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RESOLVING CASES "ON THE MERITS"

JAY TIDMARSH†

INTRODUCTION

My task, as I understand it, is to select a single rule of procedure and explain why (and how) it must be reformed in order to build a better civil justice system in the twenty-first century. Let me say at the outset that I intend to shirk this responsibility. My principal reason is the integrated nature of our rules of procedure. All the rules—or at least all the rules worth talking about in the context of serious reform to American civil justice—are interwoven. As with a spider's web, a tug on a single rule can collapse the entire structure.[1] In considering reform, therefore, it is more important to ask what kind of structure we ideally want to build and what constitutional, historical, political, and economic realities constrain this ideal. The details of shaping individual rules to fit the structure are a second-order consideration.[2]

I start from the premise that our civil justice system is broken. In the weak sense of the word "broken," I doubt that this claim will generate much controversy. The system isn't perfect. If it were, the distinguished group of judges, lawyers, and academics who are my colleagues in this collection of essays would have little to say. The history of Anglo-American procedure has been an unending effort to perfect the imperfect. Some of our efforts have made things worse, others have made them better. We have not yet come to the endpoint of procedural reform.

But I also mean that the American system is "broken" in a stronger, more controversial sense: our system is not sustainable in the long run. What particularly makes the system unsustainable is the lack of a coherent theory that justifies its present structure. Our modern procedural system was built largely on the foundations of Roscoe Pound's vision.[3] That vision, which was first implemented in the Federal Equity Rules in 1912 and then even more fully embraced in the Federal Rules of Civil Procedure in 1938, had (at least in retrospect) predictable and deep flaws that were baldly exposed after World War II as the legal market and the

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† Professor of Law, Notre Dame Law School. I thank the participants in a workshop at Notre Dame Law School for their thoughts on an early version of this essay.

1. *See, e.g.*, Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. (forthcoming 2010) (manuscript at 14), *available at* http://ssrn.com/abstract=1448796.

2. In no sense do I intend to suggest that, as a second-order consideration, crafting a body of rules is unimportant; indeed, in any practical sense, crafting rules is far more critical, and far more difficult work than the imaginative task of design. But if we do not start with some sense of what we want to build and what our real-world constraints are, a system of rules is likely to be jerry-built.

3. *See* Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 513 (2006).

nature of American law evolved.[4] Most of the efforts at procedural reform in the past thirty years have been attempts to walk away from, or tamp down the consequences of, Pound's belief in a simple, uniform, discretionary, "decide each case on its merits" approach to legal procedure.[5] Although these efforts can loosely be associated with a law-and-economics perspective (in the sense that they are all attempts to rein in perceived excess costs in the present litigation system), it is fair to say that, while we are in the process of rejecting Pound's paradigm, we have yet to come up with a paradigm to replace it.

The fundamental reason for the endurance of Pound's paradigm is its elegant simplicity: it promises to resolve each claim and each issue on its factual and legal merit, without letting procedural technicalities or traps derail the decision. No other vision—for instance, "decide claims by the most efficient means"—captures this most basic aspiration of an ideal civil justice system. Like any aspiration, resolving cases "on the merits" is never perfectly achievable.[6] Nevertheless, this paradigm has continued to battle all other policy objectives—such as achieving efficiency, fostering settlements, preventing jury confusion, and balancing party control against active judicial management—in debates over the architecture of our procedural rules.

This essay critically examines the meaning of the "on the merits" ideal, how the principle has permeated our procedural theory and architecture, and why, despite its allure and its centrality to our procedural system, we should replace the "on the merits" principle with a "fair out-

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4. *See* Geoffrey C. Hazard, Jr., *Authority in the Dock*, 69 B.U. L. REV. 469, 470–71 (1989); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 910–14 (1987).

5. The modern dissatisfaction with Pound's vision was evident by the time of a conference in 1976 intended to consider the future of civil justice and, ironically, named for Pound. *See* Charles S. House et al., *Introduction to the Conference*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 17, 17–21 (A. Leo Levin & Russell R. Wheeler eds., 1976). At the federal level, the most visible procedural manifestations of this dissatisfaction include the 1983 amendments to the Federal Rules of Civil Procedure, which invigorated Rules 11 and 16, added the initial iteration of the proportionality requirement now found in Rule 26(b)(2)(C), and created Rule 26(g) as the Rule 11 equivalent for discovery; the 1993 and 2000 amendments that created the mandatory-disclosure provisions of Rule 26(a) and further strengthened the judge's case-management authority under Rule 16; and the 2006 e-discovery amendments of Rule 26(b)(2)(B). In terms of judicial decisions, the Supreme Court's imprimatur on the more vigorous use of summary judgment, which dates to 1986, as well as its efforts in 2007 and 2009 to toughen notice-pleading requirements, also can be seen as expressions of its dissatisfaction with the consequences of the animating vision of the Federal Rules. *See, e.g.*, Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole . . . ."); *see also* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (pleading); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (pleading); Scott v. Harris, 550 U.S. 372 (2007) (summary judgment); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (summary judgment); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (summary judgment).

6. As Professor Elliott put it, "Nourishing the fiction that justice is a pearl beyond price has its own price." E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 321 (1986).

come" principle that avoids the significant costs that the "on the merits" principle generates.

I. THE MEANING OF "ON THE MERITS"

A simplistic definition of "on the merits" is "accurately": a case is resolved "on the merits" when it is resolved accurately, on the basis of the law and the facts. This definition is simplistic in the sense that it posits a correct answer for each factual and legal issue, even though a single correct answer to either factual or legal questions, or in the application of the latter to the former, is elusive.[7] A somewhat less simplistic meaning is to define "on the merits" to require a resolution that can be justified by the exercise of reason.

But this definition is not precisely what Pound had in mind when he called for reform of the American procedural system. For Pound, a principal cause of dissatisfaction with the American civil justice system was the strict and unyielding operation of procedural technicalities that thwarted the determination of a case "finally and upon its merits."[8] Thus, resolving cases on the merits meant removing procedural barriers that stood in the way of the resolution demanded by "substantive law and justice."[9] According to Pound, procedural rules should serve only two purposes: either "to provide for the orderly dispatch of business, saving of public time, and maintenance of the dignity of tribunals" or "to secure to all parties a fair opportunity to meet the case against them and a full

7. Any "accuracy" theory poses certain difficulties. One is the metaphysical commitment that underlies the concept of "accuracy." In the usual sense of the word in legal procedure, an outcome of a lawsuit is "accurate" when the legal conclusions are correct and the factual findings are true. Leaving aside the issue of how to measure whether a legal proposition can be regarded as correct, the concept that a fact determined in adjudication is "true" usually means that the fact as determined by the decision-maker (judge or jury) corresponds to the fact as it actually happened (or will happen without legal intervention). Such a correspondence theory is one possible understanding of the meaning of truth, but competing philosophical approaches also exist—including the coherence theory that better justifies the alternative definition that an accurate definition is one that can be justified by the exercise of reason. *See generally* Michael Glanzberg, *Truth*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2009), *available at* http://plato.stanford.edu/entries/truth (discussing correspondence, coherence, and other theories of truth, as well as the metaphysical and epistemological suppositions that underlie them); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (discussing the way in which a person's background can influence the legal and factual interpretation of events on a videotape). A second reason is that, to some extent, the procedures used to determine the facts influence the determination, *see infra* notes 17–19, so that it is impossible to talk about an "accurate" outcome independent of the procedural rules that determine the outcome. An "accuracy" definition, however, presupposes that the "right" answer exists independently of the process by which the answer is determined. Finally, the idea of "accuracy" is not itself clearly defined. For instance, it can be divided into concepts of "case accuracy" (getting the law, the facts, and the remedies right in a specific case) and "systemic accuracy" (adopting procedures that, *ex ante*, tend to get the law, the facts, and the remedies right). *See* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 247–48 (2004).

8. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 405 (1906), *reprinted in* 35 F.R.D. 241 (1964).

9. *Id.* at 406.

opportunity to present their own case."[10] To prevent the adversaries from manipulating these rules in order to obtain private advantages unrelated to these purposes, the judge was to have the discretion to enforce procedural rules to give effect to these purposes and to no others.[11] Thus, for Pound, resolving cases "on the merits" meant arriving at a decision through the use of procedural rules that are "capable of a reasonable individualization of application"[12] and that are designed and implemented to "mak[e] it unprofitable to raise questions of procedure for any purpose except to develop the merits of the cause to the full."[13]

These two meanings—deciding cases accurately (or at least rationally) and deciding cases under procedures that give the parties the full opportunity to present evidence and arguments in their cases—aren't precisely the same thing. Perfectly realized, the latter approach might generally yield outcomes that comport with the first approach, but the latter approach does not demand perfect realization. The qualifier "generally" in the last sentence is necessary to account for the internal dynamic of Pound's approach alluded to above. According to Pound, procedural rules can legitimately exist not only for the purpose of deciding cases on their substantive merit, but also for the purpose of ensuring the "orderly dispatch of business, with consequent saving of public time and maintenance of the dignity of tribunals."[14] Presumably, if a plaintiff with a meritorious claim missed a deadline for filing a response to a dispositive motion, a court could enforce the deadline to uphold the integrity of the judicial process—even if the meritorious claim was tossed out as a result.[15] The same result might occur if a court was convinced that the judicial costs of proceeding with a case outweighed the likelihood that the case had merit.[16] Except to the extent that Pound's system gave judges the discretion to tailor all procedural rules to the circumstances of

10. Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 402 (1910) (emphasis omitted).

11. *Id.* (stating that "[i]t should be for the court, in its discretion, not the parties, to vindicate rules of procedure" involving the first purpose and that "nothing should depend on or be obtainable through [rules meeting the second purpose] except the securing of such opportunity" (emphasis omitted)).

12. *Id.* at 400.

13. *Id.* Pound did not justify the move he made from requiring that procedural rules not act as a barrier to achieving the outcome required by the substantive law and justice, to requiring that procedural rules not act as a barrier to the full and fair participation of the parties. These formulations are not the same; we can imagine an excellent inquisitorial judge who reaches the substantively just result without allowing participation from the parties. Pound apparently believed that the parties' full and fair participation would lead to substantively just results, although that connection is not logically required.

14. *Id.*; *see* sources cited *supra* notes 8–10 and accompanying text.

