2002

Local Federal Civil Procedure for the Twenty-First Century

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Federal civil procedure is now byzantine. Lawyers and parties face, and federal judges apply, a bewildering panorama of requirements. There are strictures in the Federal Rules of Civil Procedure as well as Title 28 of the United States Code and dozens of substantive statutes. A stunning array of local measures—including local rules; general, special, and scheduling orders; individual-judge practices; and mechanisms that courts adopted under the Civil Justice Reform Act (CJRA) of 1990 to reduce cost and delay—also govern cases in all ninety-four districts. Many of the provisions are inconsistent or duplicative, while a significant percentage are difficult to discover, master, and satisfy. These phenomena have apparently undermined the federal rules' core precepts, such as uniformity, simplicity, and economical, expeditious dispute resolution, and have eroded important process values, namely court access. The developments mean that federal practice is more fractured than at any time since the Supreme Court prescribed the original federal rules during 1938.

This balkanization of federal civil procedure was not inevitable. Indeed, over a decade ago, the Court and Congress instituted actions to treat growing fragmentation, particularly the proliferation of conflicting local strictures. For example, the 1985 amendment in Federal Rule of Civil Procedure 83 and the Judicial Improvements and Access to Justice Act (JIA) of 1988 required that the Judicial Conference of the United States, circuit judicial councils, federal appellate and district courts, and specific judges periodically review local procedures for consistency with the federal rules and legislation and abrogate or

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modify violative provisions. Few institutions or people have fulfilled the responsibilities imposed principally because Congress appropriated no funding and adopted the CJRA, which essentially suspended implementation of the duties. This truncated effectuation and experimentation with mechanisms under the 1990 statute, some of which contravene the federal rules, United States Code provisions, and requirements in the remaining ninety-three districts, have led to increasingly fractured civil practice. Now that the date on which the CJRA was scheduled to expire has passed and federal litigation has become more arcane than ever, it is critical to analyze these developments in contemporary civil disputing. This Article undertakes that effort.

The first Part traces the background of local procedural proliferation, which gradually expanded after the promulgation of the initial federal rules and has accelerated since 1980. The exponential increase in local strictures, many of which were conflicting, prompted Supreme Court revision of Rule 83 during 1985 and 1995, as well as legislative enactment of the JIA in 1988. The Court and Congress clearly intended to limit inconsistent and redundant local requirements which were complicating federal practice. The second Part evaluates implementation of the mandates in Rule 83 and in the 1988 statute and ascertains that most entities and persons responsible for discharging the obligations have not performed them. I then assess the reasons for incomplete compliance, which were substantially attributable to resource deficiencies and to the 1990 CJRA's discontinued effectuation of the relevant commands in Rule 83 and the 1988 JIA, and analyze the consequences of limited implementation.

The third Part offers suggestions for the future. First, Congress should definitely state that the CJRA has expired and that districts and judges must abolish all conflicting and repetitive procedures adopted under the statute. The institutions and individuals charged with effectuating the mandates related to local proliferation in Rule 83 and the JIA should concomitantly reinvigorate and thoroughly implement them. For instance, district courts and particular judges could eliminate existing, and refrain from the prescription of, new, local provisions which are inconsistent or redundant. The circuit councils might concomitantly undertake comprehensive review of local strictures and abrogate or change those found to conflict with or duplicate federal rules or legislation. As the twenty-first century opens, these suggestions should restrict proliferation and the fragmentation of modern federal court practice, promote the restoration of a uniform, simple procedural regime, and decrease expense and delay in civil litigation.

I. A History of Local Procedural Proliferation

A. *Introduction*

The growth of inconsistent and repetitive local requirements that eventually fostered Supreme Court amendment of Rule 83 and congressional passage of the JIA, measures which were meant to limit proliferation, warrant considerable evaluation in this Article, even though these developments have been rather thoroughly chronicled elsewhere.[1] Comparatively detailed examination can improve understanding of proliferation, why the commands imposed by the rule and the statute received little effectuation, and how they might be revitalized and fully implemented.

I emphasize in this Part and throughout the Article proliferating local civil procedures that federal district courts and judges have issued and applied, although many other provisions which cover local practice in the federal courts are very important and deserve analysis and treatment. For example, each United States court of appeals and bankruptcy court has promulgated and enforced local strictures. Practically all of the ninety-four districts and many judges have correspondingly prescribed and enforced local requirements that govern criminal matters, and numerous courts and judges have adopted and employed admiralty procedures. A plethora of provisions—variously denominated as general, special, scheduling, and minute orders; internal operating procedures; and measures of specific judges, including standing orders and individual-judge practices, which may be unwritten—also regulate federal court practice.

I focus on local district court civil procedures because there are more of them, many of which are inconsistent or redundant, while the problems that the strictures pose and their efficacious resolution can felicitously serve as surrogates for the remaining local requirements. Moreover, the systematic collection, analysis, and synthesis of all relevant local measures would be an overwhelming task. Nonetheless, in an effort to facilitate future work, I catalog some of the provisions at the conclusion of this Part; briefly assess implementation of the local review mandates that Civil Rule 83's appellate, bankruptcy, and criminal analogues and the JIA imposed at the end of the second Part's first Section; and afford suggestions for limiting proliferation of civil pro-

1 *See, e.g.*, Walter W. Heiser, *A Critical Review of the Local Rules of the United States District Court for the Southern District of California*, 33 San Diego L. Rev. 555, 557–64 (1996); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence and Emerging Procedural Patterns*, 137 U. Pa. L. Rev. 1999, 2011–26 (1989).

cedures, from which it should be rather easy to extrapolate for other applicable local strictures in the third Part.

B. The 1938 Federal Rules of Civil Procedure

When Congress adopted the Rules Enabling Act of 1934, it empowered the United States Supreme Court to prescribe procedures that would cover civil litigation in every federal district court.[2] In 1935, the Supreme Court appointed the initial Advisory Committee on the Civil Rules and requested that the Committee draft uniform provisions which would govern practice in all federal districts. During 1942, the Court designated the surviving members of this entity as a standing Advisory Committee,[3] and fourteen years thereafter, the Court discharged that group.[4] In 1958, Congress assigned the responsibility for advising the Court to the Judicial Conference of the United States, the policymaking arm of the federal courts, which concomitantly named a permanent Advisory Committee.[5]

The Advisory Committee, when drafting the original Federal Rules of Civil Procedure, which the Supreme Court promulgated during 1938, seemed to have in mind a number of purposes, although it is difficult to divine the precise intent of the fourteen lawyers who held varying views on the many issues which they explored.[6] However, the attorneys apparently intended to ameliorate the complications that common law and code procedure and practice had imposed.[7] More specifically, the Committee meant to rectify the exceedingly technical nature of the earlier procedural schemes which strict plead-

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2 *See* 28 U.S.C. §§ 2071–2074 (1994); *see also* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1024 (1982); Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1658 (1995); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 272–77 (1989).

3 Order Continuing the Advisory Committee, 314 U.S. 720 (1942).

4 Order Discharging the Advisory Committee, 352 U.S. 803 (1956).

5 Act of July 1, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified at 28 U.S.C. § 331 (1994)).

6 *See, e.g.*, Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 498–99, 502–15 (1986); Tobias, *supra* note 2, at 272–77. I rely principally on secondary sources to offer an account that is most relevant to proliferation.

7 *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 914–21, 926–73 (1987); Tobias, *supra* note 2, at 270, 272–73.

ing typified.[8] The drafters concomitantly hoped to reduce the difficulties resulting from the 1872 Conformity Act's mandate that federal district judges apply procedures which resembled the strictures employed by the state courts of the jurisdictions where the federal courts were located.[9]

The federal rules seemingly incorporated numerous fundamental procedural precepts. The Committee intended to craft a national code of procedure which was simple, uniform, and trans-substantive; that is "procedure generalized across substantive lines"[10] and that facilitated the inexpensive, prompt disposition of disputes and merit-based resolution.[11] The Committee attempted to realize these purposes through many means. For instance, the Committee promoted simplicity and disposition on the merits by reducing the importance of pleadings, by providing for broad, flexible discovery, and by limiting the number of steps in cases.[12] The Committee correspondingly fostered uniformity by commanding all of the federal districts to apply identical procedures.[13] The drafters also left counsel substantial control over lawsuits, particularly prior to trial and in discovery.[14] The Committee as well increased judges' discretion and trusted to this discretion application of the rules, which the Committee contemplated that courts would flexibly and practically interpret and enforce.[15]

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8 *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986); Subrin, *supra* note 7, at 948–73. *See generally* CHARLES E. CLARK, PROCEDURE—THE HANDMAID OF JUSTICE (1965).

9 Act of June 1, 1872, ch. 255, 17 Stat. 196, 197. *See generally* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 61 (5th ed. 1994) (discussing the Conformity Act Equity Rules).

10 Cover, *supra* note 6, at 718. *See generally* Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501 (1992).

11 For analyses of these and other significant goals of the Committee, see Resnik, *supra* note 6, at 502–15; Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1648–51 (1981); and Tobias, *supra* note 2, at 272–77.

12 *See* Subrin, *supra* note 11, at 1649–50; Tobias, *supra* note 2, at 274; *see also* Marcus, *supra* note 8, at 439–40.

13 *See* Subrin, *supra* note 11, at 1650; Tobias, *supra* note 2, at 274–75.

14 *See* Resnik, *supra* note 6, at 512–15; Subrin, *supra* note 11, at 1650.

15 *See* Subrin, *supra* note 7, at 968–73; Tobias, *supra* note 2, at 275–76 & n.28. The tenets are not absolutes; some were in tension and even conflicted. The choices of an equity-based scheme and of flexible, liberal procedure facilitated court access and costly, lengthy complex cases. *See* Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1591 n.3 (1994); *infra* notes 32, 35–37 and accompanying text.

Critical to local procedural proliferation was the Advisory Committee's determination to include Rule 83.[16] This provision authorized all districts and individual judges to prescribe local measures, thus empowering them to promulgate local strictures which could erode the national, uniform, simple system of civil procedure instituted.[17] The drafters did intend to limit this authorization. The Committee apparently envisioned that districts would sparingly invoke Rule 83 to address unusual, troubling local circumstances[18] and expressly prohibited the adoption of local procedures which conflicted with the federal rules.[19]

Professor Stephen Subrin has recently afforded a valuable, specific account of the Advisory Committee's promulgation of Rule 83.[20] He concluded that Congress had expressly granted local rulemaking power to the federal trial courts from their inception in 1789 until 1872[21] but that passage of the Conformity Act of 1872 reflected legislative intent to limit this power sharply.[22] Notwithstanding Congress's purpose, the Advisory Committee appreciated that local strictures under the 1872 statute had "become an important part of the procedural landscape" and that opinion was divided about the degree to which this practice should continue under the Rules Enabling Act regime.[23]

Professor Subrin found Advisory Committee deliberations and proposals to suggest that the "drafters saw a necessity for local rules to meet local conditions and for some body of law to fill the gaps not covered by the federal rules."[24] Rule 83's final version enabled a majority of the judges in every district to prescribe local rules that did not conflict with other applicable law but rejected a provision for a supervisory entity, such as appellate courts, to monitor these procedures.[25] Professor Subrin also stated that the phrasing of Rule 83 "might be

16 *See* FED. R. CIV. P. 83, 308 U.S. 765 (1938); *see also* Subrin, *supra* note 1, at 2016–19.

17 *See* FED. R. CIV. P. 83; *see also supra* notes 8–13 and accompanying text.

18 *See* FED. R. CIV. P. 83 advisory committee's note (1937 adoption); *see also* Subrin, *supra* note 1, at 2011–16.

19 *See* FED. R. CIV. P. 83; *see also* Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1397–99 (1992).

20 Subrin, *supra* note 1, at 2011–16.

21 *Id.* at 2012; *see also* JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 117 (1977).

22 Subrin, *supra* note 1, at 2011–12; *see also supra* note 9 and accompanying text.

23 Subrin, *supra* note 1, at 2012–13.

24 *Id.* at 2013.

25 *See* FED. R. CIV. P. 83; *see also* Subrin, *supra* note 1, at 2014.

expected to result in material nonuniformity among district courts under the emerging new scheme."[26]

C. *The First Three Decades of the Federal Rules*

The national rule revision entities, especially the Advisory Committee, and federal judges maintained and promoted the essential procedural precepts, namely uniformity and simplicity, during the three decades after the federal rules' promulgation in 1938, and judicial officials and scholars generally accorded the original rules a warm reception.[27] The Advisory Committee suggested a comparatively small number of amendments, and judges experienced few problems construing and applying the initial rules and lauded their effectiveness.[28] The judiciary sustained simplicity with a general notice pleading regime that it practically and flexibly enforced,[29] while numerous districts and individual judges preserved and fostered uniformity by limiting the local prescription of strictures, particularly requirements that conflicted with the federal rules.[30]

Some of the rules which the Supreme Court promulgated in 1938 enjoyed less efficacy, and their judicial application seemingly undermined several fundamental procedural tenets during the ensuing thirty years.[31] For instance, broad discovery prompted certain problems, namely greater expense and delay, and a number of attorneys abused lawyer control over this process in ways that disadvantaged their adversaries, especially in complicated lawsuits.[32]

Most applicable to local procedural proliferation was the willingness of numerous district courts and individual judges to adopt local requirements, particularly strictures that contravened the federal rules or acts of Congress, thus honoring in the breach Rule 83's prohi-

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26 Subrin, *supra* note 1, at 2016.

27 *See* Tobias, *supra* note 15, at 1592–93; Tobias, *supra* note 2, at 277–79.

28 *See generally* Charles E. Clark, *"Clarifying" Amendments to the Federal Rules*, 14 OHIO ST. L.J. 241 (1953); Symposium, *The Federal Rules of Civil Procedure: 1938–1958*, 58 COLUM. L. REV. 435 (1958); *see also generally* Marcus, *supra* note 8, at 439–40; Tobias, *supra* note 2, at 277–78 (discussing the federal rules during the first quarter century).

29 *See, e.g.*, Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944); *see also* Marcus, *supra* note 8, at 439–40, 445–46.

30 *See* Subrin, *supra* note 1, at 2016–19; *see also infra* notes 33–34 and accompanying text.

31 *See* Tobias, *supra* note 15, at 1593; Tobias, *supra* note 2, at 278.

32 *See, e.g.*, New Dyckman Theater Corp. v. Radio-Keith-Orpheus Corp., 16 F.R.D. 203, 206 (S.D.N.Y. 1954); *see also* Maurice Rosenberg, *Sanctions To Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 480–81 (1958) (1950s account); Subrin, *supra* note 7, at 982–84 (later account).

bition on inconsistency.[33] In fact, during 1940, a brief two years after the Court prescribed the original rules, the Knox Committee determined that districts and judges had failed to abolish a significant number of conflicting local rules which antedated Rule 83's issuance and had even implemented some inconsistent local rules after the 1938 federal rules' promulgation.[34] This local procedural proliferation eroded national uniformity, simplicity, and trans-substantivity. In short, district courts and specific judges relied upon Rule 83, which its drafters intended would provide flexibility to treat peculiar, problematic local circumstances and whose use was hedged with proscriptions, especially on the application of conflicting local strictures, to adopt local requirements that promoted inconsistency and complexity.

D. The Federal Rules Since the 1970s

By the 1970s, a number of developments had fostered increasing disenchantment with the federal rules. Some observers contended that the federal courts were encountering a "litigation explosion,"[35] whereby counsel and parties were pursuing too many civil lawsuits, a number of which lacked merit.[36] Additional critics found troubling the abuse of the litigation process, particularly in discovery, by lawyers and clients.[37] Certain judges and attorneys argued that the federal rules were unresponsive to these difficulties and that a few features of the initial rules, namely their flexible, open-ended character,[38] especially during discovery, might even have led to the complications. Local procedures became important vehicles for implementing several solutions—such as increased emphasis on managerial judging and on the pretrial process and enhanced judicial discretion—which districts

33 *See* Subrin, *supra* note 1, at 2016–19; *see also* FED. R. CIV. P. 83; *supra* notes 16–19 and accompanying text.

34 *See* REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON LOCAL DISTRICT COURT RULES III, at 1–11 (1940). *See generally* Subrin, *supra* note 1, at 2016–19 (discussing the Knox Committee Report).

35 *See, e.g.*, Warren E. Burger, *Agenda for 2000 A.D—A Need for Systematic Anticipation, in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 23 (A. Leo Levin & Russell Wheeler eds., 1979) [hereinafter THE POUND CONFERENCE]; Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?, in id.* at 211–12; *see also* Tobias, *supra* note 2, at 287–89 (discussing debate over litigation explosion).

36 *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 345 (1979); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 3–5 (1984).

37 *See, e.g.*, Order Amending the Fed. Rules of Civil Procedure, 446 U.S. 997, 1000 (1980) (Powell, J., dissenting); Nat'l Hockey League v. Metro. Hockey Club, 427 U.S. 639, 643 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740–41 (1975).

38 *See* sources cited *supra* notes 28, 35–37.

and judges applied in attempting to rectify the problems identified in this paragraph.

1. Managerial Judging

In the latter half of the 1970s, numerous judges, primarily in trial courts serving large populations or metropolitan areas, such as the Northern Districts of California and Illinois and the Southern District of New York, began developing ad hoc remedies for these difficulties, a practice that some observers called "managerial judging."[39] Courts and judges invented a number of measures that promoted more active judicial involvement in civil litigation, particularly its pretrial phase. Districts and judges used pretrial conferences to control the pace of lawsuits, to clarify and resolve issues in contention, and to promote settlement, especially by invoking a broad spectrum of alternatives to dispute resolution (ADR).[40] Quite a few judges attempted to manage more rigorously the scope or timing of discovery, and some imposed sanctions on counsel or clients for abusing the discovery or litigation processes.[41] Moreover, certain courts and judicial officials created new mechanisms, such as mini-trials and mandatory summary jury trials, to treat the complications.[42] Numerous districts and individual judges practiced much managerial judging before the 1983 federal rules amendments by promulgating local procedural requirements, many of which contravened the Federal Rules of Civil Procedure or United States Code provisions.

