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PRECLUDING APPEALS

Judith Resnik††

Over the past forty years, we have vastly increased our information about courts. New methods of recordkeeping have led to a wealth of statistics about court processes.¹ This new information has, in turn, increased concern about burgeoning litigation rates and the limits of judicial and litigants' resources. The resulting perceptions of congestion and of systemic malfunctioning have led, in general, to two related developments, each pointing in a different direction. The first is a cutback—limiting access to adjudication by developing expansive preclusion doctrines. The second development is an increase in adjudicative tribunals and thus in the opportunities to have many issues decided by more than one set of decisionmakers.

As to the first development, the cutback, the Supreme Court has led the way. During the past several years, in diverse fields of law, the Court has narrowed litigation opportunities. A series of examples are cases involving the relationship between state and federal litigation. Opinions such as *Stone v. Powell*,² *Wainwright v. Sykes*,³ and *Engle v. Issac*⁴ all involve interpretations of the habeas corpus act

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¹ The sophistication of court recordkeeping has increased substantially since the creation of the Administrative Office of the United States Courts in 1939. See, e.g., DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. (1984) (appearing with JUD. CONF. U.S. PROC. REP. 1984)). See also STATISTICAL ANALYSIS & REPORTS DIVISION, ADMIN. OFF. OF THE U.S. CTS., FEDERAL JUDICIAL WORKLOAD STATISTICS: DURING THE TWELVE MONTH PERIOD ENDED DECEMBER 31, 1983 (1984) (for federal data); COURT STATISTICS & INFORMATION MANAGEMENT PROJECT, NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1979 (1984) (for state data).

² 428 U.S. 465 (1976) (when state has provided opportunity for full and fair litigation of fourth amendment claims, state prisoner may not obtain federal habeas relief on ground that evidence was obtained through unconstitutional search and seizure).

³ 433 U.S. 72 (1977) (absent cause and prejudice, failure to make timely objection to admission of inculpatory statement, as required by state rule, precludes federal habeas review).

⁴ 456 U.S. 107 (1982) (absent cause and prejudice, failure to raise timely constitutional objection to jury instructions in state court precludes federal habeas review).

for state prisoners; in all, the Court precluded habeas review.⁵ A second line of cases includes *Allen v. McCurry*⁶ and *Migra v. Warren City School District Board of Education*,⁷ both of which held that state criminal or civil litigation precluded federal civil rights litigation. Another exemplary opinion is *Kremer v. Chemical Construction Corp.*,⁸ which limited the number of occasions for factfinding in title VII cases. Within a unitary framework, the federal system, this theme has been repeated. In *United States v. Frady*,⁹ the Court narrowed decisionmaking opportunities for federal prisoners seeking habeas relief. In *United States v. Raddatz*,¹⁰ the Court permitted a limited role for federal judges who adopt magistrates' recommended opinions. Finally, the *Pullman-Standard v. Swint*¹¹ opinion set forth a minimal scope of appellate review of federal trial judges' factfinding. All of these cases involved multiple opportunities for litigation in federal courts, federal and state courts, or courts and agencies. In every case, the Court chose less decisionmaking and fewer, rather than more, procedural opportunities.¹²

At the same time that the cutback, caused by new interpretations of preclusion doctrines, is occurring, there is also an expansion of decisionmaking opportunities. Across the country, in both state and federal systems, the number of adjudicatory institutions and personnel auxiliary to courts is growing. Today, business in so-called "alternative dispute resolution" is booming. Medical malpractice panels, mandatory court-annexed arbitration schemes, magistrates, special masters, and agency hearing officers proliferate.¹³ These new adjudicatory facilities are being created with the

⁵ See *supra* notes 2-4.

⁶ 449 U.S. 90 (1980) (federal litigation under 42 U.S.C. § 1983 may be precluded by state court criminal judgment).

⁷ 104 S. Ct. 892 (1984) (state court judgment has same preclusive effect, with respect to 42 U.S.C. § 1983 claim, in federal court as judgment would have in state court).

⁸ 456 U.S. 461 (1982) (preclusive effect given to state court decision holding state agency's rejection of title VII claim as neither arbitrary nor capricious).

⁹ 456 U.S. 152 (1982) (to obtain collateral relief based on claim of unconstitutional jury instructions not objected to at the time, federal prisoner must show both cause and actual prejudice, rather than plain error).

¹⁰ 447 U.S. 667 (1980) (federal district judge, considering "de novo" the findings of a magistrate made pursuant to 28 U.S.C. § 636(b), is not required to rehear testimony on which magistrate based the findings if the findings are accepted).

¹¹ 456 U.S. 273 (1982) (under § 703(h) of 1964 Civil Rights Act, question of intent is one of fact, to be reviewed by federal appellate courts under the clearly erroneous standard) of FED. R. CIV. P. 52(a).

¹² There are a few exceptions. See, e.g., *Bose Corp. v. Consumers Union*, 104 S. Ct. 1949 (1984) (authorizing independent appellate review of trial record in libel cases); *McDonald v. City of West Beach*, 104 S. Ct. 1799 (1984) (an unappealed arbitration award is not preclusive in a subsequent federal civil rights action).

¹³ See generally DISPUTE RESOLUTION (Fall 1984) (summary by ABA Special Comm. on Dispute Resolution of alternative dispute resolution programs throughout nation). California's mandatory arbitration is analyzed in D. HENSLER, A. LIPSON & E. ROLPH,

hope that, by siphoning off some work of judges and shifting it elsewhere, disputants will not request deliberation by judges. But, to avoid political and legal battles (about the constitutionality of limiting access to jury trials and to "real" judges¹⁴), these auxiliary institutions have remained just that—add-ons, not replacements. Ironically, many of the "alternatives" themselves add tiers or levels of decisionmaking—from arbitration to jury, from magistrate to federal judge, from state agency to federal agency, and from agency to court. At each step along the way, questions of preclusion arise. Which tier's decision should endure? How much power should the first tier have?

The Supreme Court has been answering this new array of preclusion questions by developing "transubstantive rules."¹⁵ Regardless of the substantive issues, the capacity of first tier decisionmakers, or the identity of claimants, the Court has almost always¹⁶ taken a unidimensional approach and precluded additional decisionmaking.

The logical extension of the Court's preclusion jurisprudence recently became plain when Justice Rehnquist, in a speech at the University of Florida College of Law,¹⁷ commented that "we have an obsessive concern that the result reached in a particular case be the right one."¹⁸ Arguing that we are paying too great a price, "in terms of lawyers' time, speedy disposition and finality," the Justice urged that "perhaps, speaking of the federal system, the time has come to abolish appeal as a matter of right from the district courts to the courts of appeals, and allow such review only when it is

JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR (1981) and in E. ROLPH & D. HENSTLER, COURT-ORDERED ARBITRATION: THE CALIFORNIA EXPERIENCE (1984).

