REGULATING PROCEDURAL CONTRACTS

David L. Noll*

Since the year that The Godfather was released in theaters, some of the most sophisticated litigants in the United States have been fighting a slow-moving war over the enforceability of “procedural contracts” – pre-dispute agreements that define the forum and procedures for litigation between the contracting parties. With the Supreme Court’s recent decisions in American Express v. Italian Colors and Atlantic Marine v. U.S. District Court, the war in the courts has come to an end. Debate over the regulation of procedural contracting now moves to Congress and agencies exercising delegated regulatory authority. And regulate they have. In legislation, executive orders, and agency rules and enforcement proceedings, actors outside the judiciary have rejected the presumption of legitimacy that procedural contracts enjoy under the Supreme Court’s doctrine. These nascent regulatory efforts, however, do not reflect a developed theory of the circumstances in which procedural contracting is problematic, or why.

This paper sets out a theory to guide the efforts of congressional and agency policymakers who are now at the frontlines of the debate over procedural contracting. It contends that the primary normative concern raised by the proliferation of procedural contracting catalyzed by the Supreme Court’s doctrine is its effect on the implementation of regulatory policy – more precisely, the capacity of privately-designed dispute resolution systems to interfere with the market for legal services in ways that conflict with Congress’s judgments about the nature and extent of private enforcement desirable in varied regulatory regimes. This account has implications for numerous regulatory proposals that are presently before Congress and the agencies.

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INTRODUCTION

Forget “ascertainability,”¹ issue classes,² class action defendants’ ability to pick off class representatives,³ and the number of depositions a lawyer may take without asking “mother may I?”⁴ Perhaps the most important problem currently facing civil justice policymakers in the United States is how to regulate procedural contracting.

Procedural contracts come in many shapes and sizes: contractual provisions that define the forum for litigation of disputes,⁵ agreements to resolve disputes through arbitration,⁶ and “true” procedural contracts that

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² See McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012).
specify the procedures and kinds of evidence parties are permitted to use in public court litigation.\(^7\) What unites these devices is that they all purport to displace adjudicatory procedures defined by law with procedures defined by contract.\(^8\)

Procedural contracting's potential consequences are profound. When procedural contracts are routinely enforced, the Federal Rules of Civil Procedure – long the focus of scholarly and policymaking attention – become a mere default, replaceable at the click of a button by dispute resolution systems defined by contract. Procedural contracting thus gives rise to new, private forms of civil procedure. Instead of being designed by public officials and their delegates who derive authority from law, civil procedure is controlled by contract drafters who are not subject to familiar forms of democratic accountability and oversight.

Since the early 1970s, a body of law elaborated by the U.S. Supreme Court has broadly embraced procedural contracting.\(^9\) Addressing challenges to procedural contracts contained in a maritime charter party,\(^10\) a brokerage agreement,\(^11\) a cellphone contract,\(^12\) and the contract of carriage for a Carnival cruise to Puerto Vallarta, Mexico,\(^13\) among other

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8 In a reflection of its place in the traditional research agenda of American procedure scholars, commentators do not even agree on the terminology used to describe the phenomenon that this papers terms "procedural contracting." Compare, e.g., Judith Resnik, Procedure as Contract, 80 Notre Dame L. Rev. 593, 593 (2005) (using "contract procedure" to describe all aspects of civil procedure influenced by party bargaining), with Robert G. Bone, Party Rulemaking: Making Procedural Rules Through Party Choice, 90 Texas L. Rev. 1329 (2012) (using "party rulemaking" to describe ex ante agreements that modify the procedures followed by public courts), and Kevin E. Davis & Helen Hershkoff, Contracting for Procedure, 53 Wm. & Mary L. Rev. 507 (2011) (using "contract procedure" to describe the same phenomenon as Bone). I use "procedural contracting" broadly to describe any attempt to define the forum or procedures for the adjudication of legal claims by contract. I also follow the convention of referring to the documents that define the parties' procedural rights and duties as "contracts" or "agreements" even though some commentators object to this usage. Cf. Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law 16 (2013) (labelling procedural contracts "boilerplate rights deletion schemes"); Arthur Allen Leff, Contract as Thing, 19 Am. U. L. Rev. 131, 132 (1970) ("pieces of paper which pass between [the] parties").


places, the Court has rejected arguments that dispute resolution systems created by contract are unfair, violate the rule of law, and exculpate repeat-player defendants from liability for wrongdoing. In one of the stranger applications of modern preemption jurisprudence, the Court has further concluded that the Federal Arbitration Act bars states from refusing to enforce arbitration agreements based on their effects on consumer welfare and the enforcement of state law.  

Under the body of law created by the Justices, procedural contracts enjoy a presumption of legitimacy that is all but impossible to overcome. It is only where a federal statute specifically disallows procedural contracting or there is some fundamental defect in the contracting process that procedural contracts will not be enforced according to their terms. The Court has made no serious effort to identify other circumstances in which procedural contracting is problematic. Its decisions are premised on the view that specific enforcement of procedural contracts “according to [their] terms” is required by law.

Despite the Court’s enthusiasm for procedural contracting, the law has yet to reach a stable equilibrium. The empirical premises that underpin the presumption of legitimacy are dubious at best. The Court describes the presumption as a statutory default rule, open to revision by Congress and agencies exercising delegated regulatory authority. And the Court’s approach impacts litigants across the ideological spectrum. Just as an alleged monopolist can dictate the process that counterparties must use to

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16 See, e.g., Atl. Marine 134 S. Ct. at 581 (discussing forum selection agreements); CompuCredit, 132 S. Ct. at 669 (discussing arbitration agreements).

17 CompuCredit, 132 S. Ct. at 669.

18 Among those premises are that litigants bound by procedural contract in fact “agreed to be bound”, CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 668 (2012); that cost-savings realized through procedural contracting inure to the benefit of claimants, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991); and that procedural contracting does not meaningfully affect the deterrent or remedial functions of federal law, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985).
resolve anti-trust claims against it,\textsuperscript{19} so can an employer charged with violating its employees’ right to be free of religious discrimination.\textsuperscript{20}

Unsurprisingly, Congress, the President, and federal regulatory agencies have begun to address procedural contracting in legislation,\textsuperscript{21} executive orders,\textsuperscript{22} and agency rules and enforcement proceedings.\textsuperscript{23} These initiatives, however, do not reflect a developed theory of the circumstances in which procedural contracting is normatively problematic, or why. For example, the Consumer Financial Protection Bureau’s recent study of financial service companies’ use of mandatory arbitration presents data concerning “the prevalence of arbitration clauses in different consumer financial product markets,” consumers’ “knowledge and understanding of arbitration and other dispute resolution mechanisms,” “different procedural rules applicable in consumer arbitration and select courts,” “individual consumer claims filed in federal court and class claims filed in federal and certain state courts,” “the terms of consumer financial class settlements,” “how public enforcement actions and private class actions overlap,” and “the relationship between pre-dispute arbitration clauses in consumer credit card contracts and the price and availability of consumer credit card contracts.”\textsuperscript{24} It is not clear how the Bureau intends to make use of this data in its anticipated regulations on financial service companies’ use of arbitration. Like the Court’s doctrine, the nascent efforts to regulate procedural contracts do not reflect a developed theory of the situations in which enforcement of procedural contracting is normatively problematic, or why.

This paper aims to articulate such a theory to guide the efforts of federal policymakers – principally, Congress and administrative agencies –
who are now at the frontlines of the debate over procedural contracting. It contends that the central normative concern raised by the proliferation of procedural contracting is its effect on the implementation of regulatory policy – more precisely, procedural contracting’s ability to interfere with the market for legal services in ways that conflict with Congress’s judgments about the nature and extent of private enforcement desirable under various regulatory regimes.

For policymakers, this position entails a specific stance towards procedural contracting. Where procedural contracting negatively impacts the implementation of regulatory policy reflected in law, it should be prohibited or restricted. Where procedural contracting does not have such effects, it should be enforced to allow contracting parties to capture the potential gains from designing civil procedure through contract. I term this the “regulatory policy” approach to regulating private civil procedure. The yardstick for regulation is private procedure’s effect on the implementation of regulatory policy, as opposed to fairness, efficiency, justice, or the myriad other values that inform the design of the public justice system.

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Three initial qualifications: First, the paper does not distinguish among agreements to arbitrate, forum selection agreements, “true” procedural contracts, and other forms of procedural contracting. Second, this paper’s account of procedural contracting is directed primarily at Congress and agency regulators rather than courts. Third, the focus of this paper is on the stance that federal policymakers should take toward procedural contracting. In a separate paper, I consider how regulatory authority over procedural contracting should be allocated among state, federal, and international policymakers. Before addressing that question, it is necessary to nail down why policymakers should be centrally concerned with procedural contracting’s effects on the implementation of regulatory policy.

To do so, I begin by explaining why the legal system might want to enforce procedural contracts rather than requiring claims to be adjudicated in public court, using processes defined by law (Part I). I then explain how legal recognition of procedural contracting affects the implementation of regulatory policy; show why these effects should be the focus of policymakers’ attention; and consider the relationship between a regulatory stance focused on the implementation of regulatory policy and other concerns that commentators have raised about procedural contracting (Part II). I conclude by addressing three objections to the regulatory policy approach this paper develops (Part III).
I. **The Promise of Civil Procedure Defined by Contract**

Private civil procedure enjoys a privileged place in modern Supreme Court doctrine. In view of this fact, a general approach to regulating procedural contracting must begin by recognizing why the legal system might want to give it the force of law.

