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More Proposals to Simplify Modern Federal Procedure

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RESPONSE

MORE PROPOSALS TO SIMPLIFY MODERN FEDERAL PROCEDURE

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Simplified Rules of Federal Procedure? is a fitting contribution to the *Michigan Law Review* centennial issue.[1] The essay comprises a foreword, which is a tour de force of modern civil process, and a provocative simplified code that would govern less complex lawsuits. Professor Edward H. Cooper prepared this draft for the Advisory Committee on Civil Rules, which has not decided whether it will pursue the ambitious concept further. The essay affords trenchant perspectives on the Federal Rules of Civil Procedure since their original 1938 adoption and astute views on numerous pragmatic realities in contemporary process. These insights derive from Cooper's meticulous observation of procedure over four decades and lengthy service as Committee Reporter.

The foreword scrutinizes pressing complications in, and reflects incisive thought on, twenty-first century process. There is considerable agreement about many current problems but less consensus on promising solutions. For example, most proceduralists and federal court litigators believe that complex actions present greater difficulty, while some find process tailored to specific case types and early, firm trial dates effective procedural measures.

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[1] Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794 (2002).

The code first descriptively analyzes the salient questions posed by the suggested rules and characterizes their linchpin as the transfer of critical pretrial communications from discovery to fact pleading and disclosure.[2] Cooper probes numerous concerns about the draft. They include whether fact pleading efficaciously can be restored and the extent to which discovery should be restricted and disclosure compelled.[3] He then proffers the text of the simplified code, Committee Notes that assess the particular rules, and Reporter's Comments which elaborate issues those provisos raise.[4] In short, the simplification effort is creative and may ultimately be a resounding success.

Even if the project does not advance, Cooper explores one idea that deserves prompt implementation. "In 1992, the Advisory Committee proposed to amend Civil Rule 83 to authorize adoption, with Judicial Conference approval, of experimental local" measures dissimilar from federal ones,[5] a concept the Standing Committee tabled.[6] He identifies potential benefit in "facilitating well-designed and carefully monitored local" tests, which resemble "pilot" and "demonstration" programs under the 1990 Civil Justice Reform Act

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[2] *See id.* at 1800-01. The Reporter's initial draft also includes a demand-for-judgment provision, which might expedite numerous cases that are presently defaulted; makes Rule 16(b) scheduling orders optional; and requires that parties secure the court's permission to present expert testimony. *Id.* at 1801.

[3] He posits many similar, illustrative and ancillary queries, such as the wisdom of a partly paper trial and integrating summary judgment with trial. The inquiries are proffered after he asks the foundational question of whether the Simplified Rules project should even begin, claiming the provision of a model with the major issues will facilitate analysis. *Id.* at 1801-04; *see also id.* at 1804-20.

[4] *Id.*; *see* Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 633-37 (2002) (positing similar state rules). *See generally* Laurens Walker, *Writing on the Margins of American Law: Committee Notes, Comments and Commentary*, 29 GA. L. REV. 993 (1995).

[5] *See* Cooper, *supra* note 1, at 1799; *see also* Judicial Conference of the U.S., Committee on Rules of Practice and Procedure, Proposed Rules: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 137 F.R.D. 53, 153 (1991) [hereinafter Preliminary Draft]. *See generally* Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1595-98, 1600-01, 1605, 1616, 1633 (1994).

[6] *See* Cooper, *supra* note 1, at 1799; *see also* Tobias, *supra* note 5, at 1616. *See generally* A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991).

(CJRA),[7] as contrasted with essentially random, "uncontrolled proliferation of local rules,"[8] because reliable empirical data resist collection in the procedural world.[9] Moreover, local experiments could better promote simplification, whether for some, or all, litigation, than national mandates that simultaneously govern each district court.[10] Cooper also canvasses ostensible problems which may explain the idea's withdrawal. He detects tension between the approach and the United States Code section that authorizes district use of local measures which do not violate or repeat federal rules and statutes[11] and finds circular making a disuniform local provision comport with national strictures through a federal rule that permits inconsistent local mandates.[12] A second difficulty is certain hesitation about assigning the Judicial Conference review and approval tasks.[13]

Congress should expeditiously pass legislation which would amend Rule 83 to include the tabled concept. Statutory revision would answer questions about power and disuniformity that Cooper asks. Lawmakers possess the clearest authority to initiate this reform. The legislative branch could prescribe experimentation in sufficiently few districts to minimize balkanization, while it might

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[7] *See* Lauren K. Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1450-64 (1994); Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547, 596-97.

