Cooperative Procedure-Making

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Robin Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 **B.U. L. Rev.** (forthcoming 2018), available at SSRN.

Over the past few decades, two narratives have emerged about who controls civil procedure. One describes the rise of private procedural ordering, a phenomenon that encompasses a number of different practices whereby parties dictate the procedural rules they will face in potential or ongoing dispute resolution. Arbitration clauses are the most extreme example, where parties opt out of court procedures altogether, but there has also been extensive commentary about parties' abilities to contract for particular procedural rules or otherwise customize the procedure governing litigation. The rise of private procedural ordering, according to some accounts, is overtaking procedure dictated by existing laws, such as the Federal Rules of Civil Procedure. The second narrative is about the rising prominence of the judge in "managing" litigation with increasing amounts of judicial discretion. To the extent that these two narratives intersect, it might seem that private procedural ordering has nothing to do with judicial discretion other than obliterating it.

Robin Effron's new article tackles the important task of identifying and examining the connection between these two narratives. By looking at them together, Effron illuminates age-old questions of who controls litigation and arrives at a nuanced and thoughtful answer: Rather than one always overtaking the other, private procedural ordering and judicial discretion alternate between being cozy and uncomfortable bedfellows. These dynamics can result in uneasy cooperation between parties and judges, providing some solutions to difficult problems in modern litigation. But they offer little comfort with regard to many concerns about either private procedural ordering or judicial discretion.

To showcase the interaction between judicial discretion and private procedural ordering, Effron plumbs three instances in which "party agreement is already baked into some of our existing procedural tools." Learning from these investigations, Effron rejects both the common "elevation theory" that private procedural ordering is simply overtaking judicial discretion and the opposite proposition that the law and judicial discretion stand above party power in a rigid hierarchy. Instead, she proposes a two-pronged thesis that consists of the "co-management" and "co-interpretive" theories, which, together, describe the uneven and unstable power-sharing between parties and judges in procedure-making. Effron's theories are descriptively satisfying in many contexts, even though they do not purport to address any normative concerns about either private procedural ordering or managerial judging.

Effron wields three examples to illustrate these arrangements: civil discovery, settlement, and enforcement of forum selection clauses.

In the realm of discovery, the Federal Rules "deploy judicial discretion and party agreement as complementary tools." The Rules invite parties to customize discovery for each case by setting default rules from which parties are free to depart by agreement, or, failing that, by leave of the court. Judicial discretion—by means of oversight of the parties' negotiations and agreements about discovery—cooperates fairly successfully with private procedural ordering.

In the area of settlement, the two forces coexist less stably. Most settlement is completely unregulated

and left to private ordering. In the class action context, however, the Rules instruct courts to intervene. But because judges rarely examine other kinds of contracts for fairness, adequacy, or reasonableness, it is perhaps unsurprising that they do so timidly when reviewing settlement agreements. This meek use of judicial discretion as to private procedural ordering is by design: the standard for reviewing settlements is discretionary to accommodate an area (settlement) that is traditionally dominated by private procedural ordering. Another example of the push-and-pull of these two phenomena.

The final example is an area in which the Supreme Court has made private procedural ordering "open[ly] hostil[e]" to judicial discretion: the enforcement of forum selection clauses. This and Effron's prior writings show her unmasked hostility to the Supreme Court's decision in *Atlantic Marine*. The Court instructed lower courts to abandon the "normal practice" under 28 U.S.C. § 1404(a) of considering a variety of private-interest factors in determining whether enforcing a forum selection clause would promote the interests of justice. Instead, the Court declared, courts should weigh all private-interest factors in favor of the preselected forum. In Effron's words, "*Atlantic Marine* thus swept away any judicial discretion to consider private interest factors under § 1404(a) in forum-selection clause cases" and "seriously undermined a judge's ability to exercise much discretion in considering the public interest factors." The result is a "multifactor test with one factor, [a] balancing test with no balance, a discretionary standard with but one permissible outcome."

While this is an example of private ordering eclipsing judicial discretion, Effron argues that the Court did not have to decide this issue in terms of the relationship between those two phenomena. It could have resolved the question presented (what procedural mechanism should be used to dismiss or transfer a case brought in a forum other than the one designated by a valid forum selection clause) in a number of other ways. The Court chose to hold that the forum selection clause obliterates § 1404(a) discretion. The enforcement of forum selection clauses thus demonstrates the most uncomfortable coexistence—or lack thereof—of judicial discretion and private procedural ordering.

It appears that private procedural ordering assumes an increasingly privileged role in federal civil procedure, while the scope of procedural judicial discretion seems to be narrowing. But Effron urges us to question the standard explanations.