The answer is not that Congress has mandated enforcement of procedural contracts by law.\(^\text{25}\) The statutory authorities the Supreme Court has invoked in support of the presumption of legitimacy do not address most of the difficult questions that arise in litigation over the enforceability of procedural contracts. Thus, it is only through an idiosyncratic form of dynamic statutory interpretation that the Supreme Court has been able to maintain that the presumption of legitimacy is required by law.\(^\text{26}\) As Justice O’Connor said of the Court’s modern arbitration jurisprudence, “the Court has abandoned all pretense of ascertaining congressional intent . . ., building instead, case by case, an edifice of its own creation.”\(^\text{27}\)

The presumption of legitimacy is instead based on a functional model of procedural lawmaking, which posits that private control of civil procedure will improve the way disputes are resolved while honoring the rule of law. That model is developed in a speculative law-and-economics literature\(^\text{28}\) and surfaces from time-to-time in Supreme Court decisions.\(^\text{29}\) However, it is set out most elegantly and concisely in a set of briefs authored by the Mayer Brown firm, one of the intellectual architects of the presumption of legitimacy.\(^\text{30}\)

\(^{25}\) Accord Resnick, supra note ___, at 113; Carrington & Haagan, supra note ___, at 402.


\(^{30}\) Brief of the Chamber of Commerce of the United States of America, Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) [hereinafter Italian Colors Brief]; Brief for Petitioner, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) [hereinafter Concepcion Brief]; Brief of the Chamber of Commerce of the...
The Mayer Brown model begins from the premise that the style of litigation that prevails under the Federal Rules of Civil Procedure suffers from a number of pathologies.\(^\text{31}\) Traditional civil procedure is expensive and time consuming; diverts attention and resources from productive business activities; enriches profit-seeking plaintiffs who have not suffered any real injury (and their attorneys); and places U.S. firms at a competitive disadvantage to foreign peers. To overcome these pathologies, the Mayer Brown model suggests a twofold intervention.\(^\text{32}\) Parties to a commercial relationship should specify the forum and procedures for resolving legal claims by contract. When disputes inevitably arise, the parties should be held to their ex ante agreements rather than being permitted to opportunistically invoke the jurisdiction of courts whose dispute-resolution procedures are defined by law.

The Mayer Brown model thus sees civil procedure as just another feature of the contract that governs the parties’ commercial relationship.\(^\text{33}\) Just as a contract might provide better or worse credit terms or stronger or weaker warranties, so it might provide a stronger or weaker dispute resolution system for resolving legal claims. When designing a dispute resolution system, contract drafters pick and choose among familiar features of public court litigation: pleading standards, rules governing discovery and access to private information, pretrial checkpoints and standards of proof, forms of appellate review. When traditional forms of civil procedure are unattractive, drafters can reject them or substitute an alternative that is better suited to the parties’ circumstances.

This intervention ostensibly captures important benefits. By giving contract drafters authority over civil procedure, the law allows them to tailor their investment in dispute resolution to the stakes of their underlying business relationship. Parties contracting for $30/month cellphone service can bind themselves to using a cheap, efficient (and presumably error-prone) dispute resolution system,\(^\text{34}\) while parties to a billion dollar international transaction can contract for the services of the International Centre for Settlement of Investment Disputes, with its $1000 per hour arbitrators, elaborate case-development procedures, and multiple

\(^{31}\) See, e.g., Italian Colors Brief, supra note ___, at 31; Green Tree Brief, supra note ___, at 10.

\(^{32}\) See, e.g., Italian Colors Brief, supra note ___, at 5; Hall Street Brief, supra note ___, at 3.

\(^{33}\) See, e.g., Green Tree Brief, supra note ___, at 4-5; Hall Street Brief, supra note ___, at 4.

 tiers of appellate review. Tailoring dispute resolution systems to the parties’ circumstances in turn realizes the due process ideal of procedure “proportional” to the stakes of a dispute. Discovery can be kept within rational bounds. Parties to complex transactions can avoid lay juries and contract for the use of an expert in the field. Disputes can be resolved within a specified timeframe.

The Mayer Brown model acknowledges that in many settings, procedural contracts are drafted by the party with superior information and bargaining power. Indeed, the weaker party may not be aware that it is agreeing to resolve legal claims through a procedural system defined by contract. The model also acknowledges that many procedural contracts are contained in contracts of adhesion, presented on a take-it-or-leave-it basis and not subject to negotiation. But in these respects, procedural contracts are no different than most of the non-salient terms in modern standard form contracts, about which parties rationally choose to remain ignorant. Exploitation of the weaker party is constrained by consumers’ ability to contract with sellers that offer superior dispute-resolution terms and the reputational consequences of choosing an onerous dispute resolution system. As expressed by Judge Frank Easterbrook, “Competition among vendors, not judicial revision of [contract terms], is how consumers are protected in a market economy.”

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35 See generally Lucy Reed et al., Guide To ICSID Arbitration (2d ed. 2010).
36 The idea that the constitutional process which is “due” depends on the stakes of the dispute emerged in a line of Supreme Court decisions from the 1970s that rejected due process challenges to administrative adjudication schemes that departed from the common law paradigm of dispute resolution. After flirting with the position that agency adjudication was required to track the common law paradigm in Goldberg v. Kelly, 397 U.S. 254 (1970), the Court in a series of decisions by Justices Powell and White adopted the view that the process due to a person deprived of life, liberty, or property depended on the nature of the interests at stake and the costs and benefits of alternative procedural arrangements. As expressed in the leading case, costs and benefits of alternative procedural arrangements were to be evaluated by analyzing three factors: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Only where the benefits of an alternative procedure outweighed its costs was a particular procedure required as a matter of constitutional due process.
37 See Green Tree Brief, supra note ___, at 10-11.
38 See Concepcion Brief, supra note ___, at 53.
39 See id. at 26.
42 ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1453 (7th Cir. 1996).
Finally, the model acknowledges that enforcement of procedural contracts affects how federal statutory claims are adjudicated. It posits that this presents no irreconcilable conflict with the “remedial and deterrent function[s]" of federal law if procedural contracts respect the parties’ substantive rights and allow those rights to be asserted without imposing direct costs such as filing fees that make claiming prohibitively expensive. If a procedural contract does not impose such costs, the fact that it indirectly affects the calculus of plaintiffs and attorneys considering whether to bring suit is of no moment.

II. THE REGULATORY PROBLEM

The Mayer Brown model promises civil procedure that achieves the due process ideal of process tailored to the stakes of a dispute. Such procedure is realized not by mandating a single set of transsubstantive procedures that is optimal in all circumstances but by reallocating authority to design civil procedure. Privatizing the design of dispute resolution systems effectively creates a market in dispute resolution procedure. Through ordinary market dynamics, private control of civil procedure leads to new dispute resolution systems that provide a fair, efficient mechanism for enforcing rights while avoiding the pathologies of civil litigation in U.S. courts.

As noted, the empirical and economic premises that underlie the Mayer Brown model are open to question. Nevertheless, those premises and the presumption of legitimacy that follows from them are entrenched in federal doctrine. Barring a major change in personnel, the Supreme Court is unlikely to revisit the presumption in the foreseeable future.

Against this backdrop, the first and most basic task for policymakers is to identify the conditions that justify restricting procedural contracting or imposing conditions on its use. Note the framing. The question is not whether procedural contracts should be enforced vel non. There is no a priori reason why procedural contacts should reflexively be enforced, but Congress lacks the ability to enact transsubstantive legislation that rejects

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44 Concepcion Brief, supra note __, at 52 n.18 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991)).
45 See Concepcion Brief, supra note __, at 44; Italian Colors Brief, supra note __, at 21-22.
46 As Scott Dodson shows in great detail, the decision to enforce a procedural contract is an exercise of federal regulatory authority. The fact that parties have entered into a procedural contract merely raises the question: what stance should federal law take toward it? See Scott Dodson, Party Subordinance in Federal Litigation, 83 Geo. Wash. L. Rev. 1 (2014).
the presumption across the board.47 Regulatory legislation with a more limited scope, however, provides an opportunity to revisit the presumption in specific regulatory domains. And recent experience demonstrates that such legislation may incorporate restrictions on procedural contracting. In the Dodd Frank Act and elsewhere, Congress has restricted mandatory arbitration agreements or delegated authority to an administrative agency to do so.48

Thus, the task for policymakers is narrower than identifying the general conditions that justify regulating procedural contracting. Instead, it is to identify conditions that justify regulating procedural contracting in the context of specific regulatory legislation.

Within this context, justifications for regulation can be internal to the Mayer Brown model or exogenous to it. That is, regulation may be warranted either because the market for private civil procedure does not function in the manner contemplated by the Mayer Brown model. Or, the market for civil procedure might function in exactly the manner predicted by the Mayer Brown model but have effects the model does not account for that warrant regulation.

Whether the justifications for regulation are endogenous or exogenous to the Mayer Brown model, a general approach to regulating procedural contracting must satisfy two further criteria. The approach must be politically feasible, in the sense that there is a realistic chance that legislation regulating private civil procedure could pass Congress, if it has not already done so. And the approach must be tractable, in the sense that it imposes informational and analytical burdens that Congress or an agency exercising delegated regulatory authority can carry.

The task for policymakers, then, is threefold. Justifications for regulating procedural contracting must be capable of operating within the context of specific regulatory legislation, politically feasible, tractable. With these criteria in mind, I turn to the paper’s central thesis.

47 The reason is that the presumption of legitimacy implicates a classic collective action problem. A fully informed majority of the voting population might well reject the presumption, but that majority is widely dispersed and poorly organized. On the other hand, the presumption of legitimacy benefits highly organized interest groups that enjoy strong relationships with key congressional powerbrokers. Basic interest group theory therefore suggests that Congress is unlikely to enact transsubstantive legislation that rejects the presumption of legitimacy across-the-board. The fate of the proposed Arbitration Fairness Act, which has been introduced in six Congresses and died in committee every time, is consistent with that hypothesis. See, e.g., 114 H.R. 2087 (introduced May 11, 2015); 113 H.R. 1844 (introduced May 9, 2013); 112 H.R. 1873 (introduced May 12, 2011); 111 H.R. 1020 (introduced Feb. 12, 2009); 110 H.R. 3010 (introduced July 12, 2007); 107 S. 3026 (introduced Oct. 1, 2001).