¹⁴ Compare *Parker v. Children's Hosp.*, 483 Pa. 106, 394 A.2d 932 (1978) (requirement that claimant must first arbitrate before requesting relief in courts, authorized to undertake a de novo review, does not usurp court's power under Pennsylvania Constitution) with *Matos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980) (provision of original exclusive jurisdiction to arbitration panels is unconstitutional because of resulting oppressive delay and infringement on the right to trial by jury) (both cases analyze Pennsylvania's Health Care Services Malpractice Act, 40 PA. CONS. STAT. ANN. § 1301.101 to .1006 (Purdon 1982)).

¹⁵ This term comes from Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975).

¹⁶ See cases cited *supra* note 12; see also *United States v. Mendoza*, 104 S. Ct. 568 (1984) (nonmutual offensive collateral estoppel not to be applied against the United States government); *United States v. One Assortment of 89 Firearms*, 104 S. Ct. 1009 (1984) (collateral estoppel does not automatically bar civil proceeding against an individual acquitted on related criminal charges).

¹⁷ Address by Justice William Rehnquist at the 75th anniversary of the University of Florida College of Law and the Dedication of Brnton-Geer Hall (Sept. 15, 1984) (on file at *Cornell Law Review*).

¹⁸ *Id.* at 9.

granted in the discretion of a panel of the appellate court.”¹⁹ Shortly thereafter, Justice Rehnquist’s theme was echoed by United States Solicitor General Rex Lee, who stated that “there is nothing in the Constitution and nothing in common sense that says that decisions of an appellate court are more likely to be right than a district court.”²⁰ Solicitor General Lee also urged the abolition of appeal-as-of-right.²¹ Justice Rehnquist and Solicitor General Lee have addressed the questions implicit in the Court’s preclusion cases: should we ever provide more than one opportunity for decisionmaking? Should we abolish appeals?

How are we (or the justices) supposed to make choices—about whether to preclude or to permit more than one opportunity for adjudication? Because perceptions of court overload have propelled us into structuring diverse procedural arrangements, the question of limits—of preclusion—has particular import today and is likely to dominate discussions of procedure for the next decade. Below, I outline an alternative to the Supreme Court’s approach to preclusion. First, I survey procedural systems in the United States and describe several models of decisionmaking. Thereafter, I explore features of these systems to illuminate the rationales behind them so as to assess whether and under what circumstances redundant decisionmaking is appropriate.

The first and simplest model is what I call a “Single Judge/Finality Model” of adjudication. The word judge here is used as a generic to include not only judges but all adjudicators, jurors, magistrates, arbitrators, masters, and agency hearing officers. In this model, the first tier decisionmaker issues a decision which endures for all time. There is no appeal, no review, and no reconsideration—ever.

The Single Judge/Finality Model was and still is, to some extent, common in the United States. In the federal courts, Congress did not establish a statutory right of appeal independent of the amount in controversy until 1891.²² At least one state still prohibits appeal from its general jurisdiction court when the amount in controversy is less than \$300.²³ Several states also have small claims

¹⁹ *Id.* at 10.

²⁰ Overend, *Right to Choose Cases Called Way to Ease Caseloads*, L.A. Times, Dec. 23, 1984, Part I, at 3, col. 2 (quoting U.S. Solicitor General Rex Lee).

²¹ *Id.*

²² The Judiciary Act of 1789 permitted review in civil cases only when the amount in controversy exceeded a specific sum; the Act made no provision for appeals in criminal cases. The Judiciary Act of 1789, ch. 20, §§ 21-22, 1 Stat. 73, 83-84. In 1891, Congress created an intermediate appellate court and permitted appeals in all cases. The Judiciary Act of 1891 (Evarts Act), ch. 517, § 2, 26 Stat. 826.

²³ W. VA. CONST. art. VIII, § 3 (“The [Supreme Court of Appeals] shall have appel-

courts in which appeal-as-of-right is not always available.²⁴ Despite many opportunities, the Supreme Court has steadfastly declined to announce that appeal-as-of-right is constitutionally compelled.²⁵ And even when there is a second tier, some decisions are viewed as solely within the prerogative of the first tier and thereby not reviewable. Many jury decisions fall within this category.

The Single Judge/Finality Model is an extreme. This model concentrates decisionmaking power in a single individual, or set of individuals, and provides few mechanisms to supervise such persons. Correction of error cannot occur, nor can problems of bias be readily addressed. Consistency becomes problematic, and the possibility of developing legal norms is limited. The shortcomings of the Single Judge/Finality Model were evidently apparent to those in Congress who structured the three-tiered, appeal-as-of-right system to which we are accustomed today. In the 1880s, when Congress debated whether to create intermediate courts of appeal, some members of the Congress spoke of judicial despotism and of the need to constrain excesses of power.²⁶ Those debates resulted in an alternative model of adjudication which I call the "Single Judge plus Limited Review Model." Today, this model dominates the procedural landscape.

The Single Judge plus Limited Review Model increases opportunities for persuasion by offering litigants a new audience. This model provides the possibility (typically at litigants' behest) of a second decision by individuals other than the author of the first. The model diffuses the power of the first tier. The hierarchical system allows decisions of the second or third tier to be determinative. The premise is either that members of the superior tier are deemed better able to pronounce, to interpret, or to understand, or that the structure of the decisionmaking process produces better decisions. If the second tier functions well, it has the capacity to rectify disparities and inequities produced in the first tier and to promote consis-

late jurisdiction in civil cases at law where the matter in controversy . . . is of greater value or amount than three hundred dollars . . .").

²⁴ See, e.g., ASS'N OF MUN. COURT CLERKS OF CAL., SMALL CLAIMS MANUAL COMM., MANUAL OF PROCEDURES IN SMALL CLAIMS CASES 12-13 (1978) (judgment in small claims court is conclusive upon plaintiff).

²⁵ Jones v. Barnes, 103 S. Ct. 3308, 3312 (1983) ("There is, of course, no constitutional right to an appeal . . ."); Griffin v. Illinois, 351 U.S. 12, 18-20 (1956) (once states make appeals available, states must provide poor litigants with access to appeals).

²⁶ E.g., 21 CONG. REC. 3404 (1890) (Mr. Culberson, of Texas, debating legislation which became the Evarts Act, stated: "I have a supreme desire to witness . . . the overthrow and destruction of the kingly power of district and circuit judges."). See also Hill & Dent, Report of Committee on Judicial Administration and Remedial Procedure, 17 Rep. A.B.A. 336, 339 (1894) ("Under the [pre-1891] system, the District Judge or Circuit Judge . . . was the anachronism of the century. . . . He was the depository of more arbitrary one-man power than any other official known to American public life.").

tent norm enforcement. The Single Judge plus Limited Review Model compromises other concerns, often thought important to a legal system. For example, finality is delayed, although not ignored; once an appeal is concluded, additional litigation is precluded. However, some time and money are spent in deference to the perceived desirability of responding repeatedly to individuals' complaints.