15. *Cf.* Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976) (upholding the dismissal of a case as a sanction for the violation of discovery orders).

16. *Cf.* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007) (affirming the dismissal of an antitrust case on the pleadings; mentioning the significant costs of discovery as a relevant consideration in the decision).

a case, Pound never attempted to reconcile the tension generated by the dual purposes that he believed procedural rules should serve.

Both the "accuracy" definition of "on the merits" and Pound's related but distinct definition neglect an important aspect of procedural rules: the rules themselves, to some extent, determine the merits. A process that seeks to resolve disputes through, let's say, the scientific method of falsifiable hypotheses is likely to yield different results than a process that relies on adversarial presentation.[17] Some of the ways in which procedural rules affect outcomes are well-described in the literature.[18] In theory, we might talk about a "right" or "accurate" or "rational" answer on the substantive merits that is independent of the process used; in the real world, however, substance and procedure are inextricably intertwined and cannot be disaggregated.[19] Because they are interrelated, procedural rules are also inevitably political, in the sense that a given set of rules is likely to favor the interests of some over those of others.

Taking account of this fact, let me suggest a definition of "on the merits" that accounts for some of the criticisms of the "accuracy" and "rationality" definitions as well as Pound's alternative. This definition tracks fairly closely, I believe, the meaning that American proceduralists give the phrase:

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17. *See* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036 (1975) ("[O]thers searching after facts—in history, geography, medicine, whatever—do not emulate our adversary system."); *see also* THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 185 (1935) ("Bitter partisanship in opposite directions is supposed to bring out the truth. Of course no rational human being would apply such a theory to his own affairs or to other departments of the government.").

18. For a sampling of the literature, see Irwin A. Horwitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. APPLIED PSYCHOL. 909, 910–13 (2000) (reporting data showing that the likelihood of plaintiffs' recovery increases as more plaintiffs are joined, but that the average award decreases when more than four plaintiffs are joined); Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 LAW & HUM. BEHAV. 269, 281–85 (1990) (reporting changed effects on liability and damages outcomes in bifurcated trials); Irwin A. Horwitz & Kenneth S. Bordens, *The Effects of Outlier Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Civil Jury Decisions*, 12 LAW & HUM. BEHAV. 209, 225–28 (1988) (describing how the number of joined plaintiffs affects the likelihood of recovery and value of joined cases); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 74 (1990) (discussing changes in expected litigation outcomes as a result of varying summary-judgment standards); Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1612 (1963) (finding rise in defense verdicts when issue of liability was bifurcated and tried before damages); compare Hanna v. Plumer, 380 U.S. 460, 464–65 (1965) (holding that the Federal Rules of Civil Procedure are "rules of . . . procedure" within the meaning of the Rules Enabling Act, 28 U.S.C. § 2072 (2006), as long as their effects on substantive rights are merely "incidental" (internal quotation marks omitted) (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445–46 (1946))).

19. As John Dingell pithily remarked, "I'll let you write the substance . . . and you let me write the procedure, and I'll screw you every time." *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell, Chairman, H. Comm. on Energy & Commerce); *see also* Solum, *supra* note 7, at 225 (demonstrating "the ineliminable and inherent entanglement of substance and procedure").

> A resolution "on the merits" occurs when a lawsuit is decided according to procedural rules that (1) are designed, interpreted, and implemented to give the parties a full opportunity to participate in presenting the proofs and reasoned arguments on which a court can decide a case, and (2) do not systematically affect the outcomes of cases due to the intended operation of a principle other than the principle of allowing the parties a full opportunity to participate.

This definition hews more closely to the approach developed by Pound[20] because it defines "on the merits" in more procedural than substantive terms—it seeks to remove decision-making rules that act as barriers to rational resolution rather than requiring a rational resolution directly. But it also differs from Pound's approach in significant ways. First, rules designed to uphold the "dignity of the tribunal" are excluded from the definition because they are designed to serve a purpose other than assuring the parties a full opportunity to participate in the case.[21] Furthermore, the second half of the definition has no direct link to Pound's work; it is rather a reflection of the inevitably substantive effects of procedural rules. A system of rules that meets the first condition of the definition will be costly.[22] These costs might discourage some putative litigants—especially those with fairly small amounts at stake—from commencing or defending suits. Thus, rules intended to assure a full opportunity to litigate can have the opposite effect, and can prevent some putative litigants from pursuing this opportunity. Moreover, for plaintiffs who can afford to enter the system, such a system of rules is likely, in the main, to have a pro-plaintiff effect. The second clause eliminates consideration of these economic or political effects: a rule whose intended purpose is to give the parties a full opportunity to participate does not become illegitimate simply because, in its operation, it has an opposite or unintended effect in some situations.[23]

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20. Close readers will notice that I borrowed the phrase "proofs and reasoned arguments" from Lon Fuller, who argued that participation through proofs and reasoned arguments was essential to the adjudicatory form. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363 (1978). Professor Fuller's argument is often taken as a defense of the necessity of an adversarial system. *See id.* at 382–85. In using "proofs and reasoned arguments," I am not incorporating all of Professor Fuller's argument, but I am consciously using a phrase associated with the adversarial tradition to highlight the fact that, insofar as the phrase "on the merits" refers to a principle adopted to shape American procedural rules, the underlying form of the American legal system is adversarial.

21. This fact does not mean that the enforcement of sanctions against those who violate the rules is necessarily precluded. The "on the merits" principle guarantees the *opportunity* to participate, not the right of actual *participation*. Parties can forfeit their opportunity. Implementing the sanctions provided in a rule against a violator does not offend the "on the merits" principle unless the court, in enforcing the rule, considers matters other than the nature of, and reasons for, a party's forfeiture of that opportunity (such as the need to clear dockets). In this sense, the "on the merits" principle does not prevent courts from upholding their dignity against violators.

22. For further discussion of this point, see *infra* notes 49–62.

23. The second clause also allows for procedural rules that establish deadlines or practices that the "on the merits" principle underdetermines. For instance, drafters of procedural rules must

The critical word in the definition is "full." Virtually any system of procedural rules—including ones designed to enhance efficiency, to foster settlements, or to advance the interests of certain classes of litigants—gives the parties some opportunity to participate in shaping the litigation. It is the guarantee of a full opportunity—unfettered by concerns for expense, delay, or advancing certain political interests—that defines the "on the merits" principle. What this definition excludes are decisions made in accordance with rules designed, interpreted, or implemented to advance other purposes—for instance, rules designed to enhance the efficiency of litigation, to foster settlements, or to favor business interests.

To be clear, I am not contending that the "on the merits" principle is the best, or even a necessary, principle around which to design a system of procedural rules. Nor am I contending that procedural rules intended to enhance efficiency in litigation, to foster settlements, or to advance other social objectives are illegitimate; or that these other principles must be subordinated to the "on the merits" principle when designing and implementing a system of procedural rules. For now, my only point is to fix the meaning of the phrase "resolving a case on the merits," in order that I might explore the influence of this idea on our present procedural rules and to consider whether this principle is in fact an appropriate, or even a necessary, element in the design and implementation of a procedural system.

II. THE INFLUENCE OF THE "ON THE MERITS" PRINCIPLE

It is a true but unremarkable observation that the principle of resolving cases on their merits is deeply ingrained in modern American procedure. The first level of engagement is doctrinal. Major aspects of the American procedural system flow directly from the idea that parties deserve a full opportunity to participate in shaping decisions about their claims and defenses. For instance, three of the central and most controversial features in American procedure—notice pleading, discovery, and joinder—were originally designed to enable "on the merits" resolutions.[24] Notice pleading sought to eliminate the technical rigor of common-law and code pleading—a rigor that was thought to thwart the par-

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decide how many days a defendant has to respond to a complaint. The "on the merits" principle specified in the first clause requires that the period be long enough to allow the defendant a full opportunity to participate (so a response deadline of ten minutes would be inadequate). But, assuming that twenty days is adequate to ensure this opportunity, the "on the merits" principle cannot determine whether the number of days should be twenty or twenty-one. The drafters are justified in choosing either deadline, and in using other principles (such as efficiency or simplicity) to make the choice, because the choice does not systematically affect the outcome in a way intended to thwart the parties' opportunity to participate.

24. *See* Subrin, *supra* note 4, at 922, 945–47, 962–64, 973–74 (noting that modern notice pleading, discovery, and joinder have their origins in the system of equity, and that the desire to have cases determined on their substantive merits underlay the efforts of reformers such as Roscoe Pound and Charles Clark to use equity's procedural approach).

ties' ability to obtain a decision based on substantive law.[25] Generous discovery rules reversed the common-law and code-pleading practices, in which discovery was either unavailable or significantly circumscribed.[26] The principal argument for discovery was that it was necessary to ensure that both sides would have a full opportunity to present their own cases and to meet the cases of their opponents.[27] And the breadth of modern joinder devices borrowed from and expanded on the devices available in equity, which had permitted broad joinder in order to do complete justice among all interested parties.[28]

Of course, like all legal rules, these doctrines can also be justified on grounds other than the "on the merits" principle. Charles Clark argued (with apparent sincerity) that notice pleading, when combined with good case management, was more efficient than a demanding pleading standard.[29] Edson Sunderland argued that full discovery fostered settlements because the parties could know the strength of the cases on both sides.[30] The joinder rules are usually construed to permit as much joinder "as is compatible with efficiency and due process."[31]

When rules are designed to serve multiple purposes, the dominant purpose becomes evident when, on a given set of facts, a court chooses one interpretation or implementation of the rule that better fulfills the dominant purpose, but other interpretations or implementations would have better fulfilled other purposes. Traditionally, the "on the merits" principle won out at the levels of interpretation and implementation. But in recent years that dominance has been threatened. The point is well illustrated in the tension between *Conley v. Gibson*,[32] whose "no set of

25. CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 56–58 (2d ed. 1947); Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 47 (1957) [hereinafter Clark, *Big Case*].

26. *See* Subrin, *supra* note 4, at 936–37 (discussing limitations on discovery in code pleading); Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 865–66, 869–71 (1933) (discussing the general unavailability of discovery at common law, the limitations on using equity to aid in obtaining discovery in common-law actions, and the vagaries of discovery in American jurisdictions before enactment of the Federal Rules of Civil Procedure).

