Party Subordinance in Federal Litigation

*Scott Dodson**

Abstract

American civil litigation in federal courts operates under a presumption of party dominance. Parties choose the lawsuit structure, factual predicates, and legal arguments, and the court accepts these choices. Further, parties enter ubiquitous ex ante agreements that purport to alter the law governing their dispute, along with a chorus of calls for even more party-driven customization of litigation. The assumption behind this model of party dominance is that parties substantially control both the law that will govern their dispute and the judges that oversee it. This Article challenges that assumption by explicating a reoriented model of party subordinance. Under this theory, parties fall in the lowest tier of the power hierarchy, beneath the law on top and judicial authority in the middle. Party subordinance means that the law—not party agreement—binds the court, and even when parties can lawfully make litigation choices, those choices generally do not bind the court. The upshot is that parties in fact have far less control over their litigation than presently assumed. Party subordinance suggests that the trend toward litigation customization is on shakier footing than presently acknowledged, reorients some key elements of the normative debate surrounding customization, and exerts significant pressure in important doctrinal areas, including personal jurisdiction, forum selection, choice of law, and motion waiver. At its broadest, the theory of party subordinance upends the way the federal litigation system views the hierarchy among parties, courts, and the law.

Table of Contents

---

* Professor of Law and Harry & Lillian Hastings Research Chair, University of California Hastings College of Law. I received helpful reactions on a very early draft from attendees at the UC Hastings 10-10 Workshop. Many thanks to Kevin Clermont, Brooke Coleman, Ed Cooper, Jaime Dodge, Geoff Hazard, Mary Kay Kane, David Levine, Rick Marcus, Jim Maxeiner, David Noll, Zach Price, and others who commented on later drafts. This paper also received useful commentary, especially from Tobias Wolff and Ed Cheng, at the 2014 Branstetter New Voices in Civil Justice Workshop at Vanderbilt Law School. UC Hastings generously supported the writing of this paper with the 2013 Harrison Summer Stipend.

December 2014 Vol. 83 No. 1

INTRODUCTION

How much control do parties have over federal litigation? Conventional wisdom says they have quite a bit. The American system of adversarial litigation and judicial passivity assumes that the parties get to frame the lawsuit structure, factual predicates, and legal arguments, while the court intervenes only to decide any motions the parties choose to make. Plaintiffs can refuse to assert claims, defendants can forfeit defenses, parties can stipulate to discovery limits and the authenticity of evidence, and courts do not disturb those choices. As Chief Justice John Roberts famously testified during his confirmation hearings, federal judges are umpires, not players—disinterested neutrals acting only when called upon to do so and according to the circumstances presented by the parties.[1]

The primary exception tends to prove the rule. Federal subject matter jurisdiction remains exclusively within the court's authority, such that parties cannot waive, forfeit, or concede it, and the court has an independent obligation to raise such jurisdictional defects sua

[1] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.); *see also* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1041–45 (1975); David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1638 (2009); *cf.* Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").

sponte.[2] This exception for subject matter jurisdiction is so clear and so entrenched[3] that it implies the inverse for all nonjurisdictional matters; party agreement, waiver, forfeiture, and concession cabin the scope of the court's nonjurisdictional adjudicatory authority.[4]

Extreme forms of the principle of party control have expanded to support the recent trend of customized litigation.[5] As one commentator recently put it, "parties have virtually unlimited rights to control their disputes."[6] Parties today purport to select—often ex ante—their desired locations, the substantive law, and the procedures that will govern their dispute.[7] After all, if parties can settle a lawsuit according to terms that reflect neither fact nor law, and if they can choose to arbitrate in a private forum according to whatever substantive and procedural standards they desire,[8] why can't they exercise the same level of control in federal court?[9] The result is that, today, parties often assert a position of dominance over both the law and the courts,

---

2 *See* Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 6–7 (2011).

3 *See* Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1444–46 (2011).

4 *See* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 4–5 (2008).

5 For one of the earliest explorations of the trend, see generally Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291 (1988).

6 Brian S. Thomley, Comment, *Nothing Is Sacred: Why Georgia and California Cannot Bar Contractual Jury Waivers in Federal Court*, 12 CHAP. L. REV. 127, 132 (2008).

7 *See* Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 510–11 (2011); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 732, 744–46 (2011); *see also* Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 597–98 (2005) (noting a strong trend toward "contract procedure"). *But cf.* David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389, 419–20 (finding little customization outside of forum-selection, choice-of-law, fee-shifting, service-of-process, and jury-waiver clauses); Erin A. O'Hara O'Connor & Christopher R. Drahozal, *Carve-Outs and Contractual Procedure* 1 (Vanderbilt Univ. Law Sch., Public Law & Legal Theory Working Paper No. 13-29, Law & Economics Working Paper No. 13-16), *available at* http://ssrn.com/abstract_id=2279520 (asserting that the available empirical evidence reveals surprisingly little use of customized procedural rules in contracts between sophisticated parties).

8 *See* Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 512 (2005) (asserting that parties may dispense with precedent and even written reasoning in certain kinds of arbitration).

9 *See, e.g.*, Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514, 516 (2009) ("Why should certain procedural rules be inflexible, inalienable obligations when so much of dispute resolution is subject to private ordering through such mechanisms as settlements and agreements to arbitrate or mediate?"). *But see* Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1354 (2012) (characterizing arguments for private procedural ordering based on the existence of arbitration as "extremely weak" because of the substantial differences between the forums).

in which parties stand at the apex of the litigation hierarchy, with the law next and courts subordinated to the bottom.[10]

Yet there has always been unease over how much control parties should have.[11] Judges who would not dare impanel a jury over both parties' valid jury-trial waivers understandably express resistance to extremely unorthodox party stipulations, such as an agreement that the judge's decision be based upon a coin flip or that the jury be composed of monkeys.[12]

More difficult middle-ground questions abound in the broad daylight between a routine jury-trial waiver and a hypothetical coin-flip adjudication. Consider a state prisoner who, having unsuccessfully exhausted his claims in state court, seeks a writ of habeas corpus in federal court, alleging that his detention violates the U.S. Constitution. His federal petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[13] which sets a standard of review that is highly deferential to the state courts' determination of his claims.[14] Nevertheless, he asserts that the federal court should review his claims de novo, and the State respondent does not challenge that assertion. Should the district court decide the petition based upon AEDPA's deferential standard or upon the standard effectively adopted by the parties? If the district court grants the petition based upon de novo review, and the State appeals on the ground that the district court should have applied the correct standard notwithstanding the State's failure to urge it in the district court, what should the appellate court do?[15]

---

10 *See* David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 980–81 (2008) (asserting that the conventional "assumption [is] that procedural rules can in fact be bargained around").

11 *See, e.g.*, S.I. Strong, *Limits of Procedural Choice of Law*, 39 BROOK. J. INT'L L. 1027, 1030–31 (2014).

12 *See, e.g.*, LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring) (opining that an arbitration provision that the judge would review an award "by flipping a coin or studying the entrails of a dead fowl" would be unenforceable); Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994) (Posner, J.) (doubting that parties could "authoriz[e] trial by battle or ordeal, or . . . by a panel of three monkeys"); United States v. Josefik, 753 F.2d 585, 588 (7th Cir. 1985) (musing that parties could not agree that the jury be composed of twelve apes); David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1090 (2002) ("Certainly a court would not enforce an agreement to resolve a dispute by judicial coin toss . . . .").

13 Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S.C.).

14 *See* 28 U.S.C. § 2254 (2012).

15 This exact issue has come up repeatedly and has divided the circuits. *Compare* James v.

This specific example reveals the deeper issue: to what extent do party choices—agreements, waivers, forfeitures, omissions, and concessions—constrain the court or alter the law? On the one hand, party choice can reduce litigation costs by streamlining the case and simplifying the issues.[16] Party choice also accords with notions of adversarialism, judicial passivity, and litigant autonomy that undergird American litigation.[17] On the other hand, there is something unseemly about parties commandeering a public tribunal to adjudicate according to their private whims, especially if they force a judge to rely upon and potentially endorse (perhaps with precedential repercussions) an incorrect statement of law or fact or an odd procedural rule.[18]

The federal courts have attempted to reconcile these tensions through an ad hoc, case-specific approach that has resulted in a woe-

---

Ryan, 679 F.3d 780, 802 (9th Cir. 2012) (holding AEDPA's deferential standard to be waivable), *cert. granted, vacated, and remanded*, 133 S. Ct. 1579 (2013), *judgment reinstated*, 733 F.3d 911 (9th Cir. 2013), *with* Lyons v. Brady, 666 F.3d 51, 54 & n.5 (1st Cir. 2012) (applying a deferential standard even though the parties briefed the issues based on a de novo standard), Gardner v. Galetka, 568 F.3d 862, 879 (10th Cir. 2009) (holding AEDPA's standard to be nonwaivable), *and* Brown v. Smith, 551 F.3d 424, 428 n.2 (6th Cir. 2008) (same).

16 *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 446–47 (2004); Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475, 1475 (2013); Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1203 (2011); Rhee, *supra* note 9, at 517; Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 856 (2006); Charles W. Tyler, Note, *Lawmaking in the Shadow of the Bargain: Contract Procedure as a Second-Best Alternative to Mandatory Arbitration*, 122 YALE L.J. 1560, 1574–75 (2013).

17 *See* Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 509–11 (2003); Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 458–60, 495–508 (2009); Kapeliuk & Klement, *supra* note 16, at 1475–76; *cf.* Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 464, 479–91 (2007) (making the case that deference to party choice improves litigant acceptance of judicial decrees). *See generally* STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 35–39 (1988) (extolling the virtues of judicial passivity in the adversary system). Several scholars have relied on adversarialism to reject broad issue-creation authority in appellate courts. *See* Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1060 (1987); Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 272–73 (2002); *see also* Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1308 (2002) (arguing that even if appellate courts should have greater ability to raise issues, there should still be a waiver rule to prevent gamesmanship).

18 *See* Bone, *supra* note 9, at 1384; Dodge, *supra* note 7, at 729; Frost, *supra* note 17, at 515; Kapeliuk & Klement, *supra* note 16, at 1475; Resnik, *supra* note 7, at 623; *cf.* Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477, 508–11 (1959) (arguing that appellate courts should raise issues sua sponte when necessary to give accurate effect to a law with significant public implications).

fully undertheorized default presumption of party dominance, pockmarked by similarly undertheorized exceptions.[19]

The growing literature exploring the relationship among parties, courts, and the law has done better, but, to date, it has focused almost exclusively on normative positions purporting to justify lines between the presumption and its exceptions.[20] This normative conversation informs second-order questions of when and under what circumstances parties *should* be able to control the litigation. In focusing on that second-order normative question, the existing literature has tended to obscure the crucial first-order question of whether parties in fact can exercise dominance over courts and the law.[21] The answer to that underserved first-order question is primarily grounded in theory.

This Article systematically articulates and defends a formalist theory of party subordinance, with surprising and potentially controversial repercussions. Part I begins by setting out the model of party dominance: parties' procedural choices presumptively override contrary law and bind the court,[22] though the presumption comes with many exceptions.

Part II upends this orientation by giving form to a more rigid theory of party subordinance, in which parties fall at the bottom of the power hierarchy. Under this theory, parties' attempts to alter otherwise applicable procedures—such as through ex ante jury-trial waiv-

---

19 *See infra* text accompanying notes 32–48. For an argument advancing the inverse presumption—that procedural contracts should be presumptively unenforceable—see Marcus, *supra* note 10, at 1042–48.

20 For one exception focused on ex ante agreements, see Taylor & Cliffe, *supra* note 12.

21 *See, e.g.*, Frost, *supra* note 17, at 452–53 (using normative preferences to bootstrap questions of power); Scott & Triantis, *supra* note 16, at 857 ("[T]he fact that parties can vary the rules of litigation in their ex ante contract is relatively unexplored. . . . This is a rich avenue for future research . . . ."); *see also* Marcus, *supra* note 10, at 981 ("An inquiry into the basic theoretical plausibility of contract procedure—whether and when procedural rules must yield to contract—should precede this assumption [that procedural rules can in fact be bargained around]."). Although Professor Marcus appears to recognize this problem, his resolution focuses on the same private/public-interests bootstrap that others use. Marcus, *supra* note 10, at 1042–43 (arguing that procedural contracts should be presumptively unenforceable unless the court determines that the displaced rule serves purely private interests).

22 *See* Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 693 (2012) ("The standard assumption is that [consent, waiver, or] forfeiture limits the law-declaring authority of the Court in the same way that it binds the litigants."); *id.* at 680 (acknowledging "the belief that the Court's issue-forfeiture rules (waivers, stipulations, concessions) bind it as well as the litigants"); *see also* Marcus, *supra* note 10, at 981 (asserting that the conventional "assumption [is] that procedural rules can in fact be bargained around"); Henry S. Noyes, *If You (Re)build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 618–23 (2007) (arguing that litigation rules are defaults subject to party control and alteration).

ers—are wholly unenforceable absent some legal authorization for judicial enforcement. And even when the law allows parties to exercise litigation choices, courts retain largely unfettered discretion—cabined only by law—to disregard or override those choices. As a result, parties in fact have very little formal control over litigation.

Part III excavates the deeper implications of party subordinance. Subordinance illuminates the nettlesome distinction between ex ante and ex post party conduct. Although scholars have attempted to find significance in symmetry between ex post and ex ante permissibility, subordinance suggests that they have overstated the significance of the distinction while understating the significance of the law's attention to the timing of the legal mechanism for implementing party choice. Subordinance also suggests that the Supreme Court's recent focus on differences among inadvertent waiver, knowing waiver, forfeiture, and consent is misplaced. In addition, subordinance shifts a number of important conversations debating the normative virtues of the judge as an umpire. Finally, it profoundly affects existing litigation practice by destabilizing the expected enforcement of privatized procedure.

Part IV then applies the theory to demonstrate how reoriented relationships among parties, judges, and the law might inform or alter various doctrinal areas. In application, party subordinance offers ways to reconceptualize—and help harmonize—doctrines of personal jurisdiction, venue, choice of law, and motion practice.

The Article then concludes with some brief reflections on areas for further exploration.

I. The Model of Party Dominance

Parties today purport to control both law and courts. Although it was not always so,[23] the idea of rights has shifted from a structural conception to a private good.[24] At the same time, the primacy of litigant autonomy has become de rigueur, while the realist appreciation for procedural efficiency in litigation has become compelling.[25] These

23 *See* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331, 339–46; *cf.* Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) ("A man may not barter away his life or his freedom, or his substantial rights. . . . In a civil case . . . any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, 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.").

24 *See* Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. Rev. 113, 120–21 (1999).

25 *Id.* at 121–22.

notions have coalesced around a robust acceptance of the dominance of party choice.

Under this vision, parties control both the law and the courts. If parties wish to prescribe their own limitations period in advance, they can do so by private contract, and, if enforceable, their agreement will supersede the law. Parties also can control courts by waiving or forfeiting claims, defenses, facts, arguments, or other issues, which courts might otherwise raise and decide.

