JUDICIAL DISCRETION TO CONDITION

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I. INTRODUCTION

The task of judging has been described as the art or science of making discrete choices among competing courses of action.[1] Charged with the mandate to administer justice fairly and equitably, judges are said to have discretion to pursue any lawful course.[2] In both criminal and civil cases, and regarding matters profound and trivial, the exercise of discretion is a core judicial function.[3] The exercise of discretion is often characterized by vivid metaphors: judges confront a frame of possibilities,[4] a zone,[5] a range,[6] a doughnut hole,[7] two paths or a fork in the road,[8] a fenced pasture.[9]

Above all else, such metaphors convey that the exercise of discretion is about choice.[10] For example, under certain circumstances a judge hearing a motion for a mistrial could have the discretion to grant or to deny the motion; the judge could choose either of two paths. In other instances, there might be a range of available courses of action from which to choose: for instance, upon a motion to exclude, as cumulative, the testimony of four additional witnesses, the judge could have discretion to exclude none, one, two, three, or all four of them. Or the discretion in a given instance could be a function of two determinants, such as when a sentencing range includes

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[1] *See generally* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921); H.L.A. HART, THE CONCEPT OF LAW 29, 121 (1961); JOSEPH RAZ, THE AUTHORITY OF LAW 180 (1979).

[2] H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 162 (Tentative Edition 1958) ("Discretion means the power to choose between two or more courses of action each of which is thought of as permissible."); AHARON BARAK, JUDICIAL DISCRETION 10 (Yale 1989) ("The legal question to which discretion is applied does not have one lawful solution, but rather several lawful solutions.").

[3] D. J. GALLIGAN: DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION 1 (Clarendon 1986) (judicial discretion rivals in significance "the core of settled rules in terms of which legal order is characterized").

[4] "Complete freedom—unfettered and undirected—there never is. A thousand limitations—the product some of statute, some of precedent, some of vague tradition or of an immemorial technique—encompass and hedge us even when we think of ourselves as ranging freely and at large." BENJAMIN CARDOZO, THE GROWTH OF THE LAW 60-61 (1924). Hans Kelsen used the term "frame of possibilities." *See* HANS KELSEN, PURE THEORY OF LAW 351 (1967).

[5] AHARON BARAK, JUDICIAL DISCRETION 9 (1989) ("[D]iscretion assumes a zone of possibilities.").

[6] George C. Christie, *An Essay on Discretion,* 1986 DUKE L.J. 747, 748 (discussing a "range of choice").

[7] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1978) ("Discretion, like a hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept.")

[8] BENJAMIN CARDOZO, THE GROWTH OF THE LAW 59 (1924)

[9] Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Abo*ve, 22 SYRACUSE L. REV. 635 (1970-71)

[10] *See* George C. Christie, *An Essay on Discretion,* 1986 DUKE L.J. 747, 747 ("It is universally accepted that discretion has something to do with choice; beyond this, the consensus breaks down."); Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above,* 22 SYRACUSE L. REV. 635, 636 (1971) ("If the word discretion conveys to legal minds any solid core of meaning, one central idea, above all others, it is the idea of *choice*.") (emphasis in original).

various combinations of prison terms and probationary periods—a set of options that the fenced pasture metaphor captures perhaps too well.

The adversarial process encourages litigants to take extreme positions,[11] and judges may be generally or somewhat persuaded by an advocate's argument in support of a motion yet prefer some intermediate or compromise position.[12] By conferring discretionary authority, the judicial system entrusts judges with the authority to make sound and informed judgments about the relative merits of all the various lawful courses of action that fall within the frame of possibilities.[13] The grant of authority is premised, first, on the notion that the trial judge is in the superior position to see, hear and evaluate the situation with firsthand knowledge.[14] A second (albeit less exalting) justification recognizes that efficiency and finality in adjudication may be more important than accuracy in every instance.[15] The "abuse of discretion" standard of review insulates certain exercises of discretion from rigorous reconsideration on appeal.[16]

Metaphors notwithstanding, the exercise of judicial discretion does not always involve a choice among discrete, identifiable options.[17] Consider, for example, the structural injunction: desegregating a school system,[18]

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[11] Roger J. Patterson, *Dispute Resolution in a World of Alternatives,* 37 CATH. U. L. REV. 591, 602 (1988) (noting propensity of adversary system to drive parties to extreme positions); Stephen Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts,* 29 BUFFALO L. REV. 487, 529 (1980) ("Adversary procedure may exacerbate rather than resolve tensions, and may not foster the kind of compromise essential to the restoration of harmony"); Susskind & Weinstein, *Towards a Theory of Environmental Dispute Resolution,* 9 B.C. ENVTL. AFF. L. REV. 311, 319-21 (1980) ("the adversary system introduces an unfortunate 'gaming' aspect to the judicial process that discourages the search for 'win-win' solutions to a dispute.").

[12] The obvious advantages find parallels in the justifications favoring ADR, *see, e.g.,* Frank E.A. Sander, *Varieties of Dispute Processing*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65, 84 (A. Leo Levin & Russell R. Wheeler eds., 1979); voluntary cooperation and private settlements, *see, e.g.,* JEROLD S. AUERBACH, JUSTICE WITHOUT LAW 4 (1983); and plea bargaining, *see, e.g.,* Frank H. Easterbrook, *Plea Bargaining as Compromise,* 101 YALE L.J. 1969, 1975 (1992)..

[13] *See* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1978) (1st ed. 1921).

[14] Ben F. Overton, *The Meaning of Judicial Discretion, in* JUDICIAL DISCRETION 1991 8 (National Judicial College, ABA 1991).

[15] Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above,* 22 SYRACUSE L. REV. 635, 637 (1971). *See generally* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare,* 114 HARV. L. REV. 961 (2001); Larry Alexander, *Are Procedural Rights Derivative Substantive Rights?,* 17 LAW & PHIL. 19, 23-26 (1998); Thomas C. Grey, *Procedural Fairness and Substantive Rights,* in NOMOS XVIII: DUE PROCESS 182, 184 (J. Roland Pennock & John W. Chapman eds., 1977) (stating that procedural fairness favors correct resolution of disputes, but only "at a cost commensurate with what is at stake in the dispute). *See also* Ronald Dworkin, *Principle, Policy, Procedure,* in A MATTER OF PRINCIPLE 72, 73 (1985) (recognizing that the right to greater accuracy is a trade-off with cost while arguing that matters of principle should trump considerations of policy in adjudication); Joseph Raz, *Dworkin: A New Link in the Chain,* 74 CAL. L. REV. 1103, 1103 (1986) (stating that Dworkin's procedure essay "seems to undermine Dworkin's apparent view that in adjudication, rights should take precedence over issues of public policy, such as administrative expedience").

[16] RUGGERO J. ALDISERT, THE JUDICIAL PROCESS 716-719 (2d ed. 1996). Judicial discretion has many meanings that extend beyond those invoking the abuse of discretion standard of review. *See* Marisa Iglesias Vila, Facing Judicial Discretion (2001).

[17] The concept of choice has been widely developed in economic theory within the context of rational action. The defining features of choice are: voluntariness, preferences, different real possible courses of action, and mutually exclusive options. *See, e.g.,* S. N. AFRIAT, LOGIC OF CHOICE AND ECONOMIC THEORY (Clarendon 1987).

[18] *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978).

reforming a prison,[19] or disassembling a monopoly[20] demands ingenuity and inventiveness, rather than the wisdom to choose from among a finite set of options.[21] The notion of so-called managerial judging presents another example; allocating system resources efficiently and shepherding litigants through the process expeditiously encourages proactive innovation.[22] Similarly, judicial exercise of the authority to impose nonmonetary sanctions may require much creativity.[23] In these examples, however, the *tabula rasa* must not be confused with *carte blanche*. Indeed, fear of judicial activism and of "individualism run riot" has made the exercise of judicial power in these and similar contexts especially suspect and highly controversial.[24]

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[19] *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998); Ronald J. Krotosyznski, *Equal Justice Under Law: The Jurisprudential Legacy of Judge Frank M. Johnson, Jr.,* 109 YALE L.J. 1237, 1242-43 (2000) (describing and citing examples of Judge Johnson's supervision of Alabama prisons and mental hospitals through long-term structural injunctions).

[20] *See* E. Thomas Sullivan, *The Jurisprudence of Antitrust Divestiture: The Path Less Traveled,* 86 MINN. L. REV. 565 (2002); Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries,* 68 U. CHI. L. REV. 1 (2001).

[21] *See generally* OWEN FISS, THE CIVIL RIGHTS INJUNCTION (1978); OWEN FISS, INJUNCTIONS ch. 3 (1973); OWEN FISS & DOUG RENDLEMAN, INJUNCTIONS ch. 9 (2d ed. 1984); Susan Poser, *What's a Judge to Do? Remedying the Remedy in Institutional Reform Litigation,* 102 MICH. L. REV. 1307, 1307-08 (book review) (summarizing the scholarly literature); Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice,* 8 B.U. PUB. INT. L.J. 469, 469-73 (1999) (same); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy,* 91 YALE L.J. 635, 635 (1982).

[22] Judith Resnik, *Managerial Judges,* 96 HARV. L. REV. 374, 378-380 (1982) (expressing concern over the potential for judges to abuse their discretionary power under a case management regime); Steven Flanders, *Blind Umpires—A Response to Professor Resnik,* 35 HASTINGS L.J. 505 (1984) (defending proactive judicial case management); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day In Court and Jury Trial Commitments*, 78 N.Y.U. L. REV. 982 (2003).

[23] The contempt power is considered to be uniquely "liable to abuse." *International Union, United Mine Workers v. Bagwell,* 512 U.S. 821, 831 (1994) (quoting *Bloom v. Illinois,* 391 U.S. 194, 202 (1968) (quoting *Ex Parte Terry,* 128 U.s. 289, 313 (1888))). *See* Felix Frankfurter & James M. Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers,* 37 HARV. L. REV. 1010, 1056 (1924) (noting that, in contempt cases, there are "subtle dangers of bias, unconsciously operating, owing to inevitable human infirmities where one person combines in himself the roles of accuser, trier of facts and intentions, and judge").

See Margaret Meriwether Cordray, *Contempt Sanctions and the Excessive Fines Clause,* 76 N.C. L. REV. 407 (1998); Douglas C. Berman, *Coercive Contempt and the Federal Grand Jury,* 79 COLUM. L. REV. 735 (1979); Margit Livingston, *Disobedience and Contempt,* 75 WASH. L. REV. 345 (2000).

[24] Authority for this statement creates interesting bedfellows. *See* John C. Yoo, *Race Based Remedies: Recognizing the Limits of Judicial Remedies: Who Measures the Chancellor's Foot?,* 84 CAL. L. REV. 1121 (1996) (contending that the judiciary lacks the managerial and implementation skills required to enforce regulatory remedies); Judith Resnik, *Managerial Judges,* 96 HARV. L. REV. 374, 378-380 (1982) (expressing concern over the potential for judges to abuse their discretionary power under a case management regime); Louis S. Raveson, *A New Perspective on the Judicial Contempt Power: Recommendations for Reform,* 18 HASTINGS CONST. L.Q. 1 (1990); C. Jeffries, *The Right-Remedy Gap in Constitutional Law,* 109 YALE L.J. 87, 113 (1999); Donald L. Horowitz, *Decreeing Organziational Change: Judicial Supervision of Public Institutions,* 1983 DUKE L.J. 1265, 1288-89 (1983); Susan P. Sturm, *A Normative Theory of Public Law Remedies,* 79 GEO. L.J. 1355, 1406 (1991) (commenting on the failure of the critiques of court involvement in public law remedies to develop "meaningful standards for limiting the court's exercise of remedial power").

See also Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., __ U.S. __, 119 S. Ct. 1961, 1970 (1999) (holding that Congress, not the federal courts, is the proper forum to create new injunctive relief for creditors); David Zlotnick, *Battered Women & Justice Scalia,* 41 ARIZ. L. REV. 847, 914 (1999) (citing cases demonstrating Justice Scalia's hostility to the judicial contempt power).

For the reference to "individualism run riot," see, ironically, Jack B. Weinstein, *Justice and Mercy—Law*

This article focuses on conditional orders—another exercise of the judicial imagination. As used here, conditions refer to provisions included in court orders that contemplate the performance of some other act or the occurrence of some event. For example, a judge might grant a motion to amend to add a new claim upon the condition that the movant agree not to seek a postponement of the approaching trial date; or a condition might require that the nonmoving party be compensated for all costs and attorney's fees associated with the new claim. By incorporating conditions into their orders, judges can impose tailored or compromise solutions that ensure a more individualized justice. Conditions are thus an effective and very popular device to mediate a host of competing concerns and interests. Crucially, however, conditions also test the boundaries of judicial authority.

I will demonstrate that even in circumstances where a judge's discretion might be sufficiently broad either to grant or to deny a particular motion, that discretion is not necessarily so broad as to permit a conditional grant (or conditional denial). Put another way, the greater does not includes the lesser. This notion that a condition could impose or induce obligations beyond a court's authority has gone largely unnoticed. Although a few courts and commentators have touched upon discrete aspects of this phenomenon,[25] no one has evaluated the authority to impose conditions as such. This essay begins to bridge that gap in the literature.

Part II familiarizes the reader with judicially-imposed conditions. Infinite in number and scope, such conditions can arise in every phase of any litigation matter. I chart this boundless universe of conditions using an analytical framework that explores the four primary incentives for judges to impose or induce conditions. This discussion includes conditions that are routinely applied by judges as well as those that may be only hypothetical.

Parts III and IV evaluate the use of conditions more broadly and consider the potential sources of authority for judges to impose them. Given the utility and ubiquity of conditions, the three sources of authority are surprisingly deficient or unclear: legislative authorizations are limited in scope and kind; the inherent authority of courts is largely preempted by legislative regulation; and party autonomy is a dubious source because consent may be only nominally voluntary. This want of coherent comprehensive authority to support the contemporary practice of conditional orders is a curious phenomenon.

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and Equity, 28 N.Y.U. L. REV. 817, 818-19 (1984) (discussing the approach of the nineteenth century French judges "who abandoned rules of law completely and instead engaged in ad hoc decision-making according to the equity of the cases.").

[25] The propriety of judicially-imposed conditions have been discussed only in the contexts of addititurs and remittiurs, *see,* nn. __ *infra*; forum non conveniens dismissals, *see* Comment, *Conditioning Forum Non Conveniens,* 67 U. CHI. L. REV. 489 (2000); and, tangentially, in the debate about case management, *see* Judith Resnik, *Procedure as Contract,* 80 NOTRE DAME L. REV. 593, __ (2005).

Finally, Part V locates that phenomenon within a larger jurisprudential context. Conditional orders offer judges a creative escape from rigid rules and predictable outcomes. This interplay between the norms of uniformity and individualized justice evokes the traditions of law and equity. That conditional orders are a contemporary manifestation of equity is, itself, an important observation. But even more significant is the suggestion that, in many instances, the forces of equity are at work even without formal authority. In a merged system of law and equity, conflict between the goals of certainty and individual justice has created an ambivalent attitude in the law toward equity, to which the law is attracted because of the identification of equity with a general sense of justice, but which the law ultimately rejects because of the law's concern for certainty.[26] In form, equity is preserved and codified as *discretion*, which reflects a shift toward fixed options and boundaries. However, in practice the spirit of equity may innovate and create, whether or not authorized. This dissonance invites an exploration of both cause and cure.

II. EXPLORING USES OF THE CONDITIONAL

This Part describes various types of judicially-imposed conditions. As suggested in the paragraphs that follow, judges may use conditions to pursue more or less directly a variety of objectives. These objectives are clustered into four overlapping categories: (i) conditions reflecting a close nexus with the criteria for deciding the motion that is precipitating the court order ("Germane Conditions"); (ii) conditions inspired by notions of fairness ("Fairness Conditions"); (iii) conditions designed to ensure the efficient processing of cases ("Efficiency Conditions"); and (iv) conditions expressing judicial fiat ("Power Conditions").

The boundaries between these four categories are porous, and conditional orders presented in one category could instead be presented in another with minor or perhaps even no modifications to the underlying facts. My purpose in this Part is not to persuade the reader of which conditions belong in which categories, but rather to illustrate the range and force of possible conditions. Possible conditions include those that are routinely applied by courts, but also those that may be only hypothetical. Although this Part presents many concrete examples, the broader discussion about the judicial discretion to condition must contemplate an infinite number of variations.

In every hypothetical posed below it is assumed that the court has the discretion to grant in full or to deny outright the underlying motion. Most of the examples contemplate orders that are derivative of motions filed

[26] *See* Thomas O. Main, *ADR: The New Equity,* 74 U. CINTI. L. REV. __, __ (2005) (forthcoming).

pursuant to the Federal Rules of Civil Procedure, but this is only for convenience. Other possible sources in federal court include the Federal Rules of Criminal Procedure,[27] the Federal Rules of Evidence,[28] the Federal Rules of Bankruptcy Procedure,[29] the Judicial Code,[30] the Criminal Code,[31] the Administrative Procedure Act,[32] the Federal Arbitration Act,[33] the Rules of Procedure of the Judicial Panel on Multidistrict Litigation,[34] and even the inherent power of courts.[35] State substantive and procedural laws introduce another tier of motions and orders.[36] Indeed, conditions can be induced or imposed in virtually any court order.

