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Some Realism about Federal Procedural Reform

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Carl Tobias, Some Realism about Federal Procedural Reform, 49 Fla. L. Rev. 49 (1997)
A New Confederacy? Disunionism in the Federal Courts (Disunionism) is a thought-provoking tour de force about many ills that
federal court observers believe plague the modern federal district courts. In *Disunionism*, Professor Paul Carrington paints a perceptive portrait of the troubling conditions that he asserts impede civil litigation in a number of districts, and he trenchantly criticizes district judges for their contributions to these circumstances while admonishing the Judicial Conference to sweep "our national courts clear of all local clutter."

*Disunionism* is only the most recent of Professor Carrington’s many attempts at cajoling those who could improve the districts or ameliorate the deterioration that has occurred. Indeed, Professor Carrington speaks with substantial expertise derived from a lifelong commitment to improving the federal courts. His four-decade career coincides with the period in which expanding caseloads have transformed the courts, and he has actively participated in numerous procedural reforms. For example, Professor Carrington, as the Reporter for the Civil Rules Advisory Committee, ironically drafted a rule that he now criticizes as problematic. The above ideas mean that Professor Carrington’s article warrants a response; this essay undertakes that effort.

I first briefly describe *Disunionism* and then analyze its account of the districts. I find the current situation of the federal districts disturbing for numerous identical, and some different, reasons, but the dearth of empirical data complicates evaluation. Because Professor Carrington tersely treats many phenomena that seem to affect the courts, my essay elaborates his description by proffering related explanations for the condition of the districts. The response next assesses *Disunionism*’s prescriptions for improving this situation. I ascertain that most, if properly implemented, appear responsive to certain difficulties confronting the courts, but, the paucity of empirical material similarly frustrates analysis. The essay concludes with suggestions for securing better information on the districts and explores possibilities that have somewhat more realistic prospects for improving the most problematic circumstances.

2. *Id.* at 1006.


5. *See infra* note 51 and accompanying text.
I. DESCRIPTION OF DISUNIONISM

In *Disunionism*, Professor Carrington initially discusses the advent and decline of national law's private enforcement. He explains how district judges enjoyed enormous discretionary power prior to passage of the Judiciary Act of 1875, which enhanced this power by creating "federal question jurisdiction, so that claims arising under the growing body of federal legislation could be brought before a federal" court. The 1875 statute increased the already substantial mistrust of federal judges as "arrogant and unfeeling autocrats" and led Congress to pass the 1891 Evarts Act which established the United States Courts of Appeals to rein in the "kingly power" of the federal judiciary. In 1934, Congress passed the Rules Enabling Act, which, like the 1875 Judiciary Act, was intended to unify the judiciary for the purpose of enforcing rights which national law created partly through the adoption of uniform, simple procedures that would apply in all federal districts. By the 1960s, "federal courts had replaced administrative agencies as the preferred means of enforcing much of the national law." The district judges exercised increasing power and discretion, especially over the pretrial process, although appeals courts were able "to cabin that discretion" somewhat.

A "degeneration of federal civil practice"—a reduction in district judges’ sense that enforcing legal rights and responsibilities is their principal business—has since occurred. Professor Carrington contends

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6. See Carrington, supra note 1, at 932-44.
7. See id. at 932 (stating that various federal trial courts adopted local rules of procedure "with the blessing of Congress"); see also Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 Wis. L. Rev. 631, 640-41 (stating that trial judges created rules of procedure out of the common law pleadings system).
9. Carrington, supra note 1, at 934.
13. See Carrington, supra note 1, at 937-38. See generally Yeazell, supra note 7, at 632-39 (discussing the replacement of the trial with pre-trial civil litigation).
that the “worth of all rights, claims and defenses enforceable” in courts diminishes with a decline in courts’ “collective, institutional professional commitment to decide” cases by applying law to facts.\textsuperscript{15} He asserts that these ephemeral, but ineffable, losses are costly in a society that depends on “law as the adhesive force binding a diverse population together.”\textsuperscript{16} 

