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Improving the 1988 and 1990 Judicial Improvements Acts

Carl Tobias*

In this article, Professor Tobias analyzes and attempts to harmonize the conflicting frameworks for civil procedure reform embodied in the Civil Justice Reform Act of 1990 (CJRA) and its immediate predecessor, the Judicial Improvements and Access to Justice Act of 1988 (JIA). Congress intended the JIA to open the national and local rulemaking processes to public scrutiny and to decrease the use of local rules. Yet Professor Tobias finds the 1990 Act at odds with the earlier measure in several ways. By encouraging local experiments aimed at reducing litigation costs and delay, he argues, the CJRA shifted the locus of rulemaking toward the local level and departed from the tenets of simplicity, uniformity, and trans-substantivity which traditionally have underlaid the Federal Rules of Civil Procedure. Moreover, he contends, implementation of the CJRA interrupted promising reform processes started under the JIA. Professor Tobias argues that we can combine the best of the JIA and CJRA by fostering limited local experimentation while achieving most procedural revisions through notice and comment rulemaking at the national level.

Federal court judges, lawyers, and litigants confront a bewildering array of civil procedures, many of which conflict or are difficult to discover, comprehend, and satisfy. This has happened despite three concerted efforts, including two attempts in the last decade, to reform the procedures and processes for revising them. The first reform of the twentieth century led to the promulgation of the Federal Rules of Civil Procedure in 1938. The Rules instituted a liberal, flexible system, which was principally intended to embody certain of its drafters' tenets, namely uniformity, simplicity, and trans-substantivity.¹ That procedural regime functioned well for thirty years. The system became decreasingly effective by the 1970s, however. Most important, the liberal, flexible nature of the procedural scheme was said to permit abuses collectively characterized as the litigation explosion. Numerous federal district courts attempted to address these problems with local procedures. Nonetheless, knowledgeable observers of federal civil litigation suggested that a national response was preferable because the districts' efforts were eroding uniformity, simplicity, and trans-sub-

* Professor of Law, University of Montana. I wish to thank Beth Brennan, Lauren Robel, and Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. I am especially grateful to Ann and Tom Boone for their generous gift recognizing scholarship's value. Errors that remain are mine.

1. That is, "procedure generalized across substantive lines." Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 *YALE L.J.* 718, 718 (1975). See generally Carl Tobias, *The Transformation of Trans-Substantivity*, 49 *WASH. & LEE L. REV.* 1501 (1992).

stantivity and because of the need to resolve the perceived tension between the restoration, maintenance, and enhancement of those tenets and the expeditious, inexpensive resolution of lawsuits.

Congress responded to such challenges of modern civil litigation by passing two pieces of legislation: the Judicial Improvements and Access to Justice Act of 1988 (JIA) and the Civil Justice Reform Act of 1990 (CJRA). These statutes conflict in numerous respects and even exacerbate certain existing procedural problems. This article analyzes how we reached the current state of civil procedure and suggests ways to improve the procedural system.

At the outset, it is important to understand that the 1988 and 1990 Acts had different sponsors and purposes. Representative Robert Kastenmeier's House Judiciary Subcommittee developed the JIA over a 10-year period. Its principal objective apparently was to reinvigorate the major 1938 tenets of uniformity and simplicity by addressing directly the problem of local procedural proliferation and by modernizing and opening the processes of national and local procedural revision. Senator Joseph Biden's Senate Judiciary Committee drafted the CJRA during a considerably shorter time, and the measure passed in the year that it was introduced. The CJRA's goal was to reduce cost and delay in civil litigation by encouraging federal districts to experiment with procedures that might save expense and time. That purpose fostered local procedural proliferation, thereby creating conflicts between the central objectives of the 1988 and 1990 statutes.

In this article, I evaluate how Congress passed these inconsistent Acts, explore each statute's strengths and weaknesses, and offer suggestions for future reform. In Part I, I briefly analyze the history of the Federal Rules and the mounting criticism of the 1938 procedural system for its increasing inability to efficiently resolve modern civil litigation. Part II assesses the goals and specific constituents of the two measures that Congress recently passed primarily in response to this criticism. Part III discusses significant aspects of each statute's implementation, ultimately concluding that the 1990 Act effectively suspended important initiatives begun under the earlier legislation. I argue that these interrupted initiatives appeared promising, should be reconsidered, and may warrant more comprehensive implementation. Part IV offers some suggestions for improving federal civil procedure by capitalizing on the best features of each measure.

I. THE 1938 FEDERAL RULES UNDER STRESS

Congress passed the Judicial Improvements Acts in 1988 and 1990, but those statutes have their origins in considerably earlier developments.² Indeed, full appreciation of the legislation requires some understanding of the preced-

2. This Part draws substantially on Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992). Use of the JIA in this article means Title IV of the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642 (1988), which is codified as amended at 28 U.S.C. §§ 332(d)(4), 2071-2074 (1988 & Supp. IV 1992). Use of the CJRA in this article means Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990), which is codified as amended at 28 U.S.C. §§ 471-482 (Supp. IV 1992).

ing half-century history of the original Federal Rules of Civil Procedure which took effect in 1938. The initial section of this article, therefore, emphasizes the adoption of those Rules during the 1930s and their judicial application and revision over the ensuing five decades.

A. *The 1938 Federal Rules*

Charles Clark, the Reporter for the first Advisory Committee on the Civil Rules, and the members of the Committee who wrote the initial Federal Rules of Civil Procedure intended to address the complications of common law and code practice and procedure.³ These attorneys meant to eliminate the highly technical nature of the earlier procedural schemes.⁴ The lawyers intended to craft a set of procedures that was simple, uniform, and trans-substantive.⁵ The drafters also sought to accord counsel considerable control over litigation, especially in discovery; to encourage prompt, inexpensive dispute resolution; and to emphasize disposition of cases on the merits.⁶ The Committee meant to attain simplicity by restricting the importance of pleadings and by reducing the number of steps in litigation.⁷ The drafters simultaneously sought to enhance uniformity by requiring that all federal district courts apply the same procedures.⁸

These fundamental procedural tenets were not absolutes; some of the precepts were in tension and could even be inconsistent. Indeed, the very first

3. See, e.g., Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 914-21, 926-73 (1987); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 272-75 (1989).

In the Rules Enabling Act of 1934, Congress authorized the Supreme Court to adopt procedures governing civil litigation in the federal district courts. Pub. L. No. 73-415, 48 Stat. 1064 (1934) (current version at 28 U.S.C. §§ 2071-2077 (1988 & Supp. IV 1992)). See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982). In 1935, the Court appointed the original Advisory Committee, which consisted of practicing attorneys and law professors, and the Committee drafted the Rules between 1935 and 1937. See Subrin, *supra*, at 970-73; Tobias, *supra*, at 273.

4. See, e.g., Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986); Subrin, *supra* note 3, at 948-73; see also Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Address before the American Bar Association 16-19 (1906) (reprint by the American Judicature Society) (detailing the technical nature of earlier procedural schemes). See generally CHARLES E. CLARK, *PROCEDURE—THE HANDMAID OF JUSTICE* 1-84 (1965).

5. For general authority on the intent of the drafters, see Cover, *supra* note 1; Peter Charles Hoffer, *Text, Translation, Context, Conversation, Preliminary Notes for Decoding the Deliberations of the Advisory Committee that Wrote the Federal Rules of Civil Procedure*, 37 AM. J. LEGAL HIST. 409 (1993); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 502-15 (1986); Tobias, *supra* note 3, at 272-77. But see Resnik, *supra*, at 498-99, 508 (discussing the difficulties of divining the intent of drafters who worked a half-century ago); Tobias, *supra* note 3, at 274 (same).

6. The drafters seemingly intended to enlarge judicial discretion and apparently trusted substantially to judges' discretion in applying the Rules. See Subrin, *supra* note 3, at 923, 964, 972-73, 1001; Tobias, *supra* note 3, at 275-76 & n.28. For discussion of these and other important objectives of the drafters, see Resnik, *supra* note 5, at 502-15; Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1649-51 (1981); Tobias, *supra* note 3, at 272-77.

7. See, e.g., Marcus, *supra* note 4, at 439-40; Subrin, *supra* note 6, at 1649-50; Tobias, *supra* note 3, at 274.

8. See, e.g., Subrin, *supra* note 6, at 1650; Tobias, *supra* note 3, at 274-75.

Federal Rule, by admonishing that judges construe the Rules to "secure the just, speedy, and inexpensive determination of every action," manifested the phenomena.⁹ Federal Rule 83 authorized all ninety-four federal district courts to promulgate local procedures, primarily to respond to local conditions, and thereby created considerable potential for the districts to adopt local provisions that would erode the uniform, simple system of civil procedure.¹⁰ The decisions to institute an equity-dominated regime, by effectively merging law into equity,¹¹ and to provide a liberal, flexible procedural scheme opened federal court access and facilitated the pursuit of complex litigation that could impose significant expense and delay.¹² The Rules, by according attorneys substantial latitude in, and judges limited control over, lawsuits, might have similarly encouraged unfocused litigation and expansive discovery which were expensive and time-consuming.¹³

B. *The Federal Rules' First Thirty Years*

The Advisory Committee and the federal bench sustained the essential procedural tenets during the initial three decades of the Rules' existence, and those Rules were well-received.¹⁴ The Advisory Committee proposed comparatively

9. FED. R. CIV. P. 1.

10. Rule 83 authorizes districts to adopt local rules that are "not inconsistent" with the Federal Rules. FED. R. CIV. P. 83; *see also* 28 U.S.C. § 2071(a) (1988). That limitation has been honored in the breach. *See* FED. R. CIV. P. 83 advisory committee's note; *see also* notes 33-48 *infra* and accompanying text.

11. *See* Subrin, *supra* note 3, at 1000-01; Subrin, *supra* note 6, at 1650; Tobias, *supra* note 6, at 274-75.

12. *See* Resnik, *supra* note 5, at 501 n.30 (observing that the Supreme Court's interpretation of the Federal Rules may have been more liberal than the drafters intended); *see also* Subrin, *supra* note 3, at 1001.

13. Part A describes certain procedural visions that apparently animated the drafters of the Federal Rules of Civil Procedure in the 1930s while introducing fundamental procedural tenets that underlie federal civil procedure and illustrating tensions among those precepts. We do not know whether all members of the Advisory Committee crafted the original Federal Rules with each of these tenets clearly in mind, much less that they precisely calculated how every procedural decision made would affect the tenets. Nonetheless, the Committee was certainly reacting to, and attempting to remedy, numerous deficiencies, such as disuniformity, complexity, and technicality, of prior procedural schemes. Moreover, the drafters probably appreciated that they were making some tradeoffs, for example, between a flexible, liberal procedural system premised primarily on equity and one based on law. They may correspondingly have recognized that the increased judicial discretion inherent in an equity-dominated regime might have accorded judges too much power and could even have led to discretion's abuse. *See* Subrin, *supra* note 3, at 1001; Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1470, 1474, 1478 (1987) (book review). For additional treatment of the Committee's work in the 1930s, *see* Hoffer, *supra* note 5; Resnik, *supra* note 5; Subrin, *supra* note 3.

Normative questions involving the tenets which should underlie federal civil procedure and its revision and how tensions between those precepts should be resolved are examined throughout this article. I believe that the individuals and entities that apply and revise federal procedure should endeavor to realize and maximize those essential procedural tenets identified above and should attempt to accommodate as much as possible those precepts that are inconsistent. When tensions involving the tenets cannot be reconciled, selection between them should be made in ways that articulate the underlying value choices as forthrightly as possible. Numerous suggestions in the final Part of this article include my most explicit efforts to reconcile tensions involving these fundamental procedural tenets.

14. *See* Resnik, *supra* note 5, at 515-16; Tobias, *supra* note 3, at 277-78. *See generally* Symposium, *The Federal Rules of Civil Procedure: 1938-1958*, 58 COLUM. L. REV. 435 (1958).

few amendments, and most of these were clarifications.¹⁵ Federal judges experienced minimal difficulty applying the original Rules and lauded their effectiveness.¹⁶ For example, the judiciary maintained simplicity by employing a general, liberal pleading regime which it enforced practically and flexibly, and by effectively ceding discovery to attorneys.¹⁷ Individual judges preserved and promoted uniformity by adopting rather few local procedures, particularly avoiding measures that conflicted with the Federal Rules.¹⁸

All of the original Rules were not equally efficacious, and some of the fundamental tenets suffered erosion. For instance, during the 1950s, liberal pleading prompted certain judges in the Ninth Circuit to seek the revision of Rule 8(a)(2), while Charles Clark resisted a similar movement of judges in the Southern District of New York.¹⁹ The simple but open-ended discovery system led to several complications, such as expansive discovery requests, especially in complex litigation.²⁰

C. *The Federal Rules Since the Mid-1970s*

By the 1970s, a number of developments had fostered increasing dissatisfaction with the Federal Rules. Numerous members of the bench, some lawyers, and a few commentators suggested that there was a litigation explosion in the federal courts.²¹ These critics asserted that attorneys and parties were pur-

15. See Charles E. Clark, "Clarifying" Amendments to the Federal Rules?, 14 OHIO ST. L.J. 241, 242 (1953).

16. Charles Clark, the Committee's Reporter and a member of the Second Circuit, was responsible for some of the Rules' perceived initial success. See, e.g., *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944) (Clark, J.) (interpreting pleading requirements under Rule 8(a)); Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 49-50 (1957) (defending the Rules); see also Clark, *supra* note 15; Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435 (1958); Tobias, *supra* note 3, at 277-78.

17. See Marcus, *supra* note 4, at 439-40, 445-46 (pleading); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 397 (1982) (discovery). But cf. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967) (arguing that Rules 19, 23, and 24 were read inflexibly).

18. 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 based their procedures on the federal counterparts. 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); see also Subrin, *supra* note 6, at 1650. However, numerous states that had long used code procedure did not adopt the federal scheme or borrowed from it only minimally. Oakley & Coon, *supra*, at 1377-78.

19. See Marcus, *supra* note 4, at 445 & n.71; Subrin, *supra* note 3, at 983 & n.433.

20. See, e.g., *New Dyckman Theater Corp. v. Radio-Keith-Orpheum Corp.*, 16 F.R.D. 203, 206 (S.D.N.Y. 1954) (noting that the complaint could become "an almost bottomless sea of interrogatories, depositions, and pre-trial proceedings on collateral issues that have little relationship to the true issue in the case"); see also Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480 (1958) (contemporaneous account of the erosion of the Rules' principles, particularly concerning discovery); Subrin, *supra* note 3, at 982-84 (subsequent account).

21. See, e.g., Warren E. Burger, Agenda for 2000 A.D.—A Need for Systematic Anticipation, Keynote Address before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7, 1976), reprinted in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 23 (A. Leo Levin & Russell R. Wheeler eds., 1979) [hereinafter POUND CONFERENCE]; Francis R. Kirkham, Complex Civil Litigation—Have Good Intentions Gone Awry?, Address before the National Conference on the Causes of Popular Dissatisfaction with the Administration of

suing an excessive number of civil lawsuits, too many of which lacked merit.²² Several Supreme Court Justices articulated concern about abuse of the litigation process, particularly in discovery, and urged circuit and district court judges to impose sanctions on lawyers and litigants who participated in such abuse.²³

1. *The rise of managerial judging.*

Many judges, especially in the densely populated Northern District of Illinois and Central District of California, began addressing these problems on an ad hoc basis, and this practice was denominated "managerial judging."²⁴ Judges developed an impressive array of procedures which enabled them to participate more closely in their civil cases. The judges employed pretrial conferences to monitor the pace of litigation, to formulate and resolve issues in dispute, and to promote settlement, particularly by encouraging the use of certain alternatives to traditional dispute resolution (ADR).²⁵ Some courts restricted the scope and speed of discovery, and a small number levied sanctions for discovery abuse or abuse of the litigation process.²⁶ Quite a few judges created innovations, including mini-trials and mandatory summary jury trials, especially for resolving complex suits.²⁷ The *Manual for Complex Litigation (MCL)* concomitantly provided diverse procedures for treating specific kinds of complicated actions, such as mass tort, securities, and takeover litigation.²⁸ The 1983 Federal Rules amendments and the 1985 promulgation of the second edition of the *MCL* in essence codified procedures which judges had employed under the rubric of managerial judging.²⁹

Justice (Apr. 9, 1976), in POUND CONFERENCE, *supra*, at 209-14; see also Tobias, *supra* note 3, at 287-89 (discussing the debate over the litigation explosion).

22. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) (noting that "[d]istrict courts must be especially alert to identify frivolous claims brought to extort nuisance settlements"); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 2-12 (1984).

23. See, e.g., Amendments to Federal Rules of Civil Procedure, 446 U.S. 995, 998-1000 (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).