48 See supra note ___ (discussing Dodd Frank Act and other recent legislation that has restricted the enforceability of pre-dispute agreements to arbitrate).
III. A Regulatory Policy Approach to Regulating Procedural Contracting

The primary normative concern raised by procedural contracting is its effect on the implementation of regulatory policy – more particularly, procedural contracting’s ability to alter the market for legal services in ways that are inconsistent with Congress’s judgments about the desirable extent and focus of private regulatory enforcement. Regulation of procedural contracting should therefore aim at controlling these effects.

This part develops that argument. I begin by zooming out and sketching the broader role that private civil litigation plays in the implementation of federal regulatory policy (section A). I then explain how procedural contracting affects the implementation of federal regulatory policy through civil litigation, and show why those effects matter to Congress and agencies exercising delegated regulatory authority (sections B and C). I conclude by demonstrating that procedural contracting’s effects on policy implementation provide tractable and politically feasible bases for regulation (section D), and considering the relationship between the regulatory policy approach and other concerns commentators have raised about procedural contracting (section E).

A. Background: The Implementation of Regulatory Policy through Civil Litigation

Although the U.S. federal government includes some 400 executive departments, administrative agencies, and regulatory commissions, the federal regulatory state is smaller than that of virtually any other advanced democracy. The comparatively small size of the federal regulatory state is not reflected in Congress’s regulatory ambitions, however. In most areas of social and economic life, U.S. federal law is at least as comprehensive as that of EU member states. Furthermore, despite the Supreme Court’s efforts to cabin regulatory conflicts created by civil litigation in U.S. courts the geographic reach of federal law is expanding.

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to include matters such as multinational corporations’ tax reporting and bribery of foreign government officials.

To implement regulatory policy without creating a European-style public bureaucracy, Congress has long relied on private civil litigation. The objective underlying Congress’s reliance on private enforcement is to make regulatory legislation self-enforcing. By recognizing a private right of action for persons injured by the violation of a statute, Congress sanctions a form of legal self-help. Plaintiffs’ pursuit of remedies for statutory violations leads to the imposition of liability ex post, which in turn encourages regulated actors to follow the law’s commands ex ante.

Where damages from the violation of a regulatory statute are sufficiently high, simply creating a private right of action may be sufficient to make a statute self-enforcing. But in many areas of concern to congressional policymakers, the possibility of recovering actual damages is insufficient catalyze private enforcement. The obstacles are twofold.

First, many individuals are unaware of the rights they enjoy as a matter of federal statutory law. Consider the marketing of the Aspire Visa card, which led to the Supreme Court’s recent decision in CompuCredit v. Greenwood. The Aspire Visa was targeted at individuals who had exhausted every other potential source of consumer credit. In the card’s advertising, the issuer promised that responsible use of the “credit” it provided would reflect positively on a consumer’s credit report. The card agreement, however, imposed backend fees and charges that approached the card’s $300 credit limit, regardless of whether a cardholder

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defaulted. Thus, the extension of “credit” from the issuer to the cardholder was largely illusory.58

The kind of consumer likely to sign up for the Aspire card is unlikely to appreciate that the issuer’s marketing violated the Credit Repair Organizations Act of 1996 (CROA), a statute enacted to protect customers of “credit repair organizations,”59 or that there even exist such things as federal regulatory statutes. Consumers’ ability to enforce their rights under the Act thus depends on the willingness of a better-informed, more highly-resourced agent – prototypically, an attorney – to act on their behalf.60

The need for agents, however, highlights the second obstacle to self-enforcing regulatory legislation – the high cost of legal services in the United States.61 Even if they were aware that their rights had violated, consumers who signed up for the Aspire Card were unlikely to be able to pay for legal representation on an hourly-fee basis. Their ability to enforce their rights therefore turned on the willingness of another party to finance litigation. In the United States, the most likely source of such financing is an attorney. Through a no-win, no-fee contingent fee agreement, an attorney effectively puts up time and money needed to prosecute a claim in exchange for a stake in the proceeds of the suit.62

No sane attorney, however, would agree to represent an individual consumer who lost $300 to the Aspire card’s fee-harvesting fraud. A “pro bono” legal clinic located down the hall from my office charges $50/hour to represent individuals who do not qualify for in forma pauperis status but nevertheless cannot afford legal representation; at these rates, demand for

58 See Samuel Issacharoff, Assembling Class Actions, 90 Wash. U.L. Rev. 699, 722 (2013). In the Card Act of 2008, Congress effectively outlawed the Aspire Visa card by providing that card issuers could not recover fees in the first year of card membership (other late fees, over-the-limit fees, or fees for a payment returned for insufficient funds) that exceeded 25% of the total amount of credit authorized under the account when the account is opened. Pub. L. No. 111-24, § 105, 123 Stat. 1734 (May 22, 2009).
59 The term “credit repair” is inherently misleading. The Fair Credit Reporting Act of 1970 expressly permits national credit bureaus to report information about a consumer’s debts for seven years, information about bankruptcies for ten years, and reports of judgments and liens indefinitely. The only lawful way that a credit report can be “repaired” is by correcting incorrect information on the report or persuading a creditor who controls the reporting of information to withdraw derogatory information. See, e.g., Federal Trade Commission, Credit Repair: How to Help Yourself, available at https://www.consumer.ftc.gov/articles/pdf-0034-credit-repair.pdf
62 See David L. Noll, Two Models of Alternative Attorney Payment Devices, in Beyond Elite Law, supra note __.
the clinic’s services is so high that it rejects the majority of the clients who seek out its services. Even if an attorney recovered 100% of an Aspire cardholder’s economic damages, a one third contingent fee could not pay for more than two hours of attorney time at $50/hour, not to mention the costs of litigation. In the standard economic model of litigation and settlement, a single claim for violation of the Credit Repair Organizations Act has a “negative” value. The costs of representation swamp the judgment from which those costs could be recovered.

In recognition of this problem, Congress in hundreds of statutes has established financial incentives that increase the payoff from private litigation from private regulatory enforcement in an effort to attract private sectors attorneys. They fall into five general categories:

1. **Damage definitions** define the kinds of damages that plaintiffs who prove a violation of the statute may recover.
2. **Damage multipliers** provide that the plaintiff is entitled to recover a multiple of the actual damages she recovers.
3. **Statutory damage provisions** authorize a fixed amount of damages upon proof of a statutory violation, regardless of the actual damages caused by the violation.
4. **Fee-shifting provisions** modify the American rule of attorneys’ fees and generally obligate the defendant to pay the prevailing party’s attorneys’ fees and costs.
5. The **definition of statutory rights** can directly or indirectly facilitate aggregation of claims, enabling an attorney to bundle claims into a package that is worth her effort to litigate.

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63 In simplest form, that model defines the expected value of a claim to a plaintiff $EV(P)$, as the product of the likelihood of success on the merits, $p$, and quantum of damages, $j$, less the costs of litigation, $c$:

$$EV(P) = p \cdot j - c.$$  

64 A 2008 report published by the Congressional Research Service identified 293 fee-shifting provisions in the U.S. Code. Henry Cohen, CRS Report for Congress, Awards of Attorneys’ Fees by Federal Courts and Federal Agencies 64-114 (June 20, 2008). Since the CRS report was published, Congress has continued to make use of the device. For example, the Sarbanes Oxley Act created a private right of action for whistleblowers subjected to unlawful retaliation, under which successful plaintiffs may recover “compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney’s fees.” 12 U.S.C. § 5567 (c)(4)(D)(ii)(III) (2006 Supp. V).

67 See, e.g., Copyright Act, 15 U.S.C. § 704(c).
69 Cf. Davis v. Powertel, Inc., 776 So.2d 971, 973 (Fla. Dist.Cl.App.2000)) (stating with respect to the Florida Deceptive and Unfair Trade Practices Act that “the question is not whether the plaintiff actually relied on
Importantly, the recognition of incentives to sue in a federal regulatory statute does not simply overcome the problem of negative value rights. It also shapes attorneys’ decisions about clients to represent and claims to prosecute.

It is easiest to see the point through a stylized example. Suppose that Lionel Hutz, an attorney in private practice, is presented with the choice of representing three clients, $A$, $B$, and $C$, and can represent only one of them due to time and resource constraints. $A$ wishes to prosecute a claim for breach of contract, $B$ wants to prosecute a claim for copyright infringement, and $C$ wishes to prosecute a claim for employment discrimination against her former employer who has just fired her. Neither $A$, $B$, nor $C$ can afford to pay for Hutz’s time on an hourly-fee basis, so his fee must be paid from the judgment or another source of financing. For simplicity, suppose that the likelihood of recovering on each of the claims is 100%. Finally, suppose that Congress has yet to enact any incentives to sue, and that the expected payoffs from litigating the claims are as follows:

**Scenario 1 (figures in thousands)**

<table>
<thead>
<tr>
<th>Client</th>
<th>Cost of litigation</th>
<th>Damages</th>
<th>Net gain or loss from prosecuting claim</th>
<th>Attorney’s share of gain or loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>$A$ (breach of K)</td>
<td>25</td>
<td>35</td>
<td>10</td>
<td>3.33</td>
</tr>
<tr>
<td>$B$ (copyright)</td>
<td>25</td>
<td>25</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>$C$ (discrimination)</td>
<td>25</td>
<td>5</td>
<td>0</td>
<td>-20</td>
</tr>
</tbody>
</table>

In this scenario, Hutz will choose to represent $A$ and prosecute the copyright claim. That claim is the only one with a positive expected value from which Hutz could recover an attorney’s fee. Prosecuting $B$’s copyright claim is only a break-even proposition, and $C$’s employment discrimination claim has a negative expected value.