This Part remains agnostic on the issues of judicial authority to impose or to induce the contemplated conditions. That analysis is reserved for Parts III and IV.

A. Germane Conditions

Determinations that invoke a court's discretion often require a court to consider a variety of factors when making the decision to grant or to deny a particular motion. If one or more of those underlying factors to be considered can be mitigated or avoided, the judge may use conditions to tailor the order to the circumstances presented. Conditions germane to the decisional criteria can remove obstacles and make the motion easier to

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[27] Federal Rules of Criminal Procedure. *See, e.g.,* Fed. Rule Crim. P. 21(a) ("Upon the defendant's motion, the court must transfer the proceeding against the defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there."); Fed. Rule Crim. P. 21(b) ("Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties and witnesses and in the interest of justice.")

[28] Federal Rules of Evidence. *See, e.g.,* Fed. R. Evid. 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."); Fed. R. Evid. 706(a) ("The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations.")

[29] Federal Rules of Bankruptcy Procedure. *See, e.g.,* Fed. R. Bankr. Proc. 9006(b)(1) ("[W]hen an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.").

[30] Title 28, U.S. Code. *See, e.g.,* 28 U.S.C. § 1406(a) ("The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.").

[31] Title 18, U.S. Code.

[32] Title 5, U.S. Code.

[33] Title 9, U.S. Code.

[34] *See* General Rules/Rules for Multidistrict Litigation Under 28 U.S.C. § 1407; Rules for Multicircuit Petitions for Review Under 28 U.S.C. § 2112(a)(3).

[35] Forum non conveniens, for example, is derived from inherent powers. *See* Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens,* 35 CAL. L. REV. 380 (1947).

[36] The issues discussed here could be applicable at the level of state courts, though obviously without the same federalism concerns. Of course separation of powers issues can also play out differently at the state level.

decide. Germane conditions may be included in orders granting the underlying motion ("conditional grants") or in orders denying the underlying motion ("conditional denials").

1. Conditional Grants

In a routine civil litigation dispute, one party may be seeking leave from the court to exceed certain presumptive limits on discovery. In federal courts, for example, there is a seven-hour limit on the length of a deposition.[37] The seven-hour limit promotes efficiency and protects against discovery abuse; but courts may extend the length of the deposition upon consideration of various factors including the complexity of the case,[38] the density of the subject matter of the deposition,[39] and the sincerity of the parties and persons involved.[40]

Upon a motion for leave, a court with discretion to grant or deny this motion might choose to grant the motion on the condition that the deposing party restrict the scope of additional questioning to certain enumerated matters. The conditional order avoids the two extreme positions, which could have either exposed the deponent to discovery abuse or curtailed legitimate discovery efforts. Germane to the criteria for deciding the underlying motion for leave, the condition is designed to ensure the deposing party a fair opportunity to depose the witness while minimizing the likelihood that the extended period would be used to abuse the witness or to delay the litigation. Or, in a similar situation a judge might grant the motion on the condition that the movant consent that the additional testimony be taken by telephone or some other remote electronic means.[41] Again, the conditional grant strikes a workable compromise between the extreme positions represented by the grant in full or by the outright denial. These are classic conditions exemplifying a sensible mandate of modest scope and nearly universal appeal.

Next, consider a motion to intervene as a matter of right. Assume that the putative intervenor has a significantly protectable interest that could be impaired by the ongoing litigation. According to the standard applied by the courts, a timely motion should be granted unless the applicant's interest is

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[37] *See* FED. R. CIV. P. 30.

[38] *See, e.g., Moore v. CVS Corp.*, 2005 WL 581357 at *2 (W.D. Va. Mar. 11, 2005) (discussing the number of claims and parties in the case).

[39] The Advisory Committee Notes, for example, urge courts to consider, among other factors, whether the deposition requires language translation, the span of time covered by the events that are the subject of the deposition, and the number and length of documents about which the deponent is being questioned. Advisory Committee Note, 192 F.R.D. ___, 395-96 (2000).

[40] *Miller v. Waseca Medical Ctr.,* 205 F.R.D. 537, 541-42 (D. Minn. 2002) (noting the deposing party's subtle yet obstructionist tactics). *See generally* 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 2104.1 (2005).

[41] *Cf.* Fed. R. Civ. P. 30(b)(7).

adequately represented by existing parties.[42] The adequate representation prong of the analysis may be sufficiently disputed that it would be within the judge's discretion either to grant or to deny the motion.[43] But both courses of action have risks: the former could needlessly complicate the litigation; and the latter could deprive the applicant of the opportunity to protect their interest.[44]

Again we see that the judge could select one course of action and then condition that order to minimize the attendant risk. A conditional grant might require the intervening defendant to cede some control of the presentation of his case; conditions could appoint the original defendant's attorney as lead counsel and require other forms of coordination.[45] Closely aligned with the underlying criteria for deciding the motion, the condition is designed to ensure the intervenor the opportunity to participate while minimizing interference with plaintiff's prosecution of their case. Somewhat less benign than the discovery example, the conditional order has created a hybrid status that may be problematic for the intervenor.[46] The problem is not the condition *per se*, but rather the fact that the intervenor may be precluded by this litigation as though he were a party yet his ability to participate fully as a party could be compromised by the appointment of lead counsel and other cooperation requirements.[47]

The forum non conveniens context illustrates well the possibility of especially ambitious germane conditions. Defendants will often file a motion to dismiss on grounds of forum non conveniens where certain factors suggest that underlying principles of justice and convenience may favor dismissal in the U.S. court so that the case will be litigated in another forum. We might assume that certain events giving rise to a particular claim occurred in a foreign country and that some of the witnesses and evidence

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[42] Fed. R. Civ. P. 24(a).

[43] *See, e.g., Massachusetts School of Law at Andover, Inc. v. United States,* 118 F.3d 776, 779 (D.C. Cir. 1997) (noting "the existence of district court discretion over the timeliness and adequacy of representations issues under Rule 24(a)(2)).

[44] *See generally* Peter A. Appel, *Intervention in Public Law Litigation: The Environemental Paradigm,* 78 WASH. U. L.Q. 215, 217 (2000); Carl Tobias, *Standing to Intervene,* 1991 WIS. L. REV. 415; Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a),* 57 U. CHI. L. REV. 279 (1990); David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators,* 81 HARV. L. REV. 721 (1968).

[45] *See generally* Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863 (2005); Bruce H. Kobayashi & Larry E. Ribstein, *Class Action Lawyers as Lawmakers,* 46 ARIZ. L. REV. 733 (2004).

[46] See Joan Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts,* 38 GA. L. REV. 813 (2004).

[47] *See Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.,* 974 F.2d 450 (4th Cir. 1992) (holding it improper to impose conditions on intervenors of right); 7C FEDERAL PRACTICE & PROCEDURE § 1922 (questioning propriety of limitations on intervenors of right). *But see* Advisory Committee Note to Rule 24 (advocating the use of conditions on intervenors of right). *See also Stringfellow v. Concerned Neighbors in Action,* 480 U.S. 370, __ (1987) (Brennan, J., concurring) ("restrictions on participation may also be placed on an intervenor of right and on an original party.")

See generally ___ (discussing limited participation by parties through appointment of lead counsel, coordination requirements, etc.).

are still located in that country. According to the requisite standard for a forum non conveniens dismissal, courts are to consider a variety of factors, including whether the alternative forum is "adequate."[48] Although the bulk of factors to be considered might weigh heavily in favor of granting the motion to dismiss, imagine further that certain rules of procedure and evidence in the foreign forum call its adequacy into question: strict joinder rules might handicap cases involving multiple plaintiffs and/or multiple defendants; discovery essential to the case may not be discoverable; the statute of limitations may have expired; punitive damages might be unavailable; the judgment may not be enforceable elsewhere; or the defendant might enjoy certain immunities. Under these circumstances, the adequacy of the foreign forum may be sufficiently contested that it would be within the judge's discretion either to grant or to deny the motion. [49] But the former course of action risks injustice for the plaintiff; and the latter requires litigation in a forum that is inconvenient for the court or the parties.[50]

The judge could select one course of action and then condition that order to minimize the attendant risk. The judge might grant the motion, but then impose conditions on the dismissal to ensure the adequacy of the foreign forum. For example, the defendant might be required to disclose certain evidence as a condition precedent to the dismissal; defendant might be asked to waive its statute of limitations and immunity defenses in the foreign forum; and/or the defendant might be obliged to post a bond to facilitate the enforcement of any judgment awarded by the foreign court. As with almost all of the illustrated in this Part, the intensity of the condition can be increased or decreased for effect: the condition could require the defendant to ensure that plaintiff obtains legal representation; to waive certain evidentiary objections that it would enjoy in the foreign forum; and to consent to non-mutual offensive collateral estoppel in future actions by plaintiffs unable to join as plaintiffs in the foreign suit. The conditional order is ambitious, and perhaps also insidious, because it creates a novel hybrid of domestic and foreign practices; the case may be litigated in the

[48] *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 251-52 (1981). *See Monegro v. Rosa,* 211 F.3d 509, 513 (9th Cir. 2000).

[49] *See Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 257 (1981) ("The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference."). *See also Alfadda v. Fenn,* 159 F.3d 41, 45 (2d Cir. 1998) (review is "severely cabined").

[50] *See, e.g., Iragorri v. United Techs. Corp.,* 274 F.3d 65, 72 (2d Cir. 2001) (en banc) ("The decision to dismiss a case on forum non conveniens grounds ''lies wholly within the broad discretion of the district court and may be overturned only when we believe that discretion has been *clearly abused.*'" (emphasis in original) (quotation omitted); *Sigalas v. Lido Mar., Inc.,* 776 F.2d 1512, 1519 (11th Cir. 1985) ("We reverse a district court's dismissal of a case based on forum non conveniens only for a clear abuse of discretion").

foreign forum pursuant to certain procedures and substance dictated by the U.S. court.

Germane conditions also arise routinely under the criminal law. For example, a conditional grant would be common in a situation where a criminal defendant who has been banished from the courtroom for being disruptive has moved to be readmitted.[51] A modest condition could be a promise from the defendant that he will behave. Or the defendant could agree to be restrained by shackles not visible to the jury. Or the condition for readmission could be that the defendant agree to be shackled, gagged, and surrounded by security personnel.[52] Theoretically, of course, the motion could be granted on the condition that the defendant agree to be placed in a cage inside the courtroom. Obviously conditions can introduce especial problems in criminal law given the numerous constitutional safeguards, such as the right to a fair trial implicated by this example.

Sometimes a condition can enhance the constitutional protections that a criminal defendant enjoys. Consider, for example, a criminal defendant's constitutional right of self-representation.[53] When a defendant knowingly and unequivocally asserts that right within a reasonable time before the commencement of trial, the court must grant the request.[54] The requirement of timeliness, of course, ensures that the prosecution of the case is not unfairly prejudiced through assertion of the right. But when the motion is not timely made, the court may grant the motion on the condition that the defendant proceed without a continuance.[55] In this example the germane condition resurrects the defendant's ability to represent himself even though the Constitutional right had been waived as a result of its tardy assertion.

2. Conditional Denials

This category of germane conditions must also include conditional orders *denying* motions. The most familiar example of a conditional denial may be an additur or remittitur in the context of a new trial motion. A new trial motion may be granted if the jury's damage award, in light of the evidence, is excessive or is inadequate.[56] But a re-trial is expensive, given the additional cost and delay to the parties and to the court. For this reason, a judge faced with a new trial motion from one of the parties may wish to

[51] *See Illinois v. Allen*, 397 U.S. 337 (1970) (upholding a trial judge's decision to banish a defendant from the courtroom for unruly, threatening conduct; reversing the Seventh Circuit opinion, which held that the proper course for the trial judge in treating a disruptive and disrespectful defendant was to restrain the defendant).

[52] *See* Pnina Lahav, *The Chicago Conspiracy Trial: Character and Judicial Discretion,* 71 U. COLO. L. REV. 1327 (2000).

[53] U.S. Const., 6th Amend.; *Faretta v. California,* 422 U.S. 806, 818-836 (1975).

[54] *People v. Welch,* 20 Cal.4th 701, 729 (1999).

[55] *See People v. Windham,* 19 Cal.3d 121 (1977).

[56] Stephen Landsman, *Appellate Courts and Civil Juries,* 70 U. CIN. L. REV. 873 (2002); *Browning-Ferris Indus. v. Kelco Disposal, Inc.,* 492 U.S. 257, 279 (1989).

deny that motion with the condition that the non-moving party accept a particular damage award. The conditional denial works a compromise between the extremes of re-trying the case, on one hand, or accepting a damage verdict that is not supported by the evidence, on the other. Remittiturs are conditional denials that require plaintiffs to accept a lower damage award as the price for denying the new trial motion.[57] Additurs are conditional denials that require defendants to agree to pay a higher damage award.[58] In either instance the condition is germane to the criteria for deciding the underlying motion—to, wit, whether the jury's verdict is excessive or is inadequate.

A judge seeking a compromise or intermediate solution to each of the civil litigation hypotheticals posed in Section 1 above as conditional grants could instead deny the motion with conditions that mitigate or avoid the underlying factors to be considered. In the discovery dispute that framed the first example, the judge might achieve a similar result by denying the motion to extend the length of the deposition upon the condition that the party defending the deposition agree not to oppose interrogatories that might exceed the stated maximum. The discovering party would have the opportunity for the additional discovery albeit through interrogatories rather than deposition testimony. And while interrogatories are not immune from misuse, the opportunity for discovery abuse would be minimized.

In the second example from Section 1, the motion to intervene might be denied upon the condition that plaintiff and defendant consent to the robust participation of the putative intervenor as an amicus. That participation could be further enhanced with conditions requiring the parties to serve the amicus with copies of all pleadings and discovery, and to allow the amicus the opportunity to participate in all hearings. The conditional denial, much like the conditional grant, would establish an intermediate position between full participation as a party and non-participation.[59]

In the third example, forum non conveniens, the judge might deny the motion to dismiss but use conditions to minimize the inconvenience that the defendant would experience by litigating in the domestic forum. For example, plaintiff could be required to make certain concessions in order to replicate certain substantive or procedural advantages that defendant might have enjoyed in the foreign court. Such conditions could be as benign as

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[57] *See* William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury,* 54 SMU L. REV. 1695, 1727 (2001) (stating that remittitur is a "practice … widely used by trial courts in the federal system"). *See generally* Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment,* 64 OHIO ST. L.J. 731 (2003);

[58] *See Dimick v. Schiedt,* 293 U.S. 474, 486-87 (1935) (holding that judges may order a new trial where the jury returns a verdict with inadequate damages, but that the Seventh Amendment prohibits the judge from adding to those damages). *See generally* Irene Deaville Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation with Suggested Alternatives,* 38 Case W. Res. L. Rev. 157 (1987/1988).

[59] It is an open question whether the doctrine of claim preclusion would prevent relitigation by an amicus who participated actively.

obtaining consent to a litigation timetable that is convenient for the defendant. Or the conditions could be much more aggressive, requiring plaintiff to refrain from introducing certain evidence that would be inadmissible in the foreign forum; to stipulate to certain facts to ensure the applicability of foreign law; to waive the right to a jury trial; to waive the right to appeal; and so forth.

3. Antithetical Conditions

One must also anticipate that, in theory even if not in practice, germane conditions could extend beyond the moderation of a court order toward outright cancellation. Consider, for example, a motion to dismiss a complaint on grounds that the civil rights complaint lacked factual specificity. Defendant might argue that the complaint lacked specific facts regarding the dates of the offending acts and the identities of the alleged offenders. The court could deny the motion on the condition that plaintiff add to her complaint the dates of the offending acts and the identities of the alleged offenders. Such conditions may be germane to the criteria for resolving the underlying motion; hence their inclusion in this category of conditions. Yet these conditions could demand the antithesis of a denial, the purported mandate of the order. Antithetical conditions do not create a tailored or compromise solution, but instead simply offer a false choice. Interestingly, the difference between antithetical conditions and other germane conditions associated with conditional grants and conditional denials is a matter only of degree, not kind.

B. Fairness Conditions

Fairness is an express criterion of many motions, and of course is an implicit part of the exercise of all judicial power. This section considers conditions that are not necessarily germane to the criteria for deciding the underlying motion, but rather are derivative of a more contextualized pursuit of fairness. Fairness conditions can minimize prejudice, protect vulnerable parties, and deliver just results in each application of a uniform rule. Three types of fairness conditions are introduced here: reciprocity, notice, and leveling the playing field.