27. *See* Sunderland, *supra* note 26, at 869. Professor Sunderland advocated for and spearheaded the drafting of the Federal Rules' discovery provisions. *See* Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 11 (1959) (noting that "[t]he system thus envisaged by Sunderland had no counterpart at the time he proposed it").

28. *See* Zechariah Chafee, Jr., *Broadening the Second Stage of Interpleader*, 56 HARV. L. REV. 541, 548 (1943); Subrin, *supra* note 4, at 923.

29. Clark, *Big Case*, *supra* note 25, at 53 ("You will get there more expeditiously if instead of pausing to beautify the pleadings you turn to pre-trial and the . . . saving of actual trial it represents.").

30. Sunderland, *supra* note 26, at 865 ("Many a case would be settled . . . if the true situation could be disclosed before the trial begins.").

31. Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967) (interpreting Rule 24); *see also* Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1332 (8th Cir. 1974) (interpreting Rule 20 permissive joinder "to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits"); *cf.* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966) ("Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.").

32. 355 U.S. 41 (1957).

facts" interpretation of Rule 8(a)(2) proscribed nearly all dismissals of pleadings for reasons unrelated to the merits, and *Bell Atlantic Corp. v. Twombly*,[33] whose "plausibility" interpretation of Rule 8(a)(2) overruled *Conley*, in part because of fears that *Conley*'s "on the merits" approach was too costly. Bills presently pending in Congress would reject *Twombly* and restore *Conley*'s approach to pleading.[34] A principal argument justifying the bills is to restore litigants' ability to have cases determined on their merits.[35]

The fight over the proper orientation of pleading rules demonstrates the continuing vitality of, but also the controversy beneath, the "on the merits" principle. The reason that notice pleading, discovery, and joinder excite controversy and generate calls for reform[36] is not their tendency to foster efficient outcomes or settlements.[37] On the contrary, they are con-

33. 550 U.S. 544 (2007); *see also* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1947 (2009) (affirming *Twombly*'s approach).

34. As of this writing, bills have been introduced in both the Senate and the House to overturn *Twombly* and *Iqbal*, and hearings have been scheduled. Notice Pleading Resolution Act of 2009, S. 1504, 111th Cong. (2009); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009). The groups supporting these bills include civil-rights and pro-plaintiff organizations—a fact that shows that the "on the merits" principle, whatever its theoretical merit, is not perceived as politically neutral in its effect.

35. The House bill is titled the "Open Access to Courts Act of 2009." H.R. 4115, 111th Cong. (2009). The sponsor of the Senate bill, Senator Arlen Specter, stated that the effect of *Twombly* was to "deny many plaintiffs with meritorious claims access to the Federal courts and, with it, any legal redress for their injuries." 155 CONG. REC. S7891 (daily ed. July 22, 2009) (statement of Sen. Specter). His bill was intended to ensure that plaintiffs "had access to relevant information in the defendant's possession," and that they could "normally offer evidence to support the complaint's allegations" before a decision was rendered. *Id.* at S7890.

36. For one reform proposal advocating stricter pleading rules and limiting discovery, see INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & CIVIL JUSTICE, 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM PILOT PROJECT RULES 1 (2009), http://www.actl.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=4509.

37. A comparable debate over the role of the "on the merits" principle has existed for some time in the area of discovery. The 1983 amendments to Federal Rule 26(b) to require that discovery be proportional to the needs of the case (a requirement strengthened in subsequent amendments), the 2000 amendments to Federal Rule 26(b)(1) to eliminate subject-matter discovery except on a showing of good cause, and the 2006 amendments that established a presumption of non-disclosure for electronically stored information that was not readily accessible, all sought to constrain the perceived excess costs of full "on the merits" discovery. Efforts to constrain the "on the merits" orientation in the area of joinder have thus far been less evident. Except arguably in the context of class actions, the law of joinder has remained relatively stable in recent years, and the justifications for class actions are for the most part shaped by considerations other than the "on the merits" principle. *See* Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1145–51 (2009). Indeed, in some areas, the use of joinder and consolidation devices is expanding. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 71 tbl.S-20 (2009), http://www.uscourts.gov/judbus2008/JudicialBusinespdf version.pdf (showing 75,663 cases consolidated in multidistrict proceedings in 2006 and 102,448 cases consolidated in multidistrict proceedings in 2008). Because the law of joinder and consolidation has long had an orientation toward efficiency, *see supra* note 31 and accompanying text, the stability in the area of joinder is not inconsistent with my general point of the ascendancy of efficiency concerns, rather than the "on the merits" principle, in modern American litigation. Nonetheless, liberal joinder often causes requests for broad and costly discovery, such that debates over the sustainability of full "on the merits" discovery are often indirectly debates over the breadth of modern joinder and consolidation.

troversial only because, in fulfilling the goal of merits-based resolutions and thus extending to the parties (often plaintiffs) a full opportunity to litigate, they are perceived to generate inefficiencies or to have a bias against the interests of certain litigants (often defendants).

The second level at which the "on the merits" principle influences the architecture of our procedural rules is more structural in nature. When Pound first propounded his procedural vision, he recognized the tendency of any system of rules to ossify,[38] thus eventually frustrating the goal of resolving cases on their merits.[39] His antidote was judicial discretion.[40] This vision of a highly discretionary system of procedural rules manifested itself in the Federal Rules of Civil Procedure and remains intact today.[41]

At the same time, the purposes for which this discretion should be exercised have become more contested. For Pound, the point of judicial discretion was to tailor the generalities of substantive law to the facts of individual cases—in other words, to provide a structural mechanism by which rules designed to resolve cases on the merits could meet that goal.[42] Today, however, judicial discretion is often exercised for other purposes, especially for ensuring the efficient resolution of litigation.[43]

Therefore, both at the doctrinal level and at the structural level of the appropriate judicial role, the "on the merits" principle is engaged in a struggle for continued relevance. As long as the struggle continues against the backdrop of rules and understandings of the judicial role that the "on the merits" principle originally framed, the principle remains influential. But the trend line in American procedure is running against

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38. For a short statement of Pound's views on the issue, see Roscoe Pound, *Enforcement of Law*, 20 GREEN BAG 401, 403–05 (1908).

39. *See* Pound, *supra* note 8, at 397–98; Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 20–26 (1905).

40. *See* Pound, *supra* note 10, at 388–89. In particular, Pound argued for a theory of sociological jurisprudence, which he described in the following terms:

> [W]ithin wide limits [the judge] should be free to deal with the individual case so as to meet the demands of justice between the parties and accord with the reason and moral sense of ordinary men. . . . [The] application of law is not a purely mechanical process. It . . . involves, not logic merely, but discretion; that the cause is not to be fitted to the rule but the rule to the cause. . . .
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> . . . .
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> . . . Hence for us a proper proportion between the technical and the discretionary elements in the administration of justice will give chief weight to the former. The present leaning of the scale toward the latter may be counteracted by providing a more rational and flexible procedure . . . . The demand for wider discretion in the courts may be satisfied legitimately in the direction of procedure . . . .

Pound, *supra* note 38, at 405, 408.

41. According to Professor Subrin, in 1987 judicial discretion is explicitly or implicitly provided for in twenty-eight of the eighty-four Federal Rules of Civil Procedure; included on his list are the most significant Rules. Subrin, *supra* note 4, at 923 n.76. More recent amendments to Rules 16 and 26, among others, have continued to enhance judicial discretion in shaping the Federal Rules to specific cases.

42. *See* Tidmarsh, *supra* note 3, at 521–23, 527.

43. *Id.* at 560.

the "on the merits" principle and in favor of other principles, most notably, the related ideas of advancing efficiency and fostering settlements. Running beneath these principles is also the political undercurrent that the "on the merits" principle is politically skewed against the interests of repeat-player defendants (typically corporations). Indeed, in a world in which 97% or more of civil cases do not reach trial,[44] in which more than 80% of civil cases settle or are decided for reasons unrelated to their merits,[45] and in which American business must remain competitive in a global environment, it is fair to ask what role the "on the merits" principle should play going forward.

III. THE FUTURE OF THE "ON THE MERITS" PRINCIPLE

Let me suggest four possible fates for the "on the merits" principle. First, in the jostling of ideas around which we might organize our procedural system, it could occupy the lexically superior position; all other principles (such as efficiency, fostering settlements, or favoring certain interests) should be relegated to a lexically inferior status and should be used only to help choose among procedural alternatives that equally satisfy the "on the merits" principle. A second alternative is to assign no procedural principle to the superior position, and to shape procedural rules pragmatically by balancing various principles, including the "on the merits" principle, against each other. A third alternative is to invert the lexical ordering, put some other principle (say, efficiency) in the primary position, and use the "on the merits" principle (along with other lexically inferior principles) to help choose among procedural alternatives that are equally efficient. A fourth is to abandon the "on the merits" principle as a relevant consideration in designing, interpreting, and implementing procedural rules.

As I have said, the first approach is consonant with the spirit in which the Federal Rules of Civil Procedure and comparable state rules were originally conceived. The second approach strikes me as the space that rule-making and rule-implementing occupies today, as rule-makers and judges struggle to balance the "on the merits" principle against other principles that also demand satisfaction. The movement in the direction

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44. LYNN LANGTON & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, CIVIL JUSTICE SURVEY OF STATE COURTS, 2005: CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 1 (rev. ed. 2008), http://bjsdata.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf (noting that "trials collectively accounted for about 3% of all tort, contract, and real property dispositions in general jurisdiction [state] courts"); ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES 28 tbl.4.10 (2009), http://www.uscourts.gov/judicialfactsfigures/2008/all2008judicialfactsfigures.pdf (documenting the steady decline in civil trials in federal courts to a low of 1.3% of filed cases in 2006; further noting a slight uptick in trials in 2007 to 4.1% and 2008 to 2.0%, but explaining the reversal as being principally the result of trials in a mass action in one district).

