

**IF YOU (RE)BUILD IT, THEY WILL COME:
CONTRACTS TO REMAKE THE RULES OF LITIGATION
IN ARBITRATION’S IMAGE**

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INTRODUCTION

The Seventh Amendment to the U.S. Constitution provides that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved”¹ Rule 38 of the Federal Rules of Civil Procedure provides that “[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.”² The Supreme Court has described the right to trial by jury in a civil action as a “basic and fundamental” right that is “sacred to the citizen” and therefore “should be jealously guarded by

1. U.S. CONST. amend. VII.

2. FED. R. CIV. P. 38.

the court.”³ But parties to a contract may agree that, in the event a dispute arises, they waive their right to a jury. If this dispute resolution right—which is fundamental, constitutional, and set forth in the Federal Rules of Civil Procedure—may be used as a bargaining chip, are there any limits on parties’ ability to modify the rules of public dispute resolution in their ex ante contract?

In this Article, I examine the limits on parties’ ability to design and implement through contractual agreements their own set of public dispute resolution rules. I do not, however, focus on the usual method—opting-out of the public courts in favor of private arbitration. Instead, I consider parties’ ability to “opt-in” and choose the public courts as the forum for dispute resolution, yet waive, modify, and displace the “normal” litigation rules.⁴

Others have written about the general concept of agreements that modify certain litigation rules. These commentators criticize the growing body of law that recognizes the ability of private parties to modify the rules of public dispute resolution. For example, Professor David Taylor and Sara Cliffe argue that courts have improperly elevated ex ante contracts to “a status of ‘super contract,’ a status that transcends traditional rules of contract law and results in near-automatic enforcement by means of specific performance.”⁵ Professor Jean Sternlight argues that waiver of litigation rights, both constitutional and other rights, should require voluntary and knowing consent to such waiver.⁶ Professor Linda Mullenix argues that “[t]he cen-

3. *Jacob v. New York City*, 315 U.S. 752, 752–53 (1942); see also *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) (stating that the right to jury trial “is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care”) (internal quotation and citation omitted).

4. Throughout this Article, I use the term “litigation” to refer to public dispute resolution that occurs when a civil action is filed in state or federal court. I use the phrases “litigation rules” and “litigation rights” to refer to the variety of constitutional provisions, statutes, procedural rules, and other rights and obligations that apply to an action filed in state or federal court. Finally, I use the term “modify” to refer to agreements that waive, alter, alienate, or displace the existing litigation rules and rights.

5. David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convolved Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1088 (2002).

6. See Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. DISP. RESOL. 669, 678 (2001) (arguing that arbitration agreements, which effect a waiver of Seventh Amendment jury rights, should be subject to review to ensure that parties made volun-

tral problem is that substantial litigation rights are sacrificed to enhance purely prudential considerations. Contract principles now effectively usurp long-standing jurisdictional and conflict-of-laws rules."⁷

These commentators argue that the judiciary should rein in the use of ex ante contracts to modify litigation rules founded primarily on the Constitution. The commentators do not, however, explore the outer boundaries of private parties' ability to modify litigation rules by contracts made before disputes arise.⁸ In this Article, I seek to identify and examine those limits. To anchor this inquiry in something more than academic interest, I compare the limits and benefits of modified litigation with the limits and benefits of arbitration—generally considered a reasonable and often better alternative to litigation.⁹

tary, knowing, and intentional waivers made with sufficient awareness of the relevant circumstances and likely consequences); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 59 (1997) (arguing that the standard of consent required to waive constitutional protections should be "sufficient to protect ignorant employees and consumers from unwittingly waiving their rights to a jury trial, an Article III judge, and due process"); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 707 (1996) (arguing that Congress should amend the Federal Arbitration Act to allow states "to enact legislation designed to ensure that arbitration agreements are entered knowingly and voluntarily").

7. Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 296 (1988).

8. In their recent article, Professors Robert Scott and George Triantis hint that this subject is a "rich avenue for future research" that has so far escaped attention:

[T]he fact that parties can vary the rules of litigation in their ex ante contract is relatively unexplored We have been hard pressed . . . to find scholarly treatises on procedure or evidence that identify the subset of these rules that are default rather than mandatory provisions. And, as we have already noted, contracts scholars focus principally on the substantive terms and not on the ability of the parties to regulate the procedural course of their future enforcement.

Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 857 (2006).

9. "Professors of alternative dispute resolution (ADR) and of civil procedure often move in different circles. . . . Although the two fields have a common focus on issues of procedural justice, the two sets of professors work in professional arenas that have been separately delineated, each with its own set of conferences, newsletters, law journals, and affiliated practitioners." Jean R. Sternlight & Judith Resnick, *Competing and Complementary Rule Systems: Civil Procedure and ADR*, 80 NOTRE DAME L. REV. 481, 481 (2005). This situation should change. The goals, policy choices, and results of litigation are better understood when we assess litigation as a potentially superior alternative to arbitration.

I conclude that there is a presumption that litigation rules may be modified by an *ex ante* contract and that such a contract is subject to specific performance. The contract will not be enforceable, however, in the following circumstances: (A) where it gives a court subject matter jurisdiction (either expressly or impliedly) that the court would not otherwise have; (B) where the agreement is not enforceable under the traditional standards of contract law (that is, if the contract itself is not enforceable); (C) where the contract waives certain constitutional rights, it *may* be unenforceable if it was not made knowingly, voluntarily, and intelligently; (D) where Congress has acted to affirmatively prohibit modification of a specific litigation rule; (E) where the agreement seeks to waive litigation rights of a person who is not a party to the contract, including the public's litigation rights; and (F) where there is an overriding procedural consideration that prevents enforcement of the contract because it would irreparably discredit the courts.

If the contract was entered into by two sophisticated, commercial entities that are both represented by lawyers, we can eliminate most concern with limits (B) and (C). If the litigation right that is modified by *ex ante* contract is a right that courts have held can be waived during litigation, then we can eliminate most concern with limits (A), (E), and (F). Likewise, if the parties can waive the litigation right by agreeing to arbitration, they should be able to waive the same right in modified litigation without encroaching upon limits (A), (E), and (F). Thus, if Congress has not expressly precluded contractual modification of a litigation rule, parties may modify any litigation rule that they may waive either during litigation or by electing arbitration. If such a contract satisfies standard contract law requirements and, if required, was made knowingly, voluntarily, and intelligently, the contract to modify litigation rules will be subject to specific enforcement.

Given these conclusions, it follows that there is tremendous opportunity for parties to use the free and available public dispute resolution system to better accomplish the aims of arbitration. With one exception, modified litigation has all of the benefits of arbitration: it will be significantly faster than standard litigation; it will be significantly cheaper than standard litigation; and it will allow the parties to define and control the dispute resolution rules. Additionally, modified litigation has significant advantages over arbitration: it is cheaper than arbitration; it includes a meaningful right to appellate review;

it guarantees the appointment of a neutral, independent decision-maker; and it avoids problems with handling certain types of disputes, like consumer class actions, that may not be easily amenable to arbitration. Even the one notable exception—that arbitration is beneficial because it is more confidential than litigation—is counterbalanced by the benefits of *public* dispute resolution. Public dispute resolution produces precedent that helps parties value their disputes and plan to avoid disputes in the future. Modified litigation retains this same advantage. The largest “consumers” of litigation—businesses that frequently resort to a dispute resolution system—therefore stand to benefit the most from this transparency and public development of law. Of course, they also stand to benefit the most from modified litigation rules that provide a disincentive to litigate, such as a more demanding burden of proof, and that also provide “protection” against the risks inherent in a jury trial.

I. THE ARBITRATION PROBLEM

With the enactment of the U.S. Arbitration Act of 1925,¹⁰ now known as the Federal Arbitration Act (FAA),¹¹ Congress provided an approved alternative to litigation. The parties define the scope of the dispute, define the dispute resolution procedures, and determine the legal standards to be applied.¹² It is generally assumed that arbitration is faster, cheaper, and more private than litigation.¹³

Although arbitration has become commonplace (some would say ubiquitous), it has been met with great criticism. Critics

10. Pub. L. No. 68-401, 43 Stat. 883 (1925).

11. 9 U.S.C. §§ 1–307 (2000).

12. See generally *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) (emphasizing that the FAA generally ensures that arbitration agreements are enforced according to the terms agreed upon by the parties).

13. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (noting “the simplicity, informality, and expedition of arbitration”); S. JUDICIARY COMM., REPORT TO ACCOMPANY S. 1005: TO MAKE VALID AND ENFORCEABLE CERTAIN AGREEMENTS FOR ARBITRATION, S. REP. NO. 68-536, at 3 (1924) (stating that arbitration may avoid “the delay and expense of litigation”); Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171, 171 (2003) (arguing that “arbitration can be faster, cheaper and more private than litigation”); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May–July 2003, at 9, 12 (discussing the cost savings of arbitration).

charge that the Supreme Court, in its zeal to support arbitration, has gone beyond Congress's original intent in enacting the FAA. The Court is so enamored with the siren song of "cost-savings" and "efficiency," as well as the indisputable savings in court time, that its decisions in this area are no longer anchored in the Act itself.¹⁴

A. *Arbitration Is Not (Necessarily) Faster than Litigation*

Is arbitration faster than litigation? Not necessarily.¹⁵ According to one recent study, the average time to resolve an arbitration—the time from the date of filing the demand to the date of the award—is 16.5 months.¹⁶ The median time from filing to disposition of a case filed in a federal district court in 2005 was 9.5 months.¹⁷ The median time to get to trial in a case filed in a federal district court in 2005 was 22.5 months.¹⁸

14. See, e.g., Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. (forthcoming 2006) (manuscript at 2, available at <http://ssrn.com/abstract=939609>) ("The FAA that has been created by the Supreme Court in the last twenty-five years reflects judicial policy preferences reminiscent of the policies prevailing at the beginning of the last century, including laissez-faire economics, and an antipathy to state laws and regulations favoring individuals, consumers, and small businesses."); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 331 ("[T]he Supreme Court has rewritten the law governing commercial and employment arbitration in the United States. So bold has the Court been that its work in this field could be said to exemplify the indeterminacy of American law, confirming the hypothesis of Critical Legal scholars that our judges (or at least our Justices) are uncontrolled by legal texts or precedents and free to decide cases according to their own political predilections.").

15. See, e.g., Robert B. Fitzpatrick, *The War in the Workplace Must End, But Arbitration Is Not the Answer*, in ADVANCED EMPL. L. & LITIG. 101, 105 (ALI-ABA Course of Study, Dec. 1–3, 1994), available at C953 ALI-ABA 101 (Westlaw) ("Increasingly, those who have had experiences with arbitration report that it is not cheap, not quick, and as acrimonious as a court battle."); Leslie A. Gordon, *Clause For Alarm: As Arbitration Costs Rise, In-House Counsel Turn to Mediation or a Combined Approach*, A.B.A. J., Nov. 2006, at 19 (noting that arbitration may not be faster than litigation given the "messy, complicated and expensive" process necessary to enforce arbitration clauses and the general absence of summary judgment as a tool for defendants).

16. See Hill, *supra* note 13, at 16.

17. Administrative Office of the U.S. Courts, Federal Court Management Statistics, District Courts (2005), <http://www.uscourts.gov/cgi-bin/cmsd2005.pl> (select "All District Courts," then "Generate"). Disposition of a case may occur prior to trial by, for example, granting of a motion to dismiss or a motion for summary judgment.

18. *Id.*

Even where arbitration is faster than litigation, however, this efficiency is likely the result of the system that the parties have designed. Arbitration is faster because the party-selected procedures dictate a speedy resolution by waiving a jury, streamlining discovery, and otherwise ensuring that the dispute resolution procedures guarantee a quick decision.¹⁹ If these same parties may waive a jury, streamline the discovery process, and alter other procedures to guarantee a quick decision while remaining in the public court system, they may obtain the same efficiency.

B. *Arbitration Is Not Cheaper than Litigation*

Is arbitration cheaper than litigation? Probably not.²⁰ In litigation, the plaintiff incurs a minimal initial filing fee and the parties each incur the costs of their own attorneys. In arbitration, the claimant incurs an initial filing fee to initiate the dispute, and the parties each incur the costs of their own attorneys *plus* (a) administrative fees to pay the overhead of the dispute resolution service (hearing space and operating expenses) and (b) the arbitrators' fees and administrative costs.²¹ These additional expenses, "which are never incurred in the judicial forum,"²² can be substantial and significant.²³ For example, a

19. Simply waiving a jury and having a bench trial will likely reduce the actual trial time by 50–67%. See Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 57–58 (2001) (citing empirical studies of state and federal courts).

20. This Article asks whether arbitration is cheaper than litigation—and whether modified litigation is cheaper than arbitration—for the parties. It does not consider the costs to the general public of supporting the court system; nor does it consider the increased costs to courts if parties choose modified litigation, thus moving cases to the courts that might otherwise be resolved by arbitration.

21. There are other indirect expenses that must be incurred in some instances. For example, many arbitration agreements require that the arbitration take place in a certain city, which might remove a plaintiff's choice of forum and force the plaintiff to incur travel costs. But such expenses also may be imposed in standard, court-administered litigation through forum-selection clauses. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing forum selection clause in boilerplate cruise ticket contract that required plaintiffs located in Washington state to go to Florida for litigation).

22. *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 664 (6th Cir. 2003) (en banc). Most litigation requires payment of a nominal initial filing fee. Some states also require the party filing a motion to pay a minimal fee. For example, California courts require a fee of \$40 for a motion that requires a hearing and a fee of \$200 for a motion for summary judgment or summary adjudication. CAL. GOV'T CODE § 70617(a), (d) (West 2005). On the other hand, most courts also permit an indigent party to seek a waiver of the filing fees. See, e.g., CAL. R. CT. 3.50–63; CAL. GOV'T CODE § 68511.3 (West 2006).

two-party arbitration that involved three days of hearings in San Francisco before a single arbitrator, two days of pre-hearing preparation, and two days of post-hearing research and award preparation might cost each party \$450 in case management fees and \$11,200 in arbitrators' fees.²⁴ Depending upon the arbitrators selected, the same dispute might cost as much as \$96,000 per party in arbitrators' fees if held before a three arbitrator panel.²⁵ The math is simple to do. The costs increase accordingly if one anticipates an arbitration that will require weeks or months of motion practice, testimony, argument, and deliberation.

The high cost of arbitration can be a significant deterrent that precludes consumers, employees, and those with fewer resources from pursuing claims in arbitration.²⁶ The total amount of arbitration fees may be unbearable for the injured party, as well as for the party's contingent fee-based lawyer. Where the

23. My experience as a commercial litigator at a large, national law firm included complaints from sophisticated, corporate clients (on more than one occasion) that were immediately unhappy when informed that a dispute was headed to arbitration as a result of a mandatory arbitration clause. These clients understood that they would have to foot the bill for the cost of the arbitration, and that cost often impacted their decision-making process for resolving the dispute. My experience is not unique. See Gordon, *supra* note 15, at 19 ("With arbitration, you're paying a lot of mouths—you have to pay three guys to think about it. But a judge is already paid for."); Jane Spencer, *Waiving Your Right to a Jury Trial*, WALL ST. J., Aug. 17, 2004, at D1 (reporting that employers have reacted to the increasing costs of arbitration by requiring employees to execute employment contracts that provide for dispute resolution in court but also contain jury waiver clauses); Harold M. Brody & Anthony J. Oncidi, *Careful What You Wish For: Is Arbitration the Employer's Panacea? Perhaps There is a Better Alternative*, HR ADVISOR: LEGAL & PRAC. GUIDANCE, Nov.–Dec. 2003, at 7 (proposing that jury trial waiver may be a better alternative); see also Stephen F. Fink, *Insist On Bench Trials*, NAT'L L.J., Jan. 13, 2003, at A17; J. Michael McGuire & Adam S. Belzberg, *Are Jury Trial Waivers Coming of Age?*, MD. BAR J., Nov.–Dec. 2005, at 25–29.

24. Facsimile from JAMS to Henry Noyes (Sept. 6, 2005) (on file with the Author) (enclosing JAMS Northern California Panel of Arbitrators and arbitration fee schedules containing rates of 52 arbitrators) [hereinafter SF JAMS Rates]. Assuming a ten hour day (some arbitrators' fees are set at a daily rate), the average hourly rate for JAMS arbitrators in the San Francisco area is approximately \$525 per hour. *Id.* By comparison the average hourly rate for JAMS arbitrators in Washington, DC is approximately \$512 per hour. Email from JAMS to Henry Noyes (Sept. 6, 2005) (on file with author) (listing 20 JAMS Washington, DC arbitrators' rates).

25. See SF JAMS Rates, *supra* note 24.

26. See Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts* (Aug. 3, 2005) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=776786 (collecting and discussing articles and cases discussing the prohibitive costs of arbitration).

value of a claim is small, the amount of the arbitration fee may be unconscionable because it is excessive relative to the value of the underlying claim.²⁷ In these cases, the existence of such high costs provides a basis for challenge to the arbitration agreement itself.²⁸

In addition to direct expenses, the “judge for hire” aspect of arbitration creates incentives for the arbitrator to delay resolution of the action, which also may increase expenses. Some have argued that arbitrators are less likely to terminate a dispute as a result of a pre-trial motion, such as a motion to dismiss or motion for summary judgment.²⁹ This inclination may arise from a desire to hear the parties out, but it also might be influenced by the arbitrators’ self-interest in extending their ability to bill the parties for their services. Arbitrators may also be more likely to issue Solomonic “split the baby” decisions to make their employers, the parties, equally happy and increase the likelihood the arbitrator will be selected by these parties in the future.³⁰ Furthermore, arbitration often is preceded by litigation over enforcement of the arbitration agreement. This liti-

27. See *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 571 (N.Y. App. Div. 1998) (holding arbitration clause unconscionable where it required \$4,000 filing fee, \$2,000 of which was non-refundable, exceeding the value of the average computer that was the subject of the agreement); see also PUBLIC CITIZEN’S CONGRESS WATCH, *THE COSTS OF ARBITRATION* (2002). In its study, Public Citizen’s Congress Watch found that the total forum cost, including filing fee, in Illinois courts was \$221 for a \$20,000 claim. *Id.* at 42. By contrast, the arbitration forum cost ranged from \$375 to \$6,750 for the same \$20,000 claim. *Id.* But see Melissa B. Hutchens, *At What Costs?: When Consumers Cannot Afford the Costs of Arbitration in Alabama*, 53 ALA. L. REV. 599, 606 (2002) (stating that the “Alabama Supreme Court has consistently rejected arguments to invalidate arbitration agreements on the basis of financial hardship”).