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The basic framework for the example that follows is derived from Farhang, supra note ___, ch. 1. Chapter 2 of Farhang’s volume presents an impressive empirical argument that statutory incentives to sue have the effects predicted by the example in the text.
Suppose, however, that Congress is attentive to this problem and enacts a one-way fee-shifting statute that covers copyright and employment discrimination claims. Assuming that the client assigns her right to recovered fees to Hutz, the enactment of the fee-shifting statute changes the payoffs from litigation as follows:

**Scenario 2**

<table>
<thead>
<tr>
<th>Client</th>
<th>Cost of litigation</th>
<th>Damages</th>
<th>Fee recovery</th>
<th>Net gain or loss from prosecuting claim</th>
<th>Attorney's share of gain or loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>A (breach of K)</td>
<td>25</td>
<td>35</td>
<td>0</td>
<td>10</td>
<td>3.33</td>
</tr>
<tr>
<td>B (copyright)</td>
<td>25</td>
<td>25</td>
<td><strong>25</strong></td>
<td>25</td>
<td>8.25</td>
</tr>
<tr>
<td>C (discrimination)</td>
<td>25</td>
<td>5</td>
<td><strong>25</strong></td>
<td>5</td>
<td>1.65</td>
</tr>
</tbody>
</table>

The enactment of the fee-shifting statute in this scenario overcomes the negative-value problem of Scenario 1. Representing B now has a positive expected payoff, and representing C has gone from having a negative payoff to a positive one. Note, however, that Hutz still will not choose to represent C. The expected payoff from prosecuting the employment discrimination claim is minimal, and the payoffs from representing A and B are substantially higher. Thus, Hutz can be expected to represent A or more likely B over C.

If the elimination of employment discrimination is an important societal goal, Congress might conclude that still more incentives for private enforcement of the employment discrimination laws are necessary. For example, it might enact a provision that provides for statutory damages upon proof that an employer has engaged in employment discrimination. Suppose that Congress does so, changing the expected payoffs from litigation as follows:

**Scenario 3**

<table>
<thead>
<tr>
<th>Client</th>
<th>Cost of litigation</th>
<th>Damages</th>
<th>Fee recovery</th>
<th>Statutory damages</th>
<th>Net gain or loss from prosecuting claim</th>
<th>Attorney’s share of gain or loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>A (breach of K)</td>
<td>25</td>
<td>35</td>
<td>0</td>
<td>0</td>
<td>10</td>
<td>3.33</td>
</tr>
<tr>
<td>B (copyright)</td>
<td>25</td>
<td>25</td>
<td><strong>25</strong></td>
<td>0</td>
<td>25</td>
<td>8.25</td>
</tr>
<tr>
<td>C</td>
<td>25</td>
<td>5</td>
<td>25</td>
<td><strong>25</strong></td>
<td>30</td>
<td>10</td>
</tr>
</tbody>
</table>
Now, the problem of negative value rights has been overcome. In addition, Congress has altered the *relative* attractiveness to Hutz of representing A, B, and C. Through the combination of a fee-shifting statute and statutory damages, Congress has altered Hutz’s financial calculus so that he will predictably choose to represent the client asserting an employment discrimination claim. That claim promises the highest return on Hutz’s investment of time and resources.

Of course, the real world is more complicated than this stylized example. Among other things, the U.S. market for legal services includes a million lawyers in addition to Hutz. Of many law firms and attorneys do not enjoy the luxury of choosing which clients to represent. Attorneys cannot switch among practice areas without cost. And attorneys’ choice of clients may be driven by non-economic considerations.

The example nevertheless illustrates a dynamic that informs the design of hundreds of regulatory statutes. By enacting statutory incentives, Congress is able to influence the calculus of attorneys selecting among areas in which to practice and clients to represent. Responding to incentives established by law, attorneys will allocate time and resources toward claims that are (relatively) favored by the existing set of statutory incentives to sue, and away from claims that are (relatively) disfavored.

In functional terms, Congress’s recognition of incentives for private enforcement is similar to a prosecuting agency’s exercise of prosecutorial discretion. Students of administrative law have long appreciated that an agency charged with the law cannot prosecute every technical violation brought to her attention; lawbreaking is too commonplace, too pervasive for every technical violation to warrant an official response. The decision to prosecute a particular violation of the law therefore “involves a complicated balancing of a number of factors.” As expressed by the Supreme Court—

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73 See id.


[T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.76

In regulatory regimes that are enforced through administrative and criminal enforcement, the choice to prosecute a particular case is characteristically made by the frontline enforcement agency.77 While most such agencies have general enforcement priorities – violent crime or white collar? drugs or property? – the choice to prosecute a violation is usually made on a case-by-case basis.78 Attorney General Robert H. Jackson captured the dynamics of the decision process in his well-known speech on the role of federal prosecutors: “What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.”79

In regimes enforced through private, civil litigation, there is no central actor akin to a prosecutor or regulatory agency that decides which cases warrant prosecution based on the facts of individual legal violations.80 However, it does not follow that the selection of cases for prosecution is random. Instead of a central actor deciding which violations to prosecute on a case-by-case basis, Congress works at the wholesale level, establishing incentives that influence attorneys’ decision to represent particular kinds of clients pressing particular kinds of claims. When designing regulatory legislation, Congress can reasonably expect that weak incentives to sue – say, a private right of action coupled with a fee-shifting statute – will lead to modest levels of private enforcement in the

76 Id.
78 But see Adam Cox and Christina M. Rodriguez, 125 Yale L.J. (forthcoming 2015) (discussing the inevitability and desirability of general enforcement guidelines to guide the exercise of prosecutorial discretion in the immigration context).
80 See, e.g., David Freeman Engstrom, Agencies as Litigation Gatekeepers, 634-36 (2013).
wild. Conversely, the recognition of strong incentives – say, a combination of statutory damages, a damages multiplier, fee-shifting, and substantive rights that lend themselves to aggregation – can be expected to drive private enforcement of a statute. “[W]hen legislators craft enforcement markets with sufficient incentives in a regulatory statute, they can stimulate the creation of support structures for implementation in the form of an infrastructure of private prosecutors who earn a living, at defendants’ expense, practicing in the relevant area of law.”

B. Procedural Contracting’s Impact on the Implementation of Regulatory Policy

Thus far, I have assumed that legal claims are resolved under a stable set of procedural rules that imposes predictable costs on litigants. In such a world, Congress will be able to predict – if imperfectly – the effect that recognizing incentives to sue will have on the market for legal services. The defining feature of procedural contracting, however, is that contract drafters are given control over the procedures used to resolve claims. This, in turn, permits drafters to manipulate the costs and benefits of litigation and, with them, the market for private regulatory enforcement.

Contract drafters’ ability to manipulate the market for private regulatory enforcement results from the legal regime that presently governs procedural contracting. The federal law of procedural contracting, developed most fully in the arbitration context, holds that a procedural contract must honor the incentives to sue that are expressly provided by law. Thus, a procedural contract cannot waive a party’s right to pursue statutory damages, or prohibit a party from seeking attorneys’ fees that are available under a fee-shifting statute.

Aside from the requirement of honoring express incentives to sue, doctrine has yet to work out a theoretically satisfying answer to when other changes in the costs and benefits of litigation effected by a procedural contract are impermissible. The only requirement imposed by federal arbitration law, for example, is that an agreement not impose “filing and administrative fees attached to arbitration that are so high as to make access to the [arbitral] forum impracticable.” According to the Supreme Court, an agreement to arbitrate a federal employment dispute could avoid the requirement of honoring statute provided incentives to sue if it was not an “essential term” of the contract.

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81 Farhang, supra note ___, at 30-31.
83 Italian Colors, 133 S. Ct. at 2310-2311. Discussing forum selection agreements, the Supreme Court has said that “exceptional factors . . . unrelated to the convenience of the parties” would justify refusing to enforce a valid forum selection clause, Atlantic Marine Const. v. U.S. Dist. Court, 134 S. Ct. 568, 581 (2013),
Court’s most recent pronunciamento, other changes in the costs of litigating caused by the switch from litigation to arbitration are irrelevant to the validity and enforceability of an agreement to arbitrate.\textsuperscript{84}

For its part, scholarly commentary has focused on the potential for procedural contracting to recreate the problem of negative value rights that exists in a market lacking statutory incentives to sue – that is, to move claimants from Scenario 2, above, to Scenario 1.\textsuperscript{85} A procedural contract can do this while honoring the incentives to sue that are expressly recognized by law because those incentives do not completely determine the costs of prosecuting an action. In addition to statutory incentives, the expected value of prosecuting a claim depends on factors such as the forum for litigation, the forum’s filing and case-processing fees, the choice of law rules the forum will apply, the tools available for investigating claims and accessing private information held by one of the litigants, the availability of procedural devices for formally aggregating claims, the characteristics of the decisionmaker, the availability – and rigor – of appellate review, and the ease or difficulty of enforcing a judgment.\textsuperscript{86}

By modifying these variables, a procedural contract can manipulate the costs and benefits of litigating particular statutory claims. While this can recreate the problem of negative value rights, the negative-value scenario is merely a special case of procedural contracting’s more general

\textsuperscript{84} See Italian Colors, 133 S. Ct. at 2311 (“[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.”). See also Atlantic Marine, 134 S. Ct. at 583 (“When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties’ settled expectations. A forum-selection clause . . . may have figured centrally in the parties’ negotiations and may have affected how they set monetary and other contractual terms . . . .”).