45. Due to the limitations of the way in which data about case terminations in federal courts are collected, a more precise statement is not possible, but it is likely that this 80% figure is a conservative estimate. For a discussion of the issue and an examination of data and studies through 2005, see Tidmarsh, *supra* note 3, at 549.

of designing and interpreting rules to achieve more efficient outcomes[46] suggests that we might be crossing over to the third approach, in which efficiency is the lexically superior ideal. Indeed, it is only the lack of the clear emergence of efficiency as a dominant principle, rather than the continuing vigor of the "on the merits" principle,[47] that keeps me from asserting that we have already arrived at the third approach.[48] Skeptics might even argue that the "on the merits" principle is effectively dead (the fourth approach), on the theory that today "on the merits" argumentation is nothing more than a feint by litigants or judges to mask desired political outcomes in the language of a neutral, sensible principle.

In my judgment, we should adopt the fourth approach, and abandon the current "on the merits" principle in favor of a related but distinct "fair outcome" principle that I will propose shortly. Before I come to that proposal, let me explain my objections to the first three approaches.

A. The Problems of "On the Merits" Adjudication as a Lexically Superior Procedural Principle

The primary difficulty with a lexically superior "on the merits" principle is its failure to account for the costs that a full opportunity to participate in litigation can impose on others. This blind spot can be explained historically: Roscoe Pound was deeply influenced by the work of the German legal philosopher Rudolf von Jhering,[49] whose famous book, *Der Kampf ums Recht (The Struggle for Law)*, exhorted people to assert and defend their legal rights regardless of cost.[50] But it is a different issue to justify this blind spot rationally.

To take a simplistic example, suppose that a plaintiff alleges that defendant has negligently destroyed $10,000 in currency belonging to the

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46. *See supra* notes 5, 43 and accompanying text.

47. I can think of no major reform to the Federal Rules over the past forty years in which the ideal of deciding cases "on the merits" was the principal motivation behind the reform.

48. Thus far, rule-makers and judges have adopted the efficiency rationale only in a soft form. In terms of allocative efficiency, the requirements of a procedural system can be stated with some rigor. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 593–94 (7th ed. 2007) (demonstrating that, under rational-choice theory, procedural efficiency requires the minimization of the sum of direct litigation costs and error costs). *See generally* ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE (2003) (analyzing procedural rules under both rational-choice theory and important limitations on the theory such as sunk costs, limited access to information, agency costs, and bounded rationality). Neither our procedural rules nor judicial interpretations of these rules engage in the detailed and often fact-specific inquiry needed to ensure that the rules in fact meet the requirements of rational-choice theory and its limitations. For the most part, when rule-makers and judges discuss making the system more "efficient," they mean taking steps to reduce direct litigation costs. *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007) (interpreting Federal Rule 8(a)(2)'s pleading requirement in light of the fact that "antitrust discovery can be expensive").

49. *See, e.g.*, Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140, 140–47 (1911); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 610 (1908). Pound usually rendered Jhering's name as "Ihering."

50. *See* William Seagle, *Rudolf von Jhering: Or Law As a Means to an End*, 13 U. CHI. L. REV. 71, 81–82 (1945).

plaintiff. The plaintiff now wishes to discover electronically stored information in the defendant's possession. The cost to the defendant of responding to this request for discovery, which is relevant to the plaintiff's claim that the defendant acted negligently, is $50,000.[51] If an "on the merits" approach to discovery was lexically superior, the defendant must spend $50,000.[52] In this world, the defendant would be much better off settling the case for $25,000, even though the value of the remedy that a court would order is $10,000.[53]

The example is extreme, but the problem is not. In some areas of practice, direct litigation costs consume anywhere from 48% to 63% of the total amounts spent on litigation, including compensation paid to plaintiffs.[54] A large portion of these costs are associated with our system of "on the merits" discovery,[55] which in turn is brought readily into play

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51. Although I have chosen an example in which the plaintiff's use of discovery imposes costs, it is equally possible to turn the tables, and to hypothesize a case in which the defendant asks for $50,000 worth of discovery from the plaintiff (or perhaps adds additional parties that will require the plaintiff to spend $50,000 more in litigation expenses), so that the plaintiff is better off dropping the lawsuit and taking nothing rather than continuing to litigate.

52. It is true that the defendant, rather than the plaintiff, must spend the money because of the presumption that each party pays for the cost of responding to an opponent's discovery. If the rule was the opposite, and the requesting party was required to pay, *cf.* FED. R. CIV. P. 26(b)(2)(B) (permitting a court to "specify conditions," including shifting costs, for discovery of electronically stored information), the plaintiff in the hypothetical would not spend more than her expected recovery ($10,000 or less) on the discovery, and greater efficiency would be realized. But nothing in the "on the merits" principle dictates whether the requesting or responding party should pay for costs of responding; the decision must be resolved by examining second-order considerations such as efficiency and a desire for open access to courts. *Cf.* Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435 *passim* (1994) (employing economic analysis to determine the circumstances in which a requirement that the requesting party pay for discovery leads to a more efficient level of discovery).

53. Thus, it is possible to ascribe two possible motives to the plaintiff who requests the discovery. One is to obtain information that she legitimately needs to prove her case. The other is to impose costs on the opposing party in order to extract an excessive settlement. This distinction between case-relevant and impositional discovery will matter later. *See infra* note 84 and accompanying text. For now, it is useful to note that, if a court implements an "on the merits" discovery rule according to its only legitimate purpose (i.e., ensuring that the parties have a full opportunity to participate in the process of presenting proofs and reasoned arguments), it will prevent impositional discovery from occurring. But a party is unlikely to admit that she is engaging in impositional discovery, and is likely to be able to present some plausible argument why the discovery is necessary to prove the case. If a court makes errors in discerning the party's actual motives, or if it is willing to tolerate impositional discovery as a means of pressuring the opponent to settle, some impositional discovery will occur. In the real world, purely impositional discovery is arguably uncommon. *See* Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear's* The Barrister and the Bomb, 69 B.U. L. REV. 649, 654–55 (1989). Mixed-motive discovery is not; lawyers often seek discovery both to obtain useful information *and* to erode an opponent's tolerance for litigation.

54. *See* JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION, at xiii (1986) (reporting that the costs of tort litigation ranged from 48% in automobile cases to 57% in other tort cases, with plaintiffs receiving from 52% to 43% in compensation); JAMES S. KAKALIK ET AL., RAND, COSTS OF ASBESTOS LITIGATION, at vii tbl.S.2 (1983) (reporting that the costs of asbestos cases consumed 63% of all money spent on asbestos cases, with plaintiffs receiving 37% in compensation); PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL 53 (1991) (estimating that the total litigation costs of medical-malpractice cases is 55%, with plaintiffs receiving 45% in compensation).

55. James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 637 (1998) (reporting that an average of 36% of all attorney time and a median of 25% of attorney time was spent on discovery); *id.* at 636 ("Subjec-

by our "on the merits" approach of liberal pleading and joinder rules. The judicial discretion that the "on the merits" principle dictates also increases direct litigation costs, because discretion allows judges to reinvent the procedural wheel for each case and gives parties an incentive to argue over the shape of that wheel.

Beyond the effects that a full opportunity to participate in litigation can have on an opposing party's wallet and behavior, allowing this full opportunity can create other undesirable effects, including disincentives for putative litigants with meritorious claims to enter the litigation system.[56] In the same fashion, the method by which the old "on the merits" principle is implemented—giving judges discretion—can create inappropriate incentives to settle or disincentives to litigate meritorious claims for the less powerful if the judge is perceived to use that power to advance the interests of certain classes of litigants.[57]

In economic terms, the "on the merits" principle can impose direct litigation costs, error costs, or both. The $50,000 discovery expenditure is a classic example of a direct litigation cost that can distort the operation of efficient substantive rules.[58] If the defendant settles for $25,000 instead, the difference between $25,000 and the actual value of the plaintiff's claim (which is between 0% and 100% of $10,000) is a type of error cost, as are the costs associated with the decisions of putative litigants with meritorious claims not to enter the litigation system.[59]

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tive information from our interviews with lawyers also suggests that the median or typical case is not 'the problem.' It is the minority of the cases with high discovery costs that generate the anecdotal 'parade of horribles' that dominates much of the debate over discovery rules and discovery case management."). Of course, measuring costs only by attorney time does not fully capture all the expenses of litigation, including litigants' time spent responding to discovery, expert witness fees, and the like. Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practices Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 531 (1998) (reporting that, with regard to costs that flowed through the lawyer (attorneys' and expert witness fees, transcript costs, and the like) the median for litigation costs per litigant was $13,000, with about half of that amount devoted to discovery; this amount did not include costs incurred directly by the client).

56. *Cf.* Bruce L. Hay, *Civil Discovery: Its Effects and Optimal Scope*, 23 J. LEGAL STUD. 481, 510–14 (1994) (arguing that heavy discovery can induce early settlements, thus resulting in less exposure of illegal behavior); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1183–89 (1992) (summarizing statistical evidence showing that less than 20% of injured people seek any form of redress, and, depending on the nature of the claim, only 2–11% file civil cases).

57. *Cf.* Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1027–28 (1998) (noting that, in civil-law countries that have a history of judiciaries associated with totalitarian or despotic rule, judges are required to obey the precise letter of procedural law in order to avoid any hint of judicial activism or policy-making).

58. If the defendant is aware *ex ante* that she might be liable not only for the $10,000 loss but also $50,000 in discovery expenses, she will likely take more care to avoid losses than is socially optimal. *See* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 141–45 (3d ed. 2003); *cf.* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 *passim* (1960) (showing that, in the absence of transaction costs, any rule is allocatively efficient).

59. In this essay I repeatedly use the example of the $50,000 discovery request in a $10,000 case for illustrative and dramatic purposes. Most cases do not involve such disproportion, but the same concerns for the effects of litigation costs and error costs pertain if the plaintiff demanded that the defendant spend $50 responding to discovery.

To be sure, these costs are limited. They are offset by gains that result from not incurring litigation expenses in meritless cases whose filing are discouraged by "on the merits" procedures but are countenanced by other procedures. The costs must also be calculated on the margin—that is, the difference between the costs associated with providing a full opportunity to litigate and the costs associated with the opportunity to litigate afforded by procedural rules constructed under a different principle or set of principles. The effect of class actions and other mass-aggregation devices that reduce per capita direct litigation cases (but also participatory opportunities) must be considered. In some states of the world, it is possible that the "on the merits" principle leads to the adoption of procedural rules that are less costly than any alternative.[60] But in other states of the world, including ours, the "on the merits" principle leads to the adoption of procedural rules that are more costly than rules based on alternative principles.[61]

If we adopt another principle to limit the costs associated with the operation of rules constructed under an "on the merits" principle (for instance, an efficiency principle that requires the use of procedural rules that minimize the sum of litigation and error costs), then the "on the merits" principle would not be satisfied. Nor would it be lexically superior to the limiting principle. Therefore, if the "on the merits" principle is lexically superior, its costs and inefficiencies must be conceded and tolerated. An efficiency principle operates only as a method for choosing between alternatives that each guarantee a full opportunity to litigate—in other words, for choosing rules whose content the "on the merits" principle underdetermines.