28. See *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (holding that plaintiff failed to make a sufficient showing of the prohibitive costs of arbitration, but noting in dicta that “the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum.”). A party to an arbitration agreement may also challenge the agreement on grounds that it is unconscionable. See, e.g., *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893–94 (9th Cir. 2002) (applying California state law on unconscionable contracts).

29. See, e.g., Brody & Oncidi, *supra* note 23, at 8; Gordon, *supra* note 15, at 19.

30. See Brody & Oncidi, *supra* note 23, at 8; see also Rebecca Callahan, *Arbitration v. Litigation: The Right to Appeal and Other Misperceptions Fueling the Preference for a Judicial Forum* 39–41 (Apr. 7, 2006) (unpublished manuscript), available at <http://law.bepress.com/expesso/eps/1248> (explaining that a survey of business litigators found frustration with arbitrators deciding matters by “splitting the baby” and not following legal precedent).

gation can be “messy, complicated and expensive.”³¹ Finally, the cost and delay involved in this arbitration enforcement litigation is often overlooked when a party thinks that the decision to choose arbitration means avoiding the litigation process altogether.

Again, any cost-savings from arbitration are likely a product of the streamlined procedures employed in arbitration. If the parties can modify the litigation rules to make litigation look like arbitration, they can realize cost-savings equally as well through modified litigation.³²

C. *Arbitration Is More Confidential than Litigation*

The Seventh Circuit has stated plainly that “[p]eople who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials.”³³ I concede that arbitration is more confidential than litigation.³⁴ The First Amendment, the Due Process Clauses, and

31. Gordon, *supra* note 15, at 19.

32. Cost-savings through modified litigation might also force arbitration providers to reduce their costs to “compete” with the courts.

33. Union Oil Co. of Cal. v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000).

34. See generally Lauri Kratky Doré, *Public Court Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463 (2006) [hereinafter Doré, *Public Court Versus Private Justice*] (discussing the differences between secrecy in litigation and secrecy in arbitration and assessing the benefits and evils of both). Professor Doré's Article is one of several from a symposium on “Secrecy In Litigation” that appear in Volume 81 of the CHICAGO-KENT LAW REVIEW. See also Judith A. Resnick, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 653–59 (2005) (discussing “information suppression . . . through settlement” and state and federal regulation of secrecy in court); AM. ARBITRATION ASS'N, *FAIR PLAY: PERSPECTIVES FROM AMERICAN ARBITRATION ASSOCIATION ON CONSUMER AND EMPLOYMENT ARBITRATION* 16 (2003); RICHARD GARNETT ET AL., *A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION* 14 (2000) (arguing that there is greater confidentiality in arbitration than in traditional litigation); HENRY S. KRAMER, *ALTERNATIVE DISPUTE RESOLUTION IN THE WORKPLACE* § 9.01, at 9-3 (2004); Norman Brand, *Putting It Together I: A Note on the Economics of Imposed Employment Arbitration Agreements*, in *HOW ADR WORKS* 99, 102 (Norman Brand ed., 2002) (noting that employees who might otherwise be reluctant to bring claims of emotional distress in traditional litigation may be more likely to bring such claims in arbitration where there will be no public disclosure of mental, emotional, and sexual history). For a survey of consensual confidentiality in public litigation, see Lauri Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999); see also Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J.L. & POL'Y 67, 67–68 n.2 (2000) (collecting articles on restrictions on public access to information regarding civil cases).

common law rights of access all guarantee public access to court-based hearings.³⁵ Documents that are filed with the court are presumptively available for public access.³⁶ Although any party may move for a protective order to limit public access to the court records,³⁷ there is no guarantee that the motion will be granted. To rebut the presumption of public access to court records, the moving party has the burden of establishing good cause, which must be based on a “a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.”³⁸ If the parties stipulate to the need for a protective order and make a joint motion, the court still may refuse to grant the order and, if granted, it must be narrowly tailored.³⁹

Even if a protective order is issued, documents that are used for a dispositive summary judgment motion are subject to higher scrutiny.⁴⁰ Because entry of summary judgment serves as a substitute for trial, a higher showing is required to deny public access to the court’s summary judgment records than the “good cause” standard for issuance of a protective order.⁴¹ In such cases, the moving party bears the burden of establish-

35. See Resnick, *supra* note 34, at 656–57.

36. See 8 FEDERAL PROCEDURE, LAWYERS EDITION, § 20:240 (2006); see also ROBERT TIMOTHY REAGAN ET AL., FED. JUDICIAL CTR., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT 1 n.1 (2004) (arguing that it should be presumed that the public has access to all documents filed with the court); Resnick, *supra* note 34, at 657 & nn.259–60 (gathering cases requiring disclosure of terms of settlement agreements because they were filed with the court).

37. See FED. R. CIV. P. 26(c). In granting a protective order, the court “may make any order which justice requires,” including, but not limited to an order “(4) that certain matters not be inquired into . . . ; (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; [and] (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.” *Id.*

38. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981).

39. See, e.g., N.D. CAL. CIV. R. 79-5(a) (directing that an “order may issue only upon a request that establishes that the document, or portions thereof, is privileged or protectable as a trade secret or otherwise entitled to protection under the law, [hereinafter referred to as “sealable.”] The request must be narrowly tailored to seek sealing only of sealable material.”) (brackets in original); N.D. CAL. CIV. L. R. 79-5(f) (all documents are presumptively available to public 10 years from the date the case is closed).

40. See, e.g., *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135–36 (9th Cir. 2003).

41. *Id.*

ing “compelling reasons” to seal the record.⁴² Furthermore, sealed settlements are increasingly limited or prohibited by legislative action based on public outcry over cases involving toxic tort claims, design defects, sexual harassment, and the Catholic Church’s sexual abuse scandal.⁴³ Thus, modified litigation cannot provide the same confidentiality protections as arbitration.⁴⁴ But litigation is a public process that has its own benefit: It produces precedent that helps other parties value their disputes and plan to avoid the costs of, and need for, dispute resolution altogether.⁴⁵

D. *Arbitration Is Riskier and Less Predictable than Litigation*

Arbitration is riskier than litigation because the FAA severely limits parties’ ability to seek judicial review of an arbitration award.⁴⁶ As a practical matter, there is no appellate “check” on the arbitrator’s work. Once the arbitrators issue an award, the prevailing party will seek to enforce the award by submitting it to a court and requesting entry of a judgment.

42. *Id.* at 1136 (requiring moving party to meet this higher standard even though documents were filed under seal pursuant to general “protective order” governing materials produced in discovery).

43. See generally Joseph F. Anderson, Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711 (2004). For discussion of the confidentiality of settlement agreements and analysis of the restrictions on secret settlements, see Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. (forthcoming 2007), available at <http://ssrn.com/abstract=921463>; Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 101 (2006).

44. But the confidentiality protections of arbitration are not guaranteed. Recently, courts have utilized the doctrines of unconscionability and public policy to frustrate confidentiality clauses in arbitration agreements. See Doré, *Public Court Versus Private Justice*, *supra* note 34, at 501–06. In addition, the confidentiality of an arbitration proceeding may be compromised when (a) the prevailing party seeks to enforce the arbitration award by requesting a public court to confirm the award and enter judgment on it or (b) collateral, third-party litigants seek discovery of information pertaining to the “confidential” arbitration. *Id.* at 507–10.

45. This “public” benefit does not account for the increased costs to the public when parties choose the public dispute resolution system. Litigants can socialize the costs of their dispute resolution needs in public courts, thereby removing (or at least obscuring) the incentive to reduce these costs. But this debate—whether it is in society’s collective best economic interests to permit parties to modify the public dispute resolution process—is not the focus of this Article.

46. One express purpose of the FAA was to override state law that prevented or impeded the enforcement of arbitration agreements. See *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (stating that the provisions of the FAA prevail over contrary state-law rules).

The FAA provides that arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁴⁷ An arbitration award will not be vacated when the arbitrator misinterprets the governing law or applies it incorrectly. Thus, the party opposing entry of judgment based on an arbitration award will prevail only when the award is “completely irrational” or exhibits a “manifest disregard of law.”⁴⁸

This situation, however, is a double-edged sword. On the positive side, limited appellate review encourages finality and discourages parties from pursuing dubious, costly appeals. On the negative side, limited judicial review creates an opportunity for great mischief by the arbitrator and heightens skepticism regarding the value, fairness, and predictability of arbitration decisions.⁴⁹ This concern is compounded because arbitrators do not have to issue written awards, which increases the difficulty of judicial review and further reduces the likelihood of a court vacating an arbitration award.⁵⁰ “To offer protection against such unpredictable or biased decision-making, without sacrificing all the benefits of arbitration, parties have begun to include clauses in their arbitration agreements seeking to expand the scope of judicial review.”⁵¹ There is a circuit split on the issue of whether parties may contractually alter the standard of review applicable to an arbitration award.⁵² Regardless of the resolution of that split, however, the possibility for mischief by arbitrators is a serious concern for potential parties to arbitration.

47. 9 U.S.C. § 2 (2000).

48. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997–98 (9th Cir. 2003) (“These grounds afford an extremely limited review authority, a limitation that is designed to preserve due process but not to permit unnecessary public intrusion into private arbitration procedures.”). See generally Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996) (discussing the statutory and non-statutory bases for vacating an arbitration award).

49. See Callahan, *supra* note 30, at 3, 31, 35–45 (finding 84% of business litigators surveyed prefer litigation over arbitration in large part because of the availability of appellate review and their experience that arbitrators do not follow the law).

50. See *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1682 (1996) [hereinafter *Employment Discrimination*].

51. Goldman, *supra* note 13, at 173.

52. This issue is discussed more fully below. See *infra* Part III.F.1.

E. Courts Are Refusing to Enforce Arbitration Agreements.

Another problem for parties who rely on arbitration agreements is the possibility that their agreement will be held to be unenforceable. Increasingly, courts are limiting or eliminating parties' ability to force consumers into arbitration through boilerplate contracts, finding that such contracts are unconscionable and therefore unenforceable.⁵³ One recent survey of cases in the California Courts of Appeal found that those courts were over five times more likely to hold that a contractual provision is unconscionable if the contractual provision is contained in an arbitration agreement rather than in an ordinary contract.⁵⁴ Similarly, some courts have held that class arbitration waiver clauses contained in arbitration agreements are almost always unconscionable.⁵⁵ Thus, uncertainty regarding the enforceability of the arbitration agreement, or the waiver of classwide arbitration, is itself sufficient incentive to consider a modified

53. See generally Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133 (2004); Steven J. Burton, *The New Judicial Hostility to Arbitration: Unconscionability and Agreements to Arbitrate* (Apr. 4, 2006) (unpublished manuscript), available at <http://law.bepress.com/expresso/eps/1375>. The American Arbitration Association (AAA) and JAMS/Endispute (JAMS), two of the largest and most widely-used arbitration providers, have amended their procedures in recent years to respond to criticism of mandatory arbitration of consumer disputes. See JAMS, *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness* (revised Jan. 1, 2007), http://www.jamsadr.com/rules/consumer_min_std.asp [hereinafter *JAMS Policy on Consumer Arbitration*]; AM. ARBITRATION ASS'N, *CONSUMER DUE PROCESS PROTOCOL: STATEMENT OF PRINCIPLES OF THE NATIONAL CONSUMER DISPUTES ADVISORY COMMITTEE* (1988), available at <http://www.adr.org/sp.asp?id=22019&printable=true> [hereinafter *AAA CONSUMER DUE PROCESS PROTOCOL*].

54. See Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Judiciary Is Circumventing the Federal Arbitration Act*, 2 HASTINGS BUS. L.J. (forthcoming 2007) (manuscript at 7–11, available at <http://ssrn.com/abstract=893791>).

55. See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1106–10 (Cal. 2005); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?* 67 LAW & CONTEMP. PROBS. 75, 78 n.13 (2004) (citing additional cases holding class action waivers unconscionable); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 105–07 (2000). However, other state and federal courts have enforced arbitration agreements and general contracts that waive class action rights. See Martin C. Bryce, Jr., *Red State Versus Blue State: Surprisingly Most (But Not All) Courts in Both "Red" and "Blue" States Enforce Express Class Action Waivers in Consumer Arbitration Agreements*, 59 CONSUMER FIN. L.Q. REP. 222, 223–26 (2005) (collecting cases); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 400 n.139 (2005) (collecting cases).

litigation model. If the arbitration agreement is not enforceable, the parties immediately lose all of the benefits of arbitration and are subject to the “default” rules of litigation. A better alternative is opting into litigation from the outset and devising their own rules.

F. Contractually-Modified Litigation Offers a Superior Alternative to Arbitration

If ex ante contracts to modify the rules of litigation are enforceable, then contractually-modified litigation offers a superior alternative to arbitration. As noted above, arbitration is not necessarily faster or cheaper than litigation, and it is often riskier than litigation. Even assuming that arbitration might be faster and cheaper than litigation under the “default” public dispute resolution rules, it should not be faster and cheaper than litigation modified to mimic arbitration. Modified litigation also eliminates several commonly expressed concerns about arbitration. Modified litigation is cheaper than arbitration because the public pays the decision-maker, the parties get an Article III judge or a duly vetted or elected state court judge, and the parties get a meaningful right to judicial review of the decision. In arbitration, the parties pay the decision-maker on a daily or hourly basis, one party might have a greater (or the only) voice in the selection of the arbitrator, the arbitrator might not be neutral, the arbitrator might not be sufficiently trained or versed in the law, and there is no meaningful judicial review.⁵⁶

This Article assesses the current state of the law and concludes that, with very few limits, the parties may modify the public dispute resolution rules by ex ante contract. This Article identifies the few potential limits to, and explores the outer boundaries of, this freedom of contract. The underlying question is: If modified procedures are good enough for arbitration—which leads to an award that becomes a federal court judgment—how can they be repugnant to modified litigation? The conclusion is, of course, that they are not. Modified litigation is an available, superior alternative to arbitration.

⁵⁶ See, e.g., *Employment Discrimination*, *supra* note 50, at 1680–82. Of course, in a true commercial arbitration, the parties might elect an arbitrator for the very reason that she is an expert in the particular industry relevant to the dispute.

II. THE “NEW” FREEDOM OF CONTRACT: EX ANTE
CONTRACTS TO MODIFY THE RULES OF LITIGATION
ARE PRESUMPTIVELY ENFORCEABLE

It is a long-established principle that “[a] party may waive any provision, either of a contract or of a statute, intended for his benefit.”⁵⁷ Despite this long-standing principle, U.S. courts initially resisted enforcement of ex ante contracts to waive dispute resolution rights. For example, in its 1874 decision in *Home Insurance Co. v. Morse*,⁵⁸ the Supreme Court noted in dicta that a contract that waived the right to a jury trial in the event of future dispute was unenforceable.⁵⁹ The Court refused to enforce a contractual agreement not to seek removal to federal court of an action filed in state court and wrote:

Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights [A potential litigant] cannot . . . bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented [A]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.⁶⁰

The Court’s reasoning led to a series of decisions that assumed public dispute resolution rules could not be modified by contract made in advance of litigation. For example, U.S. courts refused to enforce arbitration agreements⁶¹ and forum selection clauses.⁶²

57. *Shutte v. Thompson*, 82 U.S. (15 Wall.) 151, 159 (1873).

58. 87 U.S. (20 Wall.) 445 (1874).

59. *Id.* at 450–51.

60. *Id.* at 451.

61. See, e.g., H. JUDICIARY COMM., REPORT TO ACCOMPANY H.R. 646: TO VALIDATE CERTAIN AGREEMENTS FOR ARBITRATION, H.R. REP. NO. 68-96, at 1–2 (1924) (“The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long [sic] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts.”); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55–56 (1995) (discussing historical reluctance of courts to enforce arbitration agreements).

62. See *Nute v. Hamilton Mutual Ins. Co.*, 72 Mass. (6 Gray) 174, 180–81 (1856), overruled by *W.R. Grace & Co. v. Hartford Accident and Indem. Co.*, 555 N.E.2d

The first significant step in changing the Court's dubious view of contracts to modify litigation rules was the enactment of the FAA in 1925.⁶³ With enactment of the FAA, arbitration agreements went from unenforceable to specifically enforceable and strongly favored by the Court.⁶⁴ In 1964, the Supreme Court held that private parties, by ex ante contract, may waive their constitutional due process rights to object to lack of personal jurisdiction by appointing an agent for service of process in a particular forum. In *National Equipment Rental, Ltd. v. Szukhent*,⁶⁵ the Supreme Court reviewed a contract between a New York-based equipment company and several farmers from Michigan. The Court held that a clause designating the wife of one of the owners of the plaintiff company as the agent for service of process in New York resulted in defendants' submission to personal jurisdiction in New York.⁶⁶

In its 1972 decision in *The Bremen v. Zapata Off-Shore Company*,⁶⁷ the Supreme Court continued this trend, holding that a freely-negotiated forum selection clause should be specifically enforced by the courts in the absence of some compelling and countervailing reason making enforcement unreasonable.⁶⁸ The Court noted that "[f]orum-selection clauses have historically not been favored by American courts,"⁶⁹ but it rejected the presumption against enforcement and stated that enforcement of the agreement "accords with ancient concepts of freedom of contract."⁷⁰ The Supreme Court quoted its decision

214 (Mass. 1990); *Gaither v. Charlotte Motor Car Co.*, 109 S.E. 362, 363 (N.C. 1921), *overruled by Perkins v. CCH Computax, Inc.*, 423 S.E.2d 780 (N.C. 1992); *see also* *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 & n.10 (1972) (noting that early American courts refused to enforce forum selection clauses because they "ousted" courts of their jurisdiction and citing cases and treatises).

63. Pub. L. No. 68-401, 43 Stat. 883 (1925).

64. *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (finding that the FAA manifested "a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration").

65. 375 U.S. 311 (1964).

