy because A's retreat reduces the marginal benefit of additional aggression – and vice versa. The new equilibrium is still problematic, however. When one side is aggressive as the other retreats, the more aggressive party has a stronger threat point in settlement bargaining, so any settlement is likely to be skewed in its favor. Once again, strict discovery limits mitigate the adverse effects by limiting the opportunity for aggression.

¹⁶⁷ Consider two parties, P and D. P will renege if it believes that D will not, because then P gets to take advantage of D, who will end up a “sucker.” P will also renege if it believes that D will do so too, because then P avoids being a “sucker” itself. Thus, P will renege no matter what D does. And the same is true for D.

necessarily imprecise, and the inevitable under- and over-inclusion creates social costs that must be balanced against the benefits of pre-commitment.¹⁶⁸

To illustrate, consider quantity limits on discovery. The Federal Rules limit the total number of depositions and interrogatories.¹⁶⁹ Some local district rules limit the number of requests for admission, and some also limit the number of document requests.¹⁷⁰ All these limits are presumptive: the trial judge has discretion to permit additional discovery if the parties show that more is needed.¹⁷¹

The idea of including express numerical limits is sound, but making them presumptive and thus allowing exceptions undermines the strictness of the rule and interferes with the ability of parties to credibly pre-commit. Of course, the extent of interference depends on how readily trial judges grant exceptions, and it is difficult to know for sure how often this happens. However, there is reason to believe that it is not an uncommon practice. It would be hard for a judge to resist granting an exception in the face of a showing of need when she thinks that rejecting the request risks a meritorious case losing at trial. Moreover, many trial judges were once trial lawyers themselves and are likely to empathize with attorneys and exercise leniency.¹⁷² In fact, if it turned out that trial judges actually granted exceptions only rarely, that fact would tend to support a strict rule, since a strict rule would get it right virtually all the time and also save the litigation costs of determining individual exceptions.

¹⁶⁸ See Sunstein, *supra* note 146, at 992-993.

¹⁶⁹ See FED. R. CIV. P. 30(a)(2)(A) (limiting depositions to 10), 33(a) (limiting interrogatories to 25).

¹⁷⁰ See, e.g., LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, Rule 26.1(C) (limiting document requests to two separate sets and requests for admission to 25).

¹⁷¹ Even the limits imposed by the District of Massachusetts Local Rule are presumptive. See LOCAL RULE 26.2(B).

¹⁷² See Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 65 (1997).

Thus, strict discovery limits have major advantages compared to presumptive limits. Strict limits make it possible for parties to commit in advance and achieve the superior equilibrium. The limits must be strict because the trial judge is also a player in the game. If the trial judge has power to grant exceptions, the parties will act strategically to persuade the judge to give an exception. In other words, strict limits are beneficial not only because they tie the hands of the parties, but also because they tie the hands of the judge.

Admittedly, this is not the only way to accomplish the result. One might instead rely on deterring abuse with sanctions,¹⁷³ or rely on the parties to stipulate to discovery limits on their own.¹⁷⁴ There are problems with each of these alternatives. As for the sanctioning option, the problems include difficulties detecting abuse, legal and practical obstacles to effective sanctioning, and the high costs of sanctioning hearings.¹⁷⁵ Also, sanctioning relies on the judge to be tough when experience shows that few judges are willing to be tough except in extreme cases.¹⁷⁶ As for the stipulation option, stipulations can be difficult to negotiate in an adversarial setting and difficult to enforce, and as with presumptive limits, judges will be tempted to grant exceptions.¹⁷⁷

¹⁷³ Parties can be sanctioned in federal court for conducting excessive or abusive discovery. *See* FED. R. CIV. P. 26(g).

¹⁷⁴ *See* FED. R. CIV. P. 29.

¹⁷⁵ If judges could reliably detect instances of discovery abuse and always imposed sanctions harsh enough to deter the practice, parties would not do it. However, it is difficult for a judge to distinguish between abuse and an honest effort to obtain information helpful for trial, and judges are often required to do an ex post balancing of actual prejudice and justification when deciding on a sanction and the uncertainty of this balance dilutes the deterrent effect of the sanction.

¹⁷⁶ *See* Beckerman, *supra* note 163, at 571-78; Carrington, *supra* note 172, at 65; Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem"*, 46 FLA. L. REV. 57, 85 (1994).

¹⁷⁷ It is significant in this regard that Rule 29 appears to be used only in rather limited situations. *See* Setear, *supra* note 91, at 590.

There are disadvantages to strict limits. The main problem with a general rule imposing strict limits across-the-board is that it is under-inclusive and over-inclusive. For example, the current limit of ten depositions might not “fit” all cases well; some particularly complicated cases might require more than ten for the parties to prepare adequately for trial.¹⁷⁸ However, the magnitude of this problems depends on the heterogeneity of the population of cases to which the strict rule applies, and one way to reduce heterogeneity is to divide the population into more homogeneous subgroups and adopt different rules for each subgroup based on past experience with discovery in the different types of cases.

