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# CIVIL JUSTICE REFORM SUNSET

Carl Tobias\*

*This article uses the Civil Justice Reform Act of 1990 (CJRA) as the backdrop for addressing efforts to increase uniformity, simplicity, and transsubstantivity, and to decrease expense and delay in civil litigation. Professor Tobias discusses both the origin and the implementation of the CJRA. By requiring each federal district court to formulate a civil justice expense and delay reduction plan, the purpose of the CJRA is to decrease expense and delay in civil litigation. Professor Tobias argues that the CJRA has been successful because districts have applied techniques that have saved cost and time and have provided new data that may prove valuable upon evaluation. Yet he argues that the CJRA does have shortfalls. A primary shortfall addressed in this article is that the CJRA effectively suspended the purpose of the Judicial Improvements Act of 1988 (JIA) to increase uniformity and simplicity in civil litigation. After a thorough evaluation of the effectuation of the CJRA, Professor Tobias ultimately suggests that policy makers capitalize on the best aspects of the CJRA and the JIA, and he offers proposals for the future to increase efficiency in civil litigation.*

The Civil Justice Reform Act of 1990 (CJRA) instituted the most ambitious effort to experiment with procedures for reducing expense and delay in civil litigation during the 200-year history of the federal courts. All ninety-four federal district courts undertook searching introspection of their civil and criminal caseloads and then adopted and applied measures that they believed would best conserve resources. Statutory enactment and implementation proved controversial partly because it is unclear precisely how much cost and delay attend civil lawsuits and whether either is sufficiently troubling to warrant treatment, especially with the mechanisms prescribed in the legislation and employed by the districts.

The passage and effectuation of the CJRA have also been problematic because numerous courts have enforced local requirements that conflict with the Federal Rules of Civil Procedure, provisions in

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the United States Code, and strictures in the remaining districts. This development has made the arcane state of federal civil litigation even more byzantine. An overwhelming number of procedural mandates now govern civil disputes. There are commands in the federal rules and the United States Code, while a plethora of local measures, including local rules, individual judge practices, and the aforementioned CJRA requirements, cover civil cases in every federal court. Too many of the strictures are inconsistent, and some are difficult to discover, comprehend, and satisfy. These phenomena have further fragmented the already fractured condition of civil procedure and may actually have increased expense and delay in civil suits—impacts that are diametrically opposed to the 1990 statute's express goals. Indeed, the federal rules' fundamental tenets, such as uniformity and simplicity, are now more eroded than at any time since the Supreme Court first promulgated those rules in 1938.

Despite these complications, experimentation under the CJRA has apparently afforded numerous benefits. A significant percentage of districts have developed innovative, or applied existing, techniques that apparently have saved cost or time, while the testing of many mechanisms has generated much raw data that deserve evaluation and synthesis and that should yield instructive insights on district courts and civil litigation at the conclusion of the twentieth century.

Now that the unprecedented, seven-year experiment with procedures for decreasing expense and delay is drawing to a close, the experience warrants analysis. This article undertakes that effort. The opening section traces the CJRA's origins and development, emphasizing the Supreme Court's adoption of the initial federal rules and the subsequent half-century history, the 1988 passage of the Judicial Improvements Act (JIA), and the 1990 enactment of the CJRA.<sup>1</sup>

The second part assesses CJRA implementation. It first examines the detriments and advantages of experimentation's effectuation, oversight, and evaluation in the ninety-four courts and the efficacy of the measures that districts prescribed and employed. The section next affords lessons derived from statutory implementation, ascertaining that the CJRA was a modest reform that the vast majority of courts cautiously effectuated, as evidenced by the RAND Corporation's finding that the procedures applied had minimal impact on important parameters, namely, cost. Congress also intended the CJRA and the JIA to treat the above problems in modern civil disputing, although the enactments may have exacerbated the difficulties in certain respects because senators and representatives apparently failed to think

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1. The JIA is Title IV of the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642 (codified as amended at 28 U.S.C. §§ 332(d)(4), 2071-2074 (1994)). The CJRA is Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471-482 (1994)).

through the process and reconcile the statutory purposes and implementation.

The third part offers suggestions for the future that policy makers, such as Congress and judges, should effectuate. It posits numerous principles that support the recommendations provided and that could inform their implementation. For example, I propose that the CJRA and the JIA be harmonized, principally by maximizing the statutes' best features and minimizing their worst aspects. Senators and representatives should specifically allow the CJRA to sunset and facilitate the comprehensive effectuation of the JIA's major objectives of restoring the primacy of the national rule revision process and limiting local procedural proliferation, goals that the CJRA essentially suspended. Congress must also defer to that national amendment process and eschew legislative revision, while the districts should abrogate all inconsistent local requirements, particularly strictures that they adopted under the 1990 statute.

## I. ORIGINS AND DEVELOPMENT OF THE CIVIL JUSTICE REFORM ACT

The origins and development of the CJRA warrant relatively detailed examination in this article, even though several commentators have rather thoroughly chronicled the relevant background elsewhere.<sup>2</sup> Comparatively broad analysis is justified because that type of assessment can improve understanding of the CJRA and because the coalescence of a rich, complex mix of phenomena, most of which can be traced to the federal rules' 1938 adoption, eventually culminated in statutory enactment.

### A. *The 1938 Federal Rules and Their First Half Century*

The developments that prompted Congress to pass the 1934 Rules Enabling Act,<sup>3</sup> authorizing the U.S. Supreme Court to prescribe rules of practice for civil litigation in the federal district courts, deserve considerable treatment here. This background, especially the promulgation of the initial federal rules during 1938, enhances comprehension of subsequent developments, implicating the first half-century experience with those rules, which ultimately led to enactment of the JIA and of the CJRA.

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2. See Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 *FORDHAM L. REV.* 833 (1994); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 *MINN. L. REV.* 375 (1992); and Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 *STAN. L. REV.* 1447 (1994), for thorough discussion of the origins and development of the CJRA of 1990.

3. Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (current version at 28 U.S.C. §§ 2071-2077 (1994)). See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 *U. PA. L. REV.* 1015 (1982).

### 1. *The Rules Enabling Act of 1934 and the 1938 Federal Rules*

Around the turn of the century, judges, attorneys, and law professors became increasingly dissatisfied with common-law and code practice and procedure, and this concern prompted growing calls for reform.<sup>4</sup> Support for change escalated after Roscoe Pound's famous 1906 speech to the American Bar Association.<sup>5</sup> A disparate coalition of individuals as diverse as Dean Pound and Chief Justice William Howard Taft eventually developed a compromise that Congress passed as New Deal legislation during 1934.<sup>6</sup> The statute empowered the U.S. Supreme Court to adopt rules of procedure covering resolution of civil litigation in the federal district courts.<sup>7</sup> During 1935, the Court appointed the initial Advisory Committee on the Civil Rules, which included four law professors and nine attorneys and whose reporter was Charles Clark.<sup>8</sup> The Committee commenced work that year and tendered its draft to the Supreme Court during 1937.<sup>9</sup> The Court modified little of the material that the Committee had submitted and forwarded the procedures as altered to the attorney general, who transmitted them to Congress in January 1938. The proposals took effect by congressional inaction during September 1938.<sup>10</sup>

Charles Clark and the Committee members meant to treat the problems of common-law and code practice and procedure.<sup>11</sup> The drafters intended to modify the highly technical character of the prior procedural regimes, thereby eliminating the "sporting theory" of justice.<sup>12</sup> The attorneys and law professors had numerous concepts in mind when writing the initial Federal Rules of Civil Procedure.<sup>13</sup> The Advisory Committee wished to craft procedures that were simple, uniform, and transsubstantive, that is, procedures generalized across substantive lines.<sup>14</sup> The lawyers and academicians also wanted to afford

4. See Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Law-suit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 78 (1989); Burbank, *supra* note 3, at 1035-48; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 949 (1987).

5. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 409-13 (1906).

6. See Subrin, *supra* note 4, at 944-73; see also Burbank, *supra* note 3, at 1090-98.

7. See Burbank, *supra* note 3, at 1098-1184.

8. See Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 502-15 (1986); Subrin, *supra* note 4, at 961-82.

9. See Resnik, *supra* note 8, at 494; Subrin, *supra* note 4, at 961-83.

10. See Subrin, *supra* note 4, at 973; see also Resnik, *supra* note 8, at 494 n.1.

11. See, e.g., Subrin, *supra* note 4, at 914-21, 926-73; Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 272-73 (1989).

12. See, e.g., Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439-40 (1986); Subrin, *supra* note 4, at 948-73; see also Pound, *supra* note 5, at 405-06 ("sporting theory"). See generally CHARLES E. CLARK, *PROCEDURE—THE HANDMAID OF JUSTICE* (1965).

13. See, e.g., Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975); Tobias, *supra* note 11, at 272-77.

14. See Cover, *supra* note 13, at 718. See generally Carl Tobias, *The Transformation of Trans-substantivity*, 49 WASH. & LEE L. REV. 1501 (1992).

attorneys much control over litigation, particularly in discovery; to limit judicial discretion; to foster prompt, inexpensive dispute resolution; and to emphasize merits-based dispositions.<sup>15</sup> The Committee attempted to achieve simplicity by reducing the significance of pleading and limiting the number of steps in litigation.<sup>16</sup> It concomitantly wished to increase uniformity by requiring that each federal district court apply identical procedures.<sup>17</sup>

These basic procedural precepts were not absolutes, and they might even conflict. For example, Federal Rule 83,<sup>18</sup> by providing that each of the ninety-four federal district courts could adopt local procedures, enabled them to prescribe requirements that would undermine uniformity and simplicity. The choice to institute an equity-driven scheme, by essentially merging law into equity,<sup>19</sup> and to rely upon a liberal, flexible procedural regime correspondingly opened access to federal courts and fostered the pursuit of complicated lawsuits with multiple parties and issues that could increase cost and delay in resolving disputes.<sup>20</sup> Affording lawyers considerable control while restricting that of judges concomitantly facilitated unfocused litigation and broad discovery that might impose expense and delay.

## 2. *The Federal Rules' First Third of a Century*

The Advisory Committee and the federal judiciary were able to maintain the fundamental procedural tenets examined above during the first three decades after the 1938 federal rules' adoption.<sup>21</sup> The Committee proffered relatively few amendments, a number of which were technical in nature, while federal courts encountered little difficulty interpreting and enforcing the initial rules and praised their efficacy.<sup>22</sup> For instance, the judiciary promoted simplicity by relying upon a general, liberal pleading system, which it pragmatically and flexibly applied, and by essentially leaving discovery to counsel.<sup>23</sup> The judges

15. For discussion of these and other important goals of the drafters, see Resnik, *supra* note 8, at 502-15; Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648 (1981); and Tobias, *supra* note 11, at 272-77.

16. See, e.g., Subrin, *supra* note 15, at 1649-50; Tobias, *supra* note 11, at 274; see also Marcus, *supra* note 12, at 439-40.

17. See, e.g., Subrin, *supra* note 15, at 1650 (discussing uniform procedures); Tobias, *supra* note 11, at 274-75 (same).

18. See FED. R. CIV. P. 83.

19. See Subrin, *supra* note 4, at 1000-01; Subrin, *supra* note 15, at 1650; Tobias, *supra* note 11, at 274-75.

20. See Subrin, *supra* note 4, at 1001; Resnik, *supra* note 8, at 502 n.30.

21. See Symposium, *The Federal Rules of Civil Procedure: 1938-1958*, 58 COLUM. L. REV. 435 (1958). See generally Resnik, *supra* note 8, at 516; Tobias, *supra* note 11, at 277-78.

22. Charles Clark, the Reporter and a Second Circuit judge, fostered some of this. See, e.g., *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944); Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 49 (1957); see also Charles E. Clark, "Clarifying" Amendments to the Federal Rules?, 14 OHIO ST. L.J. 241 (1953); Tobias, *supra* note 11, at 277-78.

23. See Marcus, *supra* note 12, at 439-40, 445-46 (pleading); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 397 (1982) (discovery). But cf. Benjamin Kaplan, *Continuing*

also preserved and fostered uniformity by prescribing comparatively few local procedures, especially strictures that were inconsistent with the federal rules or acts of Congress.<sup>24</sup>

Each of the original federal rules was not equally effective, and judges, lawyers, and litigants undermined certain essential procedural precepts. For example, in the 1950s, the liberal pleading system prompted judges of the Ninth Circuit to request amendment of Rule 8, while Charles Clark repelled an analogous effort mounted by judges in the Southern District of New York.<sup>25</sup> The simple, but open-ended, discovery regime led to some difficulties, such as broad discovery requests, which proved particularly problematic in complex cases.<sup>26</sup>

### 3. *The Federal Rules Since the Mid-1970s*

Numerous developments have led to growing disenchantment with the Federal Rules of Civil Procedure, and this concern was initially expressed in the 1970s. Many judges, a number of attorneys, and some writers contended that there was a litigation explosion in the federal courts.<sup>27</sup> These observers claimed that lawyers and litigants were bringing substantial numbers of civil cases, too few of which were meritorious.<sup>28</sup> Several members of the Supreme Court voiced discontent about abuse of the litigation process, especially in discovery, and they remonstrated appellate and district court judges to sanction attorneys and parties who perpetrated abuse.<sup>29</sup>

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*Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967) (suggesting Rules 19, 23, and 24 were read inflexibly); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II)*, 81 HARV. L. REV. 591 (1968).

24. See Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2016-19 (1989). Many states premised their procedures on the federal analogues. See Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2237 (1989); 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, 1377-78 (1986).

25. See Marcus, *supra* note 12, at 445.

26. See *New Dyckman Theatre 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 (1958) (contemporaneous account); Subrin, *supra* note 4, at 982-84 (subsequent account).

27. 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, 24 (A. Leo Levin & Russell R. Wheeler eds., 1979); Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, in *id.* at 209, 211-12; see also Tobias, *supra* note 11, at 287-89.

28. 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 (1984).

29. See, e.g., Amendments to Federal Rules of Civil Procedure, 446 U.S. 995, 998-100 (1980) (Powell, J., dissenting); *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975).

### a. Managerial Judging

A number of federal district court judges, principally in large metropolitan districts, such as the Central District of California and the Southern District of New York, responded to the perceived litigation explosion and abuse with numerous measures that facilitated their active involvement in civil cases and that were dubbed "managerial judging."<sup>30</sup> The judges relied upon pretrial conferences to oversee litigation's pace, narrow and resolve disputed issues, and foster settlement, typically by employing certain alternative dispute resolution (ADR) techniques.<sup>31</sup>

A number of judges monitored the breadth and pace of discovery, and some courts imposed sanctions for abuses of the discovery or litigation processes.<sup>32</sup> Certain judges developed creative techniques, such as minitrials and mandatory summary jury trials, particularly for treating complex litigation.<sup>33</sup> The *Manual for Complex Litigation*<sup>34</sup> correspondingly afforded a plethora of mechanisms for resolving specific types of complex cases, such as securities, mass tort, and employment discrimination suits. The 1983 revisions in the federal rules and the 1985 issuance of the *Manual for Complex Litigation, Second*,<sup>35</sup> effectively codified many practices with which judges had been experimenting under the rubric of managerial judging.

The 1983 amendments of Rules 11, 16, and 26 undermined uniformity and simplicity. For example, all three revisions eroded simplicity by expanding the number of steps in a lawsuit and by imposing increased, and more onerous, duties on attorneys, such as mandatory participation in pretrial and discovery conferences.<sup>36</sup> Rule 16's new version reduced uniformity by suggesting that judges tailor procedures to specific cases and that each judge craft individual scheduling orders

30. See generally 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, 675-78 (1988).

31. See, e.g., Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424 (1986) (ADR); 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 (1981) (remaining propositions); Resnik, *supra* note 23, at 391-400 (same).

32. See Peckham, *supra* note 31; Resnik, *supra* note 23, at 391-400.

33. 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. 111 (1976).

34. MANUAL FOR COMPLEX LITIGATION (1982). See generally Alan J. Simons, *The Manual for Complex Litigation: More Rules or Mere Recommendations?*, 62 ST. JOHN'S L. REV. 473 (1988).

35. Order Amending Federal Rules of Civil Procedure, 461 U.S. 1097 (1983); MANUAL FOR COMPLEX LITIGATION, SECOND (1985).

36. See Subrin, *supra* note 15, at 1650; Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933 (1991). See generally ARTHUR R. MILLER, THE 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY (Federal Judicial Ctr. ed., 1984).



for particular categories of cases.<sup>37</sup> The *Manual for Complex Litigation, Second*, concomitantly reduced uniformity by instructing judges to treat many complicated suits differently than routine, simple cases and to adjust specific measures to particular classes of complex actions.<sup>38</sup>

### b. The Proliferation of Local Procedures

Another critical source of mounting dissatisfaction with the Federal Rules of Civil Procedure has been the profound increase in local procedures since the 1938 rules' adoption, a phenomenon that has expanded exponentially in the last quarter century. Courts instituted much managerial judging, particularly before the 1983 federal rule revisions, by promulgating local procedures.<sup>39</sup> These local strictures frequently conflicted with the federal rules, acts of Congress, and local procedures in the remaining ninety-three federal districts. The classic illustration was the Northern District of California's promulgation of a "complex rule" that required attorneys to attend preliminary meetings apart from the pretrial conference and prepare joint pretrial statements addressing many factors, such as the disputed factual issues and settlement negotiations.<sup>40</sup> Since the mid-1970s, judges have prescribed growing numbers of local strictures, either under the heading of managerial judging or independently.

In the 1980s, the Judicial Conference of the United States, the policy-making arm of the federal courts, recognized the difficulties that attended local procedural proliferation and responded in several ways. The Conference orchestrated issuance of the 1985 amendment of Federal Rule 83 that specifically required that the standing orders of specific judges not conflict with the federal rules or local rules.<sup>41</sup> The advisory committee's note that attended the revision asked each district to implement procedures for adopting and monitoring standing orders.<sup>42</sup> The note correspondingly requested that circuit judicial councils review all local rules and determine if the provisions were valid or conflicted and if they promoted interdistrict consistency and uniformity.<sup>43</sup>

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37. See Subrin, *supra* note 15, at 1650; Tobias, *supra* note 36, at 942-46. See generally *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1011-13 (1st Cir. 1988).

38. See Subrin, *supra* note 15, at 1650; Tobias, *supra* note 11, at 292 n.148. Managerial judging was occurring in state court systems at the same time. For example, many trial judges in urban areas responded to civil backlogs with procedures, such as special pretrial conferences, discovery limitations, and ADR. See BARRY MAHONEY, *CHANGING TIMES IN TRIAL COURTS* (1988). See generally Lieberman & Henry, *supra* note 31; Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 STAN. L. REV. 1553 (1994).

39. See Peckham, *supra* note 31, at 773-77; Resnik, *supra* note 23, at 399.

40. See N.D. CAL. R. 235-7, reprinted in Peckham, *supra* note 31, at 776 n.30; see also Peckham, *supra* note 31, at 776-77.

41. See FED. R. CIV. P. 83 (1985 amend.).

42. See FED. R. CIV. P. 83 advisory committee's note (1985 amend.).

43. See *id.*

The Judicial Conference also responded to local proliferation by establishing the Local Rules Project.<sup>44</sup> The Conference asked the Project to assemble and organize each local rule, individual judge standing order, and every other local stricture that functioned similarly.<sup>45</sup> Moreover, the Conference requested that the Project analyze difficulties that proliferating local requirements created and suggest means of treating the difficulties that the Project discovered.<sup>46</sup>

In 1989, the Project issued its assessment of local civil procedures.<sup>47</sup> The Project found that the federal district courts had promulgated some 5000 local rules, many of which conflicted with the federal rules, provisions of the United States Code, and local requirements in other courts.<sup>48</sup> The most widely adopted local strictures governed the pretrial process, especially pretrial conferences and discovery. Many districts employed a number of specific measures, such as presumptive numerical limitations on interrogatories or special case-tracking schemes for addressing comparatively routine, simple cases.<sup>49</sup> The ninety-four districts also varied significantly. For instance, the Middle District of Georgia had issued only one local rule and eleven standing orders, even as the Central District of California had prescribed thirty-one local rules with 434 subrules, augmented by 275 standing orders.<sup>50</sup>

Local rules are merely one type of local stricture that has undermined uniformity and simplicity. The Local Rules Project found that quite a few additional requirements, variously denominated general orders, standing orders, special orders, scheduling orders, or minute orders, as well as individual judge practices, covered local litigation in the ninety-four districts.<sup>51</sup> Many courts and judges have also employed numerous procedures that they have not reduced to writing.<sup>52</sup>

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44. See COMMITTEE ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE (1989) [hereinafter REPORT OF THE LOCAL RULES PROJECT]; see also Daniel R. Coquillette et al., *The Role of Local Rules*, A.B.A. J., Jan. 1989, at 62 (providing summary of Local Rules Project).

45. See Coquillette et al., *supra* note 44, at 63; Telephone Interview with Mary P. Squiers, Project Director, Local Rules Project (Feb. 21, 1992).

46. See Coquillette et al., *supra* note 44, at 63; Telephone Interview with Mary P. Squiers, *supra* note 45.

47. See REPORT OF THE LOCAL RULES PROJECT, *supra* note 44.

48. See Subrin, *supra* note 24, at 2020-26; see also Coquillette et al., *supra* note 44, at 62-65.

49. See, e.g., U.S. DIST. COURT FOR THE E. DIST. OF N.Y., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 2 (1991), available in 1991 WL 525112 (C.J.R.A.) [hereinafter E. DIST. OF NEW YORK PLAN]; U.S. DIST. COURT FOR THE DIST. OF WYO., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 2 (1991), available in 1991 WL 525106 (C.J.R.A.) [hereinafter WYOMING PLAN]; see also Subrin, *supra* note 24, at 2020-26.

50. See Coquillette et al., *supra* note 44, at 62.

51. See Telephone Interview with Mary P. Squiers, *supra* note 45; Telephone Interview with Stephen N. Subrin, Consultant, Local Rules Project (Feb. 15, 1992).

52. For example, a few districts experimented with coequal assignments of civil cases to Article III judges and magistrate judges. See, e.g., U.S. DIST. COURT FOR THE DIST. OF MONT., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 3-4 (1991) [hereinafter MONTANA PLAN]. See generally Carl Tobias, *The Montana Federal Civil Justice Plan*, 53 MONT. L. REV. 91,

The Judicial Conference responded to the Local Rules Project's findings with an order that asked the federal districts to make all local requirements consistent with the federal rules and that afforded other helpful suggestions, such as proposing uniform numbering of the federal and local rules.<sup>53</sup> Not all districts have thoroughly implemented the recommendations, however.<sup>54</sup>

These developments, especially the rise of managerial judging and the 1983 federal rules amendments, depart significantly from the tenets that animated the drafters of the 1938 rules, changing and even reversing the prior work.<sup>55</sup> Certain modifications might represent efforts to make the rules function as initially intended or to correct errors by instituting ideas that the Advisory Committee eschewed in the 1930s.<sup>56</sup> Additional alterations may constitute attempts to fill gaps in the original rules or constitute new understandings.<sup>57</sup> Perhaps most important, managerial judging and the 1983 revisions might be an acknowledgment that the uniform, simple, procedural regime that the 1938 rules implemented may be partly responsible for the perceived explosion of litigation and litigation abuse.

### c. Concerns About Procedural Rule Revision Processes

During the last quarter century, many observers, including members of Congress, have expressed concerns about the processes for revising the requirements that cover federal practice, especially the civil rules. In 1973, Congress intervened in the national rule amendment process by enacting legislation that replaced the Federal Rules of Evi-

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93 n.9 (1992). Some districts required that litigants make good faith efforts to resolve discovery disputes before filing motions and to so certify in writing. *See, e.g., WYOMING PLAN, supra* note 49, at 13.

53. *See* Telephone Interview with Mary P. Squiers, *supra* note 45; Telephone Interview with Stephen N. Subrin, *supra* note 51. Neither the Project Director nor its Consultant believes that there has been substantial nationwide compliance. *Id.*

54. This assertion is premised on the telephone conversations cited *supra* notes 45 and 51. Indeed, the Supreme Court recently adopted a Rule 83 amendment that requires consistent numbering. *See* FED. R. CIV. P. 83 (1995 amend.). Numerous districts have complied with the Judicial Conference request that they consistently number local rules. Illustrative are the District of Minnesota and the Middle District of North Carolina. *See* RULES OF PRACTICE AND PROCEDURE OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF MINNESOTA (1996); RULES OF PRACTICE AND PROCEDURE OF THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA (1998).

55. I rely most here on Subrin, *supra* note 15, at 1650-52. For example, revised Rules 11, 16, and 26 replaced attorney self-regulation with judicial control, while Rule 26 restricted opened discovery. Local proliferation eroded interfederal district court uniformity, and suggestions in the MANUAL FOR COMPLEX LITIGATION, SECOND (1985) and Rule 16(b) that judges develop prototypical scheduling orders for different types of cases have limited intercase uniformity. Similarly, the rise of managerial judging and its codification in Rule 16 exemplified efforts to tailor procedures to particular cases, thus eroding the 1938 rules' transsubstantive basis.

56. For example, Rule 16 could be an effort to have pretrial conferences restrict the scope of, or expose, frivolous cases. The issue formulation provision institutes a concept like one Clark suggested in 1935 but the Committee rejected. *See* Subrin, *supra* note 4, at 978-79.

57. This is true of Rule 16's allusion to settlement. *See* Resnik, *supra* note 8, at 496, 527.

dence the Supreme Court had adopted the year before, thereby preempting much effort of Judicial Conference committees that had developed the procedures.<sup>58</sup> During the following year, Congress intervened in another amendment process by delaying the effective date of the revised Federal Rules of Criminal Procedure until 1975.<sup>59</sup>

This legislative activity led Professor Howard Lesnick to call for reconsideration of the federal rule amendment processes in 1975.<sup>60</sup> He suggested that there be serious inquiry and reexamination of those processes' openness; of the Conference Committees' composition and the centralization of authority for appointments in the Chief Justice of the United States; of the propriety of the Court's role as promulgator of rules; and of the meaningfulness of congressional review of rule revisions.<sup>61</sup>

During the mid-1970s, Judge Jack Weinstein of the Eastern District of New York gave several thought-provoking lectures on rule revision.<sup>62</sup> Judge Weinstein described the historical development of court rulemaking and offered numerous suggestions for improving the national and local rule revision processes.<sup>63</sup> These included somewhat reduced roles for certain participants, especially Congress and the Supreme Court, changes in procedures for appointing various committee members, and more regularized processes for local procedural revision.<sup>64</sup>

During 1979, the Judicial Conference convened a convocation on federal rulemaking and in 1981 the Conference issued a comprehensive report titled *Federal Rulemaking: Problems and Possibilities*.<sup>65</sup> Although this effort may have been undertaken partly in response to the developments described above, the specific impetus was Chief Justice Warren Burger's request for reexamination of the entire rulemaking process, particularly the Court's role in it.<sup>66</sup> The report thoroughly

58. See H.R. REP. No. 100-889, at 27-29 (1988), reprinted in 1988 U.S.C.C.A.N. 5982, 5987-89; see also Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

59. See Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-Examination*, 61 A.B.A. J. 579, 579 (1975); see also Act of July 30, 1974, Pub. L. No. 93-361, 88 Stat. 397. Congress thereafter often intervened to "delay the effective date of, disapprove, or modify rules and amendments." See H.R. REP. No. 100-889, at 27, reprinted in 1988 U.S.C.C.A.N. 5982, 5987.

