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Civil Justice Reform and the Balkanization of Federal Civil Procedure

Carl Tobias*

The recent civil war ripping apart Yugoslavia is a trenchant reminder of the horrors of balkanization. Without trivializing the Yugoslavian experience, the term balkanization usefully applies to developments in American federal civil procedure that now threaten the continued viability of a uniform, simple system of procedure. Thirty-four federal courts' nascent implementation of the Civil Justice Reform Act (CJRA) of 1990 will exacerbate these developments; indeed, if the remaining sixty districts that must issue civil justice expense and delay reduction plans by December 1993 fail to halt this trend, the Act will further fragment procedure.¹ This article cautions those responsible for maintaining an efficacious procedural system that they must slow balkanization, lest civil procedure become even more disuniform and complex.

The piece first explores numerous developments in federal civil procedure that fostered the balkanization of a once uniform, simple system. It then analyzes the most recent manifestations of the phenomenon, as witnessed in congressional passage of the CJRA and thirty-four districts' initial implementation of the statute, and finds that civil justice reform will worsen the prior procedural developments. The paper next evaluates the implications of enhanced balkanization and concludes that it will detrimentally affect federal court judges, lawyers and litigants.

I. THE ROAD TO BALKANIZATION

A. *Adoption of the Original Federal Rules*

The lawyers who crafted the original 1938 Federal Rules of Civil Procedure consciously responded to the difficulties that common law

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1. See Civil Justice Reform Act of 1990, tit. I, Pub. L. No. 101-650, 104 Stat. 5089-98 (codified at 28 U.S.C. §§ 471-82 (Supp. 1992)). Balkanization, as used in this article, is the fragmentation of federal civil procedure, which is manifested more specifically in the increasingly disuniform and complex nature of the procedural system.

and code practice and procedure had imposed.² The drafters specifically attempted to minimize the highly technical requirements of the earlier procedural systems, thereby ameliorating, if not eliminating, the "sporting theory of justice."³ Charles Clark, the Reporter for the first Advisory Committee on the Civil Rules, and the members of that Committee apparently had numerous procedural tenets in mind when they wrote the initial Federal Rules.⁴ Most relevant to increasing balkanization was the drafters' intent to devise a code of federal civil procedure that was simple and uniform.⁵ They meant to achieve simplicity, for example, by sharply reducing the significance of pleading and by limiting the number of steps in a lawsuit.⁶ The drafters attempted to achieve uniformity, for instance, by prescribing the same procedures for all federal district courts and practically all federal civil cases by merging law and equity, and by encouraging the states to model their civil procedures on the federal counterparts.⁷

B. *The Golden Age: The Initial Three Decades of Judicial Application*

The Civil Rules Committee and the federal judiciary were able to maintain simplicity and uniformity in federal civil procedure for ap-

2. 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, 272-73 (1989).

3. 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); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 404-06 (Pt. 1, 1906) ("sporting theory"); Subrin, *supra* note 2, at 948-73. See generally CHARLES E. CLARK, *PROCEDURE - THE HANDMAID OF JUSTICE* (1965).

4. E.g., Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L. J. 718 *passim* (1975); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 502-15 (1986); Tobias, *supra* note 2, at 272-77; see also Resnik, *supra*, at 498-99 (discussing the difficulties of divining intent of drafters who worked a half-century ago); Tobias, *supra*, at 274 (same).

5. Uniformity is a subset of simplicity. The drafters had other major objectives. They also intended to afford attorneys substantial, and judges limited, control over lawsuits; to subordinate procedure to substance; and to emphasize merits-based resolution of cases. For discussion of these and other important objectives of the drafters, see Resnik, *supra* note 4, at 502-15; Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648 *passim* (1981); Tobias, *supra* note 2, at 272-77.

6. Subrin, *supra* note 5, at 1649-50; Tobias, *supra* note 2, at 274; see also Marcus, *supra* note 3, at 439-40.

7. See, e.g., Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 435 (1958) (encouraging states); Subrin, *supra* note 5, at 1650 (same procedures and merger); Tobias, *supra* note 2, at 274-75 (same).

proximately thirty years after the adoption of the original Federal Rules in 1938.⁸ The federal judiciary experienced comparatively little difficulty applying the Rules and praised their efficacy.⁹ The judges were able to preserve simplicity through, for example, flexible, pragmatic enforcement of the provisions governing pleading and by leaving discovery essentially to lawyer self-regulation.¹⁰ Correspondingly, the federal judges maintained and fostered uniformity because, for instance, they promulgated a relatively small number of local rules, and even fewer local rules that conflicted with the Federal Rules,¹¹ while numerous states premised their procedures on the federal analogues.¹²

Civil procedure, however, was not universally uniform and simple. The open-ended, simple scheme of discovery, particularly in complex cases, created certain difficulties, such as overly broad requests for information and evasion of discovery requests.¹³ Moreover, a number of states, especially those, such as New York, that had long relied on code procedure, either did not subscribe to the federal regime or borrowed minimally from the Federal Rules.¹⁴

C. Increased Balkanization Since the Mid-1970s

Numerous developments have led to balkanization of federal civil procedure since the mid-1970s, particularly over the last decade. During

8. Tobias, *supra* note 2, at 277-78; *see also* Resnik, *supra* note 4, at 516. *See generally* Symposium, *The Federal Rules of Civil Procedure*, 58 COLUM. L. REV. 435 (1958).

9. Charles Clark, as the Advisory Committee Reporter and a judge on the Second Circuit, orchestrated some of this. Marcus, *supra* note 3, at 435; Tobias, *supra* note 2, at 277-78; *see also* Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944); Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 47 (1957).

10. *See* Marcus, *supra* note 3, 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* (pt. 1), 81 HARV. L. REV. 356, 356-407 (1967-68) (rules 19, 23 and 24 read inflexibly).

11. *See* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence and Emerging Patterns*, 137 U. PA. L. REV. 1999, 2016-19 (1989).

12. 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). Intrastate uniformity is less relevant to the issues considered in this piece, although it was an important goal of the drafters. Subrin, *supra* note 5, at 1650.

13. *See, e.g.*, *New Dyckman Theater Corp. v. Radio-Keith-Orpheus Corp.*, 16 F.R.D. 203, 206 (S.D.N.Y. 1954); *see also* Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480 *passim* (1958) (contemporaneous account); Subrin, *supra* note 2, at 982-84 (subsequent account).

14. *See* Oakley & Coon, *supra* note 12, at 1377-78. *But cf.* Hazard, *supra* note 12, at 2237 (some urban states borrowed significantly from Federal Rules).

the mid-1970s, many judges, led by Chief Justice Warren Burger, and some writers began to perceive that the federal courts were experiencing a litigation explosion.¹⁵ These observers contended that lawyers and litigants were filing a substantial number of civil cases, too few of which had merit.¹⁶ Numerous members of the Supreme Court expressed concern about litigation abuse, especially of the discovery process, and encouraged lower federal courts to sanction attorneys and parties who behave improperly during lawsuits.¹⁷

1. Managerial Judging

A number of federal trial judges, particularly in urban districts, such as the Northern District of California, responded to the perceived litigation explosion and litigation abuse by employing numerous practices under the rubric of "managerial judging."¹⁸ Many judges participated more actively in expediting dispute resolution. They used pretrial conferences to set lawsuits' pace, to structure questions at issue, or to foster settlement, concomitantly experimenting with Alternative Dispute Resolution (ADR).¹⁹ Numerous judges limited discovery's scope and timing while imposing sanctions for litigation abuse.²⁰ A number of courts developed novel procedural techniques, such as mandatory summary jury trials, particularly for resolving complex cases.²¹ The *Manual for Complex Litigation* correspondingly prescribed numerous different

15. E.g., Warren E. Burger, *Agenda for 2000 A.D. - A Need for Systematic Anticipation*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 23 *passim* (A. Leo Levin & Russell Wheeler eds. 1979) [hereinafter THE POUND CONFERENCE]; Francis R. Kirkham, *Complex Civil Litigation - Have Good Intentions Gone Awry?*, in THE POUND CONFERENCE, *supra* at 209, 211-12; see also Tobias, *supra* note 2, at 287-89 (discussing debate over litigation explosion).

16. See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 345 (1979); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 1-12 (1984).

17. See, e.g., 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); Supreme Court Order of the United States, 446 U.S. 997, 1000 (April 19, 1980) (amending the Federal Rules of Civil Procedure) (Powell, J., dissenting)

18. See Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REF. 647, 675-78 (1988). See generally STEVEN FLANDERS, FEDERAL JUDICIAL CENTER, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (1977).

19. See, e.g., Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 435-36 (1986) (ADR); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770, 770-89 (1981) (remaining propositions); Resnik, *supra* note 10, at 391-400 (same).

20. See Peckham, *supra* note 19, at 800-04; Resnik, *supra* note 10, at 391-400.

21. See generally E. ALLAN LIND & JOHN E. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (Federal Judicial Ctr. rev. ed. 1983); Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 111 (1976).

procedures for treating specific types of complex lawsuits, such as employment discrimination, patent and antitrust litigation.²²

The 1983 revisions of the Federal Rules and the 1985 issuance of the *Manual for Complex Litigation Second* effectively codified virtually all of the managerial judging techniques that courts had created.²³ The 1983 amendments to Federal Rules 11, 16 and 26 substantially increased complexity and disuniformity. For example, Rule 11 enhances complexity by making pleading more technical; all three provisions complicate litigation by multiplying the steps in a lawsuit and by imposing a great number of, and more onerous, responsibilities on attorneys, such as mandatory participation in discovery and pretrial conferences.²⁴ Correspondingly, Rule 16 increases disuniformity by suggesting that courts attune procedures to specific cases and that individual judges create their own prototypical scheduling orders for various categories of cases.²⁵ The *Manual for Complex Litigation Second* similarly erodes uniformity by recommending that courts treat nearly all complex lawsuits differently than simpler, routine cases and that judges adapt diverse, particular procedures to specific classifications of complex litigation.²⁶ An assumption underlying both the 1983 revisions and the second edition of the Manual is that judges would tailor procedures, frequently on an ad hoc basis, to individual lawsuits.²⁷

2. The Proliferation of Local Rules

A closely related source of increasingly balkanized federal civil procedure is the remarkable proliferation of local rules that has occurred since the 1938 Federal Rules' adoption but that has grown almost exponentially over the last two decades. An important means by which

22. See MANUAL FOR COMPLEX LITIGATION §§ 33.1, 33.5-.6 (5th ed. 1982). See generally Alan J. Simons, *The Manual for Complex Litigation: More Rules or Mere Recommendations?*, 62 ST. JOHN'S L. REV. 473 (1988).

23. See generally Supreme Court Order of the United States, 461 U.S. 1097 (April 28, 1983) (amending Federal Rules of Civil Procedure); MANUAL FOR COMPLEX LITIGATION, SECOND (1985).