This categorical approach creates its own costs. Identifying the proper groups requires empirical information and careful analysis.¹⁷⁹ Moreover, the categories must be defined with sufficient clarity so that the costs of identifying the right category and applying the correct rule are not too high. Even so, it should be possible to reduce the costs of over- and under-inclusion by using this approach.¹⁸⁰

It is also worth mentioning that heterogeneity might not be as costly as it seems at first glance.¹⁸¹ Because most cases settle, the most important question is how strict limits affect settlement. As long as both sides are able to obtain core information within the

¹⁷⁸ Moreover, some cases might require fewer and this can create problems too. Parties free to take additional depositions might threaten to do so just to increase their opponents’ costs.

¹⁷⁹ And can be difficult. See KAKALIK ET AL., EVALUATION OF CASE MANAGEMENT, *supra* note 21, at xxiii; Marcus, *supra* note 78, at 778.

¹⁸⁰ The optimal set of categories depends on balancing the costs of formulating and applying a more refined set of rules against the costs of applying a single rule to a heterogeneous group. Furthermore, if a refined category includes only a small number of cases, the benefits might not be large enough to justify the investment necessary to devise a good rule for that category, especially if doing so requires costly empirical and normative analysis. See Kaplow, *supra* note 129, at 580-581. I assume, however, that any sensible schema will leave plenty of cases to adjudicate in each category.

¹⁸¹ In addition to the point about settlement discussed in the text, it is worth noting that a strict limit is not likely to have any effect in most cases, since most cases involve very little, if any, discovery under the current system. See Garth, *supra* note 160, at 599-603. Thus, it should be possible to set a strict limit that provides ample discovery opportunities for most cases while controlling for abuse in the relatively small number of high-stakes, high-conflict cases.

discovery limits (and doing this might require careful discovery planning), they should be able to reach a good settlement in many cases without access to more marginal (albeit still relevant) information. Settlements are based on predictions about trial outcome and core information should be enough to support sufficiently reliable predictions in many cases.¹⁸²

Finally, the benefits and costs of strict limits must be compared to the benefits and costs of presumptive limits. The principal benefit of the presumptive approach is that it gives the trial judge an opportunity to fit discovery more closely to the needs of the case as the litigation proceeds and the judge learns more. However, the magnitude of this benefit depends on how effectively the judge can make case-specific adjustments, and there is reason to believe that her effectiveness is seriously limited, as we saw in Part IV.¹⁸³ On the cost side of the ledger, presumptive limits sacrifice the benefits of pre-commitment and also increase litigation costs by adding an extra layer of hearings and deliberations to decide discovery motions.

There are two important points to take from this discussion. First, it appears that on balance some type of strict limits approach might well be superior to the presumptive limits in the current Rules. Second, and more important, the Advisory Committee should explicitly consider which approach is optimal and in particular whether a strict rule is superior to case-specific discretion when strict limits promise pre-commitment or other

¹⁸² Moreover, so long as the parties are not too risk-averse, any residual error should not seriously impair settlement quality if the error is symmetrically distributed about the expected trial award, for then the errors will cancel out in expectation.

¹⁸³ See Setear, *supra* note 91, at 593 (noting the information access obstacle to effective judicial management of discovery); Beckerman, *supra* note 163, at 567-68 (same).

benefits.¹⁸⁴ Strict limits generate outcome errors, to be sure, but so do presumptive limits when trial judges make mistakes on a case-specific basis.

B. Narrowing the Range of Discretion

Another way to contain discretion is to limit the range of options available to the judge. Whether this is a sensible approach depends on its costs and benefits, which will vary with different procedural contexts. In this section, I use the example of judicial settlement promotion to illustrate the method. A comprehensive analysis of this difficult and controversial issue is beyond the scope of this Article, but it is possible to give a brief treatment sufficient to indicate what is at stake. Even this brief treatment supports restricting judicial settlement options and relying much more on general rules.

1. The Benefits and Costs of Settlement Promotion

Settlement has many benefits.¹⁸⁵ It saves litigation costs, reduces delay costs for parties in other cases, and gives needy plaintiffs compensation sooner and at a time when they can make better use of it. In addition, the fact that settlements require consent makes it more likely that party preferences will be satisfied and enhances the likelihood of cooperation at the enforcement stage. Finally, settlements offer remedial flexibility, making it possible for parties to design remedies that fit the particularities of their individual disputes.¹⁸⁶

¹⁸⁴ There are other possibilities intermediate between strict and presumptive limits. For example, a general rule might create a presumptive limit but give the judge only a single opportunity to override it and also confine that opportunity to an early stage of the litigation, such as the initial scheduling conference. This way the judge would be able to make adjustments but only once so as not to sacrifice too much by way of pre-commitment benefits. Whether this intermediate approach is better than strict limits depends on how effectively the trial judge can make adjustments early and the additional litigation costs created by permitting it.