The dominance of party choice, though robust and widespread, is not inviolate. The most recognizable exception is subject matter jurisdiction.[26] Although the concept of subject matter jurisdiction has evolved over the years, it has been accepted for decades that subject matter jurisdiction, as the "power" of the court, cannot be manufactured by parties through collusion, consent, stipulation, waiver, or forfeiture.[27] Federal courts have an independent duty to assure themselves of subject matter jurisdiction, notwithstanding any party attempt to waive or consent to jurisdiction.[28] Either the court has subject matter jurisdiction or it does not, and, if it does not, party action cannot create it.[29]

The exception for subject matter jurisdiction tends to reinforce the general rule of party control. So ingrained is the inviolate and exceptional nature of subject matter jurisdiction that the doctrine is seen as a rare anomaly in an otherwise pervasive landscape of party power, and it is common for courts to find laws or doctrines to be resistant to party control only if they have "jurisdictional" status.[30] The resulting norm is that, for nonjurisdictional matters, party

---

26 Miller, *supra* note 17, at 1280.

27 *See* Dodson, *supra* note 3, at 1440–41. Whether parties can stipulate to certain facts underlying the jurisdictional determination is more complex. *See id.* at 1466–70.

28 *See* Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

29 *See* Dodson, *supra* note 3, at 1441. Strictly speaking, this description is an oversimplification. Party choices of whom to sue, what claims to assert, the amount of relief to claim, and what court to file in (or remove to), all can establish or defeat subject-matter jurisdiction. Additionally, parties can, in limited circumstances, "cure" defects in subject-matter jurisdiction ex post by, for example, dismissing a nondiverse party from a diversity case when that party's diversity-destroying status has gone unrecognized. *See* Caterpillar, Inc. v. Lewis, 519 U.S. 61, 76–78 (1996). These situations, however, do not encompass the kind of party action upon which this Article focuses.

30 *See, e.g.*, Bowles v. Russell, 551 U.S. 205, 210 (2007) (focusing on the jurisdictional characterization of a rule to determine its effects). For criticism of this approach, see Scott Dodson, *In Search of Removal Jurisdiction*, 102 Nw. U. L. Rev. 55, 78 (2008).

choice—manifested through waiver, forfeiture, consent, and stipulation—controls contrary law, facts, and sua sponte judicial authority.[31]

Yet even while loosely adhering to the dichotomy between party-controlled nonjurisdictional rules and party-resistant jurisdictional rules, courts have developed ad hoc exceptions. For example, courts have exercised authority to consider issues sua sponte, or to override party waiver, forfeiture, or stipulation, in certain specific quasi-jurisdictional circumstances.[32] And courts possess a variety of "inherent powers" to act sua sponte or in contravention of party choice.[33] Further, the Supreme Court has developed a few exceptions in specialized areas of the law.[34] Finally, a number of statutory and rule provisions

---

31 Consider three cases from just last Term. In *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), the Court held that a Fair Labor Standards Act "collective action" case was not justiciable when the plaintiff's individual claim became mooted by a Rule 68 offer of judgment. *Id.* at 1528–29. The Court based its assumption on the ground that the plaintiff conceded the proposition in the lower courts, and on the fact that the plaintiff, as respondent in the Supreme Court, failed to cross-petition on the issue. *Id.* Similarly, in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the Court held that the certification of a class of Comcast subscribers was improper under Rule 23(b)(3), because the class had not proven that damages were measurable on a classwide basis through use of a common methodology. *Id.* at 1433. That holding was premised on the parties' assumption—highly dubious at best and likely erroneous—that Rule 23(b)(3) requires damages to be measurable on a classwide basis through use of a common methodology. *Id.* at 1430. The Court's justification for its reliance on this assumption was simply that the parties did not contest it. *Id.* Finally, in *Wood v. Milyard*, 132 S. Ct. 1826, 1830 (2012), the Court held that a court of appeals lacks authority to override a state's deliberate waiver of AEDPA's limitations defense. For other examples, see Monaghan, *supra* note 22, at 697–705.

32 *See, e.g.*, Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993) (ripeness); Bellotti v. Baird, 428 U.S. 132, 143 n.10 (1976) (abstention); Edelman v. Jordan, 415 U.S. 651, 678 (1974) (state sovereign immunity).

33 *See, e.g.*, Peacock v. Thomas, 516 U.S. 349, 359 (1996) (vacating judgments procured by fraud); Chambers v. NASCO, Inc., 501 U.S. 32, 43, 46–49 (1991) (sanctions); Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 793 (1987) (contempt); *In re* Snyder, 472 U.S. 634, 643 (1985) (disbarment); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257–59 (1975) (award attorney's fees in limited circumstances); Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962) (inherent power of "courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases"); United States v. U.S. Gypsum Co., 340 U.S. 76, 81 (1950) (inherent power of district courts to set and require case conferences); Gulf Oil Corp. v. Gilbert Storage & Transfer Co., 330 U.S. 501, 502 (1947) (forum non conveniens); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244–46 (1944) (stay of proceedings); *Ex parte* Peterson, 253 U.S. 300, 306–07, 312–14 (1920) (use of nonjudges); Bowen v. Chase, 94 U.S. 812, 824 (1876) (consolidation); Dustin B. Benham, *Beyond Congress's Reach: Constitutional Aspects of Inherent Power*, 43 SETON HALL L. REV. 75, 94 (2013) (develop an accurate factual record); Carrie Leonetti, *Watching the Hen House: Judicial Rulemaking and Judicial Review*, 91 NEB. L. REV. 72, 103 (2012) (control nonjudge courtroom personnel).

34 *See, e.g.*, Day v. McDonough, 547 U.S. 198, 205–07 (2006) (habeas limitations); Kontrick v. Ryan, 540 U.S. 443, 457 n.12 (2004) (certain bankruptcy matters); Frew v. Hawkins, 540 U.S. 431, 441 (2004) (consent decrees); Arizona v. California, 530 U.S. 392, 412 (2000) (preclusion);

directly authorize trial courts to override party choices at every stage of a lawsuit, from service of process to judgment, and everything in between.[35]

Even beyond particular subjects, inherent powers, and rule authorizations, federal courts act on their own in a variety of more subtle contexts. For example, courts often independently research and rely upon arguments, legal authority, and factual authority not cited by either party.[36] The general principle is that "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the indepen-

---

Granberry v. Greer, 481 U.S. 129, 136 (1987) (habeas exhaustion); Elkins v. Moreno, 435 U.S. 647, 662 & n.15 (1978) (certification); Graves v. City of Coeur D'Alene, 339 F.3d 828, 845 n.23 (9th Cir. 2003) (qualified immunity); Resnik, *supra* note 7, at 639 (certain class action issues).

35 *See, e.g.*, FED. R. CIV. P. 4(m) (permitting a court to dismiss a complaint for untimely service "on its own after notice to the plaintiff"); *id.* 5(c)(1) (permitting a court to order "on its own" certain procedures for service of multiple defendants); *id.* 6(b)(1)(A) (allowing a court to extend deadlines for good cause "with or without motion"); *id.* 7(a)(7) (allowing the court to order a reply to an answer); *id.* 11(c) (permitting a court to impose sanctions on its own initiative); *id.* 12(f)(1) (allowing sua sponte orders to strike pleadings); *id.* 16(c) (empowering the court to order party attendance at pretrial conferences); *id.* 19(a) (mandatory joinder); *id.* 21 (permitting a court to drop or add a party "on its own"); *id.* 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval."); *id.* 26(b)(2)(C) (allowing a court to limit discovery "on its own"); *id.* 29 ("Unless the court orders otherwise, the parties may stipulate that . . . procedures governing or limiting discovery be modified . . . ."); *id.* 39(a)(2) (permitting a court to find, "on its own," that there is no jury-trial right); *id.* 39(c)(1) (allowing a court to order, sua sponte, any nonjury issue to be tried with an advisory jury); *id.* 48(c) (permitting the court to poll jurors "on its own"); *id.* 56(f)(2) (allowing a court to grant summary judgment "on grounds not raised by a party"); *id.* 56(f)(3) (allowing a court to "consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute"); *id.* 59(d) (permitting a court to order, "on its own," a new trial under certain circumstances); *id.* 60(a) (allowing a court to correct clerical mistakes in a judgment on its own); *id.* 73(b)(3) (permitting a court to vacate a consent referral to a magistrate); Trujillo v. Williams, 465 F.3d 1210, 1222 (10th Cir. 2006) (recognizing that a district court may transfer venue under 28 U.S.C. § 1406 sua sponte); *see also* 28 U.S.C. § 1915(e)(2) (2012) (specifying circumstances under which a court hearing an in forma pauperis claim "shall dismiss the case at any time"); 42 U.S.C. § 1997e(c)(1) ("The court shall on its own motion . . . dismiss any [prisoner] action . . . if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief."); HAB. R. 4 (directing a court to dismiss a habeas petition sua sponte if it is plain that the petitioner is not entitled to relief).

36 *See, e.g.*, Elder v. Holloway, 510 U.S. 510, 511–12 (1994) (instructing lower courts to take notice of legal authority missed by the parties). On the Supreme Court's practice of developing (or, perhaps more accurately, undermining) the factual record sua sponte, see generally Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269 (1999); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012).

dent power to identify and apply the proper construction of governing law."[37]

To illustrate, the Supreme Court once decided an issue—considering when punitive damages could be awarded under Title VII—that was not addressed in the lower courts, was not briefed by the parties, and was treated as not in dispute by the parties at oral argument.[38] In some cases, such as the famous *Erie Railroad Co. v. Tompkins*,[39] the Court has even overruled controlling precedent sua sponte and without notice to either party.[40] The Court's broad "GVR" power—i.e., the power to grant, vacate, and remand a case with or without argument or briefing for further consideration in light of a recent decision—has been used often even when neither party argued for the new rule.[41] And the Court often relies on the positions and arguments of amici, some of which the Court itself appoints and directs to support an issue.[42] The Supreme Court's power to raise forfeited or waived issues is not limited to cases in which the waiver or forfeiture has occurred at the Supreme Court; rather, the Court has even raised and decided issues forfeited in the courts below.[43]

As these examples demonstrate, an absolutist model of party control is a fallacy. Instead, party dominance tends to exist as a presump-

---

37 Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991).

38 Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 552–53 (1999) (Stevens, J., dissenting). The Supreme Court's penthouse position in the federal judicial structure, in which the judicial law-pronouncing function is at its zenith, does not entirely explain the Court's practices, for the Court often—perhaps just as often—defers to party choice. *See infra* notes 45–46.

39 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

40 *Id.* at 81–90 (Butler, J., dissenting). Other famous cases decided on grounds not raised by the parties include *Mapp v. Ohio*, 367 U.S. 643 (1961), *Miranda v. Arizona*, 384 U.S. 436 (1966), *Washington v. Davis*, 426 U.S. 229 (1976), *Younger v. Harris*, 401 U.S. 37 (1971), *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

41 *See generally* Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—and an Alternative*, 107 MICH. L. REV. 711 (2009).

42 *See, e.g.*, Teague v. Lane, 489 U.S. 288, 300 (1989) (deciding the case based upon an argument advanced only by an amicus); Bob Jones Univ. v. United States, 461 U.S. 574, 599 n.24 (1983) (appointing an amicus to argue a nonjurisdictional point eschewed by both parties). On the ubiquity and influence of amicus briefs, see generally, e.g., Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000); Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669 (2008). Sometimes, the Court at least orders the parties to argue and brief a new issue. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012) (mem.) (ordering briefing and argument on the new issue of extraterritorial application); Citizens United v. FEC, 129 S. Ct. 2893 (2009) (mem.) (directing the parties to brief whether two controlling cases should be overruled). For a recent discussion, see Monaghan, *supra* note 22, at 689–90.

43 *See, e.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 255–57 (1981).

tion, pockmarked by exceptions.[44] This presumption-and-exception model of party dominance, though quite complex, might be tolerable if well justified, but courts offer little more than ipse dixit reasoning.[45] The most that has been attempted is to cast judicial power to override party choices as stemming from vague circumstances when structural concerns predominate, or when the law-pronouncing function of the courts outweighs their dispute-resolution function.[46] Commentators have rightly criticized such distinctions as descriptively porous and theoretically questionable.[47] The paramount problem is that the Supreme Court has not articulated a theory governing the relationship among parties, courts, and the law to resolve or explain both the presumption and its exceptions.[48] The best defense to date has been tautological: that the adversary tradition dictates adherence to party dominance—except when it doesn't.

---

44 *See* Frost, *supra* note 17, at 455–57 (reporting that courts act sua sponte infrequently). *But see* Bradley Scott Shannon, *Some Concerns About Sua Sponte*, 73 OHIO ST. L.J. FURTHERMORE 27, 27 (2012) (asserting that "sua sponte decisionmaking has become *de rigueur*" (footnote omitted)).

45 *See, e.g.*, Greenlaw v. United States, 554 U.S. 237, 243 (2008) (following, without justifying, "the principle of party presentation" under which "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present"); Singleton v. Wulff, 428 U.S. 106, 120 (1976) (stating, without justifying, the "general rule . . . that a federal appellate court does not consider an issue not passed upon below").

46 Some courts appear to except issues of law from party control. *See, e.g.*, United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("[T]here must be enough play in the joints that the Supreme Court need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it—particularly when the judgment will reinforce error already prevalent in the system."); Estate of Sanford v. Comm'r of Internal Revenue, 308 U.S. 39, 51 (1939) ("We are not bound to accept, as controlling, stipulations as to questions of law."); *see also* Lawson, *supra* note 16, at 1209–10 (noting that the norm is that stipulations of law are presumptively invalid while stipulations of fact—except potentially jurisdictional facts—are presumptively valid). Commentators have accepted the descriptive view that law pronouncement is routine at the Supreme Court level. *See* Monaghan, *supra* note 22, at 683 (observing that the "Court's law declaration function has long since assumed overriding importance").

47 *See* Frost, *supra* note 17, at 456, 461–69 (characterizing the exceptions to the norm of party presentation as almost as common as the general norm); Lawson, *supra* note 16, at 1209–10 (debunking the distinction between issues of law and issues of fact); Miller, *supra* note 17, at 1286 ("All of these [sua sponte] cases exist side-by-side with the waiver cases. They are hopelessly irreconcilable with them."); Shannon, *supra* note 44, at 32 ("There does not appear to be anything inherent in the concept of sua sponte decisionmaking that either compels or prevents its use."); Joan E. Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1525 (2012) (noting a "surprising number" of appellate decisions on questions the trial court did not decide). *Compare* Singleton v. Wulff, 428 U.S. 106, 120 (1976) (stating the "general rule . . . that a federal appellate court does not consider an issue not passed upon below"), *with id.* at 121 (announcing "no general rule").

48 *See, e.g.*, Monaghan, *supra* note 22, at 680.

II. The Theory Stated and Defended

In this Part, I invert this model of party dominance to systematically articulate, justify, and flesh out a model of party subordinance. The basic concept of party subordinance is not new, but it has not been fully articulated, and it is has been obscured by recent trends toward party dominance. This Part's detailed exegesis of party subordinance suggests that a model of party subordinance offers both a more coherent theoretical justification and a simpler, more consistent model than party dominance.

A. Party Subordinance, Legal Dominance

The theory of party subordinance positions party choice at the bottom of the hierarchy of power, judicial discretion in the middle, and governing law at the top. Thus, even lawful party choice may be overridden or disregarded by judicial discretion. And unlawful party choice is unenforceable. The result is that parties have few opportunities to customize their litigation, and, even when the law allows them to do so, courts generally retain discretion to disregard or override those choices. The following subsections explain the how and why of each relationship.