24. See 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. REF. 647, 660-82 (1988) (responding to Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976)).

25. See, e.g., Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 435-37 (1986); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981); Resnik, *supra* note 17, at 391-93, 397-99.

26. See Peckham, *supra* note 25, at 772, 774; Resnik, *supra* note 17, at 391-93.

27. See, e.g., E. ALLAN LIND & JOHN E. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (1983) (describing experimental local rules for mandatory nonbinding arbitration of certain classes of civil actions); Frank E. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

28. See MANUAL FOR COMPLEX LITIGATION (5th ed. 1982). An editorial board of federal judges compiled the manual, which affords guidance to district judges for resolving complex cases. See MANUAL FOR COMPLEX LITIGATION SECOND V (1985); see also note 32 *infra* and accompanying text. See generally Alan J. Simons, *The Manual for Complex Litigation: More Rules or Mere Recommendations?*, 62 ST. JOHN'S L. REV. 473 (1988).

29. See Amendments to Federal Rules of Civil Procedure, 461 U.S. 1095 (1983); MANUAL FOR COMPLEX LITIGATION SECOND (1985).

Most of these attempts to manage federal civil litigation compromised somewhat the tenets of uniformity, simplicity, and trans-substantivity. Consider, for example, the 1983 revisions to Rules 11 (governing sanctions), 16 (governing pretrial conferences), and 26 (governing discovery). Each of the changes reduced simplicity by increasing the number of steps in a case and by imposing a larger number of, and more burdensome, duties on lawyers, such as compulsory participation in pretrial and discovery conferences.³⁰ Amended Rule 16 decreased uniformity and trans-substantivity by recommending that judges adjust procedures to particular cases and fashion their own prototypical scheduling orders for different classes of lawsuits.³¹ The second edition of the *MCL*, for its part, limited uniformity and trans-substantivity: The manual admonished judges to handle most complicated actions differently from simpler litigation and to tailor specific measures to particular categories of complicated cases.³² Nearly all of these attempts to treat complex litigation undermined the idea of a uniform national procedural code.

2. *The proliferation of local procedures.*

Another important source of increasing dissatisfaction with federal civil procedure has been the growth of local procedures, a phenomenon which has accelerated in the last quarter century. Judges often pursued managerial judging, especially prior to the 1983 Federal Rules amendments, by issuing local procedures.³³ These local procedures often conflicted with the Federal Rules of Civil Procedure, the United States Code, or the procedures of other federal district courts. The Northern District of California's "complex rule" was an excellent example: It mandated that counsel participate in preliminary meetings in addition to the pretrial conference and prepare joint pretrial statements involving matters such as disputed factual issues and settlement-negotiation efforts.³⁴

30. See Subrin, *supra* note 6, at 1650; Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933, 933-52 (1991). See generally ARTHUR R. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* (1984). Rule 11's amendment has been criticized because it was based on minimal empirical data regarding the problems that it purported to address and the revision's efficacy in doing so. See Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927-28 (1989); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 456-57 (1993).

31. FED. R. CIV. P. 16; see Subrin, *supra* note 6, at 1650; Tobias, *supra* note 30, at 937. For one account of how the district courts' case-management authority increased under revised Rule 16, see *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1011-13 (1st Cir. 1988).

32. MANUAL FOR COMPLEX LITIGATION SECOND 6 (1985); see Subrin, *supra* note 6, at 1650; Tobias, *supra* note 3, at 292 n.148. Ad hoc tailoring deprives the Federal Rules of their efficacy as a uniform model for states while jeopardizing intrastate and interstate procedural uniformity. See Subrin, *supra* note 6, at 1650.

33. Peckham, *supra* note 25, at 773-89; Resnik, *supra* note 17, at 399.

34. See N.D. CAL. R. 235-7, reprinted in Peckham, *supra* note 25, at 776 n.30; see also Peckham, *supra* note 25, at 776-77. No Federal Rule, particularly Rule 16, which was most directly applicable, required lawyers to participate in these activities. Compulsory requirements, therefore, conflicted with the Federal Rules.

The judiciary itself recognized the complications that local procedural proliferation was creating and responded in several ways. The Judicial Conference of the United States, the policymaking arm of the federal courts, supported the adoption of a 1985 revision of Federal Rule 83, which expressly required that local rules be promulgated after affording public notice and opportunity for comment and that the standing orders of individual judges be consistent with the Federal Rules and all local rules.³⁵ The advisory committee note which accompanied the amendment expressed the hope that every district would institute processes for issuing and reviewing these standing orders.³⁶ The note concomitantly implored circuit judicial councils to review all local rules, ascertain their validity, determine whether the provisions conflict with the Federal Rules, and to discern if the local rules foster interdistrict uniformity and efficiency.³⁷

The Conference also responded by commissioning the Local Rules Project,³⁸ which was to collect and organize all local rules, standing orders of individual judges, and other local requirements.³⁹ The Conference additionally instructed the Project to evaluate problems that the proliferation of local procedures had created and to recommend ways of resolving those problems.⁴⁰ In 1989, the Project published its findings⁴¹: The ninety-four federal district courts had issued approximately 5000 local rules, many of which conflicted among themselves and with the Federal Rules.⁴² The most widely prescribed local rules covered pretrial procedures, particularly pretrial conferences and discovery. Most districts imposed presumptive numerical restrictions on interrogatories, while numerous courts established case-tracking systems for routine, simple suits.⁴³ There was also considerable variation among the districts. For example, the Middle District of Georgia had promulgated one local rule and eleven standing orders, while the Central District of California adopted thirty-one local rules with 434 subrules and 275 standing orders.⁴⁴ Local rules

35. FED. R. CIV. P. 83. The 1985 amendment, which bore little relationship to the 1983 revisions, resulted from the normal federal amendment process and addressed concerns about the "soundness [of the local] process as well as the validity of some rules." *Id.* advisory committee's note (1985 amendments).

36. *Id.* advisory committee's note.

37. *Id.*

38. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE 1 (1989) [hereinafter REPORT OF THE LOCAL RULES PROJECT]; see also Daniel R. Coquillette, Mary P. Squiers & Stephen N. Subrin, *The Role of Local Rules*, 75 A.B.A. J. 62 (1989) (providing background on the Local Rules Project).

39. See Coquillette et al., *supra* note 38, at 63; Telephone Interview with Mary P. Squiers, Project Director, Local Rules Project (Feb. 21, 1992).

40. See Coquillette et al., *supra* note 38, at 63; Telephone Interview with Mary P. Squiers, *supra* note 39.

41. See REPORT OF THE LOCAL RULES PROJECT, *supra* note 38, accompanying mem.

42. *Id.* at 1; see Subrin, *supra* note 18, at 2020-26; see also Coquillette et al., *supra* note 38, at 62.

43. Coquillette et al., *supra* note 38, at 65; see also U.S. DISTRICT COURT FOR THE DISTRICT OF WYOMING, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 2 (1991) [hereinafter WYOMING PLAN] (describing an inconsistent local procedure); U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 2 (1991) [hereinafter EASTERN DISTRICT OF NEW YORK PLAN] (same); Subrin, *supra* note 18, at 2024-26 (discussing similar inconsistencies).

44. See REPORT OF THE LOCAL RULES PROJECT, *supra* note 38, at 1; see also Coquillette et al., *supra* note 38, at 62.

are only one form of local procedures which have eroded uniformity and simplicity. The Local Rules Project discovered that a number of other procedures, variously named general orders, standing orders, special orders, scheduling orders, or minute orders, cover local procedural practice in the ninety-four districts.⁴⁵ Numerous judges have also applied a host of procedures which have not been reduced to writing.⁴⁶

The Judicial Conference responded to the Local Rules Project's report by requesting that the federal districts conform all of their local procedures to the Federal Rules. The Conference provided additional valuable recommendations, suggesting, for instance, that local rules be numbered in a manner consistent with the Federal Rules.⁴⁷ The suggestions have not yet been fully implemented, however.⁴⁸

The federal judiciary, in attempting to respond to the challenges of modern litigation, deviated substantially from the tenets that had motivated the Rules' drafters, often modifying or even reversing earlier efforts.⁴⁹ Some alterations may have been attempts to make the Rules function as originally intended or to correct mistakes in the Rules by implementing suggestions that the Advisory Committee rejected in 1938.⁵⁰ Still other changes were apparently efforts to fill gaps in the original Rules or represent new understandings.⁵¹ But the most

45. Telephone Interview with Mary P. Squiers, *supra* note 39; Telephone Interview with Stephen N. Subrin, Consultant to the Local Rules Project (Feb. 15, 1992).

46. For example, a few districts experimented with the coequal assignment of civil cases to Article III judges and magistrate judges. *See, e.g.*, U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA, 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 (1992). Other courts required that litigants make good faith efforts to resolve discovery disputes before filing motions and to certify those efforts in writing. *See, e.g.*, WYOMING PLAN, *supra* note 43, at 13; *see also* Letter from Avern Cohn, Judge, U.S. District Court for the Eastern District of Michigan, to Carl Tobias (Jan. 13, 1994) (on file with author) [hereinafter Cohn Letter] (referring to judicial discretion and unwritten local practices).

47. Telephone Interview with Mary P. Squiers, *supra* note 39; Telephone Interview with Stephen N. Subrin, *supra* note 45.

48. Telephone Interview with Mary P. Squiers, *supra* note 39; Telephone Interview with Stephen N. Subrin, *supra* note 45. Indeed, the Advisory Committee recently proposed an amendment to Rule 83 that would require consistent numbering. Committee on Rules of Practice and Procedure, Judicial Conference of the U.S., *Proposed Rules: Proposed Amendments to Federal Rules of Appellate Procedure, Federal Rules of Bankruptcy Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure and Federal Rules of Evidence*, 150 F.R.D. 323, 400-401 (1993) (hereinafter 1993 *Proposed Amendments*).

49. *See generally* Subrin, *supra* note 6, at 1648-51. For example, Rules 11, 16, and 26 replace attorney self-regulation with judicial control, while Rule 26 significantly restricts open-ended discovery. Local procedural proliferation has eroded interdistrict court uniformity, and suggestions in the *Manual for Complex Litigation Second* and Rule 16 that judges develop several prototypical scheduling orders for different types of cases have limited intercase uniformity. *See* note 31 *supra* and accompanying text. Similarly, the rise of managerial judging and its codification in Rule 16 exemplify efforts to tailor procedures to particular cases, thereby undermining the trans-substantivity of the initial Federal Rules. *See* note 30 *supra* and accompanying text.

50. For example, Rule 16 could be an effort to have pretrial conferences restrict the scope of cases or expose frivolous cases. FED. R. CIV. P. 16. The specific provision regarding issue formulation institutes a concept like one suggested by Judge Clark in 1935 but rejected by the Committee. *See* Subrin, *supra* note 3, at 978-79.

51. Rule 16's reference to settlement includes a topic not mentioned in the original Rules and evinces new appreciation of settlement's significance. *See* Resnik, *supra* note 5, at 496, 527 & n.144.

important modifications, the phenomenon of managerial judging and the 1983 amendments, may constitute recognition that the uniform, simple, liberal, flexible scheme embodied in the 1938 Rules was itself partly responsible for the perceived litigation explosion and litigation abuse.

3. *Emerging concerns about procedural revision processes.*

Numerous observers have voiced concerns about the processes for changing the procedures that govern federal civil litigation, particularly the Federal Rules. In 1973, Congress intervened in national rule revision by passing legislation that replaced the Federal Rules of Evidence that the Supreme Court had promulgated in 1972, thus preempting years of effort by Judicial Conference committees.⁵² During 1974, Congress postponed the effective date of the revised Federal Rules of Criminal Procedure for one year.⁵³ In the 1980s, Congress again intervened in the rule revision process by rewriting an amendment to Federal Rule of Civil Procedure 4, governing service of process, which the Supreme Court had transmitted.⁵⁴ Finally, in 1977, Congress began holding the hearings that led to the passage of the Judicial Improvements Act of 1988.⁵⁵

52. See H.R. REP. NO. 889, 100th Cong., 2d Sess. 26-29 (1988); see also Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1974) (codified as amended at 28 U.S.C. app. (1988 & Supp. IV 1992)). The Rules Enabling Act provides that rules amendments which the Supreme Court transmits by May 1 will become effective on December 1 unless Congress acts to change the amendments. 28 U.S.C. § 2074(a) (1988 & Supp. IV. 1992); see also Tobias, *supra* note 3, at 335-38 (discussing the relationship between the judicial and legislative roles in enforcing and promulgating rules of procedure). This was an important compromise struck in gaining passage of the Rules Enabling Act, which authorizes court rulemaking.

53. Act of July 30, 1974, Pub. L. No. 93-361, 88 Stat. 397 (1974); see Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A. J. 579, 579 (1975). Congress thereafter often intervened to "delay the effective date of, disapprove, or modify rules and amendments." H.R. REP. NO. 889, *supra* note 52, at 27.

54. See Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1983) (codified as amended at 28 U.S.C. § 2071 (1988)); see also Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733, 733 (1988) (discussing prospects for reform in 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) (analyzing the nascent proposal to amend Rule 4 and the rulemaking process); Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183 (1987). For criticism of the national rule revision process, see Burbank, *supra* note 30, at 1925-27; Harold S. Lewis, Jr., *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507, 1559-62 (1987) (questioning the ability of the judicial process to clarify Federal Rules); Walker, *supra* note 30, at 457.

55. See H.R. REP. NO. 889, *supra* note 52, at 23.

During this period, a number of commentators expressed their views on what authorities should be involved in the rule revision process, what their respective roles should be, and on how the process should be conducted. See generally JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977); Lesnick, *supra* note 53; Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905 (1976); Geoffrey C. Hazard, Jr., *Undemocratic Legislation*, 87 YALE L.J. 1284, 1287-94 (1978) (reviewing REFORM OF COURT RULE-MAKING PROCEDURES). In 1979, the Judicial Conference itself convened a conference on federal rulemaking and in 1981 issued a comprehensive report. See WINIFRED R. BROWN, JUDICIAL CONFERENCE OF THE U.S., FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES (1981). The report thoroughly canvassed the existing revision process, criticisms and proposals for changes in the structure of rule revision committees, the content of rules, and Congress' reviewing role.

II. CONGRESS TAKES ACTION: THE 1988 JUDICIAL IMPROVEMENTS ACT AND THE 1990 CIVIL JUSTICE REFORM ACT

A. Introduction

The sponsors of the 1988 Judicial Improvements and Access to Justice Act (JIA) intended to modernize, regularize, and open the national and local procedural amendment processes. The proponents of the JIA apparently wanted to restore the primacy of national rule revision and to limit the proliferation of local procedures. Congress may also have meant the legislation to reinvigorate numerous procedural tenets, such as uniformity, simplicity, and trans-substantivity, which animated the drafters of the original Federal Rules in 1938.

The CJRA, however, had very different purposes. Its supporters were mainly concerned about litigation costs and delay. Congress seemingly failed to coordinate this legislation with the JIA. Before several of the 1988 Act's important aspects could be thoroughly implemented, and prior to the release of the report of the Federal Courts Study Committee commissioned by the 1988 legislation,⁵⁶ Senator Joseph Biden introduced the bill that became the CJRA.⁵⁷ That law eventually preempted important reforms envisioned in the 1988 Act.

B. The 1988 Act

1. National rule revision.

Congress intended that the 1988 Act modernize court rule revision. Specifically, this statute sought to systematize and open the national and local procedural rulemaking processes and concomitantly to curb the proliferation of local rules. These features of the legislation were apparently designed to revitalize the 1938 tenets, but the CJRA of 1990 essentially suspended certain of those aspects.⁵⁸

The JIA prescribed reform of the processes for revising national and local procedures. At the national level, the legislation was supposed to improve the quality of rule revision by opening the amendment process to enhanced public scrutiny and participation.⁵⁹ The statute in essence assimilated Federal Rules amendment to notice-comment rulemaking for federal administrative agencies under the Administrative Procedure Act.⁶⁰ The JIA provided for enhanced

56. The JIA prescribed the establishment of the Federal Courts Study Committee and requested that it undertake a comprehensive study of the federal courts and issue a report with recommendations for improvement in 1990. Federal Courts Study Act, Pub. L. No. 100-702, § 101, 102 Stat. 4642, 4644 (1988); see REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990).

57. S. 2648, 101st Cong., 2d Sess. (1990).

58. Other important directives of the JIA encouraged experimentation with court-annexed arbitration. See 28 U.S.C. §§ 651-658 (1988). See generally BARBARA S. MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS (1990).

59. See H.R. REP. NO. 889, *supra* note 52, at 27; see also 28 U.S.C. §§ 2071(b), 2073 (1988). See generally Mullenix, *supra* note 54, at 830-32.