1. Reciprocity

Judges often condition the grant or denial of a motion on some assurance of reciprocity from the prevailing party. For example, a judge could impose or induce a condition that required a party moving for

additional discovery to agree that that party would accommodate any similar requests for additional discovery that might later be made by their adversary.[60] The condition would ensure that the adversary enjoyed reciprocity; and by extracting the condition, the judge might avoid hearing and deciding a motion later because the parties presumably would stipulate to the additional discovery without court involvement.[61]

Not all reciprocity conditions, however, would be as symmetrical or benign as the previous example. Consider instead a motion for leave to extend a deposition beyond the presumptive time limit that is granted on the condition that the movant waive enforcement of any limits on any of their adversary's discovery. Moreover, the asymmetry could appear in contexts with stakes higher than discovery. For example, a motion to amend could be granted on the condition that the movant consent in advance to any motions to amend (or, for that matter, any motion at all) that their adversary may later make.

2. Notice and Opportunity to Cure

Conditions can also be used to notify a party of a court's intent to take some particular action and to provide that party with an opportunity to avert that impending action. This form of condition is affiliated with notions of fairness, because the court is giving the target of the notice the opportunity to cure some defect or default.

The most common example of this condition arises in matters of contempt. Judges frequently issue orders of contempt that are conditioned on the performance or cessation of some act within a particular period of time. If the person or entity that is the subject of the conditional order performs or ceases the act desired by the court, then the condition is not triggered and the order is rendered nugatory.

Many orders, of course, could include conditions intended to provide notice and an opportunity to cure. A motion to dismiss for failure to plead with particularity could be granted on the condition that plaintiff not amend their complaint to include more particulars within a specified period of time. Similarly, judges have issued orders granting motions for summary judgment on the condition that the plaintiff not make available within 90 days affirmative evidence of defendant's liability.[62]

The same issues arise in criminal law. A defendant's motion to stay sentencing might be granted on the condition that the defendant return to

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[60] *See, e.g.,* Cynthia Day Wallace, *"Extraterritorial" Discovery and U.S. Judicial Assistance: Promoting Reciprocity or Exacerbating Judiciary Overload?,* 37 INT'L LAW 1055, 1057 (2003).

[61] *See, e.g.,* Fed. R. Civ. P. 30(d)(2).

[62] *Mamola v. State of California ex rel. Dept. of Transportaiton,* 94 Cal.App.3d 781, 156 Cal.Rptr. 614 (1979).

court within 90 days with proof that he has attended sixty Narcotics Anonymous meetings or participated in weekly outpatient psychological counseling sessions. The condition is thus structured to provide the defendant with notice and an opportunity to cure.

3. Leveling the Playing Field

Judges might also issue orders with conditions intended to level the playing field. For example, an order granting a physical examination might be conditioned upon the selection of an examiner that is suitable to the examinee. The examinee is certainly not entitled to this privilege; and the condition may not be germane to criteria for deciding the underlying motion seeking this discovery. Yet this condition giving the examinee veto power over the examiner could be included to ensure the examinee a modicum of dignity in an otherwise potentially humiliating experience.

A judge granting a forum non conveniens dismissal could grant the motion upon the condition that defendant present no defense to liability. Even if not intended to address some inadequacy in the foreign forum, the condition might be included out of a desire to level the playing field between plaintiff and defendant. The condition could be defendant's "price" for obtaining the forum non conveniens dismissal.[63]

Fairness conditions might also be used to offset some tactical advantage held by one of the parties. For example, much has been written about the "legalized blackmail" that class actions can enable.[64] Class actions can create an intense pressure for defendants to settle, and even those defendants with strong liability defenses may "not wish to roll these dice."[65] To minimize this effect a motion for class certification could be conditioned upon the class's abandonment of a claim for punitive damages. Or, the certification could be granted on the condition that class counsel will pay all costs of all defendants if the suit is lost.[66] These conditions could be wholly unrelated to the criteria underlying the decision whether to certify the class; rather it could be motivated by a desire simply to level the playing field.

Fairness conditions need not be limited to issues of fairness between the parties. Fairness between a lawyer and her client might also be accomplished through a condition. For example, a criminal defense

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[63] *Pain v. United Technologies Corp.,* 637 F.2d 775, 785 (D.C. Cir. 1980), *cert. denied,* 454 U.S. 1128 (1981). *See also Chhawchharia, v. Boeing Co.,* 657 F. Supp. 1157, 1163 (S.D. N.Y. 1987) (directing defendant not to contest liability if the foreign forum rejected its defense of release).

[64] *See generally* HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973). William Simon, *Class Actions—Useful Tool or Engine of Destruction,* 55 F.R.D. 375 (1972).

[65] *In the Matter of Rhone-Poulenc Rorer, Inc.,* 51 F.3d 1293 (7th Cir.), *cert. denied,* 516 U.S. 867 (1995).

[66] *Kline v. Coldwell, Banker & Co.,* 508 F.2d 226, __ (Duniway, J., concurring) ("Perhaps the class action order could be conditioned upon an agreement by counsel that they will pay all costs of all defendants if the suit is lost!"), *cert. denied,* 421 U.S. 963 (1975).

attorney's motion to withdraw as counsel could be granted on the condition that she return a disputed portion of a retainer to the defendant or on the condition that all discovery material be disclosed to the new attorney within a specified period of time. In these instances, the condition is leveling the playing field not between the parties, but rather within the attorney-client relationship of one party.

Conditions under the "fairness" rubric could, of course, have much more ambition than the examples offered here and, thus, more potential for benefit and mischief. Taken to the extreme, conditions could become a Philosopher's Stone: a single judge's notion of what is fair could introduce myriad conditions interfering with substantive and procedural law, access to lawyers and courts, the adversarial process, the attorney-client relationship, and so forth.

C. Efficiency Conditions

This third category regards efforts by judges to use conditions to ensure the more efficient processing of cases. Few question that delivering prompt justice is essential to a true system of justice.[67] And delay is often perceived as an institutional problem that can be cured by judges dedicated to the more efficient management of cases and the processing of claims.[68] Conditions are one such efficiency mechanism, with fee-shifting and streamlining conditions illustrated here.

1. Fee-Shifting or Pay-to-Play

Judges can grant certain motions on the condition that the movant pay their adversary's fees and costs associated with the subject of the motion. For example, a court could issue an order granting a motion for leave to obtain discovery that extended beyond presumptive limits on the condition that the moving party pay to the nonmoving party all of the fees and costs associated with that additional discovery effort.[69] This condition is designed to ensure the moving party the opportunity to engage in discovery while

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[67] The old adage advises that "Justice delayed is justice denied." The comment is variously attributed to William Gladstone or Roscoe Pound. *See Martel v. County of Los Angeles*, 56 F.3d 993, 1003 (9th Cir. 1995) (en banc) (Kleinfeld, J., dissenting) ("Roscoe Pound said 'justice delayed is justice denied …'"); *Geo. Walter Brewing Co. v. Henseleit*, 132 N.W. 631, 632 (Wis. 1911) ("Gladstone has truly said: "When the case is proved, and the hour is come, justice delayed is justice denied.'"); LAURENCE J. PETER, PETER'S QUOTATIONS: IDEAS FOR OUR TIME 276 (1977) (crediting Gladstone).

[68] *See* Thomas Church, Jr. et al., Justice Delayed: The Pace of Litigation in Urban Trial Courts 5 (1978) (reporting the findings of eighteen months of research by the National Center for State Courts and the National Conference of Metropolitan Courts) ("If any one element is essential to the effort to reduce pretrial delay, it is concern by the court with delay as an institutional and social problem.").

[69] *See generally* Judge Richard M. Markus, *A Better Standard for Reviewing Discretion,* 2004 UTAH L. REV. 1279, 1299.

minimizing the inconvenience and cost incurred by their adversary. The condition internalizes the costs associated with the motion and thus creates the incentive for the discovering party (1) to reevaluate whether the discovery is a worthwhile undertaking; and if so (2) to proceed expeditiously and efficiently so as to minimize their own expense.

One could also imagine a simple variation of this condition regarding the recovery of attorney's fees. The judge could grant a motion for additional discovery on the condition that their adversary be compensated in an amount equal to some multiple of the fees and costs associated with that additional discovery. For example, the motion for leave for additional discovery could be granted on the condition that the moving party pay to the nonmoving party an amount equal to 1.5 (or twice or ten) times the amount of fees and costs associated with that additional discovery effort. The multiplier incorporates a "pay-to-play" component that imposes an even greater incentive for the movant to undertake the additional discovery only if it is necessary and, if so, to proceed with ever greater dispatch.[70] Similarly, a judge could also consider a condition requiring payment of a lump sum. The party's motion for leave to obtain the additional discovery could be granted on the condition that the discovering party pay a lump sum (e.g., $5,000, $50,000, $500,000) to their adversary—or to the court, or even to a particular charity.

2. Streamlining

In addition to conditions that require the shifting of fees, judges have a variety of other conditions at their disposal to promote the efficient processing of litigation. Indeed, any motion that is important to a party can be a vehicle for the court to impose a condition that streamlines the litigation.

For example, in a case where a plaintiff is pursuing several theories of liability, the trial judge may view one of those theories as especially detrimental to the efficient processing of the case. The claim might be novel or it might be inadequately supported, even if it could survive challenges raised by dispositive motions. If this particular claim requires discovery along lines of inquiry or some other especial treatment that the preferred claims do not, a judge might target the disfavored claim. Under these circumstances, the judge might condition any order (no matter its relatedness to the offending claim) on the abandonment by plaintiff of this claim. The judge would be using the condition to streamline the litigation.

[70] Of course any fee-shifting scenario creates an incentive for the party recovering their fees (and especially were it some multiple of their fees) to engage in delay tactics.

Bifurcation is another condition that could be incorporated into an unrelated order; a court might, for example, condition the grant of a motion for class certification on the condition that the class adjudicate causation issues first. The bifurcation condition could be unrelated to the criteria underlying the decision whether to certify the class, but could be included to ensure a more efficient processing of the case.

Streamlining conditions can raise a different set of issues in the context of criminal law. Defendants enjoy a constitutional right to a speedy trial, yet may also be the party seeking to delay the litigation. Because courts routinely field motions from defendants and their counsel that could delay the trial (e.g., motion for continuance, motion to substitute a new attorney, motion for self-representation), judges may grant those motions on the condition that the defendant waive his right to a speedy trial. The conditional order thus does not streamline the immediate litigation, but the condition (if enforceable) could later streamline the consideration of certain constitutional challenges in the event that the defendant is convicted.

D. Power Conditions

Of course we must also consider that some conditions could be imposed for none of the aforementioned reasons, but rather solely for the exercise of judicial power itself. Ideally this would be a null set in practice, but there is potential for such a category of conditions.

We might imagine that, for purposes of levity, a judge might require an outsider to profess affection for the hometown sports team as a condition of her otherwise favorable ruling.[71] More consequential, a judge could deny a motion for sanctions on the condition that the target of that motion wear a clown costume in court the following day. Or, notwithstanding the constitution, a judge could grant a motion on the condition that the prevailing party express proper appreciation for the ruling by attending a church service.

Formal requirements to satisfy a judge's idiosyncrasies are another category of power conditions. Through conditions, judges could introduce specifications regarding the form of pleadings, methods of service, conduct for discovery, reporting requirements, and other technicalities that may be unassociated with the underlying motion, not intended to effect some concern for fairness, and unrelated to the efficient processing of the case. Imagine, for example, a motion to amend the complaint to add a new co-plaintiff; that motion could be granted on the condition that plaintiffs refer

[71] *See generally* Associated Press, *Judge Asks Killer, Victim's Family to Say "Go Seahawks,"* Feb. 6, 2006, available at http://www.koin.com/news.asp?ID=2171 (last visited February 7, 2006).

to that new party for the remainder of the case by some demeaning nickname that is chosen by the judge.

III. THE DISCRETIONARY WHOLE DOES NOT NECESSARILY INCLUDE THE CONDITIONAL PARTS

The desire to find some middle ground between the extreme positions urged by the parties on any particular motion is a noble and worthwhile effort. A compromise solution may be the most fair and equitable resolution,[72] and the court has a variety of mechanisms to achieve that result. Sometimes a court may be able to impose an intermediate solution through a partial grant; for example, a court may award 50% of the fees requested, or may exclude two of the three witnesses that are the subject of the movant's request. In other circumstances, a court may be able to tailor a solution by granting (or denying) the motion, and then relying on some alternate source of authority to moderate the effect of that ruling; for example, the court might grant the plaintiff's motion to amend, but then as a separate act at a pre-trial conference use the court's authority under Federal Rule 16 to revisit the trial date and allow defendant additional time for discovery. But the focus of this paper, of course, is a third option: the conditional. And what authorizes a court to impose or to induce conditions?

One might expect the greater to include the lesser, or the whole to include the parts.[73] But if the authority to condition were always subsumed entirely within the authority to decide the motion, the judge should be able

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[72] In certain contexts, the grant of a motion could be the death knell for the litigation. David W. Robertson, *Forum Non Conveniens in America and England: "Rather Fantastic Fiction,"* 103 LAW Q. REV. 398, 418 (1987).

[73] This deduction is a focal point of debate in several legal contexts. Typically, the reasoning is that whenever the State can deny a privilege absolutely, then the State may impose any condition on the exercise of that privilege. Justice Holmes, in particular, is identified with this argument. *See Western Union Tel. Co. v. Kansas,* 216 U.S. 1, 53 (1910) (Holmes, J., dissenting) ("Even in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way."); *Commonwealth v. Davis,* 162 Mass. 510, 511 (1895), *aff'd,* 167 U.S. 43 (1897) ("For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house .... [T]he Legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the lesser step of limiting the public use to certain purposes."); *Frost & Frost Trucking co. v. Railroad Comm'n,* 271 U.S. 583, 602 (1926) (Holmes, J., dissenting) ("'[T]he power to exclude altogether generally includes the lesser power to condition ....'") (quoting *Packard v. Banton,* 264 U.S. 140, 145 (1924); *City and County of Denver v. Denver Union Water Co.,* 246 U.S. 178, 196-97 (1918) (Holmes, J., dissenting) (City may require water company to close altogether; therefore, it may set water rates at any price.) The syllogism has been disproven in many contexts. *See generally* Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser,"* 55 VAND. L. REV. 693 (2002); Thomas Reed Powell, *The Right to Work for the State,* 16 Colum. L. Rev. 99, 106-12 (1916); Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser,* 1994 BYU L. REV. 227, 238-49; Robert M. O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached,* 54 CAL. L. REV. 443, 456-63 (1966); Kathleen M. Sullivan, *Unconstitutional Conditions,* 102 HARV. L. REV. 1413, 1428-56 (1989); Peter Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 Iowa L. Rev. 741, 745-53 (1981); Peter Westen, The *Rueful Rhetoric of "Rights,"* 33 UCLA L. REV. 977, 1010-18 (1986); and John D. French, Comment, Unconstitutional Conditions: An Analysis, 50 GEO. L.J. 234, 236-48 (1961).

to introduce *any* condition without incurring reversal. Upon review of Part II all would surely agree as a matter of intuitive judgment that *some* conditions could go too far. Setting aside for now consideration of which conditions are objectionable, one must appreciate that there is consensus on the point that some conditions may be intolerable—whether because the condition flouts the Constitution,[74] defies common sense,[75] is cruel or unfair,[76] invites corruption,[77] or otherwise appears to be an abuse use of judicial power.[78] Authority to decide the motion does not *necessarily* include the power to impose any condition.

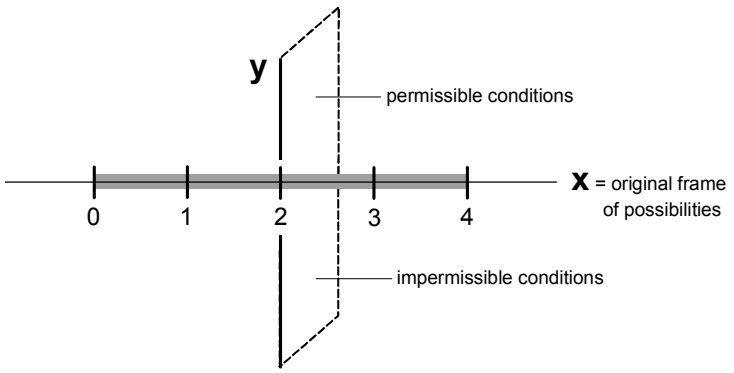
Let us revisit the discretion metaphors, then, in the context of conditions. Each of those metaphors conveys some notion of choice among identifiable options. Conditions, however, create an infinite number of variations of "grants" and "denials" that are not easily accommodated by fixed or two dimensional concepts such as frames, zones, ranges, doughnut holes, and fenced pastures. Indeed, none of the discretion metaphors suggests the incorporation of infinite space that an endless number of conditions would require. Thus although the grant or denial of the order, considered alone, is within the frame of possibilities, the attached condition represents not a judicial choice, but rather judicial creativity operating outside that frame.