1. Party Subordinance to Courts

The theory of party subordinance to courts is grounded primarily in the public nature of our litigation system and in the governmental nature of the judiciary. The Constitution envisions public and open courts composed of neutral judges exercising a governmental power derived from, and constrained by, the laws governing them.[49] Courts in turn create public goods of doctrinal precedent, legal awareness, and the development and regulation of social norms.[50] The public

---

49 U.S. Const. art. III.

50 *See* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. Legal Stud. 235, 236 (1979); Lynn M. LoPucki, *Court-System Transparency*, 94 Iowa L. Rev. 481, 494 (2009); Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 Law & Ethics Hum. Rts. 1, 53–60 (2011); *see also* Eric D. Miller, Comment, *Should Courts Consider 18 U.S.C. § 3501 Sua Sponte?*, 65 U. Chi. L. Rev. 1029, 1048 (1998) ("The adjudication of cases generates precedents and clarifies the law, providing benefits to everyone in society. The precedent-generating function of courts is inhibited when courts defer to parties' incorrect statements of the law rather than declare which legal principles in fact govern the case." (footnotes omitted)).

substantially subsidizes private litigation in public courts in part to encourage production of these public goods.[51]

That vision demands that the courts are beholden not to the whims of individual parties (as the model of party dominance puts it), which are formally outside of the governmental structure, but to the legal system as established by a republican society (i.e., the law).[52] Courts owe inherent duties to apply (and develop) the law faithfully and accurately, to resolve cases according to factual truth, and to adjudicate in accordance with due process.[53] As Judith Resnik has written: "Courts are not 'servants' of the parties; courts have an independence from the parties, not only as the voices of other parties' interests, but as institutions expressive of and accountable to the public."[54]

It is true that courts serve the private function of dispute resolution as well,[55] and this private function entails consideration of efficiency, economy, and party autonomy.[56] But private interests properly belong in a second-stage inquiry of whether a court should exercise discretion to enforce lawful party choices, where they can be taken into consideration fully without doing violence to the public na-

---

51 Without the subsidy, the cost of litigation could be as much as 5,000 percent higher. *See* Tyler, *supra* note 16, at 1569.

52 *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–84 (1976) (advocating for a model where "the object of litigation is the vindication of constitutional or statutory policies"); Davis & Hershkoff, *supra* note 7, at 535–37 (arguing that Article III dispute resolution is inherently a governmental function); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (arguing that the role of courts "is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them"); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 627–28 (1992) (proposing a "public values" model of adjudication).

53 *See* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 5–17 (1979); Resnik, *supra* note 7, at 623–24.

54 Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1527 (1994); *cf.* Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 207 (calling courts "important cultural icons").

55 *See* Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1275 (1995) ("Almost everyone today would agree that adjudication is about articulating public norms as well as settling private disputes . . . ."); Lawson, *supra* note 16, at 1223 ("Our legal system adopts neither a pure law-declaration model nor a pure dispute-resolution model . . . ."); Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 138 n.51 (2005) ("[T]here is general agreement that both functions play some role in adjudication . . . ."). *See generally* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (addressing the social tasks properly assigned to the courts).

56 *See* Lawson, *supra* note 16, at 1219.

ture of courts. Private interests have no place in the antecedent inquiry of delineating the scope of judicial power. In other words, courts—not parties—have authority to decide whether party choice should be enforced. Otherwise, the parties could, by commandeering the judicial process, force a publicly subsidized court to sacrifice public benefits for purely private interests.[57] Parties could also force courts into unique and unfamiliar procedures, elevating the peculiarities of one case over the efficiency of the system as a whole.[58] Society already recognizes private systems beholden to the parties and reflecting the orientation of the model of party dominance—including arbitration, mediation, and private adjudicators—in which parties have the power to create their own rules and even their own precedent.[59] The public, governmental nature of the federal courts need not be sacrificed in light of these alternatives.[60]

A second feature supporting the theory of party subordinance is the distinction between rights and remedies. American legal tradition has long recognized the difference between the rights (both substantive and procedural) provided by the law and the legal mechanisms (both enabling and limiting) for enforcing them.[61] This right-remedy distinction provides strong theoretical support for party subordinance in the waiver and forfeiture context. The idea is that waiver, forfeiture, and consent may disable parties *procedurally* from raising the issues formally in the future, but they do not necessarily extinguish the underlying right, which the court may still enforce using other appropriate mechanisms.[62] Put another way, parties can disable themselves

---

57 *See* Dodge, *supra* note 7, at 729 (exploring whether parties should be able to "commandeer the public litigation system" from an ex ante procedural perspective); Frost, *supra* note 17, at 474 (worrying that private procedure will "transform the federal courts from the third branch of government responsible for declaring the meaning of law into a private arbitration service working for the parties and no one else").

58 *See* Resnik, *supra* note 7, at 597 (lamenting the erosion of transsubstantivity by "mini-codes of civil procedure").

59 *See* Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994) (Posner, J.) (stating that, generally, "parties can stipulate to whatever procedures they want to govern the arbitration of their disputes"). *See generally* Frank Partnoy, *Synthetic Common Law*, 53 U. KAN. L. REV. 281 (2005) (exploring the role of fictitious precedent in private forums of adjudication).

60 A distinct analysis might arise for transnational litigation, in which private ordering through arbitration could solve some enforcement and jurisdictional problems of public adjudication. *See* S.I. Strong, *Why is Harmonization of Common Law and Civil Law Procedures Possible in Arbitration but Not Litigation?*, (Univ. of Mo. Sch. of Law Legal Studies Research Paper Series, Research Paper No. 2013-12), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2266672.

61 *See, e.g.*, Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (explaining that statutes of limitations generally limit the remedy but not the substantive right).

62 For an inkling of this principle in the context of a recent Supreme Court oral argument

from using procedural mechanisms to assert an issue, but they cannot deprive the court of discretion to raise and determine the issue on its own. Thus, parties retain some authority to limit their future options, but courts are, in general, not bound by those limitations.

These foundational assumptions of our federal system suggest that judges are largely independent from party control and retain broad authority to override party waivers, forfeitures, and stipulations, and to raise issues sua sponte.[63] This authority exists even for the most mundane, private-focused matters, and it is not contingent upon normative values. Counternorms may counsel self-restraint in the exercise of such authority, but the point is that the authority exists largely unfettered by the parties, unless modified by the legislature.

To illustrate, consider the federal statutory requirement that a state prisoner exhaust prison-condition challenges in the prison grievance process before filing a damages claim in federal court.[64] The exhaustion requirement is an affirmative defense that can be forfeited if the state fails to assert the defense in the answer or a pre-answer motion.[65] The purpose of the requirement is to provide "prison officials an opportunity to resolve disputes concerning the exercise of their responsibilities before being haled into court," "reduce the number of inmate suits," and "improve the quality of suits that are filed by producing a useful administrative record."[66] Say, however, the state fails to file a pre-answer motion and omits the exhaustion defense from its answer. During the course of pretrial litigation, it becomes obvious that case adjudication is suffering for lack of a clear and useful administrative record. Does the state's forfeiture nevertheless disempower the court from dismissing the lawsuit based on the plaintiff's failure to exhaust?

No. The forfeiture limits the state's procedural mechanisms for asserting the defense in the litigation, for example, by preventing the defendant from being able to move to dismiss on exhaustion grounds

---

on the effect of a waiver of a limitations defense, see Transcript of Oral Argument at 30–32, Wood v. Milyard, 132 S. Ct. 1826 (2012) (No. 10-9995). Justice Scalia asked, "You say you didn't abandon the right. . . . You just gave up the—the opportunity to raise it yourself." *Id.* at 30. Justice Breyer asked, "[H]e did abandon his right, the State, to push the matter. . . . He didn't abandon the right to get the case dismissed if the judge pursues it." *Id.* at 31–32.

63 *See* Frost, *supra* note 17, at 509–10 (arguing that sua sponte authority helps protect the public function of courts).

64 42 U.S.C. § 1997e(a) (2012) ("No action shall be brought with respect to prison conditions under . . . Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

65 *See* FED. R. CIV. P. 8(c)(1), 12(b); Jones v. Bock, 549 U.S. 199, 211–12 (2007).

66 *See Jones*, 549 U.S. at 204.

under Rule 12(b).[67] But extinguishing that procedural right does not mean that exhaustion is no longer implicated. It just means that the state no longer can assert the exhaustion defense in a particular way. Indeed, it is possible that the state could move to amend its answer to assert the defense and then seek a Rule 12(c) judgment on exhaustion grounds.[68] Consequently, the exhaustion requirement still applies to the claim. And neither the Federal Rules of Civil Procedure nor any statutory command disables the court from overlooking the state's forfeiture. Accordingly, the court has the power to exercise discretion to raise the defense on its own and dismiss the case on exhaustion grounds. Perhaps sound discretion counsels against overriding the state's forfeiture in such a case. But the court has the power to do so.

2. Party Subordinance to the Law

If parties exert no inherent control over judicial authority, then they also exert no inherent control over the law.[69] Consider, for example, a three-year federal statute of limitations, which is invoked through timely assertion as a defense.[70] As explained above, the defendant's forfeiture of the right to assert the defense does not suddenly make the lawsuit timely; rather, the forfeiture just extinguishes the defendant's ability to assert what might be a valid defense to the claim.[71] The judge retains the power to dismiss the case based on the limitations bar, because the bar still exists; the defendant just cannot invoke it. The parties have not changed the law at all; they have merely operated within the scope of what the law already allows.

The same principles extend to an attempt by the parties to change the limitations period to something other than three years.[72] Say the parties previously entered into an agreement that any limitations pe-

---

67 *See* FED. R. CIV. P. 12(b) ("A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed.").

68 *See* FED. R. CIV. P. 12(c), 15(a).

69 This principle is represented ambivalently in current doctrine. *Compare, e.g.*, Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 584 (2008) (holding parties unable to alter the review provisions of the Federal Arbitration Act), *with, e.g.*, Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1430 (2013) (deciding a class-certification issue according to the parties' dubious stipulation as to the law).

70 *See* FED. R. CIV. P. 8(c)(1) (listing statute of limitations as an affirmative defense).

71 Of course, the law could be written to create such a scenario, for example, by retroactively making untimely claims timely upon a defendant's forfeiture, but let us assume that the statute of limitations here does not. The next Subpart addresses the law's incorporation of party choice. *See infra* Part II.A.3.

72 Again, the statute could be written to expressly incorporate changes made by the parties, but assume that this statute of limitations does not.

riod applicable to the lawsuit would be four years, and the plaintiff's claim is timely under the agreement but untimely under the statute.[73] The parties' agreement no more changes the law than binds the court. If the defendant moves to dismiss on timeliness grounds, then the court must decide the motion under the legal limitations period, not the parties' agreement. Perhaps the plaintiff now has a breach of contract claim against the defendant, but the governing statute of limitations remains unaffected. The finer point is that the parties cannot change the limitations law by private agreement.

The private agreement effectively was a promise by the parties to not move to dismiss any lawsuit on limitations grounds unless the lawsuit was filed more than four years after the limitations period began to run. Nothing prevents parties from contractually committing themselves ex ante to that ex post conduct. The law usually permits parties to waive or forfeit limitations defenses ex post, and it is the defendant's prerogative to do so if it wishes.[74] An ex ante agreement may bind (at least as a matter of contract law) the defendant to a particular ex post litigation choice. It does not, however, bind the court, and if the defendant breaches the agreement by moving to dismiss in a manner prohibited by the contract,[75] the court should adjudicate the motion according to the law, not according to the contract.[76]

Now assume that the parties instead agreed to a two-year limitations period.[77] The plaintiff files within the statutory period but outside the contractual period. The defendant moves to dismiss based on untimeliness. The court should deny the motion. Think about it: what law authorizes such a dismissal? The law deems the claim timely, and the contract neither changes the law nor binds the court, so no authorization for dismissal exists. Perhaps the defendant now has a breach of contract claim against the plaintiff for pursuing a claim prohibited by contract, but the parties' agreement does not affect the

---

73 Professor Bone sees this kind of ex ante choice as available ex post, a category he calls "Type II," and thinks that Type II agreements generally should be enforceable. *See* Bone, *supra* note 9, at 1348, 1383. For a similar take stemming from the parallelism of ex post permissiveness, see Dodge, *supra* note 7.

74 *See* FED. R. CIV. P. 8(c)(1), 12(b).

75 Nothing in the Federal Rules bars the defendant from making such a motion in contravention of its ex ante commitments. *See* FED. R. CIV. P. 12 (setting out when motions to dismiss may be made but omitting any prohibition on motions based on ex ante agreements).

76 If the law itself allows modification by the parties or empowers parties to bind the court, then a different result follows. The next Subpart explores this. *See infra* Part II.A.3.

77 Professor Bone sees this kind of ex ante agreement as generally unavailable ex post, a category he calls "Type III," and finds the case for enforcement of Type III agreements less clear. *See* Bone, *supra* note 9, at 1348, 1383.

law governing the original lawsuit. The point is that parties have control over their own conduct, but they do not have formal control over either the courts or the law.

Importantly, courts have no discretion to enforce party choice over unyielding contrary law. Judicial authority is just as subordinate to the law as party choice is. An agreement contrary to law is both ineffective in attempting to override the law and unenforceable by the court. If the defendant makes a proper motion, the court must decide the motion under the law and has no discretion to enforce a contractually different result. Otherwise, the court would elevate parties from a position of subordinance to a position of dominance.

A *lawful* party choice naturally stands on different footing. A party choice allowed by law—such as most ex post forfeitures and waivers—is effective against the parties: parties may disable themselves from certain future action.[78] But party choice is subordinate to judicial authority and thus cannot disable courts.[79] Courts therefore have discretion to override lawful party choices, even while they lack discretion to enforce unlawful party choices.

3. The Law's Dominance

Parties are subordinate to both the law and judicial authority. But judicial authority is subordinate to the law. The law, therefore, as the apex of power, can enable party conduct to limit judicial authority. The theory of party subordinance thus needs a qualification: parties are subordinate unless the law empowers or allows party dominance.[80]

The need for that condition begins with the premise that, unlike parties, who are outside of the governmental structure, the Constitution and congressional acts can and do limit judicial power. For example, because the Constitution vests judicial power only over cases and controversies, a federal court may not issue an advisory opinion.[81] Whether an opinion is advisory often depends upon the parties' respective positions and offerings. For my purposes, this prohibition on advisory opinions means that the parties may remove certain issues from judicial consideration by refusing to press or contest them.[82] For

---

78 *See* FED. R. CIV. P. 8(c)(1), 12(b).

79 *See supra* Part II.A.1.

80 This concept is akin to one hinted at in Davis & Hershkoff, *supra* note 7, at 534–37 (where the authors contend that legal dispute resolution can be outsourced to the parties only upon a delegation of governmental authority to them), and derives from a strong form of legal positivism.

81 U.S. CONST. art. III, § 2.

82 *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 3–7,

example, the issuance of a binding covenant not to sue a particular competitor for trademark infringement moots the competitor's claim that the trademark is invalid.[83] Party conduct can change the nature of the case under Article III such that a court would exceed constitutional limits by disregarding that conduct. Put another way, the constitutional case-or-controversy requirement empowers certain party choices to control judicial authority. As I will explain in the next Subpart, however, this empowerment is relatively rare and quite narrow.

In a similar vein, Congress, through its powers to "ordain and establish" lower courts,[84] to regulate the Supreme Court's appellate jurisdiction,[85] and to make laws that are "necessary and proper" to effectuate these powers,[86] can limit judicial power as well,[87] and nothing prevents Congress generally from using certain party choices or conduct to trigger binding statutory limits. In effect, the law's dominance over courts includes the law's capacity to make party conduct binding upon courts.