24. See Subrin, *supra* note 5, 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 (Federal Judicial Ctr. ed., 1984).

25. See *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1011-13 (1st Cir. 1988); Subrin, *supra* note 5, at 1650; Tobias, *supra* note 24, at 940-48.

26. See Subrin, *supra* note 5, at 1650; Tobias, *supra* note 2, at 292 n.148.

27. Subrin, *supra* note 5, at 1650; Tobias, *supra* note 2, at 292 n.148. This deprives the Federal Rules of their efficacy as a uniform model for states while jeopardizing intrastate and interstate procedural uniformity. Subrin, *supra* note 5, at 1650.

courts accomplished much managerial judging, particularly before 1983, was through the promulgation of local rules.²⁸ Courts experimented with various techniques by adopting local rules that frequently conflicted with the Federal Rules, provisions in the United States Code, and local rules or other procedures governing civil litigation in the remaining ninety-three federal districts. For instance, during the 1970s, the Northern District of California adopted a "complex rule" governing pretrial procedures.²⁹ The rule required that attorneys participate in "preliminary meetings in addition to the pretrial conference" and that they prepare a joint pretrial statement comprised of twenty-three items, including matters such as the disputed factual issues and settlement discussions.³⁰ The promulgation of local rules, within and outside the context of managerial judging, has proceeded unabated since the mid-1970s.

In the mid-1980s, the United States Judicial Conference recognized the problems that the proliferation of local rules was creating and commissioned the Local Rules Project.³¹ The Conference instructed the Project to assemble and organize all of the local rules, standing orders, and any additional local procedural requirements that performed similar functions.³² The Conference also requested that the Project analyze issues that the growth of local rules created and suggest solutions to solve any difficulties discovered.³³

The Local Rules Project issued its assessment of local civil procedures in 1989.³⁴ The Project found that the ninety-four federal districts had promulgated more than 5,000 local rules, many of which conflicted with the Federal Rules and most of which were inconsistent across the districts.³⁵ Nearly all of the districts adopted local rules governing pretrial procedures, particularly pretrial conferences and discovery. Numerous districts employed a host of specific procedures, such as precise

28. See Peckham, *supra* note 19, at 773-77; Resnik, *supra* note 10, at 399; *supra* notes 18-21 and accompanying text.

29. Peckham, *supra* note 19, at 776-77; see also Marcus, *supra* note 18, at 675-78.

30. N.D. CAL. R. 235-7, reprinted in Peckham, *supra* note 19, at 776 n.30.

31. For a summary of the Local Rules Project, see Daniel R. Coquillette et al., *The Role of Local Rules*, 75 A.B.A. J. 62 (1989).

32. See Coquillette et al., *supra* note 31, at 63; Telephone Interview with Mary P. Squiers, Project Director of Local Rules Project (Feb. 21, 1992).

33. See Coquillette et al., *supra* note 31, at 63; Telephone Interview, *supra* note 32.

34. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PROCEDURE (1989).

35. See Coquillette et al., *supra* note 31, at 62-65; Subrin, *supra* note 11, at 2020-26.

numerical limitations on interrogatories or tracking systems for resolving relatively routine, simple cases.³⁶ The Project also discovered substantial variation quantitatively and qualitatively among the ninety-four districts. For instance, the Central District of California had promulgated thirty-one local rules with 434 sub-rules, augmented by 275 standing orders, while the Middle District of Georgia had adopted a lone local rule and only eleven standing orders.³⁷

Local rules are not the only local procedures that have contributed to balkanization. The Local Rules Project found that numerous other procedures, typically denominated standing orders, general orders, or minute orders govern practice in the ninety-four districts.³⁸ Moreover, a number of districts have experimented informally with certain procedures that apparently were not formally embodied in a written document.³⁹ The Judicial Conference responded to the findings of the Local Rules Project by issuing an order that instructed the federal districts to make all of their local procedures consistent with the Federal Rules and that offered other helpful suggestions, such as recommending that the numbering of local rules comport with the Federal Rules.⁴⁰

3. The Judicial Improvements Act of 1988 and Local Rule Revision

Congress apparently intended to treat some of the difficulties that the local rules' proliferation had created when it passed certain provisions of the Judicial Improvements and Access to Justice Act of 1988.⁴¹

36. *E.g.*, U.S. DIST. CT. FOR THE E. DIST. OF N.Y., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 2 (Dec. 17, 1991) [hereinafter E. DIST. N.Y. PLAN]; U.S. DIST. CT. FOR THE DIST. OF WYO., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 2 (Dec. 31, 1991) [hereinafter WYO. PLAN]; *see also* Subrin, *supra* note 11, at 2020-26.

37. *See* Coquillette et al., *supra* note 31, at 62.

38. *See* Telephone Interview, *supra* note 32; Telephone Interview with Stephen N. Subrin, Consultant to the Local Rules Project (Feb. 15, 1992).

39. For example, the Montana Federal District Court experimented with the co-equal assignment of civil cases to Article III judges and magistrate judges. U.S. DIST. CT. FOR THE DIST. OF MONT., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 3-4 (Dec. 1991) [hereinafter MONT. PLAN]; Carl Tobias, *The Montana Federal Civil Justice Plan*, 53 MONT. L. REV. 91, 93 n.9 (1992). Correspondingly, the Wyoming Federal District Court required "parties to make every reasonable and good faith effort to resolve discovery disputes before seeking assistance from the Court" and to so certify in writing. WYO. PLAN, *supra* note 36, at 13.

40. Telephone Interviews, *supra* notes 32, 38. Neither the Project Director nor its Consultant believes that there has been substantial nationwide compliance. *Id.*; *see also infra* notes 47-49 and accompanying text.

41. H.R. REP. NO. 100-889, 100th Cong., 2d Sess. 27-29, *reprinted in* 1988 U.S.C.A.N. 5982, 5987-89. For the text of the 1988 Act, *see* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified as amended in scattered sections of 28 U.S.C.).

The statute required that all ninety-four districts appoint advisory committees to assist the courts in developing local rules and imposed public notice and comment procedures on courts that promulgate new, or revise existing, local rules.⁴²

The creation of these committees, which must study local procedures and make recommendations for change, as needed, and the prescription of formal procedures for adopting or modifying local rules will afford several benefits. The rule revision entities and the procedures should regularize the process for modifying local rules, open the amendment process to public scrutiny, and perhaps reduce reliance on local procedural provisions that are not local rules, such as standing orders.⁴³

The establishment of local advisory committees and the provision of local rule revision procedures, however, might enhance balkanization for several important reasons. Balkanization may grow notwithstanding the improvements, such as increased regularization, that the 1988 Judicial Improvements Act and the Local Rules Project were meant to effect. The local committees essentially could replace the expert, and ostensibly neutral, Civil Rules Committee, whose charge is to study the Federal Rules from the perspective of what is best for all ninety-four districts that comprise the civil justice system and to develop proposals for change in those provisions that will be most efficacious.⁴⁴ In 1988, Congress essentially substituted for the Civil Rules Committee ninety-four relatively amateur entities, composed of local federal court practitioners appointed by the judges of those courts. Most of those practitioners are likely to be relatively unconcerned about balkanization and more interested in proposing local rules that are solicitous, and even protective, of the needs of the local federal judges, bar, and litigants.⁴⁵ For instance, some federal districts have excluded lawyers

42. 28 U.S.C. §§ 2071, 2077 (1988); see also Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 799-800 (1991). See generally JACK WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977).

43. See *supra* notes 28-40 and accompanying text; cf. Mullenix, *supra* note 42, at 797-802 (warning of risks entailed in opening Federal Rules' amendment process to public scrutiny).

44. See 28 U.S.C. §§ 331-32, 2073 (1988). This is an ideal, theoretical, and somewhat rosy view of the Civil Rules Committee. See, e.g., 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, 2073-87 (1989); Mullenix, *supra* note 42, at 799, 802, 855-57. But see Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1935-41 (view of Committee as less neutral, political entity); Tobias, *supra* note 2, at 310-13, 337 (similar ideas).

45. I am merely saying that most local advisory committees will be more sensitive to, and favorably disposed toward, the needs of local lawyers, litigants and judges than the Civil Rules Committee would be. See generally Marc S. Galanter, *Why the "Haves" Come Out Ahead:*

admitted to practice in other districts on the basis of discrepancies in local requirements for admission to the bar.⁴⁶

The creation of the local advisory committees and the concomitant implementation of new rule-amending procedures correspondingly could increase balkanization by encouraging the additional proliferation of local rules. Many of those local rules will be inconsistent across the ninety-four federal districts, and some of the local rules are likely to contravene the Federal Rules and provisions in the United States Code. The local advisory committees and district judges apparently have experienced considerable difficulty ascertaining precisely how to define what constitutes a conflict or an inconsistency, especially between their local rules and the Federal Rules.⁴⁷ These nice questions regarding conflicts may partially explain why so much inconsistency remains today, despite the efforts of the Judicial Conference and the Local Rules Project to eliminate conflicts⁴⁸ and of the judicial councils that Congress expressly instructed in the 1988 statute to minimize inconsistency.⁴⁹ Local rule revision also could increase conflicts because any procedures promulgated bypass the national rule-amending process that enables Congress to maintain consistency.⁵⁰

4. The 1991 Proposals to Amend the Federal Rules

Another potential source of balkanization is the Civil Rules Committee's 1991 issuance of proposals to amend eighteen Federal Rules,

Speculations on the Limits of Legal Change, 9 LAW & SOC'Y REV. 95 (1974). Most writers, including the authors whose works are cited *supra* note 44, agree that the Committee possesses considerable procedural expertise, even though the writers may disagree over how the Committee exercises that expertise. See generally Harold S. Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507 (1987).

46. E.g., *Frazier v. Heebe*, 482 U.S. 641 (1987); see also Coquillette et al., *supra* note 31, at 64; Carl Tobias, *Federal Court Procedural Reform in Montana*, 52 MONT. L. REV. 433, 436 n.14 (1991).

47. Telephone Interviews, *supra* notes 32, 38; see also Coquillette et al., *supra* note 31, at 64; *infra* notes 103, 119-21 and accompanying text.

48. See *supra* notes 31-40 and accompanying text for a review of the inconsistency among local rules.

49. 28 U.S.C. § 332 (1988). The Judicial Improvements Act of 1988 is discussed *supra* in the text accompanying notes 41-43 and *infra* note 102.