Disunionism enumerates ten indicia of decreasing judicial professionalism.\textsuperscript{17} They include the “growing preoccupation of district judges with administration”; managing pretrial litigation and encouraging settlement; the “proliferation of delegates performing judicial work in all” judges’ chambers; and the increase in local procedures that reflect claims of local autonomy.\textsuperscript{18}

Professor Carrington asserts that these phenomena have transformed the office of District Judge since 1965.\textsuperscript{19} Judges’ major mission has become manufacturing dispositions, rather than reaching decisions by applying law to the facts.\textsuperscript{20} Their primary work is conferring with attorneys and staff, not conducting trials.\textsuperscript{21} The judges have steadily acquired discretion and power at the expense of appellate judges.\textsuperscript{22} “In short, the district judge is each year less a judge of a law court and more a local chancellor or lord of the manor, more to be feared and less to be respected.”\textsuperscript{23} Disunionism attributes this devolution mainly to growth in the courts’ size “unaccompanied by modifications needed if the legislative purposes of 1891 and 1934 were to be preserved.”\textsuperscript{24}

Professor Carrington then evaluates several ideas regarding procedural localism.\textsuperscript{25} He states that the original 1938 Federal Rules of Civil Procedure were meant to promote national uniformity while according

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\textsuperscript{15} Carrington, supra note 1, at 939; see Judith Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U. CHI. L. REV. 494 (1986) (stating that the pressure on courts to resolve conflicts has led to decline in adjudication).

\textsuperscript{16} Carrington, supra note 1, at 939-40.

\textsuperscript{17} Id. I emphasize local procedural proliferation because it is important to the districts’ current condition and to the issues that I treat in this essay.

\textsuperscript{18} Id. at 943. See generally William H. Rehnquist, Seen in a Glass Darkly: The Future of the Federal Courts, 1993 WIS. L. REV. 1 (discussing the changes in the federal courts since the late 1950s).

\textsuperscript{19} Id.

\textsuperscript{20} Id.

\textsuperscript{21} Id.

\textsuperscript{22} Id.

\textsuperscript{23} Id.

\textsuperscript{24} Id. at 943-44; see Stephen Reinhardt, Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts, A.B.A. J., Jan. 1993, at 52, 52; supra text accompanying notes 10-11.

\textsuperscript{25} See Carrington, supra note 1, at 944-52.
district judges considerable discretion. \textsuperscript{26} Disunionism also explains how the drafters of Rule 83 authorized districts to adopt local rules that were consistent with the Federal Rules but contemplated that courts would implement local procedures sparingly. \textsuperscript{27} Professor Carrington finds that the abundant local procedural variation that actually did occur derives more from differences in the values and styles of specific groups of judges than from local conditions. \textsuperscript{28}

Professor Carrington contends that local strictures treating matters covered by the Federal Rules tend to create legal clutter—"background noise" that makes it more difficult to hear significant mandates in rules which will be enforced by appeals courts. \textsuperscript{29} Legal clutter erodes simplicity, complicates comprehension of the real rules, and fosters satellite litigation. \textsuperscript{30} It also favors the cognoscenti, particularly local lawyers, and expert litigators, while it disadvantages those who appear less frequently in federal court and increases the cost of legal services. \textsuperscript{31}

The proliferation of local procedures became problematic soon after the adoption of the 1938 Rules and gradually worsened thereafter. \textsuperscript{32} By the mid-1980s, local requirements substantially impeded legal practice, fostered expense and delay, and were a pitfall for the unwary. \textsuperscript{33} The local procedures often repeated or conflicted with national rules and were difficult to find and understand. \textsuperscript{34} The Judicial Conference and Congress respectively addressed complaints about the number of local requirements and attempted to reduce expanding localism by amending Rule 83 and revising the Rules Enabling Act with the 1988 Judicial Improvements and Access to Justice Act (JIAJA). \textsuperscript{35}


\textsuperscript{28} Carrington, \textit{supra} note 1, at 946.