Congress's power to give party choice—for my purposes, waiver, forfeiture, and stipulation—control over judicial authority is not unfettered, of course. Law has its own hierarchy. Constitutional principles of separation of powers, for example, limit congressional abridgment of inherent judicial powers.[88] And the Constitution for-

---

29–33 (1960) (comparing sua sponte decisionmaking and advisory opinionmaking); *cf.* JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 21–53 (1977) (arguing that the prohibition on advisory opinions undermines the authority of the Court to create prospective rules of procedure); Lawson, *supra* note 16, at 1222 (arguing that a pure system of law declaration would dispense with parties, cases, and real facts entirely). This limitation is related to the idea of dictum. *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 1997–98 (1994).

83 Already, LLC v. Nike, Inc., 133 S. Ct. 721, 728–29 (2013).

84 U.S. CONST. art. III, § 1.

85 U.S. CONST. art. III, § 2.

86 U.S. CONST. art. I, § 8.

87 *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 4 (1825).

88 Although few doubt the existence of some judicial prerogative in the rulemaking arena, its extent and character is richly debated. For classic positions in the debate, compare Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599, 601 (1926), which argues that the courts should control procedure, and John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276, 276–79 (1928), which argues the same, with Charles E. Clark, *The Proper Function of the Supreme Court's Federal Rules Committee*, 28 A.B.A. J. 521, 521–23 (1942), which notes that Congress is supreme on legislative rulemaking. For a smattering of important later contributions to the conversation, see, for example, FELIX F. STUMPF, INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY 18–19 (1994), Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 909 (1999), Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1687–88 (2004), A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Prob-*

bids Congress from limiting judicial powers in a way that results in the forced adjudication of a case that exceeds the grant of judicial power in Article III.[89] Congress may not do through parties what it cannot do directly. But, outside of constitutional constraints, Congress can empower party choice to control judicial authority.

Conventional wisdom (though not uniformly embraced)[90] holds that rules of court, adopted under the Rules Enabling Act,[91] have the same force as statutes in these contexts. The Rules Enabling Act, duly passed by Congress, essentially delegates much of the rulemaking authority to the Supreme Court, subject to congressional veto.[92] The resulting rules then constrain court power as much as statutes do. For example, the deadline to file a new-trial motion is twenty-eight days,[93] and courts have no authority to extend the deadline or excuse its noncompliance.[94] For purposes of this Article, I remain agnostic on the details of parity between statutes and court rules; it is sufficient to show that Congress can delegate to the rulemaking process some of its court-constraining power.[95]

In addition to law's ability to alter the normal order of party subordinance to judicial authority, law also can allow itself to be af-

---

lem in Constitutional Revision, 107 U. PA. L. REV. 1 (1958), Linda S. Mullenix, *Judicial Power and the Enabling Act*, 46 MERCER L. REV. 733 (1995), Martin H. Redish & Umu M. Amuluru, *The Supreme Court, The Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1306–07 (2006), and Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 229 (1998).

89 *See* Muskrat v. United States, 219 U.S. 346, 356–61 (1911) (holding Article III's controversy requirement to limit Congress's ability to allow parties to manufacture a case).

90 *See* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 20–22 (2d ed. 1990) (arguing that the Rules Enabling Act is an unconstitutional delegation of rulemaking).

91 Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2012).

92 *See id.* § 2072(a) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals."). Congress has authorized, and the Supreme Court has adopted, rules further delegating local rulemaking authority to the lower courts. *See id.* § 2071(a) ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."); FED. R. CRIM. P. 57(a)(1) ("Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice."); FED. R. CIV. P. 83 (authorizing the promulgation of local rules). For the seminal treatment of the Rules Enabling Act, see generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

93 FED. R. CIV. P. 59(b).

94 FED. R. CIV. P. 6(b)(2) ("A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).").

95 *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–50 (1825). For commentary on the relationship between inherent power and court rules, see generally Samuel P. Jordan, *Situating Inherent Power Within a Rules Regime*, 87 DENV. U. L. REV. 311 (2010).

fected by party choice. For example, the statute of limitations in the examples above could specifically allow party agreements to enlarge or restrict the time period. In that case, party choice actually changes the legal rule, such that a court then would be bound to enforce it. Such laws are rare, but they do exist. For example, Rule 29 of the Federal Rules of Civil Procedure permits the parties to stipulate to the time, place, and manner of depositions and to other customized procedures governing and limiting discovery, and those stipulations operate as law that a court may enforce, notwithstanding contrary discovery procedures set out in the Federal Rules.[96] In these situations, however, the parties have not exerted dominance over the law; rather, the law allows itself to be influenced by party agreement. The crucial point is this: parties exercise control over the law only to the extent the law expressly allows them to.

This feature of law's dominance—its ability to allow party conduct to affect its own contours—cycles back to influence judicial authority in various ways, depending upon how the law's allowance is structured. Normally, law's dominance will circumscribe judicial authority. Because ex ante party contracts neither bind the court nor change the law (except as the law allows itself to be changed), a judge not only is not bound by an ex ante agreement to alter the applicable limitations period (because of party subordinance to judicial authority) but also is powerless to exercise discretion to abide by the parties' contractual wishes. Thus, any second-stage discretionary analysis allowed by judicial authority's dominance over party choice is limited by the law's dominance over judicial authority. If the law applies a three-year limitations period, and the law does not incorporate party modifications, then the court has no discretion to take those party modifications into account when ruling on a proper motion to dismiss based on the applicable limitations periods. In such a case, the party choice is both ineffective and unenforceable.[97]

---

96 FED. R. CIV. P. 29 ("Unless the court orders otherwise, the parties may stipulate that: (a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and (b) other procedures governing or limiting discovery be modified . . . ."); *see also id.* 1970 advisory committee's note ("It is common practice for parties to agree on [discovery] variations, and the amendment recognizes such agreements and provides a formal mechanism in the rules for giving them effect."). Even this specific authorization, however, lodges residual discretion in the judge to require preapproval of such stipulations or to override them after the fact by court order. *Id.* ("Any stipulation varying the procedures may be superseded by court order . . . ."); *id.* 1993 advisory committee's note ("By order or local rule, the court can, however, direct that its approval be obtained for particular types of stipulations . . . .").

97 The rigidity of this model separates it from the presumption-and-exception model of

Of course, the law could authorize court discretion in deciding whether to alter the limitations period based upon the parties' ex ante agreements. For example, Rule 16 of the Federal Rules of Civil Procedure grants judges broad managerial powers to structure pretrial litigation, including, among others, the power to "modify the extent of discovery."[98] If the parties agree to conduct just two depositions each, the stipulation itself would not bind the court, but it can—and should—be a factor in the judge's discretion to issue an order limiting depositions to two per side. The resulting order would then legally bind the parties and serve as a legal basis for future court action in the event of noncompliance. To be clear, law is still dominant, and party choice has not overridden the law. Rather, the law can allow party choice—here, through the grant of judicial discretion—to alter the applicable legal rule. Again, the idea is that parties control legal rules only to the extent the law itself allows such control.

Importantly, when the law does not allow such control, law-contravening agreements are unenforceable. But that unenforceability does not render them completely irrelevant. Consider, for example, an attempt by the parties to change a three-year limitations period to four years. The plaintiff files suit three-and-a-half years after the claim accrued. As discussed above, the defendant could invoke the three-year limitations defense established by law despite the contractual four-year period, and, if the defendant does so properly, the court would have to find the action barred. But what if the defendant fails to assert the defense? Recall that the defendant's forfeiture does not render the action timely, just as the parties' agreement does not render the action timely. Because parties are subordinate to courts, a court could override the defendant's forfeiture and invoke the limitations defense sua sponte. But I expect that the parties' contractual agreement to lengthen the limitations period—though unenforceable—would nevertheless weigh heavily against any judicial decision to override the defendant's forfeiture.

The illustrations above feature limitations periods and discovery procedures, but the same reasoning applies to a host of other kinds of typical ex ante agreements, including jury-trial waivers, class-action waivers, punitive-damage waivers, and forum-selection clauses. Pri-

---

others who wish to see courts retain some discretion over enforcement of party choice. *See, e.g.*, Marcus, *supra* note 10, at 1042–43. For an important exploration of the ways substantive law might encourage or discourage judicial procedural discretion, see generally Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027 (2013).

98 FED. R. CIV. P. 16(b)(3)(B)(ii).

vate contracts attempting to alter these legal rules may bind the parties under penalty of a lawsuit for breach of contract. But they do not change the law governing the substantive lawsuit. And if a plaintiff files a complaint in a court that is proper under the law but improper under the contract (such as by properly demanding a jury trial despite a contractual waiver of that right, or by seeking punitive damages despite a release of punitive-damage liability), the court should—indeed, must—follow the law, not the contract. Part III further addresses some of these kinds of contractual provisions.

4. An Example: The Federal Arbitration Act

The Federal Arbitration Act ("FAA")[99] illustrates these principles. The FAA expressly subordinates judicial power to party agreements to arbitrate. Section 2 of the Act provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[100] Had Congress ended here, it might be an open question how a court should enforce arbitration agreements; without a specified mechanism, the default enforcement might only be via lawsuit for breach of contract. But Congress went further in Section 4 to provide a specific enforcement mechanism:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.[101]

Thus, Congress, through the FAA, has specifically provided a mechanism for the judicial enforcement of arbitration agreements that, in effect, allows party choice to circumscribe judicial power.[102]

---

99 Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16 (2012).

100 *Id.* § 2.

101 *Id.* § 4.

102 Ironically, the widespread judicial practice of party deference infects even arbitration cases in which party choices are not controlled by the FAA. *See, e.g.*, Oxford Health Plans LLC

The FAA, then, teaches two things. First, it illustrates, by counterexample, the principle of party subordinance in most litigation-based contractual provisions. Unlike arbitration provisions governed by the FAA, most party agreements have no special force and entail no special reaction. They neither change the law nor circumscribe judicial power. They are relegated to the discretion of the court or enforcement through the normal channel of a formal claim for breach of contract.

Second, the FAA shows the power of law's dominance by demonstrating that Congress can, when it wishes, alter the usual hierarchy to subjugate judicial power to party choice. It is worth noting that Congress's decision to do so with the FAA has not been overlooked. In a series of opinions over the last twenty years, the Supreme Court has implemented the FAA's language, repeatedly recognizing a special federal law of arbitration largely controlled by party choice.[103]

B. Objections to Party Subordinance

In this Subpart, I consider five possible objections to a theory of party subordinance.

The first is constitutional—that Article III's requirement of a case or controversy, and correlative prohibition on advisory opinions, requires deference to party wishes. I acknowledged this as an important example of law's dominance above. But does this constitutional constraint, which limits the power of a court to reach out to decide an issue that neither party presses or contests, deprive party subordinance of any meaningful doctrinal space?[104]

The answer is no. The reason is that the scope of law's dominance under the case-or-controversy requirement is quite narrow. Because the mandate of Article III is case-focused, not issue-focused, the Constitution requires party conduct to do one of two things to control judicial discretion: dispose entirely of the whole case or remove an issue from any relevance to the case. For example, in *Kokkonen v. Guardian Life Insurance Co. of America*,[105] the Court held that a settlement-based stipulation of dismissal, entered by the court without

---

v. Sutter, 133 S. Ct. 2064, 2068 n.2 (2013) (applying a deferential standard of review to an arbitrator's construction of an arbitration agreement only because the parties stipulated that the agreement delegated such authority to the arbitrator).

103 *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013) (upholding an arbitration provision that precluded class action treatment of claims with significant public dimension even if those claims would have been economically infeasible to pursue individually).

104 *See supra* note 82.

105 Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994).

reservation of jurisdiction, could not serve as an independent basis for federal jurisdiction to hear a later lawsuit based on an alleged breach of the settlement terms.[106] No other sua sponte issues should implicate Article III's case-or-controversy requirement.[107] Indeed, the Court just last Term in *United States v. Windsor*[108] held that the United States, a losing party to the final judgment, had standing to appeal even though it agreed with the correctness of the judgment.[109] The reality is that although party conduct can trigger Article III limits on court power, party choices rarely do so.

Further, the case-or-controversy requirement is a fickle one, for it also supports the theory of party subordinance by *demanding* judicial intervention when the parties' choices would force an otherwise deferential court to decide cases outside Article III. This scenario could occur on either the law or the facts. For example, in *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*,[110] the Supreme Court allowed the D.C. Circuit to decide a legal issue not raised by the parties, because "the contrary conclusion would permit litigants, by agreeing on the legal issue presented, to extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory."[111] Analogously, in *Swift & Co. v. Hocking Valley Railway Co.*,[112] the Court refused to accept a stipulation of fact that was contrary to the record, because, in the Court's view, accepting the stipulation would present a hypothetical case.[113] Thus, the case-or-controversy requirement is not a one-way ratchet against party subordinance. Rather, it can demand judicial override of party conduct when that party conduct manufactures a hypothetical dispute. The Article III objection, therefore, is a narrowly applicable

---

106 *Id.* at 381–82.

107 *Cf.* Davis v. United States, 512 U.S. 452, 464 (1994) (Scalia, J., concurring) ("[T]he refusal to consider arguments not raised is [not] a statutory or constitutional mandate . . . ."); Frost, *supra* note 17, at 460 ("[C]ourts are not constitutionally barred from raising new issues."). For an example of a decision of the Court resolving an issue in a way approaching an advisory opinion, see Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 58–59 (1999) (finding no state action to allow a § 1983 claim but nevertheless proceeding, as if state action had been found, to decide also the constitutionality of the conduct at issue).

108 United States v. Windsor, 133 S. Ct. 2675 (2013).

109 *See id.* at 2684–86.

110 U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439 (1993).

111 *Id.* at 447.

112 Swift & Co. v. Hocking Valley Ry. Co., 243 U.S. 281 (1917).

113 *Id.* at 285–89. Gary Lawson reads *Swift* as a nonjurisdictional decision. Lawson, *supra* note 16, at 1206–07.

one already incorporated by the condition that parties cannot limit judicial authority *unless the law so provides*. This objection need not swallow the theory, but rather need only be located within it.

The second objection is Fullerian: that party subordinance, even if not prohibited by the Constitution, undermines the prudentially desirable benefits of deferential judicial passivity. Passivity's virtues are well known: it safeguards the judicial-adjudicative function and avoids quasi-legislative decisionmaking,[114] helps preserve the appearance of judicial neutrality,[115] ensures compliance with the notice-and-opportunity feature of due process,[116] improves the accuracy of judicial decisionmaking by involving party arguments,[117] relieves judges from the burdens of developing the record and framing the case on their own,[118] avoids upsetting the reasonable expectations of litigants, potentially improves the efficiency of litigation by tailoring procedure to the needs of the case,[119] protects parties from the expense of having to litigate issues at the insistence of the court,[120] dissuades parties from sandbagging each other and courts,[121] incentivizes representational quality,[122] and potentially improves party and public acceptance of the judge's decision.[123]

---

114 *See* Fuller, *supra* note 55, at 381–82.

115 LANDSMAN, *supra* note 17, at 2; *cf.* H.R. REP. NO. 93-1453, at 4–5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6354–55 (lauding an objective standard for judicial recusal as a way "to promote public confidence in the impartiality of the judicial process").

116 *See* Postal Tel. Cable Co. v. City of Newport, 247 U.S. 464, 476 (1918) (setting out the notice-and-opportunity feature of due process); Milani & Smith, *supra* note 17, at 267–68 (recognizing due process concerns with sua sponte decisionmaking).