There are many other models of adjudication, such as the "Single Judge plus Same Judge Model" (in which the very same person reconsiders the decision) and the "Single Judge plus Unlimited Review Model" (a *de novo* system). However, for purposes of this discussion, I will skip to another extreme. In a few categories of cases, both federal and state courts, and sometimes federal and state agencies, are all authorized to participate in decisionmaking about specific issues. Two examples of such complex models are (1) litigation under title VII, which prohibits employment discrimination on the basis of race, religion, sex, or national origin,²⁷ and (2) federal habeas corpus jurisdiction, which authorizes federal judges to consider state prisoners' claims of unconstitutional confinement.²⁸ Both of these schemes were created by Congress; both contemplate that litigants begin in state adjudication systems, and both authorize litigants to continue onto the federal courts.

Title VII, in particular, permits an elaborate arrangement: a litigant must first go to a state agency, then to a federal agency, the Equal Employment Opportunity Commission (EEOC), and only after both avenues have been explored may the litigant file a lawsuit in a federal court.²⁹ The statute authorizes a federal court to then decide the case,³⁰ and the Supreme Court has interpreted this statute to mandate *de novo* decisionmaking by the federal court.³¹ Thus, under title VII, a claimant may receive three factfinding decisions on a discrimination charge. Congress set up a serial arrangement, from state agency to federal agency to federal court. Furthermore, once in federal court, a litigant may also seek limited appellate review from the court of appeals and the Supreme Court.

This model is a "Single Judge/Different Forum plus Unlimited Review Model," in which each forum may make new decisions about

²⁷ 42 U.S.C. § 2000e-1 to e-5 (1982).

²⁸ 28 U.S.C. § 2254 (1982).

²⁹ 42 U.S.C. § 2000e-5 (1982). The EEOC must give "substantial weight" to state agency findings, and the EEOC decision is admissible in the federal court proceeding. *Id.*

³⁰ *Id.* § 2000e-5(f)(1).

³¹ *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 465 (1982) (referring to "statutory grant of *de novo* federal review"); *Chandler v. Roudebush*, 425 U.S. 840, 863 n.39 (1979).

the same dispute. For simplicity, I denominate this model the "Different Forum Model." Unlike the Single Judge/Finality Model, the Different Forum Model limits the power of the first tier, increases the opportunities for litigants to persuade, and enhances the possibility of revision. On the other hand, this model substantially increases the time from the beginning of a dispute to its end, and resource expenditures are great. In Justice Rehnquist's terms, this model pays a price for its procedural elaborateness, for its diffusion and reallocation of power.

Why have all these different models of adjudication? Why not choose only one model and then adopt it uniformly? Examination of various aspects of the models illuminates some of the reasons for the existence of the many different models. Across procedural models, it is possible to identify common elements, differently weighted in the various models. First, every procedural model, from the simplest Single Judge/Finality Model to the most elaborate title VII scheme, is designed to permit individuals to be heard. These *litigant persuasion opportunities* exist for at least two reasons: to provide courts with information and to express political beliefs about the predicates for legitimate state action against individuals. Litigant persuasion opportunities could be conceptualized as mechanisms for the expression of consent, were we to adopt such a theory of the democratic state.³² Persuasion opportunities could be understood as providing the dialogue prerequisite to compulsion³³ or as the occasions upon which individuals participate in the events affecting their lives. Whatever our political views, litigants' persuasion opportunities are central to all procedure in the United States.

A second feature of our litigation process is *litigant autonomy*. We offer individuals a great array of choices, and we believe in freedom of choice. We permit individuals to decide whether to initiate lawsuits, how to present information, how to structure cases, and whether to appeal. While forfeiture may be invoked as a penalty, procedural routes are rarely mandated *in advance*.

Turning from litigants to decisionmakers, a third feature (common to all models) is a mechanism for *allocating decisionmakers' power*. Most models provide for both concentration and for diffusion or reallocation of that power. Examples of power diffusion include the jury system, put into place because of the perceived desirability of constraining the power of the judiciary, and the appellate system, which imposes a second layer of judges, authorized to supervise a

³² See M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 104-32 (1982).

³³ See B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 347-78 (1980); see also FISS, *The Supreme Court, 1978 Term Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 13-14 (1979).

lower tier's work. Sometimes power is not only diffused, but it is also reallocated. When a second set of decisionmakers has the authority to make decisions afresh (*de novo*), power is shifted from the first to the second decisionmaking body, which may even be kept ignorant of the decisions of the first tier.³⁴

In part to limit the power of decisionmakers, we require them to act in full view, to make their decisions public, and often to state reasons for those decisions. Adjudicators must also reach conclusions impartially, free from bias and without prejudgment of the issues. Thus, fourth and fifth, we find that the features of *impartiality* and *visibility* are talismanic of adjudication, although the techniques for ensuring impartiality have varied substantially over time³⁵ and the rationales for why we insist on visibility have led to confusion about what stages of litigation must be open to the public.³⁶

Another requirement of decisionmakers is that they act *rationaly* to enforce public norms. We insist upon deliberate, self-conscious decisionmaking. Recently, a judge in a New York City court flipped a coin to determine whether to sentence an individual to twenty or thirty days in jail.³⁷ The public was incensed. Although the coin flip produced an outcome in an inexpensive and prompt fashion, the judge was censured. His critics did not complain that he had reached the wrong decision. Rather, they complained about process. The coin flip offended this society's commitment to ration-

³⁴ See, e.g., MASS. ANN. LAWS ch. 218, §§ 26, 26A, 27A (Michie/Law Coop. 1974 & Supp. 1984). The Massachusetts statute permits a defendant, charged with certain crimes, to elect either a bench or jury trial. A defendant who opts for a bench trial retains a right to a *de novo* jury trial at which the jury is not informed of the first proceeding or its outcome. See *Justices of Boston Mun. Court v. Lydon*, 104 S. Ct. 1805, 1808 (1984) (describing Massachusetts two-tier system). See also CAL. CIV. PROC. CODE §§ 1281-82 (West 1982) (decision in nonbinding arbitration not admissible at *de novo* trial).

³⁵ See, e.g., CONN. GEN. STAT. ANN. § 51-183(c) (West Supp. 1984) (providing that "[n]o judge of any court who tried a case without a jury in which a new trial is granted, or in which the judgment is reversed by the supreme court, may again try the case"); N.Y. CRIM. PROC. LAW § 230.20 (McKinney 1982) (judge may be removed only upon showing of good cause); Ratner, *Disqualification for Judges for Prior Judicial Actions*, 3 How. L.J. 228, 232-38 (1957) (discussing state statutes, some of which prohibit judges who participated at one stage of a proceeding and were reversed, from making further decisions). See also Vershen, *Vicinage*, 30 OKLA. L. REV. 1, 141-42 (1977) (jurors' extrajudicial knowledge of disputes both praised and condemned).

³⁶ Although the Supreme Court has not held that all court proceedings must be open to the public, the language mandating open criminal proceedings may also embrace civil cases. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-75 (1980) (holding that public has right of access to criminal court proceedings under first and fourteenth amendments); *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 101 F.R.D. 34, 38-43 (C.D.Cal. 1984) (strong common law presumption of public access to pretrial documents in civil proceedings).