One might envision that conditions introduce a new dimension to the metaphoric representations of judicial discretion. Consider discretion in a context where a judge has a range of available courses of action: upon a motion to exclude the testimony of plaintiff's four neighbors, the judge could have discretion under the circumstances to exclude, as cumulative evidence, none, one, two, three, or all four of the witnesses. If that discretion is represented in a linear fashion, the frame of possibilities includes any integer within the 0 — 4 range. However, if a selection from within the frame is a conditional order, one must invoke some other metric to sort the permissible from the impermissible conditions: some conditional orders excluding two of the witnesses may be within the scope of a judge's authority, but some may not.

Visually, the 0 — 4 range in this hypothetical could be represented as an *x*-axis, with a conditional order excluding two of the witnesses introducing a *y*-plane that bisects the *x*-axis. The *y*-plane represents the infinite number of conditions that may be introduced. Using *x* and *y* coordinates, then, there are an infinite number of (2, y) solutions. Where *y* is a condition that is permissible, the conditional order is a (2, y) solution that the court should

[74] *See* nn. __ supra and accompanying text.
[75] *See* nn. __ supra and accompanying text.
[76] *See* nn. __ supra and accompanying text.
[77] *See* nn. __ supra and accompanying text.
[78] *See* nn. __ supra and accompanying text.

uphold. And where *y* is an impermissible condition, the conditional order is a (2, *y*) solution that is unacceptable. Importantly, the authority to impose *x* (a selection from the original frame of possibilities) does not necessarily authorize *y* (the condition).



In any given instance, the "*x*–axis" could be a one-dimensional range (as described and illustrated above), a binary choice (e.g., 0 or 1), or a two- or multi-dimensional plane of options (in instances where the conferred discretion is a function of more than one determinant). And in each instance, the infinite number of conditions could be represented by a *y*-plane adding a second dimension (or third or fourth, as the case may be) to the original frame of possibilities.

A judge's discretion in a given instance might be sufficiently broad either to grant in full or to deny outright a motion, but not necessarily so broad as to permit a conditional grant or denial. Of course the disaggregation of the authority to condition from the authority to decide the motion does not necessarily mean that all conditions are impermissible. Whether a particular conditional order is permissible depends upon whether the authority to impose the condition can be independently sourced. There are three possible sources of such authority, and each of those is explored in the next Part.

IV. SOURCING THE AUTHORITY TO CONDITION

The authority to condition must be derived, if at all, from one of three principal sources: legislative authorization, the inherent authority of courts, or consent.[79] With regard to the first of these potential sources, the authority to condition is conferred by the legislature if either (i) the condition is within the original frame of possibilities; or (ii) some other legislative enactment authorizes the condition. Many contemporary conditions can be

[79] *See* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution,* 86 IOWA L. REV. 735 (2001).

sourced to properly conferred legislative authority. However, as suggested below, this authority is limited in scope and kind.

Second, some conditions could be sourced in the inherent authority of courts. Inherent authority means that scope of authority conferred upon a trial court, whether state or federal, that is not expressly authorized by the constitution, statute, or written rule. Inherent powers are a viable source of authority to condition where rules and statutes are silent.[80] Unfortunately, however, there is much regulatory noise that preempts any definite and meaningful role for inherent authority in the context of conditional orders.

Finally, the condition could be sourced in a theory of consent or assession by the parties. This approach suggests that even if the court had neither the legislative nor inherent authority to introduce the condition, the parties may nevertheless consent to the terms of the conditional order. However, because the consent that is obtained in the context of a conditional order may be only nominally voluntary, this is a dubious source of authority.

A. Legislative Authority

Under certain circumstances, the conditional order may be sourced to authority that has been conferred by the legislature to the courts. The authority of Congress to enact procedural rules for the federal courts is well-catalogued.[81] That authority could be included as part of the authority to decide the underlying motion; or the authority to condition could be traceable to some other legislation. That is, either the *x*-axis contains the conditional order, or the condition is within the frame of possibilities on a *y*-plane that is, itself, legislatively authorized.

1. Conditions Within the Original Frame of Possibilities

Many of the legislative enactments that prescribe the action to be taken on the underlying motion will contemplate outcomes with conditions as part of the original frame of possibilities. Several of the Federal Rules of Civil Procedure, for example, expressly authorize conditions: in a class action, the court may "impos[e] conditions on the representative parties";[82] discovery orders may be issued "subject to conditions";[83] dismissals may be

[80] FELIX F. STUMPF, INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY 37 (1994).

[81] *Sibbach v. Wilson & Co.,* 312 U.S. 1, 9-10 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts…."); *Wayman v. Southard,* 23 U.S. (10 Wheat.) 1 (1825). *See generally* Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure,* 44 HASTINGS L.J. 1039 (1993); Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4,* 40 ME. L. REV. 41, 48 (1988).

[82] Fed. R. Civ. P. 23(d)(3).

[83] Fed. R. Civ. P. 26(c).

conditional;[84] subpoenas may issue "upon specified conditions" to ensure the compensation of witnesses;[85] new trial motions may be granted or denied with conditions;[86] and courts may grant a motion staying the execution of judgment with "conditions for the security of the adverse party."[87] The Advisory Committee Notes that accompany the Rules, a species of legislative history that may or may not confer additional authority,[88] contemplate conditions in still other contexts.[89]

Provided the condition to be sourced is the condition contemplated by the original frame of possibilities, these are easy cases. Federal Rule 19, for example, expressly authorizes "the shaping of relief, or other measures" to avoid prejudice in matters involving necessary parties.[90] In cases implicating Rule 19, the pursuit of equitable relief, as opposed to damages, often heightens the risk of prejudice to parties or nonparties.[91] The frame of possibilities for a judge with discretion to grant or to deny a motion under Federal Rule 12(b)(7) to dismiss for failure to join a Rule 19 party would thus appear to include orders with "shaping" conditions; for example, the Rule 12(b)(7) motion to dismiss could be denied on the condition that the

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[84] Fed. R. Civ. P. 41(d)(2).

[85] Fed. R. Civ. P. 45(c)(3).

[86] Fed. R. Civ. P. 50(c)(1).

[87] Fed. R. Civ. P. 62.

[88] *See* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure,* 150 U. PA. L. REV. 1099, 1103 (2002) (suggesting that, because of the uniqueness of the Congressional delegation to the Supreme Court of the rulemaking authority, the Courts should accord the Notes "authoritative effect"). *Cf.* Thomas O. Main, *Traditional Equity and Contemporary Procedure,* 78 WASH. L. REV. 429, 511-512 (2003).

[89] *See, e.g.,* 1966 Advisory Committee Note to Rule 23 ("An order embodying a determination [with regard to certification of the class] can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type."); *but see* current version of Fed. R. Civ. P. 23(c)(1)(c) (removing this provision). *See also* 2003 Advisory Committee Note to Rule 23 ("The terms set for permitting a new opportunity to elect exclusion from the proposed settlement of a Rule 23(b)(3) class action may address concerns of potential misuse. The court might direct, for example, that class members who elect exclusion are bound by rulings on the merits made before the settlement was proposed for approval. Still other terms or conditions may be appropriate."); 1966 Advisory Committee Note to Rule 24 ("An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."); 1991 Advisory Committee Note to Rule 45 (authorizing court to condition enforcement of a subpoena compelling a non-party witness to bear substantial expense to attend trial; the traveling non party witness may be entitled to reasonable compensation for the time and effort entailed); *id.* (authorizing "court to … condition a subpoena to protect the person subject to or affected by the subpoena from unnecessary or unduly harmful disclosures of confidential information."); *id.* ("kind of showing required for a conditional denial of a motion to quash as provided in the final sentence of (c)(3)(B); that requirement is the same as that necessary to secure work product under Rule 26(b)(3). Protects non-party witnesses who may be burdened to to perform the duty to travel; provision requires court to condition a subpoena requiring travel of more than 100 miles on reasonable compsensation); 2003 Advisory Committee Note to Rule 53 ("The question of present conflicts, and the possibility of future conflicts, can be considered at the time of appoint [of a Master]. Depending on the circumstances, the judge may consider it appropriate to impose a non-appearance condition on the lawyer-master, and perhaps on the master's firm as well."). *See also* Fed. R. Civ. P. 71A (contemplating deposits required by law as a condition to the exercise of the power of eminent domain).

[90] *See* 7 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1609 at 132-133 (2d ed. 1986) (among the court's options is to "order a pleading amended … when by restructuring the relief requested plaintiff is able to change the status of an "indispensable" party to that of merely a Rule 19(a) party or otherwise prevent the ill effects of nonjoinder").

[91] *See Martin v. Wilks, __.*

plaintiffs abandon their claim for equitable relief.[92] The legislatively-conferred *x*-axis appears to include this and other germane conditions that would mitigate prejudice.[93] The Rule does not however appear to contemplate any other types of conditions.

Similarly, in the context of consolidating two cases where there exists a common question of law or fact, Federal Rule 42(a) authorizes "orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."[94] Although the language contemplates "orders" rather than conditions, a judge might fairly invoke this authority to condition the order granting a party's motion to consolidate. For example, a condition could require the movant to undertake certain efforts to streamline the presentation of her case so as to minimize the inconvenience to the other parties.[95] The frame of possibilities thus includes not only grants and denials of the Rule 42 motion, but also grants with efficiency conditions that address unnecessary costs or delay.

Notwithstanding these examples, however, the textual authority to grant or deny motions typically does not contemplate "shaping," "other orders" or conditions that might tailor or temper the order. Federal Rule 24(a), for example, allows intervention as a matter of right under certain circumstances, but appears to contemplate a binary set of absolute options: either the motion to intervene should be granted or it should be denied.[96] Likewise, Federal Rule 15 appears to indicate that motions to amend will be granted or they will be denied; there is no mention of conditions or other middle ground.[97] Similarly, if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, then Federal Rule 56 indicates, without further qualification, that a summary judgment "shall be rendered forthwith."[98] Or Section 1404 of Title 28, provides that upon a motion for a change of venue, "a district court may transfer any civil action"; the statute thus does not appear to contemplate that the motion to transfer could be granted or denied conditionally.[99]

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[92] The 1966 Advisory Committee Note to Rule 19 gives an example of a court that awarded money damages instead of specific performance when the latter might adversely affect an absent party. *Ward v. Deavers,* 203 F.2d 72, 75 (D.C. Cir. 1953).

[93] For the legislative origins of the Federal Rules of Civil Procedure, *see* [and/or n. _ infra.]

[94] *See also* FED. R. CIV. P. 20 (authorizing "orders to prevent delay or prejudice").

[95] *See City of New York v. Darling-Delaware, Inc.,* 1976-1 Trade Cases ¶60,812, 1976 WL 1234, at *1 n.1 (S.D.N.Y March 29, 1976) (motion to consolidate was granted on condition that movant withdraw request for a jury trial and coordinate participation in discovery).

[96] By contrast, for permissive intervention the court may be authorized to impose conditions: "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." FED. R. CIV. P. 24(b).

[97] *See* Fed. R. Civ. P. 15(a) ("[A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.")

[98] Fed. R. Civ. P. 56(c).

[99] 28 U.S.C. § 1404(a).

One might argue that the authority to condition should be *inferred* from the grant of authority to decide the motion—that the greater includes the lesser. Legislative exhortations may even appear to support such inferences: the Federal Rules of Civil Procedure, for example, are to "be construed and administered to secure the just, speedy, and inexpensive determination of every action."[100] To be sure, germane or fairness conditions could better facilitate the just determination of an action; and efficiency conditions could expedite and streamline. But practical and Constitutional constraints urge caution in inferring the authority to condition.[101]

As a general matter, the courts are hoist by their own petard. The "legislation" in the context of many conditional orders is a Federal Rule drafted by the Court rather than Congress.[102] As I have demonstrated elsewhere, the Federal Rules of Civil Procedure have become increasingly more elaborate and technical.[103] And of course these additional layers of detailed prescriptions interfere with judicial discretion and flexibility. Federal Rule 23 is perhaps the most egregious example. Its textual mandates have been blamed, by judges distancing themselves from inequitable, unfair, and unfortunate results regarding notice obligations,[104] settlement class actions,[105] the unavailability of opt-in actions.[106] But Rule 23 is not the only such rule.[107] Paradoxically, even efforts to enhance judicial discretion may, in fact, ultimately narrow it. Recent amendments to Federal Rules 19, 23, 26, 41, 45, 50 and 62, authorize certain types of conditions; but this level of detail also undermines the legitimacy of an inference of authority regarding other conditions and other rules.[108]

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[100] Fed. R. Civ. P. 1.

[101] See notes ___ *supra* for a discussion of the interaction of Articles I and III of the Constitution.

[102] Although the Federal Rules are legislative enactments by virtue of the Rules Enabling Act, they are, as a matter of fact, drafted by judges. The Advisory Committee on Civil Rules/Standing Committee on Rules of Practice and Procedure/Judicial Conference of the United States/The Supreme Court. 28 U.S.C. § 2072.

The Supreme Court has long recognized that Congress may delegate to the Court authority to promulgate procedural rules. As early as 1825, in *Wayman v. Southard,* the Court held that Congress had full authority to regulate procedure in the federal courts, but that Congress had also permissibly delegated to the Court procedural rulemaking authority under the Judiciary Act of 1789. Since 1825, courts routinely have recognized that Congress has the authority to delegate procedural rulemaking authority to the Supreme Court, that Congress has delegated that authority to the Supreme Court, most recently pursuant to the Rules Enabling Act, and that Congress, by virtue of its delegation, retains the power to recall that delegation.

[103] *See* Thomas O. Main, *Traditional Equity and Contemporary Procedure,* 78 WASH. L. REV. 429 (2003) (detailing the number, pattern, and length of amendments to the Federal Rules of Civil Procedure).

[104] *See Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974) (recognizing that their holding may constitute a death knell for the class action, but holding that "the express language and intent" of the Rule requires individual notice).

[105] In *Amchem Products, Inc. v. Windsor,* 521 U.S. 1991 (1997) and in *Ortiz v. Fibreboard Corp.,* 527 U.S. 815 (1999) the Court applied the prerequisites for certification and rejecting class certification even while acknowledging that the class settlements were both substantively and procedurally fair.

[106] *See Kern v. Siemens Corp.,* 393 F.3d 120, 128 (2d Cir. 2004) ("[W]e cannot evisage any circumstances when Rule 23 would authorize an 'opt-in' class in the liability stages of a litigation.")

[107] *See* Thomas O. Main, *Traditional Equity and Contemporary Procedure,* 78 Wash. L. Rev. 429 (2003) (detailing the number, pattern, and length of amendments to the Federal Rules of Civil Procedure).

[108] Until 2003, Rule 23(c)(1) allowed "conditional" certifications of class actions. By amendment, the invitation to conditional certification was removed, and Rule 23(c)(1)(C) instead recognizes that the certification

Because "Congress knew how to draft [a condition] when Congress wanted to,"[109] we should be reluctant to transplant conditions that are expressly authorized by one rule into some other rule that does not contemplate conditions.[110] When a court rewrites a rule, it rides roughshod over the democracy's decision to regulate the event.[111] The familiar canon of statutory construction recognizes that "[w]here Congress includes particular language in one section of a statute but omits it in another…, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[112] This standard method of reasoning applies when comparing provisions within a single statute,[113] comparing related acts over years,[114] comparing early versions of an act from what was eventually passed by Congress,[115] comparing different titles of federal law,[116] and generally when reasoning about Congress' drafting

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order may be altered or amended before final judgment in the action.

[109] *Chicago v. Environmental Defense Fund,* 511 U.S. 328, 338 (1994) (concluding that an express, codified household waste exception showed that the statute did not "extend the waste-stream exemption to the product of such a combined household/nonhazardous-industrial treatment facility.").

[110] *See generally* Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models,* 22 CARDOZO ARTS & ENT. L.J. 725, 754-756 (2005) (collecting cites used throughout this discussion).

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[112] *Keene Corp v. United States,* 508 U.S. 200, 208 (1993); *Rusello v. United States,* 464 U.S. 16, 23 (1983) ("Had Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in the immediately following subsection (a)(2).").

[113] *Environmental Defense Fund,* 511 U.S. at ___; *Keene Corp.,* 508 U.S. at ___; *Bailey v. United States,* 516 U.S. 137, 150 (1995) ("[18 U.S.C.] § 924(d)(1) demonstrates that Congress knew how to draft a statute to reach a firearm that was 'intended to be used.' In § 924(c)(1), it chose not to include that term…."); *Federal Trade Commission v. Simplicity Pattern,* 360 U.S. 55, 66 (1959) (interpreting the Clayton Act, Court concluded "the only escape Congress has provided for discriminations in services or facilities is the permission to meet competition as found in the § 2(b) provisio. We cannot supply what Congress has studiously omitted."); *NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 522-23 (1984) (comparing provisions of the Bankruptcy Code, "Obviously, Congress knew how to draft an exclusion for collective-bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress intended that § 365(a) apply to all collective-bargaining agreements covered by the NLRA."); *United States v. Edmonds,* 80 F.3d 810, 829 (10th Cir. 1996).