¹⁸⁵ See, e.g., Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 486-490 (1985).

¹⁸⁶ *Id.* at 504-506.

Settlement also generates costs, and discretionary judicial involvement in settlement promotion is likely to exacerbate the costs. The following discussion focuses on strategic and agency costs because they are likely to be the most serious.¹⁸⁷

Judicial involvement can create high strategic costs when parties are in a position to exploit judicial settlement pressure to gain a bargaining advantage. An example is the frivolous suit. Since a frivolous suit by definition is unlikely to win at trial, most frivolous suits are filed in order to force settlements. Judicial pressure to settle plays into the hands of the frivolous plaintiff by making it more difficult for the defendant to hold out for trial.¹⁸⁸ Settlement pressure can also have adverse strategic effects in meritorious suits. For example, a defendant might avoid revealing private information damaging to its case by pretending to be innocent and relying on judicial pressure to force the plaintiff to settle early before discovery leads to disclosure. Also, settlement pressure can interact with unequal bargaining power to create outcomes systematically skewed in favor of wealthy and more powerful parties.¹⁸⁹

¹⁸⁷ There are other types of cost. Judicial involvement in settlement promotion adds administrative costs. See Menkel-Meadow, *supra* note 185, at 493-94; Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1364-71, 1388-89 (1994) (noting that additional administrative costs might exceed the trial savings, given that most cases settle anyway). In addition, some critics argue that settlement depletes precedent, erodes the expressive value of adjudication, and undermines the moral authority of the courts. See, e.g., H. Lee Sarokin, *Justice Rushed is Justice Ruined*, 38 RUTGERS L. REV. 431 (1986); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L. J. 2619 (1995); Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984). However, it is difficult to assess these effects without a more precise idea of how much precedent is needed to support a healthy common law system, what is entailed in expressive value, and how much expressive value adjudication adds beyond what other social institutions already provide. See Shavell, *supra* note 86, at 606.

¹⁸⁸ To be sure, a trial judge would not push for settlement in a suit she knew was frivolous, but given information obstacles, it is extremely difficult to verify frivolousness at an early stage.

¹⁸⁹ See, e.g., Fiss, *supra* note 187, at 1076-78. Corporate defendants and insurers in particular have considerable experience with settlement negotiation and opportunities as repeat players to exert strategic leverage unavailable to a one-shot litigant. For example, a repeat player is in a better position than a one-shot litigant to develop a reputation for hard bargaining, and with such a reputation the repeat player can capture more of the settlement surplus.

Judicial pressure to settle can also exacerbate agency costs. Agency costs in this context refer to the costs created when an attorney serves her own private interests at the expense of her client.¹⁹⁰ Settlement is a particularly fertile environment for self-serving behavior because settlement negotiations take place in private, settlement amounts are usually kept confidential, and few clients have the sophistication or expertise to monitor for abuse.¹⁹¹ Judicial pressure to settle only strengthens the attorney's hand by enlisting the judge on the side of the settlement. An initially reluctant client can be more easily convinced when the lawyer is able to report that the trial judge favors the settlement and even recommends some of its terms.

Although judicial involvement exposes the settlement process to some outside scrutiny, a judge bent on settling a case is not likely to examine the process too closely or critically.¹⁹² And even one who does scrutinize will face bounded rationality and information access obstacles. For example, since judges usually have little information about the nature of an attorney-client relationship early in a case, they are in a poor position to manage agency problems effectively even when they are inclined to do so.

2. A Limited Discretionary Approach to Judicial Involvement

The bounded rationality, information access, and strategic interaction effects discussed in Part IV.B. make it especially difficult for judges to manage the strategic and agency costs of settlement promotion on a case-specific basis. To be sure, similar

¹⁹⁰ For the classic treatment of agency costs in settlement, see Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEG. STUD. 189 (1987).

¹⁹¹ These are even more serious problems in those states that apply very liberal standards to determine whether clients have delegated settlement authority to their attorneys. See, e.g., Grace M. Giesel, *Enforcement of Settlement Contracts: The Problem of the Attorney-Agent*, 12 GEO. J. LEG. ETHICS 543, 555-80 (1999).