60. Compare 5 U.S.C. §§ 551-559 (1988) with 28 U.S.C. §§ 2071(b), 2073 (1988). Notice-comment rulemaking is informal rulemaking whereby an agency proposes a rule, seeks public comment on that proposal, considers that input, and decides whether to issue a final rule. See Walker, *supra* note 30, at 468-69.

public involvement commencing with the earliest phases of rule revision.⁶¹ Congress also left intact certain aspects of the national rule revision process. All of the entities—the Congress, the Court, the Judicial Conference, the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee), and the Advisory Committee—which had historically participated in the amendment process would continue to do so.⁶²

2. Local procedural revision.

More significant to the issues treated in this article, Congress intended that the 1988 legislation ameliorate complications that local procedural proliferation had created. The House Judiciary Committee Report observed that the Committee had “found a proliferation of local rules, many of which conflict with national rules of general applicability.”⁶³ Congress attempted to treat local procedural proliferation primarily by imposing requirements for amending local rules that were analogous to those governing the amendment of the Federal Rules.⁶⁴ The statute mandated that every federal district appoint a local rules committee to work with all of the judges in the court to formulate local rules, and the legislation imposed on each district a public notice and comment requirement whenever it adopts new, or changes existing, local rules.⁶⁵ Congress apparently intended that these commands also govern the procedures which individual judges apply.⁶⁶ Congress made the revision process exclusive, thereby seeking to insure that districts and judges would not circumvent the requirements by ascribing a different name to local procedures, such as “standing” or “minute” orders.⁶⁷

Congress as well sought to restrict local procedural proliferation by imposing on circuit judicial councils an affirmative obligation to review periodically

61. The measure increased public access to information that is relevant to amendments and required that meetings of certain rule revision entities, particularly the Advisory Committee, be opened to the public after notice is afforded. 28 U.S.C. § 2071 (1988). The Act also required that any entity which 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.” *Id.* § 2073(d). Moreover, the legislation afforded Congress several additional months to review amendments which the Supreme Court forwards, and this was an apparent attempt to enhance that review’s effectiveness. 28 U.S.C. § 2074(a) (1988 & Supp. IV 1992); *see also* H.R. REP. NO. 889, *supra* note 52, at 27-28.

62. Congress correspondingly decided to retain the existing composition of the rule revision institutions, although it did consider possible changes to the Advisory Committee’s constitution. 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-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2076 n.50 (1989); *see also* notes 232-233 *infra* and accompanying text.

63. H.R. REP. NO. 889, *supra* note 52, at 27. The Report also stated that the Judicial Conference had addressed the “problem of proliferating local rules” and commended the Local Rules Project for its “valuable work.” *Id.* at 28.

64. *See* 28 U.S.C. § 2071 note (1988).

65. *Id.*; *cf.* FED. R. CIV. P. 83 (imposing a similar notice and comment requirement). As with the national rule revision entities, Congress did not prescribe committee composition. *See* Carrington, *supra* note 62, at 2076 & n.50.

66. *See* 28 U.S.C. § 2071 note (1988).

67. *Id.* § 2071(f).

all local procedures for consistency with the Federal Rules. The legislation authorized the councils to "modify or abrogate [all] procedures found inconsistent."⁶⁸ Congress thus imposed a continuing duty on the councils to scrutinize the local procedures that existed when the legislation became effective on December 1, 1988, and all procedures subsequently adopted.⁶⁹

C. *The 1990 Act*

1. *Background.*

Although only two years elapsed between the time when Congress passed the 1988 and 1990 statutes, the measures had very different origins, proponents, and concerns. In contrast to the decade-long gestation period which preceded enactment of the 1988 statute, the 1990 CJRA passed within a year of its introduction. Senator Biden's Senate Judiciary Committee was the source of the 1990 Act, which emphasized problems resulting from litigation abuse.⁷⁰

Concerned about increasing cost and delay in civil litigation, Senator Biden, the Brookings Institution, and the Foundation for Change organized a task force to study the civil justice system and develop recommendations for improvement.⁷¹ The task force found considerable dissatisfaction among judges, lawyers and litigants with the federal civil justice system. The task force determined that mounting cost and delay in civil litigation threatened court access for many individuals and groups,⁷² and it recommended that federal courts implement reforms primarily relating to judicial case management, discovery, and ADR.⁷³

In early 1990, Senator Biden introduced a bill which substantially embodied the task force's recommendations.⁷⁴ It proved to be very controversial. Many federal judges opposed the bill, principally because it mandated that all ninety-four federal districts adopt numerous procedures to reduce expense and delay.⁷⁵ The judges believed the bill represented an effort by Congress to micromanage the federal courts, bypassed the normal rule revision process, and potentially jeopardized those procedures and the work of the Federal Courts Study Committee that Congress itself had commissioned. Some judges also

68. *Id.* § 332(d)(4) note; *see also id.* § 2071(c)(1).

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

70. For comprehensive treatment of the background to the 1990 Civil Justice Reform Act, *see* Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 *FORDHAM L. REV.* 833, 837-80 (1994). For more limited and specific treatment, *see* Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, *LAW & CONTEMP. PROBS.*, Summer 1991, at 105; Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 *STAN. L. REV.* 1447 (1994).

71. This discussion draws substantially on *TASK FORCE ON CIVIL JUSTICE REFORM, BROOKINGS INSTITUTION, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION* (1989) [hereinafter *BROOKINGS REPORT*]; *see also* *SENATE COMM. ON THE JUDICIARY, S. REP. NO. 416, 101st Cong., 2d Sess. 13-14* (1990).

72. *BROOKINGS REPORT, supra* note 71, at 5-6.

73. *Id.* at 12-29.

74. S. 2648, 101st Cong., 2d Sess. (1990).

75. *See* S. REP. NO. 416, *supra* note 71, at 4-6, 30-31; *see also* Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 *OHIO ST. J. ON DISP. RESOL.* 115, 128-29 (1991) (detailing several related reasons why judges opposed the CJRA).

voiced concern that there was insufficient consultation with the judiciary before the legislation's introduction.⁷⁶ The Judicial Conference ultimately developed a "Fourteen-Point Plan" in response to Senator Biden's bill.⁷⁷ Following hearings and negotiations with the Judicial Conference, Congress passed a revised version of the bill in November 1990.⁷⁸

The CJRA was then and continues to be controversial. Some observers dispute whether the federal courts have actually experienced serious delay in civil dispute resolution. Indeed, a comprehensive study published in 1990 found that there was considerably less delay, particularly in the sense of time to disposition, than many contended.⁷⁹ Some critics have observed that, insofar as delay exists, it may vary significantly across the ninety-four districts.⁸⁰ Others argue that delay is a relative concept.⁸¹ For example, it might be inappropriate to characterize as delay warranting remediation the extra time poorly financed litigants need to develop the factual information necessary to prove their cases.⁸² Additional critics believe that the CJRA is unresponsive to important sources of expense and delay, such as the criminal justice system, or that the legislation was motivated too greatly by political special interests.⁸³

2. *The CJRA's provisions.*

The CJRA required all federal districts to create civil justice expense and delay reduction plans by December 1993.⁸⁴ The purposes of the plans were "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive reso-

76. See S. REP. NO. 416, *supra* note 71, at 4-6, 10, 30-31.

77. *Id.* at 30-31; see also Robel, *supra* note 75, at 128 (detailing the Judicial Conference's preemptive proposals).

78. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, §§ 101-106, 104 Stat. 5089, 5089-98 (1990) (codified as amended at 28 U.S.C. §§ 471-482 (Supp. IV 1992)); see also S. REP. NO. 416, *supra* note 71, at 3-6.

79. See WOLF HEYDEBRAND & CARROLL SERON, RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS (1990); see also TERENCE DUNWORTH & NICHOLAS M. PACE, RAND CORPORATION, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS (1990) (arguing that there is no evidence to support the contention of increased time to disposition).

80. See, e.g., Avern Cohn, *A Judge's View of Congressional Action Affecting the Courts*, LAW & CONTEMP. PROBS., Summer 1991, at 99, 101. For a discussion of comparative delay in district courts, see Robel, *supra* note 75, at 117-23.

81. See, e.g., Johnston, *supra* note 70, at 849-51; Robel, *supra* note 75, at 117-23; see also DUNWORTH & PACE, *supra* note 79.

82. See Tobias, *supra* note 2, at 1423; see also Robel, *supra* note 75, at 121-22 (challenging the relationship between delay reduction and increased access to justice).

83. See, e.g., Cohn, *supra* note 80, at 100-03 (arguing that the CJRA is unresponsive to the criminal justice system and politically motivated); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 400-01 (1992) (same); Carl Tobias, *Silver Linings in Federal Civil Justice Reform*, 59 BROOK. L. REV. 857, 857 & n.1 (1993) (suggesting that the CJRA is politically motivated); see also David A. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 123 (1983) (questioning whether litigation expenses are excessive).

84. 28 U.S.C. § 471 note (Supp. IV 1992) (reproducing Pub. L. No. 101-650, § 102, 104 Stat. 5089, 5089-90 (1990)).

lutions of civil disputes.”⁸⁵ The districts were to adopt the plans after examining reports and recommendations submitted by advisory groups.⁸⁶

The advisory groups, appointed by the district courts ninety days after the CJRA’s passage, were to be balanced and to include lawyers and other individuals representative of civil litigants.⁸⁷ The Act instructed every group to analyze 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 to designate the “principal causes of cost and delay in civil litigation” in the district.⁸⁸ The legislation also required that each group’s recommendations consider the particular needs and circumstances of the district, its litigants, and their counsel while guaranteeing that all of them contribute significantly to “reducing cost and delay and thereby facilitating access to the courts.”⁸⁹

Once the advisory groups completed their reports and recommendations, the district courts were to evaluate the recommendations and consider adopting the eleven suggested principles, guidelines, and techniques of civil justice reform delineated in the Act and any other procedures which they believed appropriate to decrease delay and expense.⁹⁰ Section 473(a) prescribes six principles and guidelines for managing litigation and reducing cost and delay. They are: creation of a system for tailoring case management to meet the unique circumstances of each case, early judicial involvement to establish timelines, discovery conferences, voluntary and cooperative discovery, strict limits on discovery motions, and increased use of ADR.⁹¹ Those district courts which issued plans before December 31, 1991, were designated early implementation district courts (EIDCs). The deadline for the remaining districts to publish plans was December 1993.⁹²

The Act also required the Judicial Conference to designate ten districts, including five which encompassed metropolitan areas, as pilot districts.⁹³ By December 31, 1991, these districts were to adopt plans which included the six principles and guidelines of litigation management and expense and delay reduction in section 473(a).⁹⁴ Moreover, Congress mandated an independent study of the pilot program and that the Judicial Conference make recommendations regarding the principles and guidelines by December 31, 1995.⁹⁵

The statute correspondingly instituted a demonstration program, whereby the Western District of Michigan and the Northern District of Ohio would experiment with differentiated case management and the Northern District of Cal-

85. *Id.* § 471.

86. *Id.* § 472.

87. *Id.* § 478(b).

88. *Id.* § 472(c)(1).

89. *Id.* § 472(c)(2)-(3).

90. *Id.* § 472(a), 473(a)-(b).

91. *Id.* § 473(a)(1)-(6) *see also id.* § 473(b)(1)-(5) (describing five less important techniques).

92. *Id.* § 471 note (reproducing Pub. L. No. 101-650, § 103(b), 104 Stat. 5089, 5096 (1990), as amended by Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 505, 106 Stat. 4506, 4513 (1992)).

93. *Id.* § 471 note (reproducing Pub. L. No. 101-650 § 105, 104 Stat. at 5097-98 (1990)).

94. *Id.*; *see id.* § 473(a)(1)-(6).

95. *Id.* § 471 note (reproducing Pub. L. No. 101-650 § 105, 104 Stat. at 5097-98 (1990)).

ifornia, the Western District of Missouri, and the Northern District of West Virginia would experiment with various methods of expense and delay reduction, including ADR.⁹⁶ The Act requires that the Judicial Conference analyze and report on this program to Congress by December 31, 1995.⁹⁷

The legislation also created entities to monitor implementation of the plans. First, the statute requires circuit review committees, comprised of the chief circuit judge and chief district judges within each circuit, to review all plans and reports and to make recommendations for actions deemed appropriate for decreasing expense and delay in civil cases.⁹⁸ Second, the Act commands that the Judicial Conference review all plans and reports and authorizes it to request additional action when necessary.⁹⁹

Finally, the statute requires the districts to perform annual assessments. When preparing these assessments, the district courts must consult with their advisory groups in evaluating the condition of the courts' dockets and in attempting to develop additional methods for decreasing expense and delay.¹⁰⁰

In short, the legislation's proponents hoped that this method of generating reform strategies "from the bottom up" would foster innovation while improving communication and promoting consensus among the users of the federal court system within and across districts.¹⁰¹

III. ANALYSIS OF THE ACTS' IMPLEMENTATION

In enacting the 1988 Act, Congress accurately perceived that local procedural proliferation had eroded uniformity, simplicity, and trans-substantivity and framed a response to this specific problem. The CJRA effectively supplanted those dimensions of the 1988 statute which aimed at curbing the proliferation of local rules. Congress' concern about increasing expense and delay in civil litigation led it to impose requirements in the 1990 legislation which in essence suspended efforts to limit proliferation initiated under the 1988 Act. In this Part, I first analyze the 1988 Act's implementation, emphasizing how its procedural requirements respecting national rule revision affected the development and substance of the 1993 amendments to the Federal Rules of Civil Procedure. I then assess the implementation of the CJRA, focusing on federal districts' promulgation of civil justice plans, and I conclude by evaluating the sources of conflict between the two Acts.

A. *The JIA's Implementation*

1. *Local rule revision.*

Most of the ninety-four federal district courts have appointed local rules committees to advise them on procedural changes. However, a number of dis-

96. *Id.* § 471 note (reproducing Pub. L. No. 101-650 § 104, 104 Stat. at 5097 (1990)).

97. *Id.*

98. *Id.* § 474(a).

99. *Id.* § 474(b).

100. *Id.* § 475.

101. S. REP. No. 416, *supra* note 71, at 4.

tricts have only recently formed such committees, and some courts have yet to do so.¹⁰² Numerous districts have formalized their processes for adopting and revising local procedures while opening them to public input. Some districts have actually promulgated new, or amended existing, local procedures under these processes. Many local rules committees, however, have participated minimally in civil justice reform.¹⁰³

Although most districts have formalized and opened their processes for prescribing and changing procedures as required by the 1988 Act, very few have implemented that legislation's requirements regarding local procedural proliferation. For example, only a tiny number of courts have attempted to limit the number of local procedures, much less reviewed the procedures promulgated by individual judges or modified local procedures found inconsistent with local rules, the Federal Rules, or the United States Code.¹⁰⁴ The Seventh Circuit Judicial Council is apparently the only one that has scrutinized its districts' local procedures and changed or abrogated those which it deemed inconsistent.¹⁰⁵

A number of factors explain the limited implementation of the 1988 Act's requirements. Most importantly, the CJRA effectively suspended the committees' and councils' work when it assigned overlapping procedural revision tasks to federal districts and to the nonnational entities, advisory groups, and circuit review committees created under the Act.¹⁰⁶ For example, local rules committees had few incentives to propose and adopt local rules when advisory groups and districts were formulating new, potentially inconsistent local procedures. The committees and councils had no greater motivation to review and alter or

102. For example, the Eastern and Western Districts of North Carolina had not appointed committees at the time they issued plans. See U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 5 (1993); Letter from Sam Hamrick, CJRA Analyst, United States District Court for the Western District of North Carolina, to Carl Tobias (Nov. 3, 1993) (on file with author). Very few individual judges have created such entities. Telephone Interview with Mary P. Squiers, *supra* note 39. Moreover, the 1988 Act imposed no requirements relating to the composition of the committees, so that some of them may not be balanced with respect to plaintiff and defense perspectives, political viewpoints, large and small firm interests, geography, race, or gender. See note 65 *supra*.

103. This assertion is premised on conversations with numerous individuals who are familiar with reform efforts in the federal districts; see also Telephone Interview with Mary P. Squiers, *supra* note 39. A few districts attempted to involve their committees in reform efforts or included committee members in their advisory groups. See, e.g., ADVISORY GROUP OF THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, 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). Most of the districts, however, eclipsed or suspended the committees' work.

104. Telephone Interview with Stephen N. Subrin, *supra* note 45. Indeed, few districts apparently have implemented similar aspects of the 1985 amendment of Federal Rule 83. See notes 35-37 *supra* and accompanying text.