[114] *Neff v. Capital Acquisitions & Mgmt. Co.,* 352 F.3d 1118, 1121 n.5 (7th Cir. 2003) (comparing Truth in Lending Act (TILA) and the Fair Debt Collection Practices Act (FDCPA), the court noted "[s]ignificantly, Congress thus knew how to write a broader definition of 'creditor,' yet chose not to do so in TILA."); *Renteria-Gonzalez v. INS,* 310 F.3d 825, 834 (5th Cir. 2002) (comparing Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") which amended the Immigration and Nationality Act ("INA"), the court reasoned that the older title provisions showed that new exceptions were not intended: "the INA proves that Congress knew how to write exceptions for certain kinds of post-conviction relief.").

[115] *Murphy Exploration & Prod. Co. v. United States DOI,* 252 F.3d 473, 486 (D.C. Cir. 2001) (referring to a provision proposed, but not passed in the final version of the law, the court notes "[t]he legislative history underscores the point that Congress knew exactly how to write a statute to state that filing a refund request could trigger an "administrative proceeding."); *Arizona Pub. Serv. Co. v. Environmental Protection Agency,* 211 F.3d 1280, 1289 (D.C. Cir. 2000).

[116] *West Virginia University Hospitals v. Casey,* 499 U.S. 83 (1991) (comparing cost-shifting provision in 28 U.S.C. § 2412(d)(2)(A) [providing for "the reasonable expenses of expert witnesses … and reasonable attorneys fees"] to the "reasonable attorney's fee" cost-shifting provision in 42 U.S.C. § 1988); *International Union v. Auto Glass Employees Federal Credit Union,* 72 F.3d 1243, 1249 (6th Cir. 1996) (comparing Title 11 and Title 12 provisions to conclude "[t]he fact that Congress revised the Bankruptcy Code in 1984 to exempt collective bargaining agreements from a contract repudiation provision similar to the provision at issue here simply indicates to us that Congress knew how to draft such an exemption."); *Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 39 F.3d 1078, 1083 (10th Cir. 1994) (comparing Title 38 veterans' benefits with Title 29 ERISA, "Congress knew how to draft a statute protecting benefits that had left the pension plan, and it did not use similar language with ERISA section 206(d)(1)").

experience.[117] This standard Congress-knew-how-to-draft reasoning follows from the Court's recognition that it is "our duty to refrain from reading a phrase into the statute when Congress has left it out."[118]

The knew-how-to-draft argument is especially compelling when one compares the two drafting institutions. In the typical case requiring statutory interpretation, knowledge is ascribed to Congress even though it is an institution that is a relatively large group consisting of distracted, diverse, and transient individuals with generalized knowledge.[119] In stark contrast, the drafters of procedural rules are a small, stable and cohesive group with a narrow agenda, immense expertise, and no time constraints.[120] With the latter, knowledge and institutional memory are not merely convenient fictions; they are facts.[121]

Next, inferring the authority to condition from the hortatory language of Rule 1 would be an unprecedented use of that Rule. Federal Rule 1 articulates the "scope and purpose" of the Federal Rules with the modest prescription that the exercise of discretionary authority pursuant to "[t]hese rules" be undertaken in a manner that advances the universal goals of just, speedy and inexpensive determinations.[122] This exhortation thus would seem to apply to the exercise of discretion within the frame of possibilities

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[117] *Chickasaw Nation v. United States,* 208 F.3d 871, 884 (10th Cir. 2000) (declining to find an Indian Nation exception to federal wagering excise tax because "[h]ad Congress intended to provide tribes with an exemption from the federal wagering excise taxes, it clearly knew how to draft such an exemption."). The Congress-knew-how-to-draft argument is also a regular move of legal scholars. *See, e.g.,* Mark Rosen, *Root of Formalism: Nonformalistic Law in Time and Space,* 66 U. Chi. L. Rev. 622, 625 (1999) ("The fact that a few provisions of the antitrust statutes do employ formalistic rules underscores the significance of Congress's decision to adopt, for the most part, nonformalistic antitrust law, for it establishes that Congress knew how to draft formalistic rules when it wanted to.").

[118] *See Keene Corp.,* 508 U.S. at 207.

[119] *See generally* William N. Eskridge, Jr., *The New Textualism,* 37 UCLA L. REV. 621 (1990) (analyzing Justice Scalia's plain meaning interpretation of statutes, which eschews any effort to discern Congressional intent and focuses almost exclusively on statutory language); Antonin Scalia, *Judicial Deference to Administrative Interpretaions of Law,* 1989 DUKE L.J. 511, 517 (contending that "quest for ... legislative intent is probably a wild-goose chase [because] Congress [[[probably] didn't think about the matter at all").

[120] *See generally* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy,* 87 GEO. L.J. 887 (1999); Peter G. McCabe, *Renewal of the Federal Rulemaking Process,* 44 AM. U. L. REV. 1655 (1995).

[121] With regard to the fiction in the context of Congress, see David B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. & ECON. 271, 220 (1992)("What legitimizes legislative history as a source of legislative intent is not so much the probative value of this history, but instead, the democratic fiction that the history of a statute has been accepted by Congress as a body. Congress should be understood, so this argument goes, to vote upon a legislative package (text + history) and not merely the text alone."); *see also* Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1156 (1992) (noting "legislators view legislative 'intent' as the policies represented in the statutory text and explained by the legislative leaders for any particular bill"); James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 888-89 (1930) ("Through the committee report, the explanation of the committee chairman, and otherwise, a mere expression of assent becomes in reality a concurrence in the expressed views of another."); Jeremy Waldron, Legislators' Intentions and Unintentional Legislation, in Law and Interpretation 355-56 (Andrei Marmor ed., 1995) (under this theory legislative history becomes like text--it matters not why the person voted for it (even if they were mistaken), the words bind them).

[122] Interestingly, the words "and administered" were added to Fed. R. Civ. P. by 1993 amendment. In the Advisory Committee Note, the drafters noted that the amendment recognized that judges had an "affirmative duty," but that duty extends only "to exercise the authority conferred by these rules."

(i.e., along the *x*-axis), not outside it. Occasionally Rule 1 is cited in the context of resolving a lacunae or nonexistent norm.[123] Rule 1 is also cited intermittently as an additional justification for the straightforward application of another procedural rule.[124] Similarly courts also will justify particular applications of procedural rules by referring to the "spirit" of the Federal Rules.[125] But citations to Rule 1 for the purpose of avoiding the straightforward application of some Federal Rule are rare and unremarkable exceptions that prove the rule.[126]

Of course the system's overactive rulemaking gland already discussed neutralizes any prospect that the hortatory language of Federal Rule 1 could be transformed into a source of authority to condition. [127] Although many

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[123] *See, e.g., D.L. v. Unified Sch. Dist., No. 497,* 2002 WL 31296445, at *2 (D. Kan. Oct. 1, 2002) ("Though Rule 59(e) is silent as to whether the court may order such relief on its own initiative, the Eleventh Circuit has interpreted the rule's silence to be without significance, given the court's inherent powers … Fed. R. Civ. P. 1"); *W. Res., Inc. v. Union Pac. R. Co.,* 2002 WL 1822432, at *2 (D. Kan. Jul. 23, 2002) ("given the textual ambiguity of Rule 45 combined with the repeated attempts of the Plaintiff to effectuate personal service, and the cost and delay that would result by requiring further attempts at such service, this Court thus joins those holding that effective service under Rule 45 is not limited to personal service") (citing Fed. R. Civ. P. 1); *U.S. v. Star Scientific, Inc.,* 205 F. Supp. 2d 482, 484-85 (D. Md 2002) ("The language of Rule 45 clearly contemplates that the court enforcing a subpoena will be the court that issued the subpoena. However, this language must be read in light of the underlying purposes of the rule, which include 'protect[ing] … persons who are required to assist the court by giving information and evidence….") (quoting Fed. R. Civ. P. 45, Advisory Committee Notes, 1991 Amendment, *citing* Fed. R. Civ. P. 1).

[124] *See, e.g., Wells v. Greyhound Lines, Inc.*, 2002 WL 1610902, at *3-*4 (S.D. Miss. June 25, 2002) (citing Fed. R. Civ. P. 1 in support of its conclusion to transfer pursuant to 28 U.S.C. § 1404); *Menasha Corp. v. News Am. Mark. In-Store, Inc.,* 2002 WL 664067, at *1 (N.D. Ill. Apr. 23, 2002) ("apply[ing] Fed. R. Civ. P. 24 in light of Fed. R. Civ. P. 1's mandate"). The U.S. Supreme Court cited Rule in this context in *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' Fed. R. Civ. P. 1.").

[125] *See, e.g., United States on behalf of Mar. Admin. v. Cont'l Ill. Nat'l Bank & Trust Co.,* 889 F.2d 1248, 1254 (2d Cir. 1989) (discretion of the Court with regard to motions seeking leave to amend "must be exercised in terms of a justifying reason or reasons consonant with the liberalizing 'spirit of the Federal Rules'"); *Nieto v. Kappor,* 210 F.R.D. 244, 246 (D.N.M. 2002) ("outright refusal to grant the leave [to amend] without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules") (quoting *Foman v. Davis,* 371 U.S. 178, 182 (1962)); *Hurlburt v. Zaunbrecher,* 169 F.R.D. 258, 260 (N.D.N.Y. 1996) (putting defendant on notice "that, although she is technically entitled to insist upon service in strict compliance with Rule 4(e), in the opinion of the court such insistence violates the spirit of the Federal Rules as expressed in Rules 1 and 4(d)"); *Hartley Parker, Inc. v. Fl. Beverage Corp.,* 348 F.2d 161, 163 (5th Cir. 1965) (court refused to reverse judgment on ground that failure to verify answers to admissions under Rule 36 resulted in technical admission of truth of statements, particularly when proof clearly refuted truth of any such admissions; "the spirit of the federal practice [is] to accord substantial justice over mere technical contentions"); *Ford Motor Credit Co. v. Beard,* 45 F.R.D. 523, 525 (D.S.C. 1968) ("spirit of the federal rules" contemplates avoidance of circuity or multiplicity of litigation); *Gonzales v. Sec. Of the Air Force,* 824 F.3d 392, 396 (5th Cir.) (Brown, J., dissenting) (stating that it is "contrary to the spirit of Federal Rule 1" to require the plaintiff to file and serve the defendant within the 30-day statutory time limit when the statutet makes no mention of service), *cert. denied,* 485 U.S. 969 (1987).

[126] *See In re Simon II Litigation,* 211 F.R.D. 86 (E.D.N.Y. 2002) (Weinstein, J.) (using FRCP 1 in conjunction with equitable maxim that ensures where there is a wrong there is a remedy); *Tyson v. City of Sunnyvale,* 159 F.R.D. 528 (D. Cal. 1995) (just, speedy, and inexpensive determination requires that court exercise its discretion to extend the time period for serving process when process was served one day late); *TPI Corp. v. Merch. Mart of S.C., Inc.,* 61 F.R.D. 684, 692 (D.S.C. 1974) (notwithstanding considerable contrary authority, court permitted permissive intervention because justice required that the party requesting intervention be granted it); *Rollerblade, Inc. v. Rappelfeld,* 165 F.R.D. 92, 95 (D. Minn. 1995) (extending time for service of process under Rule 4(m)).

[127] *See, e.g., Central Bank*, 511 U.S. at 176 ("Congress knew how to impose aiding and abetting liability when it chose to do so"); *Pinter v. Dahl,* 486 U.S. 622, 650 (1988) ("When Congress wished to create such

commentators, including myself, have urged judges to engage in a purposive and dynamic reading of the Rules,[128] the rulemaking process must also be respected.[129] Certain rules already authorize certain conditions. Failure to use the Rules Enabling Act procedure to expand that authority to condition circumvents the congressional oversight and feedback envisioned by the legislation. Accordingly, while some conditions will be included within the original frame of possibilities, many others will not. Conditions that are not within the original frame of possibilities are not necessarily impermissible. However, conditions that are not on the original *x*-axis introduce a *y*-plane that, if legitimate, must be sourced to some other authority.

2. Conditions Authorized by Other Legislation

In certain contexts, some *other* legislative enactment could expressly authorize the condition. For example, if a plaintiff moves to amend his complaint to add an additional party in federal court, the court must consider, *inter alia,* whether "justice so requires" allowing the amendment.[130] Under the circumstances the court may have discretion to grant or to deny the motion to amend; and Federal Rule 15 does not expressly authorize conditions. With this example, the *x*-axis contains only the binary options to deny (x=0) or to grant (x=1), with no accommodation for conditions. Nevertheless, the court might grant the motion on the condition *y* that plaintiff agree that the case be transferred to the Northern District of Florida, a forum where the case originally could have been brought. In this instance, authority to decide the underlying motion is conferred by Federal Rule 15, with the authority to impose condition *y* conferred, if at all, by 28 U.S.C. § 1404. Provided the condition is within the "frame of possibilities" conferred by the legislature for a Section 1404 transfer, the conditional order (x,y) is legislatively authorized by Federal Rule 15 and 28 U.S.C. § 1404, respectively.

But few conditions appear to fit within this category. For example, germane conditions modify the criteria underlying the principal motion and

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liability it had little trouble doing so); *Blue Chip Stamps*, 421 U.S., at 734 ("When Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly").

[128] Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure,* 44 HASTINGS L.J. 1039 (1993); *See, e.g,* Joseph P. Bauer, *Schiavone: An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure,* 63 NOTRE DAME L. REV. 720, 720 (1988) (arguing that because the Supreme Court promulgates the Rules, federal courts are "fully justified in taking an expansive view of the Federal Rule under scrutiny, giving it a liberal reading if that is required to fulfill the purposes of the Rule or to do justice between the parties before the court"); Thomas O. Main, *Traditional Equity and Contemporary Procedure,* 78 WASH. L. REV. 429, __ (2003).

[129] Catherine A. Struve, ___, (arguing that paradoxically, "Congress's delegation of rulemaking authority should constrain, rather than liberate, courts' interpretation of the rules").

[130] Fed. R. Civ. P. 15(a).

thus, almost by definition, are not themselves motions that could be sourced to some independent authority. Some conditions might be related to an existing rule but are not authorized by that rule. Efficiency conditions, for example, may impose fee-shifting but are unlikely to be authorized by Rule 11, which has specific conduct triggers,[131] detailed procedures,[132] and an institutionalized bias against "fee-shifting."[133]

Some conditions could be authorized by Federal Rules of Civil Procedure 16 and 26, which authorize trial courts to exercise certain managerial control over civil cases.[134] Federal Rule 16, for example, confers considerable authority provided it is exercised at a pre-trial conference "under this rule."[135] Federal Rule 26 confers authority to police the scope and amount of discovery under certain circumstances.[136] Accordingly, if on

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[131] Under subdivision (c) of Rule 11, the court "may … impose an appropriate sanction" when "subdivision (b) has been violated." Subdivision (b) provides as follows:

> (b) Representations to Court
>
> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Fed. R. Civ. P. 11.

[132] Although sanctions initiated upon the court's initiative need not comply with the safe harbor provisions applicable to sanctions initiated upon motion by a party, "[m]onetary sanctions may not be awarded on the court's initiative unless the court isues its order to show cause." Fed. R. Civ. P. 11(c)(2)(B). Also, "[w]hen imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed." Fed. R. Civ. P. 11(c)(3).

[133] Subdivision (c)(2) of Federal Rule 11 emphasizes, first, a general limiting principle that the sanction imposed "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Next, the Rule emphasizes the availability of nonmonetary sanctions as an alternative to monetary sanctions. And then, the Rule states that monetary sanctions would be payable to the court unless "if imposed *on motion* and *warranted* for effective deterrence, an order directing payment to the movant of some or all of the *reasonable* attorneys' fees and other expenses incurred as a *direct result of the violation*." Fed. R. Civ. P. 11(c)(2) (emphasis added).

[134] Daniel J. Meador, *The Inherent Judicial Authority in the Conduct of Civil Litigation,* 73 TEX. L. REV. 1805, 1806 (1995).

[135] *See* Fed. R. Civ. P. 16(c). For actions taken at a pre-trial conference, Federal Rule 16 authorizes a judge to "take appropriate action" regarding a number of enumerated matters pertaining to motion and trial practice, discovery, and scheduling. The authority includes actions taken a pre-trial conference "with respect to such other matters as may facilitate the just, speedy, and inexpensive disposition of the action." Fed. R. Civ. P. 16(c)(16).

[136] Federal Rule 26(b)(2) provides that the court may alter discovery limits and also "the frequency or extent of use of the discovery methods otherwise permitted under these rules."