2. The 1983 Federal Rules Amendments

The 1983 revisions to Rules 11, 16, and 26 expanded attorneys' responsibilities as officers of the court, enlarged judicial discretion to control and manage lawsuits, principally during the pretrial phase and

39 *See, e.g.*, STEVEN FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (1977); Richard L. Marcus, Public Law Litigation and Legal Scholarship, 21 U. MICH. J.L. REFORM. 647, 657–78 (1988). *See generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (assessing managerial judging).

40 *See* Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 437 (1986); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770, 770–79 (1981); Resnik, *supra* note 39, at 391–400.

41 *See* Peckham, *supra* note 40, at 795–804; Resnik, *supra* note 39, at 391–400.

42 *See* E. ALLAN LIND & JOHN E. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (1983); Frank E. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 111 (1976) (addressing the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice).

discovery, and required that judges impose sanctions when lawyers or litigants violated the amendments' commands.[43] Revised Rule 16 increased district judges' authority to manage lawsuits by relying on pretrial conferences and scheduling orders and by empowering courts to sanction those who contravened the amendment's requirements, while revised Rule 26 authorized judges to restrict discovery's scope and pace and to levy sanctions for violations of the provision's mandates.[44] The new version of Rule 11 supplemented the Rule 16 and 26 prescriptions for managerial judging by mandating that courts sanction attorneys and parties for failing to conduct reasonable inquiries before they filed papers and increased the duties and accountability of counsel.[45] These modifications, therefore, essentially codified certain practices which courts had employed under the rubric of managerial judging, even as the changes empowered judges to adopt conflicting local strictures and facilitated the erosion of national uniformity and simplicity, significant precepts that underlay the initial federal rules. For example, the 1983 amendments in Rules 16 and 26 and the 1985 *Manual for Complex Litigation, Second*—which prescribed different procedures for resolving specific types of cases, such as complex and "ordinary" litigation—assumed that judges would tailor measures, often ad hoc, to particular kinds of suits,[46] thereby multiplying the possibilities for inconsistent local requirements' prescription.[47]

3. Local Procedural Proliferation

a. How Local Proliferation Occurred

Numerous phenomena examined above contributed to the proliferation of local procedures that has transpired since adoption of the 1938 federal rules but which apparently became so problematic by the 1980s that the Judicial Conference, the Supreme Court, and Congress felt compelled to respond.[48] In 1986, the Conference commissioned the Local Rules Project to collect, organize, and evaluate all of

43 *See* Order Amending Fed. Rules of Civil Procedure, 461 U.S. 1097 (1983). *See generally* ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY (1984) (assessing the 1983 revisions).

44 *See Order Amending Fed. Rules of Civil Procedure*, 461 U.S. at 1097; *see also In re* San Juan Dupont Plaza Hotel Fire Lit., 859 F.2d 1007, 1011–13 (1st Cir. 1988); Subrin, *supra* note 11, at 1650; Tobias, *supra* note 2, at 292 n.148.

45 *See Order Amending Fed. Rules of Civil Procedure*, 461 U.S. at 1097.

46 MANUAL FOR COMPLEX LITIGATION SECOND §§ 33.1–.6 (1985).

47 *See* Subrin, *supra* note 11, at 1650; Tobias, *supra* note 2, at 292 n.148.

48 *See* Tobias, *supra* note 19, at 1397–99; Carl Tobias, *More Modern Civil Process*, 56 U. PITT. L. REV. 801, 817 (1995); *see also supra* notes 33–34 and accompanying text.

the existing local rules, standing orders, and additional practices of individual judges and other local measures to ascertain whether the strictures were creating difficulties and, if so, to formulate recommendations for addressing those problems.[49] Three years later, the Project published a report stating that districts and judges had adopted approximately 5000 local rules and many additional requirements, diversely described as general, standing, scheduling, special, or minute orders—numerous of which were unwritten—that covered local practice.[50] Some procedures were inconsistent with the federal rules, acts of Congress, or measures in the remaining courts.[51] Districts and specific judges promulgated and applied conflicting strictures, despite prohibitions on doing so in Federal Rule 83 and the Rules Enabling Act.[52]

The Local Rules Project determined that the local commands governed a wide spectrum of procedural issues. The most broadly prescribed requirements pertained to the pretrial process, especially pretrial conferences and discovery.[53] A number of districts and judges employed special techniques for tracking and attempting to conclude relatively early in litigation, routine, simple lawsuits, such as social security appeals, while a significant percentage of courts imposed presumptive numerical restrictions on interrogatories.[54]

The substantive content of the local measures and the provision made for their adoption, communication, and application seemed more responsive to the needs of judges, attorneys, and parties in the local districts or of those judges vis-à-vis the counsel and litigants, than to national uniformity and simplicity. For instance, a number of district courts imposed rather onerous requirements on lawyers who wished to practice in the districts but were not members of the bars of

49 *See* JUDICIAL CONFERENCE OF THE U.S., COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE (1989) [hereinafter REPORT OF THE LOCAL RULES PROJECT]; Daniel R. Coquillette et al., *The Role of Local Rules,* 75 A.B.A. J. 62, 62–65 (1989) (summarizing the Project).

50 *See* REPORT OF THE LOCAL RULES PROJECT, *supra* note 49, at 1; *see also* U.S. DISTRICT COURT FOR THE DISTRICT OF MONT., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 3–4 (1991) (applying unwritten measures).

51 *See* Subrin, *supra* note 1, at 2025.

52 *See* 28 U.S.C. § 2071(a) (1994); FED. R. CIV. P. 83; *see also* Subrin, *supra* note 1, at 2020–26. *See generally* Coquillette et al., *supra* note 49, at 62–65 (summarizing the Project).

53 *See* REPORT OF THE LOCAL RULES PROJECT, *supra* note 49, at 1–3.

54 *See* 14 JAMES WM. MOORE ET AL., FEDERAL PRACTICE § 83.02 (3d ed. 1996) [hereinafter MOORE's 3d]; *see also* Subrin, *supra* note 1, at 2020–26.

the jurisdictions in which the courts were situated.[55] A few specific judges even mandated that counsel obtain their permission prior to filing motions.[56] Some courts and individual judges prescribed and enforced strictures covering important aspects of practice without seeking any input from the bar or the public before, and occasionally after, publishing measures.[57]

Appellate courts rarely examined the promulgation or invocation of these requirements.[58] The tiny financial stakes, and the abstract procedural principles, that typically were at issue may well have dissuaded many attorneys and parties from challenging the measures. Even those who might have had the requisite resources and interest to seek the strictures' invalidation could have been unwilling to jeopardize ongoing, cordial relationships with judges in whose courts they would later appear. Some of the few potential challenges that remained may have implicated unreviewable judicial decisions.[59]

This account of proliferating local requirements shows how increasing emphasis on the pretrial process and enhanced judicial discretion to manage it were concomitants of proliferation. The widespread adoption of local provisions by districts and judges correspondingly undermined the national, uniform procedural regime instituted in the federal rules, imposed unnecessary expense and delay, and complicated civil practice, particularly by making it more difficult to discover, comprehend, and comply with the growing number of inconsistent and repetitive requirements.[60]

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55 *See, e.g.*, D. MONT. R. 110; E.D. VA. R. 7; *see also* Frazier v. Heebe, 482 U.S. 641, 643 (1987). *See generally* RICHARD A. WILLIAMSON, NEW YORK COUNTY LAWYERS' ASSOCIATION REPORT OF THE COMM. ON THE FEDERAL COURTS ON *PRO HAC VICE* ADMISSIONS TO THE FEDERAL COURTS (Subcomm. on *Pro Hac Vice* Admissions 1996), *reprinted in* 169 F.R.D. 390, 404–08 (1997).

56 *See, e.g.*, United States v. Clark, 984 F.2d 31, 34 (2d Cir. 1993); Richardson Greenshields Sec. v. Mui-Hin Lau, 825 F.2d 647, 649 (2d Cir. 1987); *see also* Brown v. Crawford County, 960 F.2d 1002, 1009 (11th Cir. 1992).

57 *See* FED. R. CIV. P. 83 advisory committee's note (1985 amendment); *see also* 28 U.S.C. §§ 332, 2071 notes (1994).

58 *See* A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1576 (1991); *see also supra* note 25 and accompanying text.

59 Circuit judicial councils that Congress and the Court asked to review the measures also gave them little scrutiny. *See* 28 U.S.C. § 332 note; FED. R. CIV. P. 83 advisory committee's note (1985 amendment).

60 Authority's accretion in district courts facilitated by proliferation, which the "local rulemakers, each guided by individual understandings of process" had effected, was dubbed the "procedural equivalent of Luther's Ninety-Five Theses." Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 672–73 n.134; *see also infra* notes 132–36, 142–43, 202–23 and accompanying text (analyzing additional effects of proliferation).

b. Responses to Local Procedural Proliferation

Congress and the federal judiciary implemented several responses to the problems which local procedural proliferation presented.[61] The Judicial Conference supported the 1985 revisions of Federal Rule of Civil Procedure 83 and Federal Rule of Criminal Procedure 57, which mandated that districts prescribe local rules after providing notice, and an opportunity for comment, to the public and that standing orders which individual judges issue not contravene the Federal Rules of Civil or Criminal Procedure or local rules.[62] The Advisory Committee's notes that accompanied these amendments asked all of the courts to implement processes for adopting and monitoring standing orders, and requested that circuit judicial councils assess every local rule for validity and for conflicts with all of the federal rules and with local strictures in the remaining districts, implying that the councils should change local rules found to be inconsistent.[63]

Five decades after the 1938 Federal Rules of Civil Procedure took effect, Congress adopted the JIA, important objectives of which were to restore the primacy of those rules and of the national rule revision process and to limit local proliferation.[64] Senators and representatives apparently intended that the legislation would revive and promote significant procedural concepts, including uniformity and simplicity, which animated the Advisory Committee's drafting of the original federal rules.[65]

Congress meant to address proliferation by regularizing and opening to public participation and input local processes for modifying procedures. The statute required every district to appoint a local rules committee which would aid all of the court's judges in developing local strictures and to afford notice and comment before the district promulgated new, or revised existing, local rules.[66] Moreover, senators and representatives expressly attempted to reduce proliferation by assigning circuit judicial councils the affirmative duty to review

61 The Judicial Conference instituted the Local Rules Project study and upon its receipt issued an order asking districts to conform local strictures to the federal rules and suggesting ways to treat proliferation. *See* Tobias, *supra* note 19, at 1399; Tobias, *supra* note 15, at 1597.

62 *See* FED. R. CIV. P. 83; FED. R. CRIM. P. 57; *see also* FED. R. CIV. P. 83 advisory committee's note (1985 amendment). The revisors did not amend analogous appellate or bankruptcy rules. *See* FED. R. APP. P. 47; FED. R. BANKR. P. 9029.

63 *See, e.g.*, FED. R. CIV. P. 83 advisory committee's note (1985 amendment).

64 *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified in 28 U.S.C. §§ 332(d)(4), 2071–2074 (1994)).

65 *See* Tobias, *supra* note 15, at 1599–1601.

66 *See* 28 U.S.C. § 2071 (1994).

periodically all local requirements for consistency with the federal rules and by authorizing these entities to alter or abrogate specific strictures found to conflict.[67] Congress seemingly intended that those commands would govern measures prescribed by individual judges.[68]

4. The Civil Justice Reform Act of 1990

Legislative enactment of the CJRA and its implementation essentially discontinued effectuation of the directives in the 1988 JIA and Civil Rule 83's 1985 amendment that were meant to decrease local procedural proliferation.[69] The manner in which Congress passed the CJRA, the legislation's mandates, and its implementation demonstrate apparent congressional inability to harmonize the CJRA with the JIA and Rule 83, a phenomenon which effectively suspended the provisions in the JIA and Civil Rule 83 that were aimed at proliferating local strictures.

a. Statutory Passage

In early 1990, Senator Joseph Biden, the Chair of the Senate Judiciary Committee, introduced proposed legislation which was primarily based on recommendations for improving the civil justice system formulated by a task force consisting of diverse participants in federal civil litigation.[70] This bill was very controversial. A number of judges criticized the measure because it mandated that all ninety-four districts institute numerous cost and delay reduction requirements, while others considered the proposal a legislative attempt to micro-manage the courts, which avoided the ordinary federal rule amendment process or jeopardized it and the efforts of the Federal Courts Study Com-

67 *See id.* § 332(d)(4). The JIA thus imposed on councils an ongoing duty to review measures existing on its December 1, 1988 effective date and any adopted later. *Id.* § 333 note (effective date of 1988 amendment).

68 *See id.* § 2071 note. Section 2071(f) made the revision process exclusive so that judges would not avoid its mandates by giving local measures another label, such as a standing order.

69 *See* Tobias, *supra* note 15, at 1601–04. Throughout this Article, I assume that the CJRA also suspended the 1985 rule revisions aimed at proliferation; however, this is less important partly because Congress might have been unaware of the revisions.

70 *See* S. 2648, 101st Cong. (1990); *see also* SENATE COMM. ON THE JUDICIARY, S. REP. 101-416, at 13–14 (1990); TASK FORCE ON CIVIL JUSTICE REFORM, BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 5–6, 12–19 (1989) (finding much dissatisfaction with the federal civil justice system and that increasing cost and delay jeopardized court access for many, while suggesting that courts employ reforms primarily relating to judicial case management, discovery, and ADR).

mittee (FCSC) that Congress had commissioned in the 1988 JIA.[71] Indeed, advocates of the CJRA seemed unaware that Congress had adopted the JIA as recently as 1988, much less attempted to reconcile the statutes.[72] The Judicial Conference ultimately developed a "14-Point Program" in response to Senator Biden's measure.[73] After Congress conducted hearings and negotiated with the Conference, Congress passed an amended iteration of the proposal in November 1990.[74]

The CJRA was controversial when enacted, and it remains controversial today. Certain observers ask whether the federal courts have encountered serious delay. Two significant 1990 studies ascertained that there was less delay, particularly in the sense of time to disposition, than some critics suggested.[75] Others argue that the statute fails to address important sources of expense and delay, such as the criminal justice system.[76] The CJRA's specific goal also was the facilitation of experimentation with local techniques for decreasing cost and delay in civil lawsuits, to the almost total exclusion of additional significant process values and procedural precepts, especially uniformity.[77] The legislation concomitantly included impractical objectives and time-frames, as well as prescribed instrumentalities that lacked expertise or assigned them unclear duties, while much of the statute

71 *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4644 (authorizing FCSC); JUDICIAL CONFERENCE OF THE U.S., THE CIVIL JUSTICE REFORM ACT OF 1990 FINAL REPORT: ALTERNATIVE PROPOSALS FOR REDUCTION OF COST AND DELAY ASSESSMENT OF PRINCIPLES, GUIDELINES & TECHNIQUES (1997), *reprinted in* 175 F.R.D. 62, 78 (1997) [hereinafter JCR]; *see also* S. REP. 101-416, *supra* note 70, at 4–6, 10, 30–31.

72 There is little mention of the JIA in the CJRA's legislative history.

73 *See* S. REP. 101-416, *supra* note 70, at 4–6, 30–31; Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115, 128 (1991). Opposition was ironic as the CJRA increased judges' discretion and power to adopt conflicting local measures.

74 *See* 28 U.S.C. §§ 471–482 (1994); *see also* S. REP. 101-416, *supra* note 70, at 3–6.

75 *See* WOLF HEYDEBRAND & CARROLL SERON, RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS 157 (1990); TERENCE DUNGWORTH & NICHOLAS M. PACE, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS 74–75 (1990).

76 *See, e.g.*, JCR, *supra* note 71, at 88–89; Avern Cohn, *A Judge's View of Congressional Action Affecting the Courts*, LAW & CONTEMP. PROBS., Summer 1991, at 100; Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 400–01 (1992).

77 *See* Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1466–71 (1987) (discussing process values); *infra* notes 79, 82 and accompanying text. *But cf.* 28 U.S.C. § 471 (stating that CJRA's purpose was opening court access, a critical process value).

clashed with, and its effectuation essentially discontinued implementation of, the mandates included in the 1988 JIA and the 1985 revision of Rule 83 which were meant to limit local proliferation.[78]

b. Statutory Requirements and Implementation

The CJRA required by December 1993 that each of the ninety-four federal district courts issue a civil justice cost and delay reduction plan, which was "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."[79] The districts were to promulgate the plans after examining reports and suggestions assembled by advisory groups,[80] institutions that the courts appointed ninety days subsequent to statutory enactment and that were to have balanced composition.[81] The districts evaluated the groups' reports and recommendations and considered the inclusion of eleven legislatively-prescribed principles, guidelines, and techniques and any additional measures which they thought might reduce delay and expense.[82] The statute's proponents, therefore, contemplated that reform "from the bottom up" would foster innovation while improving communication and promoting consensus among federal court users and within and across federal districts.[83]

The CJRA fostered considerable local proliferation, particularly of inconsistent procedures. More specifically, the statute's twelfth open-textured prescription implicitly encouraged districts and judges to promulgate and enforce local requirements that conflicted with the federal rules, United States Code provisions, and other courts' mea-

78 *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317 § 608, 110 Stat. 3847, 3860 (extending deadlines); Judicial Amendments Act of 1994, Pub. L. No. 103-420 § 4, 108 Stat. 4343, 4345 (same); Carl Tobias, *Recalibrating the Civil Justice Reform Act of 1990*, 30 HARV. J. ON LEGIS. 115, 123–33 (1993) (assigning unclear duties).