117 *See* Polk Cnty. v. Dodson, 454 U.S. 312, 318 (1981); LANDSMAN, *supra* note 17, at 38–39; *see also* LLEWELLYN, *supra* note 104, at 325 (asserting that judges and neutral experts cannot advance party interests as zealously as parties themselves).

118 *See* Frost, *supra* note 17, at 506 ("Judges . . . lack the institutional capacity to frame cases themselves. Judges do not have the staff or funds to personally investigate the facts of the cases that come before them, nor do they share the parties' incentives to uncover all the information that could assist them in making their case.").

119 *See* Lawson, *supra* note 16, at 1203; Rhee, *supra* note 9, at 516–17; Scott & Triantis, *supra* note 16, at 856.

120 I thank Evan Lee for pressing this point.

121 *See* Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 393–98 (1998) (Kennedy, J., concurring) (worrying that parties might try to sandbag the court or adversaries by revisiting issues seriatim, or after the other party has ceased investigation).

122 Hartmann v. Prudential Ins. Co. of Am., 9 F.3d 1207, 1214–15 (7th Cir. 1993) (Posner, J.) ("[W]e cannot have a rule that in a sympathetic case an appellant can serve us up a muddle in the hope that we or our law clerks will find somewhere in it a reversible error.").

123 *See* LANDSMAN, *supra* note 17, at 33–34; THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM 121–22 (1978) (reporting that litigants can feel unfairly treated if the judge resolves an issue not raised by the parties); Moffitt, *supra* note 17, at 464, 479–91 (arguing that customization can enhance procedural justice

There often are two sides to everything, and, here, each passivity benefit has its concomitant detraction. Some quasi-legislative decisionmaking is necessary in the federal judicial system, and it occurs constantly at the appellate level whenever a court announces a rule that applies beyond the peculiar factual circumstances of the particular case. At times, judicial intervention enhances, rather than erodes, the appearance of neutrality, especially when nonparty rights are at stake.[124] Accuracy, too, cuts both ways, such as if parties fail to cite proper precedent or otherwise create an artificially closed universe of fact and law for the court to consider.[125] Efficiency can be reversed if the tailored procedures are confusing or are drafted early under expectations that do not materialize later in the litigation. The judicial burdens of going beyond party framing may not be particularly heavy, particularly when the record or law is clearly contrary to the parties' positions.[126] Party expectations are not often justifiable,[127] and even when they may be important, so are judicial expectations of the immutability of the rules the court will follow.[128] Protecting parties from being commandeered by the court to litigate an issue neither wishes to pursue is no more important than protecting the court from being commandeered by the parties to decide a manufactured issue under questionable law, fact, or process. And the notice-and-opportunity principle of due process is both widely ignored in judicial decisionmaking on small levels (such as the entrenched practice of original judicial opinion writing rather than wholesale adoption of one party's argument) and easily satisfied in more troublesome cases (such as by actually giving notice and an opportunity for briefing before ruling sua

---

and the public perception of litigation); Oldfather, *supra* note 55, at 139–42 (arguing that the loser's acceptance is enhanced by the perception of fair process). For the seminal treatment of "procedural justice," particularly as enhanced by adversarial representation, see Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 273–312 (2004).

124 *See* Fiss, *supra* note 53, at 25–26 (worrying that a court could "be led into error" by the parties and to the detriment of nonparties).

125 *See Hartmann*, 9 F.3d at 1214–15 (suggesting that sua sponte consideration may be in order "where a court decides to reexamine a precedent so deeply entrenched in the law that a litigant might not think to challenge it").

126 *Cf.* Frost, *supra* note 17, at 507 ("The point here is only that when judges do stumble upon a new legal claim, source of law, or line of reasoning, they should not be discouraged from noting that issue and asking the parties to address it.").

127 *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2015 & nn.215–16 (2007).

128 *See, e.g.*, Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2068–69 (1989).

sponte or overriding party choice).[129] Further, extreme party deference can sacrifice third-party rights[130] and public and systemic values,[131] and erode both the public perception of the judiciary[132] and its normative legitimacy.[133] Strategic sandbagging and truly poor lawyering ought to be problematic only in the unusual case in which the likely marginal advantage gained from potential future judicial intervention outweighs the risk of losing the issue entirely,[134] and, in any case, judicial intervention for truly poor lawyering might be normatively desirable on balance, especially for pro se litigants or disadvantaged parties,[135] while strategic gaming might be even more frequent under a regime of extreme deference to parties.[136] Party acceptance may be eroded rather than supported if erroneous waivers or forfeitures are enforced without consideration of the circumstances.[137]

These competing values cannot be resolved satisfactorily through a model of absolute party dominance. To do so would elevate the

---

129 Rule 56(f), for example, requires judges to give the parties "notice and a reasonable time to respond" before entering summary judgment sua sponte. FED. R. CIV. P. 56(f). For analogous arguments that sua sponte issue-raising by appellate courts should be accompanied by notice-and-opportunity allowances, see Milani & Smith, *supra* note 17, at 268; Miller, *supra* note 17, at 1290; Steinman, *supra* note 47, at 1534–35.

130 *See* Bone, *supra* note 9, at 1372; Davis & Hershkoff, *supra* note 7, at 543.

131 *See* Frost, *supra* note 17, at 479.

132 *See* Davis & Hershkoff, *supra* note 7, at 547–48.

133 *See* Bone, *supra* note 9, at 1384.

134 *See* Frost, *supra* note 17, at 508 (surmising that the concern "that judicial issue creation might diminish lawyers' incentives to locate all of the best arguments . . . seems farfetched"); *see also* Rhett R. Dennerline, Note, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985, 989 (1989) (surmising that parties would not facilely eschew winning arguments).

135 *See* Frost, *supra* note 17, at 501 ("The judge can make the adversary system more efficient at reaching just and accurate outcomes by helping to right the imbalance in opposing lawyers' skills and resources."); *see also* Hormel v. Helvering, 312 U.S. 552, 557 (1941) ("Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.").

136 Cause lawyering, in particular, is multicase strategic and often involves manipulation of the issues in the case. *See, e.g.*, Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from* Brown v. Board of Education *and its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493 (2006) (exploring gay marriage proponents' lawyering strategies); *see also* Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) (noting that the pro-choice groups did not press a Commerce Clause challenge to the partial-birth abortion ban); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *Brown v. Board of Education* and Black America's Struggle for Equality (1975) (documenting the NAACP's conspicuous refusal to press for desegregation at the Court until *Brown*).

137 *See Hormel*, 312 U.S. at 557.

Fullerian vision to an extreme and ignore its downsides; the virtues of party control, though powerful, cannot justify court subjugation to party whim in all circumstances. A more faint-hearted model of party dominance—developing a rule with exceptions dependent upon the many context-specific and competing values—would be extraordinarily difficult, complex, and perhaps even self-defeating. Consider the following. At trial, the plaintiff introduces hearsay evidence. The defendant fails to object, and the trial judge admits the evidence. The evidence is crucial in the ultimate jury verdict in favor of the plaintiff. The defendant appeals, claiming the evidentiary admission was erroneous because the evidence was hearsay. The plaintiff opposes the defendant's argument only on the ground that the evidence fell within a hearsay exception. The plaintiff does not argue that the defendant waived its right to challenge the admission on appeal because the defendant failed to object at trial. The Court of Appeals disagrees with the plaintiff on the question of whether the evidence was inadmissible hearsay, but it believes that the contemporaneous-objection rule should preclude the defendant from arguing the ground on appeal. What should the court do? Should it affirm based on the original waiver—that the defendant forfeited its right to challenge the admission on appeal? Or should it reverse based on the plaintiff's forfeiture of the waiver issue? Do two waivers make a right?[138]

Things need not be so hard. A model of party subordinance can incorporate the virtues of party control in a second-order discretionary decision by the court of whether to exercise its power to ignore or override lawful party choices. Locating the virtues of party choice in this second-order position allows courts to weigh them against their detractions in the context of a particular case. That second-order discretion is clearly necessary and important; I expect that judges will often—perhaps most often—defer to lawful party choices based on the virtues of the Fullerian model.[139]

Such a second-order discretionary power does risk a complicated and burdensome balancing act for each party choice. But in some cases, the discretionary task should be fairly easy, and in others, judges already comfortable with legal standards that depend upon

---

138 *Cf.* FED. R. EVID. 103 (disabling parties, but not the court, from raising forfeited evidence objections); City of Oklahoma City v. Tuttle, 471 U.S. 808, 815–16 (1985) (addressing the propriety of a jury instruction, despite the petitioner's failure to timely object to the instruction, because the respondent did not timely object to the petitioner's untimely objection).

139 *But see* Shannon, *supra* note 44, at 35–36 (imagining a world of limited judicial deference). I note that the Constitution may restrict the discretion of the court to follow party choice if the party choices so affect the court as an institution.

competing values ought to find themselves fairly equipped to the task. The end result is that the model of party subordinance largely incorporates due consideration of the virtues of litigant choice. It does so at the discretion of the courts rather than at the insistence of the parties, but, in a public court system, that is as it should be.

A third objection is that the theory of party subordination relies on a backward interpretation of congressional silence. If Congress controls the courts, then some may assume, perhaps premised on a conceptualization of federal courts as courts of limited jurisdiction and powers, that courts lack the power to intervene absent affirmative authorization.[140] In other words, I'm right that the law is dominant, but I'm wrong that parties are subordinate to courts. Instead, the default should be judicial subordination to party choice unless the law provides otherwise.

But the idea of limited federal power is relative to other governmental actors, not private parties, and it would be quite odd to have parties control federal courts—even federal courts with limited powers. Further, such an objection ignores the long history of equitable prerogatives of the courts, the public nature of courts and their fidelity to the law, the myriad instances in which courts have acted sua sponte or have overridden party choices, and the strong trend among federal rulemaking bodies to grant more and more discretion to district judges.[141] Given these premises, Congress's silence ought to be construed as an acceptance of a default party subordinance rather than an acceptance of a default judicial subordinance.

A fourth objection is that party subordinance gives too much discretionary power to courts and creates too much risk that courts will wield that discretionary power in biased or arbitrary ways. Party dominance over court discretion, the objection might go, is necessary to check judicial power. This objection strikes me as a legitimate concern, if it could be shown empirically to be true. But the party subordinance theory already incorporates two safeguards that ought to minimize the force of this objection. The first is that the second-order discretionary inquiry relies upon recognizable criteria to inform judges, and the scholarship in this area offers promising ways to guide

---

140 *Cf., e.g.*, Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 738–41 (2001) (making a similar argument against the use of merely "beneficial" inherent powers).

141 *See* Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (2003).

the exercise of court discretion.[142] It is not clear that this area risks any more arbitrariness or bias than any other of the numerous doctrines that require the exercise of judicial discretion or the weighing of competing values.[143] But even if it does present such a risk in particular areas, the second safeguard is law's dominance, which allows Congress to step in to empower parties to control courts in specific areas in which judicial discretion is shown to be muddled or ineffective.

A fifth objection is that party subordinance essentially reduces party choice to a nullity, depriving parties of too much autonomy and certainty in litigation. To this objection I offer three responses. The first is that although party subordinance means that party choice cannot control the law or judges, party choice may still control parties. Ex post litigation conduct—waiver, forfeiture, consent, and stipulation—can impose real constraints on future litigation conduct. As just a routine example, a party's failure to object contemporaneously to the authenticity of evidence may prevent her from raising questions of that authenticity later.[144] True, the court is not bound and may be able to resurrect the issue, but in a system that still relies heavily on party initiative, disabling parties' future choices can be significant.[145] And party-based consequence can be valuable to litigants in promoting their zealous representation through signaling, streamlining, or strategic dealing. I seriously doubt that the small risk of judicial intervention will dissuade current party-driven practices in discovery and trial. For ex ante agreements, parties' certainties are as reliable as any other contractual relationship in which breach is difficult to remedy or in which external factors (here, the court's power to disregard ex post party conduct) may reduce the expected value and certainty of the agreement. The second response is that the court always has discretion to defer to lawful party choices, and detrimental party reliance is a factor for courts to consider. As a result, courts are likely to be disinclined to disturb lawful and routine party choices and expectations. The third response is, again, that Congress is the ultimate backstop against judicial power and can legislate, using law's dominance, to enable party choice to control courts.

---

142 For a seminal treatment of discretion, see Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982).

143 *See generally id.*

144 *See* FED. R. EVID. 103.

145 Contrast this reliance on party initiative with the more active leadership role of civil-law judges in developing and directing the evidence. *See generally* Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. INT'L & COMP. L. REV. 1, 9–11 (2011).

C. Countertheories Considered

I turn now to potential alternative theories of the hierarchy among parties, the court, and the law—each offering parties more dominance.

One countertheory is contractual. The idea is that the parties, by their actions, have formed a contractual (for stipulations and consents) or quasi-contractual (for unilateral actions such as waivers and forfeitures) relationship that the court must enforce.[146]

But why? The court is neither a party to any contract nor in privity with it. Parties may have breach-of-contract remedies or equitable quasi-contract remedies against each other for noncompliance, but they do not have such remedies against the court, and it would be oddly bootstrapping if their private contract could alter the law of contracts in a way that bound the court.

The more plausible idea is not that the court is bound by the contract but rather that the court must enforce the contract as a matter of legal directive. But what law mandates such court action? There are two possibilities: general contract law and some federal common law of enforcement. Each is infected with profound difficulties that are entirely ignored in practice.

1. General Contract Law

Resort to contract law presents overwhelming obstacles. First, any enforcement obligation on the court could be imposed only by the contemporaneous assertion of a formal cause of action for breach of contract (and such claims, outside indemnification claims joinable under Rules 13 or 14,[147] are extraordinarily rare in practice). Second, even were such a claim to be asserted, a federal court could hear it only if the claim complied with both the Federal Rules and jurisdictional statutes.[148] Third, the court would have to grant specific per-

146 *See Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 979 (1961) (assuming such agreements are "enforceable as a matter of ordinary contract law"); Taylor & Cliffe, *supra* note 12, at 1127–37 (exploring the contract rationale); *see also* N.W. Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 378 (7th Cir. 1990) (Posner, J.) (reading a forum-selection clause to waive challenges to the selected venue because such a challenge "would violate the duty of good faith that modern law reads into contractual undertakings").

147 *See* FED. R. CIV. P. 14(a)(5) ("A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.").

148 Rules 13 and 18(a) of the Federal Rules of Civil Procedure might permit such a claim involving primary parties, but statutory-jurisdiction principles might not. In addition, challenging the breach by way of a formal assertion of a claim through a complaint amendment or coun-

formance, a disfavored remedy that places the burden on the party seeking enforcement to demonstrate entitlement to the remedy.[149] Fourth, such a claim would present circular questions about the proper procedure for adjudication (if a defendant asserts a breach-of-contract action against a plaintiff who signed a jury-trial waiver but is refusing to waive his jury-trial right, should the court empanel a jury to decide the breach-of-contract claim?) and other management troubles presented by such a case-within-a-case paradigm.[150] And, fifth, normal contract defenses ought to apply to any breach-of-contract claim, yet most courts "enforcing" a litigation agreement do not apply contract defenses in a manner faithful to contract law.[151]

To be clear, I acknowledge that party agreements can give rise to contractual obligations and a sustainable breach-of-contract claim. But my point is that adjudicating such a claim in the same case as the underlying substantive controversy would be incredibly difficult in most instances. One exception might be a fee-shifting agreement that operates effectively like an indemnification claim potentially assertable as either an affirmative claim by the plaintiff or a counterclaim under Rule 13 by the defendant (or, potentially, both).[152] But such possibilities are likely to be rare. And, even then, such a fee-shifting agreement would not alter the legal framework for awarding fees; it would just give rise to a private contractual relationship for re-allocation postjudgment.[153] The result is that the court's power to proceed under its own interpretation of the law, facts, and procedure remains independent of any agreement by the parties, even if that agreement validly binds the parties under contract law.