³⁷ See Shipp, *Friess Is Barred From Ever Being New York Judge*, N.Y. Times, Apr. 7, 1983, at B3, col. 1.

ality.³⁸ Whether or not a judge's mental processes, when pronouncing a sentence of twenty or thirty days, actually amount to anything more than a mental coin flip, the community wishes judicial rulings to appear to be the product of contemplative, deliberative, cognitive processes.³⁹

Turning from decisionmakers to decisionmaking, a seventh feature is *finality*. We hold dear the notion that our dispute resolution can, without undue delay, issue a decision that will close debate. Yet the tension between concentration and diffusion of power is mirrored by the tension between finality and another feature: *revisionism*. The importance placed upon the ability to revise decisions comes from several sources: the hopes of correcting error, of altering outcomes because of changed circumstances, of imbuing some decisions with more meaning by having them made repeatedly by ever more prestigious actors, of giving individuals a sense of having been fully and fairly heard.⁴⁰

Another procedural feature, in tension with revisionism and in tandem with finality, is *economy* (sometimes described as the "administration of justice"). The goal is that the system produce results with the least possible expenditure of dollars, energy, and time. Economy is used here in the narrow sense of low direct costs. Resource conservation is a familiar and persistent motif in the literature of courts. Of late, as courts appear both overused and underproductive, interest in economy has increased.

Three final features are *consistency*, *differentiation*, and *ritual*. Procedural systems are supposed to treat like cases alike; *consistency* is the systemic analogue of the impartiality feature demanded of individual decisionmakers. Yet the many sovereignties and the geographic expanse of the United States make consistency particularly problematic. And, in fact, we tolerate an impressive quantity of frank legal discord. But despite its empirical absence, consistency continues to be viewed as desirable. Consistency is in tension with *differentiation*. We do not treat all cases alike, and we value treating cases differently. Even though we espouse the notion that all litigants deserve equal access to the courts, we have long accepted restricted access and the provision of different treatment for different kinds of disputes. Some cases are sent to administrative agencies, others to various courts, as disputes are distinguished in terms of

³⁸ The commission that censured the judge concluded that "[a] court of law is not a game of chance." *Id.*

³⁹ The commission explained: "The public has every right to expect that a jurist will carefully weigh the matters at issue and, in good faith, render reasoned rulings and decisions." *Id.*

⁴⁰ For discussion of the utility of revisionism, see Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

dollar value, nature of claim, and possible remedy or sanction. Differentiation enables us to express how much we care about categories of disputes. Legitimacy is derived from conferring decisionmaking authority over certain issues to special subsets of decisionmakers. Differentiation helps to identify important claims and to sanction the outcomes in those cases as "correct," or at "least better," than those that could be obtained without the distinctive process. Finally, there is *ritual*, by which I mean that adjudication in the United States has a particular stylized form and that some of the odd etiquette and strained, formal modes of conversation are designed to symbolize the import of the events and to sanctify the results. These elements are *features*, in that, at a descriptive level, they capture the workings of procedural systems. Those features are also *values* in the sense that they embody concerns about how procedure should work. These twelve valued features of adjudication in the United States are not, indeed could not be, always viewed as equally important. As noted, there are tensions among features, and the theme of tension is important.

Giving full expression to one feature often limits another. For example, consider finality and revisionism, two features of particular relevance to this symposium. Together, they command that the system conclude its work on a dispute inexpensively yet permit occasions for error correction, supervision of the first tier, and the possibility of reconsideration based upon changed circumstances or views, or simply because an issue is perceived to be so important that it should be thought about repeatedly. Finality and revisionism cannot simultaneously be achieved. We must compromise one in search of the other; we must decide whether to permit an individual to be heard again or to opt instead for closure.

Two points should be made clear. First, I do not claim that these valued features are the only concerns that drive procedural modeling. Political concerns as well as procedural values are central to modeling the processes for decisionmaking. For example, at times Congress has given or taken away federal court jurisdiction in response to the continuing struggle for power between Congress and the courts or between the federal government and the states.⁴¹ Further, it is plain that, when crafting litigation schemes, judges and

⁴¹ *E.g.*, Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44 (repealing prior act that had authorized appeals from certain circuit court judgments to the Supreme Court), in response to the Court's ruling in *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1867). Years later, Congress restored the Supreme Court's appellate habeas jurisdiction. Act of Mar. 3, 1885, ch. 353, 23 Stat. 437; *see also* Act of Mar. 3, 1891, ch. 57, § 5, 26 Stat. 827 (expanding the range of judgments directly appealable to Supreme Court); Act of Jan. 20, 1897, ch. 68, 29 Stat. 492 (noncapital criminal judgments not directly appealable to Supreme Court).

legislators are influenced by attitudes towards particular individuals or categories of disputes. Decisions about habeas corpus litigation not only express views about what procedural features are to be stressed but also indicate beliefs about the moral worthiness of criminal defendants and about the value of liberty. Procedures for civil rights litigation embody choices about the import of substantive rights as well as about what shape systems of adjudication should take.

Second, I am not suggesting that all effects of procedure are benign. Procedure can be used as a placebo to generate a false consciousness and to hide the absence of opportunities for genuine input. Imagine appellate judges who listen carefully to each party's arguments, ask questions, permit an opportunity for full discourse and then produce a decision. The parties may believe that they had a fair opportunity to present their case and therefore may be content with the decision. However, if those judges had written the opinion long before the parties had appeared and argued, then the oral hearing might satisfy the parties but mask the real lack of exchange, the absence of dialogue. Procedure can thus be used to enshrine the powers that be—by providing an aura of legitimacy to an impoverished decisionmaking process.⁴²

The potential for misuse of procedure exists at all times and in all procedural models. Those who seek to reduce opportunities for hearings, such as Justice Rehnquist and Solicitor General Lee, claim that the reduction is necessary to combat the misuse or overuse of process. Those who argue that greater opportunities are needed make a parallel argument: additional procedures provide some check on abuses, and one "cure" for the inadequacy of decisionmaking at one tier is a second hearing in another, less overloaded forum.⁴³

Even with these caveats, identification of the twelve features⁴⁴ permits us to understand that the different models of procedure exist to work out varying accommodations among the features. Spe-

⁴² Recent habeas decisions exemplify a variant of this theme. In decisions such as *Stone v. Powell*, 428 U.S. 465 (1976), *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Engle v. Isaac*, 456 U.S. 107 (1982), the Court maintained that the "great writ" was available whenever individuals claimed to be unjustly convicted. However, the creation of numerous procedural bars to decisions on the merits has resulted in precluding habeas corpus review in many cases. Thus, the promise of habeas corpus has become an empty one. Whether it will continue to have a palliative effect is unknown. See Resnik, *Tiers*, 57 SO. CAL. L. REV. 837, 874-963 (1984).

⁴³ See *supra* note 26.

⁴⁴ This list is neither exhaustive nor exclusive. Cf. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 916 (1979) (listing the eight goals of dispute resolution systems to be finality, obedience, efficiency, availability, neutrality, conflict reduction, and fairness).

cific models accentuate certain features at the expense of others. For example, in employment discrimination and prisoner cases, the designers of the procedures have opted for greater emphasis on revisionism and less on finality.⁴⁵

The decisions of earlier decades are to be contrasted with current trends. What is plain today is that the Supreme Court prefers simpler procedural models. In virtually all of the recent preclusion cases, the Court has chosen procedural contraction in the name of finality and economy.⁴⁶ The opinions of the Court now focus on these two valued features, almost to the exclusion of all others. And the result of the Court's preoccupation with economy and finality is that a third feature, power concentration, also dominates.