Although this economic critique has limited reach,[62] it highlights a critical problem: on the assumption that unjustified wastes of resources

60. *See generally* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994) (disputing the view that full, "on the merits" discovery results in abuse).

61. I take note of the argument that "on the merits" rules have not been proven to be more costly. *See id.* But the present efforts to construct procedural rules that reduce the costs of "on the merits" rules, *see supra* notes 5, 43, 46–48 and accompanying text, reflect the considered view of our present rule-makers and judges that an "on the merits" approach is more costly (whether economically or politically) than some alternatives.

62. One problem is that the focus on litigation and error costs can mask other costs of the "on the merits" principle. For instance, as a matter of public policy, we might wish to subsidize the operations of certain product manufacturers. A set of "on the merits" procedural rules might subject these manufacturers to more liability than we wish. In other words, harms to the socially desirable distribution of resources are poorly captured in the notions of litigation and error costs, which focus on allocative efficiency. But including such costs does not change the basic proposition that the "on the merits" principle can impose excess costs; indeed, it enhances the proposition. For that reason, I do not consider them further.

Another important difficulty is that economic arguments presume that a case has a true or fair economic value that can be determined apart from the procedures used to decide the case. Thus, in the hypothetical discussed above, the assumption was that the case has a true—in other words, "pre-procedural," "no transaction cost," or "accurate"—value of no more than $10,000. I have already described the difficulties with the assumption that cases can be determined "accurately." *See supra*

ought to be avoided, any decision to use the "on the merits" approach as a lexically superior principle requires justification. If no justification can be constructed and maintained, then the lexical superiority of the "on the merits" principle must fall.

As an initial matter, things do not look good for the principle. Pound never provided any theoretical arguments for it, and it has remained undertheorized ever since. In one sense, the problem is not unique to the "on the merits" principle. Legal procedures—regardless of the principle or principles that underlie their construction—permit litigants to engage in behaviors that do or might harm the interests of other litigants in the case and that do or might negatively affect the litigation choices of actual or potential litigants in other cases. On the assumption that theories of ethics or justice ought to concern themselves with the harms that one person imposes or might impose on others,[63] structuring any system of legal procedure raises questions of ethics and justice.[64] One question is whether and when a person pursuing her own purposes can interfere with another person's opportunity to pursue his purposes. Another is whether and when a government is justified in preventing such interference. A third is whether and how the answers to the first two questions should affect the way in which the procedures in a civil adjudicatory system are designed, interpreted, and implemented.

In another sense, however, the justificatory problem for the "on the merits" principle is especially acute. Affording present litigants a full opportunity to participate in presenting proofs and reasoned arguments,

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note 7 and accompanying text. If the procedures help to define the merits of a case, *see supra* notes 17–19 and accompanying text, then it is not obvious that the true value of the case is $10,000, as opposed to the $25,000 that a plaintiff can obtain in settlement by virtue of the expansive discovery rule. Put differently, the "true" value of a case varies, depending on the procedures used to determine the dispute.

There is also a more general critique of relying exclusively on rational-choice economic arguments. *See* AMARTYA SEN, THE IDEA OF JUSTICE 174–93 (2009).

63. Ronald Dworkin distinguishes between "bare harm" and "moral harm": not all harms we inflict on each other are unjust or a cause for moral concern. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 80, 102 (1985). On this theory, the harms that litigants inflict on each other in litigation could be seen as bare harms, and thus not subject to moral analysis at all. If we assume the correctness of this point, however, we should also conclude that there is no reason in morals or justice to lexically prefer the "on the merits" principle to other principles: that any harm a person suffers in being unable to exercise a full opportunity to litigate is a bare harm that can be traded in a utilitarian way against other bare harms to minimize overall harm. In his discussion of the role of procedure, which he sees principally as a means to achieve accurate outcomes, Professor Dworkin does not contend that denial of a full opportunity to participate in litigation is a moral harm. *Id.* at 80–81; *see also* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 260–64 (1992) (arguing that the Dworkin approach to procedure does not necessarily require that parties have a right to participate in litigation).

64. *See* Solum, *supra* note 7, at 229 (noting that, in constructing a theory of procedural justice, a judge "ultimately may be required to resolve the great questions of moral theory and decide whether utilitarianism, Kantianism, virtue-ethics, or some other view offers the best general account of morality"); *cf.* ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 11 (2009) (noting that Kant drew "a series of sharp divisions between rights and ethics," so that the legal and political rights of individuals could not be derived from his ethical theory but needed to be based on other postulates).

and neglecting the effects of that opportunity on others, create the conditions under which a party can impose additional costs (i.e., harms) that other principles do not.[65] The "on the merits" principle bears a heavier burden of justification than these other principles do.

So is it possible to construct an adequate defense of the "on the merits" principle? The most common theories of ethics or justice fall into three camps: utilitarian, rights-based (whether liberty-centered or equality-centered), and virtue-based.[66] To begin, the justification for the "on the merits" principle cannot be utilitarian—at least if we measure utility in terms of money[67] and if procedures constructed under the "on the merits" principle cause more harm than procedures that can be constructed under other principles or sets of principles (such as efficiency).[68] Therefore, the justification for affording the "on the merits" principle its lexical superiority can lie only in a non-utilitarian theory of justice or right.

Perhaps the most famous, and most controversial, such theory is the "Harm Principle" offered by John Stuart Mill: "the only purpose for which power can be rightly exercised over any member of a civilized community against his will, is to prevent harm to others."[69] Because people invariably harm each other every day (for instance, by competing with each other in market economies), a standard corollary of the Harm Principle is "the 'Reciprocal Harm Principle,' pursuant to which people are permitted to harm each other if those harms are reciprocal and the practice of allowing such harming is mutually beneficial."[70]

The Harm Principle and the Reciprocal Harm Principle both pose difficulties for the "on the merits" principle. First, although all legal procedures cause harm (and thus run afoul of a relentlessly applied Harm Principle), "on the merits" procedures cause some harms that procedures constructed under other principles (such as efficiency) do not. For that

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65. *See supra* notes 60–61 and accompanying text.

66. *See* MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 6–10 (2009).

67. It could be argued that litigants' mutual preferences for a full opportunity to litigate is more valuable to them than the extra money that the full opportunity costs. Although that fact might be true of some litigants for whom "it's the principle of the thing, not the money, that matters," I am skeptical that many litigants feel this way. *Cf.* Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1540 (1998) (noting that members of class actions "would often rather have less procedural justice and more substantive justice than the reverse").

68. *See supra* notes 60–61 and accompanying text.

69. JOHN STUART MILL, ON LIBERTY 6 (Longmans, Green & Co. 1921) (1859). Although Mill was a utilitarian, his Harm Principle is often viewed as being inconsistent with utilitarianism. As a result, some have argued that "the Harm Principle is more properly based on Kant's doctrine of right." *E.g.* William E. O'Brian, Jr., *Distributive Justice and the Harm Principle* 3 (Univ. of Warwick Sch. of Law, Legal Studies Research Paper No. 2009-05, 2009), *available at* http://ssrn.com/abstract=1503963.

70. O'Brian, *supra* note 69, at 2; *see also* Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215, 217 (2006) (noting that the Harm Principle has been modified to allow "harm resulting from a fair contest, including market competition . . . . [O]n the claim that certain benefits 'outweigh' the harms they inevitably cause").

reason, the "on the merits" principle is more incompatible with the Harm Principle than some other principles, notably efficiency. Second, the Reciprocal Harm Principle fails to justify "on the merits" procedures when asymmetries prevent the parties from reciprocally inflicting harms or when harming is not mutually beneficial. For instance, in the hypothetical above, if only the defendant has electronically stored information, an "on the merits" rule that authorizes full discovery is not reciprocal and is not beneficial to the defendant. Moreover, to the extent that the Reciprocal Harm Principle operates only at the macroscopic level (e.g., that a rule authorizing broad discovery of electronically stored information is reciprocal if both plaintiffs and defendants can use it, regardless of the fact that there is an asymmetry that allows only one party to use the rule in a particular case), the mutual benefit is still lacking whenever it can be shown that rules developed under an "on the merits" approach are more costly than alternative rules that better minimize costs (i.e., minimize harms by maximizing benefits). Put differently, the Reciprocal Harm Principle injects either an act-utilitarian or rule-utilitarian check on procedural rules that is inconsistent with the lexical superiority of the "on the merits" principle.[71]

In canvassing other moral and political theories, the notion that a litigant enjoys a full opportunity to participate in litigation (regardless of the costs that this participation imposes on others) could arguably be justified by appealing to the theory of ethical egoism, in which a person is free to pursue any self-interested goals without concern for the harms that their pursuit causes to others. But the case is actually harder than it seems.[72] In any event, egoism is not an attractive ethical theory for many.[73] Standard theories of ethics and justice—such as virtue ethics, libertarianism, Rawlsian equality, and Kantian right—provide no particular support for the "on the merits" principle, or are even antithetical to its

71. *See supra* notes 23, 49–50 and accompanying text.

72. First, because laws and their enforcement frustrate the self-interest of the individual, ethical egoism can account for legal norms, and the courts and procedures that enforce these norms, only on the notion that cooperation with others sometimes best advances a person's self-interest; laws and courts are necessary to enforce such cooperation and to prevent retaliation against a person by others who are pursuing their self-interests. *See* Robert Shaver, *Egoism*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 7, http://plato.stanford.edu/entries/egoism. In such a world, which sees law as a means to avoid mutual destruction, it is not evident that the "on the merits" principle would be the principle on which egoists would agree. If I can impose $50,000 worth of discovery on you when my case is worth only $10,000, there is nothing to prevent you (or someone else) from doing the same to me. The type of cooperation that egoism envisions might lead the parties to agree that no party should be able to use a procedural rule to inflict more than a reasonable amount of litigation expense on another party—and certainly no more expense than the underlying claim is worth.