105. Telephone Interview with David Pimentel, Assistant Circuit Executive for Legal Affairs, United States Court of Appeals for the Ninth Circuit (July 22, 1994); Telephone Interview with Mary P. Squiers, *supra* note 39.

106. See notes 86-89, 98-99 *supra* and accompanying texts; U.S. Court of Appeals for the Sixth Circuit, Minutes of the Meeting of the Judicial Council 4-5 (May 4, 1994) (on file with the *Stanford Law Review*) (voting to suspend further review of local rules until the Council received further guidance from Congress, the Judicial Conference, or case law on whether the CJRA authorized adoption of local rules that conflict with the Federal Rules of Civil Procedure).

eliminate any such procedures found to conflict when the 1990 CJRA apparently authorized inconsistency.

Another, less significant reason for the 1988 legislation's comparatively limited implementation is the inherent tension between local priorities and the goal of national procedural uniformity. Federal district judges and local rules committees comprised of local practitioners were probably less concerned about maintaining national uniformity than about accommodating the needs of local federal judges, attorneys, and parties.¹⁰⁷ In fairness, the judges, local rules committees, and circuit judicial councils that attempted to review local procedures for inconsistency with federal requirements may have encountered problems defining exactly what is a conflict, particularly between those procedures and the Federal Rules.¹⁰⁸

2. National rule revision.

In evaluating the national rule revision process that the 1988 Act instituted, this Part will examine the proceedings that led to the promulgation of the 1993 revisions to the Federal Rules. These proceedings were unusual in three significant respects. First, this was the first important test of the new requirements. Second, the package of amendments that emerged from the process was one of the most ambitious sets of revisions ever developed.¹⁰⁹ Third, the perceived need to accommodate the civil justice reform requirements of the 1990 Act rendered the rule revision process atypical, if not *sui generis*. Notwithstanding these peculiarities, it is important to assess the process that yielded the 1993 amendments because evaluation affords valuable insights into modern national rulemaking and into the tensions between the 1988 and 1990 Acts.

Although the Advisory Committee implemented the 1988 statute by initially proposing amendments in eighteen Federal Rules during 1991,¹¹⁰ I shall focus on the revisions that it proposed in Rule 11, which governs sanctions for filing papers without sufficient prefiling inquiry, and Rule 26, which requires automatic disclosure of discoverable materials. The Advisory Committee had primary responsibility for developing these two amendments, which were the most controversial changes proposed. Studying the revision process enhances understanding of several tenets that are critical to modern civil litigation, of

107. I am merely saying that most local rules committees will be more sensitive to, and favorably disposed toward, the needs of local lawyers, litigants, and judges than is the Advisory Committee. See generally Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). For example, a few districts exclude counsel admitted to practice elsewhere because of disparities in local bar admission requirements. See *Frazier v. Heebe*, 482 U.S. 641, 643-44 (1987); see also Coquillette et al., *supra* note 38, at 64.

108. Telephone Interview with Mary P. Squiers, *supra* note 39; Telephone Interview with Stephen N. Subrin, *supra* note 45; see also Coquillette et al., *supra* note 38, at 64.

109. It may also be premature to analyze the efficacy of the amendments which have been in effect for less than a year.

110. See Committee on Rules of Practice and Procedure, Judicial Conference of the U.S., *Proposed Rules: 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: Committee Debates Further Amendments*, NAT'L L.J., May 4, 1992, at 1.

how those tenets can conflict, and of tensions that arose in effectuating the two Acts.

I focus on Rule 11 because its 1983 revision was highly controversial, primarily due to the amendment's adverse effects on court access, and represented a failed attempt to treat perceived abuses of the litigation process apparently made possible by the liberal, flexible procedural system of the 1938 Rules.¹¹¹ The Rule, therefore, typifies tensions between several important procedural tenets. Moreover, the proceeding that led to Rule 11's 1993 amendment exemplifies the type of open revision process that Congress seemingly contemplated when it enacted the JIA.

I stress Rule 26's provision for automatic disclosure because of the widespread concern that numerous problems with discovery, such as its abuse, will ultimately jeopardize civil litigation¹¹² and because the automatic disclosure amendment generated more controversy than any formal change proposed previously. Rule 26's 1993 revision also illustrates how compliance with the 1988 statute's requirements governing national procedural amendment and congressional failure to integrate the two Acts' implementation exacerbated local procedural proliferation, further eroded national uniformity and simplicity, and increased expense and delay. I first provide a brief, general outline of the national revision process.¹¹³

General description of the rule revision process. The national rule revision entities, especially those primarily responsible for developing proposals for procedural change, seemed to implement effectively and faithfully the 1988 Act's requirements governing the amendment process. The revision process they implemented was modeled substantially on notice and comment administrative rulemaking.

In August 1991, the Advisory Committee published a preliminary draft of proposed changes to eighteen Federal Rules.¹¹⁴ The Committee then solicited and received extensive public comment on the proposals in writing and at two public hearings.¹¹⁵ It was generally responsive to that public input and made good faith efforts to improve the proposals, particularly those that were the most controversial. Indeed, the Committee inverted the normal sequence with

111. 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 30, at 455-59.

112. See, e.g., Committee on Discovery, New York State Bar Association Section on Commercial and Federal Litigation, *Report on Discovery Under Rule 26(b)(1)*, 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. 1393 (1994) (arguing that there is no hard evidence of frequent discovery abuse).

113. In my treatment of amended Rules 11 and 26, I rely substantially on Carl Tobias, *The Transmittal Letter Translated*, 45 FLA. L. REV. — (forthcoming 1994).

114. *Preliminary Draft*, *supra* note 110.

115. See William J. Hughes, *Reflections from the House: Congressional Reaction to the 1993 Amendments to the Federal Rules of Civil Procedure*, 18 SETON HALL LEGIS. J. 1, 1-2 (1993); Tobias, *supra* note 111, at 1778; see also Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 862-63 (1992).

Rule 11 by seeking public comment before drafting its proposed amendment to the Rule.¹¹⁶

The remaining rule revision entities, including the Supreme Court, deferred to the Committee by making only one major change in its Rule 11 proposal and very few other modifications.¹¹⁷ Congress scrutinized the 1993 amendments, and although the House of Representatives opposed Rule 26's automatic disclosure provision, Congress allowed the entire package to become effective.¹¹⁸

The process in action: amending Rule 11. The process that led to Rule 11's 1993 amendment was replete with ironies.¹¹⁹ In 1983, the rule revision entities substantially amended Rule 11, primarily by encouraging judges to impose sanctions as a method for curtailing litigation abuse. A mere eight years later,¹²⁰ the courts faced new problems, namely satellite litigation and chilling effects, which the 1983 amendment to Rule 11 had created.¹²¹ Nonetheless, the proceeding which culminated in the 1993 revision of Rule 11 illustrates the considerable potential of the formal, open process Congress envisioned in 1988.

Virtually all parties whose interests would have been affected by Rule 11's amendment were dissatisfied with the Advisory Committee's preliminary draft, which was, for instance, relatively unresponsive to the problems of satellite litigation and chilling effects. One suggested change would have imposed a continuing duty to withdraw even small segments of papers when they lost merit, and another authorized large monetary sanctions for contravening the Rule. These provisions would have discouraged vigorous pursuit of litigation by parties with limited resources.¹²² The proposal also expressly included denials, in addition to allegations, as components of papers which must comply with the Rule, and limited recovery of attorney's fees for Rule violations. Those requirements especially troubled defense counsel.¹²³ Many attorneys

116. See Committee on Rules of Practice and Procedure, Judicial Conference of the U.S., *Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules*, 131 F.R.D. 335, 344-45 (1990) [hereinafter *Call for Written Comments*].

117. See Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 501-13 (1993) (White, J., separate statement; Scalia, J., dissenting statement) (indicating that the Supreme Court continued its historic practice of deferring to the expertise of these entities and apparently deferred more substantially than ever). For a discussion of the change made in Rule 11, see notes 126-127, 133-137 *infra* and accompanying texts.

118. The package became effective on December 1, 1993, when Congress failed to act. See note 52 *supra*; see also Hughes, *supra* note 115, at 2 n.5.

119. I rely substantially here on Tobias, *supra* note 115; Carl Tobias, *Rule Revision Roundelay*, 1992 Wis. L. REV. 236 (letter to the editors).

120. This time frame for testing a revision's efficacy was substantially shorter than the generation suggested by knowledgeable experts, including two former Advisory Committee Reporters. See Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 52 (1968) (paraphrasing Professor Benjamin Kaplan); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 677 (1979); see also Arthur R. Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479, 505-06 (1990).

121. See Tobias, *supra* note 119, at 236; see also Tobias, *supra* note 115, at 862-65. See generally Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475 (1991).

122. See Tobias, *supra* note 119, at 237. See generally Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 495-98 (1988-1989); Vairo, *supra* note 121, at 484-86.

123. See Tobias, *supra* note 119, at 237. See generally Vairo, *supra* note 121, at 495-500.

and litigants were bothered by the considerable ambiguity in the proposed Rule's wording.¹²⁴ Numerous observers criticized the proposal despite the Advisory Committee's comprehensive analysis of the 1983 revision; its solicitation of, and attentiveness to, public input; and its careful efforts to draft changes that would be responsive to the needs of all participants in federal civil litigation.¹²⁵

The Advisory Committee responded to the criticism with several new drafts. These modifications reflected the Committee's conscientious consideration of much written public input and oral testimony at the public hearings and its commitment to drafting the most equitable, clear, effective amendment possible.¹²⁶ Indeed, the Committee's efforts to develop the final proposal constitute the kind of open, responsive amendment process and rational decisionmaking that Congress contemplated when it altered the rule revision procedures in the 1988 Act.¹²⁷

Despite the Committee's herculean endeavors, some observers remained opposed to the 1993 amendment.¹²⁸ The most prominent critic was Justice Antonin Scalia, who wrote a stinging dissent to the Supreme Court's transmittal of the revised Rule.¹²⁹ The dissent argued that the amended Rule 11 would "eliminate a significant and necessary deterrent to frivolous litigation."¹³⁰ Justice Scalia also asserted that the change would render the Rule toothless by affording judges discretion to impose sanctions, disfavoring reimbursement for litigation expenses, and by prescribing safe harbors that would enable litigants who violate the provision to escape sanctions completely.¹³¹ Even in the face of such criticism, the rule revision entities, whose membership was then composed almost exclusively of federal judges, apparently determined that the potential detriments of a more stringent revision, such as fostering more satellite litigation and discouraging valid claims, outweighed its advantages, such as deterring frivolous litigation.¹³²

124. See Tobias, *supra* note 119, at 238; see also Tobias, *supra* note 115, at 894-95; Vairo, *supra* note 121, at 497-98.

125. See *Call for Written Comments*, *supra* note 116, at 345; see also Tobias, *supra* note 115, at 861-65. Dissatisfaction with the Committee's preliminary draft led several federal judges and other distinguished members of the American legal establishment to develop their own proposal for revising Rule 11. See A. Leon Higginbotham, Jr., Patrick Higginbotham, Mary M. Schroeder, George C. Cochran, Francis Fox, John P. Frank, Hugh Jones, Laura Kaster, Jerold S. Solovy & Bill Wagner, *Bench-Bar Proposal to Revise Civil Procedure Rule 11*, 137 F.R.D. 159 (1991). This counterproposal recommended that the Committee omit the provisions creating a continuing duty to withdraw papers that lose merit and authorizing attorney fee awards as sanctions. *Id.* at 165-66. The plaintiffs', public interest, and civil rights bars, among others, considered the bench-bar proposal much more acceptable.

126. See Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. — (forthcoming 1994); see also Tobias, *supra* note 115, at 859-65.

127. See text accompanying notes 58-62 *supra*. See generally Walker, *supra* note 30.

128. The following discussion draws on Tobias, *supra* note 126 (manuscript at 26-29, text accompanying notes 112-128).

129. Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 507-10 (1993) (dissenting statement of Scalia, J.).

130. *Id.* at 507.

131. *Id.* at 507-08.

132. See Tobias, *supra* note 126 (manuscript at 14 & n.57); see also notes 232-233 *infra* and accompanying text.

This support of federal judges for the Rule 11 revision seemed to figure prominently in congressional receptivity to the amended Rule transmitted by the Court. Most senators and representatives apparently concluded that it would be very difficult to improve on numerous aspects of the revision tendered.¹³³ The changes constituted the well-considered opinion of the rule amendment entities and their expert advisers or represented the most effective ways of treating the enormous spectrum of factual circumstances Rule 11 covers.¹³⁴

The revision process was responsive to the problems with the 1983 amendment and to the public input, yielding a balanced amendment to Rule 11. On the one hand, the rule revision entities may have substantially diminished the incentives for employing amended Rule 11 by creating safe harbors and authorizing judges to exercise discretion in deciding to impose sanctions.¹³⁵ On the other hand, the revisors retained some incentives for pursuing sanctions, such as the possibility of recovering attorneys' fees.¹³⁶ The rule revision entities also relied on ambiguous language, such as "nonfrivolous" and "appropriate sanctions," that may foster inconsistent enforcement and satellite litigation.¹³⁷

Nevertheless, the 1993 version significantly improved its predecessor and was considerably clearer and fairer than the Advisory Committee's preliminary draft. The amended provision should reduce incentives to invoke Rule 11 improperly and concomitantly decrease expense and delay attributable to satellite litigation. Moreover, the 1993 Rule is a well-considered, workable compromise, given rule revision's serious restraints, such as satisfying the diverse constituencies that Rule 11 affects.

One of the best explanations for the outcome of the 1993 amendment of Rule 11 is that numerous judges seemingly determined that the Rule had attained all that could reasonably be achieved by encouraging lawyers and parties to conduct reasonable prefiling inquiries and by discouraging their filing of meritless papers. The revisors may correspondingly have decided that the benefits of applying the Rule zealously could not justify spending limited resources

133. For example, the chair of the House subcommittee responsible for reviewing Rules amendments, Representative William Hughes, deferred to the federal judiciary because he found much support for the amendment and for restricting the satellite litigation that the 1983 Rule 11 engendered. *See Federal Courts: Bill to Delete Discovery Rule Reported to House*, Daily Rep. for Execs. (BNA) No. 150, at A-150 (Aug. 6, 1993) (reporting that despite his "reservations," Representative Hughes would "defer to the judiciary's conclusions with regard to [Rule 11]"). Other senators and representatives were less deferential and introduced bills which would have postponed the revision's effective date for a year. *See* S. 1382, 103d Cong., 1st Sess. (1993); H.R. 2979, 103d Cong., 1st Sess. (1993).

134. For example, the revised Rule relied on words, such as "reasonable" and "likely," that may be the clearest, fairest way of addressing the intrinsically fact-specific questions raised by sanctions motions. *See Amendments*, 146 F.R.D. at 420-23 (text of amended Rule 11(a)-(b) as transmitted by the Supreme Court); *see also* Tobias, *supra* note 111, at 1791. For a general analysis of the difficulty of drafting and implementing precise administrative rules, *see* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983).

135. *See Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 410, 421-23 (1993); *see also* Tobias, *supra* note 111, at 1783-88.

136. *See Amendments*, 146 F.R.D. at 421-23; *see also* Tobias, *supra* note 111, at 1787-88; note 134 *supra* and accompanying text.

137. *See Amendments*, 146 F.R.D. at 420-23.

of judges, counsel, and litigants, for example, on satellite litigation that the Rule promotes. Probably critical also were the perceptions among judges, lawyers, and litigants that discovery is currently the most pressing problem in civil litigation and that it needed more reform and held greater promise for actual improvement than Rule 11.

The process in action: amending Rule 26. The process of revising Federal Rule 26 to provide for automatic disclosure was equally ironic, but for different reasons.¹³⁸ The Advisory Committee apparently forgot its unfortunate experience with the 1983 amendment of Rule 11.¹³⁹ Despite the lack of empirical data confirming widespread discovery abuse and limited experimentation with automatic disclosure,¹⁴⁰ the Advisory Committee issued a preliminary draft in 1991 prescribing automatic disclosure.¹⁴¹ The proposal would have required that plaintiffs and defendants disclose before discovery material that was likely to bear "significantly on any claim or defense."¹⁴² The Committee proposed this relatively untested, potentially far-reaching new procedure, even though the CJRA's enactment evinced congressional concern that experimentation precede significant modification of discovery.¹⁴³ Nearly all of the approximately twenty EIDCs created under the CJRA that chose to require automatic disclosure relied substantially on the language in the Committee's preliminary draft.¹⁴⁴

138. This discussion draws from Griffin B. Bell, Chilton Davis Varner & Hugh Q. Gottschalk, *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1 (1993); Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139 (1993); Tobias, *supra* note 113; Winter, *supra* note 112.