Let me clarify my criticisms. I do not claim that the Supreme Court has botched problems of statutory interpretation. The statutes (such as title VII and the habeas corpus legislation) are admittedly open-ended and indeterminate. Nor do I claim that the Court has usurped congressional prerogatives; the Court has acted and Congress has not (yet) affirmed or overturned those decisions. Finally, I do not argue that the United States Constitution requires different outcomes in those cases in which the Court has extended the reach of preclusion doctrines.

I am claiming that the Court is very much in the business of procedural modeling—but with attention paid only to the most limited rationales for the values that animate procedural designs. For example, when narrowing the decisionmaking available in habeas corpus cases, the Court has not explored the values that underlie the complicated decisionmaking of those statutory schemes and then determined that other value choices demand preclusion. Rather, the Court has contented itself with conclusory references to the adequacy of the procedures below and with hortatory discussions of the need for finality.⁴⁷ The Court's consistent refusal to

⁴⁵ See *supra* notes 29-31 and accompanying text (discussing procedure under title VII). For discussion of the reasons for distributing power in title VII cases among state agencies, federal agencies, and federal courts, see *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 470-76 (1982); *id.* at 494-501, 499 n.13 (Blackmun, J., dissenting); U.S. CODE CONG. & AD. NEWS 2391, 2513-17 (1964).

⁴⁶ See, e.g., *Kremer*, 456 U.S. at 476-85 (noting interests of finality, efficiency, and comity when holding preclusive in title VII litigation the decision of a state court upholding state agency's rejection of employment discrimination claim); *United States v. Frady*, 456 U.S. 152, 165 (1982) ("a final judgment commands respect"); *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (conservation of resources is achieved by expanding res judicata and collateral estoppel); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-33 (1979) (offensive use of collateral estoppel served interests of finality and efficiency).

⁴⁷ In *Frady*, the Court declined habeas corpus review because a federal prisoner had failed to object to a jury instruction at trial and to demonstrate any "actual prejudice" resulting from the erroneous instruction. The Court commented that "[o]nce the defendant's chance to appeal has been waived or exhausted . . . we are entitled to pre-

acknowledge valued features other than finality and economy and its refusal to examine the reasons for the evolution of models other than the most restrictive ones does not make the need for complexity disappear.

Finality in a dispute resolution system is a normative conclusion, not objective reality. The distribution of power in a procedural system is not only a decision about procedure but is also a decision about political authority. Economy is not the sole purpose of a court system, nor is it the hallmark of court systems as contrasted with other forms of decisionmaking. Coin flipping (or lotteries) would, after all, provide final and inexpensive solutions, but would also be an offensive mechanism by which to make many decisions in this society. This Court has given the first tier a good deal more power but the Court has not justified why the first tier should receive a grant of such substantial, and in many instances unreviewable, authority.

Why has the Court been interpreting procedural models as narrowly as possible, so that the Single Judge/Finality Model and the Single Judge plus Limited Review Model replace virtually all others? There are several possible explanations. First, the Court might have a "theory of correctness." A majority of the justices may believe that the first tier consistently generates correct decisions. If one were confident that the first tier produced correct outcomes in a substantial percentage of cases, and if one perceived that the production of correct outcomes was the only purpose of procedure, then it would be sensible to eliminate the "waste" of extra, "unnecessary" procedures. Leaving aside indeterminacy problems and my own skepticism about correctness,⁴⁸ "correct" decisions would be those in which the law was properly understood, the true facts uncovered, and the appropriate remedy or sanction applied.

This explanation does not withstand scrutiny. In the cases in which the Court has precluded further decisionmaking, the Court did not affirmatively conclude that the entity below had made the correct decision. Rather, the Court forbade inquiry into the correctness of the decision.⁴⁹ Moreover, in many of these cases, the

sume he stands fairly and finally convicted . . ." 456 U.S. at 164. See also *Flanagan v. United States*, 104 S. Ct. 1051 (1984) (desirability of finality supports refusal to hear appeal from disqualification of criminal defendant's counsel until after judgment is entered).

⁴⁸ Given the difficulties of reconstructing past events, the limits of individuals' memories, and the abundant evidence of errors in cognitive judgments, I hesitate to endorse the view that the past is captured by the adjudication process. Social scientists have questioned human judgments for some time, e.g., R. NISBETT & L. ROSS, *HUMAN INFERENCE* (1980), and legal scholars have begun to recognize the indeterminate nature of legal rules. E.g., R. UNGER, *KNOWLEDGE & POLITICS* (1975).

⁴⁹ See, e.g., *United States v. Frady*, 456 U.S. 152 (1982); *Engle v. Issac*, 456 U.S. 107

records before the Court gave it substantial basis for being suspicious of the first tier's decision. For example, in *Kremer v. Chemical Construction Corp.*,⁵⁰ the New York Human Rights Division (NYHRD), a state agency, rejected the title VII claim of Rubin Kremer, who had alleged that he was the victim of discrimination. In *Kremer*, the Supreme Court precluded federal factfinding because a New York state court had found that the NYHRD decision was not "arbitrary and capricious."⁵¹ However, the petitioner had cited to the Court a New York State Bar Association report that detailed the serious deficiencies in the decisionmaking procedures of the NYHRD. This report concluded that the NYHRD was functioning very poorly, that it kept inadequate records and made incomplete investigations.⁵² In addition, the Court was well aware that Mr. Kremer had attempted to navigate the NYHRD and the state and federal courts without the assistance of counsel and that Kremer had not availed himself of procedural opportunities available to him in the agency proceeding.⁵³ In short, the record in *Kremer* gave the Court no reason to assume that the NYHRD's decision was legally or factually correct. Moreover, *Kremer* is not an isolated example. In habeas corpus cases, the Court has often forbidden federal inquiry into the correctness of the results reached by state courts. In several of these cases, lower federal courts had concluded that, on the merits, state courts had erred when deciding issues of federal constitutional law.⁵⁴ Therefore, a theory of correctness does not explain the Court's work.

A second possibility, and one for which recent decisions lend some credence, is that some members of the present Court are hostile to certain substantive rights and use preclusion rules in service

(1982); *Allen v. McCurry*, 449 U.S. 90 (1980); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Stone v. Powell*, 428 U.S. 465 (1976).

⁵⁰ 456 U.S. 461 (1982).

⁵¹ *Id.* at 483-85.

⁵² Brief of Petitioner at 17, *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461 (quoting N.Y. STATE BAR ASSOC. JOINT TASK FORCE, REP. OF PRAC. & PROC. OF N.Y. STATE DIV. HUM. RTS. & N.Y. STATE HUM. RTS. APPEAL BD. (1981) [hereinafter cited as TASK FORCE REPORT]). The report concluded that the agency was "not satisfactorily discharging its responsibilities under the Human Rights Law in large part due to inadequate budgetary appropriations. Shortcomings observed by the Task Force include "poorly conducted investigations, inadequate retention of notes, and the absence of sufficient information to enable the Appeal Board to conduct an adequate review of no-probable-cause findings" TASK FORCE REPORT at 17.