¹⁹² This problem is frequently noted in the class action context. See, e.g. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 195 COLUM. L. REV. 1343 (1995).

problems exist at the trial stage. But settlement promotion involves more active and intimate judicial involvement than trial, and more active involvement is likely to magnify the adverse effects. Moreover, judges will usually have more information at trial and certainly greater expertise at handling trials than mediating settlements. So too procedural rules have evolved over time to structure and formalize the trial process in ways that manage the potential costs, whereas active settlement promotion is too recent a phenomenon to have benefited from a similar evolutionary process.¹⁹³

Given the risks and potentially serious costs, judges should get involved in settlement promotion only when the benefits *clearly* exceed the costs. This means that the current broad scope for discretion should be significantly curtailed. In particular, appropriate methods of settlement promotion should be more frequently prescribed by general rule than is the case today. General rules have substantial advantages over case-specific discretion in this area. The formal rulemaking process, as we have seen, has built-in features that reduce the adverse effects of cognitive bias, and rulemakers deliberate at a distance from the strategic fray of litigation.¹⁹⁴ Also, because general rules prescribe requirements that apply uniformly to a broad class of cases, they can be drafted effectively with information about the average case, which is much easier to obtain than information about a specific case.¹⁹⁵

ADR referral is an example of a decision currently left for the most part to trial judge discretion that might better be handled by general rule. I endorse the general rule

¹⁹³ See Molot, *Judicial Role*, supra note 4 (making a similar point to argue against broad trial judge case management).

¹⁹⁴ See supra notes 107-113, 146 & accompanying text.

¹⁹⁵ Rulemakers can rely on past experience and empirical data to infer the relevant characteristics of the average case, such as the typical information structure, distribution of bargaining power, and attorney-client relationship.

approach because of the importance of the referral decision and my serious doubts about the effectiveness of trial judge discretion, especially given information access and strategic interaction obstacles.¹⁹⁶ General rules will refer some cases to ADR that should not be referred and not refer others that should be, but this is true of a discretionary approach as well. Moreover, by fitting the rule to different categories of cases, the risk of error can be reduced. Finally, as discussed below, the general rule can be drafted to allow narrow discretionary exceptions in clear situations.

For example, there are good reasons to adopt a general rule referring all commercial cases involving corporate parties to mediation or some other form of ADR. In such cases, there is not likely to be a serious bargaining power imbalance, and corporations are in a good position to monitor their attorneys for agency problems.¹⁹⁷ At the other extreme, ADR referral is probably not a good idea for civil rights cases. Settlement does save the cost of going to trial, but active settlement promotion runs the risk of high strategic costs and possibly also high agency costs, especially if civil rights plaintiffs are prone to frivolous filings and civil rights defendants possess critical private information in meritorious suits. Moreover, civil rights cases tend to involve strong claims of moral principle that implicate public as well as private interests and can generate expressive value from trial as well as useful precedent.

Although most settlement promotion methods should be handled by general rule, there is some room for case-specific discretion as long as it is narrowly circumscribed.

The general idea is to confine the judge's direct involvement to cases where standard

¹⁹⁶ See *supra* notes 136-143 & accompanying text (discussing a mediation referral example).

¹⁹⁷ Asymmetric information, however, is still a potential risk. Also, given that there is a rich market for private ADR, see *Paths of Civil Litigation*, *supra* note 22, at 1855-1857, it is not clear that a public subsidy is warranted through court-annexed ADR, especially for corporate parties capable of contracting for the private option.

bargaining obstacles, such as mutual optimism, frustrate settlement and where there are obvious steps the judge can take to ease the bargaining impasse without producing too many other problems.¹⁹⁸ The type of intervention that most clearly fits these requirements is for the judge to inform the parties of her tentative views about the merits as the case progresses. Sharing this information can help counteract irrational optimism and bring the parties' estimates of case strength closer together, which makes settlement more likely.¹⁹⁹ Moreover, this form of intervention is not likely to create serious strategic or agency costs, since it is too limited to be of much strategic value to parties or their attorneys.²⁰⁰

Beyond reporting periodic merits evaluations, however, judges should normally avoid getting actively involved in settlement promotion. Of course, the give-and-take of litigation requires some flexibility, but my concern is with concerted efforts to promote settlement. Sometimes it might be very clear that more active judicial intervention can overcome bargaining obstacles without creating excessive additional costs. In such cases, the judge might be justified in taking additional steps, but only when the value of judicial intervention is *obviously* compelling on cost-benefit grounds. Moreover, in order

¹⁹⁸ See Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS. L. J. 1, 60-78 (1992). Mutual optimism refers to the situation where both parties are optimistic about success. This makes settlement difficult because the plaintiff will demand a large settlement while the optimistic defendant will offer only a small one.

¹⁹⁹ In a situation of mutual optimism, one party's estimate must be wrong, and the judge's input helps to correct the error and align the parties' trial expectations. This in turn makes it easier for the parties to agree on the trial value of the claim and thus easier for them to settle.

²⁰⁰ Strategic costs depend on the pressure to settle and minimal intervention is not likely to create much pressure. As for agency costs, an attorney could use the judge's evaluation to persuade the client to accept a settlement, but that might be a good thing if the evaluation is reasonable, and even if it is not, the leverage it gives the attorney is much less than for more aggressive forms of judicial intervention. Also, announcing tentative merits evaluations should not impair the legitimacy of the judicial process since judges do this sort of thing today in the context of deciding preliminary injunction motions. See, e.g., *Lawson Products, Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986) (likelihood of success on the merits is a preliminary injunction factor).

to assure a deliberative decision and check over-reaching, the trial judge should publicly explain her reasons for intervening more actively if she decides to do so.