60. See Lesnick, *supra* note 59.

61. See *id.* at 579-84.

62. See JACK WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977); see also Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905 (1976) (condensed version).

63. See Weinstein, *supra* note 62, at 911-43.

64. See *id.* at 927-57. Professor Geoffrey Hazard responded to Judge Weinstein and Professor Lesnick by suggesting that a less than fully democratic rule revision process produced better proposals for procedural change than a more open process. See Geoffrey Hazard, *Undemocratic Legislation*, 87 YALE L.J. 1284, 1287-94 (1978) (book review).

65. WINIFRED R. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES (Federal Judicial Ctr. ed., 1981).

66. The Chief Justice's request appeared in his 1979 *Annual Report on the State of the Judiciary*. See BROWN, *supra* note 65, at vi.

canvassed the existing revision process; criticisms and proposals for change, including the structure of rule revision committees, the content of rules, and Congress's reviewing role; and specific proposals relating to structure and process.<sup>67</sup>

Since the mid-1980s, there had been mounting criticism of the 1983 federal rule revisions, particularly of amended Rule 11. One important criticism was that the revisors premised Rule 11's modification on limited empirical data regarding the problems, such as the litigation explosion and litigation abuse, that it was intended to solve and on the efficacy of the changes as a solution.<sup>68</sup> Another criticism reflected in the 1983 alteration, which has been publicly aired only during the 1990s,<sup>69</sup> is that the rule revisors have been overly responsive to the federal judiciary's needs and insufficiently solicitous of other users of the federal courts, namely, lawyers and litigants.<sup>70</sup> Some critics ascribe this phenomenon primarily to the rule amendment entities' composition because the committees have consisted primarily of federal judges.<sup>71</sup>

Congressional interest in the rule revision processes and federal civil procedure continued after the early 1970s. In 1977, Congress began holding hearings that eventually led to passage of the JIA.<sup>72</sup> During the early 1980s, Congress intervened significantly in the civil rule revision process by rewriting a proposed amendment to Rule 4, governing service of process, that the Supreme Court had transmitted.<sup>73</sup> Many of the above developments culminated in congressional passage of the JIA in 1988, although it is important to understand that the legislation had a decade-long gestation period.

### B. *The Judicial Improvements Act of 1988*

Congress intended to respond to some criticisms of federal civil procedure examined above when it passed the JIA. The requirements

67. See generally BROWN, *supra* note 65.

68. See Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455 (1993).

69. See, e.g., Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 897 (1992); Laura A. Kaster & Kenneth A. Wittenberg, *Rulemakers Should Be Litigators*, NAT'L L.J., Aug. 17, 1992, at 15; John Frank, *Rule 11—The Need to Start Over* (May 1, 1992) (unpublished manuscript, on file with the author).

70. See Tobias, *supra* note 69, at 897; Frank, *supra* note 69.

71. See Kaster & Wittenberg, *supra* note 69; Frank, *supra* note 69; see also Lesnick, *supra* note 59, at 581-82. Other criticisms of Rule 11 were that it fostered satellite litigation and discouraged valid suits. See, e.g., Tobias, *supra* note 69, at 860-63; Walker, *supra* note 68, at 456-59.

72. See H.R. REP. NO. 100-889, at 23, reprinted in 1988 U.S.C.A.N. 5982, 5983.

73. See Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1983); see also Paul Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733 (1988) (describing prospects for reform of Rule 4). See generally Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 844-46 (1991). Criticism of the rule revision processes has continued. See generally Burbank, *supra* note 68; Mullenix, *supra*; Walker, *supra* note 68.

that the statute imposed and the legislative intent in enacting the measure are considered first. The second section of this article descriptively analyzes the JIA's implementation, as witnessed in the rule revision process that yielded the 1993 federal rule amendments and in efforts relating to local procedural change.

The advocates of the JIA meant to modernize, systematize, and open the national and local processes for revising applicable procedures. The JIA's sponsors seemingly wished to restore the primacy of the national rule amendment process and to restrict local procedural proliferation. The proponents may also have intended to revitalize several procedural precepts, namely, uniformity and simplicity, which motivated the original Advisory Committee.<sup>74</sup>

### 1. National Rule Revision

Congress intended that the JIA open the national rule revision process to enhanced public scrutiny and participation, thereby ostensibly improving the quality of procedural changes.<sup>75</sup> The legislation essentially assimilated federal rule amendment to notice-comment rulemaking for federal administrative agencies under the Administrative Procedure Act.<sup>76</sup> The JIA provided for increased public involvement from the earliest phases of revisions' formulation.

The JIA prescribed enhanced public access to information that is relevant to amendments, while requiring that meetings of certain rule revision entities, particularly the Advisory Committee, be opened to the public after notice is afforded.<sup>77</sup> The JIA also required that any entity that makes a suggestion for procedural change "shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views."<sup>78</sup> Moreover, the legislation afforded Congress several additional months to review revisions that the Supreme Court forwards, in an apparent attempt to enhance that review's effectiveness.<sup>79</sup>

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74. Some JIA provisions, including its encouragement of experimentation with court-annexed arbitration, are not central to this article. See 28 U.S.C. §§ 651-658 (1994); see also *infra* text accompanying note 296 (stating that the 105th Congress authorized all districts to employ court-annexed arbitration). See generally BARBARA S. MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS (Federal Judicial Ctr., 1990) (recommending Congress enact an arbitration provision authorizing arbitration in all federal district courts to be mandatory or voluntary or a combination of both). The JIA also prescribed creation of the Federal Courts Study Committee and asked it to study comprehensively the federal courts and issue a report. See Federal Courts Study Act, Pub. L. No. 100-702, 102 Stat. 4642, 4644 (1988). See generally REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990).

75. See H.R. REP. NO. 100-889, at 27, reprinted in 1988 U.S.C.C.A.N. 5982, 5987; see also 28 U.S.C. §§ 2071(b), 2073 (1994). See generally Mullenix, *supra* note 73, at 830-32.

76. 5 U.S.C. §§ 551-59 (1994); see also 28 U.S.C. §§ 2071(b), 2073 (1994).

77. See 28 U.S.C. §§ 2071, 2073.

78. 28 U.S.C. § 2073(d).

79. See 28 U.S.C. § 2074(a); see also H.R. REP. NO. 100-889, at 26, reprinted in 1988 U.S.C.C.A.N. 5982, 5987.

Congress left essentially intact some aspects of the national rule amendment process. All of the institutions—the Congress, the Court, the Judicial Conference, the Judicial Conference Committee on Rules of Practice, Procedure and Evidence (Standing Committee), and the Advisory Committee—that had traditionally been involved in rule revision continue to participate. Congress correspondingly decided to retain the entities' existing composition, although it did consider possible change in the Advisory Committee's constitution.<sup>80</sup>

## 2. *Local Rule Revision*

Congress meant for the 1988 legislation to rectify or ameliorate problems that expanding local procedures had engendered. Indeed, the House Judiciary Committee report that accompanied the statute stated that the Committee had “found a proliferation of local rules, many of which conflict with national rules of general applicability.”<sup>81</sup> The report also observed that the Judicial Conference was addressing the “problem of proliferating local rules,” while representatives praised the Local Rules Project for its “valuable work” and remarked on the Project's continuing efforts.<sup>82</sup>

Congress attempted to limit local procedural proliferation principally by imposing restrictions on local procedural amendment that resembled those for federal rule revision. Senators and representatives essentially intended these strictures to regularize local procedural amendment and improve local procedures by opening local processes to increased public involvement and scrutiny. The legislation commanded each federal district to appoint a local rules committee that would assist all of the court's judges in developing local rules while imposing public notice and comment requirements on courts that prescribe new, or amend existing, local rules.<sup>83</sup> Congress seemingly meant for these mandates also to cover the procedures that individual judges employ.<sup>84</sup> Congress correspondingly made exclusive the revision processes prescribed, thus attempting to guarantee that courts and judges would not avoid them by attributing to local requirements a different name, such as a standing or minute order.<sup>85</sup>

An important way that senators and representatives sought to reduce local procedural proliferation was to impose specifically on circuit judicial councils an affirmative responsibility to review

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80. The proposal would have required that advisory committees “consist of a balanced cross section of the bench and bar, and trial and appellate judges.” Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2076 n.50 (1989).

81. H.R. REP. NO. 100-889, at 27, reprinted in 1988 U.S.C.C.A.N. 5982, 5988.

82. *Id.* at 28-29, reprinted in 1988 U.S.C.C.A.N. 5982, 5989.

83. See 28 U.S.C. § 2071 (1994). As with the national rule revision entities, Congress did not prescribe committee composition. See also *supra* note 80 and accompanying text.

84. See 28 U.S.C. § 2071 note.

85. See *id.* § 2071(f); see also *id.* § 2071 note.

periodically all local strictures for consistency with the federal rules while permitting the councils to “modify or abrogate [all] procedures found inconsistent.”<sup>86</sup> The JIA, therefore, assigned the councils a continuing duty to monitor local procedures that existed when it took effect on December 1, 1988, and all procedures that are subsequently prescribed.<sup>87</sup>

In short, Congress intended that the JIA modernize, regularize, and open the national and local procedural amendment processes while restoring the primacy of national rule revision and limiting the proliferation of local requirements. Congress, thus, apparently meant to reinvigorate numerous procedural tenets, such as uniformity, simplicity, and transsubstantivity, that animated the drafters of the original federal rules in 1938. Before several of the Act’s important aspects, particularly those pertaining to local procedural revision and proliferation, could be thoroughly implemented and before release of the report of the Federal Courts Study Committee commissioned by the 1988 legislation, Senator Joseph Biden (D-Del.), chair of the Senate Judiciary Committee, introduced an important bill that was the predecessor of the Civil Justice Reform Act of 1990.<sup>88</sup>

### C. *The Civil Justice Reform Act of 1990*

#### 1. *Background*

The developments that led to the introduction of the measure that eventually became the CJRA warrant comparatively thorough examination here because they inform understanding of the statute that Congress ultimately enacted. Treatment of that background in this article is somewhat attenuated, however, as a number of writers and entities have comprehensively considered the relevant history elsewhere.<sup>89</sup>

Concerns about growing expense and delay in civil litigation led Senator Biden, the Foundation for Change, and the Brookings Institution to create a task force that was to evaluate the civil justice process and make suggestions for improvement.<sup>90</sup> The task force, which included a broad spectrum of federal court users, undertook that assessment by scrutinizing the federal and state civil justice systems and commissioning several surveys conducted by Louis Harris and Associates.

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86. *Id.* § 332(d)(4); see also *id.* § 2071 note.

87. See *id.* § 332(d)(4); see also *id.* § 2071 note.

88. S. 2648, 101st Cong. (1990).

89. See, e.g., Johnston, *supra* note 2; Jeffrey J. Peck, “Users United”: *The Civil Justice Reform Act of 1990*, LAW & CONTEMP. PROBS., Summer 1991, at 105; Robel, *supra* note 2.

90. I rely substantially in this paragraph on BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION (1989). See also S. REP. NO. 101-416, at 13-14 (1990), reprinted in 1990 U.S.C.A.N. 6802, 6816.



The task force ascertained that there was much dissatisfaction among judges, attorneys, and parties with the federal civil justice process.<sup>91</sup> The task force found that increasing cost and delay in resolving civil litigation jeopardized open federal court access for numerous people and organizations<sup>92</sup> and proposed that the federal districts apply mechanisms, principally involving judicial case management, discovery, and ADR, to rectify or ameliorate these problems.<sup>93</sup>

Senator Biden relied substantially on the task force's suggestions in drafting Senate Bill 2648,<sup>94</sup> which he introduced in early 1990. The bill, which would have required each federal district to implement a number of mechanisms for decreasing cost and delay, proved to be somewhat controversial.<sup>95</sup> Many federal judges had numerous concerns about the proposed legislation. The jurists were most troubled because they considered the measure a congressional attempt to micromanage the federal courts, which avoided the ordinary rule amendment procedures, possibly threatening them and the efforts of the Federal Courts Study Committee that Congress had commissioned, and which was introduced prior to adequate consultation with the judges.<sup>96</sup> Indeed, the Judicial Conference responded to Senate Bill 2648 with a "Fourteen-Point Plan."<sup>97</sup> After holding hearings, conducting delicate negotiations with the Conference, and revising the legislation initially introduced, Congress passed the CJRA in November 1990.<sup>98</sup>

The CJRA was, and remains, controversial for reasons mentioned above and numerous others. A number of experts have challenged the assertion that the federal courts have encountered troubling delay in resolving civil cases. Thorough 1990 assessments showed that there was less delay, especially in terms of time to disposition, than some claimed.<sup>99</sup> Additional observers have suggested that, to the extent that courts experience delay, the phenomenon varies considerably from district to district.<sup>100</sup> A few critics assert that delay is a relative

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91. See BROOKINGS INST., *supra* note 90, at 1-2, 5-7.

92. See *id.* at 5-7.

93. See *id.* at 8-29.

94. S. 2648, 101st Cong. (1990).

95. See S. REP. NO. 101-416, at 4-6, 30-31, reprinted in 1990 U.S.C.C.A.N. 6802, 6806-08, 6833-34; see also Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115, 128-29 (1991).

96. See S. REP. NO. 101-416, at 4-6, 10, 30-31, reprinted in 1990 U.S.C.C.A.N. 6802, 6806-08, 6813, 6833-34.

97. See *id.* at 30-31, reprinted in 1990 U.S.C.C.A.N. 6802, 6833-34; see also Robel, *supra* note 95, at 128-29.

98. See S. REP. NO. 101-416, at 3-6, reprinted in 1990 U.S.C.C.A.N. 6802, 6805-08.

99. See TERENCE DUNWORTH & NICHOLAS M. PACE, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS (1990); WOLF HEYDEBRAND & CARROLL SERON, RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF THE FEDERAL DISTRICT COURTS (1990).

100. See, e.g., Avern Cohn, *A Judge's View of Congressional Action Affecting the Courts*, LAW & CONTEMP. PROBS., Summer 1991, at 99; see also Robel, *supra* note 95, at 117-23.

notion.<sup>101</sup> For instance, although certain resource-poor litigants may require more time for discovery to develop factual information important in proving their cases, it might be improper to describe this temporal need as delay that deserves remediation.<sup>102</sup> Other observers claim that the statute was motivated too substantially by political considerations or was insufficiently responsive to critical sources of cost and delay, mainly criminal dockets.<sup>103</sup>

It is also important to understand that the 1988 and 1990 acts had quite different origins, sponsors, and purposes, although both pieces of legislation passed within a two-year time span. The JIA gestated for nearly a decade, emanated from Representative Robert Kastenmeier's House Judiciary Subcommittee, and harkened back to the tenets that underlie the 1938 federal rules.<sup>104</sup> Congress passed the CJRA in less than a year, and it came from Senator Biden's Senate Judiciary Committee and responded to concerns regarding the litigation explosion and litigation abuse, which find their clearest expression in the 1983 federal rule amendments.<sup>105</sup>

## 2. *The CJRA*

The CJRA commanded each federal district court to formulate a civil justice expense and delay reduction plan by December 1993.<sup>106</sup> The plans' purposes were "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."<sup>107</sup> The courts were to promulgate plans after scrutinizing reports and recommendations that advisory groups prepared for the districts.<sup>108</sup>

These groups, which the districts named ninety days after adoption of the CJRA, were to be balanced and include attorneys and other people representative of those who participate in civil litigation in the trial courts.<sup>109</sup> The statute mandated that each group thor-

101. See, e.g., Johnston, *supra* note 2; Robel, *supra* note 95, at 117-23; see also DUNWORTH & PACE, *supra* note 99.

102. See Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992); see also Robel, *supra* note 95, at 121-22 (challenging relationship between delay reduction and increased access to justice).

103. See, e.g., Cohn, *supra* note 100, at 100-03; Mullenix, *supra* note 2, at 400-01; see also David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 123 (1983) (questioning whether litigation expenses are excessive).

104. See *supra* note 72 and accompanying text.

105. See *supra* notes 25-29, 36-37, and accompanying text.

106. See 28 U.S.C. § 471 note (1994) (reproducing Pub. L. No. 101-650, § 103(b)(1)).

107. *Id.* § 471.

108. See *id.* § 472. See generally JAMES S. KAKALIK ET AL., IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS 13-26 (1996) [hereinafter RAND PILOT STUDY]; Barb L. Bettenhausen, *Revolution or Restoration? District Advisory Groups Under the 1990 Civil Justice Reform Act and the Rules Enabling Act of 1934*, 4 GEO. MASON L. REV. 297 (1996).

109. See 28 U.S.C. § 478(b).

oroughly evaluate the "state of the court's civil and criminal dockets," "identify trends in case filings and in the demands being placed on the court's resources," and delineate the "principal causes of cost and delay in civil litigation" in the district.<sup>110</sup> The CJRA also commanded every group, when formulating suggestions, to consider the specific needs and situations of the district, its parties, and their lawyers, while insuring that all of them contribute significantly to "reducing cost and delay and thereby facilitating access to the courts."<sup>111</sup>

The districts, after receiving the groups' reports and recommendations, were to assess them and confer with the groups, and then were to consider and could adopt the CJRA's eleven principles, guidelines, and techniques, and any other procedures that they deemed appropriate to reduce cost or delay under the legislation's twelfth open-ended provision.<sup>112</sup> Section 473(a) of the CJRA affords six principles and guidelines of litigation management and cost and delay reduction: a system of case management tailored to each lawsuit's circumstances, early judicial participation to create timelines, discovery conferences, cooperative and voluntary discovery, strict limitations on discovery motions, and enhanced reliance on ADR.<sup>113</sup> Section 473(b) provides five techniques for managing litigation and decreasing expense and delay: parties' joint presentation of a discovery case management plan, litigant representation at each pretrial conference by counsel with authority to bind a party regarding previously identified discussion topics, a signature requirement for all requests by attorneys or parties for extension of deadlines for discovery completion and for trial postponement, early neutral evaluation, and the presence or availability by telephone of party representatives with binding settlement authority during settlement conferences upon court notice.<sup>114</sup>

None of the principles, guidelines, or techniques prescribed was novel. Congress based the eleven measures primarily on the Brookings task force's recommendations, which in turn had been derived principally from procedures that many federal districts and states had applied or with which they had experimented.<sup>115</sup> For example, numerous districts had carefully monitored complex lawsuits and imposed restrictions on discovery motions,<sup>116</sup> while trial courts in practically all of the states had employed various forms of ADR.<sup>117</sup> These phenom-

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110. *Id.* § 472(c)(1).

111. *Id.* § 472(c)(2)-(3).

112. *See id.* §§ 472(a), 473(a)-(b). *See generally* Bettenhausen, *supra* note 108, at 300.

113. *See* 28 U.S.C. § 473(a).

114. *See id.* § 473(b).

115. *See* BROOKINGS INST., *supra* note 90, at 23; *supra* notes 93-94 and accompanying text.

116. *See, e.g.,* E. DIST. OF NEW YORK PLAN, *supra* note 49, at 2; WYOMING PLAN, *supra* note 49, at 2; *see also* Subrin, *supra* note 24, at 2020-26; Edward D. Cavanagh, *Congress' Failed Attempt to Spur Efficiency: The Legacy of the Civil Justice Reform Act*, LEGAL TIMES, Nov. 25, 1996, at 28.

117. *See supra* note 38; *see also* Sherman, *supra* note 38.

ena suggest, therefore, that the CJRA's purposes, language, and requirements were comparatively modest.

The districts that adopted and implemented plans prior to December 31, 1991, qualified for designation as Early Implementation District Courts (EIDC), and the remaining courts had to promulgate plans by December 1993.<sup>118</sup> The CJRA also instructed the Judicial Conference to identify ten districts, five of which served metropolitan areas, as pilot districts.<sup>119</sup> The CJRA required the ten courts to prescribe plans that included the six principles and guidelines of litigation management and cost and expense reduction by December 31, 1991.<sup>120</sup> Congress mandated that an "independent organization with expertise in the area of Federal court management" evaluate the pilot program and that the Judicial Conference submit to Congress a report and suggestions respecting the principles and guidelines.<sup>121</sup>

The CJRA concomitantly created a demonstration program in which the Western District of Michigan and the Northern District of Ohio were to experiment with differentiated case management (DCM) while the Northern District of California, the Western District of Missouri, and the Northern District of West Virginia were to experiment with a plethora of measures, including ADR, for decreasing cost and delay.<sup>122</sup> The legislation required that the Judicial Conference assess the demonstration program and tender to Congress a report on it.<sup>123</sup>

In addition to the prescribed evaluations, the CJRA established institutions to oversee statutory implementation and assigned them rather general responsibilities. For instance, the legislation instructed circuit review committees, consisting of the chief circuit judge and all of the chief district judges in every circuit, to review all expense and delay reduction plans and advisory group reports and to make suggestions for additions or changes that the committee considered neces-

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118. See 28 U.S.C. § 471 note (implementation of plans).

119. See *id.*; see also JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 3-4, 15-18 (1996) [hereinafter RAND JCM STUDY]; RAND PILOT STUDY, *supra* note 108, at 5-9.

120. See 28 U.S.C. § 471 note; see also *supra* note 113 and accompanying text.

121. 28 U.S.C. § 471 note; see also 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 AND TECHNIQUES (1997), reprinted in 175 F.R.D. 62 (1997) [hereinafter JUDICIAL CONFERENCE REPORT]; JAMES S. KAKALIK ET AL., JUST, SPEEDY AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996) [hereinafter RAND EXECUTIVE SUMMARY].

122. See 28 U.S.C. § 471 note (demonstration program); see also JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996) (analyzing ADR) [hereinafter RAND ADR STUDY].

123. See 28 U.S.C. § 471 note; see also DONNA STIENSTRA ET AL., FEDERAL JUDICIAL CENTER REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (1997) [hereinafter FJC STUDY]; JUDICIAL CONFERENCE REPORT, *supra* note 121, reprinted in 175 F.R.D. 62 (1997).

sary to limit cost and delay in civil actions.<sup>124</sup> The statute similarly required the Judicial Conference to review each plan and report, while empowering the Conference to request additional action if it determined that districts had inadequately responded to conditions on their dockets or to their advisory groups' recommendations.<sup>125</sup> The CJRA also commanded all ninety-four districts to conduct annual assessments. It required that courts consult with their advisory groups in analyzing the condition of the districts' criminal and civil dockets to ascertain whether additional effective actions might be instituted to decrease expense and delay and to improve the courts' litigation management practices.<sup>126</sup>

In short, congressional passage of the 1990 CJRA was intended to encourage widespread district court experimentation that would lead to the discovery of efficacious procedures for reducing cost and delay in civil litigation. The statute's sponsors envisioned that reform instituted "from the 'bottom up'" would promote the creative development of measures to decrease expense and delay while fostering consensus among federal court users about optimal procedures and productive exchange among those consumers.<sup>127</sup> Finally, the legislation's advocates apparently intended it to be a modest reform, especially in the sense that the statutorily prescribed measures were premised substantially on mechanisms that many federal districts and states had adopted or with which they were experimenting. The second section, which analyzes the CJRA's effectuation, finds that the overwhelming majority of districts cautiously implemented the statute.

## II. ANALYSIS OF STATUTORY IMPLEMENTATION

The CJRA's implementation, as witnessed in federal districts' promulgation and application of civil justice plans, is inextricably intertwined with, and can be understood best by consulting, the JIA's effectuation as manifested in the national revision process that led to the 1993 federal rule amendments and in efforts meant to reform local procedural revision and treat proliferation. Most pertinent, the national rule revisors apparently felt compelled to accommodate ongoing civil justice reform experimentation in certain important aspects of the 1993 federal rule amendments, while those assigned responsibilities for limiting local procedural proliferation seemingly believed that they must defer to this experimentation that essentially suspended their work.<sup>128</sup>

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124. See 28 U.S.C. § 474(a).

125. See *id.* § 474(b).

126. See *id.* § 475; see also RAND PILOT STUDY, *supra* note 108, at 23.

127. S. REP. NO. 101-416, at 4 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6806.

128. See Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295 (1994) (suggesting revisors felt compelled to accommodate CJRA); *infra*

Congress predicated the JIA's passage on the accurate perception that proliferating local procedures had undermined important tenets, namely, uniformity and simplicity, and crafted the JIA in response to this particular difficulty.<sup>129</sup> However, legislative concern over mounting cost and delay in civil lawsuits prompted Congress to prescribe strictures in the CJRA that effectively discontinued implementation of the JIA's features that were intended to reduce proliferation. Because the 1988 JIA's effectuation enhances comprehension of the CJRA's implementation, the effectuation of the JIA is briefly evaluated.

### A. *The JIA*

The assessment above suggests that requirements relating to local procedural change that the 1988 Judicial Improvements Act imposed have received comparatively little implementation. Therefore, this limited effectuation is examined before considering the national rule revision process, although both processes' implementation and that of civil justice reform are interwoven.

#### 1. *Local Rule Revision Processes*

Nearly all of the ninety-four federal districts have now named local rules committees to advise the courts on the adoption and modification of local procedures, although some districts did not appoint the entities before they prescribed CJRA expense and delay reduction plans, and a few courts may even lack local advisory committees today.<sup>130</sup> A small number of districts have regularized and opened to public scrutiny processes for promulgating and amending local procedures, and certain courts have in fact adopted new, or revised existing, local procedures pursuant to those processes. Very few local rules committees were actively involved in implementing civil justice reform.<sup>131</sup>

An insignificant number of districts have apparently undertaken actions to implement the JIA's requirements regarding local proce-

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note 137 and accompanying text (suggesting those responsible for limiting proliferation believed they must defer to experimentation).