⁵³ Noting the various opportunities for claim presentation available in the NYHRD, 456 U.S. at 479-85, the Court declined to give weight to the fact that Kremer, pro se, had not utilized any of them. "The fact that Mr. Kremer failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy." *Id.* at 485.

⁵⁴ *E.g.*, *Rice v. Wolff*, 513 F.2d 1280 (8th Cir. 1975), *rev'd*, *Stone v. Powell*, 428 U.S. 465 (1976); *Powell v. Stone*, 507 F.2d 93 (9th Cir. 1974), *rev'd*, 428 U.S. 465 (1976).

of political ends. Two recent cases interpreting the scope of appellate review under rule 52 of the Federal Rules of Civil Procedure⁵⁵ illustrate the plausibility of this explanation. In both cases, the question was: what is the scope of rule 52? In *Pullman-Standard v. Swint*,⁵⁶ the Court commanded a narrow reading of rule 52 and overturned a Fifth Circuit opinion which had concluded that the defendant corporation had, over the course of several years, intended to discriminate in its seniority system.⁵⁷ The Supreme Court determined that the Fifth Circuit had impermissibly intruded onto the trial court's factfinding terrain.⁵⁸ Describing Pullman-Standard's motives when making employment assignments as a "pure question of fact,"⁵⁹ the Supreme Court concluded that the Fifth Circuit violated rule 52 when it made its own independent evaluation of the evidence in the record.⁶⁰

In contrast, in *Bose Corp. v. Consumers Union of United States, Inc.*,⁶¹ the Supreme Court held that rule 52 did not apply. The *Bose* Court authorized appellate courts to review trial court records in first amendment cases and to make independent assessments of whether the libel standard (of malice or reckless disregard) had been met.⁶²

⁵⁵ Rule 52 provides: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a). Proposed amendments to the rule would insulate trial judges' findings even further by providing that their factual findings, "whether based on oral or documentary evidence," could not be set aside unless clearly erroneous. Judicial Conference of the United States, Proposed Amendments to the Federal Rules of Civil Procedure 4 (Sept. 1984) (on file at the *Cornell Law Review*). The Advisory Committee explained that some courts have applied the "clearly erroneous" standard only to findings based on a witness' demeanor and credibility. *Id.* at 5-6. The Advisory Committee justified the proposed change because of the "public interest in . . . stability and judicial economy." *Id.* at 6.

In an earlier draft, the Committee had recommended that the language of the rule should state expressly that the scope was redefined because of the "need for finality." Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 338, 359 (1983).

⁵⁶ 456 U.S. 273 (1982).

⁵⁷ In *Pullman-Standard*, the trial judge had compiled a chart, summarizing the data (largely documentary) relating to the question of discriminatory seniority systems in employment in the company. *Swint v. Pullman-Standard*, 539 F.2d 77, 85-86 (5th Cir. 1976). The Fifth Circuit described this chart as "the heart" of the trial judge's conception of the case, *id.*, and concluded that, although the chart's factual content was not "clearly erroneous," its structure was legally deficient. *Id.* at 89. The case was then retried, and, on a second appeal, the Fifth Circuit again concluded that the trial judge had erred. In the appellate court's view, "the total employment picture indicates that departmental assignments continued to be infected with racial considerations . . ." *Swint v. Pullman-Standard*, 624 F.2d 525, 529 (5th Cir. 1980).

⁵⁸ 456 U.S. at 287.

⁵⁹ *Id.* at 287-88.

⁶⁰ *Id.* at 285-86.

⁶¹ 104 S. Ct. 1949 (1984).

⁶² *Id.* at 1959.

How is it possible that, given the very same rule 52, appellate courts can inquire into the state of mind of writers or publishers accused of libel (and protect them), but cannot inquire into the state of mind of corporations accused of employment discrimination (and find them culpable)? *Pullman-Standard*, like *Kremer*, involves a discrimination claim. In both cases, the request for additional procedure came from the party who claimed to be a discrimination victim. By giving preclusive effect to the first tier's decision, the Court protected the alleged discriminator. In contrast, *Bose* is a first amendment case, and there the Court permitted plenary review of the first tier's decision. Perhaps the Court cares less about discrimination claimants and more about first amendment defendants.

This political explanation is borne out in other cases as well. The Court cannot be oblivious to the fact that, in both civil and criminal cases, virtually all the "losers" of procedural opportunities are prisoners and civil rights litigants.⁶³ Further, should the Court wish to overlook this trend, one of its members, Justice Stevens, has begun to remind the Court of the impact of its decisions. In *Patton v. Yount*, for example, Justice Stevens commented that the case marked a "string of consecutive victories for the prosecution" that then stood "at 20."⁶⁴ Furthermore, in the rare instances when the Court permits more procedural opportunities, the "winner" is often the government, and particularly the United States. For example, despite the strong trend toward cutting back litigation opportunities and the growing strength of the "one-shot" rule, the Court has denied criminal defendants' double jeopardy claims⁶⁵ and has permitted forfeiture actions after acquittals.⁶⁶ Moreover, in *United States v. Mendoza*,⁶⁷ the Court created a special exception to the nonmutual collateral estoppel rule for the federal government.⁶⁸ Thus, the

⁶³ See *supra* notes 2-11 and accompanying text; see also *Tate v. Rose*, 104 S. Ct. 2186, 2187 (1984) (O'Connor, Circuit Justice) (staying a grant of habeas corpus ordered by the Sixth Circuit, the Justice concluded that the balance of hardships between the state and the individual favored the state; the Justice stated that "granting the stay for the time necessary to consider petition should not cause a significant incremental burden to respondent, who has been incarcerated for several years, but doing so will relieve the State of Ohio of the burden of releasing respondent or retrying him").

⁶⁴ 104 S. Ct. 2885, 2900 n.8 (1984) (Stevens, J., dissenting).

⁶⁵ *Ohio v. Johnson*, 104 S. Ct. 2536, 2542 (1984) (guilty plea to some charges does not bar further prosecution on related charges); *Tibbs v. Florida*, 457 U.S. 31, 47 (1982) (double jeopardy clause does not bar retrial when reversal is based upon weight of evidence).

⁶⁶ *United States v. One Assortment of 89 Firearms*, 104 S. Ct. 1099, 1107 (1984) (acquittal from charges of dealing in firearms without license does not preclude the government from commencing forfeiture action to obtain firearms).

⁶⁷ 104 S. Ct. 568 (1984).

⁶⁸ *Id.* at 574 (nonmutual collateral estoppel not enforceable against federal government). Cf. *United States v. Stauffer Chem. Co.*, 104 S. Ct. 575, 578 (1984) (no special estoppel rule for United States when estoppel is mutual).

government may be permitted multiple chances to litigate but the rest of us are not. The Court's work in this area may be explained by hostility towards certain categories of rights and to the individuals claiming them.