66. *Id.* at 315-16.

67. 407 U.S. 1 (1972).

68. *Id.* at 15.

69. *Id.* at 9.

70. *Id.* at 11. Although *The Bremen* was an admiralty case concerning a clause that selected the courts of London as the exclusive forum, other courts soon followed the Supreme Court's lead and rejected their historical resistance to forum selection clauses, determining that such clauses were generally enforceable. *See, e.g.,* Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting*

in *Szukhent* for the proposition that “[i]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether.”⁷¹ In other words, the Court found the parties free to make whatever bargains they will, subject only to the usual law of contracts.⁷² The Supreme Court elevated the concept of freedom of contract and established a presumption that the parties may bargain away their dispute resolution rights.⁷³

Critics roundly dismiss the Court’s decision in *The Bremen* as a violation of separation of powers and as neglecting due process concerns.⁷⁴ Despite this criticism, the Court’s rejection of the presumption against enforcement of agreements that alter public dispute resolution rules has ushered in the “current doctrine of consensual adjudicatory procedure” in which contractual agreements to modify public dispute resolution rules are presumptively valid.⁷⁵ Instead of a presumption

Place or Court in Which Action May be Brought, 31 A.L.R. 4TH 404, 423–33 (1984) (listing jurisdictions that enforce forum selection clauses).

71. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11 (1972) (quoting *Nat’l Equip. Rental v. Szukhent*, 375 U.S. 311, 315–16 (1964)).

72. Judge Richard Posner has noted that the decisions enforcing forum selections clauses, like *The Bremen*, “make clear that since a defendant is deemed to waive (that is, he forfeits) objections to personal jurisdiction or venue simply by not making them in timely fashion, a potential defendant can waive such objections in advance of suit by signing a forum selection clause. Their approach is to treat a forum selection clause basically like any other contractual provision . . .” *Nw. Nat’l Ins. Co. v. Donovan*, 916 F.2d 372, 375 (7th Cir. 1990).

73. *The Bremen*, 407 U.S. at 15 (“There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.”). In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974), the Supreme Court noted that refusal to enforce an arbitration agreement “would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a ‘parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.’” *Id.* at 519.

74. See, e.g., Taylor & Cliffe, *supra* note 5, at 1096 (“The decision in *The Bremen* invades legislative power, and in doing so, the door is opened for the current wholesale reworking of the procedural system by private agreement.”); see also Mullenix, *supra* note 7, at 296 (criticizing the doctrine because “substantial litigation rights are sacrificed to enhance purely prudential considerations” and because contract “principles now effectively usurp long-standing jurisdictional and conflict-of-laws rules . . .”).

75. See Mullenix, *supra* note 7, at 294 (“The doctrine of consensual adjudicatory procedure is now well entrenched in federal practice and is widely heralded as a

against enforcement, the Supreme Court now states that there is a “background presumption that legal rights generally, and evidentiary provisions specifically, are subject to waiver by voluntary agreement of the parties”⁷⁶ This presumption applies even when the party making the waiver subsequently objects, “absent some affirmative indication of Congress’ intent to preclude waiver.”⁷⁷ Under this new “freedom of contract,” it is generally accepted that contracts modifying the rules of litigation are specifically enforceable.⁷⁸

There are, however, certain clear limits on the ability of private parties to modify the rules of public dispute resolution. The first and most fundamental limit is that private parties cannot give a court subject matter jurisdiction it does not otherwise have.⁷⁹ Second, private parties cannot modify the rules

form of salutary progressivism. The doctrine is lauded for enhancing the values of predictability, certainty, security, stability and simplicity.”); Taylor & Cliffe, *supra* note 5, at 1159 (“While an argument can be made that parties should not be allowed to alter the public procedural system by private agreement, the day to make that argument seems long gone.”).

76. *United States v. Mezzanatto*, 513 U.S. 196, 203 (1995) (upholding waiver of exclusionary provisions in Rule 410 of the Federal Rules of Evidence where a prosecutor, as a precondition to any plea negotiations, required a defendant to agree that any statements made during such negotiations could be used to impeach contradictory testimony offered at trial).

77. *Id.* at 201. Although *Mezzanatto* involved an agreement between a prosecutor and a potential defendant, the reasoning applies to civil cases. If anything, the Court should be *more* protective of the rights of criminally accused. Yet the Court notes that “[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.” *Id.*

78. See, e.g., G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 433 (1993) (“[T]he modern Court has shown more fidelity to an absolute principle of freedom to contract than the Courts that preceded it” including “the reputedly conservative *Lochner*-era Court”); 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5039.5, at 860 (2d ed. 2005) (“Ironically, the growth of ‘bargain justice’ in the late 20th Century has seen a return to the commodification of evidence law that Wigmore championed.”); Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT’L L.J. 51, 52 (1992) (“The rise of forum-selection clauses is a manifestation of the increasing deference to party autonomy in jurisdictional and related matters. Not coincidentally, the last two decades have also seen the enforcement of contractual choice-of-law clauses, and the upholding of waivers of personal jurisdiction and service-of-process requirements.”).

79. U.S. CONST., art. III.; see also *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934) (“[L]ack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties”); *Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235, 1244 (2006) (“[S]ubject matter jurisdiction . . . can never be forfeited or waived.”) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)).

of public dispute resolution if Congress⁸⁰ affirmatively precludes such agreements.⁸¹ Third, private parties' ability to modify the rules of public dispute resolution is limited by the traditional standards of "contract law" that determine whether a contract is enforceable.⁸² That is, a clause of a contract that purports to modify the rules of public dispute resolution is not enforceable if the contract itself is not enforceable. In Part V, I examine what additional limits, if any, restrict private parties' ability to modify the rules of litigation and to craft their own dispute resolution procedures. Before that, however, it is helpful to look at the scope of contracts to modify litigation rules that courts have held to be enforceable.

III. COURTS HAVE ENFORCED EX ANTE CONTRACTS THAT MODIFY A BROAD ARRAY OF LITIGATION RIGHTS AND RULES.

Courts have enforced ex ante contracts that modify a broad array of litigation rights and rules. These include constitutional rights, statutory rights, rights set forth in the Federal Rules of Civil Procedure, and rights set forth in the Federal Rules of Evidence.

A. *Constitutional "Due Process" Rights*

1. *Waiver of Objection to Exercise of Jurisdiction.*

The constitutional requirement of due process limits a court's ability to exercise jurisdiction over a defendant that is not a citizen of the state in which the court sits. The defendant must have certain minimum contacts with the forum state such that

80. Although I refer to "Congress" and focus this Article on the Federal Rules of Evidence and the Federal Rules of Civil Procedure, the principles discussed herein also generally apply to actions filed in state court. Furthermore, an arbitration agreement is a contract that is subject to traditional contract law defenses available in the relevant state. That raises an interesting question, but one that I reserve for another day. If the parties adopt the law of State X in their contract, but the legislature in State X has enacted statutes that prohibit ex ante contracts to modify certain litigation rights but not others, must the federal court defer to the state legislature? Or must the federal court conduct an *Erie* analysis to determine whether to enforce the parties' contract?

81. *Mezzanatto*, 513 U.S. at 201; see also *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704–05 (1945) ("With respect to private rights created by a federal statute . . . the question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute."). To determine congressional intent, courts should look first to the statutory language and, if that is not clear, to the legislative history. *Id.* at 705–06.

82. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

the court's exercise of jurisdiction will not offend traditional notions of fair play and substantial justice.⁸³ But the Supreme Court has held that it will enforce a contractual agreement in which a party waives objection to personal jurisdiction despite the absence of minimum contacts with the forum. The parties may waive their due process rights by appointing an agent for service of process in that forum.⁸⁴ The parties may also include a forum selection clause in their contract and thereby "stipulate in advance to submit their controversies for resolution within a particular jurisdiction."⁸⁵ The right to choose a forum has been described as "perhaps *the* most fundamental and essential litigation right, since it carries with it choice-of-law determinants."⁸⁶ In addition to waiving objection to the selected forum, a party who agrees to a forum selection clause also waives objection to personal jurisdiction in that forum.⁸⁷

Once the Supreme Court determined that forum selection clauses are not *per se* invalid, it could have recognized either of two methods of enforcing such clauses. Courts could recognize a cause of action for breach of contract against the party who filed its lawsuit in a forum other than the one the parties had stipulated, and award damages to the injured party—that is, the party who did not get the benefit of the agreed upon forum.⁸⁸ Alternatively, courts could order "specific performance"

83. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

84. *See Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315–316 (1964).

85. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985); *see also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing forum-selection clause in boilerplate cruise ticket contract). A small minority of state courts refuse to enforce forum-selection clauses. *See, e.g., Cerami-Kote, Inc. v. Energywave Corp.*, 773 P.2d 1143, 1146 (Idaho 1989) (voiding forum selection clause because it violated state statutory public policy); *State ex rel. Polaris Indus. v. Dist. Court*, 695 P.2d 471, 472 (Mont. 1985) (same); *Davenport Mach. & Foundry Co. v. Adolph Coors Co.*, 314 N.W.2d 432, 437 (Iowa 1982) (same).

86. Mullenix, *supra* note 7, at 303.

87. *See The Bremen*, 407 U.S. at 10–11.

88. *See* Nicholas S. Shantar, Note, *Forum Selection Clauses: Damages in Lieu of Dismissal?*, 82 B.U. L. REV. 1063, 1079–87 (2002) (arguing that, with respect to contracts of adhesion, consumers should have the option to pay damages in lieu of specific enforcement of the forum selection clause). If the Supreme Court had adopted this approach, it might have led to liquidated damages clauses in the event of a breach. If the liquidated damages were sufficiently high, it might result in de facto specific performance of the agreement. Alternatively, Congress could establish "an appropriate amount of monetary damages for a suit filed in a forum other than the contracted-for forum." Taylor & Cliffe, *supra* note 5, at 1160. But this begs the question of how Congress should determine the proper amount of damages. If Congress were to establish a formula, the formula would require an infinite num-

of the forum selection clause. The Supreme Court opted for the latter approach.⁸⁹

In choosing to specifically enforce forum selection clauses, the Supreme Court rejected the argument that such clauses are improper because they deprive courts of their jurisdiction. Instead, the Supreme Court adopted a policy whereby courts retain jurisdiction, but refrain from exercising their jurisdiction in recognition of the parties' choice of a different forum.⁹⁰ Some commentators criticize this approach because it gives favored status to contracts that modify litigation rules: "[Pre-litigation agreements] now lead a charmed life as 'super contract,' always subject to specific performance, capable of redefining the dispute resolution system in a single bound, and, paradoxically enough, enforced in a fashion that takes away the autonomy of the parties to breach the contract and pay the resultant price."⁹¹

The Court's choice of a model based on specific performance of the parties' agreement demonstrates that it is the parties—not the courts—who own the process.⁹² The Supreme Court recognizes private parties' freedom to modify litigation rules and that such parties are in the best position to make economic decisions about how their disputes should be resolved. Once they make such decisions, they need courts to specifically enforce the agreement in order to provide the parties with sufficient certainty.⁹³

ber of variables to be effective. If Congress set a predetermined amount of damages, parties could exploit the difference between this amount and the amount of the actual damage. If the amount is set too low, it would not adequately compensate for the loss and there would be no incentive for parties to honor the contractual agreement. If the amount is set too high, it would place an inequitable burden on parties of limited economic means. It would act as a de facto specific performance decree and would create an incentive for the advantaged party to goad the other party into a breach to recover a windfall in statutorily prescribed damages.

89. See generally *The Bremen*, 407 U.S. 1.

90. See *id.* at 12–13.

91. Taylor & Cliffe, *supra* note 5, at 1092.

92. See *infra* Part IV.B; see also Shantar, *supra* note 88, at 1079–80 (arguing that specifically enforcing forum selection clauses is consistent with the doctrine of freedom of contract).

93. A forum selection clause has the "salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions." *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991). The Court also recognized an additional economic benefit to specific enforcement of forum selection clauses. See *id.* at 594 (reasoning that passengers

2. Waiver of Notice and Hearing.

Due process requires that a defendant be afforded notice and an opportunity to be heard.⁹⁴ But parties may waive these due process rights in an ex ante contract.⁹⁵ In *D.H. Overmyer Co. v. Frick Co.*,⁹⁶ the Supreme Court considered whether to enforce a cognovit note, a contractual agreement that went far beyond waiver of notice and a hearing. A cognovit note allows the “contracting parties to preclude factfinding by agreeing to confession of judgment[.]”⁹⁷ The debtor authorizes the attorney (usually for the creditor) to enter judgment against the debtor if the debt is not paid on time. The debtor not only waives notice and a hearing but also waives “every defense which the maker of the note may otherwise have. It likewise cuts off all rights of appeal from any judgment taken on it.”⁹⁸ Once the judgment is entered, the burden of litigation shifts from plaintiff to defendant, forcing the latter to seek to reopen a judgment already entered.⁹⁹

Thus, the Supreme Court considered the constitutional requirement of due process “in a context of ‘contract waiver, before suit has been filed, before any dispute has

“benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued”).

94. See *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313–14 (1950).

95. See *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315–16 (1964) (“[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether.”). See generally *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974) (enforcing a conditional sales contract that provided creditor, upon ex parte application and posting of a bond, to obtain a writ requiring the sheriff to take possession of goods from debtor, despite debtor’s objection on due process grounds that he was entitled to a hearing prior to the seizure); *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) (enforcing predispute contractual waiver of notice and hearing prior to entry of judgment on a debt). See also Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 *LAW & CONTEMP. PROBS.* 167, 182–88 (2004) (discussing cases in which parties arguably waived constitutional rights to notice, hearing, and due process in a predispute contract).

96. 405 U.S. 174 (1972).

97. *Scott & Triantis*, *supra* note 8, at 857.

98. *Jones v. John Hancock Mut. Life Ins. Co.*, 289 F. Supp. 930, 935 (W.D. Mich. 1968).

99. For background on cognovit notes, see *D. H. Overmyer*, 405 U.S. at 176 (“The cognovit is the ancient legal device by which the debtor consents in advance to the holder’s obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor’s behalf, of an attorney designated by the holder.”).

arisen,' and 'whereby a party gives up in advance his constitutional right to defend any suit by the other, to notice and an opportunity to be heard, no matter what defenses he may have, and to be represented by counsel of his own choice.'"¹⁰⁰ The Court enforced the contractual waiver of due process rights.¹⁰¹ The Court applied the standards applicable to waiver of constitutional rights in a criminal proceeding—though it did not hold that such standards necessarily applicable to waiver of constitutional rights in other kinds of civil proceedings—and held that the waiver was "voluntarily, intelligently and knowingly" made.¹⁰² The significance here is that the Supreme Court proceeded upon the presumption that all rights, constitutional or otherwise, may be waived by contract before any dispute has arisen.¹⁰³ Given that presumption, the opinion implies that the "voluntarily, intelligently and knowingly" made requirement is *the most stringent* requirement that the Court might impose on pre-dispute contractual waivers of constitutional litigation rights. It leaves open the possibility that the contractual waiver of constitutional litigation rights may be enforceable even if the rights are not voluntarily, intelligently, and knowingly waived.

Professor Stephen Yeazell describes the cognovit note as "the outer limits of the parties' ability to contract out of procedural law."¹⁰⁴ If a party may "give[] up in advance his constitutional right to defend any suit by the other, to notice and an opportunity to be heard, no matter what defenses he may have, and to be represented by counsel of his own choice,"¹⁰⁵ what else is left? Is nothing sacred?

100. *Id.* at 184.

101. *Id.* at 187.

102. *Id.*

103. The Supreme Court's opinion made clear that the cognovit note was subject to the usual requirements of an enforceable contract, but found that it was not a contract of adhesion: it was "not a case of unequal bargaining power or overreaching," the party challenging the cognovit note did not claim that it "was not aware of the significance of the note and of the cognovit provision," and that party received "substantial benefits and consideration" for the waiver. *Id.* at 186.

104. STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 144 (6th ed. 2004).

105. *D. H. Overmyer*, 405 U.S. at 184 (quoting Brief for Petitioners at 16, *D. H. Overmyer*, 405 U.S. 174 (No. 69-5)).

B. *Seventh Amendment Right to Trial by Jury*

The Seventh Amendment guarantees the right to trial by jury in most civil actions brought in federal court.¹⁰⁶ The right to jury trial, however, may be waived or forfeited if not demanded in a timely manner once litigation commences.¹⁰⁷ Similarly, the parties may agree in advance of a dispute to waive the right to trial by jury if a dispute arises and litigation commences.

The Supreme Court has not yet faced the issue of whether an *ex ante* contract to waive the right to a jury trial is enforceable in an action filed in federal court. The various district courts and courts of appeals that have faced the issue, however, have uniformly held that a jury waiver clause is enforceable.¹⁰⁸ Some courts require that the waiver be made “knowingly and voluntarily.” Other courts also require that the waiver be made “intelligently.”¹⁰⁹ But a jury waiver clause is generally found to be

106. U.S. Const. amend. VII; *see also* FED. R. CIV. P. 38.

107. *See* FED. R. CIV. P. 38(d) (“The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.”). For an application of Rule 38’s waiver provision, *see*, for example, *United States v. Moore*, 340 U.S. 616, 621 (1951). *See also* FED. R. CIV. P. 73(b) (providing that parties may waive the right to a jury trial by consent to a non-jury trial before a magistrate judge). Nearly all state courts will enforce a jury trial waiver clause that is part of a contract entered into before the dispute arises. *See* Jay M. Zitter, Annotation, *Contractual Jury Trial Waivers in State Civil Cases*, 42 A.L.R. 5TH 53, 62–69 (1996) (collecting state cases in which the courts have considered the validity of prelitigation contractual jury trial waivers). The only two states that refuse to enforce a contractual jury trial waiver (California and Georgia) do so because their respective state constitutions and related state statutes prohibit such waivers. *See, e.g.*, *Grafton Partners, L.P. v. Superior Court*, 116 P.3d 479, 480–81, 488 (Cal. 2005) (concluding that the California Constitution and the relevant statute precluded enforcement of a jury waiver clause in a predispute agreement); *Bank South, N.A. v. Howard*, 444 S.E.2d 799, 800 (Ga. 1994) (concluding that the Georgia Constitution and the relevant statute prohibits prelitigation contractual waiver of jury trial right). This distinction is consistent with the notion that all rights may be waived, absent express legislative mandate that they may not be waived.