---

terclaim could be at the discretion of the court if the breach occurs relatively late in the lawsuit. *See* FED. R. CIV. P. 15.

149 *Cf.* Taylor & Cliffe, *supra* note 12, at 1127 (pointing out that courts "enforcing" litigation agreements effectively order specific performance without analyzing whether specific performance is an appropriate remedy).

150 Contrast these difficulties with the FAA, which replaces the need for formal assertion of a breach of contract claim with a petition-and-order-to-arbitrate procedure. *See* 9 U.S.C. § 4 (2012). This mechanism, however, is limited to arbitration agreements.

151 *See* Taylor & Cliffe, *supra* note 12, at 1127–32 (documenting that ex ante contracts "are almost automatically enforced" without regard to normal contract defenses); *see also* Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 AM. J. COMP. L. 217, 247 (2013) (summarizing that "American courts are very deferential to choice-of-forum clauses").

152 *But cf.* Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs, 134 S. Ct. 773, 777 (2014) (finding a claim for fee shifting to be independent from the underlying substantive claim for finality purposes).

153 *See* Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199–203 (1988) (holding that, in general, fee-shifting claims are not part of the underlying substantive claim).

Yet to reject the contract countertheory as an a priori limit on judicial authority is not to call it irrelevant. The fact that the parties have entered into a valid and binding agreement or stipulation, or the fact that one party has knowingly and intelligently waived or forfeited rights, may be a powerful factor in the discretionary decision to defer to the parties' lawful choices.[154] My point is only that such party choices do not deprive the court of its discretion in the first place.

2. Federal Common Law

The second possible justification is that there is some federal common law of party-choice enforcement. The idea would be that federal common law authorizes or requires courts to "enforce" party choices within the context of substantive litigation and outside of the usual doctrinal parameters of contract law.

There is precedent for the creation and use of federal common law in this way for venue-selection clauses in admiralty cases.[155] Those cases may be workable in admiralty, which is almost entirely a creature of federal common law anyway, but they translate poorly to federal statutory and state claims.[156]

The reason why is that federal courts' ability to fashion common law rules for these claims is limited. To begin, there is no federal general common law of contract,[157] which is what "enforcement" naturally appears to be. But even shy of characterizing enforcement as contract common law, difficulties abound.

For federal claims, separation of powers principles subjugate judicial common law power to congressional power. Only when strong federal interests are at stake and when Congress has inadequately addressed those interests through codified law[158] may federal courts exercise this "unusual" law-making power.[159]

---

154 Intradistrict transfer illustrates this principle explicitly. *See* 28 U.S.C. § 1404(b) (2012) ("Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district.").

155 *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

156 *See* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641–42 (1981) (asserting that federal common law developed under admiralty jurisdiction is not freely translatable to nonadmiralty cases).

157 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

158 *See* Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943).

159 City of Milwaukee v. Illinois, 451 U.S. 304 (1981). For an even narrower view of federal common law power, see Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 Nw. U. L. Rev. 761, 762–64 (1989).

For state claims, separation of powers principles limit federal procedural common law, while the *Erie* doctrine limits substantive common law. Venue transfer, for example, is governed by federal codified law, not federal common law.[160] And in most matters of state law, federal courts must conduct an elaborate *Erie* analysis of the state and federal interests at stake to determine whether to apply federal common law or state law.[161] Two key examples are statutes of limitations and choice of law, areas in which federal diversity courts have no authorization to craft federal common law.[162] The result of this analysis is that federal courts have few opportunities, except in cases of unusually strong federal interests such as jury-trial rights,[163] to create a federal common law of party-choice enforcement. And even when federal courts do have authority to create federal common law, that federal common law may require a rule that mirrors the applicable state-law rule.[164] Consequently, developing a robust federal common law of "enforcement" would be very complicated indeed.[165]

Were federal common law viable, additional complexities would arise in determining just how federal common law would apply. Say, for example, that federal common law justified enforcement of a particular party choice. Would that federal common law merely provide authorization for a court to exercise discretion? Or would it *require* a court to enforce the choice? Would it matter whether the party choice was otherwise authorized by codified law? Would a federal common law of enforcement independently establish federal subject matter jurisdiction under 28 U.S.C. § 1331? These are important details, for

---

160 *See* Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex., 134 S. Ct. 568, 583 (2013) (relying on the venue-transfer statute, rather than a federal common law of enforcement, in determining how a forum-selection clause affects venue in a diversity case); Stewart Org. v. Ricoh Corp., 487 U.S. 22, 29–31 (1988) (same).

161 *See* Hanna v. Plumer, 380 U.S. 460 (1965). For a general discussion, see Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 26–27 (2010).

162 *See* Guaranty Trust Co. v. York, 326 U.S. 99, 111–12 (1945) (requiring federal courts to apply state limitations rules to a state claim); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (requiring federal diversity courts to apply state choice-of-law rules).

163 *See* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 538 (1958). For an *Erie* analysis of the validity of contractual jury-trial waivers in federal court, see generally Amanda R. Szuch, *Reconsidering Contractual Waivers of the Right to a Jury Trial in Federal Court*, 79 U. CIN. L. REV. 435 (2010).

164 *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508–09 (2001).

165 The *Erie* doctrine is notoriously challenging. For recent decisions that have splintered the Supreme Court, see Shady Grove Orthopedics Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996).

federal common law is part of the "supreme law of the land" under the Constitution, and thus must be followed by state courts as well.[166]

To be clear, there is room in the theory of party subordinance for a federal common law of enforcement. Law's dominance can enable party choice to bind courts. Federal common law, if valid and applicable, is no less "law" than codified law. I see no reason why federal common law cannot enable party choice to control judicial authority just as codified law can, and such a result would be perfectly consistent with party subordinance.[167] But the creation and application of such a federal common law of enforcement would be far more complicated than courts currently assume. Enforcement of ex ante agreements and ex post choices is usually automatic, unexplained, and undefended.[168] Courts employ no analysis of *Erie*, separation of powers, or compelling federal judicial interests.[169] If federal common law is to justify a federal law of party-choice enforcement, it must first be clearly articulated and rationalized, and it must survive the crucibles of *Erie* and separation of powers. No court or commenter of which I am aware has attempted to do so on the scale that enforcement plays in federal courts today.

III. IMPLICATIONS

The theory of party subordinance and law's dominance has a number of important implications and effects. This Part explores some of those.

A. Ex Ante/Ex Post Problems

Scholars have puzzled over the significance (or lack thereof) of the timing of parties' litigation choices, and they have tended to find significance in the ex post permissibility of ex ante choices. For example, Jaime Dodge follows a principle of symmetry for guiding the enforceability of ex ante choices: an ex ante choice is generally enforceable if it would have been permitted ex post.[170] Bob Bone makes a similar point, calling symmetrical choices presumptively en-

166 *See* U.S. CONST. art. VI, cl. 2; Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 897 (1986) ("[A] federal common law rule, once made, has precisely the same force and effect as any other federal rule.").

167 For the position that substantive law can and should inform the relationship between party prerogatives and judicial discretion, see Wolff, *supra* note 97.

168 *See supra* note 151.

169 *See* Symeonides, *supra* note 151, at 247–50 (summarizing recent cases).

170 Dodge, *supra* note 7, at 783–85.

forceable but asymmetrical choices less so.[171] Likewise, Gary Lawson reasons that if a party can waive issues unilaterally in the context of contemporaneous litigation conduct, then both parties should be able to do so bilaterally, which is really no different from an agreement (presumably ex ante).[172] For each of these positions, the keystone seems to be that the parties can simply time-shift an otherwise permissible ex post choice to an ex ante agreement.[173]

Scholars also have focused on the differing informational and social circumstances surrounding ex post and ex ante choices. Bone and Dodge, for example, each accurately note that, even for symmetrical choices, ex ante choices are often made when information is less complete and less clear than when ex post choices are made.[174] Daphna Kapeliuk and Alon Klement see meaningful differences in evaluating the benefits of private ordering from ex ante or ex post perspectives.[175] For similar reasons, David Schwartz sees voluntary and informed consent as ephemeral in many ex ante settings.[176]

The model of party subordinance—with particular emphasis on the law's dominance—suggests a different way of viewing ex ante/ex post distinctions. The problem is not so much one of symmetry but rather one of compliance with the law. The principle is simple: because parties cannot alter the law, they can exercise choice only within whatever mechanisms the law provides. Thus, if the law specifies an ex post mechanism for exercising the choice but not an ex ante mechanism, then the ex post mechanism is the only way to exercise the choice, and the ex ante agreement just becomes a contractual promise to utilize the legally sanctioned mechanism. As it happens, almost all legally sanctioned mechanisms are ex post,[177] so, as a practical matter, ex ante agreements will usually stand on far different footing than ex post choices, regardless of symmetry.

To illustrate, consider again the limitations examples from Part II above. In the first scenario of a contract to lengthen the period from

---

171 Bone, *supra* note 9, at 1340, 1383.

172 Lawson, *supra* note 16, at 1210.

173 *See* Bone, *supra* note 9, at 1338.

174 *Id.* at 1358; Dodge, *supra* note 7, at 767–68 (discussing ex ante error risks of cost asymmetries, information asymmetries, and cognitive biases); *see also* Taylor & Cliffe, *supra* note 12, at 1105–06 (mentioning the possibility).

175 Kapeliuk & Klement, *supra* note 16, at 1485–91.

176 *See* David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1283–1315 (2009); *see also* Carrington & Haagen, *supra* note 23, at 350–57; Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 72–74 (2004).

177 *See supra* note 96 and accompanying text.

three years to four years, the defendant essentially covenanted not to assert a limitations defense unless the claim was more than four years old. Under the law, the defendant certainly could abide by that promise ex post, within the mechanism established by the procedural law, by forfeiting the defense in a case filed timely under the contract but untimely under the law. But if he instead reneges and timely asserts the defense, the court must adjudicate the motion according to the law rather than to his ex ante promise. Similarly, in the second scenario of a contract to shorten the period from three years to two years, the plaintiff essentially covenanted not to file a claim more than two years old. The law certainly allows the plaintiff to decline to file an action more than two years after accrual, thereby effectuating the ex ante intentions of the parties. But if she instead files such an action, her ex ante promise does not render her claim untimely.

In each case, the law allows the ex post actions covenanted by the parties ex ante. And nothing prohibits parties from entering into such an ex ante contract. But the distinction is that the ex post actions are easily enforceable by the courts, while the ex ante covenants are not. The law governs what the court can do, and the parties' agreements do not alter the law. In the hypotheticals, the law allows only ex post conduct, and thus ex post conduct is the only way for parties to ensure effectuation of their intentions. If one party fails to act as promised, the actual—not the promised—ex post conduct will govern, leaving the other party with a potential, and separate, claim for breach of contract.

The same principle extends throughout the procedural law.[178] Say a telephone subscriber agrees to waive all jury-trial rights in any lawsuit against the provider. The law, however, sets out a very specific way for a party to forfeit the jury-trial right: by failing to demand it in accordance with Rules 38 and 39 after litigation has commenced.[179] Thus, the subscriber's ex ante jury-trial waiver has *not* waived her jury-trial right; rather, the subscriber has promised to, in the context of any future litigation, forfeit the jury-trial right (or perhaps enter

178 *See* Part II.A.2 (using limitations examples to illustrate why ex post actions control over ex ante agreements).

179 FED. R. CIV. P. 38(d) ("A party waives a jury trial unless its demand is properly served and filed."); *id.* 39(a) ("When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury . . . ."); *cf.* Grafton Partners L.P. v. Superior Court, 116 P.3d 479, 485 (Cal. 2005) (interpreting the California rules to be the exclusive mechanism for waiving jury-trial rights under California law).

into a stipulation of a nonjury trial)[180] in accordance with the ex post procedures established by law.[181] If the subscriber properly demands a jury trial in contravention of her promise, she may breach her contract, but she will be entitled to a jury. Of course, the dominance of the law means that the law could provide for ex ante waivers. For example, Rule 38(d) could state: "A party waives a jury trial by entering into a valid contract waiving its jury-trial rights or by failing to file and serve a written demand in accordance with Rule 38(b)."[182] But at present, neither the Rules nor federal statutes allow jury-trial waivers outside the ex post forfeiture mechanism in Rule 38.[183]

To be clear, neither ex ante nor ex post conduct binds courts on the underlying substantive right. But ex ante conduct is even weaker than ex post conduct, for while ex post conduct is enforceable against the parties in the context of the litigation, ex ante conduct is not.

B. Types of "Waiver"

Although legal nomenclature tends to sweep various party choices into a single concept of "waiver," the choices have formal distinctions. Black's Law Dictionary defines "consent" as "[a]greement, approval, or permission as to some act or purpose."[184] "Forfeiture" is "[t]he loss of a right . . . because of . . . breach of obligation, or neglect of duty."[185] A "stipulation" is "[a] voluntary agreement between opposing parties concerning some relevant point."[186] "Waiver" is "[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage."[187] The distinctions can be subtle and often difficult to glean in practice.[188]

Nevertheless, the Supreme Court has fixated on these subtle distinctions and elevated their significance for resolving conflicts be-

---

180 FED. R. CIV. P. 39(a)(1) (allowing parties to stipulate—after a proper jury-trial demand—to a nonjury trial).

181 *See* Taylor & Cliffe, *supra* note 12, at 1086 n.6.

182 *Cf.* CAL. CIV. PROC. CODE § 360.5 (West 2014) (providing that written ex ante waivers of limitations defenses suffice to waive the defense). I leave to the side whether such a Federal Rule would violate the Rules Enabling Act.

183 Lower courts routinely hold that ex ante jury-trial waivers themselves effectively waive the jury right. *See* 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2321 (3d ed. 2008). However, they have not articulated a convincing argument for enforcing these waivers.

184 BLACK'S LAW DICTIONARY 346 (9th ed. 2009).

185 *Id.* at 722.

186 *Id.* at 1550.

187 *Id.* at 1770.

188 *Cf.* Transcript of Oral Argument at 23–29, Wood v. Milyard, 132 S. Ct. 1826 (2012) (No. 10-9995) (exposing the Justices' struggles with the terms).

tween party choice and judicial authority.[189] In past opinions, the Court has distinguished between an intentional and knowing relinquishment (waiver) and the failure to preserve a right (forfeiture).[190] That distinction has achieved doctrinal significance in recent habeas corpus opinions. In *Granberry v. Greer*,[191] for example, the Court held that a court of appeals may consider a forfeited exhaustion defense to a habeas petition if the defense was "inadvertently" overlooked by the state.[192] Several years later, in *Day v. McDonough*,[193] the Court held that a district court has authority to resurrect forfeited, but not waived, limitations defenses to a habeas petition.[194] In the 2012 case of *Wood v. Milyard*,[195] the Court held similarly, explaining that the "distinction" between forfeiture and waiver "is key to our decision,"[196] and ruling that a court of appeals may resurrect a forfeited—but not a waived—habeas limitations defense.[197] It is worth noting that *Granberry*, *Day*, and *Wood* relied upon the unique context of habeas corpus, which implicates systemic federalism concerns beyond the private interests of the parties, in recognizing these limited exceptions to the general rule of judicial passivity.[198]

The theory of party subordinance suggests that there is less here than meets the eye, at least when it comes to the first-order question of judicial or party dominance.[199] Unless the law itself cabins judicial

---

189 Commentators have latched on to these distinctions as well. *See, e.g.*, David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 817–18 (1993) (defining waiver as the refusal to challenge personal jurisdiction, and consent as the attempt to expand the court's jurisdictional authority).