Federal Rule 26(c) provides that "upon motion" the court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

a motion to extend a deposition beyond the presumptive seven-hour limit, the court granted the motion on a condition that the moving party agree not to oppose any similar motion filed by their adversary, authority to decide the motion to extend would be found in Rule 30(d)(2), while the reciprocity condition could be grounded in the court's authority to manage discovery under Federal Rule 26(b)(2) and 26(c). The conditional order (1, y_1) could thus be authorized by Federal Rules 30(d)(2) and 26, respectively. If a condition y_2 instead (or in addition) imposed a fee-shift (or some multiple of fees) the issue, then would be whether y_2 fell within the scope of judicial authority conferred by some other source. And, as already discussed, such conditions probably do not.

B. Inherent Authority

Certain conditions may constitute a proper exercise of the inherent authority of courts. Inherent authority means that scope of authority conferred upon a trial court, whether state or federal, that is not expressly authorized by the constitution, statute, or written rule. This authority flows from the powers possessed by a court simply because it is a court; it is an authority that inheres in the very nature of a judicial body and requires no grant of power other than that which creates the court and gives it jurisdiction.[137] The narrow parameters of this jurisprudence make it a possible but unlikely source of authority for a *y*–plane introducing conditions in a given instance.

The Supreme Court has long defined "inherent powers" as those which "cannot be dispensed with … because they are *necessary* to the exercise of all others."[138] The Court has often cautioned that "the extent of these [inherent] powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority."[139] Accordingly, inherent powers extend only to those instances "necessary to permit the courts to function."[140] As a starting point, then, few germane, fairness, or efficiency conditions would seem to be absolutely "necessary." Modifying the criteria underlying a motion with a germane condition, for example, would perhaps be better described as constructive or beneficial. Efficiency conditions, too, might be extremely useful, yet still not necessary. Some fairness conditions could be truly necessary in

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Federal Rule 26(d) provides that a court may "upon motion" alter the timing and sequence of discovery.

[137] Daniel J. Meador, *The Inherent Judicial Authority in the Conduct of Civil Litigation,* 73 TEX. L. REV. 1805, 1805 (1995).

[138] *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43 (1991) (citing *U.S. v. Hudson & Goodwin,* 11 (7 Cranch) U.S. 32, 34 (1812)) (emphasis added).

[139] *Degen v. U.S.,* 517 U.S. 820, 823 (citing *Roadway Exp., Inc. v. Piper,* 447 U.S. 752, 764 (1980)).

[140] *Young v. U.S. ex rel. Vuitton,* 481 U.S. 787, 819-820 (1987) (Scalia, J., concurring in the judgment).

exercise of the judicial task, but certainly not those that are part of the standard litigation fare. Nevertheless, most judges and commentators would likely cite "inherent authority" as the contemporary source of authority to impose or to induce conditions in the ordinary course. But are they right?

The Court has never reconciled precisely how the Constitution simultaneously limits federal courts (especially as compared to Congress), yet authorizes them to exercise "inherent authority."[141] Indeed, the Constitution provides little or no guidance as to how the judiciary should go about exercising its authority in the ordinary course.[142] The Justices have generally avoided the larger Constitutional questions by focusing on the individual inherent power involved in each case.[143] The parameters of inherent judicial authority seem narrow given the "necessity" definition and the Court's frequent admonition that it be exercised cautiously.[144] Yet federal judges have repeatedly cited "inherent powers" as a catch-phrase to rationalize a wide range of actions that may be beneficial but are not truly essential to the proper exercise of judicial authority.[145]

Although unclear in its scope, the authority to "manage litigation" is often listed among the inherent powers of federal courts.[146] This authority is usually traced to *Link v. Wabash Railroad,* a case in which the district court invoked inherent authority to dismiss the case when the plaintiff's counsel failed to appear at a pre-trial conference.[147] In upholding the district court's

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> "Any judicial invocation of inherent power … seems to clash with three principles of constitutional structure that the Court has long endorsed. First, the American government is founded upon a written Constitution that enumerates and limits the powers of each department, with particularly stringent restrictions placed on the judiciary. Second, the … Constitution vests Congress with full power over the judiciary's structure, jurisdiction, and operations. Third, … Congress makes federal law, both substantive and procedural, which judges merely interpret and apply."

Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution,* 86 IOWA L. REV. 735, 739 (2001).

[142] Edward S. Corwin, The Doctrine of Judicial Review 16 (1914) (regarding "what the [judicial] power is, what are its intrinsic nature and scope, [the Constitution] says not a word.")

[143] Pushaw, *supra* n. __ at 739-40.

[144] *See, e.g., Degen v. United States,* 517 U.S. 820, 823 (1996) ("Principles of deference counsel restraint in resorting to inherent power….").

[145] *See, e.g.,* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution,* 86 IOWA L. REV. 735 (2001); Elizabeth T. Lear, *Congress, The Federal Courts and Forum Non Conveniens: Friction on the Frontier of the Inherent Power,* ___ (forthcoming). *See also* William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause,* 40 LAW & CONTEMP. PROBS. 102, 113 (1976) (noting that the tone of opinions evaluating "helpful or appropriate" uses of the inherent power, versus those claiming to be rooted to a specific constitutional grant, is not "legal"; there is very little "law" to speak of and the decisions "read no more 'judicially' than a good congressional committee report, because is essentially what [they are].")

[146] *See, e.g.,* James Wheaton, *California Business and Professorial Code Section 17200: The Biggest Hammer in the Tool Box?,* 16 J. ENVTL. L. & LITIG. 421, 433 (2001); Daisy Hurst Floyd, *Can the Judge Do That?—The Need for a Clearer Judicial Role in Settlement,* 26 ARIZ. ST. L.J. 45, 58 (1994); Simons, *The Manual for Complex Litigation: More Rules or Mere Recommendations,* 62 ST. JOHN'S L. REV. 493, 497-98 (1988) ("The creators of the Manual [for Complex Litigation] remind us that 'it is not binding law. It has no binding effect. It is only as good as the credibility of the authors and the utility of the materials.' The Manual asserts that its recommendations, like the Federal Rules, are examples of the court's inherent authority to manage litigation.") (quoting Manual for Complex Litigation § 20.1, at 6 (2d ed. 1985)).

[147] *Link v. Wabash Railroad Co.,* 370 U.S. 626, 82 S. Ct. 1386 (1962).

inherent authority, the Supreme Court described the district court's power to dismiss as one of "ancient origin."[148] The Court found that the power to dismiss was "necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts."[149] The Court found this inherent power to dismiss "governed not by rule or statute by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[150] Under the "managing litigation" rubric, the inherent powers of a federal court may also include controlling admission to its bar, disciplining attorneys who appear before the court, punishing for contempt, vacating a judgment on proof of fraud, barring disruptive criminal defendants, and dismissing a case on forum non conveniens grounds.[151] But still: what about germane, fairness and efficiency conditions?

Inherent authority is part of the broader topic of judicial case management.[152] That topic, involving the extent to which a trial court should affirmatively assert authority—inherent or otherwise—over its proceedings has sparked much debate in recent decades. Views among judges, lawyers, and commentators differ as to the degree of "managerial judging" that is desirable or appropriate.[153] At one end of the spectrum, there are those who believe that the structure and process of a case should be left largely in the hands of the litigants through the adversary process, with the judge acting mainly in response to issues churned up by the moves of the lawyers. At the other end, there are those who endorse vigorous, affirmative judicial management—especially in the pretrial stage—diminishing traditional party control in order to reduce expense and delay. That policy debate need not be joined here. Rather, the issue is the extent to which the inherent power of courts may extend to the introduction of conditions into court orders.

Although there exists an absolute core of judicial power that is immune from congressional regulation,[154] the Court has long acknowledged that

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[148] *Link,* 370 U.S. at 630, 82 S. Ct. at 1388.

[149] *Link,* 370 U.S. at 629, 82 S. Ct. at 1388.

[150] *Link,* 370 U.S. at 630-31, 82 S. Ct. at 1389.

[151] *Chambers v. NASCO, Inc.,* 501 U.S. 32, 44, 111 S. Ct. 2123, 2132 (1991).

[152] Daniel J. Meador, *The Inherent Judicial Authority in the Conduct of Civil Litigation,* 73 TEX. L. REV. 1805, 1805 (1995).

[153] Compare Robert F. Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition,* 69 CAL. L. REV. 770 (1981) (endorsing managerial judging for increasing the productivity of the federal courts) *with* Judith Resnik, *Managerial Judges,* 96 HARV. L. REV. 374 (1982) (criticizing managerial judging).

[154] The power to condition is certainly not among the core inherent powers that encompass the constitutional duty to independently adjudicate cases and controversies. Pushaw, *Inherent Power, supra* note __ at 844 ("This pure 'judicial power' consists of applying pre-existing law to the facts in a particular case, then rendering a final, binding judgment."); Evan Caminker, *Allocating the Judicial Power in a "Unified" Judiciary,"* 78 TEX. L. REV. 1513, 1518-1521 (discussing contours of adjudicatory power). *See Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211 (1995) (holding unconstitutional congressional attempt to require courts to reconsider final judgment under Securities Exchange Act); *see also U.S. v. Klein*, 80 U.S. 128, 144-147 (1871) (holding unconstitutional

most of its inherent authority is subject to partial or complete legislative control.[155] Article I vests in Congress the rulemaking power,[156] and a court cannot exercise its inherent authority in violation of a valid rule.[157] Indeed, the very purpose of inherent powers are to ensure "that the adjudicative process can function" when rules and statutes are silent.[158] Much of the jurisprudence of inherent powers thus regards the exercise of judicial authority in the absence of congressional regulation.[159] Accordingly, no matter how useful and practical a device the condition could be, the promulgation of a rule and its contemplated frame of possibilities may preempt the exercise of inherent authority to condition.

The scope of the inherent authority to condition, then, may be inversely related to the degree of particularity and comprehensiveness in the source of authority to decide the underlying motion. This line of argument tracks much of the previous discussion about the limited ability to *infer* legislative authority to condition in contexts where there is already legislative noise. Here, too, statutes or rules that are less comprehensive would allow greater room for a trial court's exercise of inherent authority to condition. And once again: more detailed schemata like the Federal Rules of Civil Procedure tend to foreclose that authority. Inherent authority, the thinking goes, is less necessary when the rules themselves are comprehensive.[160]

Even where there is regulation, in certain very limited contexts the Court has recognized inherent authority that complements that regulation. In *Link*, the Court recognized inherent power notwithstanding a Federal Rule that was on point but did not authorize the district court's action.[161] Federal Rule 41 authorized a dismissal for non-prosecution upon motion by

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congressional statute which attempted to define the scope of presidential pardon power and to dictate outcome in pending case).

[155] Elizabeth T. Lear, *Congress, the Federal Courts and Forum Non Conveniens: Friction on the Frontier of the Inherent Power,* _____ (forthcoming) (draft manuscript on file with author); *Dickerson v. United States,* __ U.S. __, 120 S. Ct. 2326, 2332 (2000) ("Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution."); *See, e.g., Michaelson v. United States ex rel. Chicago,* 266 U.S. 42, 66 (1924) ("[T]he attributes which inhere to the contempt power are inseparable from it can neither be abroaged nor rendered practically inoperative [by Congress]. That it may be regulated within limits not precisely defined may not be doubted."); *Chambers v. NASCO, Inc.,* 501 U.S. 32, 47-49 (1991) (finding that the sanctioning authority of the courts was not foreclosed by the adoption of the Federal Rule of Civil Procedure 11); *Young v. United States ex rel. Vuitton,* 481 U.S. 787, 799 (1987) ("The manner in which the court's prosecution of contempt is exercised therefore may be regulated by Congress."). *See also* Pushaw, *supra* n. __ at 848 ("the Constitution should be construed as allowing only legislation that facilitates the courts' exercise of their implied indispensable powers or that reasonably regulates minor details of such powers"); David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch,* 1999 B.Y.U. L. REV. 75, 80, 104-32 (1999).

[156] *Wayman v. Southard,* 23 U.S. (10 Wheat.) 1 (1825).

[157] Daniel J. Meador, *The Inherent Judicial Authority in the Conduct of Civil Litigation,* 73 TEX. L. REV. 1805, 1816 (1995).

[158] FELIX F. STUMPF, INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY 37 (1994).

[159] *See Ex Parte Patterson,* 253 U.S. 300, 312 (1920); *Cash v. Riggens Trucking,* 757 F.2d 557, 563-64 (3rd Cir. 1985) (en banc).

[160] The fallibility of that reasoning, *see* Thomas O. Main, *Traditional Equity and Contemporary Procedure,* 78 WASH. L. REV. 429 (2003), does not affect the issues of authority addressed here.

[161] *See* nn. __ *supra* and accompanying text.

the defendant; and the Court recognized inherent authority to dismiss *sua sponte.*[162] The Court noted the "ancient origin" of the dismissal right and emphasized that the Federal Rule did not clearly express congressional intent to abrogate the federal courts' traditional inherent authority to dismiss for want of prosecution on their own.[163]

Similarly, the Court recognized an inherent authority to sanction notwithstanding certain legislative authority already in place. In *Chambers v. NASCO, Inc.,* one party tried to deprive the district court of jurisdiction through various fraudulent and bad-faith actions.[164] The trial court invoked its inherent authority to sanction this conduct by ordering Chambers to pay all of their adversary's fees, and the Supreme Court affirmed.[165] The Court held that the sanctioning provisions in federal statutes and procedural rules, which "reache[d] only certain individuals or conduct," did not displace the inherent sanctioning power, which "extend[ed] to a full range of litigation abuses."[166] Although the Court acknowledged the legislature's right to limit inherent authority, it would "not lightly assume that Congress ha[d] intended to depart from established principles" (the longstanding precedent recognizing inherent sanctioning power) by approving the Federal Rules of Civil Procedure.[167] "[I]f in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power."[168] While conceding that many of Chambers's actions could have been sanctioned under existing laws, the Court concluded that such conduct was intertwined with behavior that fell outside their scope.[169]

One might fairly argue, then, that even in contexts where there is regulatory noise, inherent powers may authorize complementary conditions of "ancient origin". But of course this is a rather onerous standard. Both *Link* and *Chambers* regarded a court's indispensable authority to impose order, respect, decorum, silence and compliance with lawful mandates.

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[162] *See* nn. __ *supra* and accompanying text.

[163] 370 U.S. 626, 629-633 (1962). The Court characterized a dismissal for lack of prosecution as "of ancient origin, having its roots judgments of nonsuit and non prosequitur entered at common law." *Id.* at 630 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 295-96, 451 (1768)).

[164] 501 U.S. 32, 35-39 (1991)

[165] 501 U.S. at 42-58. The Court began its opinion by reiterating that federal judges necessarily had the inherent power to manage their proceedings and control the conduct of those who appeared before them. *Id* at 43-44. *See also id*. at 44, 50 (cautioning that such authority should be exercised with restraint).

[166] 501 U.S. at 46. For instance, 28 U.S.C. § 1927 authorized the award of attorneys' fees only against lawyers who vexatiously multiplied proceedings. It did not cover parties who had done so, and did not reach other attorney misconduct, such as lying to the court. *Id.* at 41-42.

[167] 501 U.S. at 47. For example, the Court maintained that the 1983 Amendments to the Federal Rules addressing sanctions (most notably Rule 11) sought only to supplement, not displace, the courts' existing inherent power to deal with litigation abuses. *Id.* at 48-49 (citing sources). The Court also cited the Advisory Committee Notets, which indicated that the amended sanctioning provisions were designed "to obviate dependence upon … the court's inherent power" as demonstrating "no indication of an intent to displace the inherent power." *Id.* at 48 n.13 (citing sources).

[168] 501 U.S. at 50.

[169] 501 U.S. at 50-51.

Some germane, efficiency or fairness conditions may tap this deep ancient root, but most contemporary conditions instead tinker at the surface.

Inherent authority may authorize certain conditions in particular instances, but it fails as a broad source of authority for two reasons. First, the jurisprudence of inherent powers is purposely narrow: "inherent powers are the exception, not the rule, and their assertion requires special justification in each case."[170] The rules are framed through a process that strikes a delicate balance between the needs of efficiency in litigation and the rights of the parties. Imposing conditions could frustrate Congress's will and infringe the Due Process rights of the plaintiff, who may have no fair notice that the court could impose such conditions. Second, even if one assumes a broader view of the inherent authority of courts, that authority can be preempted by legislative interference. Accordingly, in instances where there is regulatory noise, inherent authority is even more suspect.

C. Consent

One might argue that a condition requires no judicial authority because the condition can always be declined by the party faced with the condition. This argument would emphasize that, for example, a deposing party seeking additional discovery by way of motion would have a choice: proceed with the deposition under the prescribed conditions (e.g., paying their adversary's additional attorney's fees) or abandon the motion. Therefore, if the party accepted the condition, the court does not require any authority to impose or induce the condition. In other words, the *y*-plane is introduced as function of party autonomy. However, because consent may not be voluntary in these contexts, inducing conditions without institutional authority makes consent a dubious source of authority.