A final explanation for the Court's reduction of decisionmaking opportunities is that the Court may believe in the Single Judge/Finality and Single Judge plus Limited Review Models. The Court may, as a matter of principle, view those models as sufficient to make decisions (be they right or wrong) and to express society's concern for individuals. Here again, I think this idea has some explanatory force. The Court's opinions openly express a preference for finality, both as a means to conserve resources and as a desirable psychological state.⁶⁹ On several occasions, the Court praises the lower tiers and appears willing to give great power to their members.⁷⁰

If the Court does believe that these limited models suffice, then, in my view, the Court is wrong. Although these models produce outcomes, in many instances there are reasons to doubt the correctness and legitimacy of those outcomes. Further, although procedure exists to provide outcomes, procedure also serves nonoutcome related functions—to instruct about and to act out the political system, to legitimate decisions of the state, to dignify the participants, and to make meaningful the interaction between individuals and the state.⁷¹ Procedure has a normative, political function. Therefore, while a judge or agency hearing officer may make a "good" decision, I am troubled by the Court's tendency in this self-described liberal democratic state to invest so much power in a single individual. Such allocations of power are particularly distasteful when, as in *Kremer*, first tier decisionmakers were poorly-funded, ill-equipped, and operating under oppressive conditions.

The information gains over the last forty years have not only

⁶⁹ See *Spalding v. Aiken*, 103 S. Ct. 1795, 1797 (1983) (Burger, C.J., statement concerning denial of certiorari) (The Chief Justice, urging that additional limitations be placed on the writ of habeas corpus, argued that prisoners need to know that they have no additional avenues so as to accept the fact of conviction and " 'make peace' with society.").

⁷⁰ E.g., *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 478 (1982); *United States v. Frady*, 456 U.S. 152, 154-65 (1982).

⁷¹ See P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 8-9 (1976) (importance of ritual and "process imperatives"); R. COVER & O. FISS, *THE STRUCTURE OF PROCEDURE* (1979) (procedure as a social, cultural institution); 18 *NOMOS, DUE PROCESS* (J. Pennock & J. Chapman eds. 1977) (collection of essays explaining nature and rationale of procedural fairness); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49-52 (1976) (importance of dignitary concerns); Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172-77 (dignity, participation, deterrence, effectuation as litigation values).

been about the number of cases filed and decided. We have also learned a good deal on both empirical and anecdotal fronts. Researchers have turned their attention to decisionmaking in agencies and courts and to the interaction between attorneys and clients. What we now know is not very reassuring. Reports about trial courts expose the many burdens and pressures under which trial judges labor;⁷² some New York City courts "dispose" of 100 cases a day.⁷³ Investigations of agencies, such as the New York Human Rights Division and the Social Security Administration, reveal inadequate processes, erratic decisionmaking, lack of resources, and administrative malfunctioning.⁷⁴ Solicitor General Lee was mistaken when he said that there is "nothing in . . . common sense"⁷⁵ to prefer the decision of three people with time for reflection over the decision of one person with little or no time to think. Descriptions of attorney-client relationships are equally, if not more, distressing.⁷⁶ In some areas, such as criminal defense of the indigent, we know that the image of an attorney and client as a "moral unit"⁷⁷ is a mirage. The funding of public defender programs has been inadequate and the result has been too few lawyers to service too many clients—leading in turn to substandard representation in some cases.⁷⁸

The redundancy built into schemes like title VII was not accidental; the drafters understood the possible deficiencies in the first tier. That model of decisionmaking was created to respond to concerns about power diffusion, as well as power concentration, about revisionism, as well as finality, and about the division of responsibility between state and federal systems. The designers of title VII

⁷² See generally V. FLANGO, R. ROPER & M. ELSNER, NATIONAL CENTER FOR STATE COURTS, *THE BUSINESS OF STATE TRIAL COURTS* 67 (1983).

⁷³ See *The Criminal Court: A System of Collapse*, N.Y. Times, June 26, 1983, at 1, col. 1; *id.*, June 28, 1983, at B2, col. 1 (E.R. Shipp, *The Prosecutor*; M.A. Farbor, *The Judge*); *id.*, June 30, 1983, at 1, col. 3 (E.R. Shipp, *How Criminal Court Fails: The 8 Key Areas*).

⁷⁴ TASK FORCE REPORT, *supra* note 52; J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARZ, P. VERKUIL & M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM 126-30 (1978).

⁷⁵ Overend, *supra* note 20, at 28.

⁷⁶ Criticism of attorneys' performance has been robust, and the Chief Justice has stressed the need for improvements. Burger, *Annual Report on the State of the Judiciary—1980*, 66 A.B.A. J 295, 296 (1980). See also N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 19 (1982) (survey of criminal defense programs found that inadequate compensation caused attorneys to be unwilling to put forth effort necessary on behalf of clients); Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181, 202-03 (1984).

⁷⁷ Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1078-86 (1977).

⁷⁸ N. LEFSTEIN, *supra* note 76; Comment, *Client Services in a Defender Organization: The Philadelphia Experience*, 117 U. PA. L. REV. 448, 450, 468-69 (1969) (discussing consequences of excessive case load).

were concerned—in my view, understandably—about vesting sole factfinding authority in state agency decisionmakers. The statutory solution was to permit additional, albeit expensive, occasions for factfinding. In contrast, in *Kremer v. Chemical Construction Corp.*, the Supreme Court imbued a single individual in the NYHRD with definitive authority, absent “arbitrary [or] capricious” behavior⁷⁹ or a litigant sophisticated enough to have read the *Kremer* opinion and figure out how to avoid its *res judicata* trap.⁸⁰

Why give such power to agency officials? Do we have any reason to place complete trust in their competency? Compare that decisionmaking process to the paradigm of the Single Judge/Finality Model in this country: the jury. The jury system compromises revisionism in exchange for the legitimacy of decisions made by a group of carefully selected citizens. The strong ritualistic elements of a jury decision provide solace; the number of decisionmakers counteracts individual biases. If not “correct,” we believe jurors’ decisions are “better” because they express community values.⁸¹ Consequently, revisionism seems less important.

In contrast, judicial decisionmakers do not come with as strong an imprimatur of legitimacy, and agency decisions are equally, if not more, suspect. We have no reason to believe that such decisionmakers are always wise and just, that they capture community sentiment or render accurate decisions. Further, I assume that “correctness” itself is, to twentieth century sensibilities, a highly problematic concept. Are the tales of alleged wrongdoing retold accurately? Can one construct a theory of what it means to say that a corporation, a fictional entity, “intended” to discriminate over a course of years against a group of people? And assuming, for the moment, that we could “know” the “truth,” what are the appropriate responses? Sanctions? Remedies? Yet, even if I decline to embrace a theory of determinant correctness, I can embrace a theory of

⁷⁹ This is the standard employed by the New York appellate court which reviewed the agency decision. 456 U.S. at 464. For alternative readings of title VII, see the dissents filed by Justices Blackmun, *id.* at 486, and Stevens, *id.* at 508.