108. *See* Debra T. Landis, *Contractual Jury Trial Waivers in Federal Civil Cases*, 92 A.L.R. FED. 688 (2003) (“The cases herein uniformly support the view that, with knowing and voluntary consent, the right to a jury trial in a federal civil action may be waived by a contract that was not made in, or as an incident of, any particular litigation.”).

109. *See* *Herman Miller, Inc. v. Thom Rock Realty Co.*, 46 F.3d 183, 189 (2d Cir. 1995) (holding that contractual waiver of a jury trial can be enforceable where the waiver is part of a lease); *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988) (stating that contractual jury waivers are enforceable because they

enforceable if the contract itself is enforceable. In one instance, a jury waiver clause was enforced despite a request *by both parties* for a jury trial at the commencement of litigation.¹¹⁰ It seems likely that the Supreme Court would permit the parties to waive their jury trial rights by an *ex ante* contract given the parties' ability to do so during litigation, the uniform availability of such waivers in state courts (absent state constitutional prohibitions), and the uniformity of the decisions of the lower federal courts.

If and when the Supreme Court takes up this issue, however, it may seize the opportunity to "harmoniz[e] the law on civil waivers of constitutional rights."¹¹¹ In assessing contractual waivers of other constitutionally-protected litigation rights, the Supreme Court has required only that such waivers comport with the traditional state standards of contract law.¹¹² By explicitly requiring the higher standard of "knowing and voluntary consent" as a condition precedent to enforcement of a contractual jury waiver clause, the Court could give greater protection to such rights.¹¹³ "In sum, contract-law standards are generally used for the waiver of constitutional rights in property-deprivation cases, forum-selection cases, and consent-to jurisdiction cases, as well as in arbitration cases. Case law governing jury-waiver clauses stands out because of its failure to ap-

are "neither illegal nor contrary to public policy"); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986) (stating that contractual waiver of jury trial is enforceable where "the party seeking enforcement of the waiver [proves] that consent was both voluntary and informed"); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 758 (6th Cir. 1985) (stating that "in the context of an express contractual waiver the objecting party should have the burden of demonstrating that its consent to the provisions was not knowing and voluntary").

110. See *Great Earth Int'l Franchising Corp. v. Milks Dev.*, 311 F. Supp. 2d 419, 436-37 (S.D.N.Y. 2004) (enforcing contractual jury waiver even where both parties requested a jury trial at outset of litigation). This decision indicates that parties cannot waive a waiver—they can waive their constitutional right, but they cannot waive their contractual agreement to waive a jury trial.

111. See *Ware*, *supra* note 95, at 205.

112. See *supra* Part III.A.1. (describing the relationship between waivers of due process rights and arbitration agreements).

113. The Supreme Court has stated that "extrajudicial contracts made prior to litigation trigger closer judicial scrutiny than stipulations made within the context of litigation." *United States v. Mezzanatto*, 513 U.S. 196, 203 n.3 (1995) (citing 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5039 (1977)). This reasoning might rationalize the distinction between *ex ante* ("extrajudicial") contracts to waive the right to a jury trial and loss of the jury trial right after litigation commences, which may be forfeited through ignorant failure to assert that right in a timely manner.

ply contract-law standards of consent and its requirement that consent be ‘knowing.’”¹¹⁴

Federal courts have generally held that a contract that waives a constitutional litigation right should be enforced only if the waiver meets the standard applicable to waiver of constitutional rights in criminal cases—the waiver must be knowing, voluntary, and, in most cases, intelligent.¹¹⁵ As Professor Stephen Ware has observed, however, this position may be wrong:

If the law governing jury-waiver clauses is the only major body of law regularly applying knowing-consent standards to civil waivers of constitutional rights, then perhaps *it* is the area of law that should change. Rather than arbitration law conforming to jury-waiver cases, perhaps jury-waiver cases should conform to arbitration law—and property-deprivation cases and forum-selection cases and consent-to-jurisdiction cases. Perhaps courts should stop requiring “knowing” consent in jury-waiver cases. This view is supported by many decades of case law in which courts applied contract-law standards of consent to jury-waiver clauses. It was not until the 1970s that courts imported the knowing-consent standard from criminal law into the civil context of the jury-waiver clause. These recent jury-waiver cases fell out of step with the other areas of law pertaining to civil waivers of constitutional rights.¹¹⁶

Several factors favor this view. First, making jury waiver clauses subject to the same “contract law standards” as waiver of other constitutional dispute resolution rights “would require

114. Ware, *supra* note 95, at 197.

115. See, e.g., *Lake James Cmty. Volunteer Fire Dep't Inc. v. Burke County*, 149 F.3d 277, 280 (4th Cir. 1998) (stating that a contractual waiver of a constitutional right must be knowing and voluntary); *United States v. Local 1804-1, Int'l Longshoremen's Ass'n, AFL-CIO*, 44 F.3d 1091, 1098 n.4 (2d Cir. 1995) (stating that a waiver of constitutional rights must be “voluntary, knowing, and intelligent”); *W.B. v. Matula*, 67 F.3d 484, 497 (3d Cir. 1995) (stating that the court will “decline to enforce the agreement unless its execution was knowing and voluntary”); *Mosley v. St. Louis Sw. Ry.*, 634 F.2d 942, 946 n. 5 (5th Cir. 1981) (holding that a waiver “not only must be voluntary but must be knowing, intelligent [and] done with sufficient awareness of the relevant circumstances and likely consequences.”) (*Mosley* also serves as precedent for the Eleventh Circuit; cf. *Gete v. I.N.S.*, 121 F.3d 1285, 1293 (9th Cir.1997) (stating that principles governing waiver of constitutional rights apply equally in criminal and civil context); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 756 (6th Cir. 1985) (waiver of constitutional rights must be voluntary, deliberate, and informed); *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981)). My research yielded no case that held there was a different standard in the civil context.

116. Ware, *supra* note 95, at 198.

overruling none of [the Supreme Court's] own cases and only a few federal appeals court cases."¹¹⁷ Second, it resolves the question of what standard should be applied to an *implied* but certain waiver of the right to trial by jury. In some instances, a contractual waiver of a different litigation right will necessarily entail an implied waiver of the Seventh Amendment right to a jury trial. For example, where the forum selected is a non-U.S. forum, enforcement of a forum selection clause necessarily waives the Seventh Amendment right to a jury trial.¹¹⁸ Third, applying traditional contract law standards to contractual jury waivers that occur *before* litigation commences is consistent with the long-standing treatment of the jury trial right *after* litigation commences—the right may be forfeited through ignorant, unintended failure to claim the right.¹¹⁹ Finally, courts should enforce jury trial waivers because they offer a better alternative to arbitration.

C. *Rules of Evidence*

It is generally acknowledged that *ex ante* contracts to alter the rules of evidence are enforceable.¹²⁰ Courts have enforced agreements that waive hearsay objections,¹²¹ objections to au-

117. *Id.* at 205.

118. *See id.* at 191 n.147 (collecting cases enforcing forum selection clauses that specify foreign forums that do not provide for a right to a jury trial); *see also* Spradlin v. Lear Siegler Mgmt. Servs. Co., 926 F.2d 865, 869 (9th Cir. 1991) (enforcing employment agreement containing a forum selection clause specifying Saudi Arabia as the forum (and thereby holding the jury right to be waived)). Arbitration agreements also entail an implied waiver of the right to a jury trial. Ware, *supra* note 95, at 169–70.

119. *See* FED. R. CIV. P. 38(d); *United States v. Moore*, 340 U.S. 616, 621 (1951) (upholding determination of waiver under FED. R. CIV. P. 38 due to a party's failure to assert demand); *Wilson v. Corning Glass Works*, 195 F.2d 825, 827–28 (9th Cir. 1952) (holding that FED. R. CIV. P.38(d) is constitutional even though it permits waiver of jury trial right that is not a conscious, voluntary, or affirmative act).

120. *See* *United States v. Mezzanatto*, 513 U.S. 196, 208 n.5 (1995) (upholding waiver of exclusionary provisions in FED. R. EVID. 410 and stating that there is a "background presumption of party control over evidentiary provisions"); JOHN WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 7a, at 559–60 (1983); 7 SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 15:13, at 272 (4th ed. 1997); WRIGHT & GRAHAM, *supra* note 113, at 207–08; Note, *Contracts to Alter the Rules of Evidence*, 46 HARV. L. REV. 138, 139 (1933) [hereinafter *Contracts to Alter*].

121. *See Mezzanatto*, 513 U.S. at 196; *Sac and Fox Indians of the Mississippi in Iowa v. Sac and Fox Indians of the Mississippi in Okla.*, 220 U.S. 481, 488–89 (1911); *United States v. Bonnett*, 877 F.2d 1450, 1458–59 (10th Cir. 1989).

thenticity of documents,¹²² objections to qualifications of expert witness,¹²³ and invocations of privileges.¹²⁴

D. Rules of Civil Procedure

Rule 38 of the Federal Rules of Civil Procedure affords the right to a jury trial in most civil actions and provides that the right to trial by jury “shall be preserved to the parties inviolate.”¹²⁵ Rule 38 contemplates waiver of the right to a jury trial but does not permit or proscribe waiver of the jury trial right by ex ante contract.¹²⁶ Although Rule 38 does not directly address the issue by explicitly permitting or proscribing contractual waiver, the courts have uniformly held that an ex ante contract to waive the right to jury trial is enforceable. Because constitutional litigation rights can be waived and because the jury trial right afforded by Rule 38 can be waived, the other Federal Rules of Civil Procedure should be capable of waiver as well.

Beyond Rule 38, there have been relatively few judicial decisions requiring a federal court to decide whether to enforce a contractual agreement to alter the Federal Rules of Civil Procedure.¹²⁷ The structure, design, and intent of the Federal Rules, however, suggest that ex ante contracts that modify those rules should be enforceable. The Federal Rules of Civil Procedure allow the parties to establish their own procedures and rules

122. See *Mezzanatto*, 513 U.S. at 196; *Tupman Thurlow Co. v. S.S. Cap Castillo*, 490 F.2d 302, 309 (2d Cir. 1974); *United States v. Wing*, 450 F.2d 806, 811 (9th Cir. 1971).

123. See *Brinck v. Bradbury*, 176 P. 690, 691 (Cal. 1918).

124. See *Contracts to Alter*, *supra* note 120, at 139.

125. FED. R. CIV. P. 38(a).

126. See FED. R. CIV. P. 38(d) (“The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury.”).

127. Compare *In re Westinghouse Elec. Corp.-Uranium Contracts Litig.*, 570 F.2d 899, 901–02 (10th Cir. 1978) (declining to construe discovery stipulation that only documents would be produced and that “there would be no deposition” as barring forever any depositions because it would be manifestly unjust) with *Elliott-McGowan Prods. v. Republic Prods.*, 145 F. Supp. 48, 50 (S.D.N.Y. 1956) (enforcing parties’ pre-dispute agreement to contract away their rights to conduct discovery where the circumstances made the agreement reasonable). Professors Wright, Miller, and Marcus state that the *Elliott-McGowan* decision “has been effectively criticized” and state that “contractual provisions of this type are likely to be found only when there is inequality of bargaining power, and are hardly an appropriate means for disregarding rules of court devised to serve the public interest in bringing out all the facts prior to trial.” 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2005, at 65–66 (2d ed. 1994).

for resolving the dispute. As Professor Yeazell writes, “[o]ne of the hallmarks of U.S. law is the extent to which the rules of procedure are ‘default’ rules, rules that govern if the parties have not agreed to something else.”¹²⁸ For example, Rule 29 provides that the parties are free, with very few exceptions, to establish their own procedures for conducting discovery.¹²⁹ Although Rule 29 once required court approval of the parties’ stipulated discovery procedures, the rule was amended in 1993 for the express purpose of eliminating the need for court approval.¹³⁰ Today, such stipulations need only be memorialized

128. YEAZELL, *supra* note 104, at 172 (discussing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991)). The Rules contain numerous provisions that alert the parties to the fact that the discovery limitations and requirements established by the Federal Rules are only “default” limits. See, e.g., FED. R. CIV. P. 26(f) (“[T]he parties must, as soon as practicable . . . confer . . . to develop a proposed discovery plan that indicates the parties’ views and proposals concerning: (1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a) [and] . . . (3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed.”); FED. R. CIV. P. 26(a)(1) (stating that initial disclosure requirements may be altered “to the extent otherwise stipulated” by the parties); FED. R. CIV. P. 26(d) (“Except . . . when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f).”).

129. Rule 29 states:

Unless otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.

FED. R. CIV. P. 29. “Discovery in the United States is supposed to function as a cooperative venture among the adversaries, who, guided by the Rules, explore the facts. Lawyers conduct discovery without any but the slightest judicial supervision unless something goes wrong. So long as things remain in this state, discovery has virtually disappeared from the judicial arena.” Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 651 (1994).

130. See FED. R. CIV. P. 29 Adv. Comm. Notes, 1993 Amend. (“[Rule 29 was changed] to give greater opportunity for litigants to agree upon modifications to the procedures governing discovery or to limitations upon discovery. Counsel are encouraged to agree on less expensive and time-consuming methods to obtain information, as through voluntary exchange of documents, use of interviews in lieu of depositions, etc. Likewise, when more depositions or interrogatories are needed than allowed under these rules or when more time is needed to complete a deposition than allowed under a local rule, they can, by agreeing to the additional discovery, eliminate the need for a special motion addressed to the court.”).

in writing. So long as the parties agree, and memorialize the agreement with a letter, they may permit absolutely no discovery, permit far broader discovery than the “default” scope of discovery permitted by the Federal Rules, or alter the “approved” procedures for conducting discovery.¹³¹

One might argue that an *ex ante* contract that alters the Federal Rules of Civil Procedure violates Rule 1, which provides that “these rules govern the procedure in the United States district courts in all suits of a civil nature.”¹³² Taylor and Cliffe assert that “enforcement of [ex ante contracts] that vary established judicial procedures defeats the goal of uniformity by allowing for privately tailored procedure for individual suits. Procedure in the federal courts does not vary from state to state; however, [ex ante contracts] allow for variation from suit to suit.”¹³³ But this position is at odds with individual parties’ well-established ability to waive the jury trial right and modify discovery requirements and limitations. It is also at odds with the ability of district courts to create their own local rules of practice.¹³⁴

Furthermore, application of the Federal Rules of Civil Procedure *necessarily* results in a dispute resolution process that is unique to each case. The parties determine how the case will proceed, and the courts generally do not intervene until one or both parties ask the court to do so. A party seeking to initiate a lawsuit does not have to satisfy the court that the complaint complies with the rules of civil procedure. It is left to the defendant to identify and challenge any claimed violations of the rules. Even then, the offending party usually has a chance to “correct” any mistakes without adverse consequence.¹³⁵ If the defendant does not raise a challenge in a timely fashion, the

131. FED. R. CIV. P. 29. Most states have similar provisions. *See, e.g.*, CAL. CODE CIV. PROC. § 2016.030 (West 2006) (“Unless the court orders otherwise, the parties may by written stipulation modify the procedures provided by this article for any method of discovery permitted under Section 2019.010” (which permits, among other methods, depositions and interrogations)).

132. FED. R. CIV. P. 1.

133. Taylor & Cliffe, *supra* note 5, at 1103.

134. *See* FED. R. CIV. P. 83. Local rules can be significantly different. *Compare* N.D. CAL. CIV. R. 7-2 (requiring 35 days notice for a motion and not requiring that counsel meet and confer in advance of filing a non-discovery motion), *with* C.D. CAL. CIV. R. 6-1 (requiring 21 days notice for a motion), *and* C.D. CAL. CIV. L. R. 7-3 (requiring counsel to meet and confer, preferably in person, in advance of filing a non-discovery motion).

135. *See* FED. R. CIV. P. 11(c)(1)(A).

violation is generally ignored. For example, the defendant waives challenges to personal jurisdiction, to venue, to process, and to service of process if the challenges are not raised at defendant's first appearance in the action.¹³⁶ The Federal Rules of Civil Procedure identify numerous other rights and defenses that may be waived if not timely asserted,¹³⁷ not the least of which is the right to trial guaranteed by the Seventh Amendment to the U.S. Constitution.¹³⁸

The Federal Rules encourage the parties to resolve their disputes without court involvement.¹³⁹ For example, Rule 26(f) requires the parties to confer, as soon as practicable, and to consider, among other things, "the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case"¹⁴⁰ Prior to filing a motion to compel discovery, the moving party must certify that it, in good faith, conferred or attempted to confer with the opposing party to obtain disclosure of the information without court action.¹⁴¹ In fact, in most jurisdictions, a party may not approach the court to seek enforcement of the rules (and judicial involvement in the dispute) unless it has first contacted the opposing party and reminded it of its obligation to follow the relevant rules.¹⁴² Thus, the Federal Rules are default rules that

136. FED. R. CIV. P. 12(h)(1).

137. *See, e.g.*, FED. R. CIV. P. 13(a).

138. FED. R. CIV. P. 38(d).

139. *See* FED. R. CIV. P. 26(f); *see also* FED. R. CIV. P. 29 (allowing parties to agree to modify the procedures governing and limitations placed upon discovery by the Rules); FED. R. CIV. P. 4(d)(3) (encouraging waiver of service of summons by giving defendant additional time to answer the complaint); FED. R. CIV. P. 16(c)(12) (allowing the court to "take appropriate action, with respect to . . . the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems"); FED. R. CIV. P. 16(c)(4) (same with respect to "avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence"); FED. R. CIV. P. 16(c)(15) (same with respect to "an order establishing a reasonable limit on the time allowed for presenting evidence"); FED. R. CIV. P. 16(c)(16) (same with respect to "such other matters as may facilitate the just, speedy, and inexpensive disposition of the action").

140. FED. R. CIV. P. 26(f).

141. *See* FED. R. CIV. P. 37(a)(2)(A), (B).

142. *See, e.g.*, C.D. CAL. CIV. R. 7-3 ("[C]ounsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, *preferably in person*, the substance of the contemplated motion and any potential resolution."); C.D. CAL. CIV. R. 37-1.

are applied where the parties do not design their own rules and procedures for dispute resolution.