\textsuperscript{29} Id. at 947.

\textsuperscript{30} See id. at 947-48.

\textsuperscript{31} See id.

\textsuperscript{32} See generally id. at 948-51 (discussing scope of the effects of the 1938 Rules).

\textsuperscript{33} Id. at 951. See generally Carl Tobias, \textit{Civil Justice Reform and the Balkanization of Federal Civil Procedure}, 24 ARIZ. ST. L.J. 1393, 1397-98 (1992) (citing Local Rules Project finding that the 94 district courts had promulgated over 5000 local rules).

\textsuperscript{34} See Carrington, \textit{supra} note 1, at 951.

Professor Carrington next examines the Civil Justice Reform Act (CJRA) of 1990.\textsuperscript{36} In spite of minimal empirical data, he states that the statute responded to growing concerns about cost and delay in civil lawsuits and to excessive reliance on litigation to solve problems, although minimal empirical data supported the existence of these phenomena.\textsuperscript{37} \textit{Disunionism} shows that Congress failed to reconcile the inconsistent purposes of the 1988 and 1990 legislation.\textsuperscript{38} The article asserts that Advisory Groups appointed under the CJRA to recommend local experimental strictures risked being co-opted by the judges who appointed them or drafted procedures that would benefit the group members' clients and disadvantage their adversaries, especially lawyers and litigants located outside the districts.\textsuperscript{39}

\textit{Disunionism} then evaluates six important questions raised by the CJRA expense and delay reduction plan promulgated by the Eastern District of Texas.\textsuperscript{40} Professor Carrington claims that a negative answer to any of these questions would invalidate the Texas plan.\textsuperscript{41} These issues, which implicate the court's authority to adopt and apply the plan's provisions, warrant relatively little treatment here because they are less important to the ideas that I examine in this essay.

\section*{II. CRITICAL ANALYSIS OF DESCRIPTIVE ACCOUNT}

\subsection*{A. Areas of Agreement}

Much consensus attends Professor Carrington's descriptive account of the condition of the districts.\textsuperscript{42} The broad contours of his description of what has happened in the districts since 1965 are not disputed. For example, many observers agree that judges have accumulated greater power and discretion,\textsuperscript{43} employed proliferating local procedures which

\textsuperscript{36} See Carrington, supra note 1, at 952-66; see also 28 U.S.C. §§ 471-482 (1994).

\textsuperscript{37} See Carrington, supra note 1, at 953, 956.

\textsuperscript{38} See id. at 963.

\textsuperscript{39} See id. at 964.

\textsuperscript{40} See id. at 965-1005.

\textsuperscript{41} See id. at 965-66. Professor Carrington contends, "albeit with uneven confidence, that the correct answers to all six are negative." \textit{Id.} at 966.

\textsuperscript{42} See, e.g., Tobias, supra note 26; Tobias, supra note 27; Tobias, supra note 33. I agree with much that \textit{Disunionism} describes, and I rely on my service as a member of the Ninth Circuit Local Rules Review Committee and of the CJRA Advisory Group for the Montana District; review of local rules, individual judge procedures, and the CJRA's implementation and anecdotal information derived from many discussions with federal court judges, lawyers, litigants, and staff.