\textsuperscript{85} See, e.g., Radin, supra note ___, at 7 (“[M]any people injured through the fault of a business they deal with are precluded by the company’s paperwork from holding the company legally accountable.”); Maria Glover, Disappearing Claims and the Erosion of Substantive Law, 124 Yale L.J. 3052 (2015) (“[Supreme Court arbitration doctrine] erodes substantive law itself by empowering private parties, through contract, to frustrate or altogether eliminate claiming in any forum, and thereby to rewrite the scope of their obligations under substantive law.”); Myriam Gilles & Gary Friedman, After Class: Aggregate Litigation in the Wake of AT&T Mobility v Concepcion, 79 U. Chi. L. Rev. 623, 635 (2012) (“[T]he collective action waiver—and particularly its implicit ban on spreading across multiple plaintiffs the costs of experts, depositions, neutrals’ fees, and other disbursements—forces the individual claimant to assume financial burdens so prohibitive as to deter the bringing of claims.”); Jean R. Sternlight, Panacea or Corporate Tool—Debunking the Supreme Court’s Preference for Binding Arbitration, 74 Wash. U. L. Q. 637 (1996) (“The profit-maximizing company will attempt to draft a dispute resolution contract so as to maximize its profits and minimize its losses. The company will seek an agreement that will minimize the likelihood of having any claims made against it at all.”).

\textsuperscript{86} See generally Max Volsky, Investing in Justice: An Introduction to Legal Finance, Lawsuit Advances and Litigation Funding (2013).
ability to influence the market for legal services. And from the perspective of regulatory policy, these general effects are more significant.

Continuing the previous example, suppose that employers begin to make use of procedural contracts that curtail discovery in employment discrimination cases. As a result, employment discrimination plaintiffs are required to perform a pre-suit investigation, the costs of which are not covered by the pertinent fee-shifting statute. Suppose furthermore that the procedural contract increases the costs of prosecuting an employment discrimination claim as follows:

**Scenario 4**

<table>
<thead>
<tr>
<th>Client</th>
<th>Cost of litigation</th>
<th>Damages</th>
<th>Fee recovery</th>
<th>Statutory damages</th>
<th>Net gain or loss from prosecuting claim</th>
<th>Attorney’s share of gain or loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>A (breach of K)</td>
<td>25</td>
<td>35</td>
<td>0</td>
<td>0</td>
<td>10</td>
<td>3.33</td>
</tr>
<tr>
<td>B (copyright)</td>
<td>25</td>
<td>25</td>
<td>25</td>
<td>0</td>
<td>25</td>
<td>8.25</td>
</tr>
<tr>
<td>C (discrimination)</td>
<td><strong>40</strong></td>
<td>5</td>
<td>25</td>
<td>25</td>
<td>15</td>
<td>5</td>
</tr>
</tbody>
</table>

In this scenario, the procedural contract’s manipulation of the costs of litigation has moved the parties from a state of the world in which attorney Hutz rationally prefers to represent C to one in which he rationally prefers to represent B. Notably, this occurs even though C’s employment discrimination claim still has a positive expected value. In the post-procedural contracting world, Hutz could represent C and expect to turn a profit. Yet, assuming he seeks to maximize the return on his investment of time and resources, he will not do so because other investments have a higher rate of return.

Moreover, the contract’s ability to influence Hutz’s choice of clients does not depend on whether it is an agreement to arbitrate, forum selection agreement, or other form of procedural contract. To succeed at deterring Hutz from representing C, the contract need only change his costs of litigating an employment discrimination claim—from $25 in Scenario 3 to $40 in the scenario above. Whether the contract accomplishes this by limiting discovery, changing the forum for resolution of disputes, making it more difficult to spread costs among claimants, or some other mechanism is immaterial to Hutz’s financial calculus when selecting clients to represent.
These dynamics explain a phenomenon that has been the subject of considerable attention since the Supreme Court granted certiorari in *AT&T Mobility v. Concepcion*: the appearance of arbitration clauses that provide incentives to prosecute individual claims while limiting the availability of class actions and other aggregation devices.\(^{87}\) Such clauses might seem to present a puzzle. Why would an arbitration clause’s corporate drafter offer to pay all the expenses of arbitration, pay for its adversaries attorneys’ fees, and even offer a bounty to claimants who succeed in recovering an arbitral award?\(^{88}\) The answer lies in the clauses’ anticipated effect on the market for legal services. As I have elsewhere argued, the logic and likely objective of such agreements is to diminish the drafter’s net liability exposure by restricting attorneys’ ability to bundle claims into a package that is worth litigating, while avoiding the criticism that the agreements make all claiming prohibitively costly.\(^{89}\) By manipulating the payoffs available to attorneys considering clients to represent and claims to prosecute, the agreements shape the market for private enforcement in a way that insulates their drafters from litigation.

These and other changes worked by procedural contracting affect the implementation of regulatory policy. As attorney’s attention and resources are diverted from claims favored in the pre-procedural contracting world, regulatory statutes that Congress would have expected to be a focus of private enforcement exert less of an effect on regulated actors’ real world activities. At the same time, assuming the overall level of attorney time and resources devoted to private regulatory enforcement remains constant, areas of the law that Congress would not have expected to be a focus of private enforcement receive greater attention. The end result is a misallocation of enforcement resources. Compared to the world Congress would have contemplated when enacting regulatory legislation, attorneys spend time and resources on the “wrong” kind of claims and clients.

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\(^{88}\) See *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).

\(^{89}\) Noll, supra note ___, at 664. That claiming became negative value assumed legal significance under a poorly theorized body of precedent which held that an arbitration agreement was unenforceable if it caused a claim that had a positive expected value if litigated in court to have a negative expected value in arbitration. In re Am. Exp. Merchants’ Litig., 667 F.3d 204 (2d Cir. 2012), rev’d, Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013). I previously pointed out that in general there is no legal or normative basis for privileging the economics of claiming that prevail in public court. Noll, supra note ___, at 699. The Supreme Court adopted that criticism in *Italian Colors*, 133 S. Ct. at 2311, while conspicuously failing to engage the deep normative problems raised by “pro consumer” arbitration agreements.
C. Why Do Procedural Contracting’s Effects on Policy Implementation Matter?

On the foregoing account, procedural contracting has the effect of shaping the market for legal services in ways that potentially are inconsistent with Congress’s expectations regarding the market for private regulatory enforcement. While it may be obvious why policymakers should care about this phenomenon, it is worth spelling out the point in detail. Again, my focus is Congress and agencies exercising regulatory authority delegated by Congress. Why do procedural contracting’s effects on the market for legal services – and with them, the implementation of regulatory policy – matter to these policymakers?

The answer lies in the institutional role that Congress plays in statutory regimes enforced through private civil litigation. The enactment of hundreds of statutes containing varied incentives to sue effectively makes Congress the institution of federal government responsible for determining enforcement priorities in privately enforced regulatory regimes. Although Congress works by establishing market-wide incentives, it is no less responsible for enforcement policy than a frontline enforcement agency exercising prosecutorial discretion.

For agencies exercising delegated regulatory authority, procedural contracting’s effects on the market for private regulatory enforcement matter because they may conflict with congressional objectives reflected in law. For Congress, the salience of procedural contracting’s effects is more complicated. Congress is not legally bound by the enforcement priorities reflected in prior legislation; it cannot, constitutionally, bind itself. Those priorities nonetheless represent an attractive normative baseline because they a) capture the judgments of many Congresses about the importance of private enforcement to different statutory regimes; b) establish expectations that attorneys and regulated parties have justifiably relied upon in planning their affairs; and c) capture the way in which Congress’s enactments are read by their intended audience: attorneys deciding whether to represent plaintiffs pressing statutory claims.

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91 In the context of extra-congressional statutory interpretation, there is a venerable canon to the effect that statutes should be interpreted in the manner their intended “audience” would understand them. See Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 536 (1947) (“If a statute is written for ordinary folk, it would be arbitrary not to assume that Congress intended its words to be read with the minds of ordinary men. If they are addressed to specialists, they must be read by judges with the minds of specialists.”).
When procedural contracting is deployed to modify the market for private enforcement in ways that are incompatible with Congress’s expectations, it undermines Congress’s judgments about the extent and focus of private regulatory enforcement. To borrow a line from the preemption caselaw, procedural contracting “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

D. Do Effects on the Implementation of Regulatory Policy Provide a Tractable and Politically Feasible Basis on Which to Regulate Procedural Contracting?

To this point, I have explained how procedural contracting can interfere with the implementation of regulatory policy and why those effects should matter to Congress and agencies exercising delegated regulatory authority. A general approach to regulating procedural contracting, however, must do more than identify the circumstances in which procedural contracting is normatively problematic; it must also supply tractable and politically feasible criteria for identifying when regulation is warranted. Do procedural contracting’s effects on the implementation of regulatory policy satisfy this requirement?

The initial point to recognize is that Congress cannot monitor procedural contracting’s effects on the implementation of regulatory policy and enact legislation that addresses undesirable effects. Formally, there is nothing to stop Congress from regulating procedural contracting this way, but it is a truism of modern government that Congress lacks the institutional capacity to do so. “[I]ts size, combined with constitutional constraints, may impede a timely consensus and thus limit Congress’s ability to respond effectively in an era of rapidly changing circumstances.” Thus, as the Supreme Court has recognized, “Congress simply cannot do its job absent an ability to delegate power under broad general directives.”