Professor Michael Moffitt has written an engaging and thoughtful article that takes the position that “customized litigation” is *not* possible at this time because (1) “current procedures do not provide a specific invitation to revise the aspects of litigation the litigants have identified as problematic” and (2) “the current rules of litigation are not broadly conceived of as a baseline.”¹⁴³ I too agree that most lawyers and potential litigants do not *think* of the rules of litigation as default rules (even though they are), and I generally agree that the rules of litigation do not state that they are default rules. Yet, I disagree with the conclusion that it is not, at this time, possible to customize litigation. I do, however, agree with Professor Moffitt’s position that “the assumption should be in favor of customization.”¹⁴⁴

E. Other Public Dispute Resolution Rights

There are a variety of other public dispute resolution rights that may be waived or altered by *ex ante* contract. In the event of a dispute between the parties, the contract may specify that a certain state’s law will govern,¹⁴⁵ how courts must measure uncertain damages,¹⁴⁶ that the prevailing party is entitled to an award of its reasonable attorneys fees,¹⁴⁷ that the parties have altered the statute of limitations applicable to the claims,¹⁴⁸ that

143. Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. (forthcoming 2007) (manuscript at 4, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=888221).

144. *Id.*

145. The Uniform Commercial Code (UCC) has been adopted (in some form) by all fifty states and the District of Columbia. See Table of Jurisdictions Wherein Code Has Been Adopted, U.C.C., 1 U.L.A. 1-2 (2004). The UCC provides that parties to a contract may choose which forum’s law will apply if the transaction bears a reasonable relationship to more than one forum. U.C.C. § 1-105(1) (2001).

146. See, e.g., E.H. Schopflocher, *Provision for Liquidated Damages in Contract for Sale of Goods*, 138 A.L.R. 594 (1942).

147. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 257-59 (1975) (noting that exceptions to the “American Rule” that the prevailing party is not entitled to attorneys’ fees include (1) statutory basis, (2) enforceable contract, (3) willful violation of a court order, (4) bad faith action, and (5) litigation creating a common fund for the benefit of others).

148. See *United States v. Spector*, 55 F.3d 22, 24-25 (1st Cir. 1995) (noting that a contractual waiver of a statute of limitation is effective if the agreement was properly executed and the “waiver is made knowingly and voluntarily”). “An agreement in advance never to plead the statute of limitations is not generally recognized, although a majority of jurisdictions permit the parties to agree to a shorter

the parties waive all claims then existing, whether known or unknown,¹⁴⁹ or that the parties waive their right to appellate review altogether.¹⁵⁰ This list is certainly not complete, but it supports the proposition that *ex ante* contracts to modify the rules of litigation are presumptively enforceable.

F. *Lessons from Arbitration*

1. *Contracting to Alter the Standard of Review for Arbitration Awards*

Potential litigants may waive their right to access the public dispute resolution system altogether by agreeing to arbitrate any future disputes. By opting for private arbitration, however, the parties also accept a limited judicial review of the arbitration decision. A federal court will vacate an arbitration award only when it is “completely irrational” or exhibits a “manifest disregard of law.”¹⁵¹

There is a split of authority about whether parties may contractually alter the standard of judicial review applicable to an arbitration award. The First, Third, and Fifth Circuits have held that the parties may alter the standard of review that the federal courts apply to an arbitral award by the terms of their arbitration agreement.¹⁵² The leading case enforcing an agreement

period for bringing an action than that provided by the statute of limitations so long as the period chosen is reasonable and the agreement does not otherwise violate public policy.” WILLISTON, *supra* note 120, § 15:12, at 264–67.

149. *See, e.g.*, *United States v. Sardie*, 191 F. Supp. 2d 1128, 1131, 1135 (C.D. Cal. 2000); *see also* *Town of Newton v. Rumery*, 480 U.S. 386, 392–94 (1987) (holding enforceable a release dismissal agreement, whereby the accused criminal defendant agreed not to sue the town and its officials for violation of 42 U.S.C. § 1983 in exchange for the prosecution’s agreement to dismiss pending criminal charges).

150. *See* *Mactec, Inc. v. Gorelick*, 427 F.3d 821, 824 (10th Cir. 2005) (enforcing contractual provision eliminating the right to appeal from a district court’s judgment confirming or vacating an arbitration award); *see also* 15A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3901, at 18–19 (2d ed. 1992) (collecting cases). The Tenth Circuit’s decision in *Mactec* is discussed in detail *infra* Part III.F.2.

151. *See, e.g.*, *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 208 (2d Cir. 2002); *supra* Part I.D.

152. *See* *Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 31 (1st Cir. 2005) (“We agree with the other circuits that have concluded that the parties can by contract displace the FAA standard of review, but that displacement can be achieved only by clear contractual language.”); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001) (“hold[ing] that parties may opt out of the FAA’s off-the-rack vacatur standards and fashion their own.”); *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995) (holding that

to expand judicial review maintains that the FAA is merely a “default standard of review” that parties are free to displace.¹⁵³

By contrast, the Seventh, Eighth, Ninth, and Tenth Circuits have refused to enforce such agreements.¹⁵⁴ The Ninth Circuit concluded that the FAA prescribes specific, mandatory rules that leave no room for modification by the parties:

[P]rivate parties have no power to determine the rules by which federal courts proceed, especially when Congress has explicitly prescribed those standards. Pursuant to *Volt*, parties have complete freedom to contractually modify the arbitration process by designing whatever procedures and systems they think will best meet their needs—including review by one or more appellate arbitration panels. Once a case reaches the federal courts, however, the private arbitration process is complete, and because Congress has specified standards for confirming an arbitration award, federal courts must act pursuant to those standards and no others.¹⁵⁵

The Tenth Circuit agreed, concluding that the Supreme Court had interpreted the FAA to be “more than a collection of default rules [that] parties may alter with complete discretion.”¹⁵⁶ The Tenth Circuit found it significant that “[c]ontractually expanded standards, particularly those that allow for factual review, clearly threaten to undermine the independence of the arbitration process and dilute the finality of arbitration awards. . . .”¹⁵⁷ The court therefore refused to enforce an arbitration agreement that would contractually expand the standard of judicial review to allow the district court to vacate an award for insufficient evidence. In dicta, however, the Tenth

“[b]ecause these parties contractually agreed to expand judicial review, their contractual provision supplements the FAA’s default standard of review and allows for de novo review of issues of law embodied in the arbitration award”).

153. *Gateway Tech*, 64 F.3d at 997.

154. See *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997–98 (9th Cir. 2003) (en banc); *Worth v. Tyer*, 276 F.3d 249, 262 n.4 (7th Cir. 2001) (“However, the court, not the parties, must determine the standard of review”); *UHC Mgmt. Co. v. Computer Sciences Corp.*, 148 F.3d 992, 998 (8th Cir. 1998); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001) (“[E]xpanded judicial review would threaten the independence of arbitration . . . and reduces arbitrators’ willingness to create particularized solutions for fear the decision will be vacated by a reviewing court.”).

155. *Kyocera*, 341 F.3d at 1000.

156. *Bowen*, 254 F.3d at 935.

157. *Id.*

Circuit also stated that “parties to an arbitration agreement may eliminate judicial review by contract.”¹⁵⁸

A contract that expands the level of judicial review of an arbitration award increases both the time and expense of that judicial review when compared to the limited judicial review provided by the FAA. But this increase in time and expense is likely minimal when compared with a matter that is fully litigated under the default Federal Rules of Civil Procedure.¹⁵⁹ Prohibiting the parties from contracting for expanded judicial review might also mean that the courts see cases litigated that otherwise would be arbitrated.

Undoubtedly, expanded judicial review would increase the time and expense of the dispute resolution process compared to arbitration without expanded review. However, it might well be that if negotiated clauses expanding judicial review were not recognized, many parties would not agree to arbitration in the first place. It is doubtful many parties would take the time and expense necessary to negotiate expanded judicial review unless the opportunity was important to them. Without judicial review, a party might so fear the work of a maverick arbitrator that arbitration would not be an option.¹⁶⁰

Given the clear circuit split on this issue, it seems quite likely that the Supreme Court will resolve the issue. The outcome will depend on the Supreme Court’s view of whether Congress intended for the FAA to provide a *mandatory* standard of judicial review of arbitration awards or, alternatively, whether Congress intended the FAA to be a set of *default* rules that the parties may modify by their agreement.

Regardless of how the Supreme Court resolves this issue, however, the door will remain open for parties to modify the normal standards of review in litigation. The principal argument against enforcing contracts that alter the standard of review applicable to an *arbitration award* is that such contracts conflict with

158. *Id.* at 931. *But see* *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 65 (2d Cir. 2003) (holding that “private parties may not dictate to a federal court when to enter a judgment enforcing an arbitration award. Judicial standards of review, like judicial precedents, are not the property of private litigants.”).

159. *See* *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring) (“[E]nforcing the arbitration agreement—even with enhanced judicial review—will consume far fewer judicial resources than if the case were given plenary adjudication.”).

160. Goldman, *supra* note 13, at 184.

the express standard established by Congress in the FAA.¹⁶¹ If the Supreme Court decides that the FAA embodies a set of mandatory rules, then this is simply a case where Congress has expressly acted to preclude modification of certain procedural rules. If, on the other hand, the Supreme Court holds that contracts to expand the scope of district court review of *arbitration* awards are enforceable, it will set the bar very high for Congress when it wants to preclude waiver of certain *litigation* rights.

2. Contracting to Eliminate Appellate Review of Arbitration Awards

The Tenth Circuit recently enforced a contractual provision to eliminate *appellate* review of an arbitration award. In *Mactec, Inc. v. Gorelick*,¹⁶² the Tenth Circuit was asked to review a district court order denying Mactec's application to vacate an arbitration award. The Tenth Circuit rejected that request and dismissed the appeal for lack of jurisdiction.¹⁶³ The court based its decision on a "non-appealability clause" in the parties' arbitration agreement that stated: "Judgment upon the award rendered by the arbitrator shall be final and nonappealable and may be entered in any court having jurisdiction thereof."¹⁶⁴ The court held that "contractual provisions limiting the right to appeal from a district court's judgment confirming or vacating an arbitration award are permissible, so long as the intent to do so is clear and unequivocal."¹⁶⁵

The Tenth Circuit acknowledged that it had considered a similar issue in *Bowen v. Amoco Pipeline Co.*¹⁶⁶ The court pondered the seeming contradictions between its decisions in *Bowen* and *Mactec*:

How, then, do we reconcile our stated willingness to accept private *restrictions* on judicial review with our express holding that private *expansions* on judicial review are unenforce-

161. The Seventh Amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. This likely prohibits contractual agreements to provide for de novo review of a jury's factual findings by a federal court of appeals.

162. 427 F.3d 821 (10th Cir. 2005).

163. *Id.* at 830.

164. *Id.* at 827.

165. *Id.* at 830.

166. 254 F.3d 925 (10th Cir. 2001).

able? Fortunately, the panel in *Bowen* solves this dilemma: “The key question is whether the alternate rule conflicts with the federal policies furthered by the FAA.” If the fundamental policy behind the FAA is to reduce litigation costs by providing a more efficient forum, it makes sense to uphold contractual provisions that support that aim while striking down provisions that subvert it.¹⁶⁷

The Tenth Circuit further noted that “courts routinely enforce agreements that waive the right to appellate review over district court decisions.”¹⁶⁸

The court also distinguished *Hoefl v. MVL Group, Inc.*,¹⁶⁹ in which the Second Circuit reviewed an arbitration agreement providing that the arbitrator’s decision was not “subject to any type of review or appeal whatsoever.”¹⁷⁰ The Second Circuit held that such a non-appealability provision cannot deprive the federal courts of the ability to apply the standards for vacatur of an arbitration award.¹⁷¹ The Second Circuit reasoned that, if a district court is to give legitimacy to an arbitrator’s decision by confirming the award, it must retain the right to vacate the award if it did not satisfy the requisite standards.¹⁷² A contrary decision would turn the district court’s decision into a mere rubber stamp of the arbitration award.¹⁷³

3. *A Concern with Jurisdictional Limitations*

Although not written in such terms, *Hoefl*, *Bowen*, and *Mactec* may reflect the courts’ abiding concern for identifying and respecting the limits of their jurisdiction. Thus, agreements to expand the scope of appellate review or to expand the scope of judicial review of an arbitration award are invalid because they require the court to extend its power to an area or issue where it was previously powerless.

In the federal system, of course, the courts have limited jurisdiction. The district courts and the courts of appeals exist at the will of Congress and therefore are subject to elimination or

167. *Mactec*, 427 F.3d at 829 (quoting *Bowen*, 254 F.3d at 935) (internal citation omitted).

168. *Id.* at 830 (citing *WRIGHT ET AL.*, *supra* note 150, at § 3901).

169. 343 F.3d 57 (2d Cir. 2003).

170. *Id.* at 63 (internal quotation omitted).

171. *Id.* at 66.

172. *Id.* at 64–66.

173. *Id.*

reduction in jurisdiction by that body.¹⁷⁴ Once Congress established the jurisdictional limitations of the courts, cases such as *The Bremen v. Zapata Off-Shore Co.*¹⁷⁵ clarified that parties to a contract may remove issues from the scope of the court's review that would otherwise be reviewed by that court. But the parties may not, by consent or contractual agreement, expand the scope of the court's review because this would constitute an expansion of the court's jurisdiction. Thus, expansion of a court's jurisdiction is one area where Congress need not act to expressly preclude the parties' agreement to modify the rules of litigation. The Constitution makes clear that only Congress can establish the inferior courts' jurisdiction, and this limit is not a "default limit" of jurisdiction that is subject to expansion by private agreement.¹⁷⁶

IV. THE RELATIONSHIP BETWEEN THE LITIGATION PROCESS AND THE POWER TO MODIFY IT

A. *Litigation Rules Are Commodities that Are Subject to Negotiation and Exchange Like Other Contractual Provisions*

Although this Article discusses "waiver" of dispute resolution rights, that term is a misnomer. A true *waiver* involves a known right or privilege that a party intentionally relinquishes.¹⁷⁷ A right is *forfeited* when a party fails to assert it.¹⁷⁸ This Article addresses dispute resolution rights that are neither *waived* nor *forfeited*—they are *negotiated* and given up *in exchange for consideration*.¹⁷⁹ If a party may waive certain protections by intentionally relinquishing them and a party may forfeit the protections by ignorance (and the system is not then

174. U.S. CONST. art. III, § 1; *see also* 28 U.S.C. §§ 1291–96 (2006) (establishing jurisdiction of courts of appeals); *id.* at §§ 1331–69 (establishing jurisdiction of district courts).

175. 407 U.S. 1 (1972).

176. U.S. CONST. art. III, § 1; *see also* *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934) ("[L]ack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties.").

177. *See* *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

178. *See* *Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.").

179. *See* *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 703–05 (1945) (distinguishing between plain waiver of rights and waiver "given in settlement of a bona fide dispute between" the parties).

subverted), then a party should be able to bargain away its litigation rights in exchange for consideration.¹⁸⁰ Litigation rights are more valuable if they may be exchanged.¹⁸¹

By recognizing freedom of contract, the Supreme Court fosters certainty,¹⁸² efficiency,¹⁸³ allocation of risk,¹⁸⁴ and party confidence in the dispute resolution process and in the outcome of that process.¹⁸⁵ The Court's decision to embrace the principles of freedom of contract as applied to dispute resolution schemes has brought out a host of critics. Some have argued that "courts have rushed to embrace most forms of [ex ante contract], and in so doing have overlooked, if not forsaken, an underlying concern for fundamental fairness in favor of preservation of contractual

180. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848–49 (1986) (holding that respondents waived any right they may have had to the full trial of petitioner's counterclaims before an Article III court, noting that "personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried" are subject to waiver, and citing as examples the rights to trial by jury in civil and criminal cases).

181. See *Cange v. Stotler & Co.*, 826 F.2d 581, 596 (7th Cir. 1987) (Easterbook, J., concurring) (stating that case law does not distinguish between pre-litigation waivers and post-litigation settlements and should not do so because "[t]o forbid the contractual waiver is to make the class of statutory beneficiaries worse off, by depriving them of the opportunity to obtain the benefits of the statutory entitlement by using it as a bargaining chip in the process of contracting"); see also *United States v. Mezzanatto*, 513 U.S. 196, 208 (1995) ("A sounder way to encourage settlement is to permit the interested parties to enter into knowing and voluntary negotiations without any arbitrary limits on their bargaining chips. . . . A defendant can 'maximize' what he has to 'sell' only if he is permitted to offer what the prosecutor is most interested in buying."); *United States v. Barnett*, 415 F.3d 690, 691–92 (7th Cir. 2005) ("Constitutional rights like other rights can be waived, provided that the waiver is knowing and intelligent, as it was here. . . . Often a big part of the value of a right is what one can get in exchange for giving it up.").

182. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 14–15 (1972); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991).

183. See *Carnival Cruise Lines*, 499 U.S. at 593–94; Moffitt, *supra* note 143, at 19–22 (arguing that customization promotes efficiency); Willis L. M. Reese, *The Supreme Court Supports Enforcement of Choice-of-Forum Clauses*, 7 INT'L LAW. 530, 535 (1973).

184. See *Lowe Enters. Residential Partners v. Eighth Judicial Dist. Court*, 40 P.3d 405, 411 (Nev. 2002) (observing that "pre-litigation jury trial waivers are grounded in the parties' freedom to contract and their corresponding ability to allocate risk.").

185. See E. ALLAN LIND & TOM. R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 94 (1988) ("One of the central themes of Thibaut and Walker's work is that procedures that provide high process control for disputants tend to enhance procedural fairness. More recent research has confirmed this general finding."); see also Moffitt, *supra* note 143, at 18 ("Customized litigation is a form of process control, suggesting the prospect of increasing procedural justice.").

autonomy.”¹⁸⁶ But it is hard to accept that there is some fundamental unfairness in the parties’ agreement to adopt and apply mutually agreed-upon litigation procedures, especially where the parties bargain and negotiate for the procedures that will apply. This is exactly what happens when the parties agree to arbitration. And despite ongoing and withering criticism of the judicial treatment of arbitration agreements, these agreements continue to flourish. On a practical level, if one concedes that a paid arbitrator is capable of applying unique party-created rules and standards, and accepts that the resulting process is not fundamentally unfair, then it should not be fundamentally unfair for an Article III judge to apply those rules and standards.