\textsuperscript{43} See, e.g., Stephen B. Burbank, \textit{The Transformation of American Civil Procedure: The
accentuate these two phenomena,\textsuperscript{44} evinced declining interest in resolving disputes by hearing factual presentations and applying the law to facts, and concomitantly been more concerned about securing dispositions primarily through case management and settlement.\textsuperscript{45} There is also great agreement about numerous additional phenomena that are important to the districts, such as civil procedure’s increasingly balkanized condition and the beleaguered state of the national civil rule revision process.\textsuperscript{46}

B. Areas of Disagreement or Uncertainty

Less consensus, uncertainty, and even controversy, accompany some aspects of \textit{Disunionism}'s descriptive account, partly because there is insufficient reliable empirical data on which to premise definitive conclusions. One helpful illustration is the extent to which accurate conclusions about other districts and judges can be derived from the troubling experience in Eastern Texas which Professor Carrington so meticulously examines.\textsuperscript{47}

I believe that caution is warranted in extrapolating a general rule from the actions of a single district or a lone judge. The Eastern District of Texas may be \textit{sui generis} or, at least, very unusual. For instance, many judges opposed the CJRA, considering the statute an unwarranted congressional intrusion into a coordinate branch’s core function, procedural rulemaking.\textsuperscript{48} Judge Robert Parker, the Eastern District's Chief Judge and Chair of the Judicial Conference Committee on Court Administration and Case Management when the court promulgated its CJRA plan and the Committee approved it, was apparently a vociferous

\textsuperscript{Example of Rule 11, 137 U. Pa. L. Rev. 1925, 1929 (1989); Yeazell, supra note 7, at 647.}


\textsuperscript{46. See, e.g., Symposium, Reinventing Civil Litigation: Evaluating Proposals for Change, 59 Brook. L. Rev. 655 (1993); Symposium, Turbulence in the Federal Rules of Civil Procedure: The 1993 Amendments and Beyond, 14 Rev. Litig. 1 (1994); see also Baker, supra note 10 (documenting erosion of federal appellate justice).}

\textsuperscript{47. Carrington, supra note 1, at 929-32.}

critic of the CJRA and may have orchestrated adoption of the plan's controversial provisions as a way of protesting the CJRA's passage.\(^{49}\)

A survey of procedures in the other ninety-three districts shows that few courts prescribed requirements that conflicted with the Federal Rules or Acts of Congress, while no districts declared that local provisions took precedence over the Federal Rules. Some courts that adopted inconsistent strictures never applied them.\(^{50}\) A critical reason why so few districts promulgated unauthorized conflicting procedures was the 1993 revision of Rule 26 which specifically approved local variations of automatic disclosure procedures, the area in which most courts had initially prescribed inconsistent requirements.\(^{51}\) Thus, the actions of the Eastern District of Texas, in applying and sustaining the validity of conflicting local strictures, were the worst case scenario. This seemingly anomalous action of a single district illustrates that the risk in concluding too readily that one renegade district or judge constitutes a rebellion. The CJRA's language and purposes actually suggest that it was a modest reform,\(^{52}\) and most districts and judges modestly implemented the Act.\(^{53}\)

In short, Professor Carrington deserves praise for incisively analyzing the pernicious example of declining professionalism found in the Eastern District of Texas, and which may be symptomatic of numerous trial courts. However, I want to scrutinize some phenomena that affect the districts, most of which Professor Carrington briefly evaluates, but which I believe deserve closer study because of their importance to

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\(^{49}\) See Tobias, supra note 33, at 1409-10. These ideas are based on conversations with several individuals who are familiar with what happened. The Committee had responsibility for monitoring local procedures adopted under the CJRA. See 28 U.S.C. § 474(b) (1994).

\(^{50}\) Montana prescribed, but never created, a peer review committee to advise the court on discovery disputes. The district has retained an opt-out provision invalidated by the Ninth Circuit, for securing consent to magistrate judge jurisdiction. See infra note 138; see also Carrington, supra note 1, at 979; Carl Tobias, The Montana Federal Civil Justice Plan, 53 Mont. L. Rev. 91, 95-96 (1992).

\(^{51}\) See Paul D. Carrington, Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends, 156 F.R.D. 295, 304-06 (1994) (noting that a proposed draft governing mandatory disclosure influenced action of more than 20 districts before the rule was adopted); Tobias, supra note 26, at 1614; infra notes 90-97 and accompanying text.