79 28 U.S.C. § 471 & notes; *see also* Edward D. Cavanagh, *The Civil Justice Reform Act of 1990:* Requiescat in Pace, 173 F.R.D. 565, 567–81 (1997).

80 *See* 28 U.S.C. § 472.

81 Groups were to assess "civil and criminal dockets" and identify "trends in case filings and in the demands being placed on courts' resources" and cost and delay's major causes while suggesting means to treat the districts', parties', and counsel's needs and to insure that each helped reduce cost and delay. *See id.* §§ 472, 478. These entities and duties show how Congress structured the CJRA in ways which could increase proliferation because, for example, the Act may have led to group suggestions that seemed more solicitous of local judges and attorneys than of consistency.

82 *See* 28 U.S.C. §§ 472–473.

83 *See* Tobias, *supra* note 15, at 1604.

sures.[84] Numerous districts seemingly depended on this provision to adopt and apply strictures that contravened exogenous commands, and a number of courts apparently relied on the eleven prescriptions, especially those governing discovery, to implement inconsistent local mandates.[85] Little in the Act or its attendant legislative history seemed to prohibit these conflicts.[86] All of the federal districts invoked the twelve statutorily-enumerated principles, guidelines, and techniques to effectuate diverse procedural permutations.

Numerous judges inconsistently construed the new local measures, and a few did not even apply some requirements that their districts had prescribed. Moreover, many attorneys and parties experienced problems discovering, comprehending, and satisfying the relevant procedures. A significant reason for this is that strictures might have been included in plans, local rules, individual-judge procedures, orders, or informal practices, certain of which were practically accessible only to local counsel and litigants. For instance, some districts did not reduce to writing applicable automatic disclosure measures, leaving resolution to local practices or understandings.[87] The CJRA as enacted, drafted, and implemented, thus, clearly facilitated the promulgation of local measures, especially conflicting requirements, while suspending effectuation of those features of the 1988 JIA which were intended to limit proliferation.

Congress entrusted virtually every feature of CJRA implementation to the essentially unreviewable, and thus effectively complete discretion of the districts.[88] The courts possessed and exercised nearly

84 In adopting plans, courts were to examine and could include other features that they deemed appropriate after considering groups' suggestions. *See* 28 U.S.C. § 473(b)(6).

85 *See* U.S. DISTRICT COURT FOR THE E. DISTRICT OF TEX., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 9 (1991) (declaring that plan "has precedence and is controlling" over conflicting federal rules); *see also* Tobias, *supra* note 19, at 1417, 1421 (examples of reliance on last proviso); *id.* at 1416 (providing examples of reliance on eleven prescriptions).

86 *See* Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 963 (1996); A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV. 877, 888–92 (1993); Lauren K. Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1464–72 (1994).

87 *See* Tobias, *supra* note 15, at 1621. In fairness, the CJRA had many positive features. Congress structured the Act in ways which should have limited non-uniformity, cost, and delay, while many districts applied measures that saved expense or time. A few difficulties may have resulted more from courts' interpretation and implementation than CJRA phrasing. *See id.*

88 This discretion was essentially unreviewable because the Act did not prescribe judicial review and few cases challenged conflicting measures. *See, e.g.*, Ashland

absolute discretion to promulgate local strictures covering practically any procedural area, even those already governed by the federal rules or acts of Congress, and to enforce those requirements.[89] Because the CJRA specifically encouraged local experimentation, and a number of courts seemed to consider some of the statute's eleven prescriptions and the twelfth open-ended provision as impliedly inviting the promulgation of conflicting strictures, the legislation fostered local proliferation.[90]

The CJRA and its implementation, therefore, essentially discontinued effectuation of those aspects of the 1988 JIA and the 1985 revision of Rule 83, which Congress and the Court meant to limit the proliferation of local procedures. Even the measures that attained the CJRA's objective of reducing cost apparently did so at the expense of uniformity and simplicity or of significant process values, such as fairness or court access.[91] Indeed, the legislation, by empowering district courts to create as well as apply relevant strictures, increased their authority to prescribe inconsistent requirements.

The 1990 CJRA's purpose of decreasing cost and delay by promoting local testing with innovative measures inevitably multiplied the number of local procedures, certain of which were conflicting, and threatened the attainment of the goals included in the 1988 JIA and Rule 83's 1985 amendment which were to restrict the growing quantity of mechanisms, particularly inconsistent ones. The objectives of saving expense and time hark back to the 1938 procedural precepts of prompt, economical dispute resolution, which the 1983 federal rules amendments were intended to revitalize, while the cost and delay that the 1990 CJRA was meant to limit may have resulted from the 1938 rules' uniform, simple regime that the 1988 JIA was meant to revive.

The 1990 enactment also might evince Congress's inability to perceive process very broadly or systemically. For example, the statute's passage evidenced concern about saving money and time in civil litigation, although the few procedures prescribed, and the increased bal-

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Chem., Inc. v. Barco, Inc., 123 F.3d 261, 263–68 (5th Cir. 1997) (plaintiff challenged a local rule as conflicting with a federal rule); Laird v. Chisholm, 85 F.3d 637, 637 (9th Cir. 1996); *see also supra* notes 57–59, 86 and accompanying text. The CJRA, thus, increased local power by limiting appellate review.

89 The CJRA may only extend developments that local proliferation had already begun, especially if the Act sunsets. *See supra* notes 33–34, 48–60 and accompanying text.

90 CJRA circuit review committees' constitution and guidance made them reluctant to analyze CJRA measures. *See* Tobias, *supra* note 19, at 1406–13; *see also* Tobias, *supra* note 15, at 1620–21 (reviewing circuit councils' reluctance to review measures which CJRA seemingly authorized).

91 *See* Tobias, *supra* note 19, at 1423–27; Tobias, *supra* note 15, at 1623–27.

kanization produced, may have imposed greater expense and delay. The CJRA essentially discontinued initiatives that were meant to decrease the number of local measures, especially conflicting requirements, which Congress had instituted a mere two years previously, and seemingly increased proliferation and inconsistency.[92]

5. The 1993 Federal Rules Amendments

The most ambitious package of amendments to the Federal Rules of Civil Procedure in their six-decade history took effect on December 1, 1993.[93] Some of these revisions, especially together with prior procedural developments, such as those implicating the 1983 federal rules changes and civil justice reform, have apparently contributed to the growth of local strictures, particularly inconsistent measures. This Subsection focuses on the modification in Federal Rule 26, which instituted automatic disclosure because it was quite controversial and has the greatest importance to local proliferation.

a. Automatic Disclosure

The revision in Rule 26(a) prescribing automatic disclosure, which commands litigants to exchange significant information about their cases before traditional discovery, was the most controversial formal proposal ever made to amend the federal rules.[94] Practically all elements of the bar opposed the initial recommendation that the Advisory Committee proffered because attorneys had difficulty detecting exactly what must be revealed, thought that disclosure would add another layer of discovery, believed that the draft would pose ethical conflicts with clients, and were concerned that the mechanism suggested could impose expense and delay.[95] The Advisory Committee addressed this criticism by withdrawing the original proposal during February 1992; however, the Committee revitalized the modified dis-

92 Professor Yeazell may have best summarized the statute by stating that "without a more comprehensive sense of how process works, we can look forward only to blind vacillation between the points of a swinging pendulum as we grasp at various 'reforms,' each bringing its own unappreciated second-order effects." Yeazell, *supra* note 60, at 677–78.

93 Amendments to Fed. Rules of Civil Procedure, *reprinted in* 146 F.R.D. 401 (1993).

94 *See* Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 3 (1992); Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139, 140 (1993); Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 265–71 (1992) (describing objections to the proposed change).

95 *See Amendments to Fed. Rules of Civil Procedure*, 146 F.R.D. at 512 (Scalia, J., dissenting); Bell et al., *supra* note 94, at 28–32; Tobias, *supra* note 94, at 141.

closure requirements in April, and the remaining entities in the rule-revision hierarchy approved them.[96] The United States House of Representatives agreed to omit automatic disclosure from the package of amendments, but the Senate unexpectedly failed to act, and the disclosure revision took effect on December 1, 1993.[97]

The feature of the disclosure provision that is most relevant to proliferation was the inclusion of a local option measure, which empowered each of the ninety-four districts to alter the federal rule amendment or to eschew it totally.[98] A number of courts relied on this procedure to adopt local disclosure techniques that departed from the federal rule revision or to reject it completely.[99] A few districts actually entrusted the determination regarding disclosure to the discretion of individual judges of the court.[100] Nearly half of the districts eventually decided against employing the federal rule change.[101] This amendment concomitantly allowed judges and parties to modify its strictures in specific cases.[102]

The local option procedure was quite significant. Most important, the provision authorized districts and individual judges to promulgate and enforce local requirements that contravened the governing federal rules and strictures in the other ninety-three districts.[103] The local option technique, therefore, specifically condoned local procedural proliferation and greatly increased the potential for conflicts, complicating and imposing expense, and delay in federal civil litigation because, for example, the applicable measures were difficult to locate, understand, and satisfy.[104]

The enormous symbolic significance of the local option mechanism may well have surpassed its great pragmatic importance. Many

96 *See* Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 300 (1994); Tobias, *supra* note 15, at 1612.

97 *See* H.R. 2814, 103d Cong. 1 (1993); 139 CONG. REC. H8746-47 (1993).

98 *See Amendments to Fed. Rules of Civil Procedure*, 146 F.R.D. at 431.

99 *See, e.g.*, E.D. LA. R. 606E; D. ME. R. 18(g); *see also* DONNA STIENSTRA, IMPLEMENTATION OF DISCLOSURE IN FEDERAL DISTRICT COURTS (FJC 1994); Cavanagh, *supra* note 79, at 594–95.

100 *See, e.g.*, N.D. ILL. R. 2.04D; U.S. DISTRICT COURT FOR THE N. DISTRICT OF TEX., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 2–4 (1993); *see also* John Flynn Rooney, *Discovery Rule Lacks Uniformity, Is "Source of Confusion": Critics*, CHI. DAILY L. BULL., Apr. 23, 1994, at 17.

101 *See Half of Districts Opt Out of New Civil Rules*, NAT'L L.J., Feb. 28, 1994, at 5; *see also* STIENSTRA, *supra* note 99; Rooney, *supra* note 100.

102 *See* FED. R. CIV. P. 26(a)(1); *Amendments to Fed. Rules of Civil Procedure*, 146 F.R.D. at 432.

103 *See generally* Robel, *supra* note 86; Tobias, *supra* notes 15, 19.

104 *See* Tobias, *supra* note 15, at 1589.

federal courts experts have long viewed the Advisory Committee as the "Defender of the Faith" in the national, consistent procedural regime which the 1938 Rules instituted.[105] When that entity, seemingly for purposes of political expediency or to revive its diminishing influence, acceded to an approach which facilitated the prescription of conflicting strictures that govern a significant constituent of the increasingly emphasized pretrial process, thereby exacerbating local proliferation, the Committee dealt a serious symbolic, and perhaps fatal, blow to the cause of a national, uniform procedural code.[106]

b. Rules 30, 33, and 16

The 1993 amendments that imposed presumptive numerical limitations on interrogatories and depositions are also relevant to proliferation.[107] The provisions, which allow local variation and permit judges and litigants to modify the procedures in specific cases, resemble and have effects similar to the federal automatic disclosure amendment.[108] For example, the requirements governing presumptive limits on depositions and interrogatories have led certain districts to opt-out of or to alter the federal rules, thus eroding uniformity and simplicity, and imposing expense and delay.[109] A few revisions in Rule 16(b) covering pretrial conferences, which permit local option in some situations and change of time strictures in particular suits might

105 *See, e.g.*, Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 855–56 (1991) (explaining that the Advisory Committee is slow to accept changes in the rules, but is losing influence); Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, LAW & CONTEMP. PROBS., Summer 1988, at 67 (arguing that the way changes are made to the Rules is not good enough and proposing field experiments for proposed changes before they are made); Yeazell, *supra* note 60, at 672–76.

106 I am indebted to Lauren Robel for this idea. *But see* Carrington, *supra* note 96, at 300; *but see also* Amendments to Federal Rules of Civil Procedure 26(a)(1), (b), (d), (f), 30(d)(2), 192 F.R.D. 340, 382, 390–91, 393–94 (2000) (eliminating most of the local option provisions).

107 *See* FED. R. CIV. P. 30(a)(2)(A), 33(a).

108 Presumptive limits raise issues analogous to automatic disclosure. Most important is provision in specific cases for judicial modification and litigant stipulation.

109 *See, e.g.*, D. MONT. R. 200-5(c); N.D.N.Y. GEN. ORDER No. 40 (Dec. 14, 1993). *But cf.* Amendments to Fed. Rules of Civil Procedure, *reprinted in* 146 F.R.D. 401, 390 (1993) (eliminating the local option provisions for limitations on depositions and interrogatories but retaining it for Rule 36 requests for admission and retaining the provision for judicial modification and party stipulation in specific cases).

have similarly decreased uniformity, simplicity, and trans-substantivity, and increased costs.[110]

The set of proposals in the preliminary draft which the Advisory Committee prepared in August 1991 included additional procedures that require rather brief examination because they implicate issues which are less applicable, but relevant, to proliferation. The rule revisors deleted or withdrew a few proposals during the course of the amendment process, while others were constituents of the 1993 modifications. The most important suggestion that did not become effective was a revision in Rule 83, which would have provided for local procedural experimentation. The proposal empowered districts with Judicial Conference approval to prescribe, for not more than five years, experimental local rules that contravened federal rules.[111] The Advisory Committee apparently retracted the recommendation out of deference to contemporaneous CJRA testing, thus losing a valuable technique, which carefully balanced the need to experiment with potentially efficacious measures and to treat peculiar, problematic local conditions against inconsistency's complications.[112]

6. The 1995 Amendments of the Federal Rules

During 1995, the national rule revision entities responded to certain concerns about proliferation by amending the federal civil, appellate, bankruptcy, and criminal rules, which govern the prescription of local procedures in the respective areas.[113] These changes incorporate the JIA mandate that local rules not conflict with federal rules or United States Code provisions and also proscribe duplication.[114] The modifications correspondingly require courts to conform the numbering of local rules to any uniform system which the Judicial Conference

110 *See Amendments to Fed. Rules of Civil Procedure*, 146 F.R.D. at 427–28; *see also id.* at 478–79 (Rule 54(d)(2)(B), (D) revisions prescribe local option); D. MD. R. 104.1; S.D. IND. R. 26.3.

111 *See* COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENT TO FEDERAL RULE OF CIVIL PROCEDURE 83 (1991), *reprinted in* 137 F.R.D. 53, 153 (1991) [hereinafter PRELIMINARY DRAFT].

112 *Compare id., with* JUDICIAL CONFERENCE OF THE U.S., PROPOSED AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, Table of Contents (1992) [hereinafter PROPOSED AMENDMENTS] (deleting proposal); *see also* JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 59 (1995) [hereinafter LONG RANGE PLAN].

113 *See, e.g.*, FED. R. CIV. P. 83 (1995 amendment), *reprinted in* 150 F.R.D. 400 (1993); *see also* MOORE'S 3d, *supra* note 54, § 83.02 (estimating 6000 local civil rules in 1995). I rely in this subsection on Civil Rule 83 which typifies the other, similarly-phrased revisions.

114 *See* FED. R. CIV. P. 83 (1995 amendment); *see also* 28 U.S.C. § 2071(a) (1994).

prescribes, because consistent schemes will facilitate the efforts of an increasingly nationalized bar and of parties to find and comply with local measures.[115] Moreover, the revisions prohibit judges from enforcing local rules that impose technical requirements in ways that forfeit litigants' rights for nonwillful failures to conform.[116]

The 1995 amendments recognize that appellate courts and district and bankruptcy judges invoke multiple directives apart from the federal rules and local rules to regulate practice and authorize the mandates' continued use.[117] However, these commands cannot conflict with or repeat the federal rules, acts of Congress, or the local rules.[118] Moreover, judges can only impose sanctions or other disadvantages for noncompliance with the local procedures when alleged violators have actual notice of the strictures in specific cases,[119] notice which may be satisfied, for example, by "furnishing litigants with a copy outlining the judge's practices."[120] Each Advisory Committee's note admonishes that these local directives can be problematic because their "sheer volume may impose an unreasonable barrier" to attorneys and parties who may be unaware of, or experience difficulties securing, the strictures.[121]

Most of the requirements included in the 1995 amendments of the federal rules have apparently received limited implementation to date.[122] The principal reason why so few appellate and district courts and individual judges have effectuated the revisions seems to be reluctance or uncertainty attributable to contemporaneous experimentation under the CJRA. Moreover, the Judicial Conference has not yet seemingly surveyed, or enforced compliance with, its 1996 directive prescribing a uniform numerical system to which it requested that districts conform their local rules by April 1997, although the Confer-

115 *See* FED. R. CIV. P. 83 (1995 amendment); *see also id.* advisory committee's note; *infra* notes 123, 134, 248 and accompanying text.

116 *See* FED. R. CIV. P. 83 (1995 amendment); *see also id.* advisory committee's note.

117 *See id.*; *see also id.* advisory committee's note.

118 *See id.*; *see also* 28 U.S.C. §2071(a).

119 *See* FED. R. CIV. P. 83 (1995 amendment); *see also id.* advisory committee's note.

120 *Id.* advisory committee's note.

121 *Id.* The Judicial Conference reinforced the revisions by urging reduction of the "number of local rules and standing orders" and that circuit councils and the Conference "discourage further 'balkanization' of federal practice by exercising their statutory authority to review local court rules." LONG RANGE PLAN, *supra* note 112, at 59.