129. See *supra* notes 18, 39-54, 81-87, and accompanying text.

130. For instance, the Eastern and Western Districts of North Carolina did not name local rules committees before adopting plans. See U.S. DIST. COURT FOR THE E. DIST. OF N.C., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 5 (Oct. 1993); Letter from Sam Hamrick, CJRA Analyst, U.S. District Court for the Western District of North Carolina to Carl Tobias (Nov. 3, 1993) (on file with the author). The JIA imposed no requirements regarding committees' composition, so that certain committees may lack balance in terms of plaintiffs and defense interests, political views, race, and gender. See *supra* note 83 and accompanying text. *But cf. supra* note 109 and accompanying text (requiring CJRA advisory groups to be balanced).

131. A few districts attempted to keep their committees involved or named committee members to their advisory groups. See, e.g., ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE MIDDLE DIST. OF N.C., REPORT AND RECOMMENDED PLAN 111 (1992); see also Carl Tobias, *Civil Justice Reform in the Fourth Circuit*, 50 WASH. & LEE L. REV. 89, 108 (1993).

dural proliferation. For instance, practically no courts have attempted to restrict the number of local rules applicable in the districts, much less instituted processes for monitoring individual judge procedures or modified any local procedures deemed to conflict with the federal rules or acts of Congress.<sup>132</sup>

The circuit judicial councils, which the 1988 statute charged with responsibility for periodically reviewing and abrogating or modifying inconsistent local procedures adopted by districts or judges within the councils' purview,<sup>133</sup> have attained little more success than the districts in discharging their monitoring duties. The Judicial Council of the Seventh Circuit may be the sole council that has periodically evaluated local procedures prescribed by districts in the appeals court and abolished or altered the requirements that the council found in conflict.<sup>134</sup> However, the Ninth Circuit Judicial Council has recently concluded a thoroughgoing review of local strictures prescribed in its fifteen districts and has suggested that the courts abrogate or change some procedures that it deemed inconsistent.<sup>135</sup>

There are numerous reasons why the 1988 statute's requirements, particularly pertaining to local procedural proliferation, received comparatively limited effectuation. Most significant, the CJRA of 1990 essentially discouraged efforts that the local rules committees and circuit councils might have undertaken to restrict proliferation by assigning overlapping responsibilities to federal districts and to the institutions—advisory groups and circuit review committees—whose creation the legislation prescribed.<sup>136</sup> For instance, local rules committees had little reason to prescribe local rules when advisory groups and districts were developing new, possibly conflicting local requirements, while circuit review committees might have been understandably reluctant to review for inconsistency local rules that the CJRA apparently authorized. Indeed, the Sixth Circuit Judicial Council voted in 1994 to suspend additional review of local procedures that it had earlier commenced, pending the receipt of greater guidance from Congress, the Judicial Conference, or case law on whether the CJRA

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132. See Telephone Interview with Stephen N. Subrin, *supra* note 51. Very few courts have even implemented the analogous feature of Federal Rule 83's 1985 amendment. See *supra* notes 41-42 and accompanying text (discussing 1985 amendment to Rule 83).

133. See *supra* notes 86-87 and accompanying text; see also *supra* note 43 and accompanying text (imposing similar duties in Rule 83's 1985 revision).

134. See Telephone Interview with Mary P. Squiers, *supra* note 45.

135. See DISTRICT LOCAL RULES REVIEW COMM., REPORT TO THE NINTH CIRCUIT JUDICIAL COUNCIL: EXECUTIVE SUMMARY (1997). See generally 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, 556 (1996); Carl Tobias, *A Sixth Circuit Story*, 23 FLA. ST. U. L. REV. 983, 988 (1996).

136. See *supra* notes 108-11, 124-25, and accompanying text.

empowered districts to promulgate local procedures that conflicted with the federal rules.<sup>137</sup>

The intrinsic tension between the objective of national uniformity and solicitude for local concerns may also explain why those features of the JIA relating to local procedural proliferation have not received particularly thorough effectuation. Federal district judges and local rules committees, consisting of local attorneys, apparently have been more concerned about the needs of local federal judges, lawyers, and litigants than about preserving and revitalizing a national, uniform procedural system.<sup>138</sup> For instance, some districts excluded attorneys who were admitted to practice in states or districts other than those districts because of discrepancies in local bar admission strictures.<sup>139</sup>

It is important to understand, however, that the judges, local rules committees, and circuit judicial councils that may have considered undertaking local procedural review for conflicts with the federal rules and acts of Congress could have experienced difficulty in ascertaining precisely what constituted inconsistency, especially between local procedures and the federal requirements.<sup>140</sup> Moreover, Congress appropriated no funding for the district judges or these entities, which have comparatively limited time and money for discharging numerous burdensome responsibilities, to complete the apparently resource-intensive, onerous duties regarding local proliferation that Congress assigned.<sup>141</sup>

## 2. National Rule Revision Process

Implementation of the requirements that the JIA imposed on national rule amendment can be assessed by considering the revision process that yielded the 1993 changes in the federal rules. This process was unusual in three important ways. First, it constituted the initial significant test of the mandates included in the 1988 statute. Second, the set of modifications was probably the most ambitious package of amendments formulated in the six-decade history of the

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137. See U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT, MINUTES OF THE MEETING OF THE JUDICIAL COUNCIL OF THE SIXTH CIRCUIT 4-5 (May 4, 1994); see also Tobias, *supra* note 135.

138. Most local committees will be more solicitous than the Federal Advisory Committee of local judges, counsel, and parties. See generally Marc S. Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). Many writers agree that the Committee has much expertise, even if they disagree about its exercise. See, e.g., Burbank, *supra* note 68; Carrington, *supra* note 73; Mullenix, *supra* note 73.

139. See *Frazier v. Heebe*, 482 U.S. 641, 643, 650 (1987); see also Coquillette et al., *supra* note 44, at 64. See generally SUBCOMMITTEE ON *PRO HAC VICE* ADMISSIONS TO THE FED. COURTS, NEW YORK COUNTY LAWYERS' ASSOCIATION REPORT TO THE COMMITTEE ON THE FEDERAL COURTS ON *PRO HAC VICE* ADMISSIONS TO THE FEDERAL COURTS, reprinted in 169 F.R.D. 390 (1996); Carl Tobias, *Federal Court Procedural Reform*, 52 MONT. L. REV. 433, 436 n.14 (1991).

140. See Telephone Interview with Mary P. Squiers, *supra* note 45; Telephone Interview with Stephen N. Subrin, *supra* note 51. See generally Coquillette et al., *supra* note 44, at 64.

141. See Tobias, *supra* note 135.



federal rules.<sup>142</sup> Third, the rule revisors' perception that they must accommodate ongoing civil justice reform experimentation mandated by the CJRA may have made the rule amendment process extremely unusual.<sup>143</sup>

Despite these circumstances, the process that led to the promulgation of the 1993 rule revisions warrants evaluation because analysis informs understanding of the national amendment process and the present status of the tenets and tensions involving the 1988 and 1990 statutes. The Advisory Committee effectuated the JIA by first proposing revisions in eighteen federal rules during 1991;<sup>144</sup> however, that entity and its changes to Rule 11 and in Rule 26 that impose automatic disclosure are emphasized. The Advisory Committee was principally responsible for formulating the two amendments that were the most controversial modifications, and their examination increases comprehension of the basic procedural precepts, of inherent conflicts among certain tenets, and of issues that are critical to harmonizing the JIA and the CJRA.

Rule 11 particularly is addressed because its 1983 amendment had proved to be the most controversial change in the civil rules' history and represented a failed effort to address perceived litigation abuses that the open-ended, flexible procedural regime of the 1938 rules seemingly fostered.<sup>145</sup> The provision, accordingly, illustrates tensions between significant procedural precepts. The process from which the 1993 revision resulted also typifies the kind of open rule revision that Congress apparently envisioned in passing the JIA.

Automatic disclosure is emphasized because numerous respected experts on federal civil practice currently think that a number of difficulties with discovery, such as discovery abuse, threaten civil litigation<sup>146</sup> and because the provision prescribing disclosure was probably the most controversial formal proposal to change the rules ever developed. The 1993 amendment imposing disclosure shows how imple-

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142. Evaluating the efficacy of the revisions that have been in effect for less than five years could be premature. See Marvin E. Frankel, *Some Preliminary Observations Concerning Rule 23*, 43 F.R.D. 39, 52 (1967) (citing former Advisory Committee Reporter's view that one-generation time frame is appropriate for evaluating efficacy of federal rule amendments); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 677 (1979) (same).

143. See Carrington, *supra* note 128.

144. See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, 137 F.R.D. 53 (1991) [hereinafter Preliminary Draft]; see also Randall Samborn, *U.S. Civil Procedure Revisited*, NAT'L L.J., May 4, 1992, at 1, 1.

145. See, e.g., Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1775 (1992); Walker, *supra* note 68, at 455-59.

146. See, e.g., Committee on Discovery, New York State Bar Ass'n, *Report on Discovery Under Rule 26(b)(1)*, in 127 F.R.D. 625 (1990); Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough Is Enough*, 1981 B.Y.U. L. REV. 579; Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263 (1992). But see Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1392 (1994).

mentation of the JIA's commands governing national rule revision and congressional inability to reconcile the two statutes' effectuation worsened local proliferation, additionally undermined national uniformity and simplicity, and increased cost and delay. The national amendment process is initially afforded brief, general treatment.<sup>147</sup>

#### a. General Description

The national rule amendment institutions, particularly the entities principally responsible for studying federal civil procedure and developing proposed modifications, appeared to implement efficaciously and faithfully the strictures included in the JIA governing rule revision. They instituted amendment procedures that were premised substantially on the process of notice-comment administrative rulemaking that federal agencies follow under the Administrative Procedure Act.

During August 1991, the Advisory Committee issued a preliminary draft of proposed amendments to eighteen federal rules.<sup>148</sup> It requested and secured broad input from the public on the proposals in writing and during two public hearings.<sup>149</sup> The Committee was quite responsive to these public suggestions and attempted to improve the proposed revisions, especially the changes that were most controversial. The Committee even reversed the ordinary sequence by soliciting public input on the prospect of revision before drafting a proposal to modify Rule 11.<sup>150</sup>

The other institutions in the rule amendment hierarchy made only one major alteration in the Committee's ultimate work product on Rule 11 and a small number of additional changes, thereby exhibiting deference to the Committee and to entities below them in that hierarchy.<sup>151</sup> More specifically, the Supreme Court continued its practice of acceding to the expertise of these institutions and may have deferred more substantially than ever.<sup>152</sup> Congress closely analyzed the 1993 revisions, and the House of Representatives passed legislation that would have deleted automatic disclosure, but Congress permitted the whole set of amendments to take effect on December 1, 1993, by not acting.<sup>153</sup>

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147. I rely substantially in my treatment of amended Rules 11 and 26 on Carl Tobias, *The Transmittal Letter Translated*, 46 FLA. L. REV. 127 (1994).

148. See *supra* note 144 and accompanying text.

149. See William J. Hughes, *Congressional Reaction to the 1993 Amendments to the Federal Rules of Civil Procedure*, 18 SETON HALL LEGIS. J. 1 (1993); Tobias, *supra* note 145, at 1778; see also Tobias *supra* note 69, at 862-63.

150. See Judicial Conference of the U.S. Advisory Comm. on the Civil Rules, *Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules as Amended in 1983*, 131 F.R.D. 344, 345 (1990) [hereinafter *Call for Comments*].

151. See Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171, 185 (1994).

152. See SUPREME COURT OF THE U.S., AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS, reprinted in 146 F.R.D. 402, 403 (1993) (submitting very deferential transmittal letter) [hereinafter AMENDMENTS].

153. See Hughes, *supra* note 149, at 2.

b. Specific Amendments

i. *Amended Rule 11*

The Rule 11 revision process was replete with ironies, which reflect back on the 1938 tenets.<sup>154</sup> The Advisory Committee published a preliminary draft proposal to revise the 1983 amendment a mere eight years after the rule revisors had substantially modified the provision. The Committee's preliminary draft unfortunately did not treat numerous difficulties, such as satellite litigation and chilling effects, that the 1983 modification of Rule 11 imposed.<sup>155</sup>

Few interests that the proposal would have affected were satisfied with it. For example, the imposition of a continuing duty to withdraw small fragments of papers when they lost merit and the possibility of having to pay large monetary sanctions discouraged parties with limited resources.<sup>156</sup> The express inclusion of denials as components of papers that must comply with the rule and the reduced prospect of securing attorney's fees for rule violations bothered defense counsel.<sup>157</sup> The lack of clarity in the proposal's wording troubled many attorneys and litigants.<sup>158</sup> A number of individuals and groups criticized the preliminary draft, although the Advisory Committee thoroughly evaluated the 1983 amendment, solicited and closely examined significant public input on the prospect of amendment before suggesting change, and carefully drafted a proposal that it thought would be responsive to the needs of everyone involved in federal civil litigation.<sup>159</sup>

The Advisory Committee crafted several new drafts of the initial proposal, which meant that the final version that it prepared in May 1992 for the Standing Committee constituted a significant improvement. For example, this iteration substantially narrowed the continuing duty and parsed less finely the idea of a paper.<sup>160</sup> The changes in the first draft could be ascribed to the Committee's conscientious examination of much written public comment, consideration of oral input at several public hearings, and writing of the fairest, clearest, most efficacious revision conceivable.<sup>161</sup> The Committee's work in devel-

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154. I rely substantially here on Tobias, *supra* note 135; Carl Tobias, *Rule Revision Roundelay*, 1992 Wis. L. Rev. 236.

155. See Tobias, *supra* note 154, at 236; see also Tobias, *supra* note 69, at 862-65. See generally Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 484-86 (1991).

156. See Tobias, *supra* note 154, at 237. See generally Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 495-98 (1988-89); Vairo, *supra* note 155, at 484-86.

157. See Tobias, *supra* note 154, at 237. See generally Vairo, *supra* note 155, at 495-500.

158. See Tobias, *supra* note 154, at 238; see also Tobias, *supra* note 69, at 894-95; Vairo, *supra* note 155, at 495-500.

159. See Tobias, *supra* note 69, at 861-65; see also *Call for Comments*, *supra* note 150, at 345.

160. Compare Tobias, *supra* note 69, at 866-71 (discussing the continuing duty in the preliminary draft), with FED. R. CIV. P. 11 (1993 amendment). See also FED. R. CIV. P. 11 advisory committee's note (1993 amendment); Tobias, *supra* note 147, at 137.

161. See Tobias, *supra* note 151; see also Tobias, *supra* note 69, at 859-65.

oping the final draft represented the type of open, responsive revision and reasoned decision making that Congress envisioned in changing the rule amendment process in the 1988 statute.<sup>162</sup>

Notwithstanding the improvements in the Rule 11 proposal and the Committee's gargantuan efforts, certain critics continued opposing the 1983 provision's amendment.<sup>163</sup> The most prominent among these observers was Justice Antonin Scalia, who authored a vociferous dissent to the Supreme Court's transmittal of amended Rule 11.<sup>164</sup> The dissent contended that promulgation of revised Rule 11 would "eliminate a significant and necessary deterrent to frivolous litigation" and argued that the amendment would make Rule 11 toothless because it would give judges discretion to levy sanctions, disfavor compensation for litigation costs, and provide safe harbors which allow parties that contravene the provision to avoid sanctions altogether.<sup>165</sup> Despite these criticisms, those entities responsible for amending the rules, whose membership then consisted principally of federal judges, appeared to think that a stricter revision's possible disadvantages, namely satellite litigation and chilling meritorious cases, overrode its benefits, such as discouraging frivolous lawsuits.<sup>166</sup>

Federal judges' support for amending Rule 11 appeared important to congressional consideration of the revision that the Court transmitted. Most members of Congress seemed to find that they could not improve on many features of the rule changes forwarded.<sup>167</sup> These modifications represented the well-informed opinion of the rule revision institutions and their expert advisers or constituted the most efficacious means of responding to the myriad factual situations that Rule 11 addresses. For instance, the amendment employed words, such as "reasonable" and "likely," which are the clearest, fairest

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162. See *supra* notes 75-79 and accompanying text. See generally Walker, *supra* note 68.

163. I rely substantially in this paragraph on Tobias, *supra* note 151, at 186-87.

164. See AMENDMENTS, *supra* note 152, reprinted in 146 F.R.D. 402, 507-10 (1993) (Scalia, J., dissenting); see also *id.*, reprinted in 146 F.R.D. 402, 419-24 (1993) (transmitting revised Rule 11).

165. *Id.* at 507-08 (Scalia, J., dissenting); see also Tobias, *supra* note 151, at 186-87 (affording additional analysis of dissent).

166. See Tobias, *supra* note 151, at 188.

167. Illustrative was Representative William Hughes (D-N.J.), Chair of the House Judiciary Subcommittee with responsibility for monitoring rule revision, who deferred to the federal judiciary because he found much support for revision and for limiting the satellite litigation fostered by the 1983 rule. See *Federal Courts: Bill to Delete Discovery Rule Reported to House Committee*, Daily Rep. for Executives, Reg., Econ. and Law (BNA) (Aug. 6, 1993), available in LEXIS, BNA Library, BNABUS File. Other members of Congress evinced less deference, introducing bills that would have postponed the amendment's effective date for one year. See H.R. 2979, 103d Cong. (1993) (delaying effective date of the proposed amendments to Rule 11); S. 1382, 103d Cong. (1993) (same); see also H.R. 2814, 103d Cong. (1993) (permitting certain proposed rules of civil procedure with modifications to take effect).

phrasing that can treat the inherently fact-specific questions implicated by sanctions motions.<sup>168</sup>

The amendment process was responsive to the complications engendered by the 1983 revision and to public comment, producing a balanced change in Rule 11. For example, the 1993 revision significantly decreased the incentives to invoke the provision by affording safe harbors and by empowering judges to exercise discretion in choosing whether to sanction and in selecting appropriate sanctions.<sup>169</sup> The Advisory Committee correspondingly deleted some burdensome requirements from the preliminary draft, such as the continuing duty.<sup>170</sup> The revisors reduced incentives for invoking Rule 11 and the Committee omitted these onerous requirements, despite remaining concerns about deterring frivolous litigation that Justice Scalia articulated.<sup>171</sup>

The rule revision entities, however, retained some incentives for employing Rule 11. For instance, revised Rule 11 permits judges to award litigants who file Rule 11 motions the expenses of prevailing and to impose sanctions of attorney's fees in certain circumstances.<sup>172</sup> The revisors concomitantly used unclear or very general phrasing, such as "nonfrivolous" and "appropriate sanctions," which will inevitably promote inconsistent interpretation and satellite litigation.<sup>173</sup>

In short, the new Rule 11 may have been imperfect, but it greatly improved the 1983 version and was much better than the Advisory Committee's first draft. The 1993 rule should also decrease incentives to employ Rule 11, reduce cost and delay ascribed to satellite litigation, and limit chilling effects. Moreover, the amendment was a feasible compromise in light of the daunting restraints under which the rule revisors labored, such as the importance of satisfying the different constituencies affected by the provision.

Perhaps the best explanation for Rule 11's 1993 revision is that many judges apparently found that the 1983 provision had achieved as much as could reasonably be attained by encouraging attorneys and litigants to undertake reasonable prefiling inquiries and by discouraging pursuit of frivolous cases. The revision entities might also have determined that the provision's rigorous application could not support the expenditure of scarce resources of judges, attorneys, and parties

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168. See FED. R. CIV. P. 11(a)-(b), reprinted in 146 F.R.D. at 420-21; see also Tobias, *supra* note 145, at 1791. See generally Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983).

169. See FED. R. CIV. P. 11(c), reprinted in 146 F.R.D. at 421-23; see also Tobias, *supra* note 145, at 1783-88.

170. See Tobias, *supra* note 151, at 192-96; see also Tobias, *supra* note 69, at 866-71.

171. See *supra* notes 165-66, 169, and accompanying text.

172. See FED. R. CIV. P. 11(c), reprinted in 146 F.R.D. at 421-23; see also Tobias, *supra* note 145, at 1787-88.

173. See FED. R. CIV. P. 11(a)-(b), reprinted in 146 F.R.D. at 420-21; see also Tobias, *supra* note 151, at 196-201, 209-14.

on satellite litigation that the rule entails. Important as well may have been the perception among judges, counsel, and parties that discovery was a larger difficulty with civil litigation that required more reform and had greater prospects for actual improvement.

ii. *Amended Rule 26*

The process of amending Federal Rule 26 to prescribe automatic disclosure was similarly ironic.<sup>174</sup> The Advisory Committee seemed to forget the troubling results of its 1983 revision of Rule 11. Even though the Committee had very limited empirical data on how the 1938 Rule 11 operated, the Committee significantly changed the original rule, and this 1983 modification ultimately became the most controversial revision in the rules' half-century history.<sup>175</sup>

Notwithstanding the dearth of empirical information showing the existence of much discovery abuse, the difficulty that disclosure primarily addresses,<sup>176</sup> and the lack of experimentation with, and assessment of, automatic disclosure,<sup>177</sup> the Advisory Committee published a preliminary draft during 1991 that might have significantly altered the process of discovery.<sup>178</sup> The draft would have mandated that plaintiffs and defendants disclose prior to discovery much material that was likely to bear "significantly on any claim or defense."<sup>179</sup> The Committee published the proposal, although virtually no federal districts had experimented with automatic disclosure,<sup>180</sup> two of disclosure's earliest proponents had recommended that a national rule be adopted only after much testing,<sup>181</sup> and congressional passage of the CJRA demonstrated legislative concern that experimentation occur before discovery underwent great change.<sup>182</sup> Of the some twenty districts that issued civil justice plans by December 31, 1991, to qualify for designation as Early Implementation District Courts (EIDCs) under the CJRA, and that decided to impose disclosure, practically all depended

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174. I rely substantially in this subsection on Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139 (1993); Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1 (1992); Tobias, *supra* note 147; Winter, *supra* note 146.

175. See *supra* note 145 and accompanying text; see also Burbank, *supra* note 68, at 1927-28 (suggesting little empirical data on 1938 version's operation).

176. See Mullenix, *supra* note 146, at 1432; Jack B. Weinstein, *What Discovery Abuse?*, 69 B.U. L. REV. 649, 653 (1989).

177. A mere three federal districts had experimented with disclosure. See Bell et al., *supra* note 174, at 17-18; Mullenix, *supra* note 73, at 810, 813-21.

178. See Preliminary Draft, *supra* note 144, at 87.

179. Preliminary Draft, *supra* note 144, at 87-88.

180. See *supra* note 177 and accompanying text.

181. See Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1361 (1978); William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 723 (1989).

182. See 28 U.S.C. § 471 note (1994). See generally Carl Tobias, *In Defense of Experimentation with Automatic Disclosure*, 27 GA. L. REV. 665, 667-68 (1993).

heavily on the phrasing included in the Committee's preliminary draft.<sup>183</sup>

No formal rule amendment proposal has received so much criticism from such a broad spectrum of federal court users.<sup>184</sup> Over the course of a half-year comment period and during public hearings, numerous elements of the organized bar and many additional interests opposed the proposal because it lacked clarity, could have imposed another layer of discovery, involved ethical problems, and would increase costs.<sup>185</sup> Upon conclusion of the February 1992 Atlanta hearing on the 1991 set of proposed amendments, the Advisory Committee responded to this groundswell of public opposition by jettisoning the automatic disclosure preliminary draft and apparently deferring to experimentation with disclosure under the CJRA that was being conducted in numerous districts.<sup>186</sup> The Committee seemed to think for a short time that experimentation with the disclosure mechanism in local districts was better than national application of the relatively untested and controversial mechanism.<sup>187</sup>

Less than two months thereafter, the Advisory Committee reversed its earlier view, absent additional public input and without explanation.<sup>188</sup> Six members of the Committee, at the instigation of Second Circuit Judge Ralph K. Winter, a persuasive proponent of automatic disclosure,<sup>189</sup> convinced the rest to reevaluate the issue.<sup>190</sup> At an April 1992 session of the Committee, members resurrected the proposal, imposing the basic requirements that litigants disclose "discoverable information relevant to disputed facts alleged with particularity in the pleadings" and "all documents, data compilations and tangible things" having such relevance.<sup>191</sup> The Committee also authorized districts to vary the disclosure requirements in the federal provision or eschew them totally, which seemingly was an effort to accommodate ongoing civil justice reform experimentation.<sup>192</sup>

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183. See, e.g., MONTANA PLAN, *supra* note 52, at 15-16; E. DIST. OF NEW YORK PLAN, *supra* note 49, at 4-5; cf. Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 56 (1992) (listing 34 EIDCs); see also 28 U.S.C. § 471 note (prescribing EIDCs); Preliminary Draft, *supra* note 144, at 87 (presenting Committee's early draft).

184. See AMENDMENTS, *supra* note 152, 146 F.R.D. at 512 (Scalia, J., dissenting). Accord Bell et al., *supra* note 174, at 28-32; Ann Pelham, *Forcing Litigants to Share: Judges Back Radical Discovery Rule*, LEGAL TIMES, May 3, 1993, at 1.

185. See Tobias, *supra* note 174, at 141; Bell et al., *supra* note 174, at 28-32.

186. See Bell et al., *supra* note 174, at 34-35; Winter, *supra* note 146, at 268; Randall Samborn, *U.S. Civil Procedure Revisited*, NAT'L L.J., May 4, 1992, at 1, 1.

187. See Bell et al., *supra* note 174, at 34-35; Samborn, *supra* note 186, at 12.

188. See Bell et al., *supra* note 174, at 35.

189. See Winter, *supra* note 146, at 268.

190. See Ann Pelham, *Panel Flips, OKs Discovery Reform*, LEGAL TIMES, Apr. 20, 1992, at 6; Samborn, *supra* note 186, at 12.

191. FED. R. CIV. P. 26(a)(1), reprinted in 146 F.R.D. 431.

192. See 146 F.R.D. at 431-32; see also Bell et al., *supra* note 174, at 35-39; Carrington, *supra* note 128. But see Winter, *supra* note 146, at 269.