B. *The Parties Own Their Dispute, and the
“Rules” of Litigation Are Default Rules*

How can one reconcile the existence of statutorily and constitutionally prescribed litigation rules with the ability of individuals to modify those rules? One way is to envision a dispute resolution process that is owned by the parties, but subject to Congress’s ultimate power to curb abuses. Under this view, the parties own the dispute and therefore they may design the dispute resolution process. The power to settle and the power to voluntarily dismiss the dispute reflect the principle of “party ownership” of the dispute.¹⁸⁷ Neither the courts nor the public “own” the dispute and they do not have the power to end it short of resolution; only the parties have that power.¹⁸⁸

186. Taylor & Cliffe, *supra* note 5, at 1088.

187. See Yeazell, *supra* note 129, at 631. Professor Yeazell has argued that civil procedure reforms of the last eighty-five years have had the unintended consequence of shifting control over the system from courts to the litigants. “If one remembers that courts are instruments of government, it is not too much to call it both a change in the location of government power and the passage to private hands of some of what was once governmental power.” *Id.*; see also *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18, 26–27 (1994) (considering settlement agreement in which parties agreed to vacate a Court of Appeals judgment and stating that “[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants” (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting))); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2669–70 (1995). See generally David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).

188. Class actions are the exception to the rule. The lead plaintiff must seek court approval to settle the dispute. FED. R. CIV. P. 23(e). Class actions are, however, consistent with “party ownership” of the dispute. Individual plaintiffs can

Some commentators argue that judicial decisions are “owned” by the public and provide a public benefit.¹⁸⁹ Even if one accepts this argument, contractually-modified litigation is preferable to arbitration. Under contractually-modified litigation rules, there will be a judicial decision and a precedent. Where the agreed upon procedures are “novel” to the public dispute resolution system, they will provide guidelines for future parties who are designing their own dispute resolution systems. As the body of precedent on contractually-modified litigation grows, parties will recognize and adopt procedures that fit their needs.

Thus, parties own their disputes and may design their own dispute resolution rules. If the parties agree to a modified set of dispute resolution rules, they should be able to adopt them with the expectation that courts will enforce them.¹⁹⁰ If the parties cannot agree, then Congress has created a default set of dispute resolution rules and procedures¹⁹¹ that provide a starting point for negotiations. Default rules “preserve the concept of freedom of contract, allowing parties to opt out of them in favor of rules they prefer.”¹⁹²

The question is, at what point in time—pre-dispute or post-dispute—can the parties first agree to modify the procedures? Some courts and commentators have argued that the differ-

“opt-out” of the class action process altogether and retain control and ownership of their claim. *Id.*

189. See, e.g., Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy In Dispute Resolution*, 51 HASTINGS L.J. 1199, 1202 (2000) (“While a court’s opinion certainly impacts the litigants before it, the opinion also becomes a component of the public good known as precedent, and benefits society as a whole by increasing the predictability of legal rules, thereby allowing for more efficient private ordering.”). The availability and prevalence of “unpublished” and “non-citable” decisions are, however, inconsistent with “public ownership” of judicial decisions. Eighty-one percent of the decisions issued by the federal courts of appeals in recent years have been designated as “unpublished.” See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2004, at 39 tbl.S-3 (2004), available at <http://www.uscourts.gov/judbus2005/contents.html>. The movement to make all decisions citable has, however, gained significant traction in recent years. See Memorandum from the Advisory Comm. on Appellate Rules to the Standing Comm. on Rules of Practice and Procedure A-2 (May 6, 2005) (proposing as an amendment to the Federal Rules of Appellate Procedure a new Rule 32.1, which provides that all opinion shall be citable), available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf#page=51>.

190. As discussed above, this is consistent with the intent of the Federal Rules of Civil Procedure. See *supra* Part III.D.

191. See *supra* Part III.D.

192. Goldman, *supra* note 13, at 184 n.80 (citing Cole, *supra* note 189, at 1251).

ences between “pre-litigation” exchange of dispute resolution rights and “litigation” waiver of dispute resolution rights are so significant that the two scenarios are not (and cannot be) analogous. For example, Taylor and Cliffe argue that a “litigation waiver occurs when the party is likely to be represented by counsel so the decision to waive an objection by not raising it is more likely to be an informed decision made as part of an overall litigation strategy.”¹⁹³ Although representation and an informed decision are “likely,” litigation waivers regularly occur and are enforced, even when parties are unrepresented by counsel and waiver of rights occurs through sheer ignorance.¹⁹⁴ Furthermore, it is not necessary for the party waiving its rights to understand exactly how that waiver will impact the litigation for the waiver of constitutional rights to be effective.¹⁹⁵ All contracts include an assessment of anticipated, but unknown, future events and allocation of risks. Enforcement of contracts is normally necessary when unanticipated events transpire.

These courts and commentators also fail to explain why decisions to give away rights in exchange for nothing should be enforced, but decisions to exchange a right for something of value should not be enforced. Finally, arguments against the right to modify procedures are inconsistent with the Supreme Court’s adoption of a new conception of freedom of contract,

193. Taylor & Cliffe, *supra* note 5, at 1105. John Kobayashi argues that stipulations made during litigation are permissible because the stipulations are within judicial control, which includes the power to relieve the parties from their stipulations. John Kobayashi, *Too Little, Too Late: Use and Abuse of Imocuous Yet Dangerous Evidentiary Doctrines*, in 2 ALI-ABA COURSE OF STUDY: TRIAL EVIDENCE, CIVIL PRACTICE AND EFFECTIVE LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 1127, 1145 (1991). But this is part of the freedom to make a bad bargain. The court can “relieve” a party of its bad bargain if the contract is unconscionable or otherwise unenforceable under traditional contract law standards.

194. Taylor and Cliffe also seek to distinguish true “waiver” of litigation rights (which they see as more palatable) from pre-litigation bargaining for rights because “[t]he concept of waiver by failing to object during litigation is part of the adversarial balance that has been struck through the development and continued refinement of procedural rules.” Taylor & Cliffe, *supra* note 5, at 1104–05. Taylor and Cliffe’s argument ignores that forfeiture (which is not waiver) is a rule of necessity. “Forfeiture is ‘not a mere technicality and is essential to the orderly administration of justice.’” *Freytag v. Comm’r*, 501 U.S. 868, 894–95 (1991) (Scalia, J., concurring) (quoting 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2472 (1971)). Without forfeiture of rights, litigation would not be final. The parties would have incentive to intentionally, but discreetly, “forfeit” rights in order to leave an escape hatch for collateral attack in the event that they lost.

195. See *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972).

whereby the “pre-litigation” exchange of litigation rights is an accepted principle. Other commentators have argued that the Supreme Court should revisit its jurisprudence in this area, but this Article instead accepts the current state of the law and considers its logical extensions.

V. LIMITS ON THE POWER TO MODIFY
THE RULES OF LITIGATION

A. *Overriding Procedural Considerations*

The Supreme Court has warned that an agreement to waive dispute resolution rights will not be enforced if there is some “overriding procedural consideration that prevents enforcement of the contract”¹⁹⁶ The Court has not had occasion to apply this vague standard in subsequent cases, and the Court’s opinion in *Mezzanatto* does little to define overriding procedural considerations. In the context of waiver of the Federal Rules of Evidence, the Court stated that “[t]here may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably ‘discredit[ing] the federal courts.’”¹⁹⁷ The Court provided two examples: a court may decline a defendant’s waiver of the right to conflict-free counsel,¹⁹⁸ and, if a defendant stipulated to trial by twelve orangutans, his conviction would be invalid notwithstanding consent to the procedure.¹⁹⁹ These examples provide little guidance in the civil context. Trial by twelve orangutans is not very common, and the Sixth Amendment right to conflict-free counsel does not apply in the civil context, where waiver of conflicts of interest between a lawyer and client is fairly common.²⁰⁰

1. *Due Process*

The Court’s statement regarding “overriding procedural considerations” might simply reflect a concern for the constitutional requirements of due process.²⁰¹ But, if it was meant to indicate that enforcement of some contracts might violate due process

196. *United States v. Mezzanatto*, 513 U.S. 196, 202 (1995).

197. *Id.* at 204 (quoting *WRIGHT & GRAHAM*, *supra* note 113, § 5039, at 207–08).

198. *Id.* (citing *Wheat v. United States*, 486 U.S. 153, 162 (1988)).

199. *Id.* (quoting *United States v. Josefik*, 753 F.2d 585, 588 (7th Cir. 1985)).

200. *See, e.g.*, CAL. R. PROF’L CONDUCT 3-310 (requiring signed waiver and informed consent).

201. *See* U.S. CONST. amends. V, XIV.

requirements, then it seems likely the Court would have made an explicit reference to due process rather than referring to “overriding procedural considerations.” Furthermore, if one accepts that modified litigation is simply an exercise of freedom of contract, then due process requirements do not apply because there is no state action. For example, “[e]very federal court considering the question has concluded that there is no state action present in contractual arbitration.”²⁰²

Although contracts to modify litigation require more significant involvement by public courts than contracts to arbitrate, both contracts require the courts’ involvement. Public courts are directly involved in enforcing the contractual commitment to participate in arbitration, and they also are directly involved in confirming and enforcing arbitration awards.²⁰³ The cases that have considered the question have found that public courts’ involvement in the arbitration process did not constitute state action because arbitration is a “private proceeding arranged by a voluntary contractual agreement of the parties.”²⁰⁴ Judge Posner, in a decision of the Seventh Circuit, describes arbitration as an incident of freedom of contract:

When arbitrators issue awards, they do so pursuant to the disputants’ contract—in fact the award is a supplemental contract obligating the losing party to pay the winner. The fact that the courts enforce these contracts, just as they enforce other contracts, does not convert the contracts into state or federal action and so bring the equal protection clause into play.²⁰⁵

Like an arbitration contract, a contract to modify the rules of litigation is simply a contract that the parties ask the courts to enforce. “[C]ourt enforcement of private contract terms does not constitute state action. Without state action, there can be no

202. Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1, 4; see also *id.* at 4 n.11 (collecting cases); Paul F. Kirgis, *Judicial Review and the Limits of Arbitral Authority: Lessons from the Law Of Contract* 10–11 & n.41 (St. John’s univ. Legal Stud. Research Paper Series, Paper No. 06-0057, 2006), available at <http://ssrn.com/abstract=939554> (collecting cases). By contrast, “virtually every commentator addressing the same issue has concluded that the opposite is true.” Cole, *supra*, at 4.

203. See Cole, *supra* note 202, at 41; Kirgis, *supra* note 202, at 10.

204. Kirgis, *supra* note 202, at 10 (quoting *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995)).

205. *Smith v. Am. Arbitration Ass’n*, 233 F.3d 502, 507 (7th Cir. 2000).

due process violation.”²⁰⁶ Even if the Supreme Court treated contracts to modify the rules of litigation differently from every other contract, it is unlikely that due process rights would prevent enforcement of the contract to modify litigation. Due process rights, like other constitutional rights, can be waived by ex ante contract.²⁰⁷

Rather than being concerned with a violation of due process, the Supreme Court might be concerned with the integrity of the results that are obtained—that is, there may be some minimal level of “truth-seeking” that is required in any set of procedures. If the procedures do not guarantee a certain level of truth-seeking, the Court might refuse to implement such procedures. Alternatively, the Court might be concerned with keeping up appearances and therefore reject strange processes that make the court look silly or incompetent.

2. *Truth-Seeking Function*

In *Mezzanatto*, the Supreme Court enforced the defendant’s agreement to waive Rule 410 of the Federal Rules of Evidence, which prohibits admission of plea statements against the defendant.²⁰⁸ The Court found that enforcement of the agreement would not irreparably discredit the federal courts because “[t]he admission of plea statements for impeachment purposes enhances the truth-seeking function of trials and will result in more accurate verdicts.”²⁰⁹ The Court also quoted a law journal note, titled *Contracts to Alter the Rules of Evidence*: “A contract to deprive the court of relevant testimony . . . stands on a different ground than one admitting evidence that would otherwise have been barred by an exclusionary rule. One contract is an impediment to ascertaining the facts, the other aids in the final determination of the true situation.”²¹⁰

From the Supreme Court’s vague standard and examples, two principles emerge. First, the Court will closely scrutinize “new” exclusionary rules that are the product of the parties’ ex

206. Kirgis, *supra* note 202, at 11.

207. See *supra* Part III.A (discussing waiver of “due process” rights).

208. *United States v. Mezzanatto*, 513 U.S. 196, 204–05 (1995).

209. *Id.* at 204 (citing *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980), for the proposition that “once a defendant decides to testify, he may be required to face impeachment on cross-examination, which furthers the ‘function of the courts of justice to ascertain the truth.’”).

210. *Id.* at 204–05 (quoting *Contracts to Alter*, *supra* note 120, at 142–43).

ante contract and thereby “deprive the court of relevant testimony.” Thus, the parties may be limited in their ability to *narrow* the scope of evidence that the court may consider. Second, courts will “liberally enforce[]” agreements to waive various exclusionary rules of evidence because these agreements remove an artificial barrier to more complete information.²¹¹

This distinction makes sense at a practical level because providing more information runs comparably little risk of arriving at an unjust result; it simply increases the burden and expense on the court and the parties. Furthermore, although the rules of evidence limit admissibility to evidence that is “relevant,” the parties always determine the scope of evidence that is “relevant”²¹² by framing the issues in their pleadings. The parties also may waive the existing rules—and thereby broaden the scope of admissible evidence—by failing to object at trial.²¹³ Courts therefore will enforce a stipulation to broaden the scope of relevant evidence framed by the pleadings.²¹⁴ It should follow that the court will enforce an *ex ante* contract that expressly broadens the scope of relevant evidence in the event of any dispute between the parties.

These principles should be considered, however, in light of the limited truth-seeking requirements of the “default” litigation rules. Once an action is filed, there is no requirement that the parties see it through to a finding of the “truth.” The plaintiff may voluntarily dismiss the case at any point, and any party may agree to settle the case at any point.²¹⁵ If the system were devoted entirely, or even primarily, to determining the

211. *See id.* at 206–08 & n.5 (stating that parties may alter the rules of evidence to admit relevant evidence that is otherwise inadmissible because of a policy decision manifest in the rules that justifies the default rule of exclusion); *Contracts to Alter*, *supra* note 120, at 139–40.

212. *See* FED. R. EVID. 402.

213. *See Mezzanatto*, 513 U.S. at 203 (“During the course of trial, parties frequently decide to waive evidentiary objections, and such tactics are routinely honored by trial judges.”) (citing WRIGHT & GRAHAM, *supra* note 113, § 5032, at 161 (“It is left to the parties, in the first instance, to decide whether or not the rules are to be enforced It is only in rare cases that the trial judge will . . . exclude evidence they are content to see admitted.”)); *see also* WRIGHT & GRAHAM, *supra* note 113, § 5039, at 207.

214. *See Contracts to Alter*, *supra* note 120, at 139.

215. The ability of the parties to settle their dispute, rather than litigate it to “truth” determination, has been criticized. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing that there are social costs when cases are removed from the public litigation system).

truth, it would require investigation of claims at the direction of the court until the court determined the “truth.”²¹⁶

It is pretty clear that American adjudication involves much more than the search for truth or for right answers, and indeed it is clear that truth often plays a subordinate role in adjudication [E]ven a cursory survey of procedural and evidentiary rules, and structural features of adjudication more generally, reveals many that are designed to promote goals other than, and often at the expense of, the search for truth.²¹⁷

For example, the stated purpose of the Federal Rules of Civil Procedure is to “secure the just, speedy, and inexpensive determination of every action.”²¹⁸ The just determination of every action might include the pursuit of the “truth,” but the speedy and inexpensive determination of every action “might, and surely often does, stand against the pursuit of truth.”²¹⁹ Private parties likewise should be able to determine and assign appropriate value to the goals of speed and efficiency in their ex ante contract to modify the rules of litigation.

The burden of proof required in most civil cases also belies the idea that the primary goal of litigation is truth-seeking. For the vast majority of civil cases, the party with the burden of proof seeks to convince the trier of fact that a specific fact has been proven by a preponderance of the evidence. Proof by a preponderance of the evidence “simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.”²²⁰ If a jury concludes that the evidence is such that 500,000 out of 999,999 times, X is true (and therefore X is not true 499,999 times out of 999,999 times), then the plaintiff has proved X by a preponderance of the evidence. This burden is an astonishingly low guarantee of arriving at the truth.²²¹ But it is all that the rules of litigation require.

216. Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 741 (2004) (“Flipping a coin is not enough; dispute resolution must be reasonable.”) (emphasis omitted).

217. *Id.* at 739.

218. FED. R. CIV. P. 1.

219. Peters, *supra* note 216, at 740.

220. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) (internal quotation omitted).

221. Some “courts have been shocked at the suggestion that a verdict, a truth-finding, should be based on nothing stronger than an estimate of probabilities.” 2 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 339, at 423 (5th ed. 1999).

Contrast the principle of truth-seeking with the universally accepted notion that the courts would not enforce an agreement that required the court to decide a dispute by a flipped coin.²²² The “coin flip” is derided because it is not guaranteed to lead us closer to the truth; by definition it is guaranteed to leave us knowing that the process did not seek the truth.²²³ Yet, the standard of “preponderance of evidence” is the smallest possible step towards truth-seeking that one can take from the proverbial coin flip.

The rules of litigation could require a higher standard of proof. “The ‘clear and convincing’ standard of proof of facts is an intermediate standard which lies somewhere between ‘beyond a reasonable doubt’ and a ‘preponderance of evidence.’”²²⁴ One articulation of the standard endorsed by the Federal Circuit defines clear and convincing evidence “as evidence which produces in the mind of the trier of fact ‘an abiding conviction that the truth of its factual contentions are highly probable.’”²²⁵ This “special standard of persuasion” is reserved for special types of claims “where there is thought to be special danger of deception, or where the court thinks the particular type of claim should be disfavored on policy grounds.”²²⁶ This heightened standard provides a disincentive for parties to initiate litigation and elevates the importance of truth-seeking in the dispute resolution process.