190 *See* Wood v. Milyard, 132 S. Ct. 1826, 1832 n.4 (2012) ("A waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve."); United States v. Olano, 507 U.S. 725, 733 (1993) (defining forfeiture and noting that the terms are distinct). If this distinction is accurate, then the law is rife with misuse of the terms. For example, the inadvertent failure to include defenses in pleadings would seem to be a forfeiture, not a waiver as Rule 12(h) characterizes it. *Compare* FED. R. CIV. P. 12(h) (calling it a "waiver"), *with* Day v. McDonough, 547 U.S. 198, 202 (2006) ("Ordinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto.").

191 Granberry v. Greer, 481 U.S. 129 (1987).

192 *Id.* at 134.

193 Day v. McDonough, 547 U.S. 198 (2006).

194 *Id.* at 202.

195 Wood v. Milyard, 132 S. Ct. 1826 (2012).

196 *Id.* at 1832 n.4.

197 *Id.* at 1834–35.

198 *Id.* at 1834; *Day*, 547 U.S. at 205; Granberry v. Greer, 481 U.S. 129, 133–35 (1987).

199 It is not clear how these opinions speak to the different steps of authority and discretion. *Wood*, for its part, states that courts have the authority to raise "a forfeited timeliness defense" sua sponte but abuse their discretion when they raise a waived timeliness defense. *Wood*, 132 S. Ct. at 1834–35. If the Court meant that *both* waived and forfeited defenses are

authority differently based upon some distinction between forfeiture and waiver, then courts have authority to raise issues subjected to either kind of party conduct and irrespective of any systemic interests like federalism. In that vein, Justice Thomas, concurring only in the judgment in *Wood*, was correct to assert that "there is no principled reason to distinguish between forfeited and waived limitations defenses when determining whether courts may raise such defenses *sua sponte*."[200] Of course, the circumstances of the party conduct (inadvertence or voluntariness or intent) and the implication of any systemic interests (federalism or docket control) might be factors in whether a court should exercise its discretion (or even whether a court might abuse its discretion) in raising the lost issue sua sponte. But the finer distinctions between waiver, forfeiture, and even stipulations and consents are irrelevant to the question of the hierarchy between party choice and judicial authority unless the law expressly makes them relevant. As such, under party subordinance, the burden of grappling with these terms is alleviated.

C. Existing Private-Ordering Conversations

The ongoing conversation on the normative value of private ordering substantially elides the formal order of law, courts, and parties. That is a mistake, because party subordination and law's dominance affect this conversation in important ways.

Most profoundly, the theory suggests that current scholarship approaches private procedural contracts backwards. Scholars today focus on when courts should permit parties to contract for procedures not sanctioned by existing law, an inquiry that is founded on a presumption-and-exceptions model of party dominance.[201] But, if parties are subordinate, then in most cases such contracts will violate the law and will therefore be unenforceable. Thus, proposals such as Robert Rhee's (advocating for party power to alter the applicable burden of proof in exchange for fee shifting[202]), Robert Scott and George Triantis's (that parties should be able to adjust standards of proof[203]), Gary

within the authority of a court to raise sua sponte, I would agree wholeheartedly. But given the Court's emphasis that the distinction between forfeiture and waiver "is key to our decision," *id.* at 1832 n.4, it is hard to take *Wood*'s use of the term "forfeiture" to mean "forfeiture and waiver."

200 *Id.* at 1836 (Thomas, J., concurring).

201 *See, e.g.*, Marcus, *supra* note 10, at 1042–43.

202 Rhee, *supra* note 9, at 536.

203 Scott & Triantis, *supra* note 16, at 857–58.

Lawson's (that legal stipulations should be enforceable[204]), and David Marcus's (that parties are presumptively subordinate but that courts have discretion to balance the benefits of private ordering against any "extraindividual interests"[205]) can be adopted only by positive-law enactment and not by judicial discretion. Party subordinance to the law severely constrains—in a way largely ignored by the literature—the universe of procedural contracting available to the parties.

Meanwhile, proponents of judicial authority based on the public dimension of courts (such as Amanda Frost[206]), or on the ex post impermissibility of ex ante conduct (such as Jaime Dodge[207]), or on the protection of judicial decisionmaking (like Bob Bone[208]) appear to treat judicial intervention as exceptional, relatively circumscribed, and requiring some specific justification for overriding party choice. But the theory of party subordinance to courts posits instead that judicial authority is broad and largely unfettered. Any limitation on that authority—not the scope of authority itself—requires justification.

Finally, arguments focusing on judicial responses to lawful party choices, such as Joan Steinman's (arguing that "the general rule against appellate consideration of new issues should truly be the presumptive position taken by appellate courts"[209]), are consistent with the theory of party subordinance but are generally irrelevant to its scope. Instead, such arguments are relegated to the second-order discretionary task of determining whether to defer to or override those party choices.

D. Practical Effects

The theory of party subordinance and law's dominance has important practical implications for procedural customization outside of arbitration agreements governed by the FAA. Because parties cannot bind courts or change the law, the effectuation of privatization is less predictable; parties cannot bank on the results they hope for. The predictability is even less reliable for ex ante contracts, because either

---

204 Lawson, *supra* note 16, at 1196.

205 Marcus, *supra* note 10, at 1042–43.

206 Frost, *supra* note 17, at 452–53; *see also* Bone, *supra* note 9, at 1362 ("[T]he judge has the power to deny enforcement to any procedures that sharply conflict with a statute's public goals.").

207 Dodge, *supra* note 7, at 784; *see also* Bone, *supra* note 9, at 1383 (making similar points about symmetry between ex ante and ex post permissibilities).

208 Bone, *supra* note 9, at 1393.

209 Steinman, *supra* note 47, at 1613; *see also* Martineau, *supra* note 17, at 1059–60 (making a similar argument).

the parties or the court may disrupt what the parties originally agreed to. Liability waivers, for example, are not grounds for dismissal of a claim unless the substantive law (law's dominance) treats such waivers as extinguishing the claim. Ex ante jury-trial waivers are not themselves waivers but rather merely promises to decline to assert a jury demand in the context of litigation. Of course, parties have broader power to make reliably enforceable litigation choices under the FAA,[210] but outside that unique context, party choice offers considerably less certainty.

There are, clearly, serious normative concerns with these effects. The loss of an important ex ante vehicle for reducing uncertainty and for streamlining procedure may have severe commercial implications. Similarly, the degradation of ex post waiver and forfeiture enforcement to a discretionary analysis could bog down courts and result in costs to both parties and the judicial system. After all, parties, relying on supposed judicial passivity, may allocate resources differently depending upon what issues they expect to press and defend.[211] The possibility of judicial intervention introduces considerable risk of unexpected costs and disrupted strategy.

Further, the available remedy in the event of a breach of an ex ante agreement—a formal separate breach of contract claim—may be untenable. Proving causation or damages from breach of, say, a jury-waiver provision, could be impossible.[212] Even if successful, the parties have taken the long way around—wasting court time in the process—to getting to the end result. It is conceivable, for example, that parties to an ex ante claim waiver might nevertheless litigate the substantive claim in one court and, if the plaintiff prevails, then litigate a breach-of-contract action in a second litigation, with the damages remedy being the entire recovery (and potentially costs and attorney's fees) from the first litigation.

Finally, the devaluation of privatized procedure, resulting in impoverished diversity of procedural choice, risks siphoning cases out of court entirely and into arbitration. If parties are forced into a binary choice between court procedures over which they have no control and arbitration over which they have plenary control, they may predomi-

---

210 *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (allowing waiver of class action arbitration in the face of contrary state law).

211 *See* Principal Mut. Life Ins. Co. v. Charter Barclay Hosp., Inc., 81 F.3d 53, 56 (7th Cir. 1996) (Posner, J.) (explaining that the general rule may lull a party into presenting its case differently).

212 *Cf.* Dodge, *supra* note 7, at 753 & n.121 (calculating some jury waivers as amounting to a ninety percent verdict discount).

nantly choose arbitration, resulting in removal from the courts of disputes with significant public import.

These normative concerns are substantial. But they do not answer the descriptive question. The concerns are the faults of a rigidly independent public legal system.[213] If they are too much to bear, there may be ways to mitigate or avoid them.

For example, Congress and rulemakers can change the law to empower party choice and give parties control over courts. Such change can be wholesale or selective, depending upon the particular issue at stake. Many rules already specifically authorize parties to exercise choice in the structure of litigation in a number of circumstances, including settlement, amendment, discovery, and trial.[214] Others can be amended to incorporate ex ante choice. And for lawful ex post choices, the practical effects of judicial override may be so normatively distasteful as to be dispositive in the exercise of judicial discretion to defer to those choices.

Where the law does not alleviate the normative concerns, parties have other options. To bolster breach of contract claims, parties could add liquidated-damages clauses.[215] To avoid duplicative litigation, parties could litigate the validity of the contract first in a declaratory judgment action, the determination of which might serve as a serious deterrent to breach. Or, parties could structure the contract as an indemnification agreement, which might then be joinable in any ensuing litigation.[216]

Finally, parties can choose alternate forms of dispute resolution. Arbitration, for example, "is a consensual contractual process intended to be an alternative to (and not a copy of) litigation,"[217] and for the purely private goal of dispute resolution,[218] in which parties are free to create their own rules (at least within the boundaries of contract law), including the ability to dispense with precedent and even

---

213 These risks have manifested themselves in the past in spectacular fashion. The defendant in *Erie*, for example, wished desperately to preserve the rule of *Swift v. Tyson*, 41 U.S. 1 (1842), and may have made a more significant plea for it (or even have settled the case) had it known that the Court was considering overruling it. *See* Edward A. Purcell, Jr., *The Story of* Erie*: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, *in* CIVIL PROCEDURE STORIES 21, 48–49 (Kevin M. Clermont ed., 2d ed. 2008).

214 *See supra* note 35 and accompanying text.

215 *See* Scott & Triantis, *supra* note 16, at 855–56.

216 *See id.* at 867–69.

217 Paul Bennett Marrow, *Can an Arbitrator Conduct Independent Legal Research? If Not, Why Not?*, N.Y. ST. B.J., May 2013, at 25.

218 Arbitration awards generally are confidential and nonprecedential. *See id.*

written reasoning in certain kinds of arbitration.[219] If parties think the risk that their choices in federal court will be disregarded is too high, they are free to choose a private forum that would allow more freedom of customization.

As for the risk that a binary choice between court and arbitration will divert too many public-law cases into private arbitration, I see two possible remedies. First, applicable conflict-of-laws rules could expressly incorporate parties' choice-of-law agreements, potentially offering parties a more palatable array of public legal regimes from which to choose to govern their dispute.[220] Second, the federal government can use the costs saved by the federal courts from the diversion of cases to arbitration to fund more direct regulatory enforcement of public norms.

This brief discussion cannot possibly give these implications the attention they deserve. I mean only to acknowledge the significant repercussions of the theory of party subordinance and sketch out some paths for future thought.

IV. Application to Specific Doctrines

The theory of party subordinance also affects a number of procedural doctrinal matters, with particular relevance to some recent opinions from the Supreme Court. I discuss a few here.

A. Personal Jurisdiction

Personal jurisdiction has always been waivable and consentable.[221] The question is whether the defendant's waiver or consent merely disables the defendant from raising the procedural right to assert the defense or whether the defendant's waiver or consent actually expands the scope of the court's jurisdiction as a matter of jurisdictional law.

If party conduct affects only the procedural right to assert the defense, then a court that exercises personal jurisdiction only on the basis of consent or waiver does so not because it now has personal jurisdiction but rather because the defendant is unable to force the court to dismiss for lack of personal jurisdiction.[222] Under this conceptualization, the court nevertheless could exercise its discretion—

---

219 Rau, *supra* note 8.

220 I discuss some obstacles to this possibility below. *See infra* text accompanying notes 242–46.

221 *See, e.g.*, Hess v. Palowski, 274 U.S. 352, 354–55 (1927).

222 *See* Taylor, *supra* note 189, at 816–17.

under the theory of party subordination to judicial authority—to disregard the defendant's conduct and dismiss for lack of personal jurisdiction on its own.

If instead the law of personal jurisdiction itself allows party conduct to alter its scope, then party consent, waiver, or forfeiture actually enlarges the scope of the court's adjudicatory authority and extends personal jurisdiction over the defendant where there was no personal jurisdiction before.[223] In that case, the court has no discretion to override or ignore the defendant's conduct; the court obtains personal jurisdiction by operation of law at the moment of party action.

Note that, under the first conceptualization of waiver as having only procedural effects, ex ante consent is irrelevant to the scope of personal jurisdiction but may be relevant to the second-stage analysis of whether a court should exercise sua sponte authority to enforce those personal jurisdiction limits. If the defendant enters into an ex ante agreement to submit to the jurisdiction of a particular court and then, once sued, abides by the agreement and forfeits the defense, then a court, though having the power to override that forfeiture and dismiss for lack of personal jurisdiction, almost certainly will not exercise such discretion in light of the parties' ex ante commitments.

Under the second conceptualization of consent and waiver as altering the substantive scope of personal jurisdiction, ex ante consent will deprive the defendant of the ability to assert the defense successfully ex post. Importantly, the ex ante agreement is not then a promise by the defendant to abstain from asserting the defense ex post but rather itself a vehicle for broadening the scope of personal jurisdiction. Thus, a court faced with a timely motion to dismiss for lack of personal jurisdiction filed by a defendant who had consented to jurisdiction ex ante should deny the motion not as an enforcement of an ex ante promise to refuse to assert the defense but rather because the court actually has personal jurisdiction by virtue of the defendant's ex ante consent.

Why is all of this important? Because the legal relationship between personal jurisdiction and its waiver is visibly unsettled. In *J.*

---

223 More nuanced possibilities exist if consent, waiver, and forfeiture are treated differently by the doctrine. For example, express consent might enlarge the scope of personal jurisdiction while forfeiture might merely deny the defendants the procedural option. For some commentary on the possibilities, see *id.*, which contrasts unilateral ex post waivers with bilateral ex ante consents.

McIntyre Machinery, Ltd. v. Nicastro,[224] four justices on the Supreme Court viewed personal jurisdiction as a matter of the limits of sovereign power,[225] which, the Court previously suggested, cannot be altered by party choice.[226] Party forfeiture, consent, and waiver may affect the procedural right of the defendant to gain a dismissal for lack of personal jurisdiction, but it does not change the underlying scope of a sovereign's jurisdiction over the defendant. And a court then would maintain the power to override a defendant's forfeiture of the defense and dismiss based on the lack of personal jurisdiction.

But in *Nicastro*, three justices viewed consent as part of the doctrine's contours. They viewed personal jurisdiction in terms of fairness, which itself is influenced by party choice.[227] For them, then, consent is both highly relevant and immediately enforceable, for once a party consents to personal jurisdiction or waives the defense, it becomes fair for a court to assert jurisdiction, and the scope of jurisdiction then expands to cover the party. Under the dissenters' view, a court should have no discretion to override valid consent, for that consent has automatically expanded the scope of personal jurisdiction.