Justice Scalia's dissent from transmittal of the disclosure revision observed that the Committee might have found too prolonged the CJRA's schedule for experimentation, "preferring instead to subject the entire federal judicial system at once to an extreme, costly, and essentially untested revision of a major component of civil litigation."<sup>193</sup> The Committee members voiced a principled defense of the determination to change course two times within six weeks. They asserted that discovery was not operating efficaciously, that maintaining the status quo was not acceptable, and that the bar's self-interest precluded constructive change.<sup>194</sup> The Committee seemed to understand that the protracted three-year rule amendment process imposed in the JIA meant that its withdrawal of the disclosure proposal would have essentially postponed judicially required discovery reform for much of the 1990s.<sup>195</sup> Some observers even described the about-face as a desperate attempt to prevent the erosion of the judiciary's influence on procedure by congressional statutes, namely, the CJRA, and executive branch civil justice reform efforts, such as Executive Order 12,778.<sup>196</sup>

The other institutions in the rule amendment hierarchy approved the Committee proposal, despite mounting criticism, especially from the bar. The Supreme Court transmitted the disclosure revision without modification, although three Justices dissented.<sup>197</sup> A majority of the Court apparently considered the core concept of disclosure sufficiently important and workable and the need for discovery reform so critical that transmittal was warranted. Justice Scalia penned an acerbic dissent in which he asserted that the disclosure revision "*adds a further layer of discovery*" and "does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker."<sup>198</sup>

Once the Court had transmitted the amendment, virtually every segment of the bar and numerous other interests, encompassing individuals and entities as diverse as civil rights plaintiffs and corporations, attempted to convince Congress to eliminate the disclosure revision. In the summer of 1993, the House and Senate Judiciary

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193. AMENDMENTS, *supra* note 152, at 512 (Scalia, J., dissenting).

194. See Pelham, *supra* note 190, at 6; Samborn, *supra* note 186, at 12; see also Bell et al., *supra* note 174, at 35-39. The last observation illuminates another irony. Much of the organized bar seemed to oppose the disclosure proposal and to agree that many problems attend modern discovery. See Pelham, *supra* note 190, at 6; Samborn, *supra* note 186, at 12; see also Winter, *supra* note 146.

195. Had Congress omitted disclosure, the revisors would have had to recommence the three-year process. See 28 U.S.C. § 2074(a) (1994); see also Samborn, *supra* note 186, at 12.

196. See Samborn, *supra* note 186, at 12; see also Exec. Order No. 12,778, 3 C.F.R. 359 (1992), reprinted in 28 U.S.C. § 519. See generally Tobias, *supra* note 102 (describing congressional reforms); Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L. REV. 1521 (1993) (describing executive initiatives).

197. See AMENDMENTS, *supra* note 152, reprinted in 146 F.R.D. 402, 431 (1993); *id.* at 507, reprinted in 146 F.R.D. 402, 431 (1993) (Scalia, J., dissenting).

198. *Id.*, reprinted in 146 F.R.D. 402, 510-11 (1993) (Scalia, J., dissenting).



Committees conducted hearings on automatic disclosure.<sup>199</sup> Representative William J. Hughes, chair of the House Judiciary Subcommittee on Court Administration and Intellectual Property, guided through the House legislation that would have deleted disclosure, and the House passed it by voice vote on November 3, 1993.<sup>200</sup> The Senate surprisingly failed to adopt the measure at the eleventh hour before recessing, principally because civil rights organizations, plaintiffs' trial lawyers, and numerous defense counsel and defense interests could not craft a satisfactory compromise that would have accommodated their concerns about the amendments governing disclosure, Rule 11, and presumptive discovery limitations.<sup>201</sup>

During the period immediately after the Senate recessed without passing the bill, there was much confusion and uncertainty in many of the ninety-four districts, particularly those fifty courts that were hurrying to satisfy the December 1, 1993, deadline by which the CJRA mandated that they adopt civil justice plans and on which the federal disclosure requirements became effective.<sup>202</sup> Because numerous courts expected Congress to reject the federal disclosure amendment and failed to implement other options, the districts had to adopt last-minute alternatives. Threats to revitalize the disclosure bill, which persisted even after Congress reconvened in late January 1994, worsened the ongoing confusion.<sup>203</sup>

These courts and most of the EIDCs, many of which in 1991 had instituted variations of automatic disclosure that conflicted with the new federal amendment,<sup>204</sup> implemented a plethora of actions. A substantial number of the districts issued or revised civil justice plans, adopted general and special orders, and published new, or changed existing, local rules.<sup>205</sup> Numerous non-EIDCs opted out, totally eschewing the new federal revision. They prescribed provisions that departed from the federal strictures or discontinued application of the federal amendment until their judges, advisory groups or bars, or Congress could evaluate that procedure.<sup>206</sup> Some EIDCs maintained different variations of automatic disclosure, which in turn conflicted

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199. See Hughes, *supra* note 149, at 3-4, 9-10.

200. See 139 CONG. REC. H8745-47 (daily ed. Nov. 3, 1993); see also Hughes, *supra* note 149, at 10; Randall Samborn, *New Discovery Rules Take Effect*, NAT'L L.J., Dec. 6, 1993, at 3.

201. See Samborn, *supra* note 200, at 3; see also Randall Samborn, *Derailing the Rules*, NAT'L L.J., May 24, 1993, at 1 (analyzing diverse coalition that lobbied Congress). For example, civil rights groups refused to compromise on amended Rule 11, while the plaintiffs' bar would not separate disclosure and presumptive limits.

202. See Carl Tobias, *Automatic Disclosure: Let It Be*, LEGAL TIMES, Jan. 31, 1994, at 25; see also 28 U.S.C. § 471 note (1994) (implementation of plans) (affording statutory deadlines).

203. This assertion is premised on telephone conversations with numerous individuals who are familiar with the legislative machinations.

204. See *supra* note 183 and accompanying text.

205. A few even relied on the Rules Enabling Act's emergency clause. See 28 U.S.C. § 2071(e). See, e.g., S.D. IND. R. 26.3 (invoking emergency clause); D. MD. R. 104.1 (same).

206. See, e.g., D. ME. R. 18(g); E.D. LA. R. 6.06E (amended Dec. 1, 1993); see also DONNA STIENSTRA, FEDERAL JUDICIAL CTR., IMPLEMENTATION OF DISCLOSURE IN FEDERAL DISTRICT

with the federal revision, or continued to reject disclosure completely.<sup>207</sup> Nearly a majority of the districts ultimately chose not to apply the federal requirements.<sup>208</sup>

Senate inability to pass the bill eliminating disclosure and this activity led to considerable complication and consternation in many courts. For example, numerous attorneys and parties encountered problems finding all of the applicable procedures, determining which measures in fact governed and when they took effect, and understanding and complying with the new strictures.<sup>209</sup> The application of inconsistent requirements complicated participation in federal civil litigation for counsel and entities, such as government lawyers and public interest groups that litigate in multiple districts, and tested the patience of judges and attorneys for conflicting procedures.<sup>210</sup>

After the districts charted, instituted, and publicized particular courses of action to address automatic disclosure, the circumstances clarified and stabilized, and most judges, counsel, and clients seemingly became accustomed to the applicable procedures.<sup>211</sup> Numerous districts had attained a measure of clarity and certainty by the conclusion of 1993, and nearly all of the remaining districts had ameliorated the complications by mid-1994.<sup>212</sup>

The above assessment of automatic disclosure's effectuation suggests that the experience eroded uniformity, simplicity, and transsubstantivity, while increasing cost and delay. Disclosure's actual application in numerous specific cases has apparently had analogous impacts. For example, the inexact nature of the information that parties are to reveal and disclosure's imposition of another discovery layer mean that disclosure has increased expense, and perhaps delay, in a number of circumstances.<sup>213</sup>

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COURTS (1996); John Flynn Rooney, *Discovery Rule Lacks Uniformity, Is "Source of Confusion": Critics*, CHI. DAILY L. BULL., Apr. 23, 1994, at 17.

207. See, e.g., Order of the United States District Court of Montana (Jan. 25, 1994); Order of the United States District Court of the Northern District of Georgia (Feb. 26, 1994).

208. See STIENSTRA, *supra* note 206, at 4-5; see also Marcia Coyle & Marianne Lavelle, *Half of Districts Opt out of New Civil Rules*, NAT'L L.J., Feb. 28, 1994, at 5; Rooney, *supra* note 206.

209. See Tobias, *supra* note 202.

210. The CJRA Advisory Group for the Eastern District of New York urged the rule revisors to observe a "three-year moratorium on affected national rules so that each district can have a fair opportunity to assess reforms at the local level." Letter from Edwin J. Wesely, Chair, Advisory Group for the Eastern District of New York, to Robert Keeton, Chair, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Feb. 3, 1992) (on file with author); see also Samborn, *supra* note 186, at 1. See generally Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 856 (1993).

211. These assertions are premised on conversations with many individuals familiar with the circumstances in numerous districts.

212. These assertions are premised on conversations with many individuals familiar with the circumstances in numerous districts.

213. The assertions in this paragraph are premised on conversations with numerous individuals familiar with disclosure and civil justice reform. See also *infra* notes 220-23 and accompany-

It may be premature to posit definitive conclusions about whether any—or which—of the differing automatic disclosure measures are efficacious. A minuscule number of courts that implemented disclosure for the longest period have applied strictures analogous to the new federal revision, and the districts might not have experimented with, much less evaluated, the technique for sufficient time to yield very conclusive assessments regarding efficacy.<sup>214</sup>

Early anecdotal information indicated that some EIDCs encountered few problems employing the mechanism, particularly in comparatively simple lawsuits or when the disclosure was highly generalized.<sup>215</sup> Additional anecdotal information showed that lawyers and litigants who have had experience with automatic disclosure could comply rather easily because disclosure effectively demanded their earlier involvement in certain activities, especially document retrieval and labeling.<sup>216</sup> Disclosure, by requiring early automatic exchange of important information, may save resources, for example, that might have been expended on formal discovery and could expedite settlement. The RAND Corporation's study of automatic disclosure's application in the pilot and comparison districts unfortunately proved to be equally inconclusive as the earlier assessments of the procedure. Although RAND undertook a carefully controlled, well-defined analysis, it ascertained that disclosure had no measurable impact on cost or delay in civil litigation.<sup>217</sup>

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ing text (suggesting provision in specific cases for judicial modification or litigant stipulation additionally erodes uniformity and simplicity and increases cost and delay).

214. Most of the EIDCs only implemented disclosure during 1992, and few rigorously analyzed its efficacy. See Tobias, *supra* note 147, at 144-45; Samborn, *supra* note 186, at 1; see also 1994 CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE E. DIST. OF N.Y. ANN. REP. 3, 5-8 (affording valuable assessment reflecting ambivalence about disclosure's efficacy).

215. These included the Northern District of California and the Districts of Arizona, Massachusetts, and Montana. This evidence was derived from conversations with many individuals who are familiar with civil justice reform in those districts. See also Carl Tobias, *More on Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 357, 363 (1993); Samborn, *supra* note 186, at 12. Discovery is most problematic and requires the most efficacious disclosure in complex lawsuits and when litigants need specific information. These ideas are premised on the conversations *supra*. Accord Bell et al., *supra* note 174, at 39-42; Winter, *supra* note 146, at 268.

216. These ideas are premised on the conversations *supra* note 215. See also Samborn, *supra* note 186, at 1.

217. See RAND EXECUTIVE SUMMARY, *supra* note 121, at 17; see also James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 679 (1998) (affording further analysis of disclosure finding "no strong evidence that a policy of early mandatory disclosure reduced lawyer work time or time to disposition"); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 534-35 (1998) (affording further analysis of discovery finding attorneys' perception that disclosure decreased expense and delay and that actual disposition times corroborated finding regarding delay). These results are disappointing because the 1993 federal disclosure provision afforded courts sufficient flexibility to experiment with many disclosure schemes that appeared adequate in number and diverse enough to provide a sense of the measure's efficacy. Moreover, many districts instituted measures for evaluating the disclosure techniques' efficacy. See, e.g., 1993 ADVISORY GROUP OF THE U.S. DISTRICT COURT FOR THE E. DISTRICT OF PA. ANN. REP. 6-8; REPORT ON THE IMPACT OF THE COST AND DELAY REDUCTION PLAN ADOPTED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTH-

In short, the debate involving disclosure's effectiveness cannot be conclusively resolved today; however, the technique apparently operates most efficaciously in limited, discrete contexts. Disclosure's effectuation clearly tested the tolerance for confusion and inconsistency of judges, attorneys, and parties, while undermining uniformity and simplicity and increasing cost and delay.

### iii. *A Miscellany of Procedures*

The package of proposals in the Advisory Committee's August 1991 preliminary draft included other measures that require comparatively terse treatment because they involve issues that are less important to this article. The rule revisors omitted or withdrew a few of these proposals over the course of the revision process, while additional ones were components of the 1993 amendments that became effective on December 1, 1993.

The most significant proposal that did not take effect was a change in Rule 83, which would have prescribed local procedural experimentation. The proposal authorized districts with Judicial Conference approval to adopt for not greater than five years experimental local rules that conflict with federal rules.<sup>218</sup> The Advisory Committee's withdrawal of the proposal, out of deference to continuing CJRA experimentation, led to the loss of a valuable means of carefully balancing the need for experimentation to discover effective measures with the difficulties, such as expense, which inconsistent local procedures can foster.<sup>219</sup>

The 1993 revisions that imposed presumptive numerical limitations on interrogatories and depositions are also relevant to the issues examined in this article.<sup>220</sup> The provisions, which permit local variation and allow judges and parties to change the procedures in particular lawsuits, resemble, and have effects analogous to, the federal automatic disclosure amendment.<sup>221</sup> For instance, the strictures covering presumptive limits on depositions and interrogatories have prompted a number of courts to opt out of, or to modify, the federal requirements, thereby undermining uniformity and simplicity and increasing cost and delay.<sup>222</sup> A few changes in Rule 16 governing pre-

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ERN DISTRICT OF TEXAS, available in 1993 WL 468314 (C.J.R.A.), at \*7-9 (Apr. 6, 1993); see also 28 U.S.C. § 475 (1994).

218. See Preliminary Draft, *supra* note 144, at 152.

219. Compare *id.* with The Judicial Conference of the United States Proposed Amendments to the Federal Rules of Civil Procedure and Forms, at Table of Contents (1992) (deleting proposed amendment of Rule 83).

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

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

222. See, e.g., Order of the United States District Court of Montana (Jan. 25, 1994) (maintaining current local rule imposing presumptive limit on interrogatories that departs from Federal Rule until the district formally reviews its Civil Justice Delay Reduction Plan); General

trial conferences, which allow local option in certain circumstances and alteration of time restraints in individual cases, could have similarly reduced uniformity, simplicity, and transsubstantivity, and increased expense.<sup>223</sup>

In sum, the JIA's strictures covering local procedural amendment and proliferation received little effectuation because the CJRA essentially discontinued implementation. Effectuation of the JIA's requirements relating to national rule revision, as manifested in Federal Rule 11's 1993 modification, exemplifies the kind of amendment process that Congress seemingly contemplated when passing the JIA and illustrates the tensions between important procedural precepts. The 1988 legislation's implementation, as witnessed in the provision prescribing automatic disclosure, demonstrates how the JIA's strictures, and congressional failure to reconcile them with the CJRA's requirements, exacerbated local proliferation, additionally eroding national uniformity and simplicity and imposing greater cost and delay.

### B. *Implementation of the CJRA*

In this subsection, certain disadvantages that attended the CJRA's implementation are initially considered. For instance, difficulties involved the entities that the CJRA assigned responsibility for effectuating the legislation, for monitoring that implementation, and for evaluating the efficacy of procedures in reducing expense and delay that the ninety-four districts applied. Legislative provision for nationwide experimentation, internal statutory inconsistency, and the CJRA's encouragement of districts to prescribe conflicting strictures correspondingly undermined uniformity and simplicity while increasing cost and delay. The subsection then analyzes positive features of the CJRA's effectuation, emphasizing those experimental measures that saved expense or time. It concludes with lessons derived from the seven-year effort. Throughout the evaluation, the EIDCs' experience is stressed because the thirty-four courts experimented much longer and their work received considerably more assessment. Many of the remaining sixty districts concomitantly adopted mechanisms that replicated or resembled those that the EIDCs prescribed.

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Order No. 40 of the United States District Court for the Northern District of New York in the Matter of Local Rules of Civil Procedure (Dec. 14, 1993).

223. See AMENDMENTS, *supra* note 152, reprinted in 146 F.R.D. 402, 427-28 (1993) (text of amended Rule 16(b) as transmitted by the Supreme Court); see also *id.* at 478-79 (demonstrating that 1993 amendment to Rule 54(d)(2)(B) and (D) similarly prescribed local option); D. MD. R. 104.1; S.D. IND. R. 26.3.

## 1. *Detrimental Aspects*

### a. Relevant Entities

#### i. *Implementing Entities*

Congress meant for the CJRA to assemble a broad spectrum of interests in the districts that would develop from the bottom up innovative expense and delay reduction procedures that would be responsive to all involved in civil litigation.<sup>224</sup> However, Congress selected instrumentalities to implement the statute and assigned them responsibilities that eroded uniformity, simplicity, and transsubstantivity and increased cost and delay, partly by encouraging the proliferation of local procedures.

The CJRA required that judges in each district promulgate a civil justice plan after considering a report and recommendations prepared by an advisory group.<sup>225</sup> The legislative mandate that chief district judges name the entities, the groups as selected, and the CJRA's commands as effectuated had impacts that undermined the basic tenets. Some groups lacked balance, including, for example, large numbers of defense interests or insufficient representatives of those having few resources.<sup>226</sup> The statutory command that each group consider its district's needs and situation in assembling the report and suggestions apparently prompted a number of groups to develop recommendations that evinced more solicitude for local judges, attorneys, and parties than for national uniformity and simplicity, and that varied significantly.<sup>227</sup>

#### ii. *Monitoring Entities*

Congress designated entities to oversee CJRA effectuation and assigned them comparatively generalized, unclear responsibilities that substantially limited the possibility that the instrumentalities would meaningfully treat the inconsistency and complexity that the statute

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224. See *supra* notes 106-14, 127, and accompanying text.

225. See 28 U.S.C. §§ 471-472 (1994); see also *supra* notes 106-14 and accompanying text.

226. See, e.g., REPORT OF THE CIVIL JUSTICE ADVISORY GROUP SOUTHERN DISTRICT OF INDIANA I.A (1991) (more defense counsel); REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA frontispiece (1991) (few resource-poor litigants) [hereinafter MONTANA REPORT]. See generally RAND PILOT STUDY, *supra* note 108, at 18-19; Bettenhausen, *supra* note 108, at 300; Galanter, *supra* note 138, at 97-119.

227. This may seem too instrumental. I am merely saying that the groups were less expert and less concerned about maintaining national uniformity and simplicity than the Federal Advisory Committee. A few groups suggested that their districts more strictly enforce local procedures. See, e.g., U.S. DIST. COURT FOR THE E. DIST. OF CAL., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 3 (1991); U.S. DIST. & BANKRUPTCY COURT FOR THE DIST. OF IDAHO, EXPENSE AND DELAY REDUCTION PLAN 1 (1991) [hereinafter IDAHO PLAN]. See generally RAND PILOT STUDY, *supra* note 108, at 19-20, 24-26.

fostered.<sup>228</sup> For instance, few circuit review committees critically analyzed, much less suggested alterations in, civil justice expense and delay reduction plans, partly because chief district judges were apparently unwilling to analyze procedures prescribed by additional district judges in their appeals courts with whose districts they might have lacked familiarity.<sup>229</sup> Some districts even failed to institute recommendations for modifications tendered by those circuit review committees that did perform rigorous oversight.<sup>230</sup> Judicial Conference scrutiny was even less stringent for similar reasons that involved the reviewing entity's constitution and the unclear, weaker duties that Congress gave the Conference.<sup>231</sup>

Congress discharged its monitoring responsibilities no more rigorously than circuit review committees or the Conference. Congress had the same obligation to oversee the CJRA as with any substantive legislation that it enacts. However, Congress may have assumed greater responsibility for monitoring the CJRA because, for instance, Congress instructed the Conference and the Administrative Office of the United States Courts to furnish it material on the results of statutory implementation.<sup>232</sup> Nonetheless, Congress apparently undertook minimal review of the legislation's effectuation and never conducted oversight hearings.

Several reasons may explain legislative reluctance to scrutinize CJRA implementation rigorously.<sup>233</sup> Congress's stake in the perceived success of the statute probably meant that it had a conflict of interest. Congress also might have deferred to the decisions of the districts in prescribing procedures or to the monitoring institutions that it established, while Congress could have wished to preserve cordial ongoing relationships with the federal bench. Moreover, Congress was preoccupied by many other important responsibilities.

Insofar as Congress was tracking CJRA effectuation, the 1994 congressional elections probably disrupted, and even halted, this activity. The legal reform proposals—principally relating to securities litigation, product liability, and procedural changes—included in the *Contract with America*, which were essentially intended to restrict court access, had a quite different focus than the CJRA.<sup>234</sup> These pro-

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228. The instrumentalities are circuit review committees, the Judicial Conference, and Congress. See 28 U.S.C. § 474. The Conference Committee on Case Management and Court Administration had primary responsibility for Conference review.

229. See Tobias, *supra* note 102, at 1407-08.

230. For example, the Montana District did not adopt the Ninth Circuit Review Committee's suggestions on local procedures. See Minutes of Telephone Conference of the Ninth Circuit Civil Justice Reform Act Review Committee (Apr. 2, 1992) (on file with the author) [hereinafter Minutes]. See generally Tobias, *supra* note 102, at 1408.

231. See Tobias, *supra* note 102, at 1409-11.

232. See 28 U.S.C. § 471 note (pilot program).

233. I rely substantially in this paragraph on Tobias, *supra* note 102, at 1411-13.

234. See H.R. REP. NO. 104-10 (1995); see also Cavanagh, *supra* note 116. See generally Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699 (1995).

posals' introduction and consideration substantially altered the terms of debate, although the Private Securities Litigation Reform Act of 1995 (PSLRA)<sup>235</sup> was the only constituent of the package that actually became law. Indeed, the reforms at least deflected attention from the CJRA and apparently had effects on that statute analogous to its impacts on the JIA, essentially suspending interest in, if not implementation of, the CJRA. Finally, the 1994 congressional elections left Senator Biden, the CJRA's principal sponsor, as the ranking minority member, rather than chair, of the Senate Judiciary Committee. This meant that he could exercise less leadership to generate interest in overseeing statutory effectuation.<sup>236</sup>

### *iii. Assessment Entities*

Congress designated several bodies to assess the procedures adopted under the CJRA and apparently intended that experimentation would receive rigorous analysis.<sup>237</sup> However, the entities selected and difficulties involving statutory implementation may have compromised this goal's achievement. For example, delayed adoption of CJRA measures in numerous pilot and demonstration districts complicated the RAND and Federal Judicial Center (FJC) efforts to study those courts, while the FJC had relatively few resources for conducting its evaluation.<sup>238</sup> The districts and advisory groups to which Congress assigned responsibility for compiling annual assessments concomitantly had limited time, resources, and technical expertise for performing these analyses.<sup>239</sup>

## **b. More Specific Analysis of the CJRA's Guidance and Its Effectuation**

### *i. The Structure of Experimentation*

Congress drafted the CJRA, and the districts implemented the statute, in ways that undermined uniformity and simplicity as well as enhanced judicial discretion, expense, and delay. A significant complication was the choice to have each of the ninety-four districts effectuate the Act, which meant that numerous districts were experimenting simultaneously. This situation precluded some courts

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235. Pub. L. No. 104-67, 109 Stat. 737.

236. Senator Biden is now the ranking minority member of the Foreign Relations Committee, thus making Senator Patrick Leahy (D-Vt.) the ranking minority member of the Judiciary Committee. See Lawrence J. Goodrich, *Senate Committees Choose Chiefs*, CHRISTIAN SCI. MONITOR, Dec. 6, 1996, at 9.

237. See *supra* notes 121-27 and accompanying text.

238. See Judicial Amendments Act of 1994, Pub. L. No. 103-420, § 4, 108 Stat. 4343, 4345; Act of Oct. 3, 1995, Pub. L. No. 104-33, 109 Stat. 292 (amending the Civil Justice Reform Act of 1990). See generally Margaret L. Sanner & Carl Tobias, *The Civil Justice Reform Act Amendment Act of 1995*, 164 F.R.D. 577 (1996); Margaret L. Sanner & Carl Tobias, *The Judicial Amendments Act of 1994*, 159 F.R.D. 649 (1995).

239. For more discussion of these entities, see *infra* notes 280-85 and accompanying text.



from capitalizing on previous efforts and reduced the opportunities for productive interchange among the districts.<sup>240</sup>

The legislation concomitantly instructed each court to examine, and consider prescribing, eleven statutorily provided measures and any others found appropriate, rather than restricting, for instance, how many districts could experiment or the number of procedures that courts might employ.<sup>241</sup> The statute encouraged numerous districts to apply quite a few diverse mechanisms,<sup>242</sup> certain ones of which increased complexity, phenomena that complicated and raised the cost of litigation by, for example, demanding that lawyers and litigants prepare additional papers and participate in more activities.<sup>243</sup>

*ii. Congressional Guidance in the CJRA's First Three Sections*

Unclear guidance, conflicting prescriptions, and even internally inconsistent concepts in the legislation's initial three sections undermined uniformity and simplicity, while increasing cost and delay. Section 471 provided the purposes of civil justice expense and delay reduction plans,<sup>244</sup> section 472 instructed advisory groups how to formulate reports and recommendations,<sup>245</sup> and section 473 enumerated principles, guidelines, and techniques that districts were to examine and could have prescribed.<sup>246</sup>

Particular aspects of section 472 show how the three provisions had internal inconsistencies and conflicted with each other. The section commanded advisory groups to posit recommendations that would "reduc[e] cost and delay and thereby facilitat[e] access to the courts."<sup>247</sup> Attempts to realize these two objectives might have conflicted, as the experience of litigants with few resources illustrates. Procedures that expedite case resolution can actually disadvantage,

240. Congress required all districts to name advisory groups 90 days after passage. *See* 28 U.S.C. § 478(a) (1994). Thirty-four courts qualified for EIDC status by adopting plans by the end of 1991, but most districts fully implemented plans in 1992, while numerous non-EIDCs attempted to finish their plans in 1992. Many groups and districts were essentially working at the same time, which limited opportunities to profit from prior experimentation and interdistrict consultation.

241. *See* 28 U.S.C. § 473.