The model for regulation of procedural contracting, then, is provided by statutes that direct an agency to monitor a problem and promulgate corrective regulations if conditions warrant. A recent example is provided by the Dodd Frank Act. At the same time that Dodd Frank created the

Consumer Financial Protection Bureau and charged it with regulating consumer financial service companies, the Act directed the CFPB to study “the use of agreements providing for arbitration of any future dispute . . . in connection with the offering or providing of consumer financial products or services.” If the Bureau concluded that restrictions on the enforceability of arbitration agreements were “in the public interest and for the protection of consumers,” it was authorized to impose restrictions by regulation.

Dodd Frank’s delegation, however, is broader than necessary. Instead of a classic delegation to regulate in the public interest, an agency need only be charged with determining whether procedural contracting interferes with the implementation of regulatory policy and authorized to promulgate regulations that address such effects. It would be unwise for legislation to specify the methodology an agency should follow in determining whether procedural contracting warrants regulation; indeed, measuring impacts on the implementation of regulatory policy is the kind of technical question of subsidiary administrative policy that has long been recognized to be particularly within agencies’ expertise. At least three general approaches are open to agencies charged with this task, however.

1. **Enforcement incentives.** – First, an agency could study the effects of procedural contracting on the enforcement incentives that Congress reasonably would have assumed when enacting a regulatory statute. An agency following this approach would be required to address two questions: a) What incentives for litigation of statutory claims would Congress have reasonably anticipated when enacting a statute? b) Do the incentives for litigation available in the post-procedural contracting materially differ from those that Congress anticipated?

   The first question is a question of subsidiary administrative policy; the agency is required to identify statutory policy within the limits of its statutory delegation. The second is empirical; do the incentives that in fact prevail under prevailing forms of procedural contracting diverge from those that Congress reasonably would have anticipated? Procedural

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96 Id. § 1028(a), 12 U.S.C. § 5518(a). For the CFPB’s studies, see Arbitration Study, supra note ___; Consumer Financial Protection Bureau, Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date (Dec. 12, 2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.


99 In Professor Strauss’s useful typology, the agency here is acting in “Chevron space.” See Peter L. Strauss, “Deference” Is too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight”, 112 Colum. L. Rev. 1143, 1145 (2012).
contracting would warrant regulation when the two sets of incentives materially diverge – for example, as in Scenario 4, above.\textsuperscript{100}

2. The market for private enforcement. – Broadening its focus, an agency could study whether the market for private enforcement of a statute was consistent with the expectations of the enacting Congress. The difference between this strategy and the first is the unit of analysis. Instead of studying the incentives for prosecution of specific claims, the agency would study whether the market for private regulatory enforcement that prevails under state-of-the-art forms of procedural contracting is consistent with Congress's expectations.\textsuperscript{101}

Again, the agency be required to address two questions: a) the kind of market for private enforcement that Congress reasonably anticipated when enacting a regulatory statute; and b) whether such a market exists under prevailing forms of procedural contracting. Again, the first question is one of subsidiary administrative policy; the second is empirical. Regulation of procedural contracting would be warranted when the two markets diverged materially.

3. Substantive policy implementation. – Broadening its focus still further, an agency could attempt to study the implementation of regulatory policy on the ground: to what extent are regulated actors in fact complying with substantive norms established in regulatory legislation? This strategy is particularly well-suited for regulatory regimes enforced through a mix of private and public enforcement.\textsuperscript{102} By studying real world behavior, the strategy accounts for the extent to which compliance is driven by private enforcement on the one hand, versus criminal and agency enforcement, the internalization of legal norms, internal firm culture, and other causes of compliance, on the other.\textsuperscript{103} However, the difficulties of measuring

\textsuperscript{100} This approach to operationalizing a concern with procedural contracting’s effects on policy implementation has parallels to the interpretative approach suggested by Thomas O. Main, The Procedural Foundation of Substantive Law, 87 Wash. U. L. Rev. 801 (2010). Main contends that the procedural apparatus in place at the time a statute was enacted is relevant evidence of what Congress intended to accomplish in enacting a statute; interpreting the statute consistently with those expectations is accordingly a legitimate objective of statutory interpretation.

\textsuperscript{101} This empirical strategy has parallels to a proposal set out in Nagareda, supra note ___. Nagareda proposed that when deciding whether an arbitration agreement was enforceable, courts focus on whether "there is a viable market for claiming." Id. at 1114. However, he assumed that a "viable" market was one where individual claims had a positive expected value in arbitration, overlooking the possibility that an arbitration agreement could manipulate the market for legal services in normatively objectionable ways without rendering claiming negative value on an individual basis.


compliance in the wild make the strategy unsuitable for regulatory domains in which compliance cannot be observed on the basis of readily accessible information.  \(^\text{104}\)

Whichever empirical strategy an agency chooses to follow, regulation of procedural contracting based on its effects on the implementation of regulatory policy requires that those effects be studied over time. The evolution of arbitration agreements in response to the Supreme Court’s reinterpretation of the Federal Arbitration Act shows that procedural contracting is not static.  \(^\text{105}\) The forms of procedural contracting drafters use reflect their perception of their ability to minimize process and liability costs, the reputational effects of adopting new dispute resolution rules, and, crucially, the willingness of courts and other regulators to go along with novel forms of procedural contracting. Different forms of procedural contracting are likely to have different effects on the implementation of regulatory policy. Regulation of procedural contracting is therefore an ongoing process, not a one-time project.

* * *

Thus understood, procedural contracting’s effects on policy implementation provide a tractable basis for regulation. While there is no mathematical test for determining whether procedural contracting warrants regulation, the questions an agency must answer to determine if regulation is warranted are the bread and butter of the administrative process.

Regulating procedural contracting based on its effects on the implementation of regulatory policy is also politically feasible. The idea animating the regulatory policy approach is that procedural contracting should not be permitted to thwart the objectives of regulatory legislation. By hypothesis, those objectives enjoy broad enough support to navigate the legislative process successfully. When this is the case, there is no

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\(^\text{104}\) See Christine Parker & Vibeke Nielsen, *The Challenge of Empirical Research on Business Compliance in Regulatory Capitalism*, 5 Ann. Rev. Law Soc. Sci. 45 (2009). As Parker and Nielsen explain, the obstacles to measuring compliance in the wild are twofold. First, what counts as “compliance” with the law may be contested. While some activities are obviously lawful or unlawful, the lawfulness of other activities depends on regulatory and legal interactions that sometimes take decades to run their course. Second, even where the meaning of compliance is settled, regulators may lack access to confidential internal data from which to measure “compliance,” or the deep understanding of markets and internal firm structure necessary to anticipate compliance problems in modern firms. See also David L. Noll, *Contract Procedure, Regulatory Breakdown*, at 26-28 (unpublished manuscript on file with author).

obvious reason why restrictions on procedural contracting could not do so as well. They do not broaden or narrow the scope of conduct-regulating norms, impose new financial burdens on regulated parties or the states, require new tax expenditures, or touch any of the other third rails of modern American politics.

Indeed, there is precedent for delegating authority to regulate procedural contracting in the many anti-waiver provisions contained in prior generations of federal statutory law. Those provisions seek to ensure that private ordering does not interfere with substantive policy goals legislation seeks to accomplish. Delegations of authority to regulate procedural contracting do the same.

E. The Regulatory Policy Approach’s Relationship to Other Concerns about Procedural Contracting

The regulatory policy approach thus satisfies the basic criteria for a general approach to regulating procedural contracting: it supplies a normatively attractive, tractable, and politically feasible way of regulating procedural contracting that operates within the context of specific regulatory legislation. In addition, the approach responds – to a degree – to other normative concerns that commentators have raised about the proliferation of procedural contracts. Here, I discuss two that have figured prominently in legal scholarship on procedural contracting.

1. Equality

For a lengthy period beginning with the 1938 promulgation of the Federal Rules of Civil Procedure, the design of U.S. civil procedure was

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106 See, e.g., Securities Act of 1933, 15 U. S. C. § 77n (“Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of [the Act] or of the rules and regulations of the [Securities Exchange] Commission shall be void.”); Credit Repair Organizations Act, 15 U.S.C. § 1679f (“Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter— (1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person.”); Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(e)(1) (“The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.”).

107 For an early recognition of the point in a case under the Fair Labor Standards Act of 1938, Pub. L. No. 75-718, ch. 676, 52 Stat. 1060, see Brooklyn Savings Bank v. O’Neil, 324 U.S. 697, 704-05 (1945) (“Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.”). In more recent cases the Court would hold, based on the fiction that procedural contracting does not affect the implementation of regulatory policy, that forum-selection and arbitration agreements are not impermissible “waivers” of statutory rights. E.g., Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 480-81 (1989), overruling Wilko v. Swan, 346 U. S. 427 (1953). For criticism of the Court’s reasoning, see, e.g., Carrington & Haagen, supra note ___; Hyde, supra note ___.
informed by a particular conception of equality among litigants. Design choices such as liberal pleading standards, broad discovery, tolerance for pleadings that failed to anticipate the trial evidence, and, most prominently, the authorization of opt-out class actions reflected a concern that the adversaries have a comparable ability to invest in litigation and develop evidence and legal argument to support their positions. Equalization of litigation investments was seen as a goal in itself and had a further benefit. By ensuring that courts made decisions on the basis of a developed factual record and adversarial presentation, equality-enhancing procedures promoted the just resolution of claims.

Procedural contracting is in deep tension with the conception of “equipage” equality that informed the design of the Federal Rules because there is no guarantee that drafters of procedural contracts will honor it. Indeed, drafters’ duty of zealous representation arguably requires them to tilt the procedural playing field in favor of their clients to the extent permitted by law. Unsurprisingly, dispute resolution systems created by contract have rejected procedural devices, such as the class action, that enhance the form of litigant equality that was central to the design of Federal Rules. Equally unsurprisingly, commentators with deep commitments to the Federal Rules have suggested that regulation of procedural contracting should respond to these effects.