122 I rely in this paragraph on conversations with many individuals who are familiar with implementation of the 1995 amendments.

ence rather expeditiously provided for the regime and many districts have apparently complied.[123]

In short, the above procedural developments, particularly some quite recent ones, such as the 1993 amendments in the Federal Rules of Civil Procedure and civil justice reform, as they elaborate significant prior developments, illustrate numerous concepts that involve local proliferation. Most important, they suggest that certain 1993 revisions and the CJRA's implementation essentially suspended the effectuation of mandates in several federal rules and in the 1988 JIA which were meant to reduce proliferation, thereby permitting the further fragmentation of federal civil procedure.

E. A Survey of Local Procedures Other Than District Court Civil Procedures

Many of the above propositions regarding local civil procedures apparently have similar application to additional local requirements, although the relevant developments, the precise time when they occurred, and the scope and pace of the strictures' proliferation may differ somewhat. Most pertinent, local measures which govern appellate, bankruptcy, criminal, and admiralty cases have seemingly increased in numbers and inconsistency, while the history of their growth resembles that for civil procedures. Thorough assessment of all these provisions would be a mammoth undertaking which exceeds the scope of this Article. Nevertheless, the importance for local practice of the requirements and of attempting to inform future efforts which address proliferation means that these strictures deserve examination below.

1. Appellate Procedures

Proliferating local measures in the United States Courts of Appeals require comparatively limited evaluation, even though they have proved particularly problematic, because Professor Gregory Sisk recently completed a comprehensive analysis of the procedures and the difficulties which they present.[124] The Supreme Court promulgated the Federal Rules of Appellate Procedure (FRAP) in December 1967,

123 *See* JAMES S. KAKALIK, REPORT OF THE JUDICIAL CONFERENCE, IMPLEMENTATION OF THE CJRA IN PILOT AND COMPARISION DISTRICTS 34–35 (1996); *see also supra* note 116 and accompanying text; *infra* note 248 and accompanying text.

124 Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1, 1–61 (1997).

and they became effective on July 1, 1968.[125] The Court only adopted the FRAP three decades after it had prescribed the Federal Rules of Civil Procedure; however, most of the major precepts, such as uniformity, simplicity, and inexpensive, prompt dispute disposition, underlying the civil rules also supported the FRAP. Moreover, the Supreme Court incorporated in the original FRAP 47, which is analogous to Federal Rule of Civil Procedure 83, thereby authorizing the appellate courts to issue and apply local measures which comported with the FRAP.[126]

These federal rules seemed to operate rather efficaciously during the years immediately following their adoption. However, the appellate courts apparently relied on FRAP 47 or other authority to prescribe increasing numbers of local strictures that govern appeals, many of which contravened the FRAP, relatively soon after the provisions' 1968 effective date. Two decades later, the JIA specifically prohibited appellate courts from prescribing inconsistent local rules and mandated periodic Judicial Conference review of local strictures and the abolition or modification of any provisions which it deemed in conflict with the FRAP.[127] During 1995, the national revisors adopted an amendment in FRAP 47, which closely resembles the 1995 modification in Federal Civil Rule 83 but expressly instructs that "[a] generally applicable direction to a parties or a lawyer regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order."[128]

When Professor Sisk reviewed local appellate courts' requirements, he found a "remarkable disunity in rules of appellate practice among the federal courts of appeals, including notable instances of actual conflict between local practice and the FRAP."[129] Perhaps most disturbing was his determination that resulted from assessing a "few central elements of the ordinary civil appeal," rather than thoroughly canvassing "all local circuit rules on all aspects of appellate practice."[130]

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125 Judicial Conference of the U.S., Comm. on Rules of Practice and Procedure, *Federal Rules of Appellate Procedure*, 43 F.R.D. 61, 61 (1968); Sisk, *supra* note 124, at 5 n.19.

126 *See* FED. R. APP. P. 47; *see also supra* notes 16–26 and accompanying text.

127 *See* 28 U.S.C. §§ 331, 2071(c)(2) (1994).

128 FED. R. APP. P. 47 (1995 amendment); *see also id.* advisory committee's note ("[A] local rule may not bar any practice that [the FRAP] explicitly or implicitly permit."); *supra* notes 59, 108–09 and accompanying text (indicating Federal Civil Rule 83's 1995 revision and FRAP 47 was not revised in 1985).

129 Sisk, *supra* note 124, at 7.

130 *Id.* at 8.

However, the diversity and complexity of local rules is more pronounced with respect to other special appellate matters, ranging from applications for a stay or a writ of mandamus at the outset of the appellate process to petitions for rehearing and applications for attorney's fees at the conclusion of an appeal.[131]

Professor Sisk ascertained that the proliferation of inconsistent and duplicative local appellate requirements has numerous detrimental impacts.[132] He asserted that local variations on, and supplementation of, the FRAP hinder efficient and cost-effective pursuit of appeals and deny justice in specific cases.[133] Professor Sisk also claimed that the expanding number and complexity of local commands hamper thorough understanding and increase the possibilities for innocent error, while the need to find, comprehend, and comply with the strictures requires inordinate, unnecessary expenditures of resources.[134] He correspondingly observed that proliferation multiplies the opportunities for construction and application of procedural requirements and for concomitant mistakes by judges and court staff.[135] Indeed, Professor Sisk concluded that the "radiation of inconsistent circuit rules poses a direct challenge to the fundamental concept of a *federal* procedure."[136]

2. Bankruptcy Procedures

Local bankruptcy measures have similarly proliferated. However, they warrant relatively brief consideration here because Professor Mary Josephine Newborn Wiggins recently finished a thorough examination of the local strictures when serving as the reporter for the Committee for the Review of Local Bankruptcy Rules, which the Ninth Circuit Judicial Council appointed.[137] Prior to 1973, the Federal Rules of Civil Procedure and a series of general orders covered procedure in the bankruptcy courts, but that year the Supreme Court promulgated the Federal Rules of Bankruptcy Procedure (FRBP).[138]

131 *See id.*

132 *See id.* at 5–6, 25–34.

133 *See id.* at 6, 26–30.

134 *See id.* at 6, 30–33; *see also* Tobias, *supra* note 19, at 1422.

135 *See* Sisk, *supra* note 124, at 33–34; *see also* John B. Oakley, *An Open Letter on Reforming the Process of Revising the Federal Rules*, 55 MONT. L. REV. 435, 445 (1994).

136 Sisk, *supra* note 124, at 6 (emphasis in original).

137 Mary Josephine Newborn Wiggins, *Globalism, Parochialism and Procedure: A Critical Assessment of Local Rulemaking in Bankruptcy Court*, 46 S.C. L. REV. 1245, 1245–48 (1995).

138 *See id.* at 1249. *See generally* HAROLD REMINGTON, TREATISE ON THE BANKRUPTCY LAWS OF THE UNITED STATES 457–615 (6th ed. 1955).

Since the 1970s, bankruptcy judges have relied on FRBP 9029, which is the analogue of Federal Civil Rule 83, or other powers to adopt and apply expanding numbers of local requirements, many of which contravene or duplicate the FBRP or statutes.[139] The 1995 revision of FRBP 9029, therefore, imposed mandates proscribing these local provisions, commands that are virtually identical to those in Civil Rule 83.[140]

The bankruptcy judges have apparently promulgated and enforced numerous inconsistent and redundant local measures. Professor Wiggins' "survey of local bankruptcy rules in the Ninth Circuit reveal[ed] some conflict with the federal bankruptcy rules and the Bankruptcy Code [and that] many districts have created local bankruptcy rules that merely repeat existing federal law."[141] She found that "inconsistencies can lead to the misapplication of federal law [meaning that parties] receive different treatment in different districts [and] impose unreasonable barriers to access for some litigants."[142] Professor Wiggins correspondingly observed that repetitious local "rules impair the efficient operation of the bankruptcy courts" by wasting judicial and administrative resources on drafting and distribution of the strictures as well as attorneys' and litigants' money and time on discovering, comprehending, and satisfying the measures.[143]

This proliferation is particularly important because bankruptcy filings comprise the fastest growing category of lawsuits on the federal district court docket.[144] Finding, understanding, and conforming to more local bankruptcy provisions, some of which are inconsistent or redundant, and the need to use local counsel who are familiar with local practice can consume resources.[145] Local bankruptcy requirements have also imposed an additional layer of procedural obstacles, prompting appeals that challenge bankruptcy judges' authority to

139 Rule 927 was the predecessor of FRBP 9029. *See* Wiggins, *supra* note 137, at 1250.

140 *See* FED. R. BANKR. P. 9029 (authorizing bankruptcy judges to adopt local measures other than local rules but to adopt local rules only when district courts delegate power).

141 Wiggins, *supra* note 137, at 1251, 1255.

142 *Id.* at 1254–56.

143 *See id.* at 1256; *see also id.* at 1255 (characterizing large number of repetitive local rules as "primary threat to efficiency of bankruptcy courts").

144 *See* ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL COURTS CASELOAD CONTINUES UPWARD SPIRAL (1997) (on file with the Notre Dame Law Review) [hereinafter UPWARD SPIRAL].

145 *See* Letter from Mary Jo Wiggins, Professor of Law, University of San Diego, to Carl Tobias (Mar. 18, 1997) (on file with author).

adopt local strictures and additional disputes, while the measures might have restricted court access for certain parties, such as those with limited financial or political power.[146] These considerations, which have apparently hindered litigation's economical and speedy resolution, are critical in bankruptcy because the factors can deplete the assets that are available to creditors by, for instance, committing to case processing resources which they might otherwise recover.[147]

II. AN ANALYSIS OF EFFORTS TO LIMIT LOCAL PROCEDURAL PROLIFERATION

The description of local procedural proliferation's history in Part I of this Article suggests that the mandates relating to review of those provisions in the respective federal rules which govern the adoption of local requirements and in the JIA have received very little implementation. I initially examine this effectuation, emphasizing civil procedures. This Part then explores the explanations for, and the implications of, truncated implementation. I conclude with lessons to be derived from this experience.

A. Implementation of Local Procedural Review

1. Civil Procedures

The duties regarding periodic local review of civil procedures for consistency and duplication and possible abrogation or alteration which Federal Rule of Civil Procedure 83 and the 1988 JIA imposed on circuit judicial councils, the ninety-four federal district courts, and individual judges have received circumscribed effectuation. I focus on the councils' efforts because those entities have greater responsibility

146 *See id.*

147 The historical dearth of local criminal procedures has made their proliferation less problematic. The District of Kansas with thirty-eight civil, but only seven criminal, rules is illustrative. *See* FEDERAL LOCAL COURT RULES (2d ed. West Group 1997). However, developments, such as Congress's expansion of criminal jurisdiction and criminal cases' increasing complexity, mean that districts and judges have adopted more conflicting local measures, and this will increase. *See* Heiser, *supra* note 1, at 575–76; *see also* FED. R. CRIM. P. 57; 1 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE §§ 1–4, at 901–902 (2d ed. 1982). Proliferation has been even less troubling in admiralty. Few districts and judges, primarily on the coasts, have adopted procedures which contravene the federal admiralty or civil rules. *See* Heiser, *supra* note 1, at 575–76; *see also* FED. R. CIV. P. 81(a) (listing other cases in which federal civil rules apply only insofar as they do not contravene procedures imposed by statute or otherwise); 12 WRIGHT & MILLER, *supra*, §§ 3201–3256 (analyzing admiralty procedure); WRIGHT, *supra* note 9, § 63 (discussing procedure in other non-civil cases, such as copyright and habeas corpus).

and ostensibly have considerable independence from the districts and judges whose strictures the councils are scrutinizing.

a. Circuit Judicial Councils

i. Councils That Have Conducted Review

Several circuit judicial councils have undertaken the review of local measures that Federal Rule of Civil Procedure 83 and the JIA required. The circuit councils have approached this obligation in numerous ways, have accorded varying levels of scrutiny to local strictures, and have attained differing degrees of success in terms of securing local procedural modifications.

During the early 1990s, the Circuit Judicial Council for the United States Court of Appeals for the District of Columbia Circuit performed a comprehensive review of the local measures that the United States District Court for the District of Columbia had promulgated.[148] The council recommended changes in a number of provisions which the judges of the district court then implemented.[149]

For a decade, the Fifth Circuit staff attorney's office has reviewed thoroughly, and prepared an analysis of, all newly-adopted local rules. A committee of the judicial council has then relied on that evaluation in deciding whether to abrogate local provisos. The council, which takes this responsibility very seriously, has occasionally advised district and bankruptcy courts to redraft local rules deemed in conflict.[150] Since 1990, the Seventh Circuit Judicial Council has retained as a consultant Professor Mary Squiers, who has served for more than a decade as the Project Director of the Local Rules Project.[151] Professor Squiers annually analyzes the local requirements that the federal districts within the council's purview prescribe and proffers suggestions regarding those measures to the council. The council has evaluated Professor Squiers's recommendations, which it generally follows, and has asked that the districts abolish or alter some strictures, requests which the courts have typically honored.

148 *See* Memorandum from David Pimentel, Assistant Circuit Executive for Legal Affairs, U.S. Courts for the Ninth Circuit, to Local Rules Review Committee (Feb. 8, 1995) (on file with author); Telephone Interview with David Pimentel (July 22, 1994).

149 *See* Memorandum from David Pimentel, *supra* note 148; Telephone Interview with David Pimentel, *supra* note 148.

150 *See* Letter from David Pimentel, Deputy Circuit Executive, U.S. Courts for the Fifth Circuit, to Carl Tobias (July 17, 2001) (on file with author).

151 Telephone Interview with Mary P. Squiers, Project Director of Local Rules Project (Feb. 18, 1998).

During 1993, the Ninth Circuit Judicial Council appointed a committee to scrutinize local procedures promulgated by the fifteen districts that are situated in the Ninth Circuit.[152] The burdensome nature of the responsibilities entailed in reviewing all of these local requirements frustrated this entity's efforts, and the committee suspended its attempt to conclude a comprehensive assessment. In 1994, the judicial council delegated local procedural review to the Conference of Chief District Judges, a creation of the council, and the Conference constituted a District Local Rules Review Committee (LRRC) under its auspices.[153] The LRRC, which consisted of three chief district court judges, one district clerk, two law professors, and a practitioner, undertook scrutiny of the local measures instituted in the fifteen districts.[154]

The LRRC secured the assistance of volunteer local reviewers, who were typically law faculty or attorneys, in the fifteen courts.[155] These reviewers evaluated all local rules and general orders that have the effect of local rules, except for local rules which courts adopted pursuant to the CJRA or the 1993 federal rule revisions.[156] Reviewers compiled lists of provisions, which conflicted with, or duplicated, federal rules or acts of Congress, and reasons for their findings and forwarded them to the LRRC.[157]

The LRRC then transmitted these analyses to the judicial officers of each district for their assessment and response.[158] Numerous districts, upon examining these reports, decided to abrogate or change a number of local strictures. All of the courts next sent replies to the LRRC which evaluated them and made recommendations regarding specific local measures to the judicial council. The LRRC suggested that the council eliminate or modify some provisions which the districts retained and that the council propose to the national rule revision entities a few procedures for consideration in the amendment process. For example, several courts had adopted local requirements

152 *See* Telephone Interview with David Pimentel, *supra* note 148; *see also* Carl Tobias, *Suggestions for Circuit Court Review of Local Procedures*, 52 WASH. & LEE L. REV. 359, 365 (1995).

153 *See* Heiser, *supra* note 1, at 563; Tobias, *supra* note 152, at 365.

154 *See* Heiser, *supra* note 1, at 563. Professor Margaret Johns, U.C. Davis School of Law, served as the extremely capable chair. I was the other law professor.

155 *See id.*; Carl Tobias, *Continuing Federal Civil Justice Reform in Montana*, 57 MONT. L. REV. 143, 147–48 (1996).

156 *See* Heiser, *supra* note 1, at 563–64; Tobias, *supra* note 155, at 147–48.

157 *See* Heiser, *supra* note 1, at 563–64; Carl Tobias, *Ongoing Federal Civil Justice Reform in Montana*, 57 MONT. L. REV. 511, 515 (1996).

158 *See* Carl Tobias, *Contemplating the End of Federal Civil Justice Reform in Montana*, 58 MONT. L. REV. 281, 283–84 (1997); Tobias, *supra* note 157, at 515.

which they premised on a federal statute that Congress had repealed,[159] while most districts had promulgated local strictures which excused compliance with Federal Rule 5(d)'s command that certain discovery materials be filed with the courts, provisions which directly contravene this federal provision.[160]

During early 1997, the LRRC tendered its report and recommendations to the circuit judicial council.[161] At a February council meeting, Chief Judge Procter Hug, Jr. appointed a committee comprised of Chief Judge Judith Keep of the Southern District of California and Chief Judge Edward Lodge of the District of Idaho to review the LRRC's submission and develop possible responses.[162] In May, the two judges provided several suggestions for the circuit council's consideration. First, the committee proposed that the council not abolish or change any local measures that the LRRC recommended be altered, but rather continue working with districts and judges to encourage their modification of the requirements.[163] Second, Judges Keep and Lodge suggested that the council not commission another local review for five years, unless Chief Judge Hug so ordered.[164] The circuit council subscribed to the committee proposals.[165]

ii. Councils That Suspended Review

The Sixth Circuit Judicial Council commenced local procedural review in the early 1990s.[166] The council requested that lawyers in the staff attorney's office of the circuit executive scrutinize the local requirements of all districts within the council's compass. The lawyers undertook a comprehensive examination of the local strictures for consistency and duplication but experienced difficulty in addressing disuniform procedures adopted under the CJRA. The staff attorney's office sought the circuit council's advice regarding this concern. During a May 1994 meeting of the council, it voted to discontinue moni-

159 *See, e.g.*, D. ARIZ. R. 1.17(d); D. OR. R. 1030–2; *see also* Federal Boat Safety Act, 46 U.S.C. § 1484(d) (1994) (affording citation to repealed statute).