139. Although it lacked empirical information on how the original (1938) Rule 11 functioned, the Committee substantially modified that initial version in 1983; the revision ultimately became the most controversial change in the Rules' half-century history. See note 111 *supra* and accompanying text; see also Burbank, *supra* note 30, at 1927-28 (suggesting that little empirical data existed on the 1938 version's operation).

140. See Mullenix, *supra* note 112; Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear's The Barrister and The Bomb*, 69 B.U. L. REV. 649 (1990). Only three federal districts had experimented with automatic disclosure. See Bell et al., *supra* note 138, at 17-18; Mullenix, *supra* note 54, at 813-21. Moreover, two of disclosure's first proponents had earlier suggested promulgating a national rule only after considerable testing. See Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1361 (1978) (acknowledging the need for experimentation before applying disclosure requirements nationally); William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 723 (1989) (suggesting that reform might come about through the implementation of the disclosure proposal and stating that a trial period might help demonstrate the benefits of such reform). Judge Schwarzer, the FJC Director, and Magistrate Judge Brazil, an Advisory Committee member, also figured prominently in the disclosure draft's development.

141. See *Preliminary Draft*, *supra* note 110, at 88.

142. *Id.* at 87-88.

143. See 28 U.S.C. § 471 note (Supp. IV 1992). See generally Carl Tobias, *In Defense of Experimentation with Automatic Disclosure*, 27 GA. L. REV. 665, 667-68 (1993); Tobias, *supra* note 2.

144. The lack of available disclosure models probably led the districts to rely substantially on the language included in the Committee's preliminary draft. Compare MONTANA PLAN, *supra* note 46, at 15-16 and EASTERN DISTRICT OF NEW YORK PLAN, *supra* note 43, at 4-5 with *Preliminary Draft*, *supra* note 110, at 87.

No formal recommendation to revise the Federal Rules has prompted such a barrage of opposition from so many diverse users of the federal courts.¹⁴⁵ During an extensive comment period and in public hearings, most segments of the organized bar and numerous other interests criticized the draft because it was unclear, might add another layer of discovery, raised ethical dilemmas, and would increase expense.¹⁴⁶

At the conclusion of the public hearing on the 1991 package of proposals which was held in Atlanta during February 1992, the Advisory Committee responded by deleting automatic disclosure from its set of preliminary drafts, seemingly deferring the provision pending the results of experimentation with disclosure that was proceeding in a number of districts.¹⁴⁷ For a brief moment, the Committee apparently believed that selective local experimentation was preferable to the nationwide application of the controversial and comparatively untested technique.¹⁴⁸

A short six weeks later, the Advisory Committee again changed its position, without more public comment or explanation. Second Circuit judge Ralph K. Winter, a strong advocate of automatic disclosure,¹⁴⁹ spearheaded the issue's reexamination.¹⁵⁰ During an April 1992 meeting, the Committee revived its proposal to require that parties disclose the names of all individuals who are likely to have "discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information," as well as "all documents, data compilations and tangible things" that have such relevance.¹⁵¹ In an apparent attempt to accommodate efforts proceeding under the CJRA, the provision permitted districts to vary the Federal requirements or to reject them completely.¹⁵²

Justice Scalia, in dissenting from transmittal of the disclosure amendment, stated that the Advisory Committee may have considered the CJRA's experimentation schedule too protracted, "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."¹⁵³ The Committee defended its decision to reverse course twice on the grounds that discovery was not functioning effectively, that retention of the status quo was unacceptable, and that

145. See Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 410, 512 (1993) (dissenting statement of Scalia, J.); Bell et al., *supra* note 138, at 28-32; Ann Pelham, *Forcing Litigants to Share: Judges Back Radical Discovery Rule*, LEGAL TIMES, May 3, 1993, at 1.

146. See Bell et al., *supra* note 138, at 28-32; Tobias, *supra* note 138, at 141.

147. See Bell et al., *supra* note 138, at 34-35; Winter, *supra* note 112, at 268; Samborn, *supra* note 110, at 12. That experimentation is to continue for at least three years, and the Judicial Conference is to evaluate it and report to Congress by late 1995. 28 U.S.C. § 471 note (Supp. IV 1992).

148. See Bell et al., *supra* note 138, at 34-35; Samborn, *supra* note 110, at 12.

149. See Winter, *supra* note 112.

150. See Ann Pelham, *Panel Flips, OKs Discovery Reform*, LEGAL TIMES, Apr. 20, 1992, at 6; Samborn, *supra* note 110, at 12.

151. Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 410, 431 (1993).

152. See *id.* at 431-432; see also Bell et al., *supra* note 138, at 35-39. But see Winter, *supra* note 112, at 269 (arguing that the revised proposal responded to the legitimate concerns of critics).

153. *Amendments*, 146 F.R.D. at 512 (dissenting statement of Scalia, J.).

the bar's self-interest obstructed meaningful change.¹⁵⁴ The Committee apparently comprehended that withdrawal of the disclosure amendment would have effectively delayed judicially required discovery reform for most of the 1990s because of the 3-year rule revision process that the 1988 Act imposed.¹⁵⁵ Certain observers even portrayed the Committee's reversal as an act of desperation to slow the erosion of the judiciary's procedural influence by congressional legislation and executive branch initiatives, such as Executive Order 12,778.¹⁵⁶

The remaining rule revision entities approved the Committee draft in the face of continuing opposition, particularly from the bar. The Supreme Court transmitted unchanged the disclosure amendment, even though three Justices dissented.¹⁵⁷ After the Court tendered the revisions, practically all elements of the bar and many additional interests, ranging across the political spectrum from civil rights plaintiffs to corporations, attempted to persuade Congress to delete the disclosure provision.

The House and Senate Judiciary Committees held hearings on the disclosure provision and the remaining amendments during the summer of 1993.¹⁵⁸ Representative William Hughes, chair of the House Judiciary Subcommittee on Judicial Administration and Intellectual Property, proposed legislation omitting disclosure, which the House enacted by voice vote on November 3.¹⁵⁹ The Senate unexpectedly failed to pass the bill before adjourning, primarily because civil rights groups, plaintiffs' lawyers, and defense attorneys and interests were unable to reach a satisfactory compromise on disclosure, Rule 11, and presumptive limits on discovery.¹⁶⁰

The Senate's failure to pass the legislation engendered considerable confusion, complexity, and consternation in the federal district courts, especially those fifty courts that were rushing to meet the December 1 deadline by which the CJRA required them to issue civil justice plans and on which the federal

154. See Pelham, *supra* note 150; Samborn, *supra* note 110, at 12; see also Bell et al., *supra* note 138, at 35-39. The last observation illuminates another irony. Virtually all segments of the organized bar seemed both to oppose the disclosure proposal and to agree that many problems accompany modern discovery. For example, Judge Winter astutely observed during the April meeting that lawyers will resist discovery reform so long as they bill by the hour. See Pelham, *supra* note 150; Samborn, *supra* note 110, at 12; see also Winter, *supra* note 112, at 271, 277.

155. If the Committee had withdrawn or if Congress had omitted the automatic disclosure amendment, the rule revisors would have had to recommence the 3-year rule revision process. See 28 U.S.C. § 2074(a) (1988 & Supp. IV 1992) (prescribing rule revision process).

156. See Exec. Order No. 12,778, 3 C.F.R. 359 (1991), reprinted in 28 U.S.C. § 519 (Supp. IV 1992). See generally Tobias, *supra* note 2 (describing congressional reforms); Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L. REV. 1521 (1993) (describing executive initiatives).

157. *Amendments*, 146 F.R.D. at 507 (Scalia, Thomas & Souter, J.J., dissenting).

158. See Hughes, *supra* note 115, at 3-4, 9-11.

159. See H.R. 2814, 103d Cong., 1st Sess. (1993); 139 CONG. REC. H8746-47 (daily ed. Nov. 3, 1993); Randall Samborn, *Bill to Stop Change Dies: New Discovery Rules Take Effect*, NAT'L L.J., Dec. 6, 1993, at 3, 40.

160. See Samborn, *supra* note 159, at 40; see also Randall Samborn, *Derailing the Rules*, NAT'L L.J., May 24, 1993, at 1, 33; notes 177-179 *infra* and accompanying text. For example, civil rights groups would not compromise on revised Rule 11, while the plaintiffs' bar refused to uncouple disclosure and presumptive limits.

disclosure requirements took effect.¹⁶¹ Because most of the districts had expected Congress to omit the disclosure requirement, numerous courts apparently undertook little planning for other contingencies and had to make eleventh-hour decisions regarding the new requirements. Threats to revive the legislation, which continued well into 1994, exacerbated the uncertainty.¹⁶²

The districts and numerous EIDCs, many of which had implemented forms of disclosure that differed from the new federal revision,¹⁶³ responded variously. Most courts published or amended civil justice plans, issued general and special orders, promulgated new local rules, or revised existing ones, even invoking the emergency clause of the Rules Enabling Act.¹⁶⁴ A number of the non-EIDCs "opted out," rejecting completely the new federal amendment, adopted provisions that differed from the federal requirements, or suspended the federal revision pending additional study.¹⁶⁵ Numerous EIDCs retained diverse forms of automatic disclosure which are dissimilar to the federal requirements or continued eschewing disclosure altogether.¹⁶⁶ In the final analysis, a majority of the districts will apparently decide against applying the federal amendment.¹⁶⁷

The developments described above created much confusion in most of the federal districts. Conflicting procedures complicated federal civil litigation for lawyers and litigants, especially for government and public interest attorneys who litigate in multiple districts, and it tested judges' and practitioners' tolerance for inconsistency. Many lawyers and litigants experienced difficulty finding the relevant procedures, ascertaining which ones actually applied and when they became effective, and complying with the new requirements. Indeed, the CJRA Advisory Group for the Eastern District of New York urged that the rule revisors observe a 3-year moratorium on the affected national rules during which time districts could assess the reforms' local effects.¹⁶⁸ By the summer of 1994, however, numerous districts had implemented and publicized courses

161. See Carl Tobias, *Automatic Disclosure: Let It Be*, LEGAL TIMES, Jan. 30, 1994, at 25; see also Samborn, *supra* note 159, at 40. For statutory deadlines, see 28 U.S.C. §§ 471, 2074 (Supp. IV 1992).

162. See Tobias, *supra* note 161, at 25. These observations are based on telephone conversations with many people who are familiar with the legislative process and with civil justice reform.

163. See note 144 *supra* and accompanying text; see also DONNA STIENSTRA, FEDERAL JUDICIAL CENTER, IMPLEMENTATION OF DISCLOSURE IN FEDERAL DISTRICT COURTS (1994).

164. E.g., S.D. IND. R. 26.3 (invoking the emergency clause); D. Md. R. 104.1; see 28 U.S.C. § 2071(e) (Supp. IV 1992) (emergency clause).

165. See, e.g., D. ME. R. 18(g); E.D. LA. R. 606E (amended Dec. 1, 1993); see also STIENSTRA, *supra* note 163; John Flynn Rooney, *Discovery Rule Lacks Uniformity, Is "Source of Confusion": Critic*, CHL DAILY L. BULL., Apr. 23, 1994, at 17.

166. See, e.g., D. MONT. ORDER (Jan. 25, 1994); N.D. GA. ORDER (Feb. 26, 1994).

167. See STIENSTRA, *supra* note 163; see also *Half of Districts Opt Out of New Civil Rules*, NAT'L L.J., Feb. 28, 1994, at 5; Rooney, *supra* note 165.

168. See Letter from Edwin J. Wesely, Chair, Advisory Group for the United States District Court for the Eastern District of New York, to Joseph F. Spaniol, Jr., Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Feb. 1, 1992); see also Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 856 (1993) (advocating an evaluation of the course and process by which civil justice reform is occurring and a moratorium on reform until evaluation is concluded).

of action to treat automatic disclosure procedures, ameliorating somewhat the difficulties for judges, lawyers, and litigants.¹⁶⁹

The above examination of automatic disclosure's implementation indicates that it undermined uniformity, simplicity, and trans-substantivity while increasing judicial discretion and expense and delay.¹⁷⁰ The new procedure's actual application in many particular cases apparently has had similar effects. More specifically, the imprecise character of what must be disclosed and the imposition of an additional layer of discovery has often increased expense and perhaps delay.

It may be too early to know for certain whether any of the diverse automatic disclosure procedures will prove effective.¹⁷¹ Only a tiny number of districts that have required disclosure for the greatest period have implemented requirements similar to those of the new federal amendment, and they have not experimented with the procedure for enough time to evaluate its effectiveness conclusively.¹⁷² Early anecdotal evidence does suggest that some courts, both EIDCs and non-EIDCs, have experienced little difficulty applying the device, especially in relatively simple cases or when the disclosure is very general.¹⁷³ Automatic disclosure has essentially required lawyers and litigants to perform certain tasks, particularly document retrieval and labeling, earlier in the litigation process.¹⁷⁴ The consequent earlier exchange of important information could effect savings in time and money that would have been devoted to formal discovery and may foster prompter settlement.

In short, the debate over disclosure cannot be definitively resolved at present. Disclosure's implementation certainly tested the tolerance for inconsistency and uncertainty of judges, lawyers, and litigants while eroding uniformity and simplicity and increasing expense and delay. These factors may ultimately prove to be short-term or fixed costs of adopting a new procedure, particularly if widespread experimentation in specific districts leads to the discovery of a

169. These assertions are premised on conversations with many individuals familiar with the circumstances in numerous districts and with the actions that a number of districts instituted.

170. The assertions in this paragraph are premised on conversations with numerous individuals familiar with disclosure and civil justice reform; *see also* text accompanying notes 177-179 *infra* (asserting that provision in specific cases for judicial modification or litigant stipulation erodes uniformity and simplicity and increases cost and delay).

171. *See, e.g.*, CJRA ADVISORY GROUP OF THE EASTERN DISTRICT OF NEW YORK, ANNUAL REPORT 5-8 (1994) (valuable assessment reflecting ambivalence about disclosure's efficacy); *see also* ADVISORY GROUP OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, ANNUAL REPORT 6-8 (1993); U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, REPORT ON THE IMPACT OF THE COST AND DELAY REDUCTION PLAN 13-17 (1993). *See generally* 28 U.S.C. § 475 (Supp. IV 1992) (requiring periodic district court assessment).

172. Most of the EIDCs only instituted disclosure during 1992, and few have rigorously evaluated its efficacy. *See* Tobias, *supra* note 138, at 144-45.

173. These include the Northern District of California and the Districts of Arizona, Massachusetts, and Montana. This evidence is derived from conversations with numerous 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). Unfortunately, discovery is the most problematic and requires the most efficacious disclosure in complex lawsuits, such as products liability litigation. *See* Bell et al., *supra* note 138, at 39-42; Winter, *supra* note 112, at 268.

174. These ideas are premised on the conversations mentioned in note 173 *supra*.

highly efficacious disclosure mechanism with which courts, counsel, and litigants are comfortable.

Other relevant procedures. The Advisory Committee's August 1991 preliminary draft included several additional proposed changes which warrant brief examination because they implicate the issues considered in this article. The rule revision entities deleted some of these proposals during the amendment process, while others took effect on December 1, 1993.

Perhaps the most important of the omitted proposals was an amendment in Rule 83 that would have authorized local procedural experimentation. Districts securing Judicial Conference approval could have experimented for not more than five years with local rules which contravened the Federal Rules.¹⁷⁵ This approach carefully balanced the need for experimentation to develop efficacious procedures with the problems that proliferating inconsistent local rules can create. Unfortunately, the Advisory Committee withdrew the proposal, in apparent deference to ongoing experimentation under the CJRA.¹⁷⁶

The 1993 amendments imposing presumptive numerical limitations on interrogatories and depositions are also important to the questions addressed in this article.¹⁷⁷ These prescriptions, by providing for local variation and for judges and litigants to modify the requirements in specific cases, resemble the federal automatic disclosure revision.¹⁷⁸ For example, the provisions governing presumptive limits have led some districts to opt out of or to vary the national requirements, thus eroding uniformity and simplicity and increasing expense and delay.¹⁷⁹ Certain amended provisions of Rule 16 covering pretrial conferences and scheduling orders, which authorize local adoption and modification of time restraints in various situations, including the time for disclosure under Rule 26, may have similarly decreased uniformity, simplicity, and transubstantivity and enhanced costs.¹⁸⁰ Another significant revision was the 1993

175. See *Preliminary Draft*, *supra* note 110, at 153 (proposed Rule 83(b)).

176. Compare *id.* with COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., PROPOSED AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE tbl. of contents (1992) [hereinafter PROPOSED AMENDMENTS] (showing the deletion of proposed amendment to Rule 83). The Judicial Conference also deleted a proposal to amend Rule 56 which proved controversial, particularly in light of widespread belief that a 1986 trilogy of Supreme Court cases had appropriately modified the availability of summary judgment. Compare *Preliminary Draft*, *supra* note 110, at 141 with Memorandum from L. Ralph Meham, Director, Administrative Office of the United States Courts, to the Chief Justice of the United States and the Associate Justices of the Supreme Court (Nov. 27, 1992), reprinted in 146 F.R.D. 514, 514 (1993) (showing the deletion of the proposed amendment to Rule 56). See generally Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 53 (1988); D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35 (1988).