C. Channeling Discretion with Factors

So far, we have examined two methods for regulating discretion – a strict rule that eliminates as much discretion as possible and a rule that delegates some discretion but limits the judge’s options. A third method, and one that is extremely popular with rulemakers today, is to list factors in a rule that the trial judge must balance when making a discretionary decision. Many Federal Rules employ this technique, and appellate courts sometimes supply factors for rules that have none.²⁰¹

There are two major problems with this approach. First, the efficacy of balancing depends on the judge’s ability to acquire and evaluate accurate information about the relevant factors, and this is bound to be difficult given bounded rationality, information access, and strategic obstacles. Second, to strike a sound balance, the judge must assign weights and compare values across the various factors.²⁰² Without clear principles to guide this normative task, the resulting process can easily turn into ad hoc weighing that lacks meaningful constraint and jeopardizes principled consistency over the system as a whole.²⁰³ This is especially true when, as is so often the case, the factors listed in a Rule encompass everything conceivably relevant to the decision.²⁰⁴ While a comprehensive list of factors might restrain judges from relying on illegitimate considerations, it does nothing to constrain judges who act in good faith, at least not without some normative direction to guide the balancing process.

²⁰¹ See *supra* notes 24-26 & accompanying text.

²⁰² See Sunstein, *supra* note 146, at 998-1003 (discussing the problem of value incommensurability).

²⁰³ For a somewhat more optimistic view based on reasoning by analogy, see *id.* at 963-964, 1000-1001.

²⁰⁴ See, e.g., *supra* note 25 & accompanying text (discussing Rule 19(b)).

Thus, multi-factor balancing as a way to channel discretion requires either limitations on the factors listed, or normative principles to guide the weighing process – or both. The following section expands on the normative point.

D. Guiding Discretion With General Principles

When broad discretion is desirable (with or without factors), rulemakers should guide that discretion by supplying general principles to assist the trial judge in making the necessary normative judgments. Indeed, this fourth method – channeling discretion through general principles – is an important adjunct to all types of discretionary delegation.²⁰⁵

To illustrate how principles can help, consider the class action. There are three major challenges facing the class action today: how to correct for asymmetric settlement leverage and the related risk of frivolous suits, how to reduce attorney-class and intra-class conflicts of interest, and how to reconcile individual participation rights with an aggregative adjudication device.²⁰⁶ Rule 23 of the Federal Rules of Civil Procedure relies heavily on trial judge discretion to address these concerns. The judge, for example, is given relatively unguided discretion to decide whether and how to divide a class into subclasses, when to send notice to absent class members, what conditions to impose on intervenors, which attorney to appoint as class lawyer, and whether to approve a settlement.²⁰⁷

²⁰⁵ A committee-based rulemaking process is better suited to formulating general procedural principles than either a congressional or a common law process. *See Bone, Making Process, supra* note 31, at 940-43. A committee can take the global perspective necessary to design an integrated system of rules that distributes error risk fairly and maximizes quality outcomes. Congress is too political, and trial judges too case-focused.

²⁰⁶ *See BONE, ECONOMICS OF CIVIL PROCEDURE, supra* note 93, at 259-298.

²⁰⁷ *See* FED. R. CIV. P. 23(c)(2)(A), (c)(4), (d), (e), (g). Even the 23(a) and (b) certification requirements leave a great deal to case-specific discretion. At the same time, it is important to note that

This much reliance on discretion is not optimal. There is no reason to believe that trial judges are well equipped to resolve the complex normative issues or manage the details of class action practice on a case-by-case basis without meaningful guidance. Sometimes the Committee should resolve issues expressly in the Rule itself.²⁰⁸ Other times it is appropriate to leave issues to the discretion of the trial judge to resolve on a case-specific basis, but only with guidance from principles set forth in the Rule's text or in the Advisory Committee Note. To clarify what I have in mind, I will briefly examine two especially troubling class action devices: small claim class actions for damages, and mass tort class actions.²⁰⁹

1. The Small Claim Class Action Example

The small claim class action for damages aggregates class members who have too little at stake to bring individual suits.²¹⁰ Examples include securities fraud, antitrust, and

recent amendments to Rule 23 have narrowed the scope of discretion somewhat relative to what it was previously. See Marcus, *Slouching*, *supra* note 3, at 1602-1604.