160 *See, e.g.*, D. NEV. R. 26–28; D.N.M.I.R. Civ. 26.13; *see also* FED. R. CIV. P. 5(d); 14 MOORE'S 3d, *supra* note 54, § 83.04 (stating that sixty-eight districts excuse compliance but that the Advisory Committee has refused to amend Rule 5 on five occasions).

161 DISTRICT LOCAL RULES REVIEW COMM., REPORT TO THE NINTH CIRCUIT JUDICIAL COUNCIL, Executive Summary (1997); *see also* Telephone Interview with Margaret Johns, Chair, LRRC (Dec. 15, 1997).

162 *See* Telephone Interview with Margaret Johns, *supra* note 161.

163 *See id.*

164 *See id*

165 *See id*

166 *See* Carl Tobias, *A Sixth Circuit Story*, 23 FLA. ST. U. L. REV. 983, 989 (1996).

toring of local provisions pending the receipt of more guidance from Congress, the Judicial Conference, or case law as to whether the CJRA superseded the federal rules.[167]

iii. Councils That Have Explored Local Review

Several circuit judicial councils have apparently explored the possibility of conducting local procedural review but have not actually undertaken analyses. For instance, the First and Third Circuit Judicial Councils have evaluated the prospect of creating a framework for assessing local measures, which is analogous to that employed by the Ninth Circuit.[168] However, neither council has formally instituted a review process, much less completed scrutiny of relevant procedures. Other circuit councils have collected local strictures which their districts promulgated but may not have analyzed them for consistency or duplication. For example, the Eighth Circuit Judicial Council has asked that districts within its scope submit all of their local requirements to the circuit executive office.[169]

iv. Councils That Have Apparently Conducted Minimal Review

A number of the circuit judicial councils have seemingly performed minimal meaningful evaluation of local measures. My conversations with personnel in the circuit executive offices, law professors, and practitioners in the Second, Fourth, Tenth, and Eleventh Circuits suggest that the councils have conducted little, if any, review. The Fourth Circuit is illustrative. Samuel W. Phillips, the Fourth Circuit Executive, stated that scrutiny of all local strictures adopted by district courts would be a "mammoth task" because the Fourth Circuit includes nine federal districts and the council has few resources.[170] Phillips observed that the circuit council thinks that any difficulties involving local provisions would "readily surface and be treated."[171]

167 *See* Judicial Council of Sixth Circuit, U.S. Court of Appeals, Minutes of Meeting 3–4 (May 4, 1996).

168 *See* Telephone Interview with Andrew Tietz, Assistant Circuit Executive, U.S. Courts for the First Circuit (July 22, 1994); *see also* Telephone Interview with Theresa Burnett, Assistant Circuit Executive, U.S. Courts for the Third Circuit (Nov. 30, 2001); Telephone Interview with Susan Kruger, Deputy Circuit Executive, U.S. Courts for the First Circuit (Nov. 30, 2001); Telephone Interview with David Pimentel, *supra* note 148.

169 *See* Telephone Interview with David Day, Professor of Law, University of South Dakota (Apr. 10, 1997).

170 Telephone Interview with Samuel W. Phillips, Circuit Executive, U.S. Courts for the Fourth Circuit (Jan. 18, 1995).

171 *Id.*

Then-Chief Judge Sam J. Ervin, III examined the practicability of assessing every local measure prescribed by districts within the court for consistency, but he concluded that it was "not feasible for the Fourth Circuit to undertake such a review" without more personnel or money.[172]

b. Districts and Individual Judges

I am aware of some federal districts which have performed the review of local procedures that Federal Civil Rule 83 and the JIA mandated. Most of these courts simultaneously scrutinized local requirements and abolished or altered them in the context of implementing the CJRA or the 1993 federal rules amendments, while virtually no districts have monitored standing orders or other strictures that individual judges issue and apply.

Certain federal districts did review and change their local procedures when effectuating the CJRA or the 1993 federal rules revisions. For example, courts in several multi-district states promulgated the same local rules, while a few courts abrogated or modified conflicting local measures. The efforts of the Northern and Southern Districts of West Virginia are illustrative.[173] The courts named working groups that capitalized on implementation of the CJRA and the 1993 federal amendments to undertake the development of an identical set of local rules.[174] Multiple federal districts in Iowa, Kentucky, Louisiana, and New York similarly appeared to seize on the opportunity which CJRA experimentation afforded by adopting the same local rules within the respective states.[175] Federal district judges in the District of Maryland and the Eastern District of Virginia have also scrutinized the courts' local rules and claimed that they found no conflicts with the federal rules or acts of Congress.[176] The increased balkanization engendered

172 Letter from Samuel W. Phillips, Circuit Executive, U.S. Courts for the Fourth Circuit, to Carl Tobias (Feb. 14, 1995) (on file with author).

173 *Cf.* Carl Tobias, *Civil Justice Reform in the Fourth Circuit*, 50 WASH. & LEE L. REV. 89, 99–105 (1993) (discussing early CJRA implementation and local rule review in those districts).

174 Telephone Interview with John W. Fisher, II, Professor of Law, West Virginia University (Jan. 20, 1995).

175 *See, e.g.*, Local Rules, U.S. District Courts for the Northern & Southern Districts of Iowa; Local Rules, U.S. District Courts for the Eastern & Western Districts of Kentucky; Local Rules, U.S. District Courts for the Eastern, Middle & Western Districts of Louisiana; Local Rules, U.S. District Courts for the Eastern & Southern Districts of New York.

176 *See* Telephone Interview with Judge Robert E. Payne, Chair, Local Rules Committee, U.S. District Court for the Eastern District of Virginia (Jan. 25, 1995); Tele-

by the CJRA experience has concomitantly led the bars in several urban districts to call for limitations on proliferation, while the courts have instituted evaluations of local procedures in an attempt to restrict the measures.[177] Finally, I am aware of no individual judges who have reviewed their own orders or practices for consistency.

2. Local Procedures Other Than Civil Procedures

a. Appellate Procedures

The duties respecting periodic local review of appellate procedures for conflicts and duplication, as well as potential elimination or alteration which the 1995 amendment of FRAP 47 and the JIA imposed on the Judicial Conference and the appellate courts have apparently received little, if any, implementation. I emphasize Conference monitoring because that entity has more responsibility and may be better positioned to comply by virtue of its distance from the appellate courts whose strictures are being reviewed.

The Judicial Conference has instituted virtually no action to effectuate the mandates in FRAP 47 and the JIA, while delegating substantial responsibility for compliance to the Judicial Conference Committee on Rules of Practice and Evidence (Standing Committee).[178] Indeed, Professor Sisk characterized the "power to modify or abrogate any rule prescribed by a circuit [as] little known and seldom invoked," finding that "on only one occasion . . . has the Conference been requested to overturn a circuit rule."[179] The attorney generals of five states asked the Judicial Conference to invalidate the Ninth Circuit's local rule covering death penalty appeals because they believed that the prescription contravened federal law.[180] However, the Conference diplomatically intimated that there might be a conflict but essentially remanded the matter to the Ninth Circuit when it invited the court's reconsideration of the requirement.[181] On July 1, 1997, the Ninth Circuit responded to the Conference overture by pub-

phone Interview with Chief Judge J. Frederick Motz, Chair, Local Rules Committee, U.S. District Court for the District of Maryland (Jan. 24, 1995).

177 *See* Edward D. Cavanagh, *Congress' Failed Attempt To Spur Efficiency: The Legacy of the Civil Justice Reform Act*, LEGAL TIMES, Nov. 25, 1996, at 28, 30.

178 *See* Sisk, *supra* note 124, at 51–52.

179 *Id.* at 51.

180 *Id.*; *see also* McCabe, *supra* note 2, at 1690 n.182.

181 *See* Sisk, *supra* note 124, at 52; *see also* Carrington, *supra* note 86, at 978.

lishing a draft provision for death penalty appeals as an interim procedure which was immediately effective.[182]

I found very little evidence that the appellate courts had undertaken efforts to discharge the obligations which the 1995 revision of FRAP 47 or the JIA imposed. My conversations with officers in the circuit executive offices, practitioners, and law professors in the regions where the courts are located suggest that no appellate court has voluntarily scrutinized local strictures for consistency, much less abolished or amended any requirements deemed to conflict.[183] In fairness, it may be unrealistic to expect that the appellate courts would have rigorously implemented the command in FRAP 47 because this mandate only took effect in December 1995 and because the revisors did not amend the rule in 1985, while virtually all appellate courts have uniformly numbered their local rules.[184]

b. Bankruptcy Procedures

The mandates relating to periodic local review of bankruptcy procedures for consistency and duplication and possible elimination or change which FRBP 9029 imposed on circuit councils, federal courts, and individual judges have received considerably less effectuation than those governing civil procedures. Indeed, my discussions with staff in the circuit executive offices, practicing attorneys, and law faculty in the areas where the courts are located indicate that virtually no courts or judges have discharged this duty.[185]

The Ninth Circuit Judicial Council has conducted the most ambitious review of bankruptcy requirements. During 1993, the judicial council appointed a Committee for the Review of Local Bankruptcy Rules (CRLBR) to scrutinize procedures adopted by the circuit's fifteen districts.[186] The CRLBR fully evaluated the procedures prescribed throughout the court and completed a comprehensive report in 1994.[187] Professor Wiggins of the University of San Diego School of

182 *See* 9TH CIR. R. 22-1 to -6; *see also* Sisk, *supra* note 124, at 52 n.240. It became final in 1998.

183 Notes of conversations are on file with author.

184 *See supra* notes 62–63, 122 and accompanying text; *infra* note 249 and accompanying text.

185 Notes of conversations are on file with author.

186 *See* NINTH CIRCUIT JUDICIAL COUNCIL, REVIEW AND ANALYSIS OF LOCAL BANKRUPTCY RULES OF PROCEDURE (1994) [hereinafter REVIEW AND ANALYSIS]; *see also* Wiggins, *supra* note 137. Because the CRLBR and the LRRC operated similarly, I emphasize the CRLBR's aspects which were different. *See supra* notes 152–61 and accompanying text.

187 *See* REVIEW AND ANALYSIS, *supra* note 186.

Law, the entity's reporter, undertook the daunting task of collecting, analyzing, and synthesizing all of the relevant bankruptcy requirements with some assistance from the committee members and from law students at her institution.[188] The CRLBR then designated strictures that it believed were conflicting or duplicative and circulated the entity's findings to judges in the fifteen districts. The committee apparently attained the greatest success in "identifying inconsistent rules and persuading most districts to voluntarily rescind most inconsistent rules."[189]

The CRLBR next suggested that the Ninth Circuit Judicial Council abrogate or modify local requirements that the committee found to conflict with, or repeat, federal strictures but which districts refused to alter.[190] Because some courts resisted the CBLBR's overtures, and the circuit council was not particularly assertive about invalidating certain inconsistent rules, a number of conflicting and redundant local provisions remain in place.[191]

B. Reasons for Limited Implementation of Local Procedural Review

Numerous reasons apparently explain the growth of local procedural strictures, increasing numbers of which conflict with, or duplicate, federal rules or United States Code provisions, as well as the inability or reluctance of the Judicial Conference, circuit judicial councils, federal appeals courts, districts, and individual judges to implement comprehensively the commands regarding proliferation that various federal rules and the JIA imposed. Most of these ideas apply to all of the local measures, monitoring entities, and review mandates.

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188 *See* REVIEW AND ANALYSIS, *supra* note 186; *see also* Letter from Mary Jo Wiggins, *supra* note 145.

189 Letter from Mary Jo Wiggins, *supra* note 145.

190 *See id.*

191 Local criminal and admiralty strictures have received little review. My inquiries of circuit executive personnel, lawyers, and law professors suggest that very few districts or judges have monitored. Several councils which reviewed civil, also evaluated criminal, strictures. The District of Columbia's analysis included criminal measures, as has the Seventh Circuit's annual review. *See supra* notes 148–51 and accompanying text. The LRRC included local criminal strictures in its work, while a few of its districts changed some conflicting measures. *See supra* notes 142–52 and accompanying text. The LRRC may have accorded admiralty procedures their only serious oversight by analyzing, and making suggestions as to, all local admiralty strictures which many districts had adopted, and a few courts modified certain measures.

1. Reasons for Proliferation

All of the analysis above suggests that there are many explanations why the number of local procedures, some of which were inconsistent or repetitive, has steadily expanded since the 1970s. Numerous members of the Conference, circuit councils, and appellate and district courts may have found the prohibitions on these local requirements in the respective federal rules and the JIA unclear or difficult to effectuate; might have honored those proscriptions in the breach; or could have believed that additional factors, such as the necessity to treat the litigation explosion, were more important than the complications produced by conflicting and redundant local measures.

One critical consideration that seemingly prompted the promulgation and enforcement of many local strictures, a significant percentage of which were inconsistent or duplicative, was the felt need to address the growing quantity and complexity of lawsuits that parties pursued in the appellate, district, and bankruptcy courts.[192] Illustrative is every circuit's imposition of conflicting local requirements that were intended to facilitate inexpensive, expeditious appellate resolution, by, for example, curtailing the number of appeals which receive oral arguments or written opinions.[193] The district courts and individual trial judges correspondingly prescribed local measures, certain of which were inconsistent or redundant, to accommodate the managerial judging and additional measures that treated their expanding and increasingly complicated caseloads.[194] Factors that are closely related to these propositions and each other were the importance of addressing peculiar, problematic local conditions, which the federal rules frequently ignored,[195] and of experimenting with innovative procedures for resolving litigation, especially mechanisms that promised to foster economical, prompt dispute disposition.[196]

The adoption of some conflicting or duplicative local requirements may have reflected the attempts of appellate courts, districts,

192 *See supra* notes 35–36 and accompanying text; *see also* UPWARD SPIRAL, *supra* note 144.

193 *See, e.g.*, 1ST CIR. R. 34.1(a); 5TH CIR. R. 47.5, 47.6; *see also* THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL 108–35 (1994). *See generally* COMM'M ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, WORKING PAPERS 101–16 (1998) (analyzing case management practices); JOE CECIL & DONNA STIENSTRA, DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS (1987) (analyzing the resolution of cases without oral argument).

194 *See supra* notes 39–45 and accompanying text.

195 *See* Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 868–71 (1989); *see also* Carrington, *supra* note 86, at 946.

196 *See* Levin, *supra* note 58, at 1579–80; Tobias, *supra* note 15, at 1633–34.

and judges to improve on the national rule revisors' work or the perception that these entities' efforts were erroneous or misguided.[197] Additional inconsistent or repetitive local strictures could be ascribed to those judicial officers whom Judge Robert Keeton characterizes as the "unduly willful renegades among us trial judges" or to the concomitant predilections of judicial officials who might be described as "procedural activists."[198]

2. Reasons for Limited Implementation

Numerous concepts, some of which resemble the reasons offered above for the growth of conflicting and redundant local procedures, explain the limited implementation accorded those commands related to proliferation in the federal civil, appellate, bankruptcy, and criminal rules and in the JIA. One significant reason could be that these rules and the JIA provided insufficiently clear guidance. For example, consistency and duplication defy felicitous definition, while the entities and people responsible for conducting local review have seemingly experienced considerable difficulty applying the notions.[199] More specifically, the Judicial Conference was apparently unable or unwilling to fulfill the broad oversight role of affirmatively scrutinizing and abrogating or changing inconsistent or repetitive local appellate measures that FRAP 47 and the statute envisioned because the Conference confined review to those procedures, which others have challenged and only suggested that appellate courts modify strictures found problematic.[200]

Even had the instructions been clearer, most institutions and individuals which the Court and Congress assigned monitoring duties might have been reluctant to effectuate rigorously the obligations imposed out of deference to certain instrumentalities and persons, or because they were more concerned about other phenomena, namely the need to treat expanding caseloads.[201] For instance, the Judicial Conference may have acceded to the appellate courts when analyzing local strictures, while appellate court judges who were members of cir-

197 "Local court tinkering with the Federal Rules is inspired by a belief that the [national] rulemakers got it wrong." Robel, *supra* note 86, at 1484; *accord* Cavanagh, *supra* note 79, at 603–04.

198 Keeton, *supra* note 195, at 860; *see also* Telephone Interview with Lauren Robel, Professor of Law, University of Indiana (Apr. 14, 1997).

199 *See* 14 MOORE'S 3d, *supra* note 54, § 83.04; Heiser, *supra* note 1, at 563 n.44.

200 *See supra* notes 178–82 and accompanying text; *see also* Letter from Daniel Coquillette, J. Donald Monan Professor of Law, Boston College Law School, to Carl Tobias (Aug. 9, 1996) (on file with the Notre Dame Law Review).

201 *See* Tobias, *supra* note 19, at 1406–11; Tobias, *supra* note 152, at 363–64.

cuit councils could have deferred to district judges in reviewing their local procedures. The belief that the appellate courts and judges know more about appeals and about inexpensive, expeditious appellate dispute resolution generally and within their courts might have animated the Conference. The appellate court judges on councils may correspondingly have acceded because they thought that district courts and judges are more familiar with the disposition of trial court litigation generally and within each district and individual judge's courtroom. Additional judges, serving on the Conference or circuit councils, might have deferentially evaluated local measures out of personal or professional courtesy or respect for those officers who hold identical positions in the judicial hierarchy.