177. See FED. R. CIV. P. 29, 30(a)(2)(A), 33(a).

178. Presumptive limits are structured similarly to automatic disclosure, and they raise several analogous issues. The most important issue involves provision in specific cases for judicial modification and litigant stipulation, provisions which were not considered above to avoid additionally complicating already complex treatment. See notes 138-174 *supra* and accompanying text.

179. See, e.g., D. MONT. ORDER (Jan. 25, 1994); N.D.N.Y. GEN. ORDER (Dec. 14, 1993).

180. See Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 427-28 (1993) (text of amended Rule 16(b) as transmitted by the Supreme Court); see also *id.* at 478-79 (demonstrating that the 1993 amendment to Rule 54(d)(2)(B) and (D) similarly prescribed local options); D. Md. R. 104.1;

amendment of Federal Rule 4,¹⁸¹ which judges, lawyers, and litigants had experienced difficulty employing since Congress changed the provision in 1983.¹⁸²

In sum, the 1988 Act's requirements governing local procedural revision received limited implementation because the 1990 CJRA essentially suspended effectuation. Implementation of the JIA's strictures covering national procedural amendment, as witnessed in the 1993 revision of Federal Rule 11, illustrates the type of amendment process that Congress apparently envisioned in enacting the 1988 legislation and highlights the tensions between several significant tenets. Effectuation of the JIA, as manifested in the provision for automatic disclosure, shows how that statute's requirements, and Congress' failure to harmonize them with those of the CJRA, worsened local procedural proliferation, further undermined national uniformity and simplicity, and increased expense and delay.

B. *The CJRA's Implementation*

In this Part, I first evaluate the institutions responsible for implementing and monitoring the 1990 Act. I then explore how the CJRA, especially its requirement of nationwide experimentation, its internal inconsistencies, and its implicit invitation to the districts to promulgate procedures inconsistent with the Federal Rules and the United States Code, ultimately eroded uniformity and simplicity and increased expense and delay. I next identify some beneficial effects of the statute's implementation. Throughout the analysis, I emphasize the experience of EIDCs because these courts have been experimenting since 1991, and their efforts have received some evaluation. The remaining districts have only recently adopted civil justice plans, and most of these courts have prescribed procedures identical or similar to those selected by the EIDCs.¹⁸³

1. *The implementing entities.*

Congress intended that the CJRA bring together local, diverse interests that would develop expense and delay reduction plans which were responsive to all participants in federal civil litigation. Unfortunately, under the statute, Congress chose instrumentalities and assigned them duties that eventually undermined uniformity, simplicity, and trans-substantivity and increased expense and delay principally by exacerbating local procedural proliferation.

One reason for these complications was the lack of balance in the composition of the advisory groups that the districts were to consult before promulgat-

S.D. IND. R. 26.3. See generally note 31 *supra* and accompanying text (describing the provision in Rule 16's 1983 amendment prescribing differential case treatment).

181. *Amendments*, 146 F.R.D. at 405.

182. See *id.* at 558 (text of amended Rule 4 advisory committee's note as transmitted by the Supreme Court); see also text accompanying note 54 *supra*.

183. The procedures that the EIDCs prescribed have received relatively little evaluation for efficacy. I examined some of the procedures above. See notes 25-27 *supra* and accompanying text; note 58 *supra* and accompanying text (ADR); notes 170-174 *supra* and accompanying text (automatic disclosure); notes 177-179 *supra* and accompanying text (presumptive limits on discovery).

ing their plans. For instance, a number of the groups included too many defense counsel or too few individuals with limited resources.¹⁸⁴ Another source was the inherently local perspective of the participants. The legislative mandate that each group consider the district's particular circumstances in compiling its recommendations probably led the groups to formulate proposals which exhibited greater concern for the needs of local judges, practitioners, and litigants than for preserving national uniformity and simplicity and which were quite different.¹⁸⁵

2. *The monitoring entities.*

Congress designated several bodies to monitor the Act's implementation and gave the instrumentalities rather general and unclear duties, sharply reducing their potential to respond meaningfully to the local disuniformity and complexity promoted by the CJRA.¹⁸⁶ For example, most circuit review committees did not closely evaluate, much less recommend changes in, plans.¹⁸⁷ Another factor contributing to less rigorous oversight was the reluctance of chief district judges to review critically the procedures adopted by other district judges in their circuits, with whose courts they may have been unfamiliar.¹⁸⁸ The Judicial Conference discharged its monitoring duties with

184. *See, e.g.*, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, REPORT OF THE CIVIL JUSTICE ADVISORY GROUP I (1991) (list of advisory group members includes more defense counsel than other types of lawyers); ADVISORY GROUP FOR THE U.S. DISTRICT COURT OF THE DISTRICT OF MONTANA, REPORT OF THE CIVIL JUSTICE REFORM ACT OF 1990 frontispiece (1991) (few resource-poor litigants); U.S. DISTRICT COURT FOR THE DISTRICT OF WYOMING, ADVISORY GROUP REPORT AND RECOMMENDED PLAN frontispiece (1991) (primarily defense counsel and "defendants"). *See generally* Galanter, *supra* note 107, at 97-119 (discussing how certain defendants and defense counsel, as "repeat players" in litigation, can secure strategic advantages).

185. For example, the Eastern Districts of Arkansas and Virginia issued terse plans that changed virtually no local procedures. *See* U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1991); U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1991).

The Eastern District of Texas compiled an equally short plan which included a few novel, provocative measures, while the Massachusetts District adopted a lengthy plan containing numerous complex procedures. *See* U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1991) [hereinafter EASTERN DISTRICT OF TEXAS PLAN]; U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, EXPENSE AND DELAY REDUCTION PLAN (1991).

This analysis may appear crudely instrumental. I am only saying that the advisory groups are less expert and less concerned about maintaining national uniformity and simplicity than, for example, the Advisory Committee. For instance, a few groups suggested that their courts more strictly enforce local procedures. *See, e.g.*, U.S. DISTRICT & BANKRUPTCY COURT FOR THE DISTRICT OF IDAHO, EXPENSE AND DELAY REDUCTION PLAN 1 (1991) [hereinafter IDAHO PLAN]; U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 3 (1991) [hereinafter EASTERN DISTRICT OF CALIFORNIA PLAN].

186. The entities are circuit review committees, the Judicial Conference, and Congress. *See* 28 U.S.C. § 474 (Supp. IV 1992). The Case Management Subcommittee of the Judicial Conference Committee on Case Management and Court Administration technically has initial responsibility for Conference review.

187. *See* Tobias, *supra* note 2, at 1407-09.

188. *Id.* at 1407-08. Even in those few circuits which conducted rigorous reviews, the federal districts did not always implement the committees' suggestions for change. For example, the Montana District did not implement the Ninth Circuit Review Committee's suggestions regarding local procedures. *See* NINTH CIRCUIT REVIEW COMMITTEE, REVIEW OF CIVIL JUSTICE REFORM ACT PLANS (1992); Tobias, *supra* note 2, at 1408.

no greater rigor for analogous reasons relating to the responsible Conference Committee's composition and its equally unclear, weaker, statutorily assigned responsibilities.¹⁸⁹

3. *The structure of experimentation.*

Congress wrote the 1990 Act, and the courts have effectuated the legislation, in ways that have eroded uniformity and simplicity while increasing judicial discretion, cost, and delay. One important problem was Congress' decision to require that all ninety-four districts implement civil justice reform, creating an environment in which many courts were experimenting simultaneously. This limited the opportunities for courts to build on prior experience and to benefit from interdistrict consultation.¹⁹⁰

Congress correspondingly mandated that every district consider eleven statutorily enumerated procedures,¹⁹¹ rather than prescribing a narrower program, for instance, by restricting experimentation to fewer districts or by limiting the number of new procedures that courts could apply. Such provision has allowed districts to implement a confusing array of local procedures,¹⁹² which ultimately complicate and increase the cost of litigation.

4. *Legislative guidance in the CJRA's initial three sections.*

Unclear and sometimes conflicting instructions in the Act's first three sections have eroded uniformity and simplicity and have increased expense and delay.¹⁹³ Specific provisions even include internal inconsistencies. For example, Section 472 requires that advisory groups make suggestions which will both "reduc[e] cost and delay" and "facilitat[e] access to the courts."¹⁹⁴ But these two goals may in many cases be incompatible, as the litigation experiences of numerous impecunious parties demonstrate. Resource-poor litigants often require greater time to complete discovery and assemble sufficient information to prove their cases; consequently, measures that seek to expedite litigation may actually diminish these parties' access to the courts.¹⁹⁵

189. See Tobias, *supra* note 2, at 1409-11; see also *id.* at 1411-13 (analyzing congressional reluctance to perform rigorous oversight).

190. Congress required that all districts appoint advisory groups within 90 days after the Act's passage. 28 U.S.C. § 478(a) (Supp. IV 1992). Thirty-four courts did qualify for EIDC status by adopting plans by December 31, 1991. Nonetheless, most districts fully implemented those plans in 1992 and only issued their first annual assessments in 1993, while a number of non-EIDCs attempted to complete their plans by the end of 1992. Therefore, numerous groups and courts were effectively laboring at the same time, and relatively few districts capitalized on prior experimentation or interdistrict cooperation.

191. See *id.* § 473(a), (b) (prescribing the principles, guidelines, and techniques).

192. See text accompanying note 185 *supra*; see also Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting Courts be Remedied by Local Rules?*, 67 ST. JOHN'S L. REV. 721 (1993) (discussing similar problems with experimentation's structure).

193. Section 471 states the purposes of civil justice plans; section 472 informs advisory groups how to assemble reports and recommendations; and section 473 lists principles, guidelines, and techniques which districts must consider and may adopt. 28 U.S.C. §§ 471-473 (Supp IV 1992).

194. *Id.* § 472(c)(3).

195. See Tobias, *supra* note 122, at 495-98; see also Tobias, *supra* note 2, at 1422-25.

More important to this article, the statute implicitly invites the courts to promulgate procedures that conflict with other directives in the Federal Rules and the United States Code.¹⁹⁶ Nothing in the Act or its legislative history seems to prohibit these conflicts. Section 473 states that districts must consider, and may adopt, eleven listed procedures, and a number of districts apparently relied on the prescriptions, particularly those governing discovery, to implement inconsistent local procedures.¹⁹⁷ The statute's twelfth provision, which allows districts to adopt such other procedures as they deem proper after considering their advisory groups' suggestions, implicitly encourages courts to implement measures contravening external requirements.¹⁹⁸ The civil justice plan for the Eastern District of Texas forcefully asserted local supremacy by proclaiming that "[t]o the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling."¹⁹⁹ The court, seemingly attempting to exercise its newly found authority, adopted an offer of judgment procedure that apparently conflicts with Federal Rule 68.²⁰⁰ The district also imposed a maximum fee schedule in contingent fee cases not covered by fee-shifting statutes, even though the Supreme Court has expressly stated that Congress, not the judiciary, is to allocate litigation expenses.²⁰¹

5. *Other implementation issues.*

The procedures actually promulgated under the Act. As mentioned above, the courts promulgated different permutations of the eleven principles, guidelines, and techniques enumerated by the statute, and a number of districts adopted additional procedures under the open-ended prescription.²⁰² Many of these procedures created problems by eroding uniformity, simplicity, and transubstantivity while increasing expense and delay.

196. The Rules Enabling Act requires that local rules be "consistent with Acts of Congress" and the Federal Rules of Civil Procedure. 28 U.S.C. § 2071(a) (1988 & Supp. IV 1992); *see also* FED. R. CIV. P. 83 (requiring that local rules be consistent with the Federal Rules).

197. The most controversial and troubling examples involved automatic or mandatory prediscovery disclosure procedures, some of which would have substantially transformed traditional discovery. *See, e.g.*, EASTERN DISTRICT OF NEW YORK PLAN, *supra* note 43, at 4-5; IDAHO PLAN, *supra* note 185, at 10-11.

198. *See* 28 U.S.C. § 473(b)(6) (Supp. IV 1992) (providing that in formulating their plans, district courts must consider and may include "such other features as [they] consider[] appropriate after considering the recommendations of the advisory group"). Congress may have considered this a narrower grant of authority than did a number of judges. Robel, *supra* note 70, at 1464-72; *see also* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 438-39 (5th ed. 1994).

199. EASTERN DISTRICT OF TEXAS PLAN, *supra* note 185, at 9.

200. *Id.* at 10.

201. EASTERN DISTRICT OF TEXAS PLAN, *supra* note 185, at 7-8; *see* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 834-35 (1990); *see also* Chambers v. NASCO, Inc., 501 U.S. 32, 34 (1991) (stating that fee awards should be based primarily on statutes, and only secondarily on courts' supervisory powers). Numerous other districts have adopted procedures that actually are or appear inconsistent, but most have been less direct about doing so than the Texas court. *See, e.g.*, note 46 *supra* (analyzing the Montana District Court's experimentation with coequal assignment of civil cases to Article III judges and magistrate judges). For elaboration of how the principles, guidelines, and techniques in the Act enable districts to erode uniformity and simplicity, *see* Tobias, *supra* note 2, at 1418-22.

202. *See* text accompanying notes 191-192 *supra*.

Most of the districts adopted some specific procedures that imposed these problems. For instance, when districts implemented varied forms of automatic disclosure, this sacrificed uniformity and simplicity. Many districts implemented case-management techniques that increased judicial discretion to require lawyers or litigants to prepare more papers, such as specialized discovery plans, and to be involved in more conferences.²⁰³ Procedures authorizing the referral of cases to ADR enhanced judicial discretion to require that attorneys and litigants participate in activities which may impose greater expense and delay.²⁰⁴ A number of districts developed multiple tracks tailored to case type or complexity which allowed courts to assign different procedures to dissimilar civil cases, thereby increasing judicial discretion and decreasing uniformity and trans-substantivity.²⁰⁵ Even those procedures that achieved the 1990 statute's goal of reducing cost or delay might have done so at the expense of uniformity, simplicity, or trans-substantivity or of other important process values, such as fairness or court access.²⁰⁶

Issues of procedural interpretation and application. Many judges have inconsistently interpreted the new local procedures, and some have not even applied certain provisions that their districts prescribed.²⁰⁷ Moreover, lawyers and litigants have encountered difficulty finding the applicable procedures.²⁰⁸ The experience with automatic disclosure illustrates this idea. Some districts never reduced to written form their new procedures that govern automatic disclosure, leaving resolution to local practices or understandings. Other districts circulated letters to local federal court practitioners or issued general or special orders, few of which documents are readily accessible to lawyers outside the districts.²⁰⁹ These problems are not confined to automatic disclosure's imple-

203. See 28 U.S.C. § 473(a)(1)-(3), (a)(5), (b)(1)-(3), (b)(5) (Supp. IV 1992) (recommending differential treatment of cases, enhanced judicial case management and control of the pretrial process, and improved discovery procedures).

204. See *id.* § 473(a)(6), (b)(4) (recommending referral of cases to ADR).

205. See, e.g., U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 102-06 (1991); U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, CIVIL JUSTICE DELAY AND EXPENSE REDUCTION PLAN 2-4 (1991); see also 28 U.S.C. § 473(a)(1)-(3) (Supp. IV 1992).

206. See text accompanying note 195 *supra*. For instance, procedures which expedite dispute resolution or which mandate participation in ADR frequently disadvantage resource-poor litigants who need more time for discovery and for preparing cases and that may be unable to afford the costs of ADR. See Tobias, *supra* note 2, at 1423; see also Burbank, *supra* note 13, at 1466-71 (discussing process values).

207. Anecdotal evidence, gleaned from my conversations with numerous individuals familiar with ongoing civil justice reform efforts, identifies numerous examples, four of which are comparatively clear: the Northern District of California, the Southern District of Indiana, and the Districts of Massachusetts and Montana. See Carl Tobias, *Recent Federal Civil Justice Reform in Montana*, 55 MONT. L. REV. 235, 239 (1994). Some judges in these and other districts simply do not apply all of the civil justice reform procedures, while there is interdivisional disuniformity in Montana.

208. This discussion draws from my review of nationwide developments in civil justice reform, gleaned from analyzing advisory group reports and recommendations and districts' plans and from conversations with many individuals knowledgeable about civil justice reform. See notes 138-174 *supra* and accompanying text.