242. For instance, the Eastern Districts of Arkansas and Virginia published brief plans that altered few local procedures. *See* U.S. DIST. COURT FOR THE E. DIST. OF ARK., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1991); U.S. DIST. COURT FOR THE E. DIST. OF VA., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1991). The Eastern District of Texas assembled a terse plan that included several innovative ideas, while the Massachusetts District adopted a long plan with many complex procedures. *See* U.S. DIST. COURT FOR THE E. DIST. OF TEX., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1991) [hereinafter E. DIST. OF TEXAS PLAN]; U.S. DIST. COURT FOR THE DIST. OF MASS., EXPENSE AND DELAY REDUCTION PLAN (1991).

243. *See* Tobias, *supra* note 102, at 1422-27; *see also infra* note 259 and accompanying text.

244. *See* 28 U.S.C. § 471.

245. *See id.* § 472.

246. *See id.* § 473.

247. *Id.* § 472(c)(3); *see also* Tobias, *supra* note 156, at 495-98 (affording ideas regarding resource discrepancies among litigants in this paragraph and in remainder of article).

and limit federal court access for, impecunious parties who frequently need more time to conclude discovery and collect the requisite material to prove their cases.<sup>248</sup> Section 472, therefore, required advisory groups to make suggestions that would have implemented the requirement of delay reduction but frustrated the equally critical mandate of facilitating court access, which is in the provision's identical clause.<sup>249</sup>

Essential to the issues examined in this article is the three sections' guidance, which encouraged the districts to adopt local measures that contravened the Federal Rules of Civil Procedure and acts of Congress.<sup>250</sup> Neither the language of the CJRA nor its legislative history apparently proscribed these inconsistencies. Section 473 provided that districts were to examine, and might prescribe, eleven enumerated mechanisms, while numerous courts seemingly depended on the statutory provisions to apply conflicting local requirements.<sup>251</sup>

The CJRA's final prescription, which authorized courts to employ such additional measures as they considered appropriate after consulting recommendations of their advisory groups, implicitly invited districts to adopt procedures that were inconsistent with the federal rules or statutes.<sup>252</sup> Numerous advisory groups suggested that courts implement, and a number of districts prescribed, local procedures that conflicted with provisions of the rules or the United States Code. The civil justice plan for the Eastern District of Texas most aggressively proffered this authority by declaring that "[t]o the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling."<sup>253</sup> The district, in an apparent effort to demonstrate that it could exercise this power, implemented an offer of judgment requirement that contravened Rule 68.<sup>254</sup> The court concomitantly instituted a maximum fee schedule in contingent fee cases that fee-shifting legislation does not govern,<sup>255</sup> although the Supreme Court has specifically proclaimed that litigation

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248. See Tobias, *supra* note 156, at 495-98.

249. See *supra* text accompanying note 247. Section 472's delay reduction requirement could conflict with section 471's statement that one purpose of plans is to "ensure just . . . resolutions of civil disputes." Compare 28 U.S.C. § 472(c)(3), with *id.* § 471.

250. The Rules Enabling Act states that local rules must be "consistent with Acts of Congress" and the federal rules. 28 U.S.C. § 2071(a); see also FED. R. CIV. P. 83(a) (requiring local rules to "be consistent with—but not duplicative of—Acts of Congress" and federal rules).

251. The most controversial illustrations implicated automatic disclosure, some of which would have substantially changed traditional notions of discovery. See, e.g., IDAHO PLAN, *supra* note 227, at pt. V; E. DIST. OF NEW YORK PLAN, *supra* note 49, at pt. II.A.

252. See 28 U.S.C. § 473(b)(6). Congress may have considered this a narrower grant of authority than did a number of judges. See Paul D. Carrington, *A New Confederacy: Disunionism in the Federal Courts*, 45 DUKE L.J. 929 (1996); Robel, *supra* note 2; see also CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 63A, at 438-39 (5th ed. 1994).

253. E. DIST. OF TEXAS PLAN, *supra* note 242, at art. VI(5).

254. Compare *id.* at art. VI(a), with FED. R. CIV. P. 68.

255. See E. DIST. OF TEXAS PLAN, *supra* note 242, at art. V; see also Ashland Chem., Inc. v. Barco, Inc., 123 F.3d 261, 265-67 (5th Cir. 1997); Friends of the Earth v. Chevron Chem. Co., 885 F. Supp. 934, 940 (E.D. Tex. 1995); Carrington, *supra* note 252.

expenses are to be allocated by the legislative, rather than the judicial, branch.<sup>256</sup>

### *iii. Practical Implementation*

#### (a) The Procedures Adopted

Nearly all of the federal districts adopted varying combinations of the eleven legislatively prescribed principles, guidelines, and techniques, while numerous courts applied a broad spectrum of mechanisms pursuant to the last open-textured provision. A number of the measures that districts promulgated and enforced undermined uniformity, simplicity, and transsubstantivity, and imposed additional cost and delay. Indeed, the five-year RAND Corporation study of the pilot districts concluded that the CJRA procedures had saved little expense or time and had minimal effect on other important parameters.<sup>257</sup>

Many courts applied particular strictures that had these impacts. For example, numerous districts' adoption of diverse permutations of automatic disclosure eroded uniformity, simplicity, and transsubstantivity while increasing cost and delay.<sup>258</sup> A number of courts invoked judicial case management mechanisms, which expanded judicial discretion to demand that attorneys or parties file more papers and participate in additional conferences, thus imposing expense and delay.<sup>259</sup> CJRA provisions that empowered judicial officers to refer lawsuits to ADR in numerous districts similarly enlarged judicial discretion to require the involvement of counsel and litigants in activities that increased cost and delay.<sup>260</sup> Some courts employed multiple tracks for actions dependent on their case type or complexity, which enabled districts to apply diverse measures to different suits, thereby expanding judicial discretion and reducing uniformity and transsubstantivity.<sup>261</sup>

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256. See *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990); see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991). Additional courts prescribed measures which are or seem inconsistent, but most were less explicit. See, e.g., *supra* note 52 (noting Montana District's experimentation with coequal assignment of civil cases to Article III judges and magistrate judges). For elaboration of how the principles, guidelines, and techniques undermined uniformity and simplicity and for additional examples, see Tobias, *supra* note 102, at 1418-22.

257. See RAND EXECUTIVE SUMMARY, *supra* note 121, at 1-2; JUDICIAL CONFERENCE REPORT, *supra* note 121, reprinted in 175 F.R.D. 62, 67 (1997).

258. See *supra* notes 202-13 and accompanying text; see also *supra* note 217 and accompanying text.

259. See 28 U.S.C. § 473(a)(1)-(3), (a)(5), (b)(1)-(3), (b)(5) (1994). See generally RAND JCM STUDY, *supra* note 119.

260. See 28 U.S.C. § 473(a)(6), (b)(4).

261. See, e.g., U.S. DIST. COURT FOR THE S. DIST. OF FLA., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 102-06 (1991); U.S. DIST. COURT FOR THE S. DIST. OF ILL. EARLY IMPLEMENTATION DIST., CIVIL JUSTICE DELAY AND EXPENSE REDUCTION PLAN pt. B.1 (1991); see also 28 U.S.C. § 473(a)(1)-(3). See generally RAND JCM STUDY, *supra* note 119, at 47-50.

In short, many mechanisms that districts adopted under the CJRA imposed expense and delay, a phenomenon that was exactly the opposite of the express statutory purpose. A number of additional measures were apparently neutral in the sense that they saved minimal cost or time. Illustrative is the practice of setting early, firm trial dates under the second statutorily prescribed procedure in courts with substantial criminal dockets.<sup>262</sup> Although early, firm settings may generally expedite litigation, they can be meaningless in this context because the Speedy Trial Act accords criminal cases an automatic preference leading to an “inefficient ‘hurry up and wait’ atmosphere.”<sup>263</sup> Some efforts to employ differentiated case management similarly afforded little benefit because judges apparently prefer to resolve specific lawsuits in ways that they deem appropriate rather than fit them into predetermined classifications.<sup>264</sup> Even the techniques that attained the CJRA’s objective of decreasing expense or delay may have sacrificed uniformity, simplicity, or transsubstantivity or significant process values, namely, justice or open court access, or had other adverse side effects.<sup>265</sup> It is also important to remember that certain of the procedures that proved most efficacious were not actually new.<sup>266</sup>

#### (b) Procedural Interpretation and Application

Numerous judges inconsistently construed or applied a number of the local requirements instituted pursuant to civil justice reform, while a few judges failed to enforce some measures prescribed in the civil justice plans that their districts adopted.<sup>267</sup> Many attorneys and parties experienced problems locating the relevant local strictures,<sup>268</sup> a phenomenon that automatic disclosure’s implementation exemplifies. A few courts simply took no action respecting disclosure that they reduced to written form, thereby leaving treatment to local practice or understandings.<sup>269</sup> Additional districts eschewed the procedure’s in-

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262. I rely in this sentence and the next on Cavanagh, *supra* note 116.

263. Cavanagh, *supra* note 116.

264. *See id.*; *see also supra* note 122 and accompanying text. *See generally* RAND JCM STUDY, *supra* note 119, at 47-50.

265. For example, measures that facilitate dispute resolution or require participation in ADR can detrimentally affect impecunious parties who require greater time for discovery and for assembling their cases and who may lack resources to participate in ADR.

266. *See supra* notes 115-17 and accompanying text.

267. These ideas are premised on conversations with many individuals familiar with civil justice reform in many districts. Clear examples are the Southern District of Indiana and the District of Massachusetts. *See also* Carl Tobias, *Recent Federal Civil Justice Reform in Montana*, 55 MONT. L. REV. 235, 239 (1994) (finding interdivisional disuniformity).

268. I rely substantially here on my review of nationwide developments in civil justice reform, derived from evaluating advisory group reports and recommendations and districts’ plans and from conversations with many individuals knowledgeable about civil justice reform. *See also supra* notes 213-17 and accompanying text (discussing automatic disclosure).

269. *See* Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1621 & n.207 (1994).

clusion in their civil justice plans and only published general, standing, or special orders, or sent letters to members of the local federal bar, little of which information was readily accessible, or conveyed, to attorneys who practice beyond the confines of the courts.<sup>270</sup>

### c. Evaluation of CJRA Implementation

Congress seemingly contemplated that experimentation under the CJRA would receive comparatively rigorous analysis; however, complications involving statutory effectuation seemed to frustrate that objective's achievement. For instance, evaluators apparently encountered difficulty in comparing and contrasting various measures' effectiveness across districts because too many courts were experimenting at the same time. A number of districts were unable to assemble the annual assessments specifically mandated by the CJRA.<sup>271</sup> Some EIDCs concluded their analyses over a year after prescribing plans, a phenomenon that partly resulted from the failure to establish baselines for calculating expense and delay reduction.<sup>272</sup> A few courts compiled brief evaluations that lacked empirical material and additional analytical information,<sup>273</sup> while a number of districts did not issue these assessments annually.<sup>274</sup>

The RAND Corporation, which the Judicial Conference selected to evaluate the pilot program, and the FJC, which the Conference chose to analyze the demonstration program, experienced difficulties concluding their studies.<sup>275</sup> In fairness, some pilot districts and demonstration courts delayed implementation of experimentation that correspondingly postponed RAND and FJC assessment efforts.<sup>276</sup> Congress responded to these circumstances by twice delaying the date on which the Conference was to tender its suggestions to Congress.<sup>277</sup>

Notwithstanding the dearth of reliable empirical information, certain patterns can be identified. Numerous features of the CJRA and

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270. See, e.g., Order of John H. Moore II, Chief Judge, U.S. District Court for the Middle District of Florida (Nov. 9, 1993); Letter from Paul G. Hatfield, Chief Judge, U.S. District Court for the District of Montana, to Members of the Federal Bar of the U.S. District Court for the District of Montana (Jan. 25, 1994) (on file with the *University of Illinois Law Review*). But see D. MONT. R. 200-5(a).

271. See 28 U.S.C. § 475 (1994).

272. See RAND PILOT STUDY, *supra* note 108, at 23; Carl Tobias, *Recalibrating the Civil Justice Reform Act*, 30 HARV. J. ON LEGIS. 115, 124 (1993).

273. See, e.g., Minutes of the Local Rules Committee (Feb. 1, 1993) (Wyoming) (on file with the author).

274. Numerous courts may have issued no written annual assessments, and a few apparently published only one. See RAND PILOT STUDY, *supra* note 108, at 23; WESTLAW, CJRA Database; Cavanagh, *supra* note 116.

275. I rely substantially in this paragraph on Carl Tobias, *Extending the Civil Justice Reform Act of 1990*, 64 U. CIN. L. REV. 105 (1995). See also RAND EXECUTIVE SUMMARY, *supra* note 121; FJC STUDY, *supra* note 123.

276. See *supra* note 238 and accompanying text.

277. See Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 608, 110 Stat. 3847, 3860; Judicial Amendments Act of 1994, Pub. L. No. 103-420, § 4, 108 Stat. 4343, 4345.

statutory effectuation, especially the measures actually prescribed in, and applied under, the legislation, eroded the precepts of uniformity, simplicity, and transsubstantivity and enhanced expense and delay. The experimentation examined above essentially postponed those aspects of the JIA that Congress meant to treat the problems that resulted from proliferating local procedures.

## 2. *Beneficial Aspects*

### a. Relevant Entities

#### i. *Implementing Entities*

Some districts did bring together diverse participants in civil litigation, who formulated creative cost and delay reduction measures that were responsive to all interests that are involved in federal lawsuits. These courts assembled advisory groups whose composition was balanced, for instance, in terms of plaintiffs and defense counsel.<sup>278</sup> A number of groups made suggestions that were as solicitous of national uniformity and simplicity as of local judges, lawyers, and litigants, while a few groups developed innovative recommendations for decreasing expense or delay. For example, courts in a few states that encompass multiple districts insured intrastate uniformity by adopting identical CJRA procedures.<sup>279</sup>

#### ii. *Monitoring Entities*

Some monitoring entities rather rigorously discharged their oversight responsibilities. For example, the Ninth Circuit Review Committee closely evaluated, and recommended numerous modifications in, procedures, particularly inconsistent measures, prescribed by the EIDCs within the committee's purview.<sup>280</sup> Moreover, a few districts responded to these suggestions by changing their requirements.<sup>281</sup> Statutory assignment of relatively unclear, limited duties to the Judicial Conference and that entity's apparent deference to Congress probably explain less stringent Conference review.<sup>282</sup> However, the Administrative Office and the FJC, the two primary research arms of the federal courts, carefully tracked CJRA implementation and pro-

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278. See, e.g., MONTANA REPORT, *supra* note 226, at frontispiece; REPORT OF THE ADVISORY GROUP OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, at frontispiece (1991), *reprinted in* 138 F.R.D. 167 (1991).

279. See, e.g., Local Rules, U.S. District Courts for the N. & S. Districts of Iowa; Local Rules, U.S. District Courts for the E. & W. Districts of Kentucky; Local Rules, U.S. District Courts for the E., M., & W. Districts of Louisiana.

280. See Minutes, *supra* note 230. *But see supra* note 229 and accompanying text.

281. See, e.g., U.S. DIST. COURT FOR THE DIST. OF ALASKA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 7 (1991); U.S. DIST. COURT FOR THE DIST. OF ARIZ., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION (discovery motions) (1993). *But see supra* note 230 and accompanying text.

282. See *supra* note 231 and accompanying text.

duced several valuable studies of statutory effectuation.<sup>283</sup> Comparatively lenient congressional oversight can probably be ascribed principally to the broad spectrum of other significant responsibilities that senators and representatives have and to the introduction and consideration of the legal reforms in the *Contract with America*.

*iii. Assessment Entities*

Congress did provide for some expert entities to evaluate experimentation under the CJRA. For instance, the Judicial Conference selected the RAND Corporation and the FJC to study the pilot and demonstration districts, and both instrumentalities produced comprehensive, refined reports.<sup>284</sup> Even Congress's decision to assign districts and advisory groups responsibility for conducting annual assessments relied upon entities that had substantial familiarity with the measures and the courts being evaluated.<sup>285</sup>

b. More Specific Analysis of the CJRA's Guidance and Its Effectuation

*i. The Structure of Experimentation*

Congress did structure the statute in some ways that it intended to reduce or ameliorate inconsistency, complications, cost, and delay, or to promote important phenomena, such as bench-bar interchange and experimentation with innovative strictures. For instance, the CJRA prescribed eleven principles, guidelines, and techniques that Congress contemplated many courts would adopt while including a twelfth open-ended prescription that promoted experimentation with creative techniques.<sup>286</sup> The statute provided for pilot districts and demonstration courts that applied analogous measures, thereby promoting uniformity, and for EIDCs which were to experiment before the other districts, so that courts experimenting subsequently might benefit from the EIDCs' experience.<sup>287</sup> The legislation initiated the most intensive self-evaluation by the district courts in their history. The conceptualization of reform proceeding from the bottom up fostered valuable exchange within and among the ninety-four federal districts and with the state courts.

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283. See, e.g., JUDICIAL CONFERENCE OF THE U.S., MODEL PLAN FOR REDUCTION OF EXPENSE AND DELAY IN CIVIL CASES (1992); JUDICIAL CONFERENCE REPORT, *supra* note 121, reprinted in 175 F.R.D. 62 (1997).

284. See RAND EXECUTIVE SUMMARY, *supra* note 121; FJC STUDY, *supra* note 123.

285. For more discussion of these entities, see *infra* notes 304-20 and accompanying text.

286. See 28 U.S.C. § 473 (1994).

287. See *supra* notes 118-23 and accompanying text.

*ii. Practical Implementation*

## (a) The Procedures Adopted

A number of the federal district courts prescribed comparatively similar combinations of the eleven statutorily delineated principles, guidelines, and techniques, while some courts even applied rather analogous mechanisms under the final open-ended proviso. Numerous procedures that the districts promulgated and employed were relatively uniform, simple, and transsubstantive, and certain measures saved expense or time.

Many courts adopted or applied particular requirements that had these effects. At a general level, a number of districts that were not EIDCs apparently modeled their civil justice plans on those that the EIDCs had already issued while prescribing few strictures that the EIDCs had not employed. More specifically, the CJRA commanded the ten pilot courts to experiment with the six identical principles and guidelines of litigation management and cost and delay reduction identified in section 473(a).<sup>288</sup>

Numerous districts implemented some techniques, especially in the general fields of judicial case management, differentiated case management, discovery, and ADR, that directly treated expense and delay and seemed to be reasonably successful, even though the RAND study of pilot courts found minimal cost or delay reduction.<sup>289</sup> For example, RAND concluded that effective judicial case management saved time and perhaps money, thus confirming the conventional wisdom that has developed over two decades of reliance on these mechanisms.<sup>290</sup> The District of Montana employed an opt-out procedure for securing consent to magistrate judge jurisdiction in civil cases that expedited dispute resolution.<sup>291</sup> Several districts' use of differentiated case management seemed to limit expense and delay somewhat.<sup>292</sup>

The District of Maine and the Eastern District of New York relied on judicial officers to treat discovery controversies promptly through telephone conference calls, thus saving the time and cost entailed in preparing papers, participating in oral arguments, and resolv-

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288. See *supra* notes 119-20 and accompanying text.

289. See RAND EXECUTIVE SUMMARY, *supra* note 121, at 22; RAND ADR STUDY, *supra* note 122, at 23-25.

290. See RAND JCM STUDY, *supra* note 119, at 52-54; see also *supra* notes 30-38 and accompanying text.

291. See 1994 ANN. ASSESSMENT OF THE CIVIL JUSTICE EXPENSE & DELAY REDUCTION PLAN OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF MONT. 4; see also Carl Tobias, *Re-Evaluating Federal Civil Justice Reform in Montana*, 56 MONT. L. REV. 307, 312-13 (1995); Tobias, *supra* note 52.

292. See, e.g., 1995 DIFFERENTIATED CASE MGMT. IN THE U.S. DISTRICT COURT FOR THE W. DISTRICT OF MICH., ANN. ASSESSMENT; 1993 U.S. DISTRICT COURT FOR THE N. DISTRICT OF OHIO, ANN. ASSESSMENT OF CIV. & CRIM. DOCKET, available in 1993 WL 319599, at 1-3 [hereinafter N. DIST. OF OHIO ASSESSMENT]. See generally FJC STUDY, *supra* note 123, at 7-15, 29-132.



ing disputes.<sup>293</sup> Some observers attribute the mounting number of settlements in civil suits in the District of Massachusetts to automatic disclosure,<sup>294</sup> although experimentation with disclosure in the twenty courts that RAND studied and in some other districts has yielded inconclusive judgments regarding the technique's efficacy and whether it imposes expense or delay.<sup>295</sup>

Certain ADR techniques seem to have enjoyed considerable success. For instance, court-annexed arbitration has proved sufficiently effective that Congress authorized continued experimentation in numerous districts while the first session of the 105th Congress empowered all ninety-four courts to use court-annexed arbitration.<sup>296</sup> The Early Assessment Program employed in the Western District of Missouri has significantly increased the percentage of cases that settle in that court.<sup>297</sup>

Many districts have applied a miscellany of procedures that have decreased expense or delay. For example, the District of Maryland has sharply limited disputes over attorney's fees by requiring that counsel who anticipate requesting fees submit monthly reports to the court.<sup>298</sup> The Northern District of Illinois has employed status conferences every six months in civil lawsuits to explore the pace of litigation, especially discovery, and this technique has expedited case resolution.<sup>299</sup> The district has also encouraged its judges to volunteer in assisting other members of the court to treat litigation on their dockets, and awards the volunteers credit.<sup>300</sup> The Eastern District of Pennsylvania, which enjoys a reputation as a cohesive court, has relied

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293. See Telephone Interview with D. Brock Hornby, Chief Judge, U.S. District Court for the District of Maine (Jan. 29, 1997); *Counsel Connect Debates; Civil Justice Reform; Five Years Later*, TEX. LAW., Feb. 24, 1997, at 28 (discussing Eastern District of New York). See generally FJC STUDY, *supra* note 123, at 10-11.

294. See Telephone Interview with Dan Coquillette, Professor, Boston College Law School (Jan. 27, 1997); see also D. MASS. R. 26.2.

295. See RAND EXECUTIVE SUMMARY, *supra* note 121, at 17; FJC STUDY *supra* note 123, at 12; Cavanagh, *supra* note 116; *supra* note 217 and accompanying text.

296. See *supra* note 74; see also Act of Oct. 8, 1997, Pub. L. No. 105-53, § 1, 111 Stat. 1173 (authorizing all courts to use court-annexed arbitration). See generally ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS (Federal Judicial Ctr. ed., 1996).

297. See, e.g., Memorandum from Kent Snapp & Deborah Bell to Judges in the Western District of Missouri (Nov. 30, 1994) (on file with the author); see also FJC STUDY, *supra* note 123, at 173-282 (describing the ADR and Multi-Option Programs in the Northern District of California and discussing the impact of the ADR programs); RAND PILOT STUDY, *supra* note 108, at 71-76; RAND ADR STUDY, *supra* note 122, at 23-25. See generally Carl Tobias, *Civil Justice Reform in the Western District of Missouri*, 58 MO. L. REV. 335 (1993).

298. See Telephone Interview with Fred Russillo, CJRA Specialist, Administrative Office of U.S. Courts (Jan. 27, 1997); see also U.S. DIST. COURT FOR THE DIST. OF MD., REGULATIONS GOVERNING THE REIMBURSEMENT OF EXPENSES IN PRO BONO CASES (1997).

299. See U.S. DIST. COURT FOR THE N.D. OF ILL., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1993).

300. See *id.*; see also Telephone Interview with Fred Russillo, *supra* note 298.

upon similar measures that enable it to function as a court qua court.<sup>301</sup>

In short, this survey of techniques that districts promulgated and applied under the CJRA suggests that numerous, diverse procedures have decreased expense and delay. The review also indicates that the courts have creatively developed and applied a number of efficacious mechanisms. In the final analysis, all ninety-four districts have maintained a measure of uniformity, simplicity, and transsubstantivity, and most courts have not invoked procedures that imposed cost or delay. Experimentation thus shows that the statute was not a radical reform and that districts cautiously implemented the legislation.

### (b) Procedural Interpretation and Application

The vast majority of district judges did, or attempted to, interpret and apply consistently local procedures adopted under the CJRA, while a very small number of judges refused to implement the requirements imposed in their courts' plans. Certain difficulties that accompanied the legislation's effectuation could have been ascribed more to judicial construction and implementation than to the statute as drafted. The quintessential illustration is the twelfth procedural provision that Congress apparently intended to be a considerably narrower grant of power than some federal judges treated it.<sup>302</sup>

Numerous courts instituted certain measures to facilitate the CJRA's effectuation. The districts encouraged thorough, ongoing, and open bench-bar communication about the procedures considered, adopted, and applied, while a number of courts went to extraordinary lengths in notifying lawyers and litigants of the new techniques with which districts were experimenting. For example, some courts widely circulated proposed procedures and broadly disseminated information on the mechanisms actually implemented, and practically all districts reduced the measures to written form.<sup>303</sup>

### (c) Ancillary Benefits of Experimentation

Experimentation in the ninety-four federal districts afforded many ancillary advantages. For instance, development of the advisory groups' reports and the civil justice plans, application of the cost and delay reduction procedures, and compilation of the annual assessments of those measures and their refinement promoted valuable in-

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301. See U.S. DIST. COURT FOR THE E. DIST. OF PA., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1991), available in 1991 WL 525098.

302. See *supra* notes 252-56 and accompanying text.

303. The Northern District of Illinois and the Montana District widely circulated proposals and information on procedures actually applied. Indeed, two national services have reproduced most of the CJRA procedures in multivolume treatises, although one was first published in 1996. See DIRECTORY OF FEDERAL COURT GUIDELINES (1997); FEDERAL LOCAL COURT RULES (2d ed. 1995).

terchange involving judges, lawyers, litigants, and court personnel. Experimentation concomitantly encouraged the judges of numerous courts to view, or reconsider and emphasize, their districts as courts qua courts and to institute cooperative, districtwide mechanisms for limiting expense and delay. The national effort similarly fostered constructive exchange among judges, attorneys, parties, and court staff across many districts.