50. The national rule-amending process affords Congress seven months to analyze and act upon proposals to amend the Federal Rules that the Supreme Court transmits. 28 U.S.C. § 2074 (Supp. 1990). The creation of ninety-four local advisory committees and local amendment procedures substantially complicates efforts to monitor rule revision activity. Both intra-governmental monitoring entities (such as the Congress, the circuit judicial councils, and the Administrative Office of the United States Courts), and extra-governmental entities (such as the Alliance for Justice) will experience difficulties monitoring ninety-five rule-revision entities, rather than one Civil Rules Committee. See Mullenix, *supra* note 42 (discussing the impact of participatory rule-drafting).

perhaps the most ambitious rule revision effort in the half-century history of the Rules.⁵¹ Some specific recommendations, if adopted, will by definition increase balkanization. For example, the recently-formulated suggestions to change two provisions in Federal Rule 26 and one in Federal Rule 54 expressly authorize the federal districts to prescribe exceptions to the federal requirements in local rules.⁵² Similarly problematic was the Civil Rules Committee's proposal to amend Federal Rule 83(b), which would have permitted district courts, with Judicial Conference approval, to promulgate experimental local rules that are inconsistent with the Federal Rules or Title 28 of the United States Code, if they are only effective for a five-year period.⁵³ This suggestion would have intrinsically enhanced disuniformity and complexity, although the proposal and its accompanying advisory committee note apparently constituted a measured approach that attempted to balance the problem of balkanization with the need for experimentation. The Standing Committee decided not to send this proposal forward during June 1992 in the apparent belief that ongoing CJRA experimentation was sufficient.⁵⁴

II. THE CIVIL JUSTICE REFORM ACT AND ITS IMPLEMENTATION

The balkanization that civil justice reform promises to effect will enhance, and even may eclipse, the increased disuniformity and complexity attributable to the various sources above. Congressional passage of the CJRA in late 1990 and the initial important step in its imple-

51. See Judicial Conference of the United States, Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, reprinted in 137 F.R.D. 53 (1991) [hereinafter 1991 Preliminary Draft]; Randall Samborn, *U.S. Civil Procedure Revisited*, NAT'L L.J., May 4, 1992, at 1.

52. 1991 Preliminary Draft, *supra* note 51, at 91-92, 137-38 (proposing amendments to Rules 26(b)(2) and 54(2)(D)). The Standing Committee subscribed to these proposals in June and forwarded them, as did the Judicial Conference in September. Judicial Conference of the United States, Committee on Rules of Practice and Procedure, Proposed Amendments to the Federal Rules of Civil Procedure and Forms (July 1992) [hereinafter 1992 Proposed Amendments]; Judicial Conference of the United States, Proposed Amendments to the Federal Rules of Civil Procedure (Sept. 1992); see also Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155 *passim* (1991) (analyzing the proposed amendment to Rule 26).

53. 1991 Preliminary Draft, *supra* note 51, at 152-55 (proposing amendment to Rule 83(b)). See generally A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991) (discussing the impact of experimentation similar to that contemplated with the proposed changes in Rule 83); Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, LAW & CONTEMP. PROBS., Summer 1988, at 67 (discussing the impact of adopting a program that allows for local experimentation). A concomitant of balkanization, which is rarely a source of the phenomenon, is many federal courts' application of the Federal Rules in ways that increase disuniformity or complexity. See Stephen N. Subrin, *Fireworks on the 50th Anniversary of the Federal Rules of Civil Procedure*, 73 JUDICATURE 4, 6 (1989); Tobias, *supra* note 2, at 296-335; *infra* notes 163-64 and accompanying text.

54. See 1992 Proposed Amendments, *supra* note 52.

mentation with thirty-four districts' issuance of civil justice expense and delay plans a year later are the latest manifestations of enhanced balkanization, and civil justice reform ultimately could contribute most significantly to the phenomenon, especially after all ninety-four districts fully effectuate the Act.

Congress intentionally or inadvertently drafted the CJRA, and courts that sought Early Implementation District Court (EIDC) status practically implemented the statute, in numerous ways that will exacerbate balkanization. The potential for increased balkanization should not come as a surprise because Congress premised essential aspects of the CJRA on many of the earlier procedural developments, such as the expansion of managerial judging and the proliferation of local rules, that had already substantially increased fragmentation. Perhaps the most striking facets of the CJRA's enactment are congressional willingness to stamp its imprimatur on these general developments in procedure and to invoke those specific entities and procedures that have fostered balkanization while encouraging every one of the federal districts to employ the precise instrumentalities and procedures that have promoted disuniformity and complexity.⁵⁵ These considerations warrant more comprehensive analysis of civil justice reform than of the prior procedural developments on which Congress based important particulars of the statute. This section first examines those entities responsible for implementing the CJRA and their respective duties and the bodies charged with overseeing these efforts. It then thoroughly evaluates the Act and its implementation by the thirty-four EIDCs.⁵⁶

A. Implementing and Oversight Entities and Their Responsibilities

1. Implementing Entities and Their Duties

Congress selected certain entities to effectuate the CJRA and assigned them specific responsibilities that have increased, and will foster, bal-

55. Passage of the CJRA could be a watershed for Congress. The federal judiciary had expressed concern about a litigation explosion, litigation abuse and civil justice reform for many years. *Supra* notes 15-17 and accompanying text. Nonetheless, Congress resisted most of the judiciary's requests for substantial procedural reform in part out of apparent concern that the courts were applying procedure in ways which undermine substantive statutes. Tobias, *supra* note 24, at 961-63; *see also infra* notes 164, 172 and accompanying text. The CJRA could enable the judiciary to employ procedures in ways that erode substantive legislation.

56. I do not mean to be critical of the Congress or the EIDCs. It is virtually impossible to quarrel with the admirable goal of reducing expense and delay in civil litigation. Moreover, the unprecedented introspection in all ninety-four units of the civil justice system will provide invaluable information on local legal cultures. Furthermore, the advisory groups and EIDCs have labored mightily to implement procedures that will reduce expense and delay. I am concerned about certain ways in which Congress structured the Act, some means that Congress employed for attaining its goals, and the ways in which quite a few EIDCs have implemented the statute.

kanization. Congress instructed all ninety-four districts that comprise the civil justice system to adopt civil justice plans for reducing expense and delay in civil litigation. "The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."⁵⁷

The districts must formulate their plans after considering the reports and recommendations of local advisory groups.⁵⁸ Congress required that the chief judges of the districts appoint these groups, which were to be balanced and include lawyers and litigants who appear in the trial courts.⁵⁹ The groups must undertake studies of local conditions, such as the state of the courts' dockets, and make procedural suggestions that the districts, in consultation with the groups, must consider and might include in the plans.⁶⁰

The manner prescribed for these groups' appointment, the entities as constituted, and their statutory mandates, as implemented, therefore, could have fostered balkanization.⁶¹ For example, some groups that advised EIDCs consisted primarily of defense counsel, and few groups included very many resource-poor litigants.⁶² Congress specifically directed the groups to perform comprehensive evaluations of the courts' civil and criminal dockets; to consider the specific circumstances and needs of the districts, their litigants and the parties' counsel; to make procedural recommendations that guarantee that all three would contribute significantly to reducing expenses and delay in civil litigation, thereby increasing access; and to consult with judges when they formulate civil justice plans.⁶³

57. 28 U.S.C. § 471 (1992).

58. *Id.* § 473(a).

59. *Id.* § 478.

60. *Id.* § 472.

61. *See id.* §§ 471-72, 478. *See generally* Tobias, *supra* note 46, at 437-41 (discussing the implementation of the CJRA). These CJRA advisory groups are distinct from other entities, variously denominated local advisory or local rules committees. *See supra* notes 41-46 and accompanying text. For additional information on the difficulty of monitoring multiple entities, *see supra* note 50.

62. *See, e.g.,* U.S. Dist. Ct. for the S. Dist. of Ind., Report of the Civil Justice Advisory Group, at i (Dec. 1991) (group membership includes more defense counsel than plaintiffs' counsel); U.S. Dist. Ct. for the Dist. of Mont., Report of the Civil Justice Reform Act Advisory Group, at frontispiece (Aug. 1991) (group membership includes few resource-poor litigants); U.S. Dist. Ct. for the Dist. of Wyo., Advisory Group Report and Recommended Plan, at frontispiece (Dec. 1991) (group membership includes primarily defense counsel and "defendants"). *See generally* Galanter, *supra* note 45 (reasoning that wealthy litigants and repeat litigants have advantages over a party who only occasionally litigates a case).

63. 28 U.S.C. § 472(b) (Supp. 1992).

Given the advisory groups' composition and statutory instructions, it was predictable that numerous groups would issue reports that evinced less concern about enhanced balkanization than about proposing what they perceived would be preferable for the trial judges who named them and for lawyers and parties in their own districts.⁶⁴ The groups' reports and recommendations confirm these hypotheses. A number of groups suggested procedures that would somehow favor local interests at the expense of national uniformity or simplicity and increase balkanization. For example, several advisory groups proposed that their districts enforce local rules more strictly.⁶⁵

Many of the EIDCs, upon receiving the groups' reports and recommendations, prescribed procedures that enhance balkanization apparently for numerous reasons similar to the advisory groups. For instance, most federal judges, as former practitioners in their own districts, may have the same concerns about local factors as those of the groups. Similarly, federal judges may be attentive to other district-specific considerations, while they wish to implement procedures that they believe are most suitable for local courts.

Congress correspondingly chose to place nearly total responsibility for the CJRA's implementation in the ninety-four districts and assigned to judges obligations that could have fostered, and did promote, balkanization. The eleven principles, guidelines, and techniques of litigation management and cost and delay reduction that the Act states districts must consider and may adopt inherently increase disuniformity and complexity.⁶⁶ For example, each district in the national civil justice system can selectively adopt varying combinations of the enumerated principles, guidelines, and techniques and any other procedures that it deems appropriate. In light of these factors, which seem important to many judges, and the congressional requirements, it is not surprising that most EIDCs adopted plans which exhibited less concern about fragmentation of national procedure than about instituting procedures

64. To some readers, this may seem crudely instrumental. I only mean to say that the groups are less expert and less concerned about maintaining national uniformity and simplicity than, for example, the Civil Rules Committee. See *supra* note 45; *infra* note 173 and accompanying text.

65. *E.g.*, U.S. DIST. CT. FOR THE E. DIST. OF CAL., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 3 (Dec. 31, 1991); U.S. DIST. AND BANKR. CT. FOR THE DIST. OF IDAHO, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 1 (Dec. 1, 1991) [hereinafter IDAHO PLAN]. Some districts have adopted additional procedures that seem to favor local interests. *E.g.* IDAHO PLAN, *supra*, at 12 (using settlement weeks to encourage resolution before trial); WYO. PLAN, *supra* note 36, at 7 (providing for stacking trials). Similarly, some federal districts have excluded lawyers from other districts on the basis of discrepancies in bar admissions requirements. *Supra* note 46 and accompanying text.