209. See, e.g., Order of John H. Moore II, Chief Judge, United States District Court for the Middle District of Florida, to Federal Court Practitioners (Nov. 9, 1993); Letter from Paul G. Hatfield, Chief Judge, United States District Court for the District of Montana, to the Federal Bar (Jan. 25, 1994).

mentation; a number of districts adopted their reforms as part of local practices or understandings or in general, special, standing, or scheduling orders, rather than in civil justice plans or local rules.

6. *Evaluation of the 1990 CJRA's implementation.*

Although Congress apparently envisioned that CJRA experimentation would receive rather rigorous evaluation, difficulties with the Act's implementation may have compromised that goal's attainment. For example, as mentioned before, the essentially simultaneous nature of experimentation complicated efforts to assess various procedures by comparing their efficacy across districts. Moreover, numerous districts experienced problems compiling the annual assessments that the 1990 Act requires.²¹⁰ A number of EIDCs completed their evaluations more than a year after adopting plans. Some courts encountered difficulties because they did not create clear baselines for measuring cost and delay reduction.²¹¹ Quite a few districts issued terse assessments which included little data or other analytical material.²¹²

Congress required all ninety-four courts to undertake annual assessments with a view to refining the efficacy of their procedures.²¹³ Some districts have performed well-structured, comprehensive, or informative evaluations,²¹⁴ while a few districts have even improved their procedures in light of information which the assessments revealed.²¹⁵

Despite the current lack of empirical data, some themes can be identified. As I have suggested above, many aspects of the Act and its implementation—including the very procedures adopted under the statute—eroded the tenets of uniformity, simplicity, and trans-substantivity while increasing cost and delay. Moreover, the experimentation described effectively suspended those elements of the 1988 legislation that were intended to ameliorate the difficulties created by local procedural proliferation.²¹⁶

210. See 28 U.S.C. § 475 (Supp. IV 1992).

211. See Carl Tobias, *Recalibrating the Civil Justice Reform Act*, 30 HARV. J. ON LEGIS. 115, 124 (1993); see also Mullenix, *supra* note 83, at 402-05.

212. See, e.g., ANNUAL ASSESSMENT FOR THE DISTRICT OF WYOMING (1993); U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, CIVIL JUSTICE REFORM ACT ANNUAL ASSESSMENT REPORT (1993), available in WESTLAW, CJRA Database.

213. See 28 U.S.C. § 475 (Supp. IV 1992); see also text accompanying note 100 *supra*.

214. See, e.g., U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ANNUAL ASSESSMENT OF THE CONDITION OF THE COURT'S DOCKET 1-4 (1993); U.S. DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, ANNUAL ASSESSMENT OF THE CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN FOR IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT OF 1990 IN THE DISTRICT OF NEW JERSEY 1-3 (1992) [hereinafter NEW JERSEY ASSESSMENT]; U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, ANNUAL ASSESSMENT OF CIVIL AND CRIMINAL DOCKET 1-3 (1993) [hereinafter NORTHERN DISTRICT OF OHIO ASSESSMENT].

215. See, e.g., NEW JERSEY ASSESSMENT, *supra* note 214, at 20; TEX. GEN. ORDER NO. 92-93 AMENDING ARTICLE FOUR, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Oct. 29, 1992); *cf.* DIFFERENTIATED CASE MANAGEMENT PLAN OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN (1992) (amending the CJRA plan to implement a differentiated case-management system).

216. For elaboration of this point, see note 106 *supra* and accompanying text.

7. *Beneficial aspects of the 1990 CJRA.*

In fairness, the CJRA and its implementation had a number of positive aspects. Congress did structure the legislation in several ways that were meant to prevent or at least ameliorate disuniformity, complexity, expense, and delay. For example, Congress prescribed eleven principles, guidelines, and techniques that it envisioned most districts would adopt and it provided for pilot and demonstration districts which were to employ similar procedures and EIDCs that were to experiment earlier than the remaining districts.

Congress instituted an unprecedented nationwide self-analysis by all ninety-four units of the federal civil justice system. The vision of reform proceeding from the bottom up inevitably promoted communication inside and among federal districts and with the state courts. Nearly all of the districts implemented some procedures, particularly in the broad areas of judicial case management, discovery, and ADR, which directly and perhaps successfully address cost and delay,²¹⁷ although the efficacy of automatic disclosure remains unclear.²¹⁸

Certain complications that attended statutory implementation may have been attributable more to judicial interpretation and effectuation than to legislative drafting. The most important illustration is the twelfth procedural prescription, which Congress seemed to consider a somewhat narrower grant of authority than did numerous federal judges.²¹⁹

Finally, the Act made considerable provision for analysis of the experimentation that has proceeded and will be conducted. Congress commissioned a major study of the pilot districts by the RAND Corporation,²²⁰ and the Judicial Conference is currently evaluating the demonstration districts.²²¹

C. *Conflicts Between the Two Acts*

The JIA and CJRA as written and implemented are not completely reconcilable and, indeed, are incompatible in important respects. When enacting the JIA, Congress accurately perceived local procedural proliferation to be a major problem that was contributing significantly to the erosion of uniformity, simplicity, and trans-substantivity in federal civil procedure; facilitating expanded judicial discretion; and increasing the cost of and delay in civil litigation. Congress prescribed institutions and assigned them duties which appeared respon-

217. This appears to be particularly true of the demonstration districts experimenting with these procedures. As to case management, see *DIFFERENTIATED CASE MANAGEMENT IN THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, ANNUAL ASSESSMENT* (1994); *NORTHERN DISTRICT OF OHIO ASSESSMENT*, *supra* note 214. As to ADR, see Memorandum from Kent Snapp and Davis Loupe to Judges in the Western District of Missouri (Jan. 26, 1993) [hereinafter Memorandum from Snapp & Loupe] (assessing ADR in the Western District of Missouri); *NORTHERN DISTRICT OF OHIO ASSESSMENT*, *supra* note 214.

218. See text accompanying notes 171-174 *supra*.

219. See note 198 *supra*; text accompanying notes 196-201 *supra*.

220. See Terence Dunworth & James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990*, 46 *STAN. L. REV.* 1303 (1994); see also note 95 *supra* and accompanying text.

221. See text accompanying notes 96-97 *supra*; see also notes 213-215 *supra* and accompanying text.

sive to the problem of local proliferation while simultaneously systematizing and opening to the public local procedural amendment processes.

Congress apparently appreciated that restoring the primacy of the national rule revision process could address both the growth of local rules and the procedural tenets' deterioration. Legislative provision in the 1988 statute for opening that process to increased public scrutiny was ostensibly intended to improve the quality of Federal Rules amendments developed, although Congress may have permitted the process to become overly politicized. The 1988 Act, therefore, in significant measure reaffirmed and sought to reinvigorate nearly all of the major procedural tenets, especially uniformity and simplicity, which animated the drafters of the original Federal Rules. The CJRA's implementation, however, effectively suspended efforts to reduce local procedural proliferation and was accommodated in several important ways by the 1993 revision process.

Congress focused on different aspects of the civil justice system when it enacted the CJRA than it had when passing the JIA. It emphasized increased expense and delay in civil dispute resolution and may have thought that the uniform, simple, trans-substantive regime of the Federal Rules contributed to these difficulties. Congress' new perceptions of the most pressing complications in civil litigation led it to develop different strategies for treating them. Whereas Congress considered procedural proliferation problematic when passing the 1988 Act, Congress now encouraged local procedural innovation, principally in areas, such as judicial case management, ADR, and discovery, which were responsive to the perceived sources of increased cost and delay. Congress created entities and assigned them duties that would maximize communication between the bench and bar, among the federal districts, and between the federal and state civil justice systems, in the hope of discovering, and generating consensus about, procedures that would reduce expense and delay. The 1990 legislation, accordingly, emphasized the 1938 drafters' tenets relating to expeditious, inexpensive dispute resolution, rather than uniformity, simplicity, trans-substantivity, and other process values. The tenets stressed find their clearest modern expression in the rise of managerial judging and the 1983 Federal Rules amendments.

Numerous features of the 1990 statute and its implementation indicate that Congress may not have sufficiently thought through, and perhaps was unaware of, the conflicts with the JIA. Tensions between the two statutes are particularly evident in the 1990 Act's approach to local experimentation. For example, the CJRA encouraged districts to adopt procedures that conflict with the Federal Rules or the United States Code.²²² Moreover, circuit judicial councils were probably reluctant to abrogate local procedures that the 1990 legislation seemingly authorized. The above developments, especially the accelerating erosion of national uniformity and simplicity, manifested less than a half-decade after the 1988 Act's passage, were ironic, because local procedural proliferation and inconsistency were important ills that the JIA sought to remedy.

222. See text accompanying notes 196-198 *supra*.

These specific conflicts involving the two statutes may well be symptomatic of broader tensions. For example, the 1988 Act's attempts to reinvigorate a uniform, simple, trans-substantive code of federal civil procedure conflict with the 1990 legislation's goal of applying local procedures that will reduce expense and delay, phenomena which are partly attributable to the uniform, simple, trans-substantive nature of the 1938 Federal Rules.²²³

The CJRA's implementation and the 1993 changes in the Rules which permitted local variation essentially supplanted efforts to treat local procedural proliferation, which means that procedural conditions remain as they were when Congress found them unacceptable in 1988. The difficulties of effectuating the CJRA and the 1993 amendments recounted above may well have additionally complicated the procedural state of affairs. Indeed, the tenets of uniformity, simplicity, and trans-substantivity which underlay the initial Federal Rules are more substantially undermined, while judicial discretion and costs and delay may be greater, than at any time since 1938. There are too many procedures, too many of which are too dissimilar, too complex, or too difficult to locate, understand, and obey. These developments have eroded the primacy of national procedures, effectively portending the demise of a nationally applicable code of procedure, and have greatly complicated federal civil practice.

Certain difficulties may have been attributable less to Congress or to the legislation as written than to other entities or to statutory implementation. For instance, the 1988 and 1990 Acts were apparently good faith efforts to treat substantial problems of modern civil litigation. Nevertheless, passage of the statutes, particularly of the 1990 Act, exacerbated longstanding interbranch tensions which may be inevitable in the important area of court rulemaking, involving as it does delicate issues of separation of powers and shared responsibilities.²²⁴ More specifically, Congress may have considered the CJRA's twelfth prescription a significantly narrower grant of authority to adopt inconsistent procedures than numerous districts have treated it.²²⁵ Furthermore, the Advisory Committee probably bears greater responsibility than Congress for the complications created when the 1993 Federal Rules amendments took effect on the very date that many civil justice plans were due.²²⁶

Congress apparently failed to consider completely the purposes, structure, and implementation of the 1990 Act, especially the legislation's reconciliation with the 1988 statute. It may have not appreciated that numerous important features of the two measures were in tension, much less that each statute pro-

223. Judges also need sufficient flexibility to adopt local procedures which can enable them to resolve local cases promptly, inexpensively, and fairly. See Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 868-71 (1989).

224. These may be symptomatic of broader complications involving interbranch relations. Virtually all of Chief Justice Rehnquist's annual reports on the state of the federal judiciary reflect these tensions. See, e.g., WILLIAM H. REHNQUIST, 1993 YEAR-END REPORT ON THE FEDERAL JUDICIARY; see also Mullenix, *supra* note 83, at 379-82, 399-400; William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1; text accompanying notes 75-78 *supra*.

225. See note 198 *supra*; see also text accompanying notes 196-201 *supra*.

226. See notes 138-169 *supra* and accompanying text; see also notes 114-118 *supra*.

noted different, frequently inconsistent procedural tenets. Insofar as Congress contemplated that the 1990 Act might conflict with and even suspend the 1988 statute or frustrate the achievement of its basic objectives, Congress may have attempted to ameliorate those effects or may have decided that widespread experimentation with local procedures to decrease cost and delay was more important. In any event, Congress might have considered the 1988 legislation's suspension to be only a temporary disruption.

In short, Congress pinpointed the problems of expense and delay in modern civil litigation and prescribed institutions and procedures for addressing those difficulties in the 1990 Act. Unfortunately, Congress may have not thoroughly thought through the statute's goals, operation, and implementation, particularly vis-à-vis the 1988 legislation. The treatment of these and numerous attendant complications examined above could necessitate institutional arrangements, specific procedures, procedural revision processes, and modes of experimentation different from those which Congress prescribed or envisioned in the two statutes. Indeed, efforts to capitalize on the Acts and legislative implementation by stressing, building on, and integrating their best aspects and rejecting or deemphasizing their worst features will apparently be more productive than attempts at comprehensive reconciliation of the legislation.

As general propositions, the goals of increasing uniformity, simplicity, and trans-substantivity and of reducing cost and delay should continue to guide reform endeavors. These tenets, even as eroded, have served federal court judges, lawyers, and litigants well for a half-century, honoring important process values, such as open court access and fairness. However, the tenets, as general precepts, are not inviolable, particularly when they conflict. For instance, judicial application of special, different procedures to expedite routine, simple cases acknowledges that the need to decrease expense and delay can outweigh uniformity and trans-substantivity in certain situations.

Efforts to capitalize on both statutes and legislative implementation lead to several more specific ideas. Future work should seek to restore the primacy of the national rule revision process while reattaining the local procedural status quo of 1988 and decreasing local rule proliferation. Moreover, civil justice reform procedures which have proved very effective in reducing expense or delay and which comport with important tenets must be incorporated in the Federal Rules. Measures that showed promise should be designated for additional experimentation. The institutions and procedural revision processes prescribed in the 1990 statute should merge into those that existed or were created in 1988, while the 1990 Act's experimentation methods should be replaced with an amendment to Federal Rule 83 analogous to the 1991 proposed revision.²²⁷

The next Part offers recommendations for the future, relating to institutions, procedures, processes, and experimentation. Although Congress passed the 1988 and 1990 statutes and is the ultimate procedural policymaker, my pre-

227. See text accompanying notes 175-176 *supra*; see also text accompanying notes 229-261 *infra*.

scriptions are directed to all relevant decisionmakers, including national and local rule revisors and federal judges as well as Congress. Existing individuals and entities can implement nearly all of the recommendations without legislation. Congress may want to consider the establishment of a national commission on federal civil procedure, which could decide how to implement specific suggestions and which would have the requisite independence and resources to assemble, analyze, and develop additional ideas for improving twenty-first century civil procedure.²²⁸

IV. SUGGESTIONS FOR THE FUTURE

A. *Institutions*

1. *National rule revision entities.*

The national entities should regain and maintain primary responsibility for revising the procedures that govern civil litigation. These entities have served the courts, Congress, lawyers, parties, and the public well for many years, most recently in the amendment process that yielded the 1993 revisions, and they are repositories of a wealth of accumulated expertise. The entities can best revive, sustain, and enhance procedure's fundamental tenets, particularly uniformity and simplicity, while making exceptions as needed. The institutions' national perspective enables them to develop procedural improvements that consider the best interests of the civil justice system as a whole. Entities such as the Judicial Conference are well-equipped to identify those procedures which warrant application in all ninety-four districts or which appear promising enough to justify deviation from the Federal Rules for purposes of experimentation or of treating peculiar local conditions.²²⁹ For decades, Congress has reviewed and modified Federal Rules amendments, but Congress does not oversee local procedural changes. In contrast, most local rules committees, appointed by judges in the ninety-four districts to advise them on procedural revisions, will be more concerned about local needs than about national uniformity or simplicity.²³⁰

Among those entities—the Advisory Committee, the Standing Committee, the Judicial Conference, the Supreme Court, and the Congress—responsible for national rule revision, the Advisory Committee should retain major responsibility for developing proposals for procedural change. The bodies above that Committee in the rule revision hierarchy, while remaining involved, should defer to the institutions below them, which are more attuned to the practical effects of rule revision. The Court and Congress should continue to play limited roles as ultimate gatekeepers, rejecting, modifying, or remanding procedural proposals that are clearly inappropriate. These suggestions respect historical

228. For example, such a commission should have a staff which has no other responsibilities. A helpful model is the recent National Commission on Judicial Discipline and Removal. For background on the Commission's work, see Symposium, *Disciplining the Federal Judiciary*, 142 U. PA. L. REV. 1 (1993) (collecting papers by consultants to the Commission).