²⁰⁸ An example is whether the judges can inquire into the substantive merits as part of the certification decision. This issue is part of the larger problem of dealing with frivolous class action litigation. See Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L. J. 1251, 1276-80 (2002). The current rule, which bars a merits inquiry at the certification stage, is largely a creation of the Supreme Court, *see* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974), and to the best of my knowledge, has never received a full-scale review from the Advisory Committee. See 2003 Advisory Committee's Note to Rule 23 (stating in passing that "an evaluation of the probable outcome on the merits is not properly part of the certification decision" but not justifying the rule). However, this is just the type of issue the Advisory Committee should handle. The Committee is in a much better position than the courts to collect and consider data relevant to the severity of the frivolous class action problem. See Bone & Evans, *supra*, at 1293-94 (collecting the few empirical studies); Charles A. Silver, "We're Scared to Death": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (questioning claims about a frivolous class action problem). Moreover, rulemakers can better consider the difficulties trial judges might have assessing frivolousness at an early stage and the relative costs of erroneous certification decisions in different types of cases. See Bone & Evans, *supra*, at 1302-12. And they are in a much better position to take a global perspective on the issue, evaluating the costs and benefits in relation to other ways the Federal Rules handle frivolous suits.

²⁰⁹ Elsewhere I have described some of the ways that the Advisory Committee might propound general principles for small claim and mass tort class actions. See Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79, 98-108 (1994).

²¹⁰ For a comprehensive analysis of the small claim class action, *see* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991)

consumer protection suits. The class action in this context enables litigation where litigation would not otherwise be cost-justified, and it does so by attracting a class attorney who can take her fee from the large aggregate class recovery. The main reason to do this is to disgorge the defendant's unlawful profits and thereby deter similar wrongdoing in the future. Moreover, deterrence is valuable primarily for its public benefit – bolstering public confidence in the securities market, preserving competition, or protecting consumers as a group – rather than for any specific benefit to individual class members.²¹¹ To be sure, class members obtain some compensation, but individual recovery is usually so small – often a few hundred dollars at most – that compensation does very little justificatory work.²¹²

One fundamental issue that should be addressed at the rulemaking stage – and does not appear to have been when Rule 23 was revised to include the small claim class in 1966 – has to do with the legitimacy of the device. Deterrence is a well-accepted goal of adjudication, but in ordinary cases deterrence results from a judgment that is meant to and does provide significant compensation or other private relief to an individual plaintiff. In the small claim class action, however, individual relief is minimal, merely a means to the end of achieving broader deterrence goals. Hence the legitimacy issue: is it is proper to use adjudication exclusively (or even primarily) to deter? Neither the text of Rule 23 nor the Advisory Committee Note addresses this issue directly.²¹³ It is possible, I suppose, that the 1966 Advisory Committee discussed the question during its private

²¹¹ Many of whom would be unlikely to deal with the defendant again if they had a choice.

²¹² *But see* David L. Shapiro, *Class Actions: The Class As Party and Client*, 73 NOTRE DAME L. REV. 913, 924-25 (1998) (arguing for an entity view of the small claim class action).

²¹³ *See* 1966 Advisory Committee Note.

deliberations, but I am not aware of any evidence that it did.²¹⁴ Furthermore, private discussions do not furnish public guidance.

The legitimacy issue has engendered considerable controversy since 1966.²¹⁵ In effect, the class attorney acts as a private attorney general enforcing the substantive law for the public benefit.²¹⁶ The private attorney general is a familiar device in many litigation settings.²¹⁷ Had rulemakers explicitly addressed the legitimacy question in 1966, they might have developed guiding principles from private attorney general practice in more established settings.²¹⁸ But they never did so. As a result, individual judges are left to fill the normative gap as they decide issues on a case-by-case basis interpreting Rule 23 or making common law.

One (in)famous example is the Supreme Court's holding in *Eisen v. Carlisle & Jacquelin*, which interpreted Rule 23(c)(2) to mandate individual notice to all class members who can be identified with reasonable effort.²¹⁹ As many others have observed, the Court's interpretation was not mandated by the Rule itself and makes no policy sense

²¹⁴ For instance, I am not aware of any discussion of this question in the published accounts of the 1966 Committee's work by its Reporter, Professor Benjamin Kaplan. See, e.g. Benjamin A. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 398 (1967) (observing "for small claims held by small people," the class action "serves something like the function of an administrative proceeding," but not addressing why adjudication *should* serve such a function).

²¹⁵ See, e.g., *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 237-238 (9th Cir. 1974) (Duniway, J., concurring); *Proposed Amendments to Rule 23*, 167 F.R.D. 523, 529 (1996); *Report of the Section of Antitrust Law*, 110 A.B.A. REP. 905, 906-909 (1985).

²¹⁶ See Macey & Miller, *supra* note 210, at 101.

²¹⁷ See William B. Rubenstein, *On What A "Private Attorney General" Is – And Why It Matters*, 57 VAND. L. REV. 2129 (2004); John C. Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986).

²¹⁸ See Bone, *Making Process*, *supra* note 31, at 943-45.