[8] Cooper, *supra* note 1, at 1799. *Accord* Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS. 67 (Sum. 1988); *see also* Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533 (2002).

[9] *See* Cooper, *supra* note 1, at 1799. *Accord* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927-28 (1989); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 844-46 (1991). *See generally* Levin, *supra* note 6, at 1581-82; Tobias, *supra* note 7, at 581, 625-27.

[10] Cooper, *supra* note 1, at 1799; *see* Mullenix, *supra* note 9, at 844; Walker, *supra* note 8, at 76.

[11] Cooper, *supra* note 1, at 1799; *see* 28 U.S.C. § 2071(a) (1994); *see also infra* note 25 and accompanying text (citing Federal Rules that provide similar authorization as 28 U.S.C. § 2071); Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); *infra* notes 22-29 and accompanying text (suggesting several responses to this tension).

[12] Cooper, *supra* note 1, at 1799; *see also infra* notes 14-18, 22-29 and accompanying texts (suggesting several responses to this circularity).

[13] Cooper, *supra* note 1, at 1799; *see* Levin, *supra* note 6, at 1589; Walker, *supra* note 8, at 83-84.

urge that the Judicial Conference and courts implement existing duties which require abrogation or modification of current local procedures that are inconsistent or redundant.[14] Congress can felicitously treat other concerns, mainly implicating program structure, such as what body should evaluate and sanction proposals to test disuniform local rules. The Conference appears the most appropriate. For instance, the entity gleaned pertinent experience from overseeing CJRA procedures that districts applied.[15] It might also guarantee rigorous experimentation with conflicting local measures and their stringent analysis by expert, independent assessors.[16] Lawmakers should empower the Conference to consult staff in the Administrative Office of the United States Courts (AO) and the Federal Judicial Center (FJC).[17] They possess much relevant experience—derived from assisting judges to fashion protocols under legislation, namely the CJRA, and scrutinizing the devices applied[18]—which would enhance review and approval of testing suggestions.

The 1992 idea's codification would yield related advantages Cooper mentions but that warrant elaboration. This action should

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[14] *See supra* notes 11-12 and accompanying text; *see also* Preliminary Draft, *supra* note 5, at 153-54 (proposing that Conference approve requests to experiment that would include plan to evaluate testing and time limits be imposed on experimentation). The Supreme Court could amend Rule 83, but Congress possesses clearer authority. *See* Levin, *supra* note 6, at 1582-83; Tobias, *supra* note 5, at 1633.

[15] *See* Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1406-11 (1992); *see also* 28 U.S.C. § 474 (1991). The Conference has not comprehensively implemented analogous responsibilities to review local appellate rules. *See id.* §§ 331, 2071(a); FED.R.APP.P. 57; *see also* Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1 (1997). *See generally* Tobias, *supra* note 8, at 556-58.

[16] Rigorous testing and evaluation will improve decisionmaking about the measures' application in additional districts and nationally. *See supra* notes 10, 14, *infra* notes 19-21 and accompanying texts.

[17] *See* 28 U.S.C. § 601 et seq. (authorizing AO); *id.* at § 620 et seq. (authorizing FJC); *see also* William Schwarzer, *The Federal Judicial Center and the Administration of Justice in the Federal Courts*, 28 U.C. DAVIS L. REV. 1129 (1995); Russell Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, 51 LAW & CONTEMP. PROBS. 31 (Sum. 1988).

[18] *See* Cooper, *supra* note 1, at 1797; *supra* note 7 and accompanying text. Congress also authorized the Commission on Structural Alternatives for the Federal Courts of Appeals to enlist both entities' help, which it did. *See* Pub. L. No. 105-119, § 305, 111 Stat. 2240, 2491 (1997). *See generally* Carl Tobias, *A Divisional Arrangement for the Federal Appeals Courts*, 43 ARIZ. L. REV. 633 (2001).

fulfill a crucial need for systematic local experimentation.[19] It would facilitate educated judgments about proposed amendments' effectiveness *before* the rule revisors finalize them and solicit public comment.[20] Advance testing would permit judges to enforce and interpret measures; lawyers and parties to find, understand and comply with the provisions; and expert, independent evaluators to analyze their benefits and detriments. Experience with how the nascent procedures actually operate could inform bench, bar and litigant input on suggested rule changes, while it may foster these proposals' refinement and improve official revisions.[21]