\(^{52}\) See Biden, supra note 48, at 1287; see also Interview with Mark H. Gitenstein, Mayer, Brown, & Platt, Washington, D.C., and former staff director, Foundation for Change (Oct. 18, 1996).

understanding the devolution witnessed and other difficulties facing the courts.

C. Elaborating Disunionism's Description:
Disarray in the Federal Districts

Certain ideas examined above suggest, and numerous federal courts observers believe, that the districts are now experiencing serious problems, while many scholars have commented on devolution. Professor Linda Mullenix and I independently have found that lawyers and parties who pursue civil litigation confront an overwhelming number of complex procedures that are difficult to satisfy. Professor Charles Alan Wright has remarked that national rulemaking is characterized by malaise and analogized this situation to Europe immediately before the outbreak of World War I.

1. Expanding Federal Court Jurisdiction and Caseloads

Important reasons for the condition of the districts have been docket growth, which resulted principally from congressional willingness to expand federal civil and criminal jurisdiction, and the attendant reluctance of Congress to appropriate resources that would allow courts to treat properly the multiplying suits that arose. The original 1938 Federal Rules of Civil Procedure and most subsequent revisions, which embodied a liberal regime that judges flexibly and pragmatically applied, facilitated litigation by increasing plaintiffs’ ability to initiate cases, complete full discovery, and reach the merits. Courts’ broad

55. See Mullenix, supra note 48, at 380-81; Tobias, supra note 33, at 1422-27 (discussing the balkanization created by the proliferation of local procedures).
58. See, e.g., Tobias, supra note 12, at 271-96; Yeazell, supra note 7, at 646-66 (explaining the evolution of civil procedure over the last century); see also Tobias, supra note 26, at 1592-98 (finding that 1983 and 1993 revisions partially altered the liberal regime).
interpretation of constitutional and statutory provisions in such areas as civil and prisoner rights correspondingly encouraged filings.

Numerous judges addressed these growing dockets with local procedures, which primarily governed the pretrial process, and which occasionally contravened the Federal Rules. Districts and judges invoked the need to resolve more cases, justifying actions similar to those of the Eastern District of Texas. Courts thus practiced managerial judging pursuant to new or amended local strictures—changes that were effectively codified by the 1983 federal rules revisions and the 1990 CJRA.

2. Local Procedural Proliferation

Local procedures, particularly those that were inconsistent with Federal Rules requirements, have proliferated since 1970. Attorneys and litigants not only must locate, comprehend, and comply with expanding numbers of local requirements, but they must also research and draft additional papers, including discovery plans, and participate in more activities, such as status and settlement conferences. These developments apparently have increased cost and delay in federal civil litigation. Indeed, procedures promulgated by an individual judge, to which Disunionism only alludes, have greater potential for abuse than...
the activities of the Eastern District of Texas. Anecdotal evidence indicates that many newly-appointed judges prescribe the strictures and that numerous sitting judges apply them. The procedures receive limited public scrutiny, while lawyers and parties, especially those who do not regularly participate in litigation in particular districts or before specific judges, may have little familiarity with them. Most attorneys and clients, particularly those who frequently appear before the same judge, are reluctant to challenge the measures because they wish to preserve harmonious, ongoing relations with the judge. Moreover, judges zealously guard their prerogatives to apply the strictures and are unlikely to relinquish them.

Local procedures, especially ones that conflict with Federal Rules or statutes, have increased, despite concerted efforts to limit their proliferation. Most importantly, Congress passed the 1988 JIAJA and the Judicial Conference orchestrated the 1985 revision of Rule 83. The 1988 Act requires circuit judicial councils to review local procedures periodically and to abolish or modify those procedures that contravene the Federal Rules or statutes. The JIAJA and Rule 83 correspondingly prohibit districts and judges from promulgating inconsistent local strictures. The 1988 JIAJA and the 1985 revision to Rule 83 also recommend that districts propose procedural changes and afford public notice and comment before they adopt new, or alter existing, local rules. The 1985 revision mandates that standing orders not conflict with the Federal Rules or the district's local rules, and the advisory committee note requests that districts institute processes for prescribing and reviewing the orders.