²¹⁹ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). This requirement is now codified in Rule 23(c)(2)(B). *Eisen* relied on Rule 23 for the requirement, but a later case constitutionalized it for nonresident class members through due process personal jurisdiction principles. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). The constitutional holding is as senseless on policy grounds as the Rule 23 holding, at least insofar as small claim class actions are concerned, and clear guidance from the Advisory Committee might have convinced the Supreme Court to read the Due Process Clause differently.

in the small claim setting, where most class members have too little at stake to even bother participating and the additional cost of notice is likely to discourage socially beneficial suits.²²⁰ Had the rule drafters explained the normative justification for the small claim device, Rule 23 might have been drafted better. Moreover, the *Eisen* Court would have had guidance in sensibly resolving the issues posed by that case. The Advisory Committee Note mentions in passing that individual participation might not be practically significant when the stakes are small, but the reference is brief and not linked to a more general policy justification for the device.²²¹

More recently, the small claim class action has come under attack for enriching class attorneys at the expense of class members.²²² This agency problem exists in all class actions, but it is thought to be particularly serious in the small claim context because class members are much less likely to monitor the class attorney when they have only small amounts at stake.²²³ However, the precise magnitude of the problem in the small claim setting is unclear. One reason has to do with the paucity of empirical data; another has to do with lack of normative direction.

As for empirics, the rulemaking committee is much better situated than the courts to initiate empirical studies through the Federal Judicial Center and collect and analyze available data.²²⁴ As for normative direction, once again it would help if the committee

²²⁰ See, e.g., Macey & Miller, *supra* note 210, at 27-33. The 23(c)(2) notice requirement, as interpreted by the *Eisen* Court, increases the cost of filing and thus discourages suits.

²²¹ The reference in the 1966 Advisory Committee Note appears in the middle of a discussion of the (b)(3) factors, where the Committee simply states, without further elaboration, that the interests of class members in conducting their own lawsuits might be “theoretic rather than practical” when “the amounts at stake for individuals may be so small that separate suits would be impracticable.”

²²² See, e.g., Macey & Miller, *supra* note 210, at 3, 19-27.

²²³ *Id.*

²²⁴ The Federal Judicial Center has already conducted one class action study at the request of the Advisory Committee and Judicial Conference. See THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF

clarified the class action's goals. For example, critics who complain about agency problems tend to assume that the point of a small claim class action is to compensate class members for their (small) losses. If instead the goal is to deter future wrongdoing, which is much more sensible, then the attorney is an agent, not of class members, but of the public's interest in deterrence, and any agency problems between the attorney and the class should be irrelevant. Indeed, the attorney's share of the recovery should be of concern only if it affects litigation incentives in a way that impairs the class action's deterrent effect. Moreover, even if agency costs result in the attorney settling for less than the optimal deterrence amount, there still might not be a serious problem if public enforcement is available to fill the deterrence gap.²²⁵

2. The Mass Tort Class Action Example

Another controversial application of the class action is in the mass tort context.²²⁶ Mass tort class actions aggregate individual damage suits where the damages are large enough to justify separate lawsuits. The goal is not, as in the small claim case, to make litigation feasible. It is instead to save litigation costs, equalize power across the party line, and distribute a limited fund fairly among individual claimants.²²⁷

The mass tort class action raises a number of policy issues, but I shall address only one here: how to reconcile individual participation rights with aggregate treatment. This is arguably a much more serious concern in mass tort than in small claim class

CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES (1996).

²²⁵ For example, the Securities Exchange Commission has power to enforce the federal securities laws; the Federal Trade Commission has power to enforce the antitrust laws, and federal agencies and state attorneys general have power to enforce many of the consumer protection laws. Moreover, criminal penalties are also available in appropriate cases.

²²⁶ See, e.g., Coffee, *supra* note 192.

²²⁷ See BONE, ECONOMICS OF CIVIL PROCEDURE, *supra* note 93, at 261-65.

actions because the mass tort class action aggregates large individual suits involving personal injury, in which the injured party has a much stronger stake in her own lawsuit and presumably a stronger interest in participating.

The Advisory Committee has an important role to play in guiding trial judges as they consider the participation issue. In particular, the Committee should determine, based on settled litigation practice and due process precedent, what values the participation right serves and how those values can be reconciled with aggregation through the class device. With such guidance, judges would be in a better position to decide a number of case-specific issues. Two examples are whether to certify a heterogeneous class²²⁸ and how many subclasses to create.²²⁹ Significant heterogeneity is generally thought to undermine class treatment and trigger stronger individual participation demands because it makes the class less cohesive. And one way to reduce heterogeneity is to create subclasses.

However, the relationship between heterogeneity, certification, and subclassing depends on how individual participation is valued. If the value of participation is outcome-based – important because it gives class members the opportunity to influence their own case outcomes – the participation right should not make strong demands in the class setting as long as other safeguards are in place to assure a reasonably good outcome compared to feasible remedial alternatives. In particular, the most likely alternative to the class action is an inventory settlement, which suffers from similar (and possibly

²²⁸ Heterogeneity is relevant to Rule 23(a)(3)'s typicality requirement and 23(b)(3)'s predominance and superiority requirements.