66. See 28 U.S.C. § 473 (Supp. 1992); *infra* notes 130-54 and accompanying text.

they considered responsive to local needs and that the plans displayed marked variability. For instance, the Eastern Districts of Arkansas and Virginia issued brief plans that included virtually no new procedures.⁶⁷ In comparison, the Eastern District of Texas published an equally terse document that prescribed several innovative, provocative procedures that could increase balkanization, while the Massachusetts District adopted a seventy-page plan that has a number of procedures that may enhance complexity.⁶⁸

2. Oversight Entities

Congress also selected instrumentalities to oversee the CJRA's implementation and assigned them general, unclear responsibilities, making it unlikely that the entities would vigorously respond to the increased balkanization that the statute fosters. The organizations that have oversight duties are circuit committees, comprised of the chief circuit judge and all chief district judges in each circuit; the Judicial Conference, which has delegated its obligations to the Judicial Conference Committee on Court Administration and Case Management, chaired by Chief District Judge Robert Parker; and Congress itself.⁶⁹

a. Circuit Committees

Many members of the circuit committees could be reluctant to assess plans closely, much less require modifications that would limit balkanization in procedures adopted by districts in their circuits. Numerous chief circuit judges apparently have deferred to chief district judges in the chief judges' discharge of responsibilities to adopt plans and to oversee those promulgated, because the chief district judges individually

67. See U.S. DIST. CT. FOR THE E. DIST. OF ARK., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 30, 1991); U.S. DIST. CT. FOR E. DIST. OF VA., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 16, 1991). Each plan is shorter than fifteen pages.

68. See U.S. DIST. CT. FOR THE DIST. OF MASS., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Nov. 18, 1991) [hereinafter MASS. PLAN]; U.S. DIST. CT. FOR THE E. DIST. OF TEX., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 20, 1991) [hereinafter E. DIST. OF TEX. PLAN].

69. 28 U.S.C. § 474 (Supp. 1992). The Case Management Subcommittee of the Committee technically has initial responsibility. For convenience, this article refers to both as the Committee, except when the distinction makes a difference. Oversight entities do not increase balkanization; they simply may fail to limit it. I accord the oversight entities comparatively thorough treatment here, because I do not reexamine them.

and collectively have greater experience with federal civil litigation at the trial court level and within the circuits' districts.⁷⁰

Chief district judges, when fulfilling their duties as committee members, may have certain "conflicts of interest." One major conflict inheres in each judge's obligation to adopt a plan for that judge's district and to oversee plans that every other chief district judge in the circuit formulates. These district judges might not wish to scrutinize, or demand changes in, procedures that the judges could be contemplating or even may have instituted or view as relatively unproblematic, because the evaluators are less concerned about increased balkanization than about what they consider best for their own districts.⁷¹

Some chief district judges, like a number of chief circuit judges, could believe that they lack sufficient familiarity with local conditions in the districts being reviewed.⁷² Additional chief district judges, out of professional or personal respect for individuals who occupy identical positions in the federal judicial hierarchy, may assess plans deferentially.⁷³ One chief district judge cogently summarized certain practicalities of circuit committee review:

Our Chief District Judges hate to be very critical of the Plan of one of our fellows and for that reason rubber-stamp approval, without suggestions, is most likely. I think that the Circuit Judges are going to have to be the ones that do the real evaluations, and as a general rule, they don't have much experience in our problems.⁷⁴

The CJRA and its legislative history provide highly generalized, unclear guidance for circuit committees in conducting oversight. Both tersely prescribe the circuit committees' responsibilities; neither expressly states how closely, or for precisely what purposes, the committees are

70. Numerous chief circuit judges also may work with a number of the chief district judges on circuit councils. See 28 U.S.C. § 332 (Supp. 1992); *infra* notes 80-81 and accompanying text.

71. The proliferation of local rules indicates that many federal judges are relatively unconcerned about increased balkanization. See *supra* notes 28-40 and accompanying text. In fairness, a number of judges also may be more concerned about achieving the CJRA's goals than increasing balkanization.

72. See *supra* note 70 and accompanying text.

73. Chief district judges may defer even though circuit councils, in discharging their responsibility to ensure consistency between local rules and the Federal Rules, frequently take action that is as delicate as that which the CJRA contemplates. See 28 U.S.C. §§ 332, 474 (Supp. 1992); *infra* notes 75, 80-81 and accompanying text.

74. Letter from Clarence A. Brimmer, Chief Judge, United States District Court for the District of Wyoming, to Carl Tobias (Apr. 10, 1992) (on file with author); cf. Letter from Avern Cohn, District Judge, United States District Court for the Eastern District of Michigan, to Carl Tobias (Apr. 20, 1992) (expressing belief that committees lack resources to evaluate, research and resolve certain issues) (on file with author) [hereinafter Cohn Letter].

to evaluate plans, or specifically mentions balkanization, complexity, or disuniformity. For instance, section 474(a) provides that every committee shall "review each plan and report submitted . . . and make such suggestions for additional actions or modified actions . . . as the committee considers appropriate for reducing cost and delay in civil litigation" in the particular district, and the legislative history essentially replicates the statute.⁷⁵ Given the cryptic nature of this congressional grant, numerous committees may be unable to ascertain exactly what Congress intended that they do. The circuit committees also could be concerned about their power to analyze and suggest changes in certain plan provisions, especially those that implicate judicial authority,⁷⁶ such as the districts' adoption of procedures that conflict with the Federal Rules.⁷⁷

The circuit committees have compiled varied reviews. Some committees apparently have not performed very rigorous assessments of the plans, choosing to rely substantially on guidance prepared for their use by the Judicial Conference with the assistance of the Federal Judicial Center.⁷⁸ Relatively few committees made recommendations for "additional actions or modified actions [that they deemed] appropriate for reducing cost and delay in civil litigation,"⁷⁹ much less provided suggestions that would limit balkanization. A small number of circuits seemingly misunderstood which entity was to discharge this oversight function. A few circuits apparently employed existing circuit judicial councils, constituted for different purposes with dissimilar membership under Section 332 of Title 28 of the United States Code, rather than the circuit committees that section 474 of the Act created to conduct CJRA reviews.⁸⁰ Indeed, one Circuit Executive even reviewed the plans that

75. 28 U.S.C. § 474(a) (Supp. 1992). For the legislative history of § 474, see Senate Comm. on Judiciary, Judicial Improvements Act of 1990, S. Rep. No. 101-416, 101st Cong., 2d Sess. 59 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6848 [hereinafter Senate Report]. See generally Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49 (1992) (describing the problems that arise when supervising the implementation of the CJRA).

76. See Tobias, *supra* note 75, at 54; cf. Minutes of Telephone Conference of 9th Circuit Civil Justice Reform Act Review Committee 1 (Apr. 2, 1992) (ten of twelve committee members voting for procedural review).

77. Of course, if circuit committees inconsistently resolve this or similar issues, they could increase balkanization. See *infra* note 94 and accompanying text.

78. See, e.g., Seventh Circuit Review Committee, Review of CJRA Reports and Plans (Mar. 1992); Tenth Circuit Review Committee, Review of CJRA Reports and Plans (Mar. 30, 1992). *But cf.* First Circuit Review Committee, Review of CJRA Reports and Plans (Mar. 1992) (applying an apparently rigorous review); Ninth Circuit Review Committee, Review of Civil Justice Reform Act Plans (Apr. 14, 1992) (same). See generally FEDERAL JUDICIAL CENTER, GUIDELINES FOR REVIEW OF C.J.R.A. REPORTS AND PLANS (Jan. 1992). My assertions are premised almost exclusively on the documents that the committees prepared.

79. 28 U.S.C. § 474(a) (Supp. 1992).

80. See, e.g., Letter from Collins T. Fitzpatrick, Circuit Executive, United States Court of

two EIDCs developed, "recommended approval to the judicial council based upon [his] review, and [compliance] was accomplished by mail at the end of December [1991]." ⁸¹

b. Judicial Conference

The Judicial Conference Committee on Court Administration and Case Management has not discharged its oversight responsibilities in ways that significantly reduce balkanization for numerous reasons similar to those that apparently animated the circuit committees.⁸² District judges have even greater influence in the Judicial Conference Committee because, for instance, no circuit judges sit on the subcommittee that has responsibility for conducting the initial review, and because district judges have vast experience with trial court litigation.⁸³

Committee members may have had conflicts of interest somewhat analogous to the conflicts of individuals who serve on circuit committees. Chief Judge Robert Parker, who chairs the relevant subcommittee and is the Chief Judge of the Eastern District of Texas, affords a pointed example.⁸⁴ Numerous observers assert that his district has adopted one of the most ambitious, and probably the most provocative, civil justice plans, but the plan also includes some provisions that are debatable as a matter of policy or authority and, therefore, could increase balkanization.⁸⁵ Some judges on the subcommittee might have found it awkward to suggest changes in that plan. Many subcommittee members correspondingly may have been unwilling to evaluate plans closely and to recommend changes that might interfere with what individual chief district judges consider preferable for their districts, as to which the chief judges possess superior knowledge, and from which

Appeals for the Seventh Circuit, to Carl Tobias (Mar. 25, 1992) (on file with author); Cohn Letter, *supra* note 74 (doubting that "Circuit Councils" have the resources to review plans). Compare 28 U.S.C. § 332 (Supp. 1992) with 28 U.S.C. § 474(a) (Supp. 1992).

81. Letter from Steven Flanders, Circuit Executive, United States Court of Appeals for the Second Circuit, to Carl Tobias (Apr. 14, 1992) (on file with author). In fairness, the Judicial Conference had not issued its guidance when the review was undertaken. Congress, however, did seem to expect that chief circuit and district judges would train their expertise on the plans.

82. See *supra* notes 70-74 and accompanying text.

83. The subcommittee includes five district judges and one magistrate judge. Telephone Interview with Donna Stienstra, Research Division, Federal Judicial Center (May 4, 1991). See also *supra* note 70 and accompanying text.

84. See *supra* note 69.

85. See Cohn Letter, *supra* note 74 ("Ironically the plan of the Eastern District of Texas appears the boldest and the chair of the committee approving such plans is its chief judge."); E. DIST. OF TEX. PLAN, *supra* note 68; cf. *infra* notes 122-23, 145-46 and accompanying text.

numerous members are even farther removed than circuit committees.⁸⁶

The CJRA and its legislative history provide equally general, and even less clear, guidance for Judicial Conference oversight.⁸⁷ For example, section 474(b) states that the "Judicial Conference of the United States shall review each plan and report submitted . . . and may request the district court to take additional action if [it] determines that such court has not adequately responded to the conditions relevant to the civil and criminal dockets of the court or to the recommendations of the district court's advisory group," while the accompanying legislative history does not elaborate.⁸⁸

As with the circuit committees' instructions, neither the statutory phraseology nor the legislative history prescribes how rigorously the Judicial Conference should assess plans or expressly speaks to balkanization, complexity, or disuniformity.⁸⁹ Congress also left unclear how the Conference should determine that a district has not "adequately responded to the conditions relevant to the civil and criminal dockets of the court or to the recommendations of the district's advisory group."⁹⁰ Moreover, the statute provides significantly weaker authority for the Conference to propose modifications if it finds that a district's responses are insufficient, stating only that the Conference "may request the district court to take additional actions" without specifying those actions.⁹¹ In light of this congressional authorization, the Conference may have experienced difficulty discerning precisely how Congress meant for it to evaluate the plans and could have been particularly uncertain about its ability to suggest changes in some plans.⁹²

The Conference Committee's national composition, responsibility, expertise, and perspective might have meant that it would have analyzed the plans closely and proposed that districts adopt measures which would reduce balkanization or at least recommended alterations in provisions that promised to exacerbate balkanization. Indeed, the Judicial Conference was uniquely situated to request that districts limit balkanization, because the Conference reviewed all of the plans prom-

86. See *supra* notes 70-81 and accompanying text for a discussion of the circuit committee review process.

87. See *supra* notes 75-77 and accompanying text.

88. 28 U.S.C. § 474(b) (Supp. 1992). See also Senate Report, *supra* note 75, at 50, 59, reprinted in 1990 U.S.C.C.A.N. at 6839, 6848.