Second, if egoists do not cooperate, it is unlikely that they would adopt the procedural rules that the "on the merits" principle requires. Rather, egoists would presumably craft procedural rules that served their self-interest—including rules that countenanced imposing costs on opponents—and would insist on the observation of procedural technicalities even if they thwarted resolutions based the proofs and arguments.

73. *See* JOHN RAWLS, A THEORY OF JUSTICE 117 (Oxford Univ. Press 1999) (1971) (stating that "egoism . . . is incompatible with what we intuitively regard as the moral point of view").

use. For instance, I see no argument that a rule allowing parties a full opportunity to litigate, even when it generates more costs and therefore causes more harms than other rules, inculcates virtue in citizens. "On the merits" procedural rules do not appear to help people achieve a good life more than other procedural rules.[74] Nor would a right to a full opportunity to litigate seem to be one of the basic goods that Rawls would require to be equally distributed in the original position.[75] Although Rawls admits that the rights implicit in the rule of law are among these basic goods,[76] his discussion of the various forms of procedural justice stops well short of specifying procedural principles or arguments that justify a lexically superior position for the "on the merits" principle.[77] Therefore, the best that can be said is that theories of ethics or justice, for the most part, are indifferent to the "on the merits" principle.[78]

Perhaps that indifference is understandable. As a general matter, lawsuits fit within the Aristotelian concept of "corrective justice," which requires rectification of injustices.[79] For the most part, philosophers have

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74. For a highly readable discussion and defense of the aretaic approach to justice, see generally SANDEL, *supra* note 66.

75. One statement of Rawls' famous first principle of justice is this: "Each person has an equal right to a fully adequate scheme of basic liberties which is compatible with a similar scheme of liberties for all." JOHN RAWLS, POLITICAL LIBERALISM 291 (1993); *see also* RAWLS, *supra* note 73, at 53 ("[E]ach person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.").

76. These basic liberties include political liberty (such as the right to vote and hold office); freedom of speech; liberty of conscience and freedom of thought; freedoms necessary to protect integrity of the person; the right to hold property; and the rights and liberties implicit in the rule of law. *See* RAWLS, *supra* note 73, at 53.

77. For the basic outline of Rawls's views on procedural fairness, which include the concepts of "perfect procedural justice," "imperfect procedural justice," and "pure procedural justice," see *id.* at 74–77, 206–10. Lawsuits would fit within the boundaries of imperfect procedural justice. According to Rawls:

> [A] legal system must make provisions for conducting orderly trials and hearings; it must contain rules of evidence that guarantee rational procedures of inquiry. While there are variations in these procedures, the rule of law requires some form of due process: that is, a process reasonably designed to ascertain the truth, in ways consistent with the other ends of the legal system, as to whether a violation has taken place and under what circumstances. For example, judges must be independent and impartial, and no man may judge his own case. Trials must be fair and open, but not prejudiced by public clamor.

Id. at 210. The "on the merits" principle's insistence on a full opportunity to participate seems inconsistent with—or at a minimum not compelled by—the requirement of reasonable limitations on the goal of ascertaining the truth.

78. The most important effort to use a Rawlsian framework of procedural justice to specify more precisely the conditions of a just procedural system is that of Professor Solum. *See* Solum, *supra* note 7. But Professor Solum's lexically ordered principles for a procedurally just system, *see id.* at 305–06, cannot be read to demand adoption of the "on the merits" principle. His first lexically superior principle is the "Participation Principle," which holds that "[t]he arrangements for the resolution of civil disputes should be structured to provide each interested party with a right to meaningful participation." *Id.* at 305. Although an "on the merits" principle seems consistent with such a principle, it is not required by it, and subsequent rules for breaking ties (such as the principles that procedural rules not affect rights securing the basic liberties, the need to attain systemic accuracy, and the need to "ensure that the systemic costs of adjudication are not excessive in relation to the interests at stake in the proceeding or type of proceeding," *id.* at 306), seem to point away from the "on the merits" principle.

79. ARISTOTLE, NICOMACHEAN ETHICS bk. 5, pt. 4, at 120–21 (Martin Ostwald trans., Bobbs-Merrill 1962).

assumed that this rectification can be accomplished costlessly and perfectly. They rarely engage the epistemological difficulties that are involved in determining the law, the facts, and the remedies—difficulties that make the "on the merits" principle problematic in the real world.[80]

Arguably the strongest support for the "on the merits" principle comes from Professor Ripstein's Sovereignty Principle, which he developed from a close reading of Kant. Intended as a response to the significant theoretical difficulties with liberal approaches such as the Millian Harm Principle and Rawlsian egalitarianism, the Sovereignty Principle holds that "the only legitimate restrictions on conduct are those that secure the mutual independence of free persons from each other."[81] Professor Ripstein uses the Sovereignty Principle to describe the circumstances in which the criminal law can be invoked to sanction intentional conduct, and has little to say directly about the relevant behavioral rules in a civil context, about the rules under which legal institutions should operate when adjudicating civil disputes, or about how litigants can use those rules.[82]

Nevertheless, it is possible to develop the Sovereignty Principle into a defense of the "on the merits" principle. In general, the Sovereignty Principle does not find problematic on justice grounds most harms that a litigant causes to others (whether litigants in the same case or putative litigants in other cases) because a litigant is justified in pursuing personal ends as long as the litigant does not use others as means to those ends—in other words, the Sovereignty Principle does not destroy or usurp the ability of others to pursue their own ends.[83] Thus, on first blush, the Sovereignty Principle does not appear to condemn as unjust the actions of a plaintiff who, having lost $10,000 at the defendant's hands, asks for $50,000 worth of discovery—as long as the plaintiff wants the discovery to determine the claim more accurately rather than merely to impose costs on an opponent.[84] It certainly does not condemn as unjust any actions undertaken in the exercise of a party's full opportunity to participate when the existence of that opportunity causes putative litigants to

80. This statement is certainly true of Aristotle. *See id.*; *see also* Ripstein, *supra* note 70, at 239–40 (noting, in the course of developing a Kantian theory of right and criminal responsibility, that civil remedies should be available for injuries to a person's means to choose her own purposes when the injuries are caused by accident or mistake, but failing to discuss the procedural difficulties associated with making these civil remedies effective); Solum, *supra* note 7, at 186 (noting that "the actual world is characterized by three problems of compliance with substantive legal norms: (1) the problem of imperfect knowledge of law and fact, (2) the problem of incomplete specification of legal norms, and (3) the problem of partiality").

81. Ripstein, *supra* note 70, at 229.

82. *Id.* at 239–40.

83. *Id.* at 234. *See generally* RIPSTEIN, *supra* note 64 (developing Kant's theory of private right, public right, and the role of law and public institutions in ensuring equal freedom).

84. *See* Solum, *supra* note 7, at 250–51 (positing a Kantian deontological argument that "one should never render an unjust decision at the expense of an innocent litigant in order to achieve systemic benefits. Instead, we might choose to pursue case accuracy because it respects an important political right—the right to an accurate determination of one's legal rights").

avoid filing meritorious cases. In neither instance is a party who exercises the opportunity to participate usurping or destroying any means that the opposing party or other putative litigants have to pursue their interests. The Sovereignty Principle, however, does judge as unjust a plaintiff's decision to ask for $50,000 in discovery if the plaintiff's purpose is to extort an excessive settlement of $25,000 (when the plaintiff's loss is only $10,000). Such action destroys the opponent's capacity to use $15,000 of his resources to pursue his own purposes. Because that possibility results from the unavoidable slip between the purpose of a rule and its application, not from a flaw in the "on the merits" rules themselves, it can be discounted as a reason to reject the theory itself.

But this defense is flawed for two reasons. First, the Sovereignty Principle was not designed to deal with issues of procedural justice. The Sovereignty Principle requires a distinction among means. In the absence of another's consent, I cannot use as a means to achieve my own purposes those means that another person possesses or can legitimately regard as available to her for pursuing her own purposes. All other means, however, are available for my use in pursuing my purposes. Thus, the Sovereignty Principle distinguishes between harms that occur when I take something of yours (I can't grab your body to block a bullet intended for me because your body is one of your means to pursue your ends) and harms that occur during market competition (I can sell my widget for less than you sell yours even though I harm your ability to earn a living because the expectation that customers will purchase from you is not one of your means).[85] On this distinction, it seems that the plaintiff's discovery request, which requires the defendant to spend either $50,000 of his means to respond or $25,000 of his means to settle, is more like using another's body to block a bullet than engaging in market competition.[86] More generally, whenever any system of legal procedure allows one party to require that an opposing party undertake an action to advance the first party's interests in winning the case, a violation of the Sovereignty Principle occurs—a fact that suggests that the Sovereignty Principle is an inapposite way to think about the principles of justice that should shape procedural rules. Second, the Sovereignty Principle fails as a defense of an "on the merits" approach because rules developed under the "on the

85. RIPSTEIN, *supra* note 64, at 49–50.

86. Professor Ripstein mentions that "fair contests" are an exception to the usual rule that one person cannot take another's means; if we agree to a contest conducted under fair rules, I can take a means of yours pursuant to the rules of the contest. *Id.* at 48–49. But that argument does not direct that, when the plaintiff takes either $50,000 or $25,000 from the defendant under "on the merits" discovery rules that govern litigation "contests," the taking comports with this exception to the Sovereignty Principle. First, the argument begs the question: whether "on the merits" rules are fair is the issue. Second, this argument justifies any of a number of sets of procedural rules; it does not uniquely justify "on the merits" rules. Third, litigants do not in any meaningful sense agree to use the procedural rules; they are given by the rule-makers and judges who interpret and implement them. The basis for the "fair contest" argument is the autonomy of the parties to consent to the game; and litigants do not give consent in the way that they do if, for instance, they agree to arbitrate.

merits" principle can inflict more harm on others than rules constructed under principles such as efficiency.[87] Therefore, the "on the merits" principle is less clearly supported by the Sovereignty Principle as it might have appeared initially.