222. See *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring) (“I would call the case differently if the agreement provided that the district judge would review the award by flipping a coin or studying the entrails of a dead fowl.”); *Kandalepas v. Economou*, 547 N.E.2d 496, 497–98 (Ill. App. Ct. 1989) (holding that court-approved settlement reached as a result of coin flip in the court’s presence could not be judicially enforced because it violated public policy); see also *Taylor & Cliffe*, *supra* note 5, at 1090 (“Certainly a court would not enforce an agreement to resolve a dispute by judicial coin toss, the parties not trusting each other to flip the coin fairly. It is simply too ridiculous and makes a mockery of why the court is there.”); *Cole*, *supra* note 189, at 1225 (“Imagine that the parties to a lawsuit sign an agreement that authorizes the court to decide their dispute by flipping a coin. If such an agreement were enforced, it would undermine the integrity of the court as an institution by making it appear that courts exist to serve the whims of litigants and make decisions without regard to legal precedent.”).

223. See *James v. Otis Elevator Co.*, 854 F.2d 429, 432 n.3 (11th Cir. 1988) (“A fact that can only be decided by a coin toss has not been proven by a preponderance of the evidence, and cannot be submitted to the jury.”).

224. *Buildex Inc. v. Kason Indus., Inc.*, 849 F.2d 1461, 1463 (Fed. Cir. 1988) (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)).

225. *Id.* (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)).

226. *STRONG ET AL.*, *supra* note 221, at § 340, at 426–27.

Thus, the public dispute resolution system does not require the result to reflect the truth; rather, “in resolving private disputes, society is content if courts get it right somewhat more often than not.”²²⁷ The decision of which standard of proof to employ is primarily a policy decision. The parties to an ex ante contract should be free to substitute their own policies where those policies demand a measure of truth-seeking greater than a judicial coin flip. This would include any agreement that *heightens* the requisite standard of proof from preponderance of evidence to clear and convincing evidence and, in turn, reinforces and elevates the court’s truth-seeking function.

The courts would likely refuse to apply a “probable cause” or “reasonable suspicion” standard of proof—standards that are familiar to American courts, but less likely to determine the truth than a coin flip.²²⁸ And, of course, the parties cannot turn the federal courts into a rubber stamp by requiring the courts to enter judgment in any event, thus removing the courts’ decision-making function altogether.²²⁹

3. *Resistance to Unusual and Unfamiliar Procedures*

The Supreme Court’s concern for “overriding procedural considerations” might also reflect a resistance to unusual and unfamiliar procedures. Where the parties’ agreement forces a court “to try a case by unusual methods,”²³⁰ the agreement might be unenforceable. As noted by Judge Alex Kozinski, “I would call the case differently [and refuse to enforce the parties’ agreement] if the agreement provided that the district judge would review the award by flipping a coin or studying

227. Peters, *supra* note 216, at 741.

228. “Reasonable suspicion does not mean evidence beyond a reasonable doubt, or by clear and convincing evidence, or even by a preponderance of the evidence. Reasonable suspicion is not even equal to a finding of probable cause. Rather, reasonable suspicion requires only specific objective facts upon which a prudent official, in light of his experience, would conclude that illicit activity *might be* in progress.” Spear v. Sowders, 71 F.3d 626, 631 (6th Cir. 1995) (emphasis added).

229. See *supra* Part III.F.2. (discussing *Mactec, Inc. v. Gorelick*, 427 F.3d 821 (10th Cir. 2005), *Hoefl v. MVL Group, Inc.*, 343 F.3d 57 (2d Cir. 2003), and refusal to enforce agreements to eliminate the district court’s review of arbitration award because it would turn the district court into a rubber stamp for the award even if it were blatantly improper).

230. *Contracts to Alter*, *supra* note 120, at 140; *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 935–36 (10th Cir. 2001) (suggesting that an agreement to alter the typical appellate standard of review might be unenforceable if it required the courts to apply unfamiliar rules and procedures).

the entrails of a dead fowl.”²³¹ But a reluctance to try a case by “unusual methods” should not include a reluctance to try a case by nontraditional *but familiar* standards. For example, a contractual agreement to arbitrate that required a district court to review an arbitration award for errors of fact and law is “different” than the traditional standard applied to review of arbitration awards. But it “is no different from that performed by the district courts in appeals from administrative agencies and bankruptcy court, or on habeas corpus.”²³² Thus, the real question is whether the court is capable of applying the “unusual” procedure to reach a reasoned result. If so, the fact that the procedure is “unusual” is not problematic. If the procedure is unfamiliar to the court, which may not be competent to employ the procedure to reach a reasoned result, then it may constitute an “overriding procedural consideration.”²³³

B. *Courts’ Inherent Power to Control the Litigation Process*

The courts’ inherent power to control the litigation process may constitute an additional limitation on the parties’ ability to modify the rules of litigation. In modified litigation, the parties design the rules and procedures. They can be very detailed in their procedures, leaving few issues up to the court’s discretion and setting forth specific standards for the court to apply. The parties, however, necessarily place their faith in the court’s ability to apply the rules and procedures. The court then must faithfully apply the parties’ procedures and may not reject them “based on judicial preferences of any kind, moral or oth-

231. *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring); see also *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995) (citing *United States v. Josefik*, 753 F.2d 585, 588 (7th Cir. 1985) (“No doubt there are limits to waiver; if the parties stipulated to trial by 12 orangutans the defendant’s conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept.”)); Cole, *supra* note 189, at 1225 (“Imagine that the parties to a lawsuit sign an agreement that authorizes the court to decide their dispute by flipping a coin. If such an agreement were enforced, it would undermine the integrity of the court as an institution by making it appear that courts exist to serve the whims of litigants and make decisions without regard to legal precedent.”).

232. *Lapine*, 130 F.3d at 891. This example leaves aside the question of whether the modified standard of review constitutes an impermissible expansion of the reviewing court’s jurisdiction.

233. See *Mezzanatto*, 513 U.S. at 202.

erwise.”²³⁴ Thus, the parties have inherent power to modify the rules of public dispute resolution; the courts do not.

On the other hand, the courts possess certain inherent powers to control the litigation process that the parties cannot eliminate by contract (ex ante or otherwise).²³⁵ This inherent judicial authority is “[d]eeply rooted in Anglo-American judicial usage.”²³⁶ The Supreme Court defines inherent powers as those which “cannot be dispensed with . . . because they are necessary to the exercise of all others.”²³⁷ In the words of Professor Daniel Meador:

Inherent powers consist of all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. These powers are inherent in the sense that they exist because the court exists; the court is, therefore it has the powers reasonably required to act as an efficient court.²³⁸

The courts’ inherent authority includes power to order consolidation of cases for trial, court administration and docket management, and authority to sanction counsel and litigants for misconduct.²³⁹ Conversely, the parties may not emasculate the court by contractually eliminating its inherent powers to sanction the parties for litigation misconduct.

234. Shell, *supra* note 78, at 452.

235. See *Chambers v. Nasco, Inc.*, 501 U.S. 32, 44–51 (1991) (holding that courts have the inherent power to manage their own proceedings and to control the conduct of those before them—including the power to punish conduct that abuses the judicial process—and that this inherent power is not displaced by the rules of civil procedure); see also *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001) (stating that although the judgments of federal courts were normally given the same claim preclusive effect as a judgment rendered in the courts of that state, this same result would not be required where “state law is incompatible with federal interests. If, for example, state law did not accord claim-preclusive effect to dismissals for willful violation of discovery orders, federal courts’ interest in the integrity of their own processes might justify a contrary federal rule.”) (emphasis added).

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

237. *Chambers*, 501 U.S. at 43 (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)).

238. Meador, *supra* note 236, at 1808 (quoting *Bankers Trust Co. v. Braten*, 420 N.Y.S.2d 584, 590 (Sup. Ct. 1979)).

239. See Meador, *supra* note 236, at 1811; Robert J. Pushaw, *Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 760–61 (2001).

Courts are inclined to enforce agreements that lessen the burden on the public judicial system and thereby protect their resources.²⁴⁰ This is consistent with the express goal of the Federal Rules of Civil Procedure to “secure the just, *speedy, and inexpensive determination* of every action.”²⁴¹ It is clear that the courts will look favorably on an *ex ante* contract that reduces the burden on the courts.²⁴² It is unclear whether it is a requirement, or only a preference, that the contract reduce the burden on the court and the judicial system.²⁴³ Consistent with the theme of this Article, courts should enforce *ex ante* contracts that make litigation look like arbitration by streamlining the procedures and thereby reducing the time and expense of litigation. If the modified procedure results in a reasonable increase in the court’s workload, it should be enforced unless it

240. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10–15 (1972) (rejecting the “historical judicial resistance to any attempt to reduce the power and business of a particular court [which] has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets [because it] reflects something of a provincial attitude regarding the fairness of other tribunals”); see also *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991) (“[A] clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions.”); Zitter, *supra* note 107, at 71 (“[C]ourts have observed that these jury trial waivers are appropriate since in many commercial transactions, advance assurance that any disputes that might arise would be subject to expeditious resolution in a court trial would best serve the needs of the contracting parties as well as those of the overburdened judicial system.”) (internal citations omitted).

241. FED. R. CIV. P. 1 (emphasis added).

242. See Jonathon R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994) (arguing that their self-interest in caseload reduction and in other means of reducing the burden on the court often influences judges’ decisions).

243. See, e.g., Carrington & Haagen, *supra* note 14, at 332 (arguing that the Supreme Court has “elevate[d]” its impulse to “conserve scarce judicial resources by encouraging citizens to resolve disputes by private means . . . to the rank of imperative[.]”). *But see* Moffitt, *supra* note 143, at 40–41 (arguing that some benefits of the current litigation system give the public pause about advocating the ability to customize litigation). In the context of arbitration agreements, one commentator argues that, “where the intent of the parties and the speed and cost of dispute resolution conflict, the Supreme Court has made clear that the intent of the parties must control.” Goldman, *supra* note 13, at 183 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219–20 (1985)).

impliedly (or expressly) expands the courts' jurisdiction.²⁴⁴ Where the increase in costs is significant, the courts might require the parties to cover the additional costs.²⁴⁵

Finally, the courts' inherent power to control the litigation process is related to a concept discussed below—the parties may waive only their own litigation rights. The court would not be a “party” to any *ex ante* contract agreed to by the parties. Thus, the court could not be sued for “breach” of that contract if the court failed to perform some act required by the contract. On the other hand, the premise of this Article is that the courts are obligated to enforce *ex ante* contracts to modify the rules of litigation and that the enforcement mechanism of choice is specific performance. Thus, the parties can contract for specific procedures and the court should be obligated to apply those procedures. But the interpretation of the chosen procedures, as well as sanctions for violation of the procedures, is left to the court.

C. *The Parties May Waive Only Their Own Litigation Rights*

Although a party may waive its “personal” litigation rights, a party may not waive the litigation rights of others,²⁴⁶ nor may it waive the public's litigation rights. For example, an *ex ante* contract cannot modify the litigation rules to provide that there shall be no public access to the court files, the hearings, and the trial of the matter. A party to a contract may waive its own First Amendment rights,²⁴⁷ but that party cannot “waive” the public's First Amendment rights.²⁴⁸

In addition, the Supreme Court has indicated that there may be certain “structural protections” of the Constitution that are not waivable because these protections do not belong to the individual litigants. For example:

244. Cf. Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147, 151 (1997); Kevin Sullivan, Comment, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J. 509, 548–49 (2002).

245. See Moffitt, *supra* note 143, at 46–47.

246. See *id.* at 43–45 (noting that litigants cannot modify litigation rules to eliminate or decrease the litigation rights of non-litigants).

247. See *Snepp v. United States*, 444 U.S. 507 (1980) (holding as enforceable a CIA agent's contractual commitment to the CIA to submit any writing for review prior to publication).

248. See *supra* Part I.C.

Article III, § 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts . . . and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other. . . . To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. . . . When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.²⁴⁹

On the other hand, the Court has not squarely addressed this issue and this dicta has been disavowed in other circumstances.²⁵⁰ In particular, Justice Scalia noted several “structural claims” that the Supreme Court and various Federal Courts of Appeals declined to consider because they were forfeited, and he posited that non-jurisdictional structural limitations may be *forfeited*.²⁵¹ But Justice Scalia would argue nevertheless that such limitations may not be *negotiated* away:

It is true, of course, that a litigant’s prior agreement to a judge’s expressed intention to disregard a structural limitation upon his power cannot have any *legitimizing* effect—*i.e.*, cannot render that disregard *lawful*. Even if both litigants not only agree to, but themselves propose, such a course, the judge must tell them no. But the question before us here involves the effect of waiver not *ex ante* but *ex*

249. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850–51 (1986) (internal citations and quotations omitted); *see also id.* (distinguishing Article III’s guarantee of impartial and independent federal adjudication, which is a personal constitutional right that is subject to waiver, from Article III’s role as “an inseparable element of the constitutional system of checks and balances”).

250. *See Freytag v. Comm’r*, 501 U.S. 868, 893–901 (1991) (Scalia, J., concurring in part and in the judgment) (noting that the Court, when it granted certiorari, asked the parties to brief the issue of whether a party may waive an Appointments Clause challenge but that it then refused to reach the issue in its opinion, and arguing that non-jurisdictional structural guarantees can be waived); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) (“[T]he proposition that legal defenses based upon doctrines central to the courts’ structural independence can never be waived simply does not accord with our cases.”).

251. *See Freytag*, 501 U.S. at 899–900 (Scalia, J., concurring in part and in the judgment) (discussing cases involving claims based on the negative Commerce Clause, the Commerce Clause, separation of powers, and the Supremacy Clause).

post—its effect not upon right but upon *remedy*: Must a judgment already rendered be set aside because of an alleged structural error to which the losing party did not properly object? There is no reason in principle why that should always be so.²⁵²

Justice Scalia stated that adoption of a rule that structural limitations may not be forfeited also would be unwise because it “would require the development of a whole new body of jurisprudence concerning which constitutional provisions are ‘structural’—a question whose answer is by no means clear.”²⁵³ If parties’ ability to modify the rules of litigation is limited by the inability to waive “structural protections” of the Constitution—even though these protections may be forfeited by ignorance—then the Court may have to begin the development of this new body of jurisprudence to determine whether a waiver is effective.²⁵⁴

D. *Waiver of Constitutional Rights May Be Subject to Stricter Scrutiny: The “Knowing, Voluntary, and Intelligent Waiver” Standard*

Although not an absolute limit on the power to modify litigation rules, certain rules may be subject to stricter scrutiny such that waiver is only effective if it is knowing, voluntary, and intelligent. For example, most federal courts have held that a jury waiver clause is enforceable *only if* the waiver is knowing and voluntary (and, in some cases, intelligent).²⁵⁵ Similarly, those federal courts that have reached the issue have held that waiver of constitutional rights in the context of civil litigation is subject to the same standards as waiver of constitutional rights in a criminal proceeding.²⁵⁶

252. *Id.* at 896. This raises the troubling possibility that waiver will depend upon an inquiry into the parties’ state of mind and that courts will enforce “ignorant” waivers, but refuse to enforce knowing waivers of certain rights.

253. *Id.* at 900.

254. Although it goes beyond the scope of this Article, this raises the question of what kinds of agreements would raise ‘structural protections’ concerns in an ex ante contract. This question might have added importance and relevance when a governmental or quasi-governmental body entered into an ex ante contract to modify the public dispute resolution rules.

255. See *supra* Part III.B.

256. See *id.*

The Supreme Court has not addressed this issue directly, and its decisions have not provided any clear guidance. When the Court enforced the cognovit note in *Overmyer*,²⁵⁷ it held that the Constitutional rights to notice, hearing, and due process may be waived in a predispute contract.²⁵⁸ The Court assumed that the “standard for waiver in a corporate-property-right case of this kind is the same standard applicable to waiver in a criminal proceeding, that is, that it be voluntarily, knowingly, and intelligently made, or an intentional relinquishment or abandonment of a known right or privilege”²⁵⁹ But it did not have to resolve this issue because “that [higher] standard was fully satisfied” in that case.²⁶⁰ By contrast, the Court has enforced extrajudicial contracts made prior to litigation that waive rights, in some cases constitutional rights, under circumstances that indicate that the waiver was *not* knowing, voluntary, and intelligent.²⁶¹ Likewise, the Court has indicated that “it may be true that extrajudicial contracts made prior to litigation trigger closer judicial scrutiny than stipulations made within the context of litigation,”²⁶² but the Court has not so held in any particular case.²⁶³ Given the uncertainty of the standard that the courts will apply, it is safest to assume that constitutional rights may only be waived by *ex ante* contract if the waiver is voluntary and knowing (and, possibly, intelligent). But even if these litigation rights are subject to stricter scrutiny, they may be modified by *ex ante* contract.

257. D.H. *Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972).

258. *Id.*

259. *Id.* (internal citations and quotations omitted).

260. *Id.* at 186.

261. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *Nat'l Equip. Rental v. Szukhent*, 375 U.S. 311 (1964).

262. *United States v. Mezzanatto*, 513 U.S. 196, 203 n.3 (1995).

263. The Court did not have to consider this issue in *Mezzanatto*. There, the defendant and prosecutor made an agreement to waive the exclusionary provisions of Rule 410 of the Federal Rules of Evidence before an indictment was issued, but the Court found that “there [wa]s nothing extrajudicial about the waiver agreement at issue [t]here. The agreement was made in the course of a plea discussion aimed at resolving the specific criminal case that was ‘in progress’ against” the defendant. *Id.*

E. Conclusions

Given this new freedom of contract, I conclude that there is a presumption that litigation rules may be modified by ex ante contract and, if enforceable, the contract will be specifically enforced. The agreement will *not* be enforceable in the following circumstances:

- (A) Where it gives a court subject matter jurisdiction, either expressly or impliedly, that the court would not otherwise have;
- (B) Where the agreement is not enforceable under the traditional standards of contract law—that is, the contract itself is not enforceable;
- (C) Where the contract waives certain constitutional rights, it *may* be unenforceable if the waiver was not knowing, voluntary, and, possibly, intelligent;
- (D) Where Congress has acted to affirmatively prohibit modification of the litigation rule by ex ante contract;
- (E) Where the agreement seeks to waive litigation rights of one who is not a party to the contract, including the public's litigation rights; and
- (F) Where there is an overriding procedural consideration that prevents enforcement of the contract because it would irreparably discredit the courts.