229. See Keeton, *supra* note 223; see also Cohn Letter, *supra* note 46.

230. See note 185 *supra* and accompanying text; see also Tobias, *supra* note 2, at 1401 n.50 (observing that 94 local rule revision entities are more difficult to monitor than one Advisory Committee).

practice and are commensurate with the apparent interest, expertise, and resources, including time and staff, that the entities possess and can devote to rule revision. The recommendations appropriately accommodate conflicting concerns, such as the need for congressional and Supreme Court involvement to legitimate court rulemaking and for relatively expeditious procedural revision which participation by a multiplicity of institutions complicates. The limited roles suggested for the Court and the Congress are reinforced by the Justices' extremely deferential review of the 1993 amendments and by Congress' rather erratic treatment of that package.²³¹

Additional practicing attorneys should be included as members of the Standing Committee and the Advisory Committee to counter the perception that the revisors' work product is overly solicitous of the needs of the federal bench.²³² Numerous observers assert that these entities' relative solicitude is partially attributable to their recent historical composition, which overwhelmingly consists of federal judges.²³³

2. *Local procedural revision entities.*

With respect to local procedural revision, the advisory groups and circuit review committees created under the CJRA should merge with the local rules committees and circuit judicial councils required under the JIA and earlier legislation.²³⁴ Too many institutions serving analogous functions currently participate in local revision processes. Moreover, the newer entities have already achieved their principal purpose, facilitating widespread experimentation, and the older institutions can competently assume their remaining responsibilities. Those districts that have not appointed local rules committees should promptly do so. All committees should have balanced composition and should recruit civil justice reform advisory group members for their expertise.²³⁵ These local rules committees can provide valuable assistance to district judges in formulat-

231. See notes 117-118, 157-162 *supra* and accompanying texts. Congress' failure to reconcile the 1988 and 1990 Acts or at least to think completely through the CJRA's implementation implicates its institutional competence as a procedural policymaker and may support its adopting a more circumscribed role in the future. See Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 800-05, 817-18 (1993); see also Burbank, *supra* note 168; Colloquy, *Perspectives on Supplemental Jurisdiction*, 41 EMORY L.J. 3 (1992) (essays debating the strengths and weaknesses of 28 U.S.C. § 1367, governing supplemental jurisdiction, which Congress passed in 1990); note 54 *supra* and accompanying text (describing congressional revision of Rule 4).

232. See Tobias, *supra* note 115, at 897; see also notes 145-152 *supra* and accompanying text (describing the Advisory Committee's reversal on automatic disclosure twice in two months, despite the organized bar's strident opposition).

233. See Tobias, *supra* note 115, at 897; see also S. 2212, 103d Cong., 2d Sess (1994) (bill requiring that rule revision committees have a majority of members of the practicing bar because the committees lack balance). *But see* 1993 *Proposed Amendments*, *supra* note 48, at 329-30 (reflecting recently revised composition to include more practitioners on advisory committees on bankruptcy, civil, criminal, and evidentiary rules).

234. See texts accompanying notes 63-69, 84-108, 184-189 *supra*.

235. For instance, advisory group members could contribute an appreciation of the history of civil justice reform efforts, could help promote bench-bar exchange, and could develop strategies for integrating civil justice reform into future procedural endeavors.

ing local procedural proposals, can help foster consensus on the best local procedures, and can serve as constructive liaisons between the bench and bar.

All of the judges in each district, in consultation with local rules committees, should have primary responsibility for developing procedural changes, and individual judges should defer as much as possible to those institutions, rather than develop individual-judge procedures. Judges working with local rules committees should have the expertise, understanding of local circumstances, and appreciation of the need for national uniformity and simplicity that are required to develop local procedures that restore, maintain, and enhance those tenets and which reduce cost and delay and decrease judicial discretion, when warranted. The judges, the local rules committees, and the circuit judicial councils should reassume and discharge the duties relating to local procedural proliferation imposed by the JIA that the CJRA, in effect, suspended. The Local Rules Project, with its wealth of information on local procedures and its substantial expertise regarding local procedural proliferation, can assist and coordinate efforts aimed at limiting local proliferation.²³⁶

B. *Procedures*

Restoring, sustaining, and enhancing the tenets of uniformity, simplicity, and trans-substantivity while reducing judicial discretion and cost and delay require preferring Federal Rules over local rules, local rules over individual-judge procedures, and written procedures over unwritten ones. These propositions, as general precepts, are not absolutes and allow for variation, particularly when the tenets are in tension. For instance, it may be necessary to sacrifice a measure of national uniformity or simplicity to experiment locally with techniques that promise to limit expense or delay. When ascertaining the propriety of applying specific procedures, it will be important to employ a finely calibrated analysis which considers the tenets and additional significant process values, such as open court access.²³⁷

1. *Local procedures.*

All local procedures, especially those of individual judges, such as general, standing, special and minute orders, and unwritten practices, that are unnecessary or inconsistent should be eliminated.²³⁸ The maximum number of local procedures that remain ought to be included in local rules. Every local procedure should be in written form. However, courts must retain some flexibility to experiment and to apply measures which efficaciously treat problems that are peculiar to local dockets.²³⁹

236. See notes 38-48 *supra* and accompanying text (discussing the Project's efforts, including its suggestion that local procedures be numbered consistently).

237. See Robel, *supra* note 70, at 1484 (suggesting a similar test premised on local legal cultures for experimentation with inconsistent procedures).

238. See text accompanying notes 45-46, 66-67, 104, 196-198 *supra*; FED. R. CIV. P. 83 (permitting district courts to promulgate local rules not inconsistent with the Federal Rules and individual judges to "regulate their practice in any manner not inconsistent with" the Federal Rules or local rules).

239. See note 223 *supra* and accompanying text.

There should also be provision for procedures which were tested under the 1990 Act. Those procedures that clearly reduced expense or delay while respecting additional important tenets should be incorporated into the Federal Rules.²⁴⁰ Other procedures which showed promise of decreasing cost or delay but were not effective enough to be implemented nationwide should be designated for more experimentation. Experimentation could be authorized under a modified version of the 1991 proposal to amend Rule 83 or under legislation similar to that providing for court-annexed arbitration.²⁴¹

2. *National procedures.*

I offer some general suggestions with examples derived principally from the 1993 Federal Rules amendments, subject to the caveat that they are in the early stages of implementation. The 1993 revision of Federal Rule 11 has apparently had the intended effect of reducing incentives to invoke the provision, thereby decreasing satellite litigation and effecting concomitant reductions in cost, delay, and chilling effects.²⁴² The difficulty of implementing automatic disclosure, the controversial nature of the provision adopted, and the limited application and evaluation of the procedure to date complicate definitive conclusions regarding its efficacy. Anecdotal evidence indicates that disclosure's effectiveness is context-specific.²⁴³ It is advisable, therefore, to refine the procedure by confining its application to those contexts in which disclosure works best.

Other, less controversial procedures, such as those in the broad fields of case management and ADR, appear to yield cost or time savings, although conclusive determinations must await additional experimentation and evaluation under the CJRA.²⁴⁴ However, the local-option mechanism, which was included in the 1993 Federal Rules amendments primarily as a temporary expedient to accommodate local experimentation with civil justice reform, should be

240. See, e.g., Memorandum from Snapp & Loupe, *supra* note 217 (describing successful efforts to implement ADR in Missouri). See generally Debra Cassens Moss, *Reformers Tout ADR Programs*, A.B.A. J., Aug. 1994, at 28. The 1990 statute expressly requires that the Judicial Conference make this determination as to the six principles and guidelines prescribed. See notes 93-95 *supra* and accompanying text. It is now difficult to identify definitively which procedures warrant enforcement in the ninety-four districts because their assessment has not been completed. Nonetheless, it presently appears that some principles, guidelines, and techniques in the broad areas of case management, ADR, and discovery will reduce cost or delay and be consistent with the remaining tenets and other significant process values. See notes 217-218 *supra* and accompanying text. Those procedures not statutorily prescribed which similarly reduce expense or delay and comport with the tenets should also be included in the Federal Rules.

241. See notes 175-176 *supra* and accompanying text (discussing proposed Rule 83); note 58 *supra* (discussing court-annexed arbitration); see also notes 258-261 *infra* and accompanying text (discussing experimentation).

242. These assertions are premised on an informal survey of reported and unreported Rule 11 opinions issued since December 1993, and on conversations with many individuals involved in federal court litigation.

243. See notes 152, 173-174 *supra* and accompanying texts (suggesting that disclosure functions more efficaciously in relatively routine, simple cases rather than complex cases, such as products liability litigation).

244. See notes 217-218 *supra* and accompanying text.

eliminated.²⁴⁵ The technique has created significant problems of disuniformity and complexity and concomitantly has increased expense and delay, even as the flexibility that it afforded has facilitated experimentation.²⁴⁶

C. Revision Processes

1. National revision processes.

As between the national and local rule revision processes, the national process should be accorded primary responsibility for changing procedures that govern federal civil litigation. This national process has served the public very well for more than a half-century, and it can best attend to the revitalization, maintenance, and enhancement of the fundamental tenets of federal civil procedure and to the needs of all ninety-four districts in developing proposals for procedural change.²⁴⁷

It is difficult to evaluate precisely the national revision process instituted in the 1988 Act, because the proceedings that led to the 1993 amendments were peculiar in several important respects.²⁴⁸ As a general matter, the process, premised on a weak administrative law model of federal agency rulemaking, seemed reasonably effective. The statutory requirements providing for increased public participation in the process encouraged public input which informed the procedural changes developed and apparently promoted public acceptability and accountability.²⁴⁹ For example, written comments and oral testimony from the public seemingly persuaded the Advisory Committee to make changes in the Rule 11 preliminary draft that improved it.²⁵⁰ Unfortunately, the greater openness and public involvement also imposed disadvantages, such as the costs of treating duplicative or incorrect public input and the potential to politicize the process which can compromise merits-based decisionmaking about procedures.²⁵¹

245. See notes 177-179 *supra* and accompanying text.

246. See notes 161-170, 179 *supra* and accompanying texts; see also notes 258-261 *infra* and accompanying text (describing more effective methods of experimentation).

247. For example, the process is best able to identify proposals which are sufficiently efficacious to warrant nationwide application.

248. See text accompanying note 109 *supra*.

249. See notes 114-116, 125-127, 145-148 *supra* and accompanying texts; see also Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 528-29, 531-32 (1972) (offering similar observations in the administrative 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).

250. See, e.g., texts accompanying notes 114-116, 125-127 *supra*.

251. See, e.g., Cramton, *supra* note 249, at 536 (identifying "overlapping and even frivolous representation [and] proliferation of issues" as some of the problems associated with active public participation in agency rulemaking); Tobias, *supra* note 249, at 946-47 (discussing costs of treating duplicative or incorrect public input in administrative proceedings); see also Mullenix, *supra* note 54, at 798-802, 830-57 (discussing how increased openness can compromise procedural decisionmaking). Thus, while proper accommodation may have been reached, additional tinkering with administrative models may be warranted. Examples are questions involving timing, such as the length of the entire process and the time that individual entities have to consider proposals, as well as the frequency with which procedures should be changed.

It is now appropriate to consider whether the assimilation of national procedural revision to federal administrative agency rulemaking should be more comprehensively and candidly realized. For instance, the procedures for securing, evaluating, and applying public input might improve if regularized under a clear, formal process for the submission of public comment to the Supreme Court.²⁵² There is also an important need to premise more Federal Rules amendment proposals on actual experience through careful experimentation and rigorous evaluation of procedural efficacy with the systematic collection, analysis, and synthesis of relevant empirical data. The unfortunate experience with automatic disclosure and the problems with the 1983 amendment of Rule 11 and its subsequent application that led to the 1993 amendment illustrate the importance of having information on how procedures operate in practice at the outset.²⁵³

2. *Local revision processes.*

Many of the ideas relating to the institutions responsible for local procedural change and to local procedures apply to the local procedural revision processes.²⁵⁴ As discussed above, the major priority should be instituting processes for reviewing all local procedures, abrogating those measures that are unnecessary or inconsistent, limiting the number of local procedures and including as many as possible in local rules, and reducing each local procedure to writing.²⁵⁵

Much I have said regarding the national revision process similarly applies to implementation of the JIA's requirement that local procedural revision processes be systematized and opened to public scrutiny. A number of districts have only recently instituted formal procedural revision procedures, while few courts have conducted proceedings, and civil justice reform under the 1990 Act suspended those processes in other districts. Nevertheless, some courts have completed proceedings that appeared effective, and a tiny number of districts capitalized on the CJRA's implementation to improve their local rules.²⁵⁶

As with the national revision process, the 1988 Act's requirements governing local procedural amendment seemed to reach appropriate accommodation among the applicable factors, such as the need for cogent public input to improve procedures and the need to avoid undue politicization of revision processes.²⁵⁷ These similarities between the national and local processes suggest that recommendations regarding national amendment have analogous local application. For example, local processes should be open to public involve-

252. See Tobias, *supra* note 113.

253. See notes 138-141 *supra* and accompanying text.

254. See notes 234-236, 238-241 *supra* and accompanying texts.

255. See text accompanying note 238 *supra*.

256. The Middle District of Georgia and the Southern District of West Virginia apparently capitalized on opportunities afforded by civil justice reform to review and revise their local rules. See, e.g., U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, PLAN TO MINIMIZE COST AND DELAY OF CIVIL LITIGATION 5 (1993); Tobias, *supra* note 103, at 104 & n.113 (discussing local rules in the Southern District of West Virginia).

257. See notes 248-251 *supra* and accompanying text.

ment. This means that all of the judges in specific districts should work closely with the local rules committees in developing suggested procedural improvements while affording the public and the bar notice of the proposed changes and formally soliciting public input. The judges and committees should also capitalize on all relevant civil justice reform efforts by, for instance, continuing the informative bench-bar dialogue and the exchange of ideas among the districts which pervaded the CJRA's implementation.

D. *Experimentation*

Future experimentation should proceed pursuant to a systematic, measured approach modeled on the 1991 proposal to amend Federal Rule 83 which the Advisory Committee withdrew in deference to civil justice reform efforts.²⁵⁸ That proposal would have permitted districts, which secured Judicial Conference approval, to experiment for not greater than five years with inconsistent local procedures.²⁵⁹ Some subset of the ninety-four federal districts might serve as laboratories for testing procedures that appear sufficiently promising to warrant application in additional courts or nationally.²⁶⁰

All of the judges working with local rules committees in each district could propose and develop experimental projects. The judges and committees might rely upon efforts to implement the CJRA and reform endeavors in the state civil justice systems when identifying potential procedures for testing and when designing experiments. They should also draw upon the wealth of information and technical expertise that is available in the Administrative Office of the United States Courts, the Federal Judicial Center, and the Judicial Conference committees, especially the Court Administration and Case Management Committee.

Equally important as vigorous, systematic experimentation is rigorous evaluation. The districts should develop appropriate evaluative criteria, establish proper baselines, employ correct techniques for assessing procedures' effects, and analyze procedures with sufficient rigor in diverse situations for enough time to afford an accurate sense of their efficacy. The RAND Corporation's study of experimentation in the pilot districts provides an instructive model of evaluation.²⁶¹ When experimentation with and assessment of specific procedures in particular federal districts show that they warrant broader application, the Advisory Committee and the Judicial Conference should ascertain whether the procedures need additional testing or are sufficiently efficacious to be implemented nationally. When more experimentation is indicated, the entities should calculate exactly how much is necessary and designate the appropriate circumstances for that activity. If the Committee and the Conference deem

258. See notes 175-176 *supra* and accompanying text. See generally 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.

259. See notes 175-176 *supra* and accompanying text.

260. The proposal prescribed no standard for approving proposals to experiment.

261. See Dunworth & Kakalik, *supra* note 220.

nationwide application proper, the Advisory Committee ought to draft a proposal for consideration in the national rule revision process.

Many factors support adoption of an approach similar to the one described above. It relies substantially on those entities which have great expertise relating to experimentation and capitalizes on civil justice reform efforts. The model accommodates a number of often conflicting needs. These include the flexibility to conduct experimentation that will lead to the discovery of procedures which reinvigorate the Federal Rules' basic tenets while minimally disrupting daily dispute resolution. Moreover, the course of action is deliberately structured narrowly, to minimize certain difficulties created by the CJRA's implementation, even as the approach capitalizes on the legislation by developing experiments from the bottom up and by using the information that the Act generated. For example, the ability to control the number of districts that are simultaneously experimenting with similar procedures will enable districts to build on prior testing and to facilitate effective evaluation.

CONCLUSION

The Judicial Improvements Act of 1988 and the Civil Justice Reform Act of 1990 were important efforts to improve federal civil procedure. Very different visions of the problems with modern civil litigation and of the solutions to those difficulties animated the 1988 and 1990 statutes. There has been considerable tension between the two Acts, in part because the drafters of the CJRA apparently did not think completely through its implementation and seemingly made little effort to integrate the legislations' effectuation. Notwithstanding these tensions and other complications which have attended each statute and its implementation, the JIA and CJRA have afforded numerous benefits. If those responsible for the current state of federal civil procedure follow the suggestions above, they may now capitalize on the two statutes and their effectuation to improve that procedure in the twenty-first century.