89. See *supra* text between text accompanying notes 74 and 75.

90. 28 U.S.C. § 474(b). The Conference, therefore, must both understand local conditions and have a command of the advisory group's work.

91. 28 U.S.C. § 474(b). 28 U.S.C. § 474(a) states that circuit committees shall make suggestions for actions they deem appropriate.

92. Telephone Interview *supra* note 83; see also *supra* notes 76-77 and accompanying text.

ulgated and could have afforded national resolution of critical issues, such as districts' authority to prescribe procedures that conflict with the Federal Rules.⁹³ Nonetheless, the Judicial Conference requested that few EIDCs take additional actions which would substantially modify their plans.⁹⁴

c. Congress

Congress also may be reluctant to perform its oversight responsibilities in ways that restrict balkanization. Congress assumes the same duty to oversee the CJRA as Congress has to monitor any substantive statute that it passes. Moreover, Congress has at least implicitly assumed more specific oversight responsibilities under CJRA by, for example, requiring that the Judicial Conference and the Administrative Office of the United States Courts submit to it information on the Act's implementation.⁹⁵

Nevertheless, Congress seems unlikely to conduct rigorous oversight that would restrict balkanization. Congress has a "conflict of interest" because it has a substantial stake in the perceived success of the CJRA. After all, the CJRA was very controversial, the Judicial Conference opposed the legislation as introduced, and Congress passed the measure only after its principal sponsors agreed to make important aspects of the Act voluntary, namely the eleven principles, guidelines, and techniques.⁹⁶ Were Congress to demand substantial changes in the plans aimed at curbing balkanization, that response might be considered an admission that it had improperly conceptualized the statute. Correspondingly, Congress may not want to review the plans vigorously or to require major modifications in them, because it must maintain relatively cordial relations with the federal judiciary, whose cooperation is essential to the success of CJRA and to other interbranch efforts, particularly efficacious court rulemaking.⁹⁷

93. Telephone Interview, *supra* note 83 (reviewing all plans); *see also supra* note 77.

94. *See, e.g.*, Letter from Robert M. Parker, Chair, Judicial Conference of the United States Committee on Court Administration and Case Management, to Edward J. Lodge, Chief Judge, United States District Court for the District of Idaho (July 30, 1992) (on file with author); Letter from Robert M. Parker, Chair, Judicial Conference of the United States Committee on Court Administration and Case Management, to John F. Gerry, Chief Judge, United States District Court for the District of New Jersey (July 30, 1992) (on file with author); *cf.* Memorandum from Robert M. Parker, Chairman, Judicial Conference of the United States, Committee on Court Administration and Case Management, to Chief Judges, United States Courts of Appeals *et al.* (Oct. 22, 1992) (explaining the Conference's action with respect to limitations on contingency fees).

95. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, §§ 103(c)(3)-(4), 104(d), 105(c), 104 Stat. 5089, 5096-98.

96. Senate Report, *supra* note 75, at 4-5, 29-31, *reprinted in* 1990 U.S.C.C.A.N. at 6806-07, 6832-34.

97. *See id.* at 4-5, *reprinted in* 1990 U.S.C.C.A.N. at 6806-07; *supra* notes 50-55 and accompanying text; *infra* notes 103, 173 and accompanying text.

Congress may also defer to the judgment of the individual chief district judges who adopted the plans, for reasons similar to those that apparently motivated the circuit committees,⁹⁸ and to the determinations of the oversight entities that Congress created.⁹⁹ For example, Congress will be less familiar with conditions in the local districts than the chief district judges who formulated the plans and less familiar than most members of the circuit committees and of the Judicial Conference Committee which reviewed the plans.¹⁰⁰

Moreover, congressional treatment in the CJRA of several issues, and its failure to address certain others, suggest that Congress will be reluctant to scrutinize implementation and to institute measures which would curtail balkanization. Congress did not expressly provide for its own oversight and afforded only highly generalized guidance for other reviewing entities. For instance, the Act obliquely states that the "Judicial Conference shall prepare a report on the plans developed and implemented by the Early Implementation District Courts" for Congress by June 1, 1992.¹⁰¹ Concomitant congressional failure to mention specifically the crucial problem of potential conflicts between local procedures and the Federal Rules illustrates its lack of concern about balkanization.¹⁰² Congress deliberately structured the statute so that the ninety-four districts can implement local procedures that are not subject to the national rule revision process, which permits Congress to maintain consistency.¹⁰³

Furthermore, Congress is too busy discharging a plethora of other responsibilities, ranging from balancing the budget to debating the war powers. An important duty that has led many federal judges, most notably Chief Justice Rehnquist, to question congressional resolve regarding civil justice reform is the serious consideration that Congress

98. See *supra* notes 70-74 and accompanying text for a discussion of the circuit committees' apparent motivations.

99. After all, Congress did create these entities, ostensibly because they possessed relevant expertise.

100. See *supra* notes 70-74, 82-83 and accompanying text.

101. Civil Justice Reform Act of 1990, tit. I, Pub. L. No. 101-650, § 103(c)(3); see also Judicial Conference of the United States, Civil Justice Reform Act Report, Development and Implementation of Plans by Early Implementation Districts and Pilot Courts (June 1, 1992).

102. In fairness, Congress may have believed that the Judicial Improvements Act of 1988 and the efforts of the Local Rules Project had adequately responded to the problems of inconsistency. *Supra* notes 28-50 and accompanying text; *infra* notes 103, 118-28 and accompanying text.

103. The Rules Enabling Act affords Congress seven months to analyze and act upon proposals to amend the Federal Rules that the Supreme Court submits to it. 28 U.S.C. § 2074 (Supp. 1992); see also Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 *passim* (1982) (discussing the history and evolution of the Rules Enabling Act of 1934); *supra* note 102.

has accorded to new substantive legislation, such as the Violent Crime Control Act and the Violence Against Women Act.¹⁰⁴ The judges believe that this legislation's passage would severely hamper their efforts to achieve the CJRA's goals. In the final analysis, Congress simply may be more concerned about a host of additional matters, including the reduction of expense and delay in civil litigation, than the increased balkanization that the CJRA's implementation could effect.

B. Evaluation of the CJRA and its Implementation

This subsection considers in greater detail how Congress deliberately or inadvertently drafted the CJRA, and how the thirty-four EIDCs have implemented the Act, in certain ways that have promoted, and will foster, balkanization. The potential for increasing disuniformity and complexity are manifested theoretically in the statute's language and accompanying legislative history and are evidenced practically in the districts' implementation of the CJRA.

1. Placing Responsibility in the Ninety-Four Districts

Important congressional choices, alluded to above, involved the branch and level of the federal government at which it lodged nearly exclusive responsibility for the CJRA's implementation and the time frames prescribed for compliance.¹⁰⁵ Placing practically complete responsibility for effectuating the CJRA at the local level in the ninety-four districts that comprise the civil justice system with comparatively similar temporal requirements inherently enhances balkanization.

A critical factor has been, and will be, the sheer number of federal districts, many of which have different needs, geography, populations, available physical space, and legal cultures. Moreover, Congress instructed the districts to appoint all of the advisory groups by the same early date, ninety days after the CJRA's passage.¹⁰⁶ Although thirty-four courts adopted plans by December 31, 1991 to qualify for EIDC designation, many of the remaining sixty districts attempted to issue plans by the end of 1992.¹⁰⁷ A number of the groups and districts,

104. See *The Chief on the Judiciary: Less is More*, LEGAL TIMES, Jan. 6, 1992, at 6, 7 (expressing concerns about two bills in year-end report on federal judiciary); S. 1241, 102nd Cong., 1st Sess. (1991) (Violent Crime Control Act); S. 15, 102nd Cong., 1st Sess. (1991) (Violence Against Women Act).

105. See *supra* notes 57-68 and accompanying text.

106. 28 U.S.C. § 478(a) (Supp. 1992). Congress passed the Act on December 1, 1990.

107. Telephone Interviews with Abel Mattos, Court Administration Division, Administrative Office of the U.S. Courts (Sept. 4, 1992); Donna Stienstra, Research Division, Federal Judicial Center (Feb. 13, 1992); cf. U.S. DIST. CT. FOR THE W. DIST. OF MO., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Apr. 30, 1992) (only court adopting plan in 1992).

therefore, were essentially working simultaneously. This sharply constricted the opportunities for interdistrict consultation about the CJRA's implementation and specific procedures. It also reduced the time for instituting, experimenting with, and evaluating, procedures which EIDCs adopted and concomitantly restricted the possibility that plans developed earlier would inform and improve the efforts of districts working subsequently.¹⁰⁸

Furthermore, the CJRA assigns all ninety-four districts numerous tasks. Perhaps most important, each district must consider, and may adopt, eleven principles, guidelines, and techniques and any other procedures which they deem appropriate under the sixth, open-ended technique, while the districts can select diverse means for effectuating the procedures that they choose.¹⁰⁹ Congress so provided, rather than, for example, circumscribing the number of districts which could prescribe such a broad panoply of procedures or limiting those procedures that every one of the districts might adopt. These factors intrinsically have fostered, and will promote, balkanization. Quite a few districts have inserted in their plans, and many others will select, numerous procedures that vary substantially from district to district and among cases. Correspondingly, the imposition of a greater number of procedures, some of which are more complex—requiring that attorneys and parties prepare, file, and sign more documents and participate in additional activities, especially litigation conferences, thereby introducing more points of contention—has complicated the litigation process for, and consumed valuable resources of, judges, lawyers, and parties.

2. Congressional Guidance in the CJRA's First Three Sections

Congress included additional specific guidance in the first three sections of the CJRA which contributes to balkanization. Advisory groups and districts have applied instructions from each section in ways that are internally inconsistent and that conflict with guidance in the other two sections and with external strictures, such as those in the Federal Rules and the United States Code. One of the provisions, section 472, affords instructions for advisory groups in compiling

108. For example, once districts adopt plans, they must conduct annual assessments of their dockets "with a view to determining appropriate additional actions . . . to reduce cost and delay in civil litigation." 28 U.S.C. § 475 (Supp. 1992). This means that relatively few districts which might have intended to adopt plans by the end of 1992 would have had the benefit of annual assessments that EIDCs perform.