⁸⁰ Under the opinion, preclusion occurs only when a litigant appeals a state agency decision to a state court. 456 U.S. at 466-76. Thus, had *Kremer* ignored the form provided by the agency (explaining how to appeal to state court) and not sought review in the state court, his case would have been heard in federal court. 456 U.S. at 476-78.

⁸¹ See *Ford v. Kentucky*, 53 U.S.L.W. 3338, 3339 (1984) (denying cert. to *Ford v. Kentucky*, 665 S.W.2d 304 (Ky. 1983)) (Marshall, J., dissenting). Justice Marshall commented:

Law is not a process by which a society actually arrives at objective truth, but rather a means for structuring the truth-seeking process so that the answers it yields will be accepted as morally legitimate by the community; it is this acceptance that enables the verdicts of the jury system to be treated as “true.”

error. And by error, I mean two kinds of wrongs: the wrong way in this society to make a decision, and the wrong outcome on the basis of the information known. Both kinds of errors can be found in many first tier decisions, and the question becomes how we should respond. We could decide that we cannot afford to do better. The Court seems to be telling us this—to live with decisions, and further, to respect those results, regardless of what we know about the poverty of the process that produced them.

I protest that conclusion. Instead of taking this route, I believe the Court should reevaluate the weight given to various procedural features. For example, in lieu of stressing economy and finality, the Court should emphasize differentiation. The Court should identify subsets of cases by the kinds of claims involved, the nature of the decisionmaking entity, the identity of the parties, or the resources of the parties, and then permit additional decisionmaking in certain areas. To the Court's credit, it has taken this approach in a few cases. In *United States v. Mendoza*,⁸² the Court shaped special rules reflective of the distinct nature of one of the litigants.⁸³ In *Bose v. Consumers Union*,⁸⁴ the Court created a particular rule in light of the nature of the issue.⁸⁵ In contrast, the Court's refusal in *Kremer* to contemplate the unique nature of title VII, the Court's unwillingness in *Pullman-Standard* to face the indeterminacies of so-called "factual findings" in mammoth discrimination cases, and the Court's dogged pursuit of preclusion in habeas cases are its failures. All cases, from death penalty to car crashes, should not be decided with the same quantum of procedure. The Court has not paid sufficient attention to differentiation.

Second, the Court must reconsider the esteem in which it holds the feature of litigant autonomy, which often translates as attorney autonomy, which in turn means that a litigant is stuck with whatever his or her lawyer does or does not do.⁸⁶ Many lawyers are simply inadequate, and consequently our fidelity to rugged individualism may have become counterproductive. In criminal cases, we can no longer afford to live with self-guided, unguided or attorney-misguided litigants. We should consider frank (but rule-bound) state control over more of the litigation process to narrow the choices

⁸² 104 S. Ct. 568 (1984).

⁸³ *Id.* at 572-74 (holding that nonmutual collateral estoppel did not apply to government).

⁸⁴ 104 S. Ct. 1949 (1984).

⁸⁵ *Id.* at 1865.

⁸⁶ For example, in habeas cases, the Supreme Court attributes attorney failures to make claims to be clients' deliberate decisions to "sandbag" proceedings. See Resnik, *supra* note 42, at 895-98.

permitted to litigants and their attorneys.⁸⁷ We might, for example, make certain pretrial motions obligatory.

Third, the Court should develop sensitivity to the diversity of the first tier. Given the increasingly broad range of adjudicatory models, the Court should not simply assume that first tier decision-making occurs in a context that legitimates the decisions rendered. Rather, the Court should inquire into the nature of the decision-making process to determine whether any of the valued features of adjudication are present. For example, are there mechanisms in a given scheme to ensure rational norm enforcement? Are there checks for impartiality? Are there reasons to be suspicious of the outcomes?⁸⁸ The Court must recognize that, with the high volume of cases and the relatively minimal resources invested in running agency and court adjudication systems, many first tiers are populated by overworked, underpaid individuals, whose jobs do not provide the prestige that compensates for the unremitting demands and the difficult conditions. In an occasional opinion, such as *Logan v. Zimmerman Brush Co.*,⁸⁹ the Court has expressed some willingness to scrutinize the adequacy of agency decisionmaking.⁹⁰ By and large, however, the Court has ignored complaints of inadequate process and endorsed first tier decisionmaking regardless of the weaknesses delineated.⁹¹

Justice Rehnquist, in his speech in Florida, has raised the right question. A coherent evolution of this Court's jurisprudence is to consider the abolition of appeals. I have no quarrel with Justice Rehnquist's question. I am, however, deeply distressed by the Court's answers in the preclusion cases. The issues are not easy. Whether the decisionmakers are called "judges," "jurors," "administrative hearing officers," "arbitrators" or "magistrates," the issue is how much power to give them and why. The Court's superficial

⁸⁷ I have previously expressed concern over aggressive judicial control of litigation. Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982). If we were to abandon litigant autonomy we would have to provide exacting safeguards to protect against inappropriate judicial action.

⁸⁸ Cf. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1540-42 (1984) (foreign admiralty decrees were not held conclusive because of suspicion that vessels were being falsely condemned as nonneutral).

⁸⁹ 455 U.S. 422 (1982).

⁹⁰ *Id.* at 428-33 (reversing decision by Illinois courts, which had barred claim because an official of Illinois Fair Employment Practices Commission had inadvertently scheduled a conference after the statutory time to hold such a meeting had expired).

⁹¹ See, e.g., *Strickland v. Washington*, 104 S. Ct. 2052, 2066-67 (1984) ("strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"; refusing to overturn convictions even when counsel's behavior is "unreasonable" unless defendant can also show resulting prejudice); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-85 (1982).

finality/economy gloss obscures the deeper, and admittedly more difficult, questions.

There are no simple, inexpensive answers nor any solutions that are problem free. The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms. The 1930s, 1940s, 1950s and 1960s gave us liberal rules of pleading and eased access to the courts, which today have resulted in a high volume of litigation.⁹² The current "solution" of finality, achieved by enshrining first decisions and by precluding review, is premised upon a fiction that the first tier's evaluations of disputes are sufficient to fulfill all the purposes of procedure. Those close to agencies and courts know that, while there are many first tier successes, there are many failures as well. If we are committed to features of court procedure other than power concentration, finality, and economy, then we must permit more opportunities for revisionism. I invite the reader to see the continuum between *res judicata*, collateral estoppel, and appeal, and to understand that the Supreme Court (in its preclusion jurisprudence and elsewhere) is leading us towards the abolition of various forms of redundancy in decisionmaking, including appeals. I invite the reader to question the desirability of imposing the Single Judge/Finality and Single Judge plus Limited Review models across the litigation spectrum.

⁹² Of course, many other factors were at work, including the population growth, the growing number of attorneys, and a dramatic rise in federal legislation which in turn authorized or begat more litigation. For historical and statistical analyses of litigation rates in one jurisdiction, see M. SELVIN & P. EBENER, *MANAGING THE UNMANAGEABLE: A HISTORY OF CIVIL DELAY IN THE LOS ANGELES SUPERIOR COURT* (1984).