In the end, the economic and philosophical case for the lexical superiority of the "on the merits" principle is weak. This does not mean that the rational adjudication of legal disputes—a purpose that the "on the merits" principle arguably advances—cannot be pursued. Nor does it say that a party's right to participate in a lawsuit or the court's interest in fostering settlements—two other purposes that the "on the merits" principle arguably advances—are illegitimate. In proper circumstances, the "on the merits" principle might be a helpful means for achieving these other goals. My point is that, despite its prominence in constructing our modern American procedural system, providing the parties a full opportunity to participate in litigating a case is not the foundation on which to build a procedural system.[88]

B. The Problem of Using the "On the Merits" Principle as an Equal or Lexically Inferior Procedural Principle

In reaching this conclusion, I could be accused of setting up a straw man. Not even the strongest proponent of the "on the merits" principle would likely countenance the use of procedures that require a party to spend more money to respond to discovery than the value of the remedy that the court will provide. This fact suggests that, despite the lip service paid to resolving every case on its merits, the "on the merits" principle operates either as one of several principles that are pragmatically melded to shape a system of procedural rules[89] or as a second-level tiebreaker when lexically superior principles underdetermine the best procedural rule. Thus, the "on the merits" principle converts into a presumption that, all things being equal, giving parties more opportunities to participate is better than giving them less.

The arguments from the prior section, however, bear on the reasonableness and utility of this presumption.[90] If, as I have just argued, the "on the merits" principle lacks a strong basis of economic or philosophi-

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87. *See supra* notes 60–61 and accompanying text.

88. I am not suggesting that the "on the merits" principle is illegitimate as a matter of morality or justice, but rather that the principle's costs should form part of the judgment about whether the principle is worth maintaining.

89. *Cf.* FED. R. CIV. P. 1 (stating that the Federal Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding").

90. Although treating the "on the merits" principle as one of several first-order principles is different from treating it as a lexically inferior principle, my difficulties with both approaches are similar, so I will handle them together. Therefore, I note only in passing the evident objection to pragmatically blending multiple factors: that it injects too much uncertainty into the design, interpretation, and implementation of procedural rules. *Cf.* Tennessee v. Lane, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting) (noting that "malleable standards . . . have a way of turning into vehicles for the implementation of individual judges' policy preferences").

cal support, it is unclear why the principle deserves any place among the principles used to shape a procedural system. If we pragmatically blend multiple principles, some of which are strongly justified and some of which are not, the shape of the rules that will emerge will mostly reflect the strongly justified principles, rather than the "on the merits" principle. Similarly, if we lexically order strongly and weakly justified principles, the weak principles will fall to the bottom of the ordering, and the resulting system of procedural rules will employ a full opportunity to participate only as a fairly low tiebreaker.

The best argument for the "on the merits" principle is probably a prophylactic one: because litigants have a right to a *strong* opportunity to participate in presenting proofs and reasoned arguments, guaranteeing a *full* opportunity to participate ensures that the core of that right is protected. Thus, the "on the merits" principle becomes an instrumental principle justifiable only because it protects a fundamental principle (strong opportunity to participate) better than any other.

This argument presupposes, of course, that a strong opportunity to participate in presenting proofs and arguments is a right that can be justified economically or philosophically. I am willing to concede for now that it could be.[91] Even so, it seems unlikely that adopting the "on the merits" principle as a prophylactic measure is the best way to protect the strong-opportunity principle. Assume that we have only two co-equal procedural principles that we will use to create a procedural system: the strong-opportunity principle ("all things being equal, we want rules that give the parties as much opportunity to participate as possible") and the efficiency principle ("all things being equal, we want procedural rules that are as efficient as possible"). If we prophylactically over-enforce the strong-participation principle (turning it into an "on the merits" full-opportunity principle), then we must in fairness do the same with the efficiency principle (turning it into the "only the most efficient rule will do" principle). Expanding the scope of both principles to their maximum prophylactic scope probably doesn't favor the strong-opportunity principle, because a maximal efficiency principle has an economic and philosophical (specifically, utilitarian) foundation that—even though the foundation can be criticized—the "on the merits" principle does not. Thus, this expansion risks sublimating the strong-opportunity principle to the efficiency principle, rather than giving them an equal weight, in the

91. *See, e.g.*, Fuller, *supra* note 20, at 382 (arguing that adversarial participation in presenting proofs and arguments is an optimal, and perhaps an essential, feature of adjudication); Solum, *supra* note 7, at 308–09 (arguing that party participation is a lexically superior right). *But see* Bone, *supra* note 63, at 236–79, 288 (arguing that a right of participation is not required on normative grounds and that "the extent of an individual's right to participate in litigation should vary with the type of case").

process of pragmatically blending or lexically ordering principles that shape procedural rules.[92]

More generally, I fail to see how the expansion of both principles to their prophylactic maximum helps to resolve the question about the shape of procedural rules. We do not avoid any of the difficulties in shaping procedural rules if we stick with the original core principles of providing, all things being equal, strong opportunities to participate and the most efficient procedures possible. This conclusion holds true as we add in additional procedural principles, such as fostering settlements, providing open access to the courts, and so on.

Finally, in light of the trend in American litigation away from adjudicated resolutions,[93] it is not obvious that insisting on a right to fully participate in presenting proofs and reasoned arguments is even a useful principle to use. Our experience with settlement and other methods of alternative dispute resolution suggests that the relevant principle should not be the litigant's opportunity to participate in shaping the court's adjudicated decision, but the litigant's broader and more amorphous opportunity to participate in shaping the outcome of a legal dispute. Moreover, in a mass society, the prevalence and necessity of class actions[94] and other mass-resolution processes (such as multidistrict litigation[95]) further undercut the notion that each litigant must have a full opportunity to participate in presenting proofs and arguments. In these contexts, litigants might not enjoy any right to participate in presenting individualized proofs and arguments. Insisting on a full opportunity to litigate vaults into a privileged position a principle that few litigants insist on when they are presented with opportunities to exit into other dispute resolution mechanisms; nor is it one that our procedural system honors in mass controversies.

Obviously, the relationship between "on the merits" procedural rules and non-litigated or mass-litigated resolutions is a complicated one. To some extent, "on the merits" rules can increase the likelihood of non-litigated outcomes[96]—albeit not always in a positive way, as the example of a $25,000 settlement shows. Likewise, the expense of individual litigation under the "on the merits" principle helps to establish the need for mass resolutions.[97] But focusing on the litigants' opportunity to partici-

92. Indeed, the losing battle that the "on the merits" principle is fighting against the use of more efficient procedures, *see supra* notes 5, 43, 46–48 and accompanying text, could be explained in part because of this theoretical imbalance between the two principles.

93. *See supra* notes 44–45 and accompanying text.

94. *See* FED. R. CIV. P. 23.

95. *See* 28 U.S.C. § 1407 (2006).

96. *See supra* notes 51–53 and accompanying text.

97. *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (Posner, J.) (noting that the situation "in which the rationale for [using class actions] is most compelling" occurs when "individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation"); *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997).

pate in presenting proofs and arguments to an adjudicator presupposes a particular view of the value and preeminence of adjudicated resolutions that is at odds with the realities of modern litigation.

In the end, the "on the merits" principle owes its staying power to three important and related impulses: we want cases decided accurately, we want them decided without procedural trickery affecting the outcome, and we want them decided with input from those affected. Neither of the first two impulses is precisely what the "on the merits" principle delivers. Providing litigants a full opportunity to participate does not necessarily make case resolutions more accurate, and the costliness of a full opportunity to participate creates ample room for the type of "trickery" that can influence outcomes. Although I am somewhat skeptical of an excessive reliance on the first two impulses in shaping procedural rules—because they assume a correct pre-procedural answer to a legal dispute[98]—it is better to place them directly on the table in any pragmatic horse-trading or lexical ordering that shapes rules, rather than letting the "on the merits" principle act as their proxy. As I have just argued, the same is true of the third impulse, which is poorly served by the overprotecting claim that each litigant deserves a full opportunity to participate in presenting proofs and arguments.

Nonetheless, the "on the merits" ideal does summarize, in a pithy way, some of the basic aspirations of our procedural system. Its "slogan value" might itself be an argument for keeping the principle around if no better principle could be found to replace it. I consider whether it is possible to restate the principle in the next section.

C. Replacing the "On the Merits" Principle

In light of the foregoing discussion, let me suggest a new standard that ought to replace the "on the merits" principle: the "fair outcome" principle. It can be stated as follows:

> Lawsuits should be decided according to procedural rules that are designed, interpreted, and implemented to give the parties the maximal opportunity to participate in shaping an outcome that can be sustained upon critical scrutiny.

This "fair outcome" principle differs from the "on the merits" approach in several ways. First, it eliminates the "on the merits" principle's second clause,[99] which prohibited rule-makers or judges from considering the consequences that ensuring a full opportunity to litigate cause. Second, it replaces the word "full" with the admittedly ambiguous word "maximal." The combination of these two changes requires rule-makers and judges who design, interpret, and implement procedural rules to con-

98. *See supra* notes 7–19 and accompanying text.
99. *See supra* text preceding note 20, note 23 and accompanying text.

sider the consequences of their decisions on the behaviors of litigants in the case and on the capacity of others to access the court system; it further requires them to factor those consequences into the design of procedural rules and their interpretation and implementation in specific cases. Third, a "fair outcome" definition moves from the purely procedural approach of the "on the merits" principle, which gives the parties a right to participate in the process by which the judge decides the case, to an approach that includes both "procedural" and "substantive" elements: the justness of the outcome matters in addition to the process by which the outcome is achieved. Fourth, the relevant outcome is not necessarily a litigated outcome as the "on the merits" principle presupposes; rather, it is any outcome, including settlement, that is fair (understood here to mean an outcome that can be sustained upon critical scrutiny[100]). Procedural rules can be constructed with other end games than individualized adjudication in mind.