Consent is valid only if it is not coerced. Judges enjoy significant leverage over the parties in the context of a pending motion, and thus can extract concessions that may be only nominally voluntary. Moving parties who accept conditions would likely do so because the alternative to the condition is that their motion will be denied outright.[171] From this perspective, the conditional order looks like an offer most movants would be silly to refuse. For this reason, most conditional offers probably are "accepted." But acceptance here is a product of the court's power, not its authority.[172]

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[170] *Chambers v. NASCO, Inc.,* 501 U.S. 32, 63 (Kennedy, J., dissenting).

[171] Of course, for nonmoving parties who "accept" conditional denials the threat is that their adversary's motion will be granted in full.

[172] *See generally* Joseph Raz, Legitimate Authority, in The Authority of Law: Essays on Law and Morality 3, 19-25 (1976) (discussing necessity of distinction to prevent "endless confusion" on questions of legitimacy).

Consider this simple non-legal example. A student asks a former professor to accompany her to lunch. The professor responds that she will join upon the condition that the student pay. The professor has no *authority* to require that the student pay.[173] Yet the circumstances present the opportunity for the professor to assert *power* that could effect that result.[174] The conditional offer may be "accepted" by the student, but the use of power without authority may have been exploited. The use of power is a form of arm-twisting that casts doubt on the voluntariness of that consent.

In the judicial context, the situation is even more troubling since the exercise of judicial *power* is not only the exercise of power without authority, but also a failure to exercise delegated authority. By introducing a condition that a court is not authorized to induce, the judge avoids (and the movant is denied) an up-or-down determination on the motion itself. Passing judgment on the motion is a part of the judicial function that the judge should not escape; judicial inaction is not within the judge's discretion.[175] By granting or denying the motion with conditions, the judge is, in some sense, ruling on a motion that the parties didn't file; but, more importantly, it is not ruling on the motion that one of the parties did file. Even if consenting to the conditional order, the movant has not consented to *not* having a ruling on her motion.

Moreover, consent is a dubious basis for because conditional orders may also not even provide a meaningful opportunity to reject the offer. If a motion for additional discovery is granted on the condition that the defendant pay the additional attorneys' fees associated with that additional discovery, then the movant can reject the conditional grant by simply not engaging in the additional discovery. But consider an order dismissing for lack of proper venue where the order is conditioned upon the waiver of defendant's statute of limitations defense if the case is re-filed elsewhere. If the defendant finds these conditions unacceptable, he cannot simply abandon the motion. Of course defendant could move to withdraw his ("successful") motion or move to vacate the judgment that was entered on his motion, but either approach would require further litigation and also the court's permission.[176] The failure to take these affirmative steps—which would also involve returning the partial victory for the chance at a complete victory—is an unfamiliar foundation for consent.[177] Deriving meaningful

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[173] Authority is a form of leverage generated by a demonstrably valid right or justification.

[174] *See generally* Steven Lukes, Power: A Radical View (1974). *See also* Robert O. Keohane & Joseph Nye, Jr., Power and Interdependence in the Information Age, 77 For. Aff. 81, 86-88 (1998) (distinguishing between "hard" power exercised through threats and rewards and "soft" power exercised through persuasion).

[175] *See* David L. Shapiro, *Jurisdiction and Discretion,* 60 N.Y.U. L. REV. 543, 577-78 (1985). *See* VILA at 10.

[176] The withdrawal of a motion ordinarily would require the court's permission.

[177] To bring these issues into further relief, consider the conditional denial of a motion. Imagine that the motion to dismiss on ground of forum non conveniens is denied on the condition that the litigation will proceed

consent in the context of a conditional denial can be even more problematic.[178]

V. CONDITIONS IN CONTEXT

The mismatch between the form and practice of conditional orders is illustrative of a broader jurisprudential phenomenon. This Part V uses a wide-angle lens to examine conditional orders within this larger context.

Conditional orders enable a more individualized justice. Germane conditions can facilitate creative outcomes tailored to the unique circumstances of the case presented.[179] Fairness conditions can minimize prejudice, protect vulnerable parties, and deliver just results in each application of a uniform rule.[180] And efficiency conditions can help assure that justice in a particular case is not delayed.[181] Whether the flexibility and tailoring is used constructively or destructively,[182] conditions enable judges to adapt to the circumstances presented and to customize their order.

Profound respect for individualized justice is part of the tremendous legacy of equity. For centuries the Anglo-American legal system administered justice through separate systems of law and equity. The law courts ensured uniformity and predictability, while courts in equity tailored the substance and procedure to the exigencies of each case.[183] Within a merged system of law and equity, the spirit of equity is reflected in many important doctrines, traditions, and practices. Much of our contemporary substantive law, procedural law, and remedial law originated in equity.[184] And, perhaps more subtly, the influence of equity is reflected in the proliferation of broad principles as opposed to narrow rules,[185] variable

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according to a timetable that is more convenient for the defendants. Is anything short of an "objection" going to constitute "consent"? Again, the rational act of risk aversion, is a rather dubious foundation for consent.

[178] For example, a court might deny a motion to intervene on the condition that the existing parties allow robust participation by the putative intervenor as an amicus. Have the parties "consented" if they fail then to voice their objection to the court's order? Must the parties seek clarification of the court's intent regarding "robust participation"?

[179] *See* nn. __ *supra* and accompanying text.

[180] *See* nn. __ *supra* and accompanying text.

[181] *See* nn. __ *supra* and accompanying text.

[182] Conditions can unfairly exploit, prejudice, embarrass, bias, and deprive.

[183] *See* Thomas O. Main, *Traditional Equity and Contemporary Procedure,* 78 WASH. L. REV. 429, 444 (2003) ("Law and equity approached a given set of facts from opposite angles—invoking distinctive traditions, applying different reasoning, and pursuing separate aims."). *See generally* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 65 (1921) ("[W]hen the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history, and sacrifice custom in the pursuit of larger ends."); Joseph Story, Commentaries on Equity Jurisprudence: As Administered in England and America § 28, at 19 (12th ed. 1877). *See also Toledo, A.A. & N.M. Ry. v. Penn. Co.,* 54 F. 746, 751 (C.C.N.D. Ohio 1893) ("[T]he powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex … relations and the protection of rights can demand.").

[184] *See* Thomas O. Main, *ADR: The New Equity,* __ U. CINTI. L. REV. __ (2005) (detailing Equity's legacy in substantive and procedural law).

[185] *See generally* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 98, 158-162 (1991); Antonin Scalia, *The Rule of Law as a Law of*

standards of conduct,[186] balancing tests,[187] lee ways of precedent,[188] the acceptance of legal fictions,[189] and broad grants of discretionary authority.[190] Conditional orders can "adjust at one stroke the various interests of all parties concerned"[191] and, thus, are part of this tradition that favors the specific over the general.

The apparent vitality of equity's legacy is intriguing in light of other jurisprudential currents. After all, "judicial activism" is a boogeyman with whom few choose to associate.[192] "For a generation now, candidates for the federal bench have been expected to ritualistically disavow liberal activism. As a job criterion, anti-activism is right up there with 'objectivity' in the minds of the public, Congress and, now, the judiciary itself."[193] Judges overstep their institutional boundary by forsaking "neutral principles,"[194] creating policy in an area which should be left for the legislature,[195] or by

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Rules, 56 U. CHI. L. REV. 1175 (1989); Robert F. Nagel, *The Formulaic Constitution,* 84 MICH. L. REV. 165 (1985).

[186] *See generally* Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code,* 27 STAN. L. REV. 621 (1975); James Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law,* 51 IND. L.J. 467 (1976); Aaron Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts,* 57 N.Y.U. L. REV. 521 (1982).

[187] *See generally* Robert F. Nagel, *Liberals and Balancing,* 63 U. COLO. L. REV. 319 (1992); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773 (1995).

[188] *See generally* Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't: When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605 (1990); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991).

[189] *See generally* LON FULLER, LEGAL FICTIONS 9 (1967); Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1 (1990); HENRY SUMNER MAINE, ANCIENT LAW 17–36 (E.P. Dutton & Co. 1910) (1861).

[190] *See* P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law,* 65 IOWA L. REV. 1249, 1251-59 (1980); ALAN PETERSON, THE LAW LORDS 123-24 (1982).

[191] Sherman Steele, *The Origin and Nature of Equity Jurisprudence,* 6 AMER. LAW SCH. REV. 10, 14 (1926).

[192] *See, e.g.,* Valerie Bauerlein, Senate Rivals Court Key Voters Down East, News & Observer (Raleigh, N.C.), Oct. 31, 2004, at A1 (identifying judicial activism as an issue used to motivate North Carolinians to vote in the hotly-contested U.S. Senate race for John Edwards' open seat); Editorial, Courting Consistency, Columbus Dispatch, Nov. 5, 2004, at 10A (applauding voters for effectively putting an end to an era of judicial activism by the Ohio Supreme Court); Jannell McGrew, Roy Moore Backer Holds Lead, Montgomery Advertiser, Nov. 3, 2004, at A6 (describing the platform of Tom Parker, Alabama Supreme Court candidate, as one of "rein[ing] in 'judicial activism"' on the heels of public protest following the removal of Chief Justice Roy Moore for ignoring a federal court order to remove a monument of the Ten Commandments from the state Judicial Building); Richard Ruelas, Judge Unexpectedly Targeted in Political Campaign, Ariz. Republic, Nov. 1, 2004, at 1B (discussing the tactics of a conservative Arizona political group intended to send a message to judges who are perceived as "trying to legislate increased abortion access and gay marriage from the bench"); Joan Vennochi, Was Gay Marriage Kerry's Undoing?, Boston Globe, Nov. 4, 2004, at A15 (suggesting that the Massachusetts Supreme Judicial Court played a role in John Kerry's presidential loss as a result of its approval of same-sex marriage during his campaign).

[193] Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops … it's Still Moving,* 58 U. MIAMI L. REV. 143, 145 (2003) (citing David Alistair Yalof, Pursuit of Justices: Presidential Politics and The Selection of Supreme Court Nominees (1999)).

[194] The neutral principle theory suggests that judges should decide cases based on general principles which are consistently applied in similar cases. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Intepretivism and Neutral Principles,* 96 HARV. L. REV. 781 (1983).

[195] *See* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); KENNETH M. HOLLAND, JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE, 1 (Kenneth M. Holland ed., 1991) ("Judicial activism comes into existence when courts do not confine themselves to adjudication of legal conflicts but adventure to make social policies….").

nullifying legislation.[196] The judiciary is constituted only to interpret the laws, not to make or enforce them.[197] And with regard to that particular task of interpretation, the "rule of law" demands consistency and uniformity from the judiciary.[198]

In many respects equity, then, appears to have lost its currency. The structural reform injunction[199]—"the most visible and perhaps the most ambitious exercise of judicial power"[200]—awaits a eulogy.[201] Less

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[196] *See* C. HERMAN PRITCHETT, THE ROOSEVELT COURT 277-285 (1948) (stating that the "most perpelexing" dilemma faced by the Roosevelt Court was the "determination of the degree of deference owed by a liberal bench to the legislative will."); Bradley C. Canon, *A Framework for the Analysis of Judicial Activism in* SUPREME COURT ACTIVISM AND RESTRAINT 385-386 (Stephen C. Halpern & Charles M. Lamb eds., 1982) ("Classic discussions of activism focused on the nullification of legislation—usually liberal in nature—by conservative justices.").

[197] The statement that judges should not make law has been something of a mantra for conservatives since the Warren Court. See Address to the Nation Announcing Intention to Nominate Lewis F. Powell, Jr. and William H. Rehnquist to be Associate Justices of the Supreme Court of the United States, 1971 Pub. Papers 1053, 1054 (Oct. 21, 1971). *See also* 144 Cong. Rec. S11,883 (daily ed. Oct. 8, 1998) (statement of Sen. Thurmond regarding the nomination of William A. Fletcher to the Ninth Circuit Court of Appeals) ("I firmly believe that the role of the judge is to interpret the law as the legislature intended, not to interpret the law consistent with the judge's public policy objectives. A judge does not make the law and is not a public policy maker."); 144 Cong. Rec. S646 (daily ed. Feb. 11, 1998) (statement of Sen. Ashcroft regarding the nomination of Margaret M. Morrow to the District Court for the Central District of California) ("[T]he question is ... whether this candidate will say the legislature is the place to make the law, and whether she will recognize that courts can only make decisions about the law."); 140 Cong. Rec. 27,526 (1994) (statement of Sen. Gramm regarding the nomination of H. Lee Sarokin to the Third Circuit Court of Appeals) ("I believe judges ought to be in the business of interpreting laws, not making them."); 140 Cong. Rec. 27,470 (1994) (statement of Sen. Hatch regarding the nomination of H. Lee Sarokin to the Third Circuit Court of Appeals) ("What are judges for other than to implement the laws, to abide by them, to interpret them, not to make them."); 140 Cong. Rec. 7509 (1994) (statement of Sen. Hatch regarding the nomination of Rosemary Barkett to the Eleventh Circuit Court of Appeals) ("[W]e do not need another [judge] who ignores the laws and starts to put his or her own emotional predilections into the law instead of interpreting the **laws** made by elected representatives ...."); 139 Cong. Rec. 18,133 (1993) (statement of Sen. Grassley regarding the nomination of Ruth Bader Ginsburg to the Supreme Court) ("For me, [judicial restraint] is being very cautious to make sure you only interpret the law and do not make the law ...."); 137 Cong. Rec. 25,264 (1991) (statement of Sen. Specter regarding the nomination of Clarence Thomas to the Supreme Court) ("Justices are supposed to interpret the law rather than make the law."); 137 Cong. Rec. 23,612 (1991) (statement of Sen. Specter regarding the nomination of Clarence Thomas to the Supreme Court) ("[T]he Court is supposed to interpret law, not to make law."). *Cited in* Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory,* 78 N.C. L. Rev. 1253 (2000).

[198] *See, e.g.,* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue,* 42 WM. & MARY L. REV. 1575, 1594 (2001) ("Central to the rule of law is the notion that judicial decision making must be marked by reason, integrity, and constituency."); Neil S. Siegel, *State Sovereign Immunity and Stare Decisis: Solving the Prisoners' Dilemma Within the Court,* 89 CAL. L. REV. 1165, 1183-1184 (2001) ("[R]eplicability, stability and consistency in application are values that the ideal of the rule of law is intended to serve.").

[199] In this remedial regime, the trial judge became the central figure of the entire litigation process by both determining liability and then fashioning a decree that would achieve the constitutional or regulatory purpose. The injunctions ordered forward-looking, affirmative steps.

[200] OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 18 (1978).

[201] "Evidence of the end is everywhere to be seen: On September 25, 2003, *Missouri v. Jenkins,* 515 U.S. 70 (1995)—a 26-year-old, $2 billion case seeking to desegregate Kansas City public schools that reached the Supreme Court three times - finally ended. The case was closed when plaintiffs voluntarily dismissed their appeal of the district court's ruling that the 35,000-student district had met its final goal of closing the achievement gap between black and white students. Ann Bradley, Kansas City Marks End of Desegregation Case, 10/8/03 Educ. Wk. 4 (available at 2003 WL 9607526). Although lawyers for the plaintiffs in *Missouri v. Jenkins* would not comment on their reasons for dropping the appeal, many observers believe that the appeal was sure to lose, especially given that both the Eight Circuit and the Supreme Court had expressed exasperation that the case had dragged on for so long. See also Tresa Baldas, As Large School Districts Leave Court Supervision, Critics See Resegregation, Nat. L.J., June 16, 2003, at 4. (reporting that school districts across the nation are seeking to be released from federal supervision under decades-old decrees ordering actions taken to desegregate and provide a

ambitious forms of equitable relief, too, have been curtailed: federal judges may not fashion new forms of equitable relief without express congressional permission, and, even when permission has been granted, that authority must be read narrowly by judges.[202] More and longer procedural rules suggest regulatory creep.[203] And judges are unable to invoke equity or equitable principles to supplant or override existing procedural rules: summary jury trials,[204] mandatory ADR,[205] settlement class actions,[206] trial-by-statistics,[207] and creative contempt sanctions[208] are among the many

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"unitary," equal education to all students)." Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops ... it's Still Moving,* 58 U. MIAMI L. REV. 143, 145 (2003).

[202] Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power,* 78 Ind. L.J. 223 (2003) (citing *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.,* 527 U.S. 308 (1999); *Great-West Life & Annuity Insurance Co. v. Knudson,* 534 U.S. 204 (2002)).