109. 28 U.S.C. § 473 (Supp. 1992); *see also infra* notes 129-53 and accompanying text.

reports and recommendations.¹¹⁰ The others are section 471, which prescribes the purposes of plans, and section 473, which enumerates specific principles, guidelines, and techniques that courts must consider and may include in those plans.¹¹¹

a. Internal Inconsistency

Certain guidance in section 472 illustrates how the three provisions can be internally inconsistent. In that section, Congress instructed the advisory groups to posit recommendations for districts that would "reduce cost and delay and thereby facilitat[e] access to the courts."¹¹² Expedited disposition may not necessarily be the best resolution, especially for litigants who possess comparatively limited resources and information, such as numerous civil rights plaintiffs. These parties typically need more, not less, time to conduct discovery, so that the litigants can collect, analyze and synthesize the requisite material to make their cases. This means that Congress required the advisory groups to formulate recommendations which would satisfy the statutory requirement of reducing delay, but frustrate, and even defeat, the equally important requirement of facilitating court access, which appears three words away in the same clause of section 472.¹¹³ Nearly all of the groups and districts have apparently ignored this conflict, as witnessed in the groups' proposals and the courts' adoption of numerous procedures that would simultaneously decrease delay and impede access. For instance, quite a few of the EIDCs have imposed numerical restrictions on discovery, that will reduce delay and restrict access.¹¹⁴

b. Conflicts Among the Three Sections

Examples in the paragraph above also demonstrate how the three sections conflict with one another.¹¹⁵ The requirement in section 472 that advisory group recommendations decrease delay can contradict the

110. 28 U.S.C. § 472 (Supp. 1992).

111. 28 U.S.C. §§ 471, 473 (Supp. 1992). These three sections are among the most important to the implementation of the CJRA.

112. 28 U.S.C. § 472(c)(3) (Supp. 1992). For the ideas regarding resource discrepancies among litigants in this paragraph, and in the remainder of this paper, I rely substantially on Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 *BUFF. L. REV.* 485, 495-508 (1988-89).

113. See *supra* text accompanying note 112. Section 471 includes similar internal inconsistencies. For example, the "purposes of each plan are to . . . ensure just [and] speedy . . . resolutions of civil disputes." 28 U.S.C. § 471 (Supp. 1992).

114. E.g., *IDAHO PLAN*, *supra* note 65, at 11 (limits on interrogatories and depositions); *MASS. PLAN*, *supra* note 68, at 35 (same).

115. See *supra* note 113 and accompanying text.

statement in section 471 that one purpose of plans is to “ensure just . . . resolutions of civil disputes.”¹¹⁶ Moreover, the eleven principles, guidelines, and techniques that section 473 states courts must consider and may adopt could conflict with the requirements of section 472 and the purposes of section 471. For instance, vigorous implementation of the sixth guideline—authorizing the referral of appropriate cases to ADR programs—can frustrate and pervert section 472’s requirement to facilitate court access and section 471’s purpose to facilitate “deliberate adjudication of civil cases on the merits.”¹¹⁷

c. Conflicts with External Requirements

Moreover, the three CJRA sections afford considerable guidance, which when implemented can conflict with external requirements. Congress implicitly, and perhaps expressly, empowered advisory groups to suggest, and districts to adopt, procedures that contravene provisions in the Federal Rules and the United States Code.¹¹⁸ None of the three sections explicitly prohibits, and each by implication permits, such inconsistency; indeed, nothing in the CJRA or its legislative history appears to proscribe expressly these conflicts. More specifically, section 473 provides that districts shall consider, and may adopt, eleven principles, guidelines, and techniques. Certain of these prescribed procedures, such as several principles and guidelines pertaining to discovery, which quite a few districts have implemented, contravene existing Federal Rules governing discovery.¹¹⁹ Correspondingly, the open-ended provision in the sixth technique of section 473(b) implicitly invites districts to adopt procedures that conflict with exogenous requirements.¹²⁰ How

116. Compare 28 U.S.C. § 472(c)(3) (Supp. 1992) with 28 U.S.C. § 471 (Supp. 1992). See also *supra* note 113 and accompanying text.

117. Compare 28 U.S.C. § 473(a)(6) (Supp. 1992) with 28 U.S.C. § 472(c)(3) (Supp. 1992) and 28 U.S.C. § 471 (Supp. 1992). See also *infra* notes 144-45 and accompanying text.

118. The Rules Enabling Act states that local rules must be “consistent with Acts of Congress” and the Federal Rules of Civil Procedure. 28 U.S.C. § 2071(a) (Supp. 1990); see also *supra* notes 35-37, 53-54; *infra* notes 128, 140-51 and accompanying text.

119. Perhaps the most controversial and most troubling examples involve mandatory pre-discovery disclosure, some of which would radically transform traditional notions of discovery. See, e.g., IDAHO PLAN, *supra* note 65, at 10-11; E. DIST. N.Y. PLAN, *supra* note 36, at 4-5. The Civil Rules Committee, which proposed a similar revision in federal discovery provisions during 1991, has already dramatically reversed course twice on the issue. See 1991 Preliminary Draft, *supra* note 51, at 87-88 (proposing amendments to rules 16 and 26); Randall Samborn, *U.S. Civil Procedure Revisited*, NAT’L L.J., May 4, 1992, at 1, 12. See also *supra* note 52.

120. Each district “shall consider and may include . . . such other features as [it] consider[s] appropriate after considering the recommendations of the advisory group.” 28 U.S.C. § 473(b)(6) (Supp. 1990). The examples immediately below overlap with similar ones that districts apparently adopted pursuant to the sixth technique. See *infra* notes 140-51 and accompanying text.

numerous districts in fact implemented the CJRA makes less significant precisely what Congress intended regarding consistency.¹²¹

A number of advisory groups have recommended that courts adopt, and numerous districts have proceeded as if they have authority to prescribe, procedures that contravene the Federal Rules or the United States Code. The baldest assertion of authority appears in the plan for the Eastern District of Texas, which proclaims that "to the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling."¹²² The court, apparently attempting to demonstrate that it could exercise that power, included an offer of judgment provision which seems inconsistent with Federal Rule 68.¹²³ Additional EIDCs have implemented procedures that clearly or apparently contravene the Federal Rules or the United States Code, although few have been so direct as the Eastern District of Texas. For example, the Montana District is assigning civil cases co-equally to Article III judges and magistrate judges.¹²⁴ The court will notify litigants whose cases are assigned to magistrate judges that they may request reassignment to an Article III judge; however, if parties do not file timely requests, the right will be deemed waived.¹²⁵ Placing the onus on litigants in this way, rather than proceeding only with their affirmative consent, seems inconsistent with the provision for referring cases to magistrate judges in section 636(c)(2) of Title 28 of the United States Code.¹²⁶

Numerous courts have asserted that they possess rather broad authority to prescribe procedural provisions that conflict with the Federal Rules or the United States Code.¹²⁷ The districts have so acted, even though the General Counsel of the Administrative Office of the United States Courts, which has substantial responsibility for implementing the CJRA, has circulated to all of the courts a memorandum stating that

121. I am not saying that what districts actually did makes it correct; indeed, I find the activity problematic. It is difficult to imagine that Congress accorded the issue no consideration. For instance, when it instructed three demonstration districts to "experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution," Congress must have contemplated that the districts might make ADR mandatory and even enforce the requirement with sanctions. See *infra* notes 144-45 and accompanying text.

122. E. DIST. TEX. PLAN, *supra* note 68, at 9.

123. Compare E. DIST. OF TEX. PLAN, *supra* note 68, at 10 with FED. R. CIV. P. 68. See also *supra* notes 85-86 and accompanying text, *infra* notes 142-43 and accompanying text. See generally *Marek v. Chesny*, 473 U.S. 1 (1985) (discussing Rule 68).

124. MONT. PLAN, *supra* note 39, at 3-4; see also Tobias, *supra* note 39, at 93 n.9.

125. MONT. PLAN, *supra* note 39, at 3-4; see also Tobias, *supra* note 39, at 93 n.9.

126. See 28 U.S.C. § 636(c)(2) (Supp. 1990); Tobias, *supra* note 39, at 93 n.9.

127. See, e.g., *infra* notes 140-51 and accompanying text.

the Act grants them much narrower authority to adopt inconsistent procedures.¹²⁸

3. A Closer Look at the CJRA's Principles, Guidelines, and Techniques

Congress afforded considerable, unclear guidance that has enhanced, and will increase, balkanization. The eleven principles, guidelines, and techniques of litigation management and cost and delay reduction that districts must take into account, and may adopt, have been, and will be, so conducive to balkanization that they warrant more detailed treatment here. The large number of principles, guidelines, and techniques, most having multiple subparts, inherently enhance balkanization because the districts will select varying permutations and combinations of the procedures that Congress provided, thereby contributing to complexity and disuniformity. Congress, however, apparently attempted to retain some uniformity, and perhaps limit complexity, by stating that all districts are to consider, and may adopt, the identical eleven procedures.

In addition to this general propensity of the eleven principles, guidelines, and techniques to increase balkanization, nearly all of the specific procedures enhance disuniformity. Most of the six principles and guidelines foster intercase disuniformity. The first, prescribing differential judicial management tailored to case complexity, and the third, calling for careful, deliberate judicial monitoring of discovery in complex lawsuits, inherently promote intercase disuniformity.¹²⁹ Numerous EIDCs have used tracks, which contemplate that judicial officers will closely manage complex cases, especially during discovery, and minimally man-

128. See Memorandum from William R. Burchill, Jr., General Counsel, Administrative Office of the U.S. Courts, to Abel J. Mattos, Court Administration Division, Administrative Office of U. S. Courts (July 5, 1991) (regarding the impact of the Civil Justice Reform Act on the Federal Rules of Civil Procedure and arbitration statutes) (on file with author). See generally Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 Minn. L. Rev. 375 (1992).

A related, but less important, issue for which Congress did not clearly provide is whether the plans are self-executing or whether they only can be implemented through existing, revised, or new local rules. Most of the thirty-four districts seeking EIDC status have relied on current, or proposed amended, or new, local rules. Nevertheless, some districts have proceeded as if procedural provisions in their plans can be directly enforced against lawyers and litigants. The plan for the Eastern District of New York affords an analogous, but even more troubling, example. The Plan states that the advisory group's report "constitutes the 'legislative history' of the Plan and shall serve as a guide in its implementation and interpretation." E. DIST. N.Y. PLAN, *supra* note 36, at 1. This assumes that all federal court practitioners have copies of the report, although that document comprises 147 pages and few copies were printed initially.