Because the "fair outcome" approach is intended to serve as a replacement for the "on the merits" approach, it might be subject to the criticism that it tries to do too much, and thus becomes meaningless. Indeed, it can become the vessel into which those who believe that procedure should be about accuracy in outcomes,[101] those who believe that procedure must avoid technical traps,[102] those who believe that guaranteeing participation is the fundamental goal of process,[103] and those who want procedural rules to be constructed to foster more settlements[104] can all pour their preferences. It is true that, on its own and shorn of any real-world context, the "fair outcome" principle settles little about the content of procedural rules. Its blending of procedural and substantive aspects also seems out of line with much modern thinking, which more sharply distinguishes the roles of process and substance. It refuses to commit clearly to one side or the other in the debate over whether process has inherent value apart from substance.[105] It is also subject to the criticism

100. The phrase "an outcome that can be sustained upon critical scrutiny" is a close paraphrasing of a concept of Amartya Sen. *See* SEN, *supra* note 62, at 180. I will discuss Professor Sen's theory in detail shortly. *See infra* notes 109–16 and accompanying text.

101. *See, e.g.*, DWORKIN, *supra* note 63, at 80–81.

102. *See supra* notes 8–13 and accompanying text.

103. *See supra* note 91 and accompanying text.

104. *See, e.g.*, Michael Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L.J. 727, 769–71 (2005) (discussing ways in which pleading rules might be designed to enhance settlement).

105. The prevailing assumption among many people who do not consider procedural issues deeply, and even among some who do, is that procedure exists only to ensure that substantive values are transmitted into adjudicated results as seamlessly as possible. This proposition sees "the relation of rules of practice to the work of justice . . . to be that of handmaid rather than mistress." *In re* Coles, (1907) 1 K.B. 1, 4; *see also* Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938). For others, however, procedure encompasses important independent values that counterbalance the policies of the substantive law. *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 939 (1999) ("Although the matter is controversial, many proceduralists believe that litigants enjoy process-based procedural rights unrelated to outcome quality.").

that I leveled against the "on the merits" principle: that it is insufficiently supported by any theory of morality or justice.

Let me respond to these criticisms with a brief defense that better explicates the working of the "fair outcome" principle. To begin, I intend the principle as an emendation to the idea of corrective justice, which typically presupposes the legal system's costless (in both senses of that word: without expense and without error) ability to correct legal wrongs.[106] Both factually and legally, however, real-world determinations about whether a person has committed a wrong face epistemological difficulties.[107] Procedural rules cannot completely overcome this problem (no system of procedure leads to perfectly accurate outcomes in all cases), and they can even exacerbate the problem (litigation expenses and error rates can cause behaviors that lead to undercorrection or overcorrection of wrongs). In addition, the manner by which we inquire into whether a wrong has occurred and how to correct it says something about the values that a society holds dear[108]—values that are independent of the arguably universal impulse to correct wrongs. In accounting for these real-world concerns, it is not possible to shape a principle more specific than a "fair outcome" principle.

It probably does not lie in the mouth of advocates of the "on the merits" principle to complain too loudly about indeterminacy, for the "on the merits" ideal is itself a skeletal notion. That matter aside, the criticism of the indeterminacy of a "fair outcome" principle reflects a desire for certainty in procedure that is associated with the type of moral and political philosophy that Amartya Sen has described as "transcendental institutionalism."[109] Represented in modern form by such thinkers as Kant and Rawls, transcendental institutionalism seeks to specify socially just institutions and the rules by which these institutions operate, and then trusts that the institutions will deliver just outcomes. Put differently, transcendental institutionalism does not concern itself directly with consequences. It assumes that just institutions will yield just outcomes; therefore, all the philosophical energy goes into the project of specifying the conditions under which perfectly just institutions operate. Sen contrasts that approach with its standard philosophical alternative: consequentialism (most famously represented by utilitarianism), in which the

106. *See supra* note 79 and accompanying text.

107. *See supra* note 80 and accompanying text.

108. *See* McNabb v. United States, 318 U.S. 332, 347 (1943) (Frankfurter, J.) ("The history of liberty has largely been the history of observance of procedural safeguards."). *See generally* MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY (1986) (suggesting that nations with different attitudes toward the organization of authority and the regulation of human behavior have different procedural norms); John C. Reitz, *Political Economy as a Major Architectural Principle of Public Law*, 75 TUL. L. REV. 1121 (2001) (suggesting that the major "architectural" features of a country's laws and legal system can be derived from the notion of "political economy").

109. SEN, *supra* note 62, at 5–8.

measure of justice is the quality of the results, or "culmination outcomes," that the decision-making process yields.[110]

Sen's approach, which he labels either the "realization-focused" or "comprehensive outcome" approach,[111] straddles the traditional divide. Outcomes matter, but not to the exclusion of the process by which we arrive at those outcomes.[112] Particularly critical to Sen is the idea of capacity, or freedom to act; freedom, which concerns the process by which we achieve an outcome rather than the outcome itself, is not the absolute measure of justice, but in general more freedom is preferable to less.[113] He also argues for a social-choice or comparative approach to justice, in which disagreements over comprehensive moral theories should not prevent us from remedying evils that different comprehensive theories can condemn as unjust, merely because people cannot agree on the proper comprehensive theory or on whether other situations require a remedy.[114] Reason helps to achieve these often partial or incomplete agreements. Although reason does not necessarily lead to a single correct solution about how to act, it does impose a serious obligation to make "choices . . . on reasoning that we can reflectively *sustain* if we subject them to critical scrutiny."[115] As an aspect of employing reason, Sen appeals to the idea of the "impartial spectator"—a person whose outsider perspective prevents the discussion from becoming entirely captured by parochial interests.[116]

Sen's theory of justice underlies the "fair outcome" principle, which considers both the quality of the procedures by which a dispute's outcome is decided and the quality of the outcome these procedures deliver. The consequences of procedural rules can never be ignored. But it is equally important to consider whether, independent of consequences, the rules provide the affected parties an opportunity to participate in shaping outcomes; giving people the capacity to participate is a valuable, even if not an absolute, right that ought to be maximized to the extent possible. Sen's theory and the "fair outcome" principle both emphasize the danger of assuming that good procedures will deliver good results; they also emphasize the danger of assuming that good results justify the procedures that create them. They recognize that there might be a range of outcomes that can be justified by reason, not simply the single outcome

110. *Id.* at 7, 215–16.
111. *Id.* at 10, 22–23, 215–17.
112. Sen links the idea of the comprehensive outcome to Indian philosophy, which distinguishes between *niti*—the performance of duty regardless of consequence—and *nyana*—the regard for consequences as an aspect of determining the moral quality of a person's actions in the world. He sees his theory as being consistent with the idea of *nyaya*. *Id.* at 20–22, 208-14.
113. *Id.* at 225–52, 299–301.
114. *Id.* at 87–113.
115. *Id.* at 180.
116. *Id.* at 44–46.

that most precisely meets the demands of corrective justice.[117] In considering the fairness of an outcome and the procedures that bring them about, Sen's theory and the "fair outcome" approach require that we try, to the extent we can, to leave parochial interests of plaintiffs or defendants aside and consider matters from a more objective and impartial frame of reference. They also leave open the possibility of thinking about procedural rules in a broader way: not just as the way by which we adjudicate disputes, but rather as the way by which we *resolve* disputes.

Unlike the "fair outcome" principle, the "on the merits" principle fails under Sen's theory of justice. In the way in which I defined it, the "on the merits" principle leans far too heavily on process (guaranteeing a full opportunity to participate by presenting proofs and arguments) and far too lightly on the consequences of that opportunity for other litigants or putative litigants. To the extent that the principle instead can be understood to require accurate decisions,[118] it has the opposite difficulty, focusing too much on outcomes and too little on the processes that bring those outcomes into existence. In either case, the "on the merits" principle mistakenly weds procedure to adjudicated outcomes, when the reality is that legal procedure most often guides cases toward settlement.

Let me make two final notes about the "fair outcome" principle: First, the principle almost certainly requires a fair degree of judicial discretion. As I have discussed, discretion imposes costs,[119] and one of the things that rule-makers and judges must consider in designing, interpreting, and implementing rules under a "fair outcome" principle is the cost of discretion. But some discretion is necessary to ensure that strict adherence to process does not frustrate the realization of just outcomes.[120] Second, the "fair outcome" principle strikes me as lexically superior to all others. Part of the reason is its breadth: its requirement of reasoned scrutiny is capacious enough to allow rule-makers and judges to consider numerous ideas—including efficiency, accuracy, and participation—that already dominate procedural discourse. Part of the reason is the principle's tie to a comprehensive theory of how justice should be advanced.

The "fair outcome" principle can certainly be criticized, for it is not perfectly consistent with any of the standard moral and political theories—such as those of Kant, Bentham, Mill, or Rawls. Nor does it align perfectly with rational-choice economic theory. But it works well within

117. For instance, in a world of uncertainty, a settlement for fifty cents on the dollar might well be a rational and fair result, even though the theory of corrective justice requires an all-or-nothing response to an allegation of wrong.

118. *See supra* note 7 and accompanying text.

119. *See supra* text accompanying note 55.

120. In this regard, Pound was surely right, even if he went too far in the direction of dismissing the value of how we achieve justice—in other words, the value of process. *See supra* notes 8–13 and accompanying text; *cf.* David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1991–97 (1989) (arguing that judicial discretion and the disuniformity it creates are not necessarily undesirable despite their costs).

Sen's inclusive, comparative framework for advancing justice. Whether this theory of justice stands the test of time remains to be seen. Whether it does or not—and I see great merit in his theory—the advantage of the "fair outcome" principle over the "on the merits" principle is its anchoring in a significant theory of justice. If nothing else, consideration of whether the "fair outcome" principle is the best procedural principle relocates the discussion about legal process to the larger discussion about the meaning of justice and the way in which process must contribute to achieving it.

CONCLUSION

It is tempting to close by showing how a "fair outcome" principle solves some nettlesome problems of procedural reform—perhaps, to take a presently raging controversy, to decide once and for all how much specificity should we expect of pleadings.[121] But I will resist the urge to do so. One reason is my desire to posit the principle and lay it open for discussion, without necessarily sweeping it up in the particular political controversies of the moment. Another reason is my sense that the "fair outcome" principle probably does not, by itself, provide an answer to the question about the specificity of pleadings. The principle requires that we step back from particular questions of design, interpretation, or implementation to examine how any given procedure fits into the procedural and legal system as a whole. It requires us to think broadly, without undue consideration of parochial interests, about what goals we can rationally justify and what processes we as moral agents should or should not use in advancing them. My argument here is only that a "fair outcome" principle should be our primary guide as we think about procedural reform.

121. *See supra* notes 32–35 and accompanying text.