### c. Evaluation of CJRA Implementation

Congress provided for the thoroughgoing assessment of the experimentation that proceeded in the districts. It commissioned an unprecedented, searching analysis by the RAND Corporation of the pilot courts, while Congress asked that the Judicial Conference comprehensively evaluate the demonstration districts and submit to Congress reports on the pilot and demonstration court experimentation and a recommendation on whether the pilot project warranted expansion.<sup>304</sup> Congress mandated that all ninety-four districts compile annual assessments and refine the measures employed in light of those studies.<sup>305</sup>

RAND recently concluded its examination of the pilot courts, which is probably the most intensive analysis of federal districts' application of techniques intended to reduce cost and delay ever undertaken.<sup>306</sup> RAND meticulously collected, evaluated, and synthesized an enormous amount of valuable empirical information on those procedures, the federal courts' operation, and participants in civil litigation. Some of these raw data will probably warrant greater scrutiny, which may well yield many instructive insights, because Congress and the Judicial Conference assigned RAND the relatively circumscribed charge of assessing comparatively few specific devices in a rather small number of districts.<sup>307</sup>

The FJC also recently completed its analysis of the demonstration courts, which similarly affords helpful perspectives on the efficacy of the mechanisms that these districts applied and considerable additional material on the federal courts' functioning and those involved in civil litigation.<sup>308</sup> The FJC effort is not as informative as the RAND endeavor principally because the Center had a narrower mandate, was studying five districts, had limited resources to perform its evaluation, and assembled, reviewed, and synthesized significantly less data.<sup>309</sup>

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304. See 28 U.S.C. § 471 note (1994); see also RAND EXECUTIVE SUMMARY, *supra* note 121; FJC STUDY, *supra* note 123; JUDICIAL CONFERENCE REPORT, *supra* note 121, reprinted in 175 F.R.D. 62, 73 (1997). The FJC actually performed the evaluation of the demonstration districts. See FJC STUDY, *supra*.

305. See 28 U.S.C. § 475 (1994).

306. See RAND EXECUTIVE SUMMARY, *supra* note 121.

307. See *supra* text accompanying notes 121 & 123.

308. See FJC STUDY, *supra* note 123.

309. See *id.*

However, the comprehensive, detailed nature of the report compiled, as well as the apparent success that several demonstration courts attained in reducing expense or delay, means that the FJC endeavor should advance the inquiry in important ways.<sup>310</sup>

The Judicial Conference submitted its report and recommendation on the pilot court experimentation to Congress in May 1997.<sup>311</sup> The Conference determined that the districts had applied most of the CJRA principles, guidelines, and techniques; however, the Conference did "not support expansion of the Act's case management principles and guidelines to other courts *as a total package*."<sup>312</sup> The Conference based its recommendation primarily on the RAND analysis which ascertained that considerations other than judicial case management measures drive litigation expenses and that the pilot court experimentation per se did not appear to decrease significantly cost or delay because the districts were already applying most of the statutorily prescribed procedures.<sup>313</sup> The Conference noted the RAND Corporation's conclusion that six mechanisms proposed by the CJRA are efficacious, when used together, in reducing delay without increasing expense: "(1) early judicial case management; (2) early setting of the trial schedule; (3) shortening discovery cutoff; (4) periodic public reporting of the status of each judge's docket; (5) conducting scheduling and discovery conferences by telephone; and (6) implementing the advisory group process."<sup>314</sup> The Judicial Conference report, therefore, provided suggested alternatives to expansion of the pilot program, which it premised essentially on statutory experimentation as well as findings, commentary, and suggestions relating to particular measures for effective case management.<sup>315</sup> The alternative procedures and recommendations constituted the Conference's alternative expense and delay reduction program as required by the CJRA.<sup>316</sup>

Numerous specific districts concluded their annual assessments in a timely manner, and some courts produced the evaluations during each year following the one in which they adopted CJRA plans.<sup>317</sup> Many districts conducted carefully structured, full or instructive analyses,<sup>318</sup> while certain courts improved strictures that they applied in ac-

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310. See *supra* notes 292, 297, and accompanying text.

311. See JUDICIAL CONFERENCE REPORT, *supra* note 121, reprinted in 175 F.R.D. 62 (1997).

312. *Id.*, reprinted in 175 F.R.D. 62, 67 (1997).

313. See *id.*, reprinted in 175 F.R.D. 62, 67, 80 (1997).

314. *Id.*, reprinted in 175 F.R.D. 62, 67 (1997); see also *id.*, reprinted in 175 F.R.D. 62, 80-81 (1997).

315. See *id.*, reprinted in 175 F.R.D. 62, 67, 74 (1997).

316. See *id.*, reprinted in 175 F.R.D. 62, 67 (1997).

317. See WESTLAW, CJRA Database; see also RAND PILOT STUDY, *supra* note 108, at 23-59. The District of New Jersey and the Eastern District of Pennsylvania are illustrative.

318. See, e.g., 1993 U.S. DISTRICT COURT FOR THE N. DISTRICT OF GA., ANN. ASSESSMENT OF THE CONDITION OF THE COURT'S DOCKET, available in 1993 WL 524466; N. DIST. OF OHIO ASSESSMENT, *supra* note 292, available in 1993 WL 319599, at 1-3.

cord with information gleaned from the assessments.<sup>319</sup> The Northern District of Ohio has even undertaken an ambitious effort to estimate costs and scrutinize effective ways of decreasing expenses,<sup>320</sup> phenomena which have proved much more elusive than those relating to delay and its reduction.

### 3. *Major Lessons*

The seven-year, unprecedented national experiment with procedures that senators and representatives intended to limit cost and delay in civil litigation affords a number of helpful lessons that involve Congress, the federal courts, districts, judges, court personnel, attorneys, and parties. The ideas have significant implications for them and should be especially useful to individuals and institutions, such as members of the Senate, the House, and the federal bench, as well as the Judicial Conference, that develop public policy for the district courts and that plan future reform efforts.

#### a. *The Modest Nature of the Reform*

The CJRA experience teaches that Congress instituted a relatively modest reform that most federal districts cautiously implemented and that yielded unremarkable results. These determinations are not surprising and might well have been anticipated, particularly given the statute's objectives, sources, and structure; the interests and perspectives of those assigned primary responsibility for effectuating the legislation and for monitoring that implementation; and procedural reforms' intrinsic limitations, including the glacial pace at which they advance and the resistance of expense and delay to procedural amelioration.<sup>321</sup>

The findings of the RAND Corporation and the Judicial Conference that pilot court application of the six CJRA principles and guidelines provided little benefit in terms of important outcomes but that judicial case management can save time may seem inconclusive, while these determinations and the Conference's recommendation against expansion of the CJRA's case management principles and guidelines as a total package might be disappointing. Nonetheless, it is valuable to have systematically collected, analyzed, and synthesized empirical

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319. See, e.g., 1992 U.S. DISTRICT COURT FOR THE DISTRICT OF N.J., ANN. ASSESSMENT OF THE CIV. JUST. EXPENSE & DELAY REDUCTION PLAN FOR IMPLEMENTATION OF THE CIV. JUST. REFORM ACT OF 1990 IN THE DISTRICT OF N.J. 20; General Order No. 92-93 Amending Article Four, Civil Justice Expense and Delay Reduction Plan in the United States District Court for the Eastern District of Texas (Oct. 29, 1992).

320. See Telephone Interview with Geri M. Smith, Clerk, U.S. District Court for the Northern District of Ohio (Feb. 24, 1997).

321. "[J]udicial reform is no sport for the short-winded." MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION xix (Arthur Vanderbilt ed., 1949); see also Burbank, *supra* note 68, at 1928.

data that apparently confirm the conventional wisdom regarding procedure's inherent restrictions and respecting case management.

Congress had substantial responsibility for the modest character of civil justice reform. First, the CJRA's express purpose was decreasing cost and delay in civil litigation through the application of procedures. However, it was uncertain that expense or delay was sufficiently troubling to warrant treatment or that procedural change was the best solution, and even were these circumstances clearer, which measures would be most efficacious.<sup>322</sup> A large percentage of the techniques that Congress prescribed and that courts applied had already received experimentation in numerous districts and many states, much of which testing suggested procedural reforms' intrinsic constraints.<sup>323</sup> Those endeavors indicated, and the CJRA effort seemingly reaffirms, that the federal and state courts have attained practically all of the cost and delay reduction possible with procedures. Indeed, nonprocedural approaches—such as supplementing the federal judiciary's resources, modifying court structure or administration, or altering the current American adversarial system—may more effectively secure additional, meaningful monetary and temporal economies.

Senators and representatives concomitantly ignored or underestimated several phenomena that contribute to, or might decrease, expense and delay in civil litigation while minimally treating them in the CJRA. For example, some advisory groups, districts, and judges observed that criminal cases are significant sources of cost and delay, a factor that the 1990 statute essentially disregarded,<sup>324</sup> and others stated that the more expeditious filling of judicial vacancies could conserve resources and time.<sup>325</sup>

Congress also entrusted most day-to-day CJRA effectuation and oversight to individuals and entities, while structuring and funding the CJRA in ways that may have limited the statute's efficacy, particularly its ambitious implementation. For instance, federal judges, many of whom believed that the legislation was an unwarranted, and even unconstitutional, attempt to micromanage the courts, had virtually exclusive responsibility for effectuating and monitoring the CJRA.

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322. See JUDICIAL CONFERENCE REPORT, *supra* note 121, reprinted in 175 F.R.D. 62, 67, 80 (1997).

323. See *id.*, reprinted in 175 F.R.D. 62, 67, 80 (1997).

324. See, e.g., FINAL REPORT OF THE ADVISORY GROUP, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK pt. II (1991); ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE MIDDLE DIST. OF N.C., *supra* note 131, at 57-58; RAND PILOT STUDY, *supra* note 108, at 21-22. *But cf.* 28 U.S.C. § 472(c)(1) (1994) (requiring analysis of criminal dockets).

325. See, e.g., REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA pt. III(C)(2)(a) (1991); REPORT AND RECOMMENDATIONS OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE DISTRICT OF KANSAS pt. II(B)(1-2) (1991); see also *infra* notes 409-17 and accompanying text (more phenomena). See generally Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527 (1998).

Moreover, senators and representatives might have complicated efficacious implementation and oversight by facilitating simultaneous experimentation in a large number of districts and by seeming to ignore or deemphasize integral features of the federal justice system. These include the individual calendaring scheme that the courts employ, the independence of Article III judges, and the deference that numerous members of the bench accord district judges when operating, and choosing procedures for, their courts. Congress correspondingly appropriated rather few resources to effectuate the CJRA and to monitor implementation.<sup>326</sup>

It should not have been surprising that considerable statutory compliance was honored in the breach. For example, districts varied significantly in terms of the rigor with which they analyzed dockets, promulgated and applied CJRA measures, evaluated those mechanisms' effectiveness, and prepared annual assessments, while most circuit review committees undertook minimal oversight of the strictures that district courts prescribed and enforced.<sup>327</sup>

Finally, even if procedures were more efficacious in reducing expense or delay and all districts and judges were to adopt identical requirements, a major impediment would remain. Certain phenomena, such as the federal courts' structure, disparate local conditions, the perceived need to address dissimilar cases differently, and individual judges' abilities, predilections, and viewpoints, would seriously frustrate uniform procedural administration and application.

#### b. Ironies

CJRA experimentation was replete with ironies, some of which already have been mentioned. One illustration is how the experience apparently sensitized many participants in federal civil litigation to several developments. Perhaps most importantly, the increased balkanization of procedure that testing wrought has seemingly galvanized much of the bar and numerous judges to explore and institute means of decreasing fragmentation, particularly by limiting the proliferation of inconsistent local measures.<sup>328</sup> For instance, a number of districts have comprehensively evaluated local requirements in an attempt to make them simpler and more uniform or have actually abrogated or modified strictures, principally conflicting ones.<sup>329</sup> Indeed, CJRA experimentation that suspended effectuation of the JIA mandates that

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326. See Cavanagh, *supra* note 116.

327. See *supra* notes 227, 267-74, and accompanying text (analyzing districts); *supra* notes 228-29 and accompanying text (analyzing circuit committees); see also *supra* notes 41-43, 53-54, 83-87, 132-41, and accompanying text (suggesting compliance resembles most circuit councils' and districts' discharge of duties to limit local proliferation imposed in JIA and Rule 83).

328. I rely in this sentence and the remainder of this paragraph on Cavanagh, *supra* note 116; see also *supra* notes 132-41 and accompanying text; *infra* note 405 and accompanying text.

329. See *supra* notes 132, 134-35, 318-19, and accompanying text.

Congress intended to reduce local procedural proliferation has rekindled interest in treating the very problem that the JIA was meant to address. The balkanization created concomitantly imposed additional expense and delay, a result precisely the opposite of the legislation's expressly stated goal.

A few ironies involved the CJRA mechanisms that proved to be most efficacious. For example, RAND and the FJC, as well as many judges, attorneys, and litigants, found that the statutorily prescribed procedures employed in pilot and demonstration districts were comparatively ineffective, even though Congress and the courts spent millions of dollars testing and assessing those measures.<sup>330</sup> More specific illustrations are various forms of ADR which were costly and automatic disclosure that apparently operated best in narrow, discrete contexts.<sup>331</sup> In contrast, judicial case management, which judges have practiced for two decades, saved time and perhaps expense, while certain other techniques that districts had used earlier worked well.<sup>332</sup> Some quite successful procedures also were ones that courts and judges invented, a phenomenon that could attest to congressional wisdom in encouraging experimentation from the bottom up and capitalizing on local ingenuity.<sup>333</sup>

Perhaps the consummate irony was the apparent inability of Congress to sustain interest in the reform until its completion. Indeed, the first session of the 105th Congress recessed in November 1997 without definitively resolving the fate of the CJRA, which was ostensibly scheduled to expire on December 1, 1997.<sup>334</sup> Congressional failure to provide conclusively for statutory expiration leaves unclear whether the CJRA actually expired last December partly because the relevant legislative history is sparse and ambiguous.<sup>335</sup> This lack of clarity means that many districts have continued to apply procedures that they prescribed under the CJRA, although such measures that conflict

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330. See *supra* notes 257-61 and accompanying text.

331. See *supra* notes 213-17, 258, 260, and accompanying text.

332. See *supra* notes 289-90, 296, and accompanying text; see also *supra* notes 115-17 and accompanying text.

333. See *supra* notes 291, 293, 297-301, and accompanying text.

334. The statute provides that the "requirements set forth in sections 471 through 478 of title 28, United States Code [(the CJRA)] . . . shall remain in effect for seven years after" the December 1, 1990, date of enactment. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 103(b)(2), 104 Stat. 5096. But see Act of Oct. 6, 1997, Pub. L. No. 105-53, § 2, 111 Stat. 1173.

335. Subsection (b)(2) subjects sections 471 through 478 of the Civil Justice Reform Act to a seven-year sunset provision so that those sections can be thoroughly tested. Upon the expiration of the seven-year period following enactment, federal district courts are no longer required to operate pursuant to the civil justice expense and delay reduction plans mandated by Title I. Congress and the courts then will have a chance to evaluate those provisions and, if warranted, reauthorize them.

S. REP. NO. 101-416, at 63-64 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6852-53.



with the federal rules or United States Code provisions would be invalid if the statute did expire.<sup>336</sup>

### c. Local Legal Culture and Civil Justice Reform

The idea of local legal culture yields instructive insights on CJRA experimentation, even as the seven-year experience enhances understanding of the local legal culture concept. This notion means that norms relating to phenomena, such as judges' productivity, discovery's pace, and lawyers' civility, can differ significantly across districts, may be responsible for the varied expense and time that are needed to resolve civil disputes and could respond to distinctive local procedures.<sup>337</sup>

Several aspects of CJRA testing suggest that the analytical construct of local legal culture, which researchers had employed primarily in the criminal law context, applies more felicitously than was formerly thought to civil litigation.<sup>338</sup> For instance, the experience with judicial case management generally shows that the disparate conditions in particular courts affect cost and delay in civil lawsuits, that these disputes are responsive to diverse case management, and that nationwide deployment of identical measures can be impractical.

CJRA experimentation more specifically revealed numerous, rather informative geographical patterns. Illustrative are certain districts situated in urban areas that encouraged their courts' judges to cooperate and the districts to function as courts qua courts when expediting the disposition of substantial caseloads.<sup>339</sup> Other metropolitan districts were among the initial courts that treated the proliferation of conflicting local strictures or aggressively resisted abusive behavior of attorneys and parties during lawsuits.<sup>340</sup> By comparison, a number of districts that are in sparsely populated locales have exhibited less concern about, and adopted fewer mechanisms to address, delay, litigation and discovery abuse, and incivility.<sup>341</sup> It also seems that some

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336. See 28 U.S.C. § 2071(a) (1994); FED. R. CIV. P. 83. One minor exception to the ideas regarding inconsistent measures prescribed under the CJRA is the provision in certain 1993 federal civil rules amendments, principally governing discovery, that authorizes the courts to promulgate and implement procedures that vary from the federal rules. See, e.g., FED. R. CIV. P. 26(a)(1).

337. See Robel, *supra* note 2, at 1483-84; see also RAND JCM STUDY, *supra* note 119, at 36-37; Carrington, *supra* note 252, at 945-47. See generally THOMAS W. CHURCH ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (1978).

338. Some researchers have persuasively questioned the concept's applicability to civil litigation. See Herbert Kritzer & Frances Kahn Zemans, *Local Legal Culture and the Control of Litigation*, 27 LAW & SOC'Y REV. 535 (1993).

339. See *supra* notes 300-01 and accompanying text.

340. The Eastern and Southern Districts of New York treated proliferation by adopting identical local civil rules. The Southern and the Northern Districts of California and Illinois accounted for one-third of the early Rule 11 decisions under the 1983 revision of Rule 11, and I assume that aggressive resistance to abusive behavior has continued in those courts. See Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1987).

341. Illustrative are the Districts of North and South Dakota.

courts, whose Article III judges and magistrate judges are viewed similarly by attorneys and parties for purposes of civil dispute resolution, serve cultures that enjoy reputations for egalitarianism.<sup>342</sup> In short, these examples suggest that the local legal culture idea applies more usefully to civil litigation than was earlier believed, that districts' varying norms can contribute to differences in the cost and time required for concluding civil cases, and that disparate local circumstances respond to diverse measures.

d. The Unclear Nature of Procedural Reform: Reconciling the CJRA and the JIA

The analysis above indicates that the JIA and the CJRA, as drafted and as effectuated, cannot be comprehensively harmonized and may well conflict in several critical ways. When Congress passed the JIA, it correctly understood that proliferating local requirements were substantially undermining federal civil procedure's uniform, simple, and transsubstantive nature, enlarging judicial discretion, and imposing expense and delay in civil litigation. Congress provided for entities and accorded them responsibilities that would address proliferation's complications, namely, the increasing inconsistency between local strictures and the federal rules and statutes, while it systematized and opened to public scrutiny and involvement local procedural revision processes.<sup>343</sup>

Senators and representatives seemed to perceive that restoring and maintaining the primacy of the national rule amendment process might correspondingly treat proliferation and slow erosion of the fundamental procedural precepts. Statutory prescription for opening federal rule revision to greater public participation and input was meant to enhance the quality of amendments proposed, even though that legislative provision probably exposed this process to increased politicization.<sup>344</sup> Congress, accordingly, reconfirmed and attempted to revitalize several basic procedural concepts, namely, uniformity and simplicity, that underlay the 1938 federal rules, and comprehensive implementation of the JIA might have achieved these purposes. Effectuation of the CJRA, however, essentially supplanted the JIA's aspects that were intended to limit local procedural proliferation, while certain 1993 federal rule revisions accommodated the 1990 legislation.

When Congress passed the CJRA, it emphasized different features of civil justice. Senators and representatives identified cost and delay as important problems in considerable civil litigation and apparently believed that the uniform, simple, transsubstantive system of the

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342. Illustrative are the Districts of Montana and Oregon. See *supra* note 291 and accompanying text.

343. See *supra* notes 74-87 and accompanying text.

344. See *supra* notes 74-79, 154-71, 184-201, and accompanying text.

federal rules was substantially responsible for these complications.<sup>345</sup> Congress's changed conceptualization of the foremost difficulties confronting modern dispute resolution prompted its employment of new techniques to combat them. In contrast with the JIA's purpose of reducing local proliferation, the CJRA facilitated district court experimentation involving potentially inconsistent local procedures that were meant to address expense and delay.<sup>346</sup> Congress also prescribed institutions and assigned them responsibilities that it intended would promote healthy dialogue among judges, attorneys, and parties, across the districts, and between the federal and state courts, thereby fostering reform from the bottom up, and discovery of, and consensus about, cost and delay reduction measures. The CJRA, thus, stressed the procedural precepts implicating prompt, economical dispute disposition, as opposed to uniformity, simplicity, transsubstantivity, and significant process values. The practice of managerial judging and the 1983 federal rules changes best exemplify the themes that Congress emphasized in 1990.

Several dimensions of CJRA effectuation suggest that senators and representatives did not fully conceptualize the legislation's goals and its practical implementation, particularly vis-à-vis the 1988 Act. Most compelling was the 1990 statute's implicit invitation for courts to prescribe local measures that contravened the federal rules or acts of Congress.<sup>347</sup> That provision probably encouraged numerous districts to adopt conflicting requirements and dissuaded circuit judicial councils from scrutinizing, much less abolishing, inconsistent local strictures. The above phenomena, especially the further erosion of a national, uniform code of procedure, witnessed so soon after the JIA's enactment, were ironic because the proliferation of conflicting local requirements was a crucial problem that this legislation specifically attempted to rectify. These particular statutory tensions are not isolated but could epitomize broader inconsistencies. For instance, the JIA's purpose of reviving and increasing uniformity, simplicity, and transsubstantivity clashed with the 1990 Act's objective of implementing local measures that would decrease cost and delay, factors that could be attributed to the uniform, simple, transsubstantive system that the original federal rules instituted.<sup>348</sup>

The CJRA's goals, structure, and timing, and the 1993 federal rules revisions authorizing local option, alone and together, essentially frustrated attainment of the JIA's purposes and suspended attempts to address local proliferation, which had eroded uniformity, simplicity,

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345. See *supra* notes 90-94, 105, and accompanying text.

346. See *supra* notes 107, 112, 252-56, and accompanying text.

347. See 28 U.S.C. § 473(b)(6) (1994); see also *supra* note 346 and accompanying text.

348. Judges also must have the requisite flexibility to apply local strictures that permit the expeditious, economical, and just resolution of cases on local dockets. See Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853 (1989).

and transsubstantivity and increased judicial discretion, cost, and delay. The state of federal civil procedure, therefore, is worse than the condition that Congress considered unacceptable in 1988. The problems entailed in implementing the 1990 statute and the 1993 federal rule amendments examined already have exacerbated the procedural circumstances. In fact, the precepts of uniformity, simplicity, and transsubstantivity that supported the 1938 federal rules are more significantly eroded, while judicial discretion, expense, and delay could be larger than at any time since the rules' adoption. Judges, lawyers, and parties simply confront too many requirements, substantial numbers of which are overly complex, very different, and even inconsistent, or are quite difficult to find, comprehend, and satisfy. These developments have undermined the primacy of federal procedures over local ones, effectively eviscerating the national civil procedure code and enormously complicating federal practice, particularly for entities that litigate in multiple districts, such as the Department of Justice, public interest organizations like the Sierra Club, and large corporations.

Some problems can probably be ascribed less to Congress and to the CJRA as drafted than to additional institutions or the Act's effectuation. For example, the JIA and the CJRA were well-intentioned attempts to address significant difficulties that involve civil procedure at the twentieth century's close. However, congressional enactment, especially of the 1990 legislation, perpetuated, and perhaps compounded, perennial tensions between the legislative and judicial branches that might be unavoidable in the critical field of court rulemaking, implicating, as it must, complex questions of separation of powers and shared duties.<sup>349</sup>

Senators and representatives could have viewed the CJRA's twelfth, open-ended provision as a narrower authorization to prescribe conflicting local requirements than a number of judges considered it.<sup>350</sup> The Advisory Committee concomitantly was more responsible than Congress for the confusion that arose when the 1993 federal rules revisions became effective on the identical date that numerous districts adopted civil justice plans.<sup>351</sup>

Congress may have incompletely understood the objectives, operation, and implementation of the CJRA, particularly its integration with the JIA. Senators and representatives seemingly failed to apprehend that certain central aspects of the two statutes were inconsistent

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349. These ideas may epitomize larger issues involving interbranch relations evinced in annual reports on the judiciary. See, e.g., William H. Rehnquist, Chief Justice of the United States, *1997 Year-End Report on the Federal Judiciary* (Jan. 1, 1998) <<http://www.uscourts.gov/cj97.htm>> [hereinafter *Year-End Report*]; see also Mullenix, *supra* note 2, at 379-82, 399-400; William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 Wis. L. REV. 1.

350. See *supra* note 252 and accompanying text.

351. See *supra* notes 199-212 and accompanying text.

or even that the measures fostered dissimilar, and often diametrically opposed, procedural precepts. Insofar as Congress foresaw that the CJRA could clash with, and suspend, the JIA or prevent realization of the earlier legislation's core purposes, Congress might have meant to limit those impacts or have deemed the discontinuation a temporary inconvenience that was outweighed by the greater need to experiment with local expense and delay reduction mechanisms.<sup>352</sup>

In sum, Congress identified cost and delay as important complications in late twentieth-century disputing and provided for entities and measures that would respond to these problems in the CJRA. Senators and representatives may have not considered comprehensively the legislation's goals, structure, and implementation, especially in light of the JIA. The resolution of this and several related difficulties that I surveyed above could require institutions, strictures, procedural amendment processes, and methods of experimentation that differ from the ones that Congress provided or contemplated in the 1988 and 1990 statutes. Attempts to capitalize on the measures and on their effectuation by emphasizing, building on, and meshing the legislation's finest features and eschewing or limiting the Acts' least desirable dimensions would be more profitable than efforts to harmonize the statutes. This is particularly true given the possibility of the CJRA's expiration and the concomitant prospect of reviving and fully implementing the JIA, which afford the most felicitous solution by maximizing both enactments' benefits.