68. These assertions are premised on conversations with numerous individuals who are familiar with the procedures. See generally DIRECTORY OF FEDERAL COURT GUIDELINES (1996).

69. See A. Leo Levin, Local Rules as Experiments: A Study in the Division of Power, 139 U. PA. L. REV. 1567, 1576 (1991); see also Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOC'Y REV. 95 (1974) (finding that the ambiguous facets of litigation have established a dual system that distinguishes between society's "have" and "have not" and discussing the idea of repeat players); infra note 138 and accompanying text.


In 1989, the Local Rules Project issued a comprehensive report that found more than 5000 local requirements, many of which conflicted with Federal Rules, in the ninety-four districts. The Project proposed that inconsistent procedures be abrogated or changed. The Judicial Conference asked courts and judges to follow this suggestion and to number local rules uniformly.

Numerous districts and judges did not comply with these requests, and the 1995 revision of Rule 83 was designed to address those problems. The revision requires that local rules “conform to any uniform numbering system prescribed by” the Conference and not conflict with, or duplicate, the Federal Rules or statutes. The revision further mandates that judges not enforce local rules of form by forfeiting litigants’ rights and that courts not disadvantage parties for noncompliance with local procedures of which parties have no actual notice.

There are several explanations for the local proliferation since 1975. First, the 1990 passage of the CJRA frustrated effectuation of congressional and Conference initiatives that were meant to limit local strictures’ expansion. The CJRA empowered districts and judges to experiment with local expense and delay reduction procedures, apparently ones that even contravened the Federal Rules and statutes.

Some circuit councils, districts and judges could have justifiably believed that this authorization postponed the congressional and Conference efforts until the CJRA’s 1997 conclusion. For example, the councils might have been reluctant to implement the 1988 JIJA’s command to review and abrogate or change conflicting local strictures after the strictures were seemingly approved by the 1990 CJRA.

Because councils have scant resources and Congress appropriated no

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advisory comm. note, reprinted in 105 F.R.D. at 228. The 1988 legislation can be read to impose similar mandates.

74. Tobias, supra note 33, at 1398 (citing LOCAL RULES PROJECT, supra note 35).
75. See id. at 1398-99 (citing LOCAL RULES PROJECT, supra note 35); see also Subrin, supra note 44, at 2020-26 (discussing the results of the Local Rules Project).
76. Tobias, supra note 26, at 1597.
81. See Mullenix, supra note 48, at 379 (stating that “Congress has effectively repealed the Rules Enabling Act” by authorizing districts to adopt inconsistent local procedures); Robel, supra note 48, at 1482-83 (commenting on Professor Mullenix’s assessment).
82. See Tobias, Suggestions for Circuit Court Review of Local Procedures, supra note 72, at 367.
funds for procedural review, the councils could have considered this scrutiny unnecessary or wasteful until the 1997 expiration of the CJRA.

Additional reasons may explain reluctance to effectuate legislative and Conference efforts aimed at reducing local proliferation. Numerous federal judges who have oversight duties probably believe that the judges of particular districts have superior knowledge regarding local civil litigation. Those judges who monitor may defer to local judges' decisions in adopting and applying measures that they think will most effectively resolve civil lawsuits. Even district judges might be unwilling to review rigourously, much less abrogate or modify, local strictures that have been or may be adopted within their own districts or by judges with whom they could have ongoing, close relationships or with whose districts they are rather unfamiliar. Recent experience with implementation of monitoring responsibilities assigned under the 1990 CJRA confirms these ideas. Finally, the absence of a meaningful congressional mechanism for reviewing local procedures, which sharply contrasts with Congress' effective veto power over national revisions with which it disagrees, accentuates proliferation's importance.