129. See 28 U.S.C. § 473(a)(1), (3) (Supp. 1992).

age relatively simple, routine litigation.¹³⁰ Indeed, a number of districts have required or suggested that magistrate judges or alternative dispute resolution processes be employed when resolving less complicated litigation.¹³¹ This implicates the sixth principle, “authorization to refer appropriate cases” to ADR programs that have been designated for use in districts or which the courts may provide.¹³² In short, according lawsuits differential treatment, essentially premised on their complexity, intrinsically promotes intercase disuniformity.¹³³

Numerous principles, guidelines, and techniques also increase complexity. Practically all of the techniques and most of the principles and guidelines complicate civil litigation by, for example, imposing greater responsibilities on judges, lawyers, and litigants. The initial two techniques’ requirements—that counsel prepare discovery-case management plans and attend pretrial conferences with authority to bind clients on matters that the court identifies—enhance complexity.¹³⁴ Additional complication similarly attends the fifth technique’s command that representatives of litigants who can bind the parties attend settlement conferences¹³⁵ and the suggestions in the fourth technique and the sixth principle that litigants participate in various forms of ADR.¹³⁶ The third technique’s signature requirement and the fifth guideline’s certification stricture concomitantly enhance complexity.¹³⁷

Examples in the two paragraphs immediately above illustrate that the closer judicial management, especially of pretrial procedures and discovery, which the principles, guidelines, and techniques contemplate,

130. *E.g.*, U.S. DIST. CT. FOR THE S. DIST. OF FLA., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 102-06 (Nov. 1991); U.S. DIST. CT. S. DIST. ILL., CIVIL JUSTICE DELAY AND EXPENSE REDUCTION PLAN 2-4 (Dec. 27, 1991); *see also supra* note 36 and accompanying text.

131. *See, e.g.*, U.S. DIST. CT. FOR THE DIST. OF OR., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 9-17 (Dec. 30, 1991); U.S. DIST. CT. FOR THE S. DIST. OF W.V., CIVIL JUSTICE DELAY AND EXPENSE REDUCTION PLAN 81-89 (Dec. 30, 1991) [hereinafter S. DIST. W.V. PLAN].

132. 28 U.S.C. § 473 (a)(6) (Supp. 1990).

133. Any time multiple districts adopt disparate principles, guidelines, or techniques they will increase interdistrict disuniformity. *See supra* text in the paragraph immediately preceding the text accompanying this note.

134. *See* 28 U.S.C. § 473(b)(1), (2) (Supp. 1992); U.S. DIST. CT. FOR THE S. DIST. OF IND., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 3-9 (Dec. 31, 1991) [hereinafter S. DIST. IND. PLAN]; MONT. PLAN, *supra* note 39, at 10.

135. *See* 28 U.S.C. § 473(b)(5) (Supp. 1992); U.S. DIST. CT. FOR THE DIST. OF KAN., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 9-10 (Dec. 31, 1991); MASS. PLAN, *supra* note 68, at 54.

136. *See* 28 U.S.C. § 473(a)(6), (b)(4) (Supp. 1992); *supra* notes 131-32 and accompanying text.

137. *See* 28 U.S.C. § 473(a)(5), (b)(3) (Supp. 1992); S. DIST. OF IND. PLAN, *supra* note 134, at 13; WYO. PLAN, *supra* note 36, at 13.

may compound complexity in somewhat subtler ways. The central function assigned to judges' participation in the pretrial process, by overemphasizing factual and legal specifics before trial, might make pretrial conferences the modern equivalent of technical pleading.¹³⁸ The principles, guidelines, and techniques could introduce additional complication by multiplying the number of steps in particular cases,¹³⁹ and the procedures promise to enhance the complexity of discovery by increasing judicial control of it and by imposing greater, earlier discovery responsibilities on counsel.

The sixth technique's open-ended provision for courts to adopt "such other features" as districts find "appropriate after considering" their advisory groups' recommendations apparently has been an important source of complexity and disuniformity.¹⁴⁰ Numerous EIDCs, more by implication than explicitly, may have relied on this technique to prescribe many procedures that the CJRA does not specifically authorize.¹⁴¹ A number of these procedures seem debatable as a matter of authority or policy, and they increase balkanization.

Provisions in quite a few civil justice plans are illustrative. The Eastern District of Texas has imposed a "maximum fee schedule for contingency fee cases" that are not governed by congressional fee-shifting provisions, such as civil rights cases.¹⁴² The district is implementing this schedule, although the Supreme Court has recently and clearly proclaimed that "allocation of the costs accruing from litigation is a matter for the legislature, not the courts."¹⁴³

The Western District of Missouri is sending one-third of its civil suits automatically to a mandatory, non-binding program of Alternative Dispute Resolution (ADR) and will sanction litigants who fail to participate in good faith in ADR.¹⁴⁴ This requirement could seriously disadvantage parties with scarce resources. It demands that the litigants spend their time, money, and effort on preparing to participate in

138. See Subrin, *supra* note 5, at 1649; *supra* note 24 and accompanying text; cf. Tobias, *supra* note 24, at 942-46 (suggesting that Rule 16 is overused, especially to sanction).

139. See Subrin, *supra* note 5, at 1649-50; *supra* notes 24, 134-37 and accompanying text.

140. 28 U.S.C. § 473(b)(6) (Supp. 1992).

141. Because very few districts have expressly so stated, I am assuming that they relied on the sixth technique. The examples below overlap with, but are broader than, those offered above to illustrate conflicts with the Federal Rules or the United States Code. See *supra* notes 118-28 and accompanying text.

142. E. DIST. TEX. PLAN, *supra* note 68, at 7-8.

143. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835 (1990); see also Chambers v. Nasco, 111 S. Ct. 2123, 2141-42 (1991) (Kennedy, J., dissenting).

144. U.S. DIST. CT. FOR THE W. DIST. OF MO., EARLY ASSESSMENT PROGRAM, EARLY IMPLEMENTATION PROJECT 1-15 (Oct. 31, 1991). See generally Tobias, *supra* note 75, at 50 n.5, 52.

reach agreement before counsel file discovery motions.¹⁵² A number of districts correspondingly require that courts set early, firm trial dates, that opponents confer prior to submitting discovery requests, and that individuals with binding authority attend settlement conferences.¹⁵³

In sum, Congress structured the CJRA in ways that inherently increase balkanization. Most importantly, Congress placed primary responsibility for implementing the Act in all ninety-four districts and stated that each must consider, and might adopt, a plethora of principles, guidelines, and techniques. The EIDCs, for their part, selectively prescribed different combinations of the statutorily-enumerated procedures, thereby fostering greater disuniformity and complexity. The third section analyzes the consequences of enhanced balkanization.

III. IMPLICATIONS OF INCREASED BALKANIZATION

This piece has expressly or implicitly mentioned numerous consequences of increased balkanization, as most recently, and perhaps most significantly, manifested in civil justice reform. Nonetheless, those implications are so important that they warrant explicit examination at this juncture. Enhanced balkanization, as witnessed more specifically in greater complexity and disuniformity, detrimentally affects participants in federal civil litigation, institutions associated with the federal courts, and the broader society.

Increased complexity is evidenced by the growing number of procedures, many of which have become more complicated, impose onerous obligations, or are obscure or otherwise difficult to find. This complexity has deleterious ramifications for all judges, lawyers, and litigants, but especially for counsel and parties with limited resources.¹⁵⁴ Attorneys and litigants who possess less money, time, and information experience significant difficulty discovering and mastering, much less fully complying with, more numerous and more complex procedures, such as the ever-expanding number of steps in civil lawsuits.¹⁵⁵ The new requirements for drafting, filing, and signing papers, for attending conferences, and for discharging additional, burdensome obligations

152. See FEDERAL JUDICIAL CENTER, CJRA PLAN COMPARISON (Feb. 27, 1992) [hereinafter CJRA PLAN COMPARISON]; *supra* notes 131-32, 134, 137 and accompanying text.

153. See CJRA PLAN COMPARISON, *supra* note 152; *supra* notes 135-37 and accompanying text. The survey in this paragraph considers all of the EIDCs. Many of the procedures mentioned here, accordingly, complement those examined more specifically above.

154. See *supra* note 112.

155. See, e.g., *supra* notes 134-35, 139 and accompanying text. For a discussion of the difficulties imposed upon civil rights litigants by Rule 11, see Tobias, *supra* note 112, at 495-98.

ADR, the results of which will not be binding. The parties must participate on pain of being sanctioned, which could further deplete their resources.¹⁴⁵ Additional districts have issued plans which expressly or implicitly state that sanctions might be imposed for failure to comply with prescribed procedures, although the CJRA does not specifically mention sanctions.¹⁴⁶ Indeed, the plan developed in the Massachusetts District characterizes negligent violations of its provisions as conduct punishable with sanctions.¹⁴⁷

The Montana District is establishing a peer review committee, composed of federal court practitioners "appointed by majority vote of the article III Judges of the district in active service," which will review the litigation conduct and discovery practices of lawyers who practice in the court.¹⁴⁸ The committee will analyze litigation behavior or discovery practices at the request of any judicial officer, who will provide it with a statement describing the questionable activity.¹⁴⁹ The committee, after considering the record, must "present the judicial officer with an advisory opinion stating whether the practice or conduct falls within the bounds of accepted discovery or litigation practice."¹⁵⁰ The Montana District affords few procedural prescriptions, particularly in terms of due process. For example, it makes no provision for oral testimony or the right to challenge allegations in the paper record. Although courts certainly possess broad authority to appoint special masters or other adjuncts who will assist the court, the CJRA does not expressly provide for entities like the peer review committees.¹⁵¹

A survey of the thirty-four EIDCs shows that nearly all of them have subscribed to most of these principles, guidelines, and techniques. Practically every district has prescribed early, ongoing judicial management, ADR participation, and certification of good faith efforts to

145. The Western District of Missouri also may lack the requisite authority to impose the ADR requirement, although congressional designation of the court as a demonstration district that must experiment with ADR may suffice. See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 104(b)(2), 104 Stat. 5089, 5097 (1990) (codified as amended in scattered sections of 28 U.S.C.); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 947-51 (1991); Tobias, *supra* note 75, at 52 n.17; *supra* notes 118-28 and accompanying text.

146. *E.g.*, Report and Plan of the Advisory Group of the District Court of the Virgin Islands, at 35 (Dec. 23, 1991); S. DIST. W.V. PLAN, *supra* note 131, at 90 (Dec. 30, 1991); *see also* E. DIST. N.Y. PLAN, *supra* note 36, at 18.

147. *See* MASS. PLAN, *supra* note 68, at 67.

148. MONT. PLAN, *supra* note 39, at 17; *see also* Tobias, *supra* note 46, at 449.

149. *See* MONT. PLAN, *supra* note 39, at 17.