### III. SUGGESTIONS FOR THE FUTURE

#### A. Introduction

At a rather general level, the objectives of revitalizing and increasing uniformity, simplicity, and transsubstantivity, and of decreasing expense and delay should continue to animate reform efforts. These fundamental procedural precepts, even as diluted, have served the federal courts, Congress, judges, attorneys, parties, and the public remarkably well for six decades and have respected crucial process values, such as broad court access and justice. The propositions, as general principles, also envision that restoration and enhancement of uniformity, simplicity, and transsubstantivity, and reduction of cost and delay are not absolutes, especially when the precepts clash. For example, the successful practice of judicial case management in many districts since the 1970s and reliance on specific, different devices to

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352. The PSLRA may, and the procedural and the products liability reform proposals could, have had analogous, albeit narrower, effects on the CJRA. *See supra* notes 234-36 and accompanying text. The PSLRA passed, and Congress seriously analyzed the other two measures, before RAND even completed the unprecedented study that Congress commissioned. *See supra* notes 234-36 and accompanying text. The PSLRA's revision of nine federal rules in securities litigation also complicates realization of the JIA's goals of restoring the national revision process's primacy and a national procedure code.

resolve complex suits show that expense and delay imperatives can override uniformity and transsubstantivity in some circumstances.<sup>353</sup>

Attempts to maximize realization of the salutary dimensions of the two acts prompt more particularized recommendations. Capitalizing on the legislation's best aspects requires that the primacy of the national rule amendment process be restored. The local procedural status quo that obtained in 1988 should be secured, while the JIA's prescriptions pertaining to local strictures, especially the proliferation of inconsistent requirements, must be comprehensively implemented. The measures receiving CJRA experimentation that saved money or time and that honor significant procedural concepts should be included in the Federal Rules of Civil Procedure. The mechanisms that appeared promising, but were insufficiently efficacious to deserve national application, might be identified for future experimentation.

The 1990 statute should sunset, and the entities and procedural amendment processes that it instituted ought to merge into the ones that existed or were prescribed in 1988. Congress should clearly state that CJRA procedures that were less effective must expire, and districts and judges need to abrogate them. A revision in Federal Rule of Civil Procedure 83, which resembles the 1991 proposed amendment that the Advisory Committee withdrew in apparent deference to CJRA testing, should replace the techniques for experimenting prescribed by the 1990 statute.<sup>354</sup>

In short, the analysis above suggests that the preferable approach is to capitalize on the finest constituents of the JIA and the CJRA. The remainder of this section affords suggestions for the future, primarily respecting entities, procedures, processes, and experimentation.<sup>355</sup> Congress enacted the 1988 and 1990 legislation and has the ultimate power to fashion procedural policy; however, the following recommendations are aimed at all applicable decision makers and participants in federal civil litigation. These encompass Congress, national and local procedural revision bodies, federal districts and judges, court personnel, lawyers, and litigants. Existing institutions can effectuate most of the proposals absent statutory prescription.<sup>356</sup> This section examines the JIA as well as the CJRA because I suggest

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353. See *supra* notes 30-38, 289-90, 292, and accompanying text.

354. See *supra* notes 218-19 and accompanying text; see also *infra* notes 429-35 and accompanying text.

355. These parameters are not completely separable. For example, institutions implement revision processes and adopt procedures through experimentation. The suggestions provide a conceptual framework for analysis with specific examples but leave technical details to others.

356. Congress can institute most of the ideas that I offer, but it might consider creating a national civil procedure commission that could implement many recommendations and would have sufficient independence and resources to develop promising ways of improving civil procedure in the next century. Such a commission must have a staff with no additional duties. A helpful model is the National Commission on Judicial Discipline. See Colloquy, *Disciplining the Federal Judiciary*, 142 U. PA. L. REV. 1-430 (1993).

the 1990 Act's expiration, retention of its premier features, and the 1988 measure's revival and thorough implementation.

### B. *A Preliminary Word About Empirical Data*

The maximum relevant empirical information that can be systematically collected, evaluated, and synthesized should inform decision making on the future of the CJRA, the JIA, and the civil justice system. The RAND Corporation and the FJC assembled, assessed, and synthesized much applicable material in compiling their studies, although both entities apparently gathered considerable raw data that they have not scrutinized and that could be instructive. Moreover, RAND and the Center had relatively narrow assignments to analyze experimentation with comparatively few procedures in some courts.<sup>357</sup> The remaining seventy-nine districts may also have an enormous mass of unexamined or undigested material, while the Administrative Office and the FJC have access to similar information. Judges, advisory groups, lawyers, litigants, and court personnel in all ninety-four districts also might have derived perceptive insights from experimentation that could improve future procedural policy making.

Illustrative of certain ideas in the paragraph above may be the Montana District, the court with which I am most familiar.<sup>358</sup> My attempt to track CJRA implementation since its inception and my service as an advisory group member since 1994, as well as discussions with numerous participants in the court's litigation, have led me to formulate several conclusions that might apply to other districts. For example, the ability and speed with which the court's magistrate judges treat cases may have led numerous attorneys and parties to consider them and Article III judges as similar for purposes of civil dispute resolution. Automatic disclosure has seemed to work well, partly because many lawyers and clients have apparently accommodated, rather than strictly complied with, disclosure strictures and because the court reinforces disclosure with a local sanctioning provision that incorporates, but actually contravenes, Federal Rule 11.<sup>359</sup>

The perception that requirements for preparing papers and participating in activities make time to disposition longer and litigation more costly in the federal district has also enhanced state courts' appeal, even as attorneys' experiences with state court mechanisms, such as mandatory settlement conferences, have seemingly increased their receptivity to the federal district's application of analogous procedures. Some evidence concomitantly suggests that CJRA experimen-

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357. See *supra* notes 119-23 and accompanying text.

358. I rely here on a series of articles that analyze the Montana District. See Carl Tobias, *Ongoing Federal Civil Justice Reform in Montana*, 57 MONT. L. REV. 511, 511 n.1 (1996).

359. See D. MONT. R. 200-5(a)(4); see also FED. R. CIV. P. 11(d); *Sheetz v. Bridgestone/ Firestone*, 152 F.R.D. 628 (D. Mont. 1993).

tation has reduced the federal bar's size. The examination of other courts has afforded, or can offer, similar ideas that could be profitably compared and contrasted.<sup>360</sup>

In short, Congress, in resolving the fate of the CJRA and Congress and the Judicial Conference when considering future reforms, should consult the maximum relevant data. Procedural policy makers must concomitantly eschew reliance on anecdotal information, which advocates apparently invoked to support legal reform proposals in the *Contract with America* and certain aspects of the 1990 statute.<sup>361</sup> All of the material that involves CJRA experimentation has yet to be gathered, evaluated, and synthesized; however, there is ample applicable information on which to premise the recommendations below.

### C. Institutions

#### 1. National Rule Revision Entities

The national rule amendment institutions must recapture and retain major responsibility for changing those strictures that cover federal civil litigation. The revisors have served Congress, the courts, judges, attorneys, litigants, and the public very well since the 1930s, and the entities possess enormous experience and knowledge relating to federal civil procedure. The institutions can most felicitously revitalize, maintain, and increase the essential procedural precepts, especially uniformity and simplicity, even as they implement exceptions, when warranted. The entities' broad perspectives facilitate their development of proposals for improvement that take into account what is preferable for the entire civil justice process. For example, the Judicial Conference has the systemic, expert viewpoint to designate the measures that deserve adoption by all ninety-four districts or that are sufficiently efficacious to support departure from the federal rules for purposes of experimentation or of addressing unusual problems in specific courts.<sup>362</sup> Congress has trained a national perspective on the oversight and change of federal rule revisions; however, it has rarely scrutinized local procedural modifications.<sup>363</sup> Local rules committees that assist the judges in analyzing and altering district court requirements correspondingly can be more solicitous of local concerns than of national uniformity or simplicity.

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360. See, e.g., Mary B. McManamon, *Is the Recent Frenzy of Civil Justice Reform a Cure-All or a Placebo? An Examination of the Plans of Two Pilot Districts*, 11 REV. LITIG. 329 (1992); Linda S. Mullenix, *Civil Justice Reform Comes to the Southern District of Texas: Creating and Implementing a Cost and Reduction Plan Under the Civil Justice Reform Act of 1990*, 11 REV. LITIG. 165 (1992); see also FJC STUDY, *supra* note 123; Cavanagh, *supra* note 116.

361. See *supra* notes 88-105, 234-36, and accompanying text; see also *supra* note 352.

362. See *supra* note 348 and accompanying text.

363. See *supra* notes 58-60, 73, 167, 199-201, and accompanying text. Even when Congress evinced concern about local proliferation in the JIA, Congress itself did not scrutinize local procedures but assigned this task to circuit judicial councils, districts, and individual judges.



The Advisory Committee, as among those institutions—the Committee, the Standing Committee, the Conference, the Supreme Court, and Congress—that are involved in national rule amendment, must remain primarily responsible for studying the federal rules and drafting suggested changes. Every entity above the Advisory Committee in this hierarchy should continue participating but show increasing deference to the institution below it. The Court and Congress ought to remain involved in national rule revision, principally as gatekeepers that reject, modify, or remand proposed alterations that they find inadvisable.

My recommendations honor long-standing tradition, such as the Advisory Committee's recognition and cultivation of uniformity, simplicity, and transsubstantivity. The ideas also reflect the respective interest, expertise, and appreciation for the pragmatic consequences of procedural change that the entities apparently bring, and the time, energy, and money that they can commit, to rule amendment. The suggestions address a number of problematic, and often inconsistent, factors. These include the need for Supreme Court and congressional participation to legitimate rule revision, for multiple institutions with varying perspectives, experience, and resources to review and improve proposals, and for comparatively prompt amendment which too many bodies' involvement confounds. The Court's very deferential scrutiny of the 1993 federal revisions as well as the Justices' disparate views regarding that approach's propriety and the advisability of the Rule 11 and 26 amendments support the circumscribed participation that I recommend for the Court.<sup>364</sup> Congress's vacillation in considering the 1993 changes concomitantly justifies the limited role suggested for it.<sup>365</sup>

## 2. *Local Procedural Revision Entities*

As among those entities that participate in local procedural revision, the local rules committees that the JIA and Federal Rule 83 require should subsume the advisory groups, which the 1990 Act prescribed.<sup>366</sup> Too many institutions with similar responsibilities are involved in the local modification process. The advisory groups have attained their chief objectives of fostering and evaluating broad experimentation and of promoting valuable interchange among judges, lawyers, and parties, and the bodies, namely, local rules committees, that they effectively displaced can ably discharge any duties that remain. The few courts that have yet to name local rules committees must expeditiously appoint them, and these entities should be balanced, in

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364. See *supra* notes 163-65, 197-98, and accompanying text.

365. See *supra* notes 167, 199-210, and accompanying text; see also *infra* paragraph following text accompanying note 431 (suggesting why Congress should exercise caution when statutorily adopting procedures).

366. See *supra* notes 41-43, 83-84, 108-09, 130-32, 140-41, and accompanying text.

terms of plaintiff and defense interests, political views, race, and gender, and have the maximum expertise, perhaps including some CJRA advisory group members whose prior service will be helpful.<sup>367</sup> Specific judges who envision actively adopting new, or amending current, individual judge procedures should probably appoint their own local rules committees. Each local entity can advise districts and judges in developing suggestions for procedural alterations, help secure consensus on the finest strictures, and promote valuable bench-bar interchange.

As among those institutions that are involved in local procedural revision, all of the judges of the ninety-four districts, working with local rules committees, must assume major responsibility for formulating proposed modifications, while particular judges should defer to these entities when contemplating individual judge measures. All of the judges, in consultation with the committees, ought to have the expertise, appreciation of local conditions, and concern for national uniformity and simplicity that are necessary to draft and promulgate local requirements that revive and foster those precepts and that decrease expense and delay.

### 3. *Monitoring Entities*

The courts, the district judges, the local rules committees, and the circuit judicial councils, which the CJRA essentially rendered moribund for the purpose of reducing local proliferation, must reassume, and comprehensively implement, their obligations to review local procedures.<sup>368</sup> Of course, the districts, judges, and committees could thoroughly effectuate the duties by scrutinizing for consistency all local strictures, including mechanisms prescribed under the 1990 statute, and abrogating or modifying measures deemed to conflict.<sup>369</sup> This approach would enable them to limit, if not obviate, the need for external oversight.

Exogenous institutions should assume some responsibility for monitoring local procedures in courts whose judges or local rules committees undertake insufficiently rigorous review. For example, circuit judicial councils, which are to examine periodically the districts' local requirements and abolish or alter those found inconsistent, must discharge these obligations. Few councils have performed the duties principally because the CJRA's implementation effectively suspended

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367. See *supra* notes 83, 108-09, 130, 226, and accompanying text. Advisory group members can improve understanding of the CJRA's history, promote bench-bar exchange, and help harmonize civil justice reform with future procedural efforts. See RAND PILOT STUDY, *supra* note 108, at 13-26; see also JUDICIAL CONFERENCE REPORT, *supra* note 121, reprinted in 175 F.R.D. 62, 67, 82-83 (1997) (recommending continuation of advisory group process).

368. Circuit judicial councils which can best perform oversight should subsume circuit review committees that the CJRA created. See *supra* notes 86-87, 124, and accompanying text.

369. If Congress allows the CJRA to sunset, districts and judges should abrogate inconsistent CJRA procedures, even though they may wish to retain those that proved efficacious.

oversight or because Congress failed to authorize funds for monitoring. The entities might consult the Ninth Circuit Judicial Council's review of fifteen districts' local strictures, as that endeavor shows how to satisfy this responsibility with limited resources, while Congress could facilitate oversight by allocating the requisite appropriations.<sup>370</sup>

If numerous councils remain reluctant to monitor local procedures, even after the CJRA expires and simplifies review by significantly decreasing the number of local requirements that need evaluation, the Judicial Conference or Congress should apply other approaches. For instance, a Conference committee, the FJC, or Administrative Office staff might assist specific councils in conducting oversight. The Conference or Congress could even create a centralized entity, such as a standing committee on local strictures, that would facilitate national implementation of the JIA's provisions related to proliferation by supporting and coordinating efforts at the circuit and district levels.<sup>371</sup> The Local Rules Project, which has compiled voluminous, instructive materials on, and possesses enormous expertise regarding, local procedures, can help realize the above suggestions for reducing proliferation.<sup>372</sup>

#### D. Procedures

As general propositions, federal civil procedures must restore and increase uniformity, simplicity, and transsubstantivity, while limiting judicial discretion and expense and delay. These principles warrant preferring federal rules over local rules, local rules to individual judge procedures, and written strictures rather than unwritten requirements. The ideas, as general propositions, are not inviolable, and permit exceptions, especially when the concepts conflict. For example, the need to experiment with promising measures that save resources or time may undermine somewhat uniformity and simplicity. In discerning the appropriateness of implementing particular mechanisms, decision makers should employ a precisely tuned evaluation that takes into account and balances the core procedural precepts and important process values, such as fairness and court access.<sup>373</sup>

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370. See Heiser, *supra* note 135; Tobias, *supra* note 135; see also Carl Tobias, *Suggestions for Circuit Court Review of Local Procedures*, 52 WASH. & LEE L. REV. 359 (1995).

371. See Carl Tobias, *Some Realism About Federal Procedural Reform*, 49 FLA. L. REV. 49, 78-79 (1997); see also Heiser, *supra* note 135, at 580-81.

372. See *supra* notes 44-54 and accompanying text. Rule 83's 1995 revision proscribing duplicative local procedures should also be implemented. See FED. R. CIV. P. 83 (1995 amend.). It requires as well that "local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference," a system that the Conference recently prescribed and to which numerous districts have conformed. *Id.* advisory committee's note (1995 amend.); see also *supra* note 54.

373. See Robel, *supra* note 2, at 1484 (suggesting similar test based on local legal culture). I examine local procedures before national ones for ease of analysis.

## 1. Local Procedures

The JIA's mandates pertaining to local procedural review, whose enforcement the CJRA's implementation effectively suspended, should be strictly observed, so as to halt and even reverse proliferation. All local requirements, particularly procedures of individual judges, including general, standing, special, and minute orders, and unwritten practices, that are not needed or that conflict with or duplicate the federal rules or acts of Congress must be abrogated.<sup>374</sup> The largest number of remaining local strictures should be incorporated in local rules, while all local procedures must be reduced to writing. Districts and judges, however, should maintain sufficient flexibility to experiment with local requirements that facilitate the discovery of efficacious new measures and to employ techniques that address unusual conditions that arise in specific courts.<sup>375</sup>

When resolving the fate of the CJRA and local procedures applied thereunder, Congress must consult the maximum relevant empirical data that is available on the mechanisms applied in the pilot and demonstration districts and the remaining courts. This material includes the information regarding the pilot and demonstration districts that RAND and the FJC studied and on which programs the Judicial Conference reported to Congress, as well as the annual assessments compiled by every court. The Conference apparently found, and Congress should remember, that invocation of procedures before the CJRA's passage suggests, and the 1990 statute's implementation apparently confirms, that procedural reforms have achieved practically all of the cost and delay reduction that could reasonably be expected.

The Congress must accurately categorize the measures that received CJRA experimentation. The strictures that clearly conserved expense or time while respecting significant process values should be included in the federal rules.<sup>376</sup> Congress could legislatively prescribe those techniques for which no doubts remain. Procedures as to which there is lingering uncertainty may deserve consideration in the normal course of national rule revision. Additional mechanisms that exhibited promise in limiting cost or delay but were insufficiently efficacious to justify national adoption because the money or time saved was unclear or they eroded other tenets might be identified for further experimentation. For example, increased reliance on magistrate judges, which has ameliorated docket pressures in multiple courts, and certain types of case management, which may be inherently district-

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374. See 28 U.S.C. § 2071(a) (1994); FED. R. CIV. P. 83.

375. See *supra* note 348 and accompanying text; *infra* notes 429-35 and accompanying text.

376. The CJRA requires the Judicial Conference to make this judgment regarding the six statutorily prescribed principles and guidelines. See 28 U.S.C. § 471 note (congressional statement of findings).

specific, probably need continued testing to ascertain whether they warrant broader application. Experimentation could proceed pursuant to a variation of the 1991 proposed revision in Rule 83 or under a statute analogous to legislation prescribing court-annexed arbitration.<sup>377</sup>

Existing information suggests that Congress should allow the CJRA to expire, which means that districts and judges must abolish CJRA procedures that conflict with or replicate federal rules or provisions in the United States Code. It is somewhat difficult to designate conclusively particular measures that deserve nationwide adoption because their evaluation remains unfinished and all relevant material has not been systematically analyzed and synthesized. However, rather definitive determinations can be posited by relying upon the RAND and FJC studies, the Judicial Conference Report, and much information that is available from additional sources, namely, the courts that experimented.<sup>378</sup> It now seems that some techniques in the general fields of case management, ADR, and discovery, as well as a number of devices that the CJRA did not prescribe, will limit expense or delay and respect the major precepts and important process values.

Narrower suggestions regarding certain procedures can be afforded. Considerable judicial case management conserved time and perhaps cost, but the context-specific nature of most such activity augurs against broad-based, much less national, application.<sup>379</sup> Differentiated case management seemed to function reasonably well in the two demonstration districts that intensively practiced it and in some other courts for very complex and simple or ordinary litigation; however, many judges found that the detriments of classifying cases into tracks outweighed the benefits.<sup>380</sup> Reliance on several ADR techniques in a few districts apparently yielded financial or temporal savings, but more courts ascertained that most ADR techniques minimally reduced expense or delay while imposing significant cost.<sup>381</sup> The employment of certain discovery devices in a small number of districts also seemed to conserve money or time.<sup>382</sup> Numerous courts applied a miscellany of additional procedures principally pursuant to the CJRA's open-ended prescription, and certain of these measures decreased expense or delay.<sup>383</sup>

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377. See *supra* notes 74, 218-19, and accompanying text; *infra* notes 429-35 and accompanying text.

378. See, e.g., RAND EXECUTIVE SUMMARY, *supra* note 121; FJC STUDY, *supra* note 123; JUDICIAL CONFERENCE REPORT, *supra* note 121, reprinted in 175 F.R.D. 62 (1997).

379. See *supra* notes 289-90 and accompanying text.

380. See *supra* note 264 and accompanying text. But see *supra* note 292 and accompanying text.

381. See *supra* notes 289, 296-97, and accompanying text.

382. See *supra* notes 293-94 and accompanying text; see also *infra* notes 387-88 and accompanying text (analyzing automatic disclosure as national procedure).

383. See *supra* notes 298-301 and accompanying text; see also 28 U.S.C. § 473(b)(6) (1994).

A special effort should be instituted to evaluate all of those local requirements receiving experimentation that RAND or the FJC did not assess. For example, the Judicial Conference, the Administrative Office, the FJC, individual districts, judges, and advisory groups should assemble, analyze, and synthesize the maximum relevant empirical data and forward that material to Congress for its consideration and action in light of the guidance above.<sup>384</sup>

## 2. *National Procedures*

Affording very specific ideas is problematic because, for instance, it is difficult to predict the future of civil litigation and practice, a situation that federal civil procedure's fractured present state compounds. Nonetheless, I can provide rather general recommendations with illustrations gleaned primarily from the 1993 federal rule revisions pursuant to the disclaimer that those changes remain in the relatively nascent phases of effectuation.

Federal Rule 11's 1993 amendment has seemingly had certain impacts that the drafters intended. The new version sharply limited incentives to apply it, thus reducing satellite litigation over the provision and decreasing expense, delay, and chilling effects attributable to the rule.<sup>385</sup> Several factors complicate conclusive determinations about the effectiveness of automatic disclosure. These include problems of implementation, such as erratic enforcement by some districts that formally adopted the technique<sup>386</sup> and the controversial character of the federal amendment prescribed, the dearth of analysis accorded the mechanism, and the unclear results secured in the evaluations undertaken. Anecdotal information suggests that the measure's efficacy is context dependent.<sup>387</sup> The Supreme Court or Congress, therefore, should probably refine disclosure by restricting its application to situations in which the device seemed very effective or by authorizing continued experimentation in districts that most successfully implemented disclosure.<sup>388</sup>

The local option procedure, which the revision entities incorporated in the 1993 federal rule amendments principally out of deference to contemporaneous CJRA testing, should be deleted.<sup>389</sup> The

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384. See *supra* notes 348-56 and accompanying text.

385. I premise this on an informal survey of reported and unreported Rule 11 opinions and on discussions with many participants in federal civil litigation. See also JOHN SHAPARD ET AL., REPORT OF A SURVEY CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE (Federal Judicial Ctr. ed., 1995); Laura Duncan, *Sanctions Litigation Declining*, A.B.A. J., Mar. 1995, at 12.

386. See *supra* notes 202-13, 258, and accompanying text.

387. See *supra* notes 215-16 and accompanying text; see also *supra* notes 294-95 and accompanying text.

388. These suggestions are premised on experimentation with disclosure to date and on the conversations *supra* notes 211-13, 215. See also Brendan M. Stephens, *Review of Federal Civil Discovery Rules Aims to Cut Cost, Delay*, CHICAGO DAILY L. BULL., Feb. 26, 1997, at 1.

389. See *supra* notes 220-23 and accompanying text.

technique imposed more disadvantages, implicating consistency and simplicity and corresponding cost and delay, than benefits in terms of enhanced flexibility for experimentation with mechanisms tailored to individual districts' conditions.<sup>390</sup> The Supreme Court or Congress should eliminate most other authorizations for local variation in the federal rules, unless there is a compelling reason to employ different procedures in the ninety-four courts. For instance, Rule 16's local option proviso appears generally to facilitate the practice of judicial case management, which can vary significantly among districts, and specifically to accommodate the need for particularized, disparate treatment of complex and simple civil lawsuits.<sup>391</sup>

The rule revision entities and Congress may want to consider whether several recent trends that involve federal civil litigation should be addressed more expressly and comprehensively in the existing federal rules. Examples mentioned immediately above are widespread reliance on judicial case management and on diverse measures for handling complicated and routine disputes. The revisors or Congress could explicitly and thoroughly provide in the rules, or adopt separate sets of federal rules, for case management and for different treatment of complex and ordinary lawsuits. However, the current prescription in Rule 16, the *Manual for Complex Litigation, Third*, and numerous courts' local procedures for both practices might well suffice.<sup>392</sup> Additional modern trends include the declining willingness of many judges and attorneys to adjudicate civil cases as well as their increased interest in various alternatives to dispute resolution for settling lawsuits, which are manifested in the rise and growth of managerial judging and of ADR, as confirmed by CJRA experimentation.<sup>393</sup> It may now be appropriate, therefore, to elaborate the rather sparse provision in the federal rules for ADR and settlement.

### E. Procedural Revision Processes

#### 1. The National Process

The national rule revision process, rather than local procedural amendment processes, should regain and retain principal responsibility for modifying those strictures that cover federal civil litigation. The national process has served the courts, Congress, lawyers, parties, and the public exceptionally well for six decades. It is best positioned and equipped to revive and enhance the essential procedural precepts,

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390. See *supra* notes 220-23 and accompanying text; see also *infra* notes 429-35 and accompanying text (illustrating more effective methods of experimentation).

391. See FED. R. CIV. P. 16(c); see also *supra* notes 30-40, 290, and accompanying text.

392. See FED. R. CIV. P. 16; MANUAL FOR COMPLEX LITIGATION, THIRD (1995); *supra* notes 30-40, 49, and accompanying text.

393. For astute exposition of the ideas in this sentence and the next, see Resnik, *supra* note 8, at 549-55; Judith Resnik, *From "Cases" to "Litigation,"* LAW & CONTEMP. PROBS., Summer 1991, at 5; see also *supra* notes 31, 57, 122, 296-97, and accompanying text.

while the process has accumulated a wealth of expertise and can canvass and take into account the views of the entire federal justice system and its ninety-four districts when drafting proposed rule changes. For instance, the process is a repository of ideas for promising new measures that could improve federal civil procedure, and it can survey the courts and identify those mechanisms that are sufficiently effective to be incorporated in the federal rules. The multiple phases of review and revision that comprise the process and its provision for substantial public participation and for serious consideration of public input improve the quality of draft modifications and ostensibly insure that the amendments adopted are clear, fair, and responsive to the needs of all participants in federal civil litigation. These factors and the methodical, systematic manner in which the process unfolds can galvanize consensus, particularly among judges, lawyers, and parties, regarding the efficacy of proposals.

A few peculiarities that attended the proceedings that culminated in promulgation of the 1993 federal rules revisions complicate analysis of the changes in the national amendment process that the JIA imposed.<sup>394</sup> This process, which was based primarily on an administrative law construct of federal administrative agency rulemaking, functioned rather efficaciously, although certain of its aspects may warrant alteration or refinement. The JIA's strictures apparently strike an appropriate balance among numerous relevant, and often competing, factors. These include the benefits, such as the need for public comment that will inform and enhance the procedural changes developed and concomitant public acceptability and accountability, of greater openness and public involvement.<sup>395</sup> More specifically, written submissions and oral presentations of the public apparently convinced the Advisory Committee to institute modifications that improved the preliminary draft proposals covering Rule 11 and automatic disclosure.<sup>396</sup> Increased openness and public participation also had certain detrimental impacts, namely, the time and effort required to address redundant or erroneous contributions and the possibility of politicizing rule revision which can undercut merits-based determinations.<sup>397</sup>

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394. See *supra* notes 142-43 and accompanying text.