Judges, who were members of the Judicial Conference, circuit councils, or districts, could have experienced certain "conflicts of interest" in discharging their local review duties. One significant, generic conflict implicated every judge's responsibilities to adopt new, and amend existing, local strictures while closely analyzing the procedures that other courts or judges promulgated. Few judges seemingly wished to scrutinize, much less abolish or alter, requirements which the jurists might have been contemplating for, or may have already promulgated in, their courts because the judges were apparently more concerned about advancing what they perceived as those courts' best interests than about limiting proliferation.

Some of these judges could concomitantly have thought that they lacked the requisite familiarity with local conditions in the appellate courts, districts, or courtrooms whose measures they were assessing to institute or recommend efficacious modifications, even in procedures deemed inconsistent or duplicative. Implicit and probably express in certain ideas above is the sensitive character of local review. For example, many district judges jealously guard their prerogatives to prescribe and enforce local strictures, particularly individual-judge practices.

Underlying, and perhaps driving, the limited implementation witnessed was the apparent belief of numerous Judicial Conference and circuit judicial council members and specific judges that the problems attributable to conflicting and redundant local requirements are less significant than other factors, such as the importance of addressing expanding, and increasingly complex, caseloads. For instance, those judges who feel inundated by burgeoning, complicated dockets may well find that the need for economical, prompt dispute disposition outweighs the perceived necessity to reduce inconsistent and duplicative local measures.

Even had the institutions and people charged with restricting local proliferation been more favorably disposed toward fully effectuating the commands in the federal rules and the JIA, additional considerations might have frustrated comprehensive implementation. For example, the Supreme Court and Congress assigned burdensome responsibilities for reviewing local strictures to entities and individuals with relatively few resources for performing a broad spectrum of onerous duties. More specifically, the circuit judicial councils discharge numerous administrative tasks, while appellate and district court judges must resolve multiplying, complex caseloads economically and expeditiously. Congress appropriated no funding to satisfy the new obligations, despite the important difficulties enumerated above. The Court and Congress also failed to even charge an instrumentality with responsibility for monitoring compliance with any of the local review mandates, much less for attempting to insure their rigorous effectuation. For instance, the Court or Congress could have delegated this duty to existing institutions, including the Judicial Conference, the Federal Judicial Center, or the Administrative Office of the United States Courts, or created a new entity, such as a "standing committee" on local procedures.

Finally, Congress passed the CJRA which effectively suspended compliance with the commands respecting proliferation of local civil, but also other, procedures in the federal rules and the JIA. The CJRA expressly empowered districts and judges to adopt local measures for reducing expense and delay in civil litigation and implicitly encouraged their promulgation and application of inconsistent strictures. The CJRA also created circuit review committees and assigned them unclear oversight duties, while the committees' composition differed substantially from circuit judicial councils because the committees consisted almost exclusively of chief district judges. Many districts and judges, thus, may have believed that the CJRA constituted a congressional mandate to prescribe new local requirements, some of which were conflicting. Most circuit councils, districts, and individual judges could concomitantly have been reluctant to institute efforts aimed at limiting proliferation, and others might have found inefficient the continuation of attempts to review non-civil procedures, given the uncertainty which the CJRA had engendered. In short, the CJRA essentially supplanted implementation of the local review commands in the federal civil, appellate, bankruptcy, and criminal rules as well as the JIA.

C. *Implications of Limited Implementation*

The growing number of local procedures, many of which were inconsistent or redundant, and the corresponding failure or unwillingness of the entities and individuals responsible for review to effectuate thoroughly the mandates respecting proliferation in several federal rules and the JIA had numerous significant implications. Most of them pertain to all of the local strictures, oversight institutions, and review commands, while I expressly or implicitly examined above certain of these consequences.

There have been important ramifications of power's concentration in the federal district courts, which local procedural proliferation and the concomitant inability or reluctance to implement comprehensively local review mandates effected.[202] The accretion in these courts of much more authority, particularly power that is essentially unreviewable and for which judges effectively do not account, can have substantial implications for judges, attorneys, and parties, as well as for Congress, procedural amendment instrumentalities, and the justice system.[203] Quite significant, power's accumulation vests great trust in the judgement of a single person and expands considerably the already enormous authority of the state which federal judges exercise.[204]

Reliance on this expanded power and, indeed, its very existence, may often redound to the advantage of lawyers and litigants that have more financial or political power, are "repeat players" or are situated in a particular district and could benefit district courts vis-à-vis most additional entities and people.[205] Courts of the first instance can apply, and even abuse, their enhanced authority, especially when manag-

202 *See* Levin, *supra* note 58, at 1572–73; Tobias, *supra* note 19, at 1422–27; *see also* Yeazell, *supra* note 60, at 631–32, 676–78.

203 *See* Tobias, *supra* note 19, at 1422–27; Tobias, *supra* note 15, at 1625–32.

204 *See* Robert M. Cover, *The Supreme Court, 1982 Term-Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 6–11 (1983); *see also* Judith Resnik & Dennis E. Curtis, *Images of Justice*, 96 YALE L.J. 1727, 1764–68 (1987).

205 Several qualifications apply. The power's exercise can vary among cases and judges, depending, for example, on judges' political views and temperament. *See* Tobias, *supra* note 19, at 1424; *see also* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97–124 (1974) (discussing repeat players). The assertions may seem crudely instrumental, but a recent study of employment discrimination litigation showed that some judges' procedural application disadvantaged plaintiffs. *See* Phyllis Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 296–335 (1992) (discussing how the Supreme Court has used both substantive and procedural law to favor defendants in Title VII cases); *see also* Tobias, *supra* note 2.

ing the pretrial process, which local proliferation frequently accommodates, in ways that detrimentally affect some attorneys and parties. For instance, district court judges may have exercised this power in the pretrial process to control and attempt to end civil litigation by extracting settlements from reluctant lawyers and litigants.[206]

The increasing emphasis on; the ever-expanding number of steps in; the growing demands for writing, filing, and signing documents and for attending conferences during;[207] and the enhanced judicial decisionmaking necessitated at the pretrial phase[208] have facilitated power's accretion. The application of this enlarged authority has disadvantaged most counsel and parties with the least economic and political power. A clear illustration of these concepts is that the need to research and draft the papers and to participate in the activities has further depleted their scarce resources and complicated efforts to prove cases, reach trial, and complete litigation.[209]

The accumulation of authority in courts of original jurisdiction, particularly when conjoined with increasing judicial discretion, which the 1938 federal rules and numerous subsequent revisions have afforded, has similarly affected counsel and litigants who possess little time, money, or political influence. Judicial discretion is an instrument of power, the exercise of which frequently has the most detrimental impacts on these attorneys and parties.[210] For example, judges have applied the broad discretion which many federal rules bestow on them to require that the lawyers and litigants tender documents or

206 *See, e.g.*, Lockhart v. Patel, 115 F.R.D. 44, 45–47 (E.D. Ky. 1987); *see also* Yeazell, *supra* note 60, at 657–59. In *Lockhart*, the authority's exercise was blatant and was invoked against an insurer. It often is subtler and is used against those with less power and resources. *See, e.g.*, Strandell v. Jackson County, 838 F.2d 884, 884–85 (7th Cir. 1988); Williams v. Ga. Dep't of Human Res., 789 F.2d 881, 881–82 (11th Cir. 1986); *see also* Baumann et al., *supra* note 205, at 286–88; Tobias, *supra* note 2, at 310–19.

207 Some of these requirements elaborate or complement the already substantial demands, such as those in Rules 11, 16, and 26. *See supra* notes 50–59 and accompanying text.

208 Greater demands in pretrial have disadvantaged federal judges. For example, presiding over more increasingly complicated conferences and making more decisions consume scarce judicial resources and limit other duties' discharge. *See* Tobias, *supra* note 19, at 1423.

209 Increased emphasis on pretrial and trial's deemphasis can disadvantage lawyers and litigants, who pursue, for example, personal injury or job discrimination litigation because they are more likely to succeed before juries in trials. *See* Baumann et al., *supra* note 205.

210 *See* Burbank, *supra* note 77, at 1470; *see also* Tobias, *supra* note 2, at 296–335; Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 490–506 (1988–1989).

attend conferences or ADR sessions, which has additionally strained their limited resources and made cases' pursuit more difficult.[211]

Authority's concentration in courts of the first instance, especially as encouraged by growing numbers of inconsistent and duplicative local procedures, has had related, important pragmatic consequences, such as making federal civil practice even more complex. For example, the local proliferation, which CJRA experimentation typified and exacerbated, has complicated the efforts of all attorneys and clients, but particularly those who lack financial or political power, or are situated outside a specific district, to discover, comprehend, and satisfy local strictures, whose adoption and enforcement have detrimentally affected them.[212] The need to search for, understand, and comply with increasingly arcane local requirements may well have imposed greater expense and delay in federal civil litigation. It is ironic that procedure has experienced expanding balkanization, even as federal practice has become more nationalized and internationalized.

The accretion of authority has also contracted the procedural opportunities that are available. These constricted possibilities are exemplified by the imposition of numerical restrictions on interrogatories and depositions,[213] which have adversely affected counsel and litigants with few resources or limited access to information that is important to their cases because they need greater discovery to acquire this material.[214]

Numerous district judges have informally applied the enlarged authority, particularly when managing the pretrial process, while that and numerous other exercises of power have received little appellate scrutiny. This authority's invocation has detrimentally affected all lawyers and parties; however, its application has most disadvantaged, and chilled the enthusiasm of, those attorneys and litigants who lack money and power, as they have less ability to withstand the authority's application. Many of the above ideas have meant that public interest entities, such as the ACLU or the National Wildlife Federation, which participate in litigation in multiple districts, may experience problems vindicating rights and interests in the Constitution and federal statutes.[215]

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211 *See* Tobias, *supra* note 19, at 1422–27; *see also* Tobias, *supra* note 15, at 1621–24.

212 *See* Cavanagh, *supra* note 79, at 603–04; Tobias, *supra* note 19, at 1422–27; Tobias, *supra* note 15, at 1611; *see also* LONG RANGE PLAN, *supra* note 112, at 59.

213 *See* FED. R. CIV. P. 30(a), 33(a); Amendments to Fed. Rules of Civil Procedure, *reprinted in* 146 F.R.D. 401, 449, 461 (1993).

214 *See* Tobias, *supra* note 19, at 1424; Tobias, *supra* note 210, at 495–98.

215 *See* Cavanagh, *supra* note 79, at 603–04; Tobias, *supra* note 19, at 1423; *see also* Tobias, *supra* note 210, at 495–98.

Those judges who have invoked this enhanced authority have correspondingly exercised it at the expense of Congress, thus undermining legislative branch power.[216] For example, when federal districts or specific judges adopt local strictures which conflict with or repeat commands in federal rules or the United States Code, the local measures can erode those national mandates and avoid the legislative review which the Rules Enabling Act prescribes for federal rules amendments.[217] To the extent that district judges have promulgated, construed, or applied local procedural requirements in ways that inappropriately discouraged lawyers and litigants, such as civil rights plaintiffs, whose enthusiastic pursuit of cases Congress expressly instructed the courts to foster in substantive, procedural, and fee-shifting statutes, the judiciary has concomitantly frustrated legislative intent and increased judicial authority vis-à-vis congressional power.[218]

Authority's concentration, particularly as promoted by local procedural proliferation, has correspondingly had deleterious institutional impacts, undermining the power, prestige, and work of national rule revision bodies, such as the Standing Committee.[219] These entities have generally trained their significant expertise and systemic perspective on the protection and improvement of a national, uniform procedural regime; have developed federal rules changes which are best for all ninety-four federal district courts; and have limited the potential for district judges to accumulate or exercise excessive or abusive authority, especially through the prescription and enforcement of inconsistent or redundant local strictures.[220] The growing localization of federal civil procedure that local proliferation has encouraged, by instituting a procedural scheme which is premised on less expertise and is more parochial and by reducing the perceived

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216 *See* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1443–44 (1994); *see also* Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933, 961–63 (1991); Tobias, *supra* note 2, at 296–98.

217 *See* 28 U.S.C. § 2074(a) (1994). District judges who rely on the CJRA to adopt conflicting local measures frustrate the intent of Congress and the Court in the JIA and Rule 83 to limit inconsistency, but judges have honored these in the breach, and the CJRA seems to authorize conflicts. *See supra* notes 16–26, 33–34, 48–92, 94–110, 113–23 and accompanying text.

218 *See* Tobias, *supra* note 19, at 1424–25. The activity also undermines the statutory beneficiaries' vindication of substantive rights. *See id.*

219 *See* Paul D. Carrington, *The New Order in Judicial Rulemaking: Factional Politics Is Jeopardizing the Federal Rulemaking Process*, 75 JUDICATURE 161, 161–66 (1991); Tobias, *supra* note 19, at 1426.

220 *See* Mullenix, *supra* note 105, at 830–43; Tobias, *supra* note 216, at 961–63.

necessity for federal amendments, has seemingly eroded the national revisors' influence and even challenged their relevance.[221]

The accretion of authority in districts, particularly authority that is fostered by enhanced judicial discretion to manage the increasingly emphasized pretrial stage, has detrimentally affected the civil justice system. The prior developments in procedure, such as the growth of managerial judging, especially as elaborated by the CJRA's effectuation—mandating that attorneys and parties draft and file more documents and participate in increased activities, expanding litigation's steps and enlarging ADR's importance—have arguably complicated attempts to detect the truth and to reach the merits of cases while decreasing the quality of justice secured. Indeed, the earlier developments, as compounded by the CJRA implementation, have apparently produced impacts quite different from ones which Congress envisioned: they may have led to expense and delay in civil lawsuits, narrower federal court access, and fewer fair and merits-based resolutions.[222] The civil litigation system can even lose respect when the public believes that the procedures available or the character of justice can vary substantially across districts, that the nature of justice reflects lawsuits' magnitude or subject matter, that attorneys' or clients' resources affect the quality of justice, or that complexities or technicalities preclude or restrict the vindication of rights.[223]

D. Lessons from Local Proliferation and Limited Implementation

Numerous lessons can be derived from the experience involving local procedural proliferation and the limited implementation that the Judicial Conference, circuit judicial councils, appellate and district courts, and specific judges have accorded commands which the Supreme Court and Congress intended to rectify or ameliorate detrimental effects, which the growing number of conflicting and redun-

221 *See* Mullenix, *supra* note 76, at 400; Tobias, *supra* note 19, at 1426.

222 *See* Tobias, *supra* note 19, at 1426–27; *see also* Cavanagh, *supra* note 79, at 603; *supra* notes 33–60, 69–112 and accompanying text.

223 *See* Tobias, *supra* note 19, at 1427. Because federal civil procedure is in its worst condition since the 1938 federal rules' adoption, state civil procedure may be even more fragmented, especially in states that model their procedural systems on the federal analogues. *See generally* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986) (surveying state court systems and identifying their reliance on the federal system); Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 STAN. L. REV. 1553 (1994) (recommending that state court systems examine and reform their existing systems).

dant local strictures imposed. Certain of these ideas are expressly stated or implicit in much of the above assessment.

The efforts of the Court and Congress to restrict proliferation afford several lessons. Those endeavors teach that initiatives aimed at reducing proliferation must be harmonized with other activities, most notably the attempts to decrease cost and delay through managerial judging or the CJRA, which were frequently premised on inconsistent local requirements. The experience also shows that institutions and individuals charged with conducting local procedural review must have clear guidance and adequate resources. Moreover, the work should be carefully structured. For instance, appellate court judges may be very reluctant, or perhaps unable, to scrutinize, much less abrogate or modify, measures which the jurists believe district judges prescribe to improve their courts. This unwillingness could reflect a lack of experience with local strictures, concomitant limited appreciation of the circumstances in particular districts or respect for colleagues with whom the reviewers must maintain ongoing, cordial relations. It might even be preferable to lodge the ultimate authority for abrogating or changing local provisions in entities or people with the requisite expertise, distance, and commitment to undertake rigorous review and eliminate or alter conflicting or duplicative requirements when indicated.

Certain of these phenomena, particularly the failure to reconcile the CJRA and the JIA, mean that the legislative and judicial branches must cooperate more when formulating federal court policy and that the condition of federal civil procedure is considerably worse than in 1988 when Congress found it unacceptable. Indeed, an important irony of CJRA experimentation was that it has sensitized many members of the bench and bar to the need for consistent, simple procedures and has fostered their adoption or scrutiny of reforms, which would reduce growing disuniformity and complexity.

III. Suggestions for the Future

The first two Parts of this Article illustrated how prior developments in civil procedure, such as managerial judging, and rather recent ones, namely the CJRA's implementation, encouraged the expansion of local strictures and that increasing numbers of these provisions conflicted with or repeated federal rules or statutes. The initial Parts correspondingly showed that certain institutions and individuals with responsibility for restricting the quantity, inconsistency, and redundancy of local measures were unable or reluctant to discharge their duties and why proliferating requirements should be limited.

Moreover, I recognized that numerous entities and people could decrease conflicting and duplicative local strictures in various ways, while proliferation is only a single phenomenon, albeit symptomatic of other important ones, which comprise the modern procedural landscape.

Congress, the Judicial Conference, circuit judicial councils, appellate and district courts, and individual judges should undertake concerted efforts to reduce local mechanisms' growing inconsistency and redundancy, which have imposed the above disadvantages, particularly by further fragmenting the already fractured state of procedure and increasing expense and delay. These implementing instrumentalities and persons must capitalize on the finest and abolish or ameliorate the worst features of the 1988 JIA, the 1990 CJRA, and the federal rules that implicate local proliferation, such as the local review prescriptions in certain 1985 and 1995 revisions as well as the local variation provisions in the 1993 civil rule amendments.[224] They can realize those goals by restoring and maintaining the primacy of all the federal rules that govern civil, appellate, bankruptcy, criminal, and admiralty procedure and of the national revision process; by reattaining the procedural status quo which existed in 1988, principally through the expiration of the CJRA and of conflicting and repetitive measures adopted thereunder; and by thoroughly effectuating the local review mandates in the federal rules and the JIA.