²²⁹ The Supreme Court has held that fairness to absent class members sometimes requires subclassing under Rule 23(c)(4)(B) to address intra-class conflicts of interest. *See Ortiz v. Fibreboard* 527 U.S. 815, 856-59 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-27 (1997). The problem with subclassing, however, is that it undermines the benefits of class aggregation.

worse) problems as the class action.²³⁰ It follows that certification of a mass tort class action would be justified even with a great deal of intra-class heterogeneity if the class device promised greater litigation cost savings or other benefits than an inventory settlement. So too, subclassing would be required only insofar as necessary to ensure an outcome superior to the inventory settlement alternative.²³¹

On the other hand, if the value of individual participation is process-based – important because it respects the dignity and autonomy of class members by affording each an opportunity to control litigation that affects her life profoundly²³² – then the participation right would be much stronger and intra-class heterogeneity more problematic. The reason is a bit complicated, but the intuition is straightforward.²³³ The class action relies on representation to satisfy participation demands, but it is not clear how representation can substitute for personal participation when participation is valued on dignitary grounds. It follows that the class would have to be much more homogeneous to support certification, and judges would have to consider subclassing

²³⁰ In an inventory settlement, an attorney settles a large group of cases en masse for a total lump sum and then decides how to distribute the total among all her clients (after taking her fee). See Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L. J. 381 (2000); Lynn Baker & Charles Silver, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1470-1478 (1998).

²³¹ In other words, it is conceivable that a class action could be the best practical option for class members even with strong heterogeneity and potentially high agency costs. See generally Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1569 (2004) (describing the pervasiveness of informal aggregate settlement practices historically and urging consideration of the relative merits of the class action compared to likely alternatives).

²³² See generally *supra* note 85 (distinguishing between outcome-based and process-based theories). The dignitary theory of process-based participation differs from an approach that equates participation value with psychological benefits, such as assuring *feelings* of just treatment. See, e.g., Carey v. Phipus, 435 U.S. 247, 260-61 (1978); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 26-40, 61-83, 93-127 (1988). I focus on dignity theory because it is the most difficult to square with the class action. After all, if the value of participation is about feelings or perceptions, class aggregation should satisfy participation rights if class members feel at least as good about their treatment in the class action as they would in their next best remedial alternative.

²³³ For a more rigorous analysis, see Robert G. Bone, *Rethinking the Day in Court Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 236-79 (1992).

more seriously given the added importance of aligning class representatives with the litigating interests of absentees.

This is not the place to explore these complicated issues in detail. I have discussed some of them in other publications.²³⁴ This brief mention is intended only to illustrate how normative guidance from rulemakers can channel trial judge discretion in useful ways and generate results that are more likely to conform to the policies that the rulemakers sought to advance when they adopted the rule.

It is true that the task I have in mind for the Advisory Committee is more burdensome than what committee members are accustomed to doing today, and it is bound to introduce more controversy into the rule-making process. But I see no other alternative if we are to have a coherent body of procedural law that distributes the risk of decisional error fairly among all litigants, efficiently balances the costs and benefits of accurate law enforcement, and respects deeply embedded participation norms. Either rulemakers do this job systematically with an eye to the integrity of the system as a whole, or individual judges do it haphazardly on a case-by-case basis. The better choice is clear.

VI. Conclusion

It is past time to examine procedural discretion critically. The naïve assumption that trial judges have the institutional expertise and experience to exercise discretion well ignores serious and unavoidable bounded rationality, information access, and strategic interaction obstacles that impair the quality of case-specific decisionmaking. The fact is

²³⁴ See Bone, *Agreeing to Fair Process*, supra note 84, at 542-550; Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 638-650 (1993); Bone, supra note 233, at 236-279.

that rulemakers are often in a better position than trial judges to assess the data and make the necessary global judgments in a way that is attentive to settlement as well as judgment effects. Rulemakers are better situated to consider the desirability of stricter and more specific rules, and then to craft those rules for different procedural contexts. So too, rulemakers are in an ideal position to offer normative direction to guide trial judge discretion where the exercise of that discretion requires difficult normative judgments.

The challenge is to persuade rulemakers to take on these additional tasks. In this respect, the Reporter to the Advisory Committee has an important role to play. Normally a law professor, the Reporter can assemble the empirical data, present the normative arguments, and draft proposals supported by more comprehensive justifications. The Committee can then debate the issues with public input. As long as the Committee views its task as crafting an optimal set of rules rather than catering to the preferences of strong interest groups, the result of this process should be an improved procedural system.

To be sure, hard choices will have to be made, and not everyone will be pleased by the results. But there is no way to avoid hard choices; they are being made now – by trial judges in individual cases. We can and should do better.