Plaintiffs face forum issues as well. Consider the following agreement that YouTube previously extracted from certain users as a condition of visiting its website: "[T]he YouTube Website shall be deemed a passive website that does not give rise to personal jurisdiction over YouTube, either specific or general, in jurisdictions other than California."[228]

Unlike the personal jurisdiction doctrine illustrated in cases like *Nicastro*, in which consent is defendant-centric and permissive (i.e., meant to broaden the range of forums available to hear the dispute over objections of defendants), this forum-selection agreement is

---

224 J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

225 *See id.* at 2789 (plurality opinion).

226 *See* Ins. Corp. of Ire., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982) ("[I]f the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected."); *cf.* Pennoyer v. Neff, 95 U.S. 714, 720 (1877) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse.").

227 *See Nicastro*, 131 S. Ct. at 2794 (Ginsburg, J., dissenting).

228 Bowen v. YouTube, Inc., No. Co8-5050FDB, 2008 WL 1757578, at *2–3 (W.D. Wash. Apr. 15, 2008). For the most recent iteration of YouTube's website agreement, see *Terms of Service*, YouTube (June 9, 2010), http://www.youtube.com/t/terms.

plaintiff-centric and *restrictive*; its primary goal in fact is to limit the plaintiff to a single geographic forum even if, absent the agreement, other forums could hear the dispute. Now say a resident of Washington recently used the YouTube website under this agreement. A dispute arises, and the user sues YouTube in Washington.[229] Say that, absent the agreement, a court in Washington could lawfully assert personal jurisdiction over YouTube in this lawsuit based on minimum contacts and the Washington long-arm statute. Nevertheless, YouTube moves to dismiss the lawsuit for lack of personal jurisdiction. Must the court dismiss?

No. Nothing in the law of personal jurisdiction enables a party to unilaterally (or even bilaterally, as between the parties) reduce the power of the state by shrinking the scope of personal jurisdiction otherwise applicable.[230] Instead, the YouTube agreement is akin to the example above illustrating an agreement to reduce the applicable limitations period.[231] The user may have promised to sue only in California, but that promise neither alters the law nor binds the court. YouTube might have a breach of contract action against a user for suing in Washington, but if Washington undeniably has personal jurisdiction over YouTube for the underlying dispute, a court has no basis for dismissing the case for lack of personal jurisdiction on the ground that the agreement has ousted the court of personal jurisdiction.[232]

B. Venue Selection

The YouTube website also contained the following venue-restricting language: "Any claim or dispute between you and YouTube that arises in whole or in part from the YouTube Website shall be decided exclusively by a court of competent jurisdiction located in San Mateo County, California."[233]

Much like the inability of YouTube to narrow the scope of personal jurisdiction, the parties cannot narrow the scope of what the law

---

229 This occurred in *Bowen*, which upheld and enforced the language of the agreement. *Bowen*, 2008 WL 1757578, at *2–3.

230 Theoretically, personal jurisdiction law could allow itself to be narrowed by party conduct, but I do not see room for that possibility in the doctrine's current form.

231 *See supra* Part II.A.2.

232 The Court does not understand forum-restriction clauses to shrink the scope of personal jurisdiction, even in admiralty cases. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 588–89 (1991) (distinguishing between forum-selection clauses and personal jurisdiction); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972) (explaining that the district court was not "ousted" of jurisdiction).

233 *Bowen*, 2008 WL 1757578, at *2. For the most recent iteration of YouTube's website agreement, see *Terms of Service*, YouTube (June 9, 2010), http://www.youtube.com/t/terms.

deems an appropriate venue.[234] Venue law sets out the permissible venues and does not allow those options to be ousted by narrower party agreements.[235] Thus, a user may properly sue YouTube in any venue permitted by law, notwithstanding any venue-restriction agreement.

That does not mean that restrictive forum-selection clauses like YouTube's are meaningless. To the contrary, they can strongly support a venue transfer under federal statutory law, which expressly allows transfer to the parties' chosen court "[f]or the convenience of parties and witnesses" and "in the interest of justice."[236] Forum-selection agreements are relevant to those factors.[237] Further, venue transfers may be made by the court sua sponte.[238] YouTube then could attempt to recover its expenses associated with the venue-transfer motion through a breach of contract action against the user.

The rub of all of this is that restrictive forum-selection clauses may be "enforced" by a court not by displacing venue law with the parties' agreement and dismissing for improper venue[239] but rather by transferring venue to the selected court (or possibly dismissing under forum non conveniens if the agreement specifies a court outside the federal system). Thus, it would be wrong for a court to conclude that a restrictive forum-selection clause waives personal jurisdiction and venue objections[240] or, as some commentators have suggested, renders an otherwise proper venue improper.[241]

---

234 Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex., 134 S. Ct. 568, 577–78 (2013).

235 28 U.S.C. § 1391 (2012); *Atl. Marine*, 134 S. Ct. at 578 (interpreting § 1391 to be the controlling definition of proper venue).

236 28 U.S.C. § 1404(a).

237 *See Atl. Marine*, 134 S. Ct. at 580; Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29–31 (1988). *Atlantic Marine* unwisely goes further to make restrictive forum-selection clauses dispositive of § 1404(a)'s "convenience of the parties." *See Atl. Marine*, 134 S. Ct. at 580. For a fuller consideration of *Atlantic Marine* in the context of party subordination, see Scott Dodson, Atlantic Marine *and the Future of Party Preference*, 66 HASTINGS L.J. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2477205.

238 *See* Trujillo v. Williams, 465 F.3d 1210, 1222 (10th Cir. 2006).

239 Section 1404, not § 1406 and Rule 12(b)(3), would apply if venue is proper in the original court under § 1391.

240 *But see* N.W. Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 375 (7th Cir. 1990) (Posner, J.) (stating 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").

241 *See, e.g.*, Allan Ides & Simona Grossi, *Supreme Court Update*, AALS CIV. PROC. SEC. NEWSL., Fall 2013, at 5 (questioning the Court's use of § 1404 and rejection of § 1406); *cf.* Brief of Professor Stephen E. Sachs as Amicus Curiae in Support of Neither Party at 5–6, Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex., 134 S. Ct. 568 (2013) (No. 12-929), 2013

Under the theory of party subordinance, however, "enforces" is probably the wrong term to describe how a court uses a forum-selection agreement. The statute—not the agreement—guides the exercise of the venue-transfer discretion of the court. That the statute incorporates factors that are reflected in a private agreement does not result in "enforcement" of the agreement as if the party agreement dominates over the law and forces judicial action; rather, the statute's incorporation merely results in following the statute in recognition of law's dominance.

C. Choice of Law

Another common party agreement is to specify the law applicable to a dispute.[242] Under prevailing doctrine, parties can select the applicable law as long as there is some rational basis for doing so.[243] But the theory of party subordinance suggests that things are more complicated. The applicable choice-of-law rules, not the parties' agreement, control the inquiry. However the governing conflict rules treat parties' choice of law—as dispositive, as a presumption, as merely a factor, or as irrelevant—so must the court.[244] And a federal court adjudicating a state claim must undertake a preliminary *Erie* analysis, which generally will direct the court to apply a state's choice-of-law rules rather than federal choice-of-law rules,[245] which may differ on the deference afforded to parties' choice of law. That the parties select—even for rational reasons—a set of official laws already available in another jurisdiction is irrelevant.[246] The forum court must apply the

---

WL 3362094 (insisting that a restrictive forum-selection clause does not render a proper venue improper but nevertheless agreeing that a permissive forum-selection clause can render an otherwise improper venue proper). *But see* Marcus, *supra* note 10, at 1038 (arguing, correctly, that nonadmiralty venue-clause enforcement should be through § 1404(a)).

242 *See* Hoffman, *supra* note 7.

243 *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308–13 (1981); *see also* Symeonides, *supra* note 151, at 241–42 (summarizing that "in the vast majority of cases, American courts uphold choice-of-law clauses," though they "continue to require some 'significant connection' between the contract and the chosen state").

244 For example, the Second Restatement, which some states follow, defers to party choice. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). The Uniform Commercial Code also defers to choice-of-law agreements. U.C.C. § 1-105(1) (1989).

245 *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (directing federal courts to apply state choice-of-law rules to state claims).

246 *But cf.* Bone, *supra* note 9, at 1339 (defending choice-of-law provisions as "merely select[ing] among different sets of official rules"); Lawson, *supra* note 16, at 1210 (stating that choice-of-law provisions are usually accepted if within the realm of independently lawful options).

applicable choice-of-law rules—not the parties'—to determine what substantive law applies.

D. Motion Waivers

For ex post waivers of certain procedural rights normally preserved via motion, the theory of party subordinance may suggest a rethinking of cases disclaiming judicial authority to enforce procedural rights in those contexts. Take, for example, Rule 29 of the Federal Rules of Criminal Procedure, which states that a motion for judgment of acquittal after a guilty verdict must be made within fourteen days of the jury's discharge.[247] In *Carlisle v. United States*,[248] the Supreme Court held that a district court had no power to enter a judgment of acquittal absent a timely motion under Rule 29.[249] In the Court's view, the defendant's forfeiture constrained the authority of the court.[250]

I suggest that this holding be reconsidered. The first step in reconsideration should be to recognize the court's authority to enter a judgment of acquittal in favor of a legally innocent defendant. The next step should be to determine whether Rule 29—or any other rule—expressly restricts that authority upon the failure of the defendant to file a timely motion. If the answer is no, then the court has the power to override the defendant's forfeiture in the exercise of its discretion.

In response to similar points made by the dissent,[251] Justice Scalia, writing for the *Carlisle* majority, stated that such a framework "would create an odd system in which defense counsel could move for judgment of acquittal for only seven days after the jury's discharge, but the court's power to enter such a judgment would linger."[252] But that is not so odd. It accords perfectly with the theory of party subordinance and is reflected in countless other doctrines, including those recognized by Justice Scalia.[253] The deadline simply reflects the effect of

---

247 FED. R. CRIM. P. 29.

248 Carlisle v. United States, 517 U.S. 416 (1996).

249 *Id.* at 433. At the time of the case, the statutory period was seven days. *Id.* at 418.

250 *Id.* at 426.

251 *Id.* at 436–37 (Stevens, J., dissenting) ("The exercise of the court's inherent power to set aside a jury verdict unsupported by evidence is not contingent on the filing of a timely motion by the defendant. . . . [T]he question is whether that Rule [29] *withdraws* the court's pre-existing authority to refrain from entering judgment of conviction against a defendant whom it knows to be legally innocent.").

252 *Id.* at 422.

253 *See, e.g.*, cases cited *supra* note 46.

forfeiture on the defendant's procedural ability to secure a judgment of acquittal; it does not constrain the court's authority (though perhaps the rule could be written to do so). Does this then render superfluous, as Justice Scalia thinks, the need for any motion at all?[254] I think not. A timely motion forces the court to decide the issue of the legal sufficiency of the evidence to convict. A forfeited motion gives the court discretion, but not the obligation, to consider the issue, a much riskier proposition for the defendant. The scenario is comparable to the parties' power to move for a new trial in a civil case, which is coupled with the court's own independent authority to grant a new trial sua sponte.[255] *Carlisle*, then, ought to be reconsidered.

Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.[256] presents a similar case study. There, the Supreme Court held that a court of appeals lacks the power to order a new trial in a civil case for insufficiency of the evidence if the appellant failed either to file a postverdict Rule 50(b) motion or to request a new trial under Rule 59.[257] Although Rule 50 says nothing about binding appellate courts, the Court relied both upon prior precedent establishing the requirement of a postverdict motion[258] and upon practical reasons, such as district-court competence and litigant fairness.[259]

Unitherm fails to distinguish between forfeiture's effects on parties and forfeiture's effects on the courts. It may be true, as the Court stated, that "a party is not entitled to pursue a new trial on appeal unless that party makes an appropriate postverdict motion in the district court,"[260] or that a party's "failure to comply with Rule 50(b) forecloses its challenge to the sufficiency of the evidence [on appeal],"[261] or that "a litigant that has failed to file a Rule 50(b) motion is foreclosed from seeking the relief it sought in its Rule 50(a) motion."[262] But that does not inexorably lead to the conclusion that any *court* was so foreclosed. The Court's conclusion that a party's failure to make a postverdict motion left the district court "without the power

254 *Carlisle*, 517 U.S. at 430–31.

255 *See* FED. R. CIV. P. 59.

256 Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394 (2006).

257 *Id.* at 396.

258 *Id.* at 401–02 ("This Court's observations about the necessity of a postverdict motion under Rule 50(b), and the benefits of the district court's input at that stage, apply with equal force whether a party is seeking judgment as a matter of law or simply a new trial.").

259 *Id.*

260 *Id.* at 404.

261 *Id.*

262 *Id.*

[to order a new trial]"[263] is true only if the rule expressly subjugates court power to party waiver, which it does not.[264] Thus, as the dissent recognized, the court of appeals had the power and discretion to consider grounds for a new trial.[265] *Unitherm* likewise should be reconsidered.

These cases illustrate how the theory of party subordinance ought to apply to motion forfeitures and ex post party conduct more broadly. Together with law's dominance, the theory counsels wholesale rethinking of the way the legal system frames the relationship among parties, the court, and the law.

CONCLUSION

This Article systematically explored a theory of party subordinance, which posits that parties' litigation choices do not alter the law unless the law allows alteration, and that even when the law allows alteration, courts are not bound by litigant choices except when the law makes that choice binding. This theory offers opportunities to rethink both scholarly commentary and existing doctrine.

I conclude by identifying two paths for further thought. First, conceptualizing court power as inviolate, with party choice informing the discretionary exercise of that power, helps assuage tensions resulting from disparate results in various doctrines, because discretion—as opposed to mandatory rules—can better tolerate inconsistency in application. The theory thus may have insights for the enduring debate over rules, standards, mandates, and discretion.

Second, the discretion helps balance the law-pronouncing and error-correcting functions of the courts and reorients the role of the judge as less passive than some would view it. As Judge Learned Hand famously proclaimed: "A judge, at least in a federal court, is more than a moderator; he is affirmatively charged with securing a

---

263 *Id.* at 405.

264 Of course, Rule 59 does set other binding limits on a district court's discretion, but they are a product of positive law, not party decision. *See* FED. R. CIV. P. 59(d).

265 *Unitherm*, 546 U.S. at 409 (Stevens, J., dissenting) ("[I]t may be unfair or even an abuse of discretion for a court of appeals to direct a verdict in favor of the party that lost below if that party failed to make a timely Rule 50(b) motion. Likewise, it may not be 'just under the circumstances' for a court of appeals to order a new trial in the absence of a proper Rule 59 motion. Finally, a court of appeals has discretion to rebuff, on grounds of waiver or forfeiture, a challenge to the sufficiency of the evidence absent a proper Rule 50(b) or Rule 59 motion made in the district court. None of the foregoing propositions rests, however, on a determination that the courts of appeals lack 'power' to review the sufficiency of the evidence and order appropriate relief under these circumstances . . . .").

fair trial, and he must intervene sua sponte to that end, when necessary."[266] For now, I remain silent on whether that is for good or for ill.

266 Brown v. Walter, 62 F.2d 798, 799 (2d Cir. 1933) (Hand, J.).