A. A Word About Empirical Information

The maximum applicable empirical material must inform decisionmaking on the future of the CJRA, the JIA, and the federal rules, as well as attempts to limit proliferation. The Judicial Conference, the RAND Corporation, and the Federal Judicial Center (FJC) have collected, analyzed, and synthesized much empirical data on the requirements applied in pilot and demonstration courts, the other seventy-nine districts apparently have similar information on testing under the 1990 statute, and the Judicial Center and the Administrative Office of the United States Courts possess, or have access to, additional material on all ninety-four courts. In every appellate and district court, numerous institutions and people involved with CJRA experimentation and with efforts to implement the provisions for local procedural review and amendment in the respective federal rules and the

224 *See* Tobias, *supra* note 15, at 1625–32; *see also supra* notes 62–63, 98–106, 113–23 and accompanying text; *infra* note 242 and accompanying text. In fairness, the 2000 revisions abolished some, but retained a few local option provisions. *See supra* notes 106–10 and accompanying text.

JIA have correspondingly gathered information or gleaned ideas that could improve future policymaking.

Most important to local proliferation's reduction is systematically assembling, evaluating, and synthesizing the greatest amount of relevant empirical data on the total quantity of local measures which actually exist, as well as the precise number that are inconsistent or redundant and exactly how they conflict or are duplicative. For example, the preceding examination demonstrated the need to improve comprehension of proliferation and to accumulate much greater, and considerably more refined, information on local appellate, bankruptcy, criminal, and admiralty rules. There is concomitantly a striking dearth of material on strictures, namely individual-judge practices, which are not local rules in all of the above areas and in civil procedure, primarily because many of these mechanisms are unwritten and legal scholars and those responsible for monitoring the measures have minimally scrutinized them. It would also be helpful to have a clearer understanding of the entities and persons officially charged with adopting and reviewing local requirements and how they have fulfilled the duties imposed and have interacted.

A useful starting point might be the data on local strictures which the Local Rules Project compiled and classified for potential inconsistency and redundancy, although this information may be somewhat dated because courts and judges have applied, particularly under the rubric of civil justice reform, numerous, additional conflicting and duplicative local procedures since 1989.[225] The Administrative Office, the FJC, and each of the appellate and district courts have, or could collect, many local measures, and they might evaluate these measures, especially techniques adopted under the CJRA. Several rather new local procedural services, one of which is an electronic database, also afford valuable access to a number of applicable local requirements.[226] Other helpful sources, principally of informative insights for attempting to limit proliferation, are the local district reviews performed by the Seventh and Ninth Circuit Judicial Councils and by some districts.[227]

After those responsible for gathering and analyzing all of the relevant local mechanisms have completed this task, they ought to categorize the measures in terms of possible inconsistency and duplication.

225 *See* REPORT OF THE LOCAL RULES PROJECT, *supra* note 49.

226 *See, e.g.*, DIRECTORY OF FEDERAL COURT GUIDELINES (1996); FEDERAL LOCAL COURT RULES, *supra* note 147; *see also* Westlaw, US-RULES database, http://www.westlaw.com.

227 *See supra* notes 151–61, 173–76 and accompanying text; *infra* notes 244–47 and accompanying text.

Courts and judges adopting the procedures found in conflict or repetitive should be permitted to abolish or modify the strictures, and, if they reject these opportunities, appropriate authorities, such as Congress, must eliminate or change the requirements.

B. Suggestions Regarding the CJRA

Congress should conclusively decide the fate of the CJRA before efforts to restrict proliferation are revived and comprehensively implemented because definitive resolution will facilitate those endeavors. For instance, if Congress determines that the 1990 Act ought to expire, districts and judges should abrogate inconsistent or redundant procedures, which they adopted under the legislation, thereby obviating the need to review a number of existing local measures and significantly simplifying the work.

Congress should thoroughly assess the maximum amount of pertinent information on the unprecedented CJRA experiment with mechanisms for decreasing expense and delay in civil litigation. It may seem somewhat premature, particularly before Congress has fully absorbed the 1997 Judicial Conference report and recommendations on the pilot project and report on the demonstration program and much additional, relevant information on experimentation, to posit very conclusive determinations about the efficacy of strictures that judges applied. However, the Conference works, the expert, rigorous evaluations which the RAND Corporation and the FJC recently finished, and the considerable material on the remaining courts suggest that the statute should have expired in December 1997 when it was apparently scheduled to sunset, although Congress has not conclusively prescribed expiration.[228]

228 *See* Carl Tobias, *The Judicial Conference Report and the Conclusion of Federal Civil Justice Reform*, 175 F.R.D. 351, 360 (1998); *see also* JCR, *supra* note 71; JAMES KAKALIK ET AL., JUST, SPEEDY AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996); DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMM. ON COURT ADMINISTRATION AND CASE MANAGEMENT, A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (1997). Recent legislation arguably suggests expiration, but it is too tense to be definitive. *See* Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, 114 Stat. 2411, 2414. *See generally* Carl Tobias, *Did the Civil Justice Reform Act of 1990 Actually Expire?*, 31 U. MICH. J.L. REFORM 887 (1998). The Advisory Committee commissioned two follow up studies on discovery. *See* James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. Rev. 613 (1998); Thomas Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. Rev. 525 (1998).

Those principles, guidelines and techniques, and other requirements which courts implemented under the CJRA that clearly saved cost or time and which respected additional, important procedural tenets, such as simplicity, and process values should receive national application through incorporation in the federal rules.[229] Devices, the effectiveness of which remains uncertain, may warrant consideration in the ordinary process of federal rule revision. The measures that displayed promise in reducing expense or delay but seemed insufficiently efficacious to deserve nationwide prescription because the mechanisms conserved unclear amounts of money or time, or they could threaten other procedural precepts might be identified for further selective testing. Congress should replace the CJRA's experimental methods with an approach which is premised on a 1991 proposed amendment of Rule 83 that the revision entities apparently retracted in deference to contemporaneous civil justice reform testing. This recommended change would have permitted districts which secured Judicial Conference approval to experiment with inconsistent local rules for not more than five years.[230]

Current information indicates that Congress should conclusively provide for the 1990 Act's expiration, which means that districts and judges must abolish strictures adopted under the CJRA which contravene or duplicate federal rules or United States Code provisions. It is rather difficult to designate definitively those devices that warrant national adoption because all relevant data have yet to be evaluated and synthesized systematically, and their analyses have not been completed. However, sufficiently conclusive determinations can be formulated by employing the Judicial Conference reports and suggestions, the RAND and FJC assessments, and much material which is available from other sources, such as the courts that experimented. Some measures in the general areas of case management, ADR, and discovery, as well as a few mechanisms which were not among the eleven principles, guidelines, and techniques that the CJRA specifically prescribed will seemingly decrease cost or delay and honor significant procedural tenets and process values.

229 *See* Judicial Improvements Act of 1990, 28 U.S.C. § 471 note (1994); *see also* Burbank, *supra* note 77, at 1466–71 (discussing process values).

230 *See* PRELIMINARY DRAFT, *supra* note 111, at 152; Carl Tobias, *A Modest Reform for Federal Procedural Rulemaking*, 64 LAW & CONTEMP. PROBS., Summer 2001, at 283; Tobias, *supra* note 15, at 1630–32. Testing could also be premised on the approach used with court-annexed arbitration. *See* 28 U.S.C. §§ 651–658 (1994); *see also* Amendment to the Judicial Improvement Act, Pub. L. No. 105-53, § 1, 111 Stat. 1173 (1997). *See generally* BARBARA S. MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS (1990) (reporting findings of a study on court-annexed arbitration).

More particular ideas can be offered. For example, differentiated case management apparently worked in the two demonstration courts which extensively practiced it and in additional districts for complicated and routine or ordinary litigation; however, numerous judges concluded that the disadvantages of categorizing suits into tracks overrode the benefits.[231] Invocation of various alternatives to dispute resolution in a number of courts seemed to afford fiscal or temporal savings, but more districts found that most ADR measures minimally reduced expense or delay while imposing considerable cost.[232] Certain discovery techniques, such as the use of telephone conference calls to resolve discovery disputes, also apparently saved money or time.[233]

Several difficulties that principally implicated automatic disclosure's effectuation complicate analysis of its efficacy. These include the controversial nature of the federal revision adopted, erratic application by a number of districts which formally adopted the device, the lack of evaluation accorded the mechanism, and the unclear determinations reached in the assessments performed. Anecdotal material concomitantly indicates that the procedure's effectiveness is context-specific.[234] Disclosure, thus, probably warrants refinement by confining its use to circumstances in which the technique appeared particularly efficacious or by authorizing continued experimentation in courts that most successfully applied the device.[235]

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231 *See, e.g.*, DIFFERENTIATED CASE MANAGEMENT IN THE UNITED STATES DISTRICT COURT FOR THE W. DISTRICT OF MICHIGAN, ANNUAL ASSESSMENT 37 (1995); U.S. DISTRICT COURT FOR THE N. DISTRICT OF OHIO, ANNUAL ASSESSMENT OF CIVIL AND CRIMINAL DOCKET 1–3 (1993); *see also* JCR, *supra* note 71, at 90–93; STIENSTRA ET AL., *supra* note 228, at 7–15, 29–132; Cavanagh, *supra* note 79, at 595.

232 *See, e.g.*, JCR, *supra* note 71, at 99–102; STIENSTRA ET AL., *supra* note 228, at 173–282; Cavanagh, *supra* note 79, at 585–86, 605–06; Memorandum from Kent Snapp & Deborah Bell, to Judges in the Western District of Missouri (Oct. 22, 1996) (on file with author). *See generally* ELIZABETH PLAPINGER & DONNA STEINSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS (1996) (reporting the findings of a study of several district courts). Congress did pass the Alternative Dispute Resolution Act of 1998. *See* Pub. L. No. 105-315, 112 Stat. 2993 (1998).

233 *See Counsel Connect Debates; Civil Justice Reform; Five Years Later*, TEX. LAW., Feb. 24, 1997, at 28; Telephone Interview with D. Brock Hornby, Chief Judge, U.S. District Court for the District of Maine (Jan. 29, 1997); *see also* JCR, *supra* note 71, at 81–85 (affording "alternative" program to expansion of CJRA measures); STIENSTRA ET AL., *supra* note 228, at 10–11.

234 *See* Cavanagh, *supra* note 79, at 605; Tobias, *supra* note 15, at 1615; *see also supra* notes 94–106 and accompanying text.

235 These ideas are premised on testing to date and JCR. *See* JCR, *supra* note 71, at 97–98; DISCOVERY AND DISCLOSURE PRACTICE PROBLEMS AND PROPOSALS FOR CHANGE 23–28 (1997) [hereinafter DISCLOSURE STUDY]; Cavanagh, *supra* note 79, at 594–95,

It now appears that the Supreme Court or Congress should omit all of the local option measures, which the Court, primarily out of deference to ongoing CJRA experimentation, included in 1993 amendments to several discovery provisions and which the Court has included in other rules.[236] The mechanism has imposed greater disadvantages, involving uniformity and simplicity as well as concomitant expense and delay, than benefits in terms of increased flexibility for testing discovery procedures calibrated to specific districts' situations.[237]

C. After the CJRA: Comprehensive Implementation of the Local Review Requirements in the Federal Rules and the JIA

I have championed the reattainment of the 1988 procedural status quo and the systematic implementation of the prescriptions included in several federal rules and the JIA. The provisions for limiting local proliferation are obviously most relevant, although Congress and the Supreme Court also intended to restore and maintain the primacy of all the federal rules and the national revision process, to open the federal rule amendment process, and to regularize and open local procedural revision. Thorough effectuation of the elements covering local review in the federal rules and the 1988 legislation, which implementation of the 1990 CJRA essentially discontinued, together with the above-proposed resolution of CJRA experimentation, could substantially reduce the number of inconsistent and duplicative local requirements.

Congress, the Court, and the Judicial Conference should clearly reiterate the critical need for all entities and individuals with responsibility for proliferation to discharge these duties while affording them another opportunity to fulfill the obligations. Congress could facilitate the short-term performance of those tasks and the periodic local review envisioned in the federal rules and the JIA by providing the requisite resources while definitively stating that the CJRA has expired and that conflicting or redundant mechanisms adopted under the statute must also expire.

604–05; Tobias, *supra* note 15, at 1615; *see also* Amendments to Fed. Rules of Civil Procedure, 192 F.R.D. 340, 382–84 (2000) (revising Rule 26 to narrow disclosure's scope).

236 *See supra* notes 98–106 and accompanying text; *see also supra* notes 106–10 (omitting some, but retaining a few local option provisions).

237 *See supra* notes 98–106 and accompanying text; *see also* DISCLOSURE STUDY, *supra* note 235, at 3, 9, 42–43; JCR, *supra* note 71, at 98; *infra* notes 252–56 and accompanying text (suggesting more limited use of local option measures in the federal rules).

1. General Ideas

The above examination of prior attempts at effectuating the responsibilities, which Congress and the Court imposed in the federal rules and the 1988 JIA to restrict proliferation, suggests that they selected a method and implementing instrumentalities which realized comparatively limited success and that there are preferable ways to proceed. Indeed, the approach as well as the institutions and people chosen were arguably so inadvisable or inefficacious that renewed effectuation would merely perpetuate a system which has proved unworkable.

These ideas are not intended to denigrate the perceptive recognition by Congress and the Court of the troubling complications that proliferation had created or their conscientious efforts to treat those problems or of the endeavors of implementing entities and individuals in attempting to institute the regime prescribed. In fact, those responsible for review should have another opportunity to satisfy the mandates in the federal rules and the 1988 JIA.

It is difficult to overstate the mammoth, complicated nature of the duties assigned, particularly given the enormous number of local procedures, a phenomenon which CJRA experimentation compounded, and the complexities entailed in clearly defining and felicitously applying the concepts of inconsistency and duplication. Congress and the Court correspondingly imposed these substantial responsibilities on institutions and persons with few resources for completing myriad, onerous obligations, but Congress allocated no funding to perform the new tasks. The CJRA also seemed to mandate or at least authorize the application of conflicting and redundant local strictures so that many districts and judges could have felt obligated to prescribe, and numerous reviewers may have been unwilling to evaluate, these measures. The 1990 Act, therefore, encouraged the enforcement of violative requirements while essentially suspending most efforts which might have limited proliferation.

Despite the above problems, it apparently remained much easier to identify offending local provisions than to discharge the very delicate duty that the measures' designation triggered: the abrogation or modification of strictures which appellate or district courts or judges had adopted in the belief that the techniques would improve their courts. Some instrumentalities and people responsible for scrutinizing and abolishing or changing those local procedures deemed inconsistent or duplicative were understandably reluctant to eliminate or alter mechanisms prescribed for treating local conditions with which the reviewers had relatively limited familiarity. For instance, appellate

judges were probably loath to be perceived as infringing on district courts' and judges' decisions that implicated local court administration. A few district judges may correspondingly have experienced intrinsic conflicts of interest because the jurists had promulgated, or were contemplating the adoption of, similar requirements for their courts.

Even the Ninth Circuit Judicial Council's attempts to scrutinize the local strictures of fifteen districts, efforts which were more ambitious than those of most councils, remained incomplete.[238] For example, the District Local Rules Review Committee and the Committee for the Review of Local Bankruptcy Rules encountered comparatively little difficulty in delineating many conflicting and redundant measures, and in persuading numerous districts and judges to abrogate or change a significant number of these requirements.[239] However, both entities specifically excluded CJRA mechanisms from review while deferring to some courts' and judges' determinations, particularly their prescription of inconsistent and duplicative local procedures.[240] Moreover, when the two committees recommended that the judicial council abolish or modify the strictures, which the committees considered conflicting or repetitive and which districts or judges did not change, the council was unable or reluctant to eliminate or alter these measures.[241]

It bears reiteration that I am not criticizing Congress or the Supreme Court for the means, or the entities and individuals, chosen in attempting to limit proliferation or those conducting review. Congress and the Court identified, and made good-faith efforts to address, difficulties imposed by proliferating procedures, although neither seemed to think completely through, or to appreciate conflicts between, the approaches that it employed. For instance, Congress did not harmonize the 1990 statute's goal of encouraging experimentation with local expense and delay reduction measures and the objective in the federal rules and the 1988 legislation of restricting local proliferation. Moreover, numerous developments, which were attributable to Congress or the Court, alone or synergistically discouraged most institutions and persons from fulfilling their review obligations. These included adoption of the CJRA and of certain 1993 federal rules amendments, concomitant reluctance to abrogate or modify procedures that appeared to be legislatively authorized, and failure to

238 *See supra* notes 152–61, 186–91 and accompanying text.

239 See *supra* notes 152–61, 186–91 and accompanying text.

240 See *supra* notes 152–61, 186–91 and accompanying text.

241 See *supra* notes 152–61, 186–91 and accompanying text.

appropriate resources for local review. In short, the concepts examined above suggest that efforts to decrease proliferation should be revitalized but that caution is warranted and the revived endeavors must be rigorously evaluated.

The little apparent success attained thus far indicates the need to scrutinize, or at least investigate, the method and implementing instrumentalities prescribed, particularly if a second attempt to satisfy the local review mandates in the federal rules and the JIA yields minimal improvement. Should this assessment proceed and show that the course of action used was inadvisable or misguided or that the entities or people chosen to effectuate it were inappropriate, Congress or the Court could then explore and select approaches and implementing institutions or individuals offering greater promise. For example, the delicate nature of abolition and change of conflicting and duplicative local procedures may require that this task be assigned to someone other than colleagues of the judges who adopt the strictures, although this resolution might mean that Congress is the only viable choice.