We can eliminate most concern about limits (B) and (C) if the contract was entered into between two sophisticated, commercial entities who are both represented by lawyers.²⁶⁴ Concerns regarding improper expansion of jurisdiction, waiver of non-personal litigation rights and overriding procedural considerations are just as important during litigation as they are prior to litigation. Thus, if the right that is waived in advance of a dispute is a right that courts have held can be waived during litigation, then we can eliminate most concern about limits (A), (E), and (F).²⁶⁵

264. See *D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 185–86 (1972) (stating that the waiver standard of “voluntarily, intelligently and knowingly made” was “fully” satisfied where the contract was negotiated between sophisticated, commercial entities who were represented by lawyers). This assumes that the contract was not the product of fraud or duress.

265. This conclusion may be limited, however, by the distinction between the effect of a waiver ex ante and a forfeiture ex post. There may be certain rights that cannot be waived intentionally but can be forfeited by failure to object. See Frey-

Likewise, if the parties can waive their procedural rights by agreeing to arbitration, they should be able to waive these same rights through modified litigation without encroaching upon limits (A), (E), and (F). An arbitration award is presented to the courts and judgment is entered upon the award unless the award is “completely irrational” or exhibits a “manifest disregard of law.”²⁶⁶ This limited review is necessary to satisfy due process.²⁶⁷ Likewise, the Supreme Court’s concern about “overriding procedural considerations” in *ex ante* contracts to modify litigation rules is necessary to preserve due process. In both cases, the parties design the procedures, but there is a minimum of fairness and principled decision-making that must be incorporated in those procedures. A district court would refuse to enter judgment on an arbitration award that was inconsistent with this minimal requirement of due process. The district court also would refuse to enter judgment on an arbitration award that improperly expanded the court’s jurisdiction or sought to waive litigation rights of persons other than those party to the arbitration agreement.

Thus, if Congress has not expressly precluded contractual modification of a litigation rule, parties may negotiate and modify any litigation rule that they may waive either during litigation or by electing arbitration. If such a contract satisfies standard contract law requirements and, if required, was made knowingly, voluntarily, and intelligently, the contract to modify litigation rules will be subject to specific enforcement.

VI. MODIFIED LITIGATION UNDER THE NEW FREEDOM OF CONTRACT

A. *Maximizing the Chances for Specific Enforcement*

The “new” freedom of contract applies to adhesion contracts between consumers and large, sophisticated commercial entities.²⁶⁸ But this trend has been the subject of withering criticism,

tag v. Comm’r, 501 U.S. 868, 896 (1991) (Scalia, J., concurring in part and in the judgment); *supra* Part V.C.

266. See *Kyocera Corp. v. Prudential-Bache*, 341 F.3d 987, 998 (9th Cir. 2003); *supra* Part I.D.

267. See *Kyocera*, 341 F.3d. at 998.

268. “[T]he Rehnquist Court has collapsed all distinctions between international and domestic cases and between consumer and nonconsumer transactions and ruled that statutory litigation rights are fully alienable regardless of context.” Shell, *supra* note 78, at 459.

and courts are much more likely to refuse to enforce such agreements because they are found to be “unconscionable” or because they are not made “knowingly, voluntarily and intelligently.”²⁶⁹ Given these limitations, how can one maximize the chances that a contract to modify the litigation rules will be specifically enforced? Part of the answer lies in making explicit that the litigation rights at issue are not being “waived” but are being bargained with and exchanged for specific consideration.

The plethora of caselaw and commentary on mandatory arbitration provisions in consumer adhesion contracts should provide much guidance in crafting enforceable modified litigation agreements that are not “unconscionable.” There is, however, a significant distinction that supports *greater* enforcement of modified litigation agreements. Arbitration agreements have been criticized for requiring the consumer to “opt-out” of the public dispute resolution system, thus giving up the right to a neutral and independent decision-maker, being required to pay for arbitration even if victorious, and losing the right to appeal an arbitration award on all but the most outrageous grounds. But here, we are “opting-in” to the (modified) public dispute resolution system that is free and guarantees review by an Article III judge.

In addition, businesses that offer a modified litigation contract to consumers should specify the value attributed to each litigation right that is waived. The contract might look like a rental car agreement that provides a menu of options that the consumer may elect to keep or may elect to waive and initial to acknowledge their choices:

Section X: WAIVER OF LITIGATION RIGHTS.

- a. If you wish to waive your right to a jury, reduce your purchase price by \$5.00. [___]
- b. If you wish to agree that Florida is the exclusive forum for dispute resolution, reduce your purchase price by \$5.00. [___]

269. See, e.g., Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1243–44 (2001); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 763–64 n.7 (2002) (collecting articles); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 69–81; Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1070 (1998).

- c. If you wish to agree that the standard of proof required to prove breach of contract is “clear and convincing evidence,” reduce your purchase price by \$5.00.
- d. . . . etc. . . . etc. [___]
- e. If you wish to waive all of the foregoing litigation rights, reduce your purchase price by \$100.00. [___].²⁷⁰

This arrangement would go a long way toward establishing that the waiver of litigation rights was “knowing, voluntary and intelligent,” even where the consumer is not represented by an attorney.²⁷¹ These principles should translate particularly well to commerce transacted over the internet, where the business might provide links to generic explanations of the various rights being waived.

B. *What Might Modified Litigation Look Like?*

If *ex ante* contracts to modify the rules of litigation are presumptively enforceable (subject to the limits identified above) what might modified litigation look like? In drafting a contract to modify the rules of litigation, one could consider the follow-

270. This proposal raises a host of questions that must be left for another day. What price must be paid for litigation rights? Is it a safe assumption that consumers will undervalue their rights? How would one determine the “correct” value for a litigation right? Must the pricing be actuarially correct? If the rights are valued higher than their actuarial value, then no one will elect to preserve them. If they are underpriced but waived anyway, does that reflect that the waiver was not “knowing, voluntary and intelligent?” Or that consumers simply do not care about these litigation rights?

271. See *Atlantic Leasing & Fin., Inc. v. IPM Tech.*, 885 F.2d 188, 192–93 (4th Cir. 1989) (citing and discussing *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972)). Neither specific consideration for each clause nor representation by counsel is required to have a knowing, voluntary, and intelligent waiver of litigation rights, but, “[a]s an evidentiary matter, the existence of specific consideration obviously supports a finding of knowing and intelligent waiver” *Id.* Compare JAMS Policy On Consumer Arbitration, *supra* note 53, at 1 n.1 (special consumer standards do not “apply if the agreement to arbitrate was negotiated by the individual consumer and the company”) with AM. ARBITRATION ASS’N, SUPPLEMENTARY PROCEDURES FOR CONSUMER-RELATED DISPUTES 1 (2005), available at <http://www.adr.org/sp.asp?id=22014> (stating that consumer procedures apply “where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices”).

ing possibilities as four tiers of modification. Tier one represents modifications that courts have held to be enforceable. Tier two represents modifications that are consistent with the concept of waiver of litigation rights during litigation. Tier three represents modifications consistent with routine procedures used and approved in arbitration. The first three tiers are familiar procedural modifications and should be enforceable. The fourth tier represents unusual procedural modifications—an attempt to test the outer limits of the parties' power to modify the rules of litigation.

1. *Adopting Pre-Approved Modified Litigation Rules*

The parties may include various modifications that have already been found to be enforceable.²⁷²

- The parties may select the exclusive forum for resolution of the dispute;
- The parties may waive the right to trial by jury;
- The parties may modify the rules of evidence;
- The parties may specify the substantive law that will apply to the dispute; and
- The parties may waive their right to appellate review of the trial court's decision.

2. *Ex Ante Modification of Litigation Rules that May Be Modified Pendente Lite.*

The parties may specify waiver of certain rights in advance of litigation that can be waived by the parties during litigation.

- The parties may modify the Federal Rules of Civil Procedure;²⁷³
- The parties may waive the defense of lack of jurisdiction over the person;²⁷⁴
- The parties may waive the defense of improper venue;²⁷⁵

272. *See supra* Part III.

273. *See supra* Part III.D.

274. *See* FED. R. CIV. P. 12(h).

275. *See id.*

- The parties may specify a method of service of summons other than that provided for in the Federal Rules of Civil Procedure;²⁷⁶
- The parties may specify that any litigation is referred to an arbitrator for non-binding arbitration;²⁷⁷
- The parties may specify that any evidence adduced at such a non-binding arbitration is admissible if either party requests trial de novo of the arbitration award;²⁷⁸
- The parties may specify that the jury verdict may be non-unanimous;²⁷⁹
- The parties may specify that an action filed in state court is not removable to federal court;²⁸⁰ and
- The parties may agree that discovery will be limited to first tier discovery—that is, “discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party” is discoverable, but “discovery of any matter relevant to the subject matter involved in the action” is *not* discoverable.²⁸¹

3. *Adopting Standard Arbitration Procedures*

The parties may choose to emulate common arbitration procedures.²⁸² Arbitration “rules” generally permit the parties to

276. *See id.*

277. *See* 28 U.S.C. §§ 654–57 (2006).

278. *See id.*

279. *See* FED. R. CIV. P. 48.

280. *See* 28 U.S.C. §§ 1441–52 (2006).

281. *Cf.* FED. R. CIV. P. 26(b)(1) (stating that discovery of second tier information is only available for good cause and upon order of the court).

282. For examples of common arbitration procedures, see Uniform Arbitration Act § 4, *available at* <http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm>; ALTERNATIVE DISPUTE RESOLUTION: THE LITIGATOR’S HANDBOOK 72–75 (Nancy F. Atlas et al. eds, 2000); JOHN W. COOLEY & STEVEN LUBET, ARBITRATION ADVOCACY §§ 2.3.11, 3.6 (2d ed. 2003); JOHN W. COOLEY, THE ARBITRATOR’S HANDBOOK 30–35, 54–56 (2d ed. 2005); CORPORATE COUNSEL’S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES § 2.020 (2006); AM. ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R-1, R-30, R-31, R-32, R-39, R-42, E-6,

agree on any procedure that is consistent with the arbitration provider's policies.

- The parties may waive oral hearings in the case;
- The parties may waive the rules of evidence;
- The parties may permit witnesses to submit evidence by declaration or affidavit in lieu of live testimony;
- The parties may agree in advance to limit discovery to an exchange of documents;
- The parties may agree in advance to limit discovery to an exchange of documents plus a single deposition of the other party;
- The parties may agree that discovery shall be limited to the parties to the arbitration (and shall not include third-party discovery rights);
- The parties may agree that all discovery shall be completed within a certain amount of time of filing the complaint;
- The parties may agree in advance to the method(s) for service of notice;
- The parties may agree that the award need not set forth the decision-maker's reasoning;
- The parties may limit the amount of time for their presentation of evidence and argument at trial; and
- The parties may limit testimony on direct examination to written affidavit and specify that the witness will appear only if cross-examination is requested.

A few items that are standard procedure for arbitration might be problematic for modified litigation. For example, the

<http://www.adr.org/sp.asp?id=22440&printable=true>; AAA CONSUMER DUE PROCESS PROTOCOL, *supra* note 53, at Principles 1, 13; AM. ARBITRATION ASS'N, SUPPLEMENTARY PROCEDURES FOR ONLINE ARBITRATION, at § 1.a., <http://www.adr.org/sp.asp?id=22003&printable=true>; JAMS, COMPREHENSIVE ARBITRATION RULES AND PROCEDURES Rules 2, 17, 22-24, http://www.jamsadr.com/images/PDF/comprehensive_arbitration_rules.PDF.

parties to an arbitration agreement often specify the identity of the trier of fact, such as a particular arbitrator or arbitration service. It seems unlikely that parties to a contract that modifies litigation procedures could specify the particular federal judge to hear their dispute, though they can specify the particular district court to hear the dispute. This limitation is likely a facet of the court's inherent powers to control the litigation process. An interesting question is whether the parties may contractually agree that the trier of fact will be a jury made up of specified demographic groups, for example, only women, only people with children, or only people over age 40.²⁸³

4. *The Outer Limits: Other Litigation Rules that Should Be Subject to Specific Enforcement if Waived in an Ex Ante Contract.*

Although I do not intend the list in this subsection (or the preceding three subsections) to be exhaustive, it should be evident that the parties may modify litigation rules to make public dispute resolution look like arbitration. How far can the parties take this "new" freedom of contract? Consider the following possibilities. In order to ensure that litigation is limited to the parties to the litigation-modifying contract (and to preserve the ability to sue in federal court based on diversity jurisdiction), the parties might agree to limit resolution of any disputes to the parties to the contract. If third parties need not be joined for just adjudication,²⁸⁴ they shall not be joined. To consolidate claims and seek finality and efficiency of resolution, the parties might specify that "permissive counterclaims" are compulsory.²⁸⁵ These are simple choices that litigants face during litigation relating to how broad they want to make the dispute. It seems appropriate for the parties to make such decisions in advance of a dispute.

283. See *supra* Part V.A. (discussing due process and "overriding procedural considerations"); cf. Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145, 1147 (2004) (considering "whether or not it should be permissible for a party to a court-ordered or contractual arbitration to exercise a peremptory strike against a potential arbitrator on the basis of the potential arbitrator's race, sex or other characteristic which would not be a permissible basis for such a strike of a potential juror in a public court proceeding").

284. See FED. R. CIV. P. 19.

285. See FED. R. CIV. P. 13(b).

The parties may waive the right to initiate or participate in a class action lawsuit. Although some courts have refused to enforce class *arbitration* waiver clauses, others have held such class action waivers to be enforceable, and resolution of the issue depends upon the state's law that governs interpretation and enforcement of the agreement.²⁸⁶ Utah recently enacted legislation that specifically permits lenders (including credit card issuers) to include a class action waiver in their *ex ante* consumer contracts.²⁸⁷ If the contract includes a Utah choice of law clause (and the choice of law clause is enforceable), then the class action waiver would be enforced. The likelihood of enforcement increases if the contract also includes an enforceable choice of forum clause selecting Utah as the exclusive forum.

Finally, consider whether the parties may modify the burden of persuasion, such that certain claims must be proved by clear and convincing evidence. This would provide a powerful disincentive for the parties to initiate litigation—especially if used in conjunction with an attorneys' fees clause. It would also elevate the truth-seeking function. To obtain judgment, the trier of fact would have to be more convinced of the position of the party with the burden of proof than under the "preponderance of evidence" standard.²⁸⁸ Although this would require the court to apply a different standard than the "normal" standard of proof, this burden is familiar to courts because it applies to certain disfavored claims, such as fraud and will contests. Is it fundamentally unfair to require proof that satisfies this higher standard? In the context of an arbitration award, the courts do not think so.²⁸⁹

286. See *supra* Part I.E.

287. S.B. 252, 2006 leg., Gen. Sess. (Utah 2006), available at <http://www.le.state.ut.us/~2006/bills/sbillenr/sb0252.pdf>. The waiver, which must be in bold type or all capital letters, will preclude the consumer from initiating or participating in a class action. *Id.*

288. See *supra* Part V.A.2.

289. See *Keebler Co. v. Truck Drivers, Local 170*, 247 F.3d 8, 11 (1st Cir. 2001) (holding that arbitrator did not exceed authority in applying heightened standard of proof—clear and convincing evidence—rather than customary civil standard of preponderance of evidence, despite arbitration agreement's silence on the issue). *Id.* ("Applying a heightened standard of proof to terminations resulting from potentially criminal conduct, while judicially unorthodox, is not fundamentally unfair."); see also *Gen. Drivers, etc. v. Sears, Roebuck & Co.*, 535 F.2d 1072, 1075–76 (8th Cir. 1976) (holding that arbitrators' decision to use "clear and convincing evidence" standard in reviewing promotion decision did not require district court to vacate award).

CONCLUSION

This Article started with a practical problem—that arbitration is not all it is cracked up to be—and concluded with a potential solution. If we can remake litigation in arbitration’s image, we get the best of both worlds. I conclude that the current state of the law favors enforcement of ex ante contracts to modify the rules of litigation. Such contracts are presumptively enforceable and, where enforceable, are subject to specific enforcement. Congress can act to preclude ex ante contracts to modify the rules of litigation. Maybe it should do so, but as of yet, it has not. And the horse may be out of the barn. Courts regularly enforce ex ante contracts to modify the rules of litigation through, for example, forum selection clauses, waiver of due process rights to notice and a hearing, waiver of the Seventh Amendment right to jury trial, and choice of law clauses.

Given the current state of the law, I identify the limits on parties’ ability to modify the rules of litigation. The ex ante contract will *not* be enforceable in the following circumstances: (A) where it gives a court subject matter jurisdiction (either expressly or impliedly) that the court would not otherwise have; (B) where the agreement is not enforceable under the traditional standards of contract law (that is, if the contract itself is not enforceable); (C) where the contract waives constitutional rights, it *may* be unenforceable if the waiver was not knowing and voluntary (and, possibly, intelligent as well); (D) where Congress has acted to affirmatively prohibit modification of the litigation rule by ex ante contract; (E) where the agreement seeks to waive litigation rights of one who is not a party to the contract; and (F) where there is an overriding procedural consideration that prevents enforcement of the contract because it would irreparably discredit the courts.

These “limits” recognize and favor freedom of contract. Within these bounds, ex ante contracts to modify the rules of litigation can accomplish nearly all of the procedural benefits of arbitration. They can make modified litigation look like arbitration. But modified litigation can be superior to arbitration. The parties get a neutral decision-maker who is free of bias and free from the repeat-player syndrome of arbitration’s judges-for-hire. The parties retain their right to full appellate review. And these disputes remain in the pub-

lic domain—moving from the shadows of arbitration to the light of litigation.

Finally, this freedom of contract adds value to the litigation rights. Because they may be exchanged for consideration, they become more valuable. This creates the potential for great creativity and efficiency in negotiations. It also creates the potential for abuse. But Congress, not the courts, can always step in and remedy the abuse if it becomes manifest.