3. National Rule Revision

The federal amendment process and the national rule revision entities—the Advisory Committee, the Standing Committee, the Judicial Conference, and Congress—could also be responsible for the current condition of the districts. By the 1980s, the revisers may have become too solicitous of the bench's views and insufficiently concerned

84. See id. at 987.
85. See Tobias, supra note 33, at 1406-09.
86. Circuit judges, many of whom know relatively little about district judges' daily activities or trial court civil litigation, are especially likely to defer. See Tobias, supra note 33, at 1406-07.
87. See id. at 1407.
88. See id. at 1408 (stating that most circuit review committees undertook circumscribed scrutiny of the CJRA procedures prescribed by districts and judges situated in the circuits). The Judicial Conference correspondingly discharged its oversight obligations with little rigor. See id. at 1409. Few of the 94 districts changed any CJRA strictures in response to circuit or Conference review. See id. at 1411; see also 28 U.S.C. § 474 (1994) (describing requirements for review of district court procedures).
89. See 28 U.S.C. § 2074(a)(1994) (outlining rule proposal procedures); Tobias, supra note 26, at 1627 (noting the lack of congressional oversight of local rulemaking).
about the needs of federal court practitioners and litigants and the
broader public interest. These attributes were evidenced most clearly in
the 1983 amendments to Federal Rules 11, 16, and 26—which effective-
ly codified the managerial judging that many districts and judges already
had been practicing—because the revisions were seemingly adopted
of, by, and for the federal judiciary. The requirements of opening, and
enhancing public participation in, national civil rule amendment imposed
by Congress in the 1988 JIAJA, thus, were partly intended as corrective
mechanisms.

The first major test of the modifications to the national revision
process yielded the 1993 federal rules amendments. Most relevant
were two changes in Rule 26. These changes prescribed automatic
disclosure—a highly controversial technique requiring the release of
important information before formal discovery—and authorized all
ninety-four districts not to apply federal strictures covering disclosure,
interrogatories, and depositions, or to experiment with variations of these
discovery mechanisms that the districts deemed best.

The automatic disclosure issue provoked the greatest controversy,
and the most vociferous lobbying effort, in the history of the national
revision process. During one six-week period, the Advisory Commit­
tee withdrew the amendment and formulated a new provision absent
public input. The Supreme Court transmitted the revision to Congress
over the dissent of three Justices, while expressly disavowing substan­tive
responsibility for the amendment tendered. People and groups
that represented a broad spectrum of special interests then intensively
lobbied Congress, nearly preventing the revision from taking effect.

91. See supra note 46; supra notes 61-62 and accompanying text.
92. See Carl Tobias, Judicial Discretion and the 1983 Amendments to the Federal Civil
Rules, 43 RUTGERS L. REV. 933, 936-37 (1991) (discussing the effect of the rule revisions which
enhanced judicial discretion on judicial management); see also Stephen N. Subrin, The New Era
amendments). See generally ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE
MANAGEMENT AND LAWYER RESPONSIBILITY (1984); Tobias, supra note 26, at 1594-95 (noting the trend toward
managerial judging).
94. See id. at 431-32.
95. In fairness, the local option provision accommodated ongoing CJRA experimentation.
See Carrington, supra note 51, at 306; infra text accompanying note 141.
96. See Tobias, supra note 26, at 1611-15 (describing the amendment of Rule 26).
97. See id. at 1612.
99. See William J. Hughes, Congressional Reaction to the 1993 Amendments to the
Congress failed to act at the last-minute and exacerbated confusion in some districts that were unprepared for this contingency, while many districts rejected the federal amendment or adopted different disclosure rules.\(^{100}\) These developments and provision for variations in strictures governing interrogatories and depositions fragmented nationally and within specific districts important aspects of discovery.\(^{101}\)