She rejects the conventional wisdom, or "elevation theory," that "rule makers and judges have decided to prize party preference over other procedural values," including judicial discretion. In the first two examples, private procedural ordering is not totally "dominant." On the other hand, Effron disagrees with Scott Dodson's recent work arguing that private procedural ordering is completely subordinate to law and judicial discretion. As evidence, Effron points to the easy enforceability of arbitration agreements, "a cheap ticket to the land of party dominance." Arbitration is an efficient and common way for parties to obtain privatized (even if not bespoke) procedure. She could also note that *Atlantic Marine*'s strict attitude toward enforcing forum selection clauses further demonstrates the supremacy of party control in certain contexts. Thus, "[j]udicial discretion cannot be fairly characterized as resting solidly atop party choice."

The point is that the relationship is more complex, as the 2015 discovery amendments demonstrate. On one hand, the amendments elevate judicial discretion—by directing judges to police party behavior more actively. On the other hand, the amendments ratchet up judicial oversight "to limit the scope of discretion and enable continued private procedural ordering." Thus it's not clear whether judicial discretion or private procedural ordering is being prioritized.

These complexities drive Effron to seek other ways to understand the increased prominence of private procedural ordering and its relationship to judicial discretion. She finds two frameworks: the co-management theory and the co-interpretation theory.

The core of the co-management thesis is that once "litigation became something that needed to be managed… judges and parties each assumed increasingly prominent roles in such management." Civil discovery again illustrates the point: the rules direct co-management of discovery, starting with party negotiation and agreement, but with the judge as important overseer. Class action settlement likewise begins with party negotiation and ends with judicial oversight, but oversight that defers to party agreement. Effron admits that the enforcement of forum selection clauses may seem like proof of the elevation thesis rather than co-management, but she highlights that "§ 1404(a) also contains a great example of the recent *codification* of the co-management theory" because in 2011, Congress amended § 1404(a) to permit transfer "to any district or division to which all parties have *consented*" (emphasis added). Thus, "the text of § 1404(a) now includes an express invitation for parties to use private procedural ordering to choose a venue during the life of the lawsuit," right alongside the statute's direction to the court to exercise judicial discretion.

The co-management thesis is descriptive and does not allay the normative concerns about judicial discretion, its waning influence, or the increasing prominence of private procedural ordering. Co-management creates additional "troubling conflicts" that perhaps can be likened to the problems of fighting a war "by committee." For example, co-management might dilute the ability of either the parties or the judge to completely control procedural decisions without providing a better replacement. The theory also operates exclusively within federal litigation; it does nothing to account for the popularity of arbitration.

The "co-interpretation theory," which Effron admits is "more controversial," posits that "in a few procedural areas"—such as determining what it means for discovery to be "relevant" or "proportional to the needs of the case" or whether a settlement is "fair, reasonable, and adequate"—"litigants have assumed some interpretive authority over procedural rules," either through delegation or deference by the judge. Effron argues that the enforcement of forum selection clauses may be an example of co-interpretation "gone too far," resulting in near-total deference to contractual venue choice. She seems understandably concerned about the implications of co-interpretation and argues that "to the extent that it is a normatively desirable practice at all, [co-interpretation] should reflect a dynamic interplay between judge and parties"—not extreme deference, which *Atlantic Marine* seems to introduce.

One take-away from co-management and co-interpretation is that they are anti-adversarial elements in U.S. litigation culture, which has always distinguished itself as adversarial and not "inquisitorial" (the system in most European countries). The cooperation inherent in co-management and co-interpretation reveals a litigation process that may be a path forward in modern litigation that eschews the ultimate adversarial system (the trial), but also doesn't replace it with an inquisitorial system foreign to our litigation culture.

Effron's cooperation-based theories offer much food for thought. While not posed as a "theory of everything," the idea of procedure as a cooperative endeavor—between parties and among parties and judge—feels both right and somewhat radical. Judges and litigants are in the litigation boat together; who steers the ship—and who should steer it—is not always clear. The infrastructure that supports this cooperation comes from all procedural rule-makers: from the Federal Rules (2015 discovery amendments), Congress (amendments to § 1404(a)), and the Supreme Court (*Atlantic Marine*). We should be on the lookout for more examples of cooperation and we should be wary of its potentially troubling aspects.

It is also worth considering how these dynamics interact with other recent procedural developments. Is a cooperative model a better option for the shifting nature of federal dockets, in light of the rise of multidistrict litigation and the increasing barriers to access to litigation? Does it facilitate ad hoc procedural adjustments to accommodate litigation when the ordinary rules of civil procedure do not

seem to be working? Will courts themselves take a wrecking ball to judicial discretion, as by eagerly enforcing arbitration and forum selection clauses? These areas for future research are rife with important questions. Effron has ably pushed us forward on this journey.

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