Carefully formulated and strictly monitored experimentation should also halt, or at least temper, the random proliferation of local, often inconsistent, mandates that the current regime tolerates, and even promotes.[22] For several decades, all ninety-four districts have prescribed many new local commands, growing numbers of which contravene or reiterate federal rules or legislation.[23] These developments have further balkanized and complicated practice, imposing unnecessary expense on counsel and parties who litigate in multiple districts as they must discover, master and satisfy local provisos.[24]

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[19] *See, e.g.*, Burbank, *supra* note 9, at 1927-28; Mullenix, *supra* note 9, at 844; Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 456-57 (1993).

[20] Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV. 877, 891 (1993); Carl Tobias, *A Modest Reform for Federal Procedural Rulemaking*, 64 LAW & CONTEMP. PROBS. 283 (Spr./Sum. 2001); Walker, *supra* note 8, at 75-77.

[21] Illustrative are revisions in Rules 11 and 26. Careful advance testing and rigorous analysis might have vitiated the need for further amendments so soon after recent revisions. *See* FED.R.CIV.P. 11, 1983 & 1993 amends.; FED.R.CIV.P. 26(a) 1993 & 2000 amends. *See generally* Tobias, *supra* note 5, at 1606-16.

[22] *See supra* notes 7-8, 14 and accompanying texts. I accept Professor Cooper's assumption that interest in testing mainly explains proliferation. For other explanations, see Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 868-71 (1989); Robel, *supra* note 7, at 1484.

[23] JUDICIAL CONFERENCE OF THE U.S., COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE (1989); *see* Daniel R. Coquillette et al., *The Role of Local Rules*, 75 A.B.A. J. 62 (1989). *See generally* Sisk, *supra* note 15; Tobias, *supra* note 8.

[24] *See* Levin, *supra* note 20, at 893; Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2016 (1989); sources cited *supra* note 15. Rule 83's amendment would facilitate the simplification idea. Relatively few districts could apply simplified rules that receive rigorous

There is a second effective way to simplify ever more complex federal procedure that Professor Cooper's otherwise instructive disquisition leaves unmentioned: the elimination or reduction of proliferating local strictures. The Judicial Conference, Circuit Judicial Councils and district courts might rectify or ameliorate proliferation through assiduous implementation of their duties to review local measures.[25] The 1988 Judicial Improvements and Access to Justice Act as well as 1985 and 1995 amendments in the federal appellate, bankruptcy, civil and criminal rules mandated that those entities assess local commands and abrogate or modify any provisions which conflict with or repeat federal rules or statutes.[26] The CJRA's passage and effectuation suspended discharge of those responsibilities;[27] however, its expiration during 2000 means the Conference, Councils and districts must now implement the obligations.[28] Indeed, they ought to fulfill these duties as soon as practicable, thus restricting proliferation and simplifying process, even if Congress declines to alter Rule 83.[29]

Professor Edward Cooper has crafted a valuable approach that promises to simplify federal procedure. Regardless of this idea's fate, lawmakers must promptly enact legislation, which revises Rule 83 to include the 1992 proposal. If Congress eschews Rule 83's amendment, the Judicial Conference, Circuit Judicial Councils and federal district courts should effectuate their responsibilities for local review because this will ultimately simplify modern practice.

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analysis, thus showing their efficacy; permitting adjustments; and informing decisions about broader application. *See supra* note 10 and accompanying text.

[25] *See* 28 U.S.C. §§ 332(d)(4), 2071(a) (1994); FED. R. APP. P. 57; FED. R. BANKR. P. 9029; FED. R. CIV. P. 83; FED. R. CRIM. P. 47. *See generally* Sisk, *supra* note 15; Tobias, *supra* note 8.

[26] *See* sources cited *supra* note 25.

[27] 28 U.S.C. §§ 471-78; *see* Tobias, *supra* note 5, at 1605; *see also* Robel, *supra* note 7, at 1450-51.

[28] *See* Pub. L. No. 106-518, § 206, 114 Stat. 2411, 2414 (2000). *See generally* Carl Tobias, *The Expiration of the Civil Justice Reform Act of 1990*, 59 WASH. & LEE L. REV. 541 (2002).

[29] I recognize that my suggestions may conflict. Rule 83's revision would authorize, yet control, inconsistency, but even if the provision is not amended, reducing proliferation will limit inconsistency.