The fly in the ointment is that a simple concern with equipage equality lacks the power to identify which forms of procedural contracting are normatively problematic. If we are uncomfortable with procedural contracting’s effect on an employment discrimination plaintiff’s ability to

113 Fleming James, Jr., et al., Civil Procedure § 3.1, at 140 (4th ed. 1992) (combination of liberal pleading standards and liberal discovery “makes possible the prosecution and defense of actions that would be impossible without it”); Benjamin Kaplan, Comment on Carrington, 137 U. Pa. L. Rev. 2125, 2126-27 (1989) (1966 class action rule “would open the way to the assertion of many, many claims that otherwise would not be pressed; so the rule would stick in the throats of establishment defendants”). Kaplan, a Harvard law professor and future Justice of the Massachusetts Supreme Court, was the reporter for the sixteen-member advisory committee on civil rules that drafted the modern, 1966 version of Rule 23.
bring suit against an employer who holds all the information relevant to the dispute, we are less concerned when the party disadvantaged by enforcement of a procedural contract is a Wall Street bank that has agreed to arbitrate customers’ claims of fraud. If all possible claims cannot be subsidized, whether negative effects on equipage equality are normatively problematic depends on the answer to an underlying question: which claims are sufficiently important that, from a societal perspective, ensuring litigants have a comparable ability to prosecute and defend claims is desirable?

The regulatory policy approach supplies an answer. It teaches that procedural contracting warrants regulation when it conflicts with Congress’s judgments about the desired level, and focus, of private regulatory enforcement. The regulatory policy approach thereby offers a way of operationalizing a concern with litigant equality that does not depend on the dubious assumption that society has an interest in seeing all possible claims asserted. It is where procedural contracting negatively affects litigant equality and the disruption affects the implementation of regulatory policy that policymakers should be most concerned.

2. The role of courts

Commentators have also expressed concern at procedural contracting’s implications for the role of courts in democratic society. Classical liberal accounts of the rule of law emphasize the importance of legal claims being resolved in public proceedings by an impartial decisionmaker according to rules of decision that are promulgated in advance.115 Expanding on this model, the framers sought to ensure that juries would play a central role in criminal and civil trials.116 Two centuries later, the Yale school of civil proceduralists came to see public trials as an crucial mechanism for realizing legal commitments that had been betrayed on the ground. When Own Fiss wrote that “[s]omeone has to confront the betrayal of our deepest ideals and be prepared to turn the world upside down to bring those ideals to fruition,” he had in mind the

115 See, e.g., John Locke, Second Treatise of Government § 125 (1689) (“In the state of nature [that organized society overcomes,] there wants a known and indifferent judge, with authority to determine all differences according to the established law: for every one in that state being both judge and executioner of the law of nature, men being partial to themselves, passion and revenge is very apt to carry them too far, and with too much heat, in their own cases; as well as negligence, and unconcernedness, to make them too remiss in other men’s.”); Lon Fuller, The Morality of Law 39 (1964) (similar).
judges and juries that used civil litigation to attack systemic racial discrimination in the Jim Crow south.  

To the extent that procedural contracting requires disputes to be resolved in private, it is in tension with the cluster of values served by open, public proceedings. Because the polity is excluded from adjudication, it cannot monitor adjudicators’ performance and ensure the law is applied evenhandedly. The body of precedent that shapes public understanding of the law is diminished. Adjudication ceases to provide an opportunity for the state to demonstrate its respect for the equality and dignity of citizens. Widespread procedural contracting thus entails what Margaret Radin terms “democratic degradation.”

Despite its foundations in liberal political theory, a concern with the role of courts in democratic society does not give policymakers a tractable and politically feasible means of regulating procedural contracting. Again, the difficulty is that this single value does not distinguish forms of procedural contracting that are normatively problematic from those that are not. A thoroughgoing commitment to historical forms of public court adjudication would render all procedural contracting invalid, regardless of its effects on the parties’ welfare or the implementation of regulatory policy – not to mention major parts of the federal regulatory state and the claims facilities that the legal system depends on to close out liability from mass torts.

The regulatory policy approach, however, provides a way of identifying when the degradation of public adjudication has normative purchase for policymakers. The approach counsels that policymakers should seek to preserve traditional, publicly accessible forms of civil procedure when this style of dispute resolution is necessary to the successful implementation of regulatory policy. An example is the implementation of a new regulatory statute, when it is necessary to build up a body of precedents and fix the meaning of the law. On the other hand, as claiming assumes the routinized quality that characterizes administrative claims facilities and mass settlements, open, public

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118 Radin, supra note ___, at 16.


120 See In re Vioxx Prods. Liab. Litig, 2008 WL 4681368 (describing structure of privately negotiated $ 4.1 billion settlement that resolved products liability claims arising out of the use of Vioxx painkiller, and rejecting legal challenges to settlement).
proceedings are not necessarily required for the successful implementation of regulatory policy. Indeed, one can imagine how public proceedings might obstruct rather than further the implementation of regulatory policy.121

This is not to say that removing dispute resolution entirely from public view is necessarily compatible with the regulatory policy approach. If procedural contracting’s effects on the implementation of regulatory policy do not require that a category of claims be resolved through open, public proceedings, they may justify other regulatory interventions needed to assess those effects. Examples are provided by state laws that require arbitration providers to disclose data about the volume, nature, and outcomes of claims they adjudicate,122 and federal laws which mandate that regulated companies supply information and data to market regulators.123 To the same effect, Professors Hershkoff and Davis propose that parties to public court litigation be required to disclose agreements governing the manner in which the case will be litigated.124

This paper takes no position on the specific forms of data that must be disclosed to enable policymakers to assess procedural contracting’s effects on the implementation of regulatory policy. It is clear, however, that laws requiring disclosure are consistent with the regulatory policy approach, and may be indispensable to it.

IV. Objections and Qualifications

As suggested at the outset, how to regulate procedural contracting is perhaps the most important question now facing civil justice policymakers in the United States. The preceding parts have explained the task for policymakers considering that question; explained how procedural contracting affects the implementation of regulatory policy; argued that such effects should be the focus of the regulatory response to procedural contracting; and argued that such effects provide a tractable and politically feasible means of regulating procedural contracting. I conclude by addressing three likely objections.

121 Cf. 42 U.S.C. § 2000e-5(b) (providing that conciliation proceedings before the Equal Employment Opportunity Commission are to be confidential unless the parties to the proceedings agree otherwise).
124 Kevin E. Davis & Helen Hershkoff, Contracting for Procedure, 53 Wm. & Mary L. Rev. 507, 556 (2011).
A. Why Congress?

One objection involves Congress’s role in regulatory regimes that are enforced through private civil litigation. In describing the enforcement of regulatory policy through civil litigation, I have described Congress as the institution of federal government that is “responsible” for determining enforcement priorities. This responsibility results from Congress’s enactment of hundreds of statutes that contain varying incentives to sue. By providing stronger or weaker incentives to sue, Congress shapes the time and resources that attorneys devote to enforcement of various regulatory regimes.

Congress, however, is not the only institution of government that influences the market for private enforcement; students of procedure are well aware that courts’ decisions frequently impact the costs, benefits, and viability of litigation. For example, the judge-made “common fund” doctrine was recognized from the first to enable a form of self-financing litigation by plaintiffs’ attorneys who lacked a traditional attorney-client relationship with the class they undertook to represent.\(^{125}\) Similarly, until the Supreme Court’s 1975 decision in *Alyeska Pipeline v. Wilderness Society*,\(^{126}\) the courts of appeals claimed authority to reverse the American rule in cases where enforcement of a federal regulatory statute served the “public interest.” Courts continue to influence the litigation market by, for example, deciding whether claims are subject to arbitration,\(^{127}\) interpreting pleading standards,\(^{128}\) ruling on the type and quantum of damages that are available when liability is established,\(^{129}\) ruling on defendants’ immunity from or susceptibility to suit,\(^{130}\) and interpreting authorities that allocate litigation costs.\(^{131}\)

The courts’ influence on the market for private enforcement, however, is not inconsistent with this paper’s account of why policymakers in Congress and the agencies should be concerned with procedural

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contracting’s effect on the implementation of regulatory policy. At the core of the regulatory policy approach is a specific form of institutional self-interest: Congress should be concerned private civil procedure’s effects on policy implementation because it is Congress’s objectives that private procedure has the capacity to frustrate. Even if control over incentives to sue is dispersed between courts and Congress in the manner the above examples suggest, it does not follow that procedural contracting’s effects on policy implementation lack normative purchase for Congress. For those effects to have normative purchase, it is enough that they interfere with the markets for private enforcement of the law that Congress intends to catalyze when enacting regulatory legislation that contains incentives for private enforcement.132

B. Does Congress Have Coherent Enforcement Preferences?

Even if one accepts that Congress is responsible for enforcement policy in privately enforced regulatory regimes, the coherence of Congress’s preferences vis-à-vis private enforcement might be questioned.

This objection invokes the fact that members of the advocacy coalitions that support legislation containing incentives to sue will not necessarily share a single set of objectives.133 I have said that the incentives to sue that appear in many regulatory statutes reflect Congress’s judgment about the importance of private litigation in different regulatory regimes. But perhaps those incentives reflect nothing more than a “mood” that the law should be self-enforcing134 or are merely a form of pork, included at the urging of the trial bar and its congressional allies.135 If so, the regulatory policy approach’s assumption that Congress has a coherent set

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132 Courts’ practical ability to influence the market for private enforcement raises a separate set of questions about the judicial role in private enforcement regimes. What interpretive tools should courts make use of when interpreting authorities that create incentives for private enforcement? When courts are inevitably called upon to reconcile different statutory schemes, what weight should they place on Congress’s desire to catalyze private enforcement in one of the schemes? Can courts legitimately engineer incentives to sue to encourage the assertion of some claims and discourage the assertion of others. See Main, supra note ___. I don’t engage these questions here, because they are foreclosed by current Supreme Court doctrine, which requires reflexive enforcement of procedural contracts according to their terms.