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[204] A summary jury trial is a trial of an action usually tried in one day during which each party presents the facts in a courtroom before a judge and jury for a verdict, usually by the end of the day. It is an expedited means to have a jury evaluate a case on a binding or nonbonding basis. Judge Thomas Lambros of the U.S. District Court for the Northern District of Ohio created this procedure in 1980 in "response to burgeoning court dockets." Thomas D. Lambros, *The Summary Jury Trial: An Effective Aid to Settlement,* 77 JUDICATURE 6, 6 (1993). Early resistance to the technique is illustrated by *Strandell v. Jackson County,* 838 F.2d 884 (7th Cir. 1987); *Hume v. M & C Management,* 129 F.R.D. 506, 506 (N.D. Ohio 1990) (holding that court has not authority to use persons as summary jurors); Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations,* 53 U. CHI. L. REV. 366 (1986); Shirley A. Wiegand, *A New Light Bulb or the Work of the Devil? A Current Assessment of Summary Jury Trials,* 69 OR. L. REV. 87, 115 (1990).

[205] The judicial debate hinged primarily on the interpretation of an earlier version of Rule 16. With non-coercive, permissive language earlier Advisory Committee Notes acknowledged, if not encouraged, judges to use ADR before trial. The Notes did not clearly identify acceptable ADR methods. Courts rejecting mandatory ADR read Rule 16 and the accompanying notes as limiting the courts' express and inherent authority rather than encouraging judicial innovation. Judges could urge litigants to use litigation alternatives, but had no power to compel them, these courts said. Amid disputes about the scope of judicial authority, demands for faster and less expensive dispute resolution led to important statutory changes during the l990s, particularly the Civil Justice Reform Act of l990, which directed federal courts to draft plans for streamlining case processing and resolution—including making ADR options available to litigants. Rule 16 was also amended in 1993 to include provisions authorizing certain ADR referrals.

[206] *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591 (1997). This case resulted from an attempt to use a settlement class action to resolve asbestos liability. This strategy began when all asbestos cases pending in federal court were enjoined pending issuance of a final order by District Judge Weiner in the Eastern District of Pennsylvania. Thereafter, settlement negotiations ensued between the asbestos bar, the insurers, and the tort defendants. The Center for Claims Resolution (the "CCR"), a facility formed by certain defendants to settle asbestos claims, indicated that it would be willing to settle, but only if future claims could be resolved as well. The mechanism decided on to settle future claims was a plaintiffs' class action with respect to all persons who had not yet filed an asbestos related lawsuit, a simultaneous settlement agreement, and a motion for class certification. The proposed class would have comprised all persons who had been exposed to asbestos but who had not yet filed a lawsuit. Upon approval of the settlement, every member of the class would have been barred from suing any company participating in the CCR. The district court certified the class, but the Third Circuit reversed and the Supreme Court affirmed. The Supreme Court held that the common issues of exposure to asbestos and not yet filing a complaint did not predominate over the non-common issues of type of asbestos exposure, type of disease, history of cigarette smoking, extent of medical expenses, and so on. It also held that the class representatives could not fairly represent the class members because they had conflicted positions, based on their diverse medical conditions and whether they had merely been exposed to asbestos or were in fact ill. Finally, notice to class members could probably not be given fairly because of the latent nature of asbestos exposure, although that issue was not dispositive to the decision denying class certification.

[207] In *Cimino* ____, Judge Parker certified a class of 3,031 plaintiffs, all of whom had pending asbestos claims in the Eastern District of Texas. Settlements and dismissals reduced the class to 2,298 claims. Five defendants that manufactured asbestos products remained in the case at the time of trial. Judge Parker conducted trials of these cases in three phases. In Phase I, a jury resolved all the issues that were common to the plaintiffs in the litigation, using procedures that Judge Parker had created and applied--and, most importantly, the court of appeals had approved--in Jenkins v. Raymark. The issues were whether the asbestos

judicial innovations once held to be beyond the proper exercise of judicial authority.[209]

So has equity won?[210] Or lost?[211] It should not surprise that the resolution of the law-equity tension would be complex. A unified system must reconcile its commitment to equity—or fairness, which is probably the most important principle of jurisprudence[212]—with the countervailing concern for certainty—or uniformity, which may be the most basic principle

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products were defective and unreasonably dangerous, whether the warnings were adequate, and whether the state of the art or fiber type defenses were viable. The jury also considered the issue of punitive damages and returned its Phase 1 verdict after about seven weeks of trial. In addition to finding defective products, the jury found all five defendants to be grossly negligent and, in response to a special interrogatory, found punitive damages multipliers ranging, for the five defendants, from $1.50 to $3.00 for each $1.00 of actual damages. Phase II was designed for another jury to establish levels of exposure for various worksites and crafts for defendants, including those defendants who settled, and to apportion percentages of causation among the defendants. As it turned out, defendants stipulated to findings on all of the issues in Phase II. Phase III dealt with damages. The court divided the cases into five disease categories based on plaintiffs' injury claims and selected a random sample of cases from each disease category. The categories, total numbers, and sample sizes (in parentheses) were: mesothelioma-32 (15); lung cancer-186 (25); other cancer-58 (20); asbestosis 1,050 (50), and pleural disease-972 (50). Two new juries were impaneled and they sat together for five days to hear general medical testimony. They then sat separately and heard testimony, group-by-group, on cases from each of the five injury groups and returned separate damage verdicts for all the cases from each group over a period of approximately 3 months. The juries considered the groups in descending order of severity, starting with the mesothelioma cases. Judge Parker reviewed the verdicts and ordered remittiturs in 34 pulmonary and pleural cases and in one mesothelioma case. According to Professor Mullenix, in a case study of Cimino, Judge Parker "used almost every known technique for aiding jury comprehension, including extensive pretrial and posttrial jury instructions, jury notebooks, notetaking, interim summations, and witness photographs to refresh the jury's memory." Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation,* 32 WM. & MARY L. REV. 475, 572 (1991). Based on statistical evidence presented at a post-trial hearing, Judge Parker found that the sample cases were in fact representative of the total population on all relevant variables. Defendants did not challenge the statistical evidence. After calculating the remittiturs and including cases with zero verdicts, the court applied the average damage awards within each disease category to the remaining cases within that category. Plaintiffs waived any rights to individual damage determinations. Defendants objected on due process grounds. The court rejected those challenges, saying that "unless this plan or some other procedure that permits damages to be adjudicated in the aggregate is approved, these cases cannot be tried." Defendants appealed, and the Court of Appeals unanimously held that the sampling procedures violated the Seventh Amendment and perhaps also the Due Process Clause. *Cimino,* 151 F.3d at 320-21. *See also In re Fibreboard Corp.,* 893 F.2d 706 (5th Cir. 1990).

[208] *See* nn. ___, *supra,* and accompanying text.

[209] Of course many of these innovations were later implemented through "proper" legislation. *See* __.

[210] *See* nn. __ *supra* and accompanying text. *See also* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,* 135 U. PA. L. REV. 909, 970-82 (1987); Richard Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure,* 50 U. PITT. L. REV. 725, 725 ("[A]s to the pretrial portion of litigation, equity conquered law."); Judith Resnik, *Managerial Judges,* 96 HARV. L. REV. 374, 376 (1982) (the relaxed procedures of equity allow activist judges to take control of litigation throughout the pretrial stage); Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Torts,* 1991 U. ILL. L. REV. 269, 278-81 (1991) (offering examples of how equity has dominated the legal system through "modes of proof and trial," and the "varied circumstances in which courts today turn to equitable remedies" in mass tort cases); Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era,* 80 N.C. L. REV. 527, 542-51 (2002) (discussing equity's triumph in mass tort trial procedures); Douglas Laycock, *The Triumph of Equity,* 56 LAW & CONTEMP. PROBS. 53, 53-54 (1993) ("The war between law and equity is over. Equity won."); Abram Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1292-96 (1976) (declaring in public law litigation the "triumph of equity"); 1 Charles E. Clark, Cases on Pleading and Procedure preface (1930) (among other highlights of the volume were "[t]he history of equity, and its triumph over law").

[211] *See* nn. __ *supra* and accompanying text. *See also* Thomas O. Main, *Traditional Equity and Contemporary Procedure,* 78 Wash. L. Rev. 429 __ (2003).

[212] *See* ROSCOE POUND, LAW AND MORALS 65 (1924) ("Cases are seldom exactly alike."); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach,* 35 COL. L. REV. 809, 833 (1935) ("Every case presents a moral question to the court.").

of jurisprudence.[213] The architects of the merger of law and equity did not articulate precisely how a unified system could ensure uniformity yet also depart from rigid rules to ensure fairness in each case. The form and practice of conditional orders illustrate the tension and demonstrate the contemporary compromise.

In form, there are an increasing number of instances where judges are legislatively authorized to impose conditions.[214] These codifications demonstrate the systemic response to the demand for and the utility of conditions, to-wit: legislation. And indeed, codification is the likely response if useful but unauthorized conditions are revealed by this essay or are identified elsewhere. But legislative micromanagement can create mischief, of course, as rules drafted for one situation then become a major source of inefficiency and unfairness in unanticipated later situations;[215] this cycle repeats and the pathogens of strict law spread.[216] Importantly, however, this strain of regulatory creep may be different because the legislation does not prescribe a particular result. Instead, these reforms lead to legislation that authorizes the exercise of judicial discretion.[217]

Discretion is the expression of equity in our merged system. Judicial discretion enables flexibility and ensures a more individualized justice;[218] and of course this is entirely consistent with equity's protocol.[219] Yet there is a significant difference between equity and discretion: symbolically if not also practically, discretion is exercised from within a zone or frame of possibilities.[220] A judge with discretion may have many options within that frame, but the exercise of the judicial authority is fundamentally a *choice*. Equity is not similarly constrained.[221] Indeed, the very purpose of a separate system of equity was to offer relief from laws that did not—or could not—anticipate the situation presented.[222] Equity presumed that laws were the product of human calculations that were not always precise and of

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[213] Henry J. Friendly, *Some Indiscretion About Discretion,* 31 EMORY L.J. 747, 758 (1982).

[214] *See* nn. __ *supra* and accompanying text.

[215] *See generally* Edward H. Cooper, *Aggregation and Settlement of Mass Torts,* 148 U. PA. L. REV. 1943, 1944 (2000) ("[I]t may be better to leave judges free to adapt to the challenges without interference from statutes and rules framed for the last war by Congress and the rulemaking committees.").

[216] *See generally* Bayless Manning, *Hyperlexis: Our National Disease,* 71 NW. U. L. REV. 767, 767 (1977); Thomas O. Main, *Traditional Equity and Contemporary Procedure,* 78 WASH. L. REV. 429, __ (2003).

[217] *See* nn. __ *supra* and accompanying text.

[218] *See* FREDERIC WILLIAM MAITLAND, EQUITY AND THE FORMS OF ACTION 4-7 (A.H. Chaytor ed., 1909); Sidney Post Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171 (1936); 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 27, at 19 (12th ed. 1877).

[219] *See* JOHN FREEMAN MITFORD, TREATISE ON THE PLEADINGS IN SUITS IN THE COURTS OF CHANCERY BY ENGLISH BILL 112, 123 (George Jeremy ed., 1980); RICHARD WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 203-06 (T. Payne ed., 1792).

[220] *See* nn. __ *supra* and accompanying text.

[221] Robert Severns, *Nineteenth Century Equity: A Study in Law Reform,* 12 CHI.-KENT L. REV. 81, 89 (1934) (the Chancellor had "the right and the powers, in fact, to do as he likes, whatever hard law and still harder practice may dictate.")

[222] *See* Robert Wyness Millar, ____ 24 (1952); Robert Severns, *Nineteenth Century Equity: A Study in Law Reform,* 12 CHI.-KENT L. REV. 81,84 (1934).

generalizations that were not always general.[223] Equity offered an escape from rigid rules and empowered the judicial imagination.[224] But this part of equity's protocol has faded in the unified system. In form, then, that part of equity's protocol represented by judicial discretion has been embraced and authorized,[225] while that part of equity's protocol that enabled and encouraged exercises of the judicial imagination has been curtailed or rejected.[226]

In practice, however, the spirit of equity may innovate and create, whether or not authorized. In this essay it has been demonstrated that judges are imposing some conditions that may be facilitating creative, fair, and just outcomes; yet those orders are not authorized by the standard sources of judicial authority.[227] Such practices may be illustrative of other unauthorized exercises of judicial authority that are tolerated if not also desired. For example, no matter the political resistance and prevailing case law, judges must, or at least will craft creative, dramatic forms of injunctive relief to remedy certain wrongs.[228] And regardless of the procedural infrastructure, judges with unusual demands of case management will undoubtedly try to deviate from those rules.[229] Although some exercises of this authority could be challenged or even reversed on appeal, others may never be reviewed by an appellate court. Or appellate courts, too, may recognize that some judicial actions are useful or beneficial even without formal authority. For example, in many appeals in cases where conditional orders were issued, neither the parties nor the court even questioned the propriety of the condition.[230]

Equity is a natural precursor to the law's innovations, and thus the dissonance between form and practice could be viewed in a very positive light.[231] Codified discretion is an inadequate substitute for equity. Equity can play an important role in the growth of the law, and without that engine, "our law will be moribund, or worse."[232] A merged system of law and equity could (and in fact presently does) tolerate this practice through

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[223] Thomas O. Main, *Traditional Equity and Contemporary Procedure,* 78 WASH. L. REV. 429, 434 (2003).

[224] JOHN SALMOND, JURISPRUDENCE 1–5 (13th ed. 1906) (suggesting that the true and original distinction between law and equity is one not between two conflicting bodies of rules, but between a system of judicial administration based on fixed rules and a competing system governed solely by judicial discretion); BALDWIN, *supra* note __, at 64 (referring to equity as a court "of indefinite powers and unrestricted procedure").

[225] *See* nn. __ *supra* and accompanying text.

[226] *See* nn. __ *supra* and accompanying text.

[227] *See* nn. __ *supra* and accompanying text.

[228] *See* nn. __ *supra* and accompanying text.

[229] *See* nn. __ *supra* and accompanying text.

[230] *See* nn. _*supra* and accompanying text.

[231] *See* GOLDWIN SMITH, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 209 (1990) (crediting Sir Henry Sumner Maine for the famous dictum that there are three methods by which the law has sought to meet changing conditions: (i) fictions; (ii) legislative amendment; and (iii) equity). *See also* Melvin M. Johnson, Jr., *The Spirit of Equity,* 16 B.U. L. REV. 345, 352–53 (1936).

[232] Percy Bordwell, *The Resurgence of Equity,* 1 U. CHI. L. REV. 741, 749 (1934).

benign neglect. But accusations of judicial activism are forthcoming.[233] And, more significantly, Constitutional mandates demand reform. Articles I and III of the Constitution clearly allocate procedural rulemaking authority to Congress; the courts are the guest in this realm.[234] Further, given the reasonable expectations of litigants, the Due Process Clause may also demand closer adherence to the form.[235]

But if the mismatch between form and practice cannot be ignored, then how should it be rectified? Modifying the practice to match the existing form is probably both undesirable and unworkable. Conditional orders are an extremely useful technique for finding intermediate and compromise solutions; eliminating these options would be an unfortunate tack. Moreover, such an undertaking might also be impossible since judges already impose or induce conditions in a variety of circumstances where they lack the formal authority to do so; efforts to educate trial and appellate judges about the limits of their authority could be effective, but this seems unlikely.

If the practice will not or cannot be modified, then presumably the mismatch can only be rectified by modifying the form to authorize the practice. In other words, the form must give judges the authority to impose useful conditions. This approach could be undertaken with more rules authorizing conditions (and discretion). But as demonstrated by the status quo and as described in Part IV, the profoundly ironic consequence of rules that confer discretion is that they may, in fact, ultimately reduce judicial discretion. By delineating the boundaries of the authority to impose a condition, or by codifying flexibility, the rule not only bounds judicial authority to those particular reference points, but even worse, bounds judicial authority in other contexts where the discretion or flexibility is not detailed. Legislative efforts usurp the more robust role that inherent authority would otherwise perform.[236]

The better approach, then, is not more rules, but fewer rules. More and longer rules will never anticipate all of the eccentricities that fate or human ingenuity are "virile enough to devise."[237] My effort here is to urge a commitment and return to more flexible rules of procedure that reflect the rhetoric and common perception that the Federal Rules are "all equity."[238] Amendments that add the authority to condition or that purport to give discretion perpetuate a cycle that leads to the creation of further procedural insufficiencies that, in turn, require still more elaboration. That cycle must

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[233] *See* nn. __ *supra* and accompanying text.
[234] *See* nn. __ *supra* and accompanying text.
[235] *See* nn. __ *supra* and accompanying text.
[236] *See* nn. __ *supra* and accompanying text.
[237] Colin P. Campbell, *The Court of Equity—A Theory of its Jurisdiction,* 15 GREEN BAG 108, 113 (1903)
[238] *See* nn. __ *supra* and accompanying text.

be broken with broader rules that facilitate vigor and common sense and efficiency and fairness in their application. Conditional orders offer a useful case study of a paradox: rules that purport to authorize, may in fact constrain.