2. Specific Guidance

a. Internal

i. Local Procedural Adoption and Revision

When the appellate and district courts and individual judges, alone or with local rules committees, contemplate promulgating new, or amending current, local requirements, especially inconsistent or redundant measures, they should exercise restraint and be sensitive to the problems that attend the strictures' prescription and enforcement. These entities and people must only adopt additional, and retain present, conflicting, or duplicative local procedures, which are necessary to treat peculiar, problematic local conditions or to facilitate the discovery of promising mechanisms. The institutions and persons should correspondingly abrogate or modify all local requirements, particularly individual-judge practices, that contravene or repeat federal rules or statutes; reduce to writing, and include in local rules, the maximum number of local measures; and conform local rules to the uniform numbering system prescribed by the judicial conference.[242]

242 *See* Tobias, *supra* note 15, at 1627; *supra* notes 115, 123 and accompanying text; *infra* note 248 and accompanying text.

ii. Local Procedural Review

Insofar as appellate or district courts and judges had initiated efforts to limit local proliferation which the CJRA and other phenomena, such as resource deficiencies, effectively discontinued, they must reassume, and implement comprehensively, the affirmative review obligations assigned, while those not instituting local procedural review must now do so.[243] The appellate courts and district judges should scrutinize all current local strictures for conflicts and redundancy and eliminate or alter those found deficient. This examination will include requirements adopted under the aegis of the CJRA, if Congress does not definitively provide for the 1990 statute to sunset or if courts and judges retain the procedures after Congress permits the legislation to expire. Should the appellate and district courts and judges conscientiously assess for inconsistency and duplication all local measures and abolish or change the strictures considered violative, these activities could sharply restrict, and perhaps vitiate, the need for exogenous scrutiny.

b. External

i. Judicial Conference

If appellate courts, districts, or judges fail to capitalize on these opportunities or conduct local procedural review that lacks sufficient rigor, external entities may need to assume new or greater responsibilities for proliferation. For instance, the Judicial Conference, which is to evaluate periodically local appellate requirements and abrogate or alter those deemed conflicting or redundant, must fully discharge these duties and might want to exercise less deference than it has to appellate courts, which have minimally scrutinized their procedures. The Conference should conduct an affirmative review by identifying inconsistent and duplicative local measures, affording appellate courts opportunities to correct deficiencies, and eliminating or changing the strictures of those appellate courts which do not respond to its overtures. If the Conference is unable or reluctant to fulfill these obligations, Congress might encourage the Conference or even oversee compliance.

243 Few councils apparently undertook rigorous review of local appellate strictures, even though the CJRA, which only implicates district court measures, had no effect on this review.

ii. Circuit Councils

The circuit judicial councils have analogous responsibilities for analyzing the districts' local requirements, most of which remain identical to the procedures that existed in 1988, as augmented by CJRA mechanisms. Only a few circuit councils have satisfied the duties, principally because the 1990 statute's effectuation essentially discontinued monitoring, or because Congress budgeted no resources for review. Congress ought to appropriate adequate funding, while it should clearly state that the CJRA has expired and require that conflicting and redundant measures adopted thereunder sunset.

The councils might correspondingly consult the models afforded by the Seventh and Ninth Circuit Judicial Councils' examination of their districts' local strictures, as these efforts show how to discharge these responsibilities efficaciously and facilitate compliance with limited resources.[244] The Seventh Circuit Council has depended on an expert consultant, who served as Local Rules Project Director, to scrutinize and make recommendations annually on the procedures of the districts within the court's purview, while the council has stringently enforced the consultant's suggestions regarding inconsistency and duplication.[245] The Ninth Circuit Council concomitantly created a review committee under the auspices of its Chief Judges' Conference, thereby enabling the council to secure considerable cooperation from the districts. For example, the courts and individual judges apparently found many committee proposals for changing local requirements so palatable that they willingly implemented the recommendations.[246] The committee also relied on volunteer law professors and practicing attorneys to evaluate each district's local measures which reduced the costs of compliance.[247] If the councils that have inadequately discharged these obligations do not respond, Congress or the Judicial Conference may wish to assume the duties.

iii. National Rule Revision Entities

The national rule revision bodies, alone or in conjunction with appellate and district courts and judges, might institute certain efforts that could limit local procedural proliferation or ameliorate certain of

244 *See* Heiser, *supra* note 1, at 564–81; Tobias, *supra* note 166, at 983–94; *see also* Tobias, *supra* note 152, at 359–69; *supra* notes 152–61 and accompanying text.

245 Telephone Interview with Mary P. Squiers, *supra* note 151.

246 *See supra* notes 152–54, 158–60 and accompanying text.

247 *See supra* notes 155–57 and accompanying text; *see also supra* notes 187–91 and accompanying text (analyzing the Ninth Circuit's review of local bankruptcy measures).

its detrimental consequences. For instance, the Judicial Conference should promptly survey and enforce compliance with the April 1997 deadline for uniformly numbering local strictures in its directive implementing the 1995 amendments of the federal civil, appellate, bankruptcy, and criminal rules.[248] Virtually all of the regional circuits have already conformed their local appellate rules to the FRAP.[249] Moreover, numerous districts have ordered the courts' local civil and criminal rules similarly to the federal analogues,[250] but some have not. Non-compliance may reflect mere inadvertence; resource deficiencies or the concomitant belief that other matters, including daily dispute resolution, deserve higher priority; or concern that consistency interferes with local prerogatives. Those appellate and district courts which have not conformed their procedures should do so expeditiously because uniformity will reduce complexity, cost, and delay in federal practice.

The Judicial Conference or the Federal Advisory Committees might also thoroughly review, and seriously consider eliminating, any remaining local option provisions in the respective federal rules for which no compelling need exists. These prescriptions expressly authorize the appellate courts, districts, and judges to promulgate and apply conflicting and redundant local requirements or recognize that they might do so, phenomena which can complicate federal litigation and can be expensive and time-consuming. Illustrative are varying publication practices that a Judicial Conference resolution encouraged appellate courts to prescribe[251] and the local option provisos governing discovery in the 1993 civil rule amendments.[252] Insofar as the Supreme Court has premised local option prescriptions on the need to address problematic local conditions or to experiment with promising measures, the withdrawn 1991 proposed revision in Rule 83 could advance these goals and limit inconsistency.[253]

248 *See, e.g.*, FED. R. CIV. P. 83 (1995 amendment); *see also supra* notes 115, 123 and accompanying text.

249 The Sixth Circuit is apparently the only court which has not.

250 Illustrative are the Districts of Colorado, Maryland, and Nebraska.

251 *See, e.g.*, 1ST CIR. R. 36.2; 4TH CIR. R. 36; 6TH CIR. R. 24. FRAP 33 recognizes that judges or officers might conduct settlement conferences. *See, e.g.*, 8TH CIR. R. 33A; 9TH CIR. R. 33-1; 11TH CIR. R. 33-1(c). In fairness, the Conference may have been attempting to secure more uniformity or at least to insure that publication practices were in writing. *See infra* note 254.

252 *See supra* notes 98–109, 236–37 and accompanying text; *see also supra* notes 106, 110.

253 *See supra* note 230 and accompanying text; *infra* notes 259–62 and accompanying text.

When special circumstances require the application of diverse strictures in numerous appellate or district courts, however, the Court should retain or adopt provisions for local variation.[254] For instance, FRAP 34's proviso that authorizes local variations in oral argument may afford the requisite flexibility to address discrepancies in the size and complexity of appellate court caseloads and resources for resolving appeals.[255] The local option prescription in Civil Rule 16 concomitantly seems to facilitate the practice of judicial case management, which can differ significantly among districts, and to accommodate the need for particularized, disparate treatment of complex and simple lawsuits.[256]

c. A Miscellany of Ideas

Should numerous circuit judicial councils, districts, and judges fail to discharge their local review duties, even once the CJRA definitively expires and simplifies monitoring by substantially reducing the number of local strictures that require analysis, the Judicial Conference or Congress might explore and implement other measures and may want to examine approaches that are relatively intrusive or perhaps coercive. For example, a Conference committee or the FJC or Administrative Office personnel could help specific courts and judges complete review by offering additional expertise, information, or resources.

In any event, the Conference or Congress should carefully evaluate the possibility of establishing a centralized instrumentality, such as a standing committee on local procedures, which would facilitate nationwide effectuation of the mandates related to proliferation in the federal rules and the JIA.[257] This entity could specifically serve as a clearinghouse and might assist or complement the efforts of councils, appellate and district courts, and judges by bringing expertise and independence, as well as a national perspective and oversight to these endeavors. The institution could collect, assess, and synthesize all rel-

254 FRAP 34 at least clearly authorizes this practice, thus reducing the element of surprise for non-local counsel and parties. *See infra* note 255 and accompanying text.

255 *See, e.g.*, D.C. CIR. R. 34; 2D CIR. R. 34(d); 3D CIR. R. 34.1; *see also* Fed. R. App. P. 34.

256 *See* FED. R. CIV. P. 16; *see also supra* notes 110, 216 and accompanying text. Congress and national and local rule revisors should attempt to limit proliferation by considering procedural changes' effects on it and on phenomena, such as judicial discretion, which facilitate proliferation. *See* Tobias, *supra* note 15, at 1590 n.13 & 1627 n.237.

257 *See* Carl Tobias, *Some Realism About Federal Procedural Reform*, 49 FLA. L. REV. 49, 79 (1997); *see also* Heiser, *supra* note 1, at 580–81.

evant local strictures; encourage, and even be authorized to compel, performance of the local review duties; and perhaps make suggestions respecting abrogation or modification to the Conference or Congress, if councils, courts, or judges do not cooperate. This instrumentality must recognize that the tasks envisioned are delicate and work closely with, and facilitate efforts of others, rather than be coercive.

All entities and individuals performing local procedural review should keep in mind, and capitalize on, the experience of the Local Rules Project which I recounted above. For instance, the Project has assembled voluminous, valuable information on, and possesses great expertise regarding, local measures and the institutions and people responsible for their growth, and it can contribute significantly to realization of my recommendations for decreasing proliferation.[258] The Judicial Conference might even revitalize the Local Rules Project and perhaps enlarge the entity's charter. The Project could compile, assess, and classify, in terms of consistency and redundancy, those local procedures that courts and judges have applied since the 1989 completion of its report, while the Project's new work might encompass strictures, such as individual-judge practices, which it did not include in the study more than a decade ago.

D. Suggestions for Treating Problematic Local Conditions and for Experimenting

The analysis above indicates that the disadvantages which local procedural proliferation imposes outweigh its benefits, but the evaluation also suggests that the expanding application of local provisions, especially ones which are inconsistent or duplicative, serves several important purposes. Appellate courts, districts, and individual judges adopted and enforced many of these requirements to treat peculiar, problematic local conditions, such as expense and delay, which have arisen from the litigation explosion and have received minimal attention in the federal rules, or to experiment with promising measures that might warrant national implementation.

Congress or the Supreme Court, therefore, should accord courts and judges the requisite flexibility to address unusual, difficult local situations or to test nascent mechanisms by revising those federal civil, appellate, bankruptcy, and criminal rules which govern the prescription of local strictures.[259] Congress or the Court could enable appellate courts, districts, and judges to treat the circumstances and to

258 *See supra* notes 49–56 and accompanying text.

259 Congress is the preferable entity to institute this change because the modification implicates questions of authority. *See* Levin, *supra* note 58, at 1585–87.

experiment with a thorough, balanced approach, which might be modeled on the 1991 proposed amendment in Civil Rule 83 that the revisors withdrew out of respect for simultaneous CJRA testing.[260] The recommended change would have authorized districts which obtained Judicial Conference permission to experiment for five years with local requirements that contravene federal rules or statutes. One, or a percentage, of the appellate and district courts could promulgate and enforce techniques, which respond to troubling conditions, or might serve as laboratories for testing devices that appear sufficiently effective to deserve employment in additional courts.

The 1991 suggested modification in Rule 83 included no criteria on which the Conference would premise its decisions regarding proposals to apply local procedures that conflict with federal rules or the United States Code provisions.[261] Congress or the Court could require appellate courts or districts to show that they need the measures for treating problematic local situations or even to present empirical data indicating the strictures' potential efficacy.[262]

The recent experience under the CJRA and the decade of experimentation which involved court-annexed arbitration could also inform future testing.[263] For instance, both efforts suggested the need for centralized monitoring and for a few courts to deploy similar provisions while gradually expanding experimentation with effective procedures. The appellate and district courts might consult their local rules committees and develop proposals, and the Conference could structure and coordinate testing. The experimentation that proceeds must receive stringent evaluation. When testing and assessment show the advisability of broader application, the Conference should ascertain whether additional experimentation or nationwide use is indicated.

Numerous ideas support the adoption and effectuation of this course of action. It capitalizes on the valuable model in the recommended revision of Rule 83, on entities with relevant expertise, and on prior experience with the CJRA and court-annexed arbitration. The approach provides sufficient flexibility to apply promising measures, which will address problematic local circumstances, and to conduct testing which will foster the discovery and employment of strictures that revitalize and maintain the basic procedural tenets, while minimizing the disruption of daily dispute resolution. Moreo-

260 *See supra* note 230 and accompanying text.

261 *See* PRELIMINARY DRAFT, *supra* note 111.

262 The courts might rely on prior federal or state court experimentation.

263 *See supra* note 230.

ver, the above suggestions apart from the recommendations for treating difficult local situations and experimenting would afford those responsible for the prescription, retention, and review of inconsistent and redundant local requirements another opportunity to modify the provisions as well as guidance for doing so.

This method of proceeding is also somewhat circumscribed. For example, it treats local procedural proliferation more specifically than other integral features of current federal litigation which have been concomitants of proliferation. These central aspects include power's accretion in district courts, increasing judicial discretion, and growing emphasis on the pretrial process and on managerial judging. Those phenomena's broad, structural, and ingrained nature and the obstacles, such as judicial opposition, to greater change indicate that more fundamental reform should await the course of action's implementation.[264] The realization that the 1988 JIA the 1985 and 1995 rule revisions were the only important developments in modern civil process which did not underlie the phenomena correspondingly attests to their entrenched character, the difficulty in attaining additional change, and the advisability of proceeding cautiously and of directly attacking proliferation.[265] Some observers concomitantly consider procedure's present state so fragmented that it is best to secure a measure of stability with, for instance, a moratorium on reform before pursuing broader change.[266] However, the comparatively narrow nature of the complications which local proliferation presents and of the approach proffered indicate that it can be felicitously implemented.[267]

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264 For example, the systemic character of judicial discretion, which permeates modern disputing and the federal rules, means that it would resist broad change. Managerial judging, which is primarily a style of judging, appears narrower and more malleable but is difficult to address thoroughly because many judges practice it and would oppose change. *See* JCR, *supra* note 71, at 74–75.

265 *See* Tobias, *supra* note 48, at 839; *see also* Cavanagh, *supra* note 79, at 601–06. If Congress or the judiciary directly addresses the phenomena, they must cooperate because this will be crucial to success and the work will implicate delicate interbranch relationships typified by rule revision. *See* Mullenix, *supra* note 76, at 379–82, 399–400; Tobias, *supra* note 15, at 1623.

266 *See, e.g.*, Mullenix, *supra* note 76, at 379–82, 399–400; Robel, *supra* note 86, 1449–50; *see also* Levin, *supra* note 86, at 900 (suggesting a preference for moratorium or national procedural commission to conduct kind of intensive analysis and meticulous development of basic changes that may be indicated); Tobias, *supra* note 15, at 1627 & n. 228 (same); *id.* at 1612 & n. 168 (alluding to moratoria); Yeazell, *supra* note 60, at 676–78 (suggesting the need for painstaking development of changes).

267 For example, conflicting local rules are a rather discrete problem, whose treatment the CJRA has fostered by systematizing their adoption and emphasizing the difficulties posed. *See* Tobias, *supra* note 19, at 1422–27; Tobias, *supra* note 15, at

This manner of proceeding may seem to impose a few disadvantages. For example, the course of action could limit experimentation or the application of measures which address unusual, troubling local conditions. Nonetheless, Rule 83's proposed revision, that would authorize testing with inconsistent, creative techniques for improving litigation, will minimize any potential loss of flexibility.[268] Effectuating the mandates which cover local proliferation in the federal civil, appellate, bankruptcy, and criminal rules and in the JIA might be expensive, and cost was apparently a major reason for the truncated compliance witnessed.[269] However, the expense entailed in halting the growth of conflicting and redundant local requirements should be comparatively small and could be reduced by employing volunteer assistance of the bar or law professors.[270] In short, these projected problems, which are relatively minor or can be treated, seem less significant than the need to restrict inconsistent and repetitive local provisions.

CONCLUSION

Local procedural proliferation has detrimentally affected modern process. Increasing numbers of local strictures, many of which conflict with, or duplicate, federal rules or acts of Congress have created confusion, imposed greater cost and delay in federal practice, and further balkanized federal procedure. If the institutions and individuals responsible for the expansion of inconsistent and redundant local measures implement the suggestions afforded in this Article, they should be able to limit proliferation and improve process in the twenty-first century.

1621–24. Proliferation is pervasive and difficult to treat fully because many judges apply violative measures and will resist change.

268 *See supra* note 230 and accompanying text. Courts could also invoke their substantial inherent authority. *See, e.g.*, Chambers v. Nasco, 501 U.S. 32, 33 (1991). *See generally* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001).

269 Telephone Interview with David Pimentel, *supra* note 148; Telephone Interview with Andrew Tietz, *supra* note 168; *see also supra* notes 168–72 and accompanying text.

270 *See supra* notes 153–61, 230, 244–47 and accompanying text.