150. *Id.*

151. *See* Tobias, *supra* note 39, at 95 n.23.

that the CJRA's implementation effects—particularly as they elaborate the already substantial demands, such as those which Rules 11 and 16 impose—similarly disadvantage these lawyers and parties.¹⁵⁶ Enhanced complexity also adversely affects the federal courts. For example, judges' responsibilities to preside over a larger number, and greater variety, of litigation conferences, many of which are more complex, consume increasingly scarce judicial resources.¹⁵⁷

Enhanced disuniformity could have certain, closely related implications. Greater interdistrict disuniformity is seen in increasingly disparate local rules governing the pretrial process and in growing inconsistencies between many local rules that encompass numerous procedural matters and the Federal Rules.¹⁵⁸ This interdistrict disuniformity, which is compounded by the plethora of additional principles, guidelines, and techniques that civil justice reform provides, complicates the efforts of lawyers with national practices, such as federal government attorneys, to participate in lawsuits in districts that follow procedures with which they are not completely familiar.¹⁵⁹ These problems will afflict everyone who litigates in multiple districts, but will be acute for public interest litigants, such as the Sierra Club and the NAACP, and public interest lawyers. For example, resource deficiencies make it difficult for the public interest groups and attorneys to learn about, command, and conform to the procedures. Enhanced intercase disuniformity is witnessed by limitations imposed on certain parties' procedural possibilities, such as numerical restrictions on interrogatories or depositions, and by requirements that mandate or encourage participation in ADR or settlement conferences.¹⁶⁰ For instance, individuals who lack resources and information need greater, rather than less, discovery, so that they can secure sufficient data to prove their cases, while participation in ADR can additionally deplete the few resources these litigants may possess.¹⁶¹

Increasingly balkanized procedure is not neutral. Procedural choices that enhance complexity and disuniformity can foster particular values

156. See, e.g., *supra* notes 23-25, 134-37 and accompanying text.

157. See, e.g., *supra* notes 18-19, 134-35 and accompanying text; see also *supra* notes 15, 104 and accompanying text (discussing scarcity of judicial resources and the explosion of litigation).

158. See, e.g., *supra* notes 18-21, 119 and accompanying text.

159. At least government counsel usually can rely on local United States Attorneys who will be familiar with local practice. Large, private law firms with multi-district practices typically will have more resources to master the procedures than others involved in federal court litigation. See Coquillet et al., *supra* note 31, at 65.

160. See, e.g., *supra* notes 114, 129-32, 136 and accompanying text. These restrictions and requirements may apply to all cases. Even when they do, the limitations and requirements disproportionately disadvantage lawyers and litigants with fewer resources.

161. See, e.g., *supra* notes 112-14, 144-45 and accompanying text.

and serve specific interests.¹⁶² Accumulating evidence suggests that many practitioners and their clients, especially those with significant resources and information, have increasingly capitalized on numerous tactical advantages that growing balkanization affords.

On a general level, lawyers and parties who have greater resources can invest their time, money, and effort finding, integrating, and invoking increasingly complex and disuniform procedures. A recent, exhaustive study in the specific context of employment discrimination litigation shows that defense counsel and defendants have employed a number of strategic benefits that enhanced balkanization makes possible to frustrate plaintiffs' vindication of constitutional rights and statutorily-prescribed interests.¹⁶³ The study also indicates that numerous judges have become more receptive to defendants' assertion of the procedural requirements, other judges have invoked the procedural strictures, and a few judges have even vigorously enforced them, thereby evincing decreased solicitude for the needs of the plaintiffs.¹⁶⁴ These practices have had detrimental impacts on resource-poor attorneys and litigants. For instance, even when the lawyers and parties were able to master and comply with onerous procedures and could defeat procedural technicalities that their opponents or judges asserted, the attorneys and litigants have increasingly found that contracting procedural opportunities frustrate and preclude their pursuit of substantive rights,¹⁶⁵

The newest indicium of these developments in procedure is the deployment for perceived tactical gain of procedures instituted under the CJRA. A clear example that already enjoys widespread use is the request for mandatory pre-discovery disclosure.¹⁶⁶ Counsel and parties have sought disclosure, even when plaintiffs had commenced suit long before EIDCs made disclosure requirements effective, and although most of the requirements conflict with applicable discovery provisions in the Federal Rules.¹⁶⁷

Many of the lawyers and litigants, such as civil rights attorneys and plaintiffs, whom increased balkanization disadvantages the most, are

162. See Subrin, *supra* note 5, at 1651; Tobias, *supra* note 2, at 336-39. See generally Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463 (1987) (book review).

163. See generally Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 331 (1992).

164. Cf. Tobias, *supra* note 2, at 296-335 (similar conclusions regarding judicial application of Federal Rules). See generally Baumann et al., *supra* note 163.

165. See, e.g., *supra* notes 20-21, 114, 129-32, 136 and accompanying text.

166. The material in this paragraph is premised on conversations with numerous attorneys in a number of locales and on letters from, and conversations with, some judges.

167. See *supra* note 119 and accompanying text.

precisely the practitioners and parties Congress intended to vindicate constitutional rights and statutory interests in federal civil litigation.¹⁶⁸ Numerous potential litigants and actual parties whom enhanced balkanization will similarly affect are those individuals whose court access Congress avowedly meant to facilitate when it enacted the CJRA. In all of these statutes, but especially the social legislation, Congress intended that the federal judiciary be solicitous of persons for whose benefit Congress passed the measures.

These factors in turn implicate certain important institutional consequences of increased balkanization.¹⁶⁹ Congress has enacted more than forty statutes that grant substantive rights or interests and procedural advantages to their intended beneficiaries, such as individuals entitled to social security, whose vindication of rights and interests Congress wanted judges to encourage.¹⁷⁰ When heightened procedural complexity or disuniformity, reflected in local rules' requirements that are stricter than the Federal Rules or that conflict with the substantive legislation, complicates the potential litigants' pursuit of those rights and interests, several deleterious effects can arise.¹⁷¹ The increased complexity and disuniformity may foreclose intended beneficiaries' vindication of their rights, such as the pursuit, and possible recovery, of social security payments to which they might be legally entitled. They may also frustrate Congress' intent—such as reducing discrimination—in passing the substantive statutes. Judicial power concomitantly expands at the expense of Congress and of the parties who Congress intended would vindicate the constitutional rights and substantive statutory interests. These developments could additionally strain already fragile relations between the legislative and judicial branches, especially in such important areas as national rule revision, and may even provoke a constitutional confrontation.¹⁷²

168. Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C.L. REV. 745, 756-57 (1987); see also Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988) (intended beneficiaries); Tobias, *supra* note 2, at 284-85 (same).

169. In this paragraph, I rely substantially on Tobias, *supra* note 2; Tobias, *supra* note 112. See also Baumann et al., *supra* note 163.

170. See, e.g., Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213 (1988) (Supp. 1990)) (recent example); see also ROBERT E. LITAN & WILLIAM D. NORDHAUS, *REFORMING FEDERAL REGULATION* 44 (1983); Tobias, *supra* note 168, at 756-57; Tobias, *supra* note 2, at 284-85.

171. See, e.g., *supra* notes 35, 119, 123 and accompanying text. The problem is acute when the courts adopt local rules that undercut procedural advantages that Congress deliberately inserted in substantive statutes. See Carl Tobias, *Civil Rights Procedural Legislation*, 70 WASH. U. L. Q. 801 *passim* (1992).

172. For example, Congress has adopted a plethora of civil rights restoration acts, which

Enhanced balkanization might correspondingly have detrimental implications for the venerated institution of national court rulemaking by indirectly diminishing its influence and even undermining its relevance. Greater balkanization, particularly as manifested in the increased localization of federal civil procedure, could foster a procedural system that is premised on less expertise and is more parochial. As that system becomes increasingly local and disuniform, there may even be less perceived need for national rule revision. It would be unfortunate, however, to lose the experience and the system-wide perspective on the rule-amendment process of the Civil Rules Committee, the Supreme Court, and Congress.¹⁷³ This expertise and viewpoint have served the federal courts exceedingly well for over a half-century, especially by sustaining a uniform, simple procedure and, concomitantly, minimizing balkanization.

Growing balkanization adversely affects the civil justice system. For example, the earlier procedural developments, such as managerial judging, as elaborated by the CJRA's implementation, require that attorneys and parties prepare, file, and sign a greater number of papers and attend more conferences, multiply the steps in lawsuits, and enhance the emphasis on ADR. Most importantly, these considerations make it more difficult to ascertain the truth and to reach the merits of disputes, diminishing the quality of justice secured.¹⁷⁴ The factors correspondingly enhance delay in civil litigation and enlarge its costs. The consummate irony of civil justice reform is that the increased balkanization manifested in CJRA's implementation probably will have effects very different from those that Congress intended: it may well lead to greater delay and expense in civil litigation, decreased federal court access, fewer fair resolutions and fewer merits-based dispositions.¹⁷⁵ Indeed, as early as April, 1992, one district judge aptly epitomized the implications for the civil justice system of the CJRA's implementation and then mentioned a deleterious, systemic consequence: "Importantly, if idiosyncratic approaches to procedure [are] the order of the day we are in

culminated in the divisive passage of Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.). See Tobias, *supra* note 24, at 961-63. See generally Tobias, *supra* note 171 (discussing the relationship between procedural rules and civil rights). Ironically, passage of the CJRA indicates decreased congressional concern about the federal judiciary's application of procedure in ways that erode substantive statutes.

173. See, e.g., sources cited *supra* notes 44-45. See also Paul D. Carrington, *The New Order in Judicial Rulemaking: Factional Politics is Jeopardizing the Federal Rulemaking Process*, 75 JUDICATURE 161 (Oct. - Nov. 1991). See generally Mullenix, *supra* note 128.

174. See Subrin, *supra* note 5, at 1651; Coquille et al., *supra* note 31, at 64-65.

175. See 28 U.S.C. § 471 (Supp. 1992).

for quite a ride. Already there appears to be some evidence of district shopping because of the existence of a particular plan."¹⁷⁶ Citizens lose respect for the civil justice system when they believe that the procedures available, or the character of justice, vary significantly from district to district, that the nature of justice depends on the magnitude or type of a specific case, that lawyers' and litigants' resources influence the quality of justice, or that procedural technicalities or complexities preclude or restrict the vindication of rights.¹⁷⁷

IV. CONCLUSION

Recent procedural developments, as exacerbated by the Civil Justice Reform Act and its nascent implementation, now threaten the integrity of federal civil procedure. Those individuals and institutions responsible for maintaining a uniform, simple procedural system must act decisively if the system so carefully created and nurtured for more than a half-century is not to become increasingly balkanized.

176. Cohn Letter, *supra* note 74.

177. See Subrin, *supra* note 5, at 1651; Coquillette et al., *supra* note 31, at 64-65; Tobias, *supra* note 112, at 495-98 (discussing these problems arising in litigation with respect to civil rights cases).