133 See generally Kenneth A. Shepsle, Congress Is a "They," Nor an "It:" Legislative Intent as Oxymoron, 12 Int. Rev. L. & Econ. 239 (1992).

134 Cf. Universal Camera v. NLRB, 340 U.S. 474 (1951) (observing of the Administrative Procedure Act’s “substantial evidence” standard that “in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation.”).

135 This apparently was the view of prominent lawyers in the Reagan administration. See Stephen B. Burbank & Sean Farhang, Litigation Reform: An Institutional Approach, 162 U. Pa. L. Rev. 1543, 1554 (2014) (quoting memorandum from Office of Management and Budget General Counsel Michael Horowitz to White House counsel Fred Fielding to the effect that “[a] literal industry of public interest law firms has developed . . . as a result of the legal fee awards with such groups regarding attorney’s fees as a permanent financing mechanism”).
of preferences regarding the importance of private enforcement under different statutory regimes might seem dubious. And if Congress does not have coherent enforcement preferences, there is nothing for procedural contracting to “disrupt.”

The objection is misplaced. To begin with, it misperceives the sense in which Congress’s enactments express its preferences regarding private enforcement. My claim here is not that individual members of Congress have considered the importance of private enforcement to different regulatory statutes, ranked the statutes, and adjusted incentives to sue to reflect that ranking. Rather, it is that Congress’s enactments are best understood to reflect a judgment about the nature and extent of private enforcement that is appropriate under various regulatory regimes. As I said, this reading captures the way in which Congress’s enactments are understood by their intended audience. It is a normatively attractive baseline for congressional policymakers because it captures the views of many congressional majorities over time concerning the need to catalyze enforcement of different statutory regimes.136

Even if the subjective expectations of members of Congress were relevant, the suggestion that modern incentives to sue reflect nothing more than pork or a general preference for self-enforcing law is impossible to reconcile with the incentives Congress has enacted. Consider the Credit Repair Organizations Act – a minor part of the federal framework of consumer protection law.137 The Act specifies separate limits for punitive damages in individual and class actions138; provides for costs and “reasonable attorneys’ fees,” a linguistic formulation that is the subject of an extensive case law139; specifies a four-factor test for courts to apply when awarding punitive damages140; and provides that contracts that do not comply with the Act “may not be enforced by any Federal or State

136 Given the many vetogates in the legislative process that are controlled by members of the minority party, it bears noting that set of incentives to sue in reflected in existing law generally received bipartisan support. This fact is reflected in roll call votes. For example, the Civil Rights Attorneys Fees Act of 1976 passed the House by a vote of 306-68 and the Senate by a vote of 57-15. Senate Subcomm. on Constitutional Rights, Comm. on the Judiciary, Civil Rights Attorney’s Fee Awards Act of 1976 (Public Law 94-559, S. 2278) Source Book: Legislative History, Texts, and Other Documents, 199, 276 (1976). The Civil Rights Act of 1991 passed the House by a vote of 381-38 and the Senate by a vote of 93-5. Proquest Bill Profile of S. 1745 (102d Cong. 1991-1992).
140 15 U.S.C. § 1679g(b) (directing courts to consider the frequency and persistence of noncompliance by the credit repair organization; the nature of the noncompliance; the extent to which such noncompliance was intentional; and in the case of a class action, the number of consumers adversely affected).
court or any other person.” These provisions are not naturally read as a general mood or unconsidered handout to the trial bar.

From a different perspective, one might question whether Congress has coherent enforcement preferences because of changes in its membership. I have said that procedural contracting’s effects on the implementation of regulatory policy matter to Congress because they interfere with objectives that Congress seeks to accomplish in enacting regulatory legislation that contains incentives for private enforcement. But it is possible and indeed likely that the Congress which enacts a statute containing incentives for private enforcement will have different preferences regarding private enforcement than later Congresses that evaluate procedural contracting’s effect on the implementation of the statute. This is particularly true given that party control of Congress shifted between the 1970s, when many statutes containing incentives to sue were enacted by Democratic congresses, and the present day, when the Republican Party controls both the House and Senate. If Congress 1 and Congress 2 disagree about the importance of private enforcement in a regulatory regime – or the desirability of private enforcement at all – procedural contracting’s effects on the market for legal services will not necessarily matter to Congress.

As an initial matter, note that the problem does not arise when Congress delegates authority to an agency to regulate private civil procedure. In this scenario, the enacting Congress’s control to the extent they are reflected in law. But what about the more common scenario in which Congress does not delegate authority to an agency to regulate procedural contracting at Time 1? If Congress 2 has different preferences regarding private enforcement than Congress 1, how can procedural contracting interfere with “Congress’s” policy objectives?

The answer is that, on the account here, Congress’s responsibility for enforcement policy extends broader than ensuring a particular statute functions in the precise manner contemplated by the enacting Congress. Congress’s responsibility for private enforcement results from the enactment of hundreds of statues containing varied incentives for private civil litigation. Until those statutes are repealed, the fact that Congress’s preferences change does not affect its underlying responsibility for private enforcement policy any more than changes in the enforcement policies of a

142 See Burbank & Farhang, supra note ___ at 1547-49, 1562.
local district attorney affect the district attorney’s responsibility to decide which violent crimes to prosecute.

C. Does the Regulatory Policy Approach Rest on an Accurate View of the Policymaking Process?

A final objection to the regulatory policy approach questions the view of the policymaking process it is based on. The approach may seem to resonate with the older, “textbook” model of the policy process. That model divides the policymaking process into several distinct stages that characteristically are performed by different institutions of government. On the textbook account, Congress defines “policy” which is implemented by agencies and courts.

Recent theoretical work in political science rejects the textbook model, in part because it fails to capture the way in which policy actually is made. For example, pervasive delegations of regulatory authority cast doubt on whether there is a sharp dividing line between policy “definition” and “implementation.” The textbook model assumes that Congress specifies what it wants to accomplish, at least in general terms, and that an agency, which has better access to technical and scientific information and is able to adapt regulate comparatively quickly, carries Congress’s commands into action. But in practice, “implementing” agencies exercise significant authority not only to carry out Congress’s orders, but to define the policies they implement.

In light of this work, it might be objected that the regulatory policy approach does not reflect the way in which regulatory policy is actually made. More to the point, it might be objected that enforcement priorities for privately enforced regulatory regimes are not fixed by Congress at the time regulatory statutes are enacted or amended, but evolve as the meaning of policy is elaborated and redefined by courts, agencies, and other actors. Enforcement priorities are a symphony of these actors’ voices, not a congressional command.

But the extent of the regulatory policy approach’s reliance on the textbook model is limited. While the approach sees Congress as the institution of government responsible for private enforcement policy, it

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145 For summaries of the criticisms, see, e.g., Nakamura, supra note ___; Paul A. Sabatier, The Need for Better Theories, in Theories of the Policy Process, supra note ___.

does not share most of the textbook model’s descriptive assumptions. The key to the regulatory policy approach is that Congress recognize the potential for procedural contracting to negatively impact the implementation of regulatory policy. To address this risk, the approach suggests that Congress ordinarily should delegate authority to regulate procedural contracting when enacting or amending regulatory legislation enforced through private civil litigation. It is commonplace that such delegations include authority to choose among reasonable interpretations of the legislation under which an agency acts.\textsuperscript{146} Thus, I have suggested that an implementing agency may choose among several yardsticks when assessing whether procedural contracting impermissibly interferes with the implementation of regulatory policy. If “Congress has not directly addressed the precise question,” the agency’s choice is authoritative.\textsuperscript{147}

As developed here, then, the regulatory policy approach recognizes that the ultimate form regulatory policy takes is informed by the actions of many actors; recognizes that policy development occurs over time; and does not require Congress to make all decisions relevant to the determination of regulatory policy.

To the limited extent that the approach incorporates the textbook model by requiring Congress to take some stance toward procedural contracting, the defense is that the textbook model remains normatively attractive even if its utility for positive analysis of the policy process is limited. As Robert Nakamura notes, “the ‘textbook process’ is consistent with the democratic norms that underlie public action. . . . The notion that policymakers make policy, and bureaucrats create organizations and routines to carry them out, divides labor in the process, legitimates activities, and provides a framework of goals and organizational practices within which individual roles are given meaning in light of the requirements of a collective enterprise.”

**CONCLUSION**

Three decades of litigation over forum selection clauses, arbitration agreements, and other forms of private civil procedure can give the impression that the debate over how procedural contracting should be regulated is over. But the past, as Faulkner said, is never dead. Supreme Court doctrine’s studied indifference to Congress’s objectives in legislation that seeks to catalyze private regulatory enforcement, the fact that doctrine


\textsuperscript{147} Chevron USA Inc. v. NRDC, Inc., 467 US 837, 843 (1984).
requiring courts to enforce private civil procedure is cast as a default rule that is open to congressional revision, and the fact that the doctrine gores ideologically diverse oxen guaranty that questions about the regulation of procedural contracting will be with policymakers for a generation.

This paper has sought to explain how civil justice policymakers in Congress and the agencies should approach the task of regulating procedural contracting. Exposing the effects of procedural contracting on the implementation of regulatory policy, the paper has offered policymakers a way of thinking about procedural contracting that is tractable, politically feasible, and deeply rooted in the modern regulatory state. That approach, moreover, addresses some of the normative concerns that commentators have raised regarding private civil procedure while permitting contracting parties to capture gains from procedural contracting when it does not frustrate the implementation of regulatory policy. It now falls to Congress and the agencies to put the approach into action.