395. See, e.g., Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 528-29 (1970) (affording analogous insights in agency context); Carl W. Tobias, *Of Public Funds and Public Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in Administrative Proceedings*, 82 COLUM. L. REV. 906, 941-45 (1982) (same).

396. See, e.g., *supra* notes 161-62, 184-92, and accompanying text.

397. These are fixed costs of openness. See, e.g., Cramton, *supra* note 395, at 536; Tobias, *supra* note 395, at 946-47. The balance may be proper, but Congress might tinker with its model by analyzing the process's length and amendment's frequency. See SUBCOMMITTEE ON LONG RANGE PLANNING TO THE COMM. ON RULES OF PRACTICE, PROCEDURE AND EVIDENCE OF THE JUDICIAL CONFERENCE OF THE U.S., *A SELF-STUDY OF FEDERAL JUDICIAL RULEMAKING* (1995), reprinted in 168 F.R.D. 679 (1996) [hereinafter SELF-STUDY].



Having partially assimilated federal rule amendment to federal agency rulemaking, Congress and the judiciary may want to decide whether that development should be more thoroughly effectuated. For example, the process for soliciting, analyzing, and considering public suggestions might be enhanced by specifically prescribing formal procedures for the Supreme Court to secure and take into account public input or requiring written responses of the other revision entities to public submissions.<sup>398</sup>

More proposals for changing the federal rules must be based on actual experience involving careful experimentation and stringent assessment of measures' effectiveness with the systematic collection, evaluation, and synthesis of applicable empirical information. Illustrative of these ideas are the troubling recent experience with automatic disclosure and the difficulties implicating Rule 11's 1983 modification and its consequent enforcement, which necessitated the 1993 amendment.<sup>399</sup> These complications can be partially ascribed to the lack of experience with the recommended revisions and the paucity of information on how the mechanisms operated in practice before the alterations were formally proposed and adopted.<sup>400</sup>

## 2. *Local Processes*

Numerous propositions respecting the entities that have responsibility for local procedural amendment and the local requirements themselves are relevant to local processes for modifying procedures.<sup>401</sup> Most importantly, there must be processes that scrutinize all local strictures, eliminate any provisions that conflict or are unnecessary, include the maximum number of measures that are not local rules in those procedures, restrict the quantity of local requirements, and reduce every local stricture to written form.<sup>402</sup>

Some of the above ideas regarding the national rule revision process also implicate the JIA's commands that the procedures for changing existing, or adopting new, local measures be regularized and opened to the public.<sup>403</sup> For example, several reasons complicate assessment of these processes' efficacy. Some courts only recently adopted amendment procedures, while a small number of districts have held revision proceedings, and the CJRA discontinued the

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398. See Tobias, *supra* note 147, at 144-46. See generally SELF-STUDY, *supra* note 397, reprinted in 168 F.R.D. 679, 705-06 (1996).

399. See *supra* notes 174-82 and accompanying text.

400. See *supra* notes 174-82 and accompanying text; see also *infra* paragraph following text accompanying note 423 (suggesting why national revision process should generally take precedence over statutory prescription of procedures).

401. See *supra* notes 366-67, 374-84, and accompanying text.

402. See *supra* note 288 and accompanying text.

403. See *supra* notes 394-400 and accompanying text; see also *supra* notes 75-80 and accompanying text (affording 1988 Act's local procedural requirements).

processes' operation in additional courts.<sup>404</sup> However, a few districts have apparently conducted efficacious proceedings, and other courts capitalized on that statute's effectuation to reconsider, reformulate, and enhance their local strictures.<sup>405</sup>

The JIA's mandates covering local procedural revision, like the national process, seemed to accommodate fairly relevant considerations, such as the need for helpful public comment to improve local requirements and for minimizing politicization of amendment procedures.<sup>406</sup> These analogous conclusions regarding the national and local processes indicate that suggestions relating to national revision have similar local applicability. An important illustration involves regularizing and opening local processes to public scrutiny. All of the district judges in particular courts must cooperate with the local rules committees to study local procedures and develop proposals for change, provide the public and the bar notice of the suggested modifications, and solicit input and consider those views when finalizing amendments. These judges and entities might correspondingly rely on initiatives that the CJRA prompted. For example, they should continue fostering the constructive exchange of ideas among judicial officers and counsel, the federal districts, and state court systems that pervaded civil justice reform.

#### F. *Beyond the CJRA*

Once senators and representatives allow the CJRA to sunset, and federal districts and judges abolish inconsistent local procedures applied thereunder, Congress and the judiciary should explore future reforms. The touchstones for any general course of action and its specific constituents must be the restoration and enhancement of uniformity, simplicity, and transsubstantivity, and significant process values, the reduction of cost and delay, and the careful harmonization of those precepts when they are in tension.

The legislative and judicial branches should ascertain as precisely as possible the need to save additional resources or time in resolving civil litigation, and, if either is substantial, how further decreases can best be realized. Assuming that expense and delay remain sufficiently problematic to warrant ongoing efforts aimed at curbing them, Congress and judges might evaluate the advisability of continuing to apply procedural solutions. Much of the above examination suggested, and CJRA experimentation apparently reaffirmed, that federal and state

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404. See *supra* notes 130-31, 136.

405. See, e.g., U.S. DIST. COURT FOR THE MIDDLE DIST. OF GA., PLAN TO MINIMIZE COST AND DELAY OF CIVIL LITIGATION 5 (1993); Tobias, *supra* note 297, at 350-51 (discussing Western District of Missouri); Tobias, *supra* note 131, at 104 (discussing Southern District of West Virginia).

406. See *supra* notes 394-400 and accompanying text.

courts have probably achieved all that could reasonably be expected by invoking procedures.<sup>407</sup>

Congress and the judiciary, therefore, must decide whether cost or delay is troubling enough to deserve treatment with less conventional, more controversial approaches and, if so, what measures would be most efficacious in terms of conserving money or time, of restoring and enhancing uniformity, simplicity, and transsubstantivity while honoring related process values, and of maximizing other benefits and minimizing additional disadvantages. If the legislative and judicial branches choose to proceed, they can consider and apply a broad spectrum of possibilities.

Senators and representatives could rather easily implement a number of alternatives that may reduce expense or delay in civil lawsuits. Several options involve federal court resources. For instance, Congress might appropriate larger budgets for the federal judiciary,<sup>408</sup> thereby enabling the courts to institute measures that could facilitate civil dispute resolution and limit procedural proliferation in the districts. More specifically, numerous circuit judicial councils would probably discharge their responsibility to review local strictures for consistency, were legislative funding earmarked for that purpose.

Congress might augment federal court resources by authorizing new judgeships which would permit the districts to resolve civil cases more rapidly. The legislative branch has periodically approved additional judges since the 1960s, and as recently as 1990.<sup>409</sup> However, the current Congress, with Republican Party majorities in each house, seems unlikely to create judgeships during the administration of a Democratic president. Even if Congress approved more judges, the Senate's inability to fill federal court vacancies efficiently could limit this approach's promise.<sup>410</sup> In any event, senators should implement numerous suggestions for expediting nominees' confirmation because promptly appointing members of the bench and seating the full com-

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407. See *supra* notes 321-27 and accompanying text.

408. See *Year-End Report, supra* note 349, at I.A.

409. See Federal Judgeship Act of 1990, Pub. L. No. 101-650, tit. II, §§ 201-206, 104 Stat. 5089, 5098-5104; see also Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629; S. 678, 105th Cong. (1997), available in WESTLAW, 1997 Cong. US S. 678 (Cong-Billtxt); GORDON BERMANT ET AL., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS 3-9 (1993).

410. See THE MILLER CENTER OF PUBLIC AFFAIRS, IMPROVING THE PROCESS OF APPOINTING FEDERAL JUDGES: A REPORT OF THE MILLER CENTER COMMISSION ON THE SELECTION OF FEDERAL JUDGES 3-4 (1996) [hereinafter IMPROVING]; Neil A. Lewis, *Clinton Has a Chance to Shape the Courts*, N.Y. TIMES, Feb. 9, 1997, at A30; see also *infra* notes 421-22 and accompanying text. See generally JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 102-05, 137-40 (1995) [hereinafter LONG RANGE PLAN]; JUDICIAL CONFERENCE REPORT, *supra* note 121, reprinted in 175 F.R.D. 62, 88-89 (1997); Tobias, *supra* note 325; Orrin G. Hatch, *Judicial Nominees: The Senate's Steady Progress*, WASH. POST, Jan. 11, 1998, at C9.

plement of judges authorized will decrease cost and delay in civil litigation.<sup>411</sup>

Additional possibilities do not directly implicate federal court resources. For example, Congress might attempt to write clearer legislation that would ostensibly save the expense and time entailed in seeking judicial resolution of the meaning of statutory language.<sup>412</sup> The difficulty inherent in drafting unambiguous terminology and the ease of articulating multiple plausible interpretations, however, probably limit this alternative's utility.<sup>413</sup>

Congress could also reverse, halt, or slow its virtually uninterrupted, three-decade expansion of federal court civil and criminal jurisdiction. For instance, senators and representatives have adopted fewer statutes that enlarge civil jurisdiction during the 1990s than in comparable periods of the 1960s and 1970s,<sup>414</sup> while the 104th Congress arguably restricted jurisdiction by passing the Prison Litigation Reform Act, the Antiterrorism and Effective Death Penalty Act, and the Private Securities Litigation Reform Act.<sup>415</sup> However, the three measures undercut the important process value of court access, as might other efforts to limit jurisdiction. Moreover, these developments only constitute recent, and perhaps anomalous, exceptions to jurisdiction's apparently inexorable growth, which senators and representatives seem to find an irresistible, cost-free means of cultivating constituents, while passage of major crime legislation in 1994 testifies to these phenomena.<sup>416</sup>

Congress or the federal courts could explore and apply structural, administrative, or organizational remedies, some of which are appar-

411. See, e.g., IMPROVING, *supra* note 410, at 3-5, 11; Laura E. Little, *Loyalty, Gratitude and the Federal Judiciary*, 44 AM. U. L. REV. 699, 732-36 (1995); Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309, 325 (1996); see also *Year-End Report*, *supra* note 349, at I.A.

412. See, e.g., 28 U.S.C. § 472(c)(1)(D) (1994); Exec. Order No. 12,778, § 2, 3 C.F.R. 363 (1992); REPORT OF THE CIVIL JUSTICE ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA pt. 1, II (1991); see also CONFERENCE ON ASSESSING THE EFFECTS OF LEGISLATION ON THE WORKLOAD OF THE COURTS: PAPERS AND PROCEEDINGS (A. Fletcher Mangum ed., Federal Judicial Ctr. 1995); RAND PILOT STUDY, *supra* note 108, at 22; Tobias, *supra* note 196, at 1535-36.

413. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); see also William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

414. See, e.g., Tobias, *supra* note 11, at 284-85; Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1270 (1996) (stating that since the 1960s, statutes that expanded federal district court criminal and civil jurisdiction have continuously been passed).

415. See Act of Apr. 26, 1996, Pub. L. No. 104-134, 110 Stat. 1321; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2241 (1996)); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737; *supra* notes 234-35 and accompanying text.

416. See Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C.A. §§ 13701-14223 (West 1995 & Supp. 1998); see also Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (1994)). See generally LONG RANGE PLAN, *supra* note 410, at 21-39.

ently so nontraditional that they have never been implemented. For example, several districts have encouraged the courts' judges to cooperate in resolving cases and the districts to function as a court *qua* court.<sup>417</sup> A more unconventional way to attain similar results might be alteration of the individual calendaring system that judges currently use; however, that modification would forfeit the regime's benefits and be controversial.

The legislative and judicial branches could correspondingly examine and institute less traditional approaches, such as changes in the existing American adversarial system. Illustrative are the English Rule, whereby losing parties pay prevailing litigants' attorney's fees, and judges' assumption of a more active, or inquisitorial, judicial role.<sup>418</sup> These and numerous other measures, which are widely accepted in England and Europe, may deserve exploration, although they have historically been perceived as too unconventional for adoption in the United States.<sup>419</sup> Congress, and the bench as well, might evaluate means of changing lawyer and client conduct, including their limited ability to appreciate the complexity and stakes of civil lawsuits and to predict accurately case outcomes, which ultimately increases litigation costs. The legislative and judicial branches could explore ways of improving this behavior of attorneys and parties; however, the measures available may seem overly intrusive or might prove inefficacious.

### G. *The Future of Congressional-Judicial Relations with Special Reference to Procedural Policy Making*

Congress and the federal judiciary must undertake concerted efforts to improve frayed, if not deteriorating, relationships between the coordinate branches of government. Emblematic, and most relevant to the issues treated in this article, was the CJRA's enactment. Passage worsened long-standing legislative-judicial conflicts, a phenomenon that may inhere in the important area of court rulemaking. Tensions relating to rule revision, however, could well be symptomatic of considerably broader difficulties implicating interbranch relations. For instance, members of Congress recently castigated individual judges for their rulings in specific cases, and this activity may have compromised judicial independence or bred public disrespect for the

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417. See *supra* notes 300-01 and accompanying text.

418. See, e.g., John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); John Leubsdorf, *Toward History of the American Rule on Attorney Fee Recovery*, LAW & CONTEMP. PROBS., Winter 1984, at 9. See generally Robert L. Rossi, ATTORNEYS' FEES § 7:4 (2d ed. 1995).

419. For example, the Supreme Court has adhered to the American Rule. See *Alyeska Pipeline Sewer Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Few states have correspondingly adopted the English Rule. See generally Langbein, *supra* note 418.

courts.<sup>420</sup> Moreover, the Senate Judiciary Committee circulated questionnaires to judges asking how they spend time, a practice that posed a similar, albeit less troubling, threat.<sup>421</sup> Members of each branch have also participated in disputes over courthouse construction, federal courts appropriations, and whether vacancies created by judges who assumed senior status should be filled.<sup>422</sup>

These controversies, which are representative, illustrate the critical need for Congress and the federal judiciary to enhance interbranch relationships by increasing cooperation and communication, especially through candid and clear consultation on matters of significance to either branch. One idea that members of Congress and the bench should explore, and probably implement, is deferring to the coordinate branch in areas for which it is primarily responsible or that implicate specific expertise. For example, senators and representatives must refrain from attacking federal judges for decisions in particular lawsuits because this activity could undercut judicial independence and public respect. Congress might also accede in the field of federal procedural revision to members of the judiciary, who have more expertise and day-to-day experience with amendments' practical impacts and responsibilities. Judges should similarly avoid actions that unduly pressure senators and representatives to restrict federal court jurisdiction, lest the behavior be perceived as trenching on an area principally entrusted to members of Congress.<sup>423</sup>

The importance of ameliorating interbranch tensions and several other reasons, such as the need to restore and foster the primacy of the federal rules, the national revision process, and the fundamental tenets, indicate that Congress must exercise greater caution in legislating procedures. Senators and representatives should rarely include strictures that conflict with the federal rules in substantive statutes, much less pass procedural enactments, such as the Attorney Accountability Act, which would have significantly amended Rule 11 shortly

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420. The ABA was so concerned by this dynamic that it created a special commission on the issue. See John Gibeaut, *Taking Aim*, A.B.A. J., Nov. 1996, at 50; *American Bar Association Examines Judicial Independence*, THIRD BRANCH, Sept. 1996, at 2; John Gibeaut, *Mending Judicial Fences*, A.B.A. J., Aug. 1997, at 92.

421. See *Appellate Survey Results Released*, THIRD BRANCH, June 1996, at 5; *Conference Will Submit Institutional Response to Grassley Survey*, THIRD BRANCH, Feb. 1996, at 12.

422. See *Hearing on Conserving Judicial Resources: Considering the Appropriate Allocation of Judgeships in the U.S. Court of Appeals for the Fourth Circuit Before the Subcomm. on Admin. Oversight and the Courts of the Senate Judiciary Comm.*, 105th Cong. 1 (1997); *Bill to Prioritize Buildings Passes*, THIRD BRANCH, June 1996, at 1; William H. Rehnquist, *1995 Year-End Report on the Federal Judiciary* (1995), reprinted in 19 AM. J. TRIAL ADVOC. 491, 492-93 (1996); see also *105th Congress' First Session Productive for Judiciary*, THIRD BRANCH, Dec. 1997, at 1-5.

423. See LONG RANGE PLAN, *supra* note 410, at 21-39, 134-35; see also Lauren K. Robel, *Impermeable Federalism, Pragmatic Silence, and the Long Range Plan for the Federal Courts*, 71 IND. L.J. 841 (1996). Some disputes mentioned above are close questions and may reflect the healthy aspect of interbranch tension.

after its substantial 1993 revision.<sup>424</sup> Indeed, Congress could restrict legislative prescription of procedures to modifying flawed federal rule amendments as the final decision maker in the national revision process. Senators and representatives might even want to remove from existing acts procedural provisions that contravene the federal rules, a phenomenon manifested when the PSLRA partially amended nine of those rules, unless the requirements' deletion would narrowly constrict federal court access or unfairly interfere with settled expectations.<sup>425</sup>

Much said above in this subsection and in the article, especially implicating legislative branch participation in national rule revision, involves Congress's institutional competence as a procedural policy maker and suggests that it assume a comparatively limited role in the future.<sup>426</sup> For instance, senators and representatives apparently did not attempt to harmonize the CJRA with the JIA or at least failed to think thoroughly through the two measures' effectuation. Moreover, Congress had insufficient interest in the CJRA to monitor closely its implementation or to abstain from embarking on new initiatives before the 1990 effort had received evaluation. Legislative introduction and consideration of the legal reforms in the *Contract with America* and passage of the PSLRA preceded completion of the RAND and FJC studies, Judicial Conference reports, and a recommendation to Congress predicated thereon, and congressional resolution of the CJRA's fate.<sup>427</sup> The PSLRA's partial modification of numerous federal rules in securities cases concomitantly eroded those provisions, uniformity, simplicity, and transsubstantivity and the JIA's critical purpose of restoring the primacy of the federal rules and national rule revision.<sup>428</sup> Indeed, Congress may lack the requisite understanding of CJRA experimentation to make well-informed decisions regarding statutory expiration and, therefore, might consider deferring to the suggestions of the Judicial Conference.

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424. See H.R. 988, § 4, 104th Cong. (1995); see also Tobias, *supra* note 234, at 707-10, 721-24. See generally *supra* notes 234-35 and accompanying text.

425. See *supra* notes 234-35, 352, and accompanying text. I appreciate that Congress meant the PSLRA to curb litigation abuse, while it has legislated many procedures to facilitate litigation vindicating rights of statutory beneficiaries, such as discrimination victims. See Tobias, *supra* note 11, at 285, 314-17. I could also be criticized for advocating a double standard; however, the needs for broad court access and to honor settled understandings justify differential treatment.

426. See Burbank, *supra* note 210, at 856; Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 800-05, 817-18 (1993); see also Colloquy, *Perspectives on Supplemental Jurisdiction*, 41 EMORY L.J. 3, 3-112 (1992) (debating efficacy of 1990 supplemental jurisdiction statute); *supra* note 73 and accompanying text (describing Rule 4's legislative revision).

427. See *supra* notes 121, 123, 234-35, and accompanying text.

428. See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737; see also Carl Tobias, *Reforming Common Sense Legal Reforms*, 30 CONN. L. REV. 537, 550-52 (1998); Tobias, *supra* note 234, at 724-26.

Finally, nothing that I stated earlier in this article is intended to intimate that local district testing of promising procedures for reducing expense or delay or fostering significant process values must cease. On the contrary, my recommendations are completely compatible with, and I wholeheartedly endorse, efficacious future experimentation, while senators and representatives should prescribe the maximum feasible testing pursuant to the ideas below.

### H. Experimentation

Congress should provide for future experimentation with a comprehensive, balanced approach, premised on a modified version of the 1991 proposed revision in Federal Rule 83 that the Advisory Committee withdrew out of apparent solicitude for the ongoing CJRA endeavor.<sup>429</sup> This suggested amendment would have empowered any district with Judicial Conference authorization to test for as much as five years local measures that contravene the federal rules or acts of Congress.<sup>430</sup> One or more of the ninety-four courts could function as laboratories for experimenting with mechanisms that seem efficacious enough to deserve broader application.<sup>431</sup>

The seven-year CJRA effort and recent experience involving court-annexed arbitration might also guide future testing. For instance, the 1990 statute's implementation teaches the importance of centralized coordination and oversight and cautions against too much simultaneous experimentation with significant numbers of inconsistent procedures. The court-annexed arbitration endeavor concomitantly illustrates the advisability of testing and evaluating specific devices in relatively few districts and gradually expanding work with techniques that prove effective.<sup>432</sup> Courts, judges, the Judicial Conference, and Congress, therefore, should carefully consider and calibrate experimentation.

Each of the district judges in conjunction with local rules committees of all ninety-four courts might study their local circumstances when designing and proffering experimental programs. These judges and entities could draw upon, and perhaps elaborate, the CJRA's effectuation in their own and the remaining districts, as well as state civil justice reform activities, when analyzing and designating measures that might warrant testing and when developing experimental proto-

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429. See *supra* notes 218-19 and accompanying text. I rely substantially here on A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991); Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, LAW & CONTEMP. PROBS., Summer 1988, at 67; see also Levin, *supra*, at 1585-87 (suggesting why reasons implicating authority require Congress, not rule revisors, to prescribe Rule 83 revision).

430. See *supra* notes 218-19 and accompanying text.

431. The Rule 83 proposal included no criteria for analyzing proposals to experiment. The procedures proffered should show promise and be necessary to treat specific problems.

432. See *supra* note 74.



cols. For example, helpful sources of information and ideas should be the advisory group reports, the expense and delay reduction plans, and the annual assessments prepared under the 1990 legislation; the procedures, particularly the principles, guidelines, and techniques that actually received experimentation and evaluation; and the participants involved in the federal efforts. Local districts, judges, and committees might correspondingly rely on the enormous quantity of valuable material and the accumulated technical expertise that exist in the Administrative Office, the FJC, and the Judicial Conference committees as well as in state civil justice systems, much of which is available through the National Center for State Courts (NCSC).

The Judicial Conference could structure and coordinate testing with the approval mechanism in the proposed Rule 83 revision that the Advisory Committee withdrew. For instance, it can guarantee that experimentation proceeds under optimal conditions by meticulously monitoring the number of districts that are testing similar measures at the same time. The Conference should concomitantly encourage experimentation in enough circumstances to afford statistical validity and a sense of the procedures' efficacy but in sufficiently few situations to minimize duplication and disruption of daily dispute resolution.

A critical aspect of any experimentation that courts undertake will be its rigorous assessment. For example, the districts should articulate and apply defensible analytical standards, create appropriate baselines, invoke proper mechanisms for evaluating measures' impacts, and assess the procedures with adequate rigor in different contexts for sufficient periods to ascertain accurately their effectiveness. Informative templates are the RAND and FJC analyses of pilot and demonstration court testing and numerous studies that the FJC, the Administrative Office, and the NCSC have performed.<sup>433</sup> The districts could depend on court staff who participated in civil justice reform and on the FJC and the Administrative Office for technical assistance in their evaluative efforts, while the districts might rely on these policy arms or the Judicial Conference to coordinate assessment across courts or to supply perspective or additional expertise.

When experience with, and analysis of, particular mechanisms in specific districts suggest that more courts could employ the techniques, the Advisory Committee or the Judicial Conference must determine whether the measures require greater experimentation or are effective enough to deserve nationwide enforcement. Should increased testing be warranted, the Committee or the Conference must estimate how much additional work is needed and identify commodious contexts for future efforts. When either entity finds national ap-

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433. See, e.g., RAND PILOT STUDY, *supra* note 108; FJC STUDY, *supra* note 123; CHURCH ET AL., *supra* note 337; MEIERHOEFER, *supra* note 74; SHAPARD ET AL., *supra* note 385.

plication appropriate, the Advisory Committee ought to develop proposed revisions for examination in the federal rule amendment process. The Committee should have final responsibility for the duties delineated in this paragraph and for general oversight and coordination because it has a number of rule revision obligations, a systemic viewpoint, and considerable experience with, and appreciation for, the practical effects of civil litigation, experimentation, and procedural change.<sup>434</sup>

Many reasons warrant prescription and implementation of the approach suggested. It is premised upon the well-considered, readily available model in the proposed Rule 83 amendment.<sup>435</sup> This course of action invokes institutions that have substantial expertise related to testing and capitalizes on the CJRA experience. The approach accommodates numerous perspectives and needs, certain of which are even conflicting. For instance, it affords the necessary flexibility to undertake the experimentation that should foster the discovery and application of mechanisms that revive and reinforce the essential procedural precepts, including economical, expeditious dispute resolution, but limits the disruption of day-to-day case disposition. This method of proceeding is purposely structured in a circumscribed manner that avoids or minimizes some problems with the CJRA's effectuation, namely, the local proliferation of inconsistent strictures and the concomitant propensity to increase fragmentation, cost, and delay. It correspondingly capitalizes on this statute by facilitating the development of promising experiments from the bottom up and by employing lessons from the seven-year effort. For example, centralized, systematic control over the number of courts that can simultaneously apply identical measures should permit many districts to profit from earlier testing and facilitate the effective analysis of experimentation as it progresses. The approach also accommodates additional work with judicial case management, which probably represented the CJRA's greatest success, even though its practice varied significantly across courts.

#### IV. CONCLUSION

The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1988 were valuable attempts to improve the state of modern federal civil procedure. Diverse, and perhaps inconsistent, visions of the most pressing complications in fin-de-siècle civil litigation and of appropriate remedies for those problems apparently motivated the legislation's drafters. The two measures have been in tension because the CJRA's proponents may have failed to think fully through

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434. The Conference or one of its committees would be equally competent to assume these duties, and the Advisory Committee should consult them.

435. See *supra* notes 218-19 and accompanying text.

its effectuation and apparently did not harmonize the acts' implementation. Despite these conflicts and additional difficulties involving the JIA and CJRA and their application, each statute offered a number of advantages. If the individuals and entities with responsibility for the condition of federal civil procedure follow the recommendations in this article, they can realize the legislation's best features and enhance civil litigation as federal courts enter the twenty-first century.