Additional legislative action relating to the national civil rule revision process has significantly affected the revision. Since the early 1970s, Congress has been increasingly willing to intervene in the process for amending the rules that govern evidence, as well as appellate, criminal, and civil procedure.\(^{102}\) Congress also has included more strictures—covering, for example, pleading, intervention and attorney's fees—in substantive statutes, such as environmental and civil rights legislation.\(^{103}\) The Republican Party's Contract With America constituted the most recent manifestation of this phenomenon. For instance, the eighth tenet promised to change Rule 11 two years after its major 1993 overhaul,\(^{104}\) while the Private Securities Litigation Reform Act of 1995 modified requirements relating to pleading, class actions and sanctions in securities suits.\(^{105}\)

The ideas above mean that the most vexing questions regarding national civil rule revision today are whether the amendment procedures which have served so well for six decades can be revitalized and the revisors reattain primary responsibility for federal rule amendment that they formerly had.\(^{106}\) Experience with the 1993 revisions suggests that the 1988 JIAJA politicized the revision process and opened it to public participation.\(^{107}\) The 1988 statute similarly opened and politicized local

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\(^{100}\) See Tobias, supra note 26, at 1614.

\(^{101}\) See id. at 1614-15.

\(^{102}\) See Burbank, supra note 11, at 1019-20; Tobias, supra note 92, at 961.


\(^{106}\) See Linda S. Mullenix, Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking, 69 N.C. L. REV. 795, 810-54 (1991) (discussing the politicization of the rulemaking process); Tobias, supra note 26, at 1627-34.

\(^{107}\) See Tobias, supra note 26, at 1606-17 (examining the rule amendment process of the
procedural amendment processes, phenomena to which CJRA implementation attests.\textsuperscript{108} The 1990 effectuation of the CJRA and the 1993 federal revision process additionally undermined the authority of, and confidence in, national amendment partly because the revisors, by authorizing local variation, appeared to abandon a longstanding commitment to preserving a national, uniform code of procedure.\textsuperscript{109}

4. Interbranch Conflicts

Decreasing cooperation, and even deteriorating relationships, among members of Congress and the judiciary have seemingly contributed to the disarray in the federal districts. Reduced cooperation and growing conflicts can be witnessed across numerous areas that implicate the legislative and judicial branches.\textsuperscript{110} These developments may have exceeded the healthy tension between Congress and the federal courts that the Framers of the Constitution apparently envisioned would prevent a single branch from accumulating too much power.

Recent disputes over rule revision resulted partly from the increasing propensity of Congress to intervene in the processes for amending all of the federal rules governing procedure and evidence and to include procedural provisions in substantive statutes.\textsuperscript{111} The disputes also arose from the national civil rule revisors' inattention to interests other than those of the judiciary. This situation prompted the 1988 passage of the JAJA, thereby opening and politicizing the federal amendment process and leading to the difficulties examined above.\textsuperscript{112} Indeed, the 1990 CJRA, which numerous judges viewed as interfering with their fundamental duty to adopt procedures that would best resolve civil litigation, effectively represented the culmination of congressional intervention in national revision.\textsuperscript{113}

There have been many instances of interbranch conflict in areas that are distinct from rule amendment. One critical point of contention

\begin{itemize}
  \item \textsuperscript{108} See Tobias, \textit{supra} note 26, at 1617-23.
  \item \textsuperscript{109} See \textit{Oakley, supra} note 90, at 437-38. \textit{See generally Lauren K. Robel, Mandatory Disclosure and Local Abrogation: In Search of a Theory for Optional Rules, 14 REV. LITIG. 49 (1994) (promoting uniformity within the procedural system); supra notes 95-100 and accompanying text.}
  \item \textsuperscript{110} See, e.g., William H. Rehnquist, \textit{1994 Year-End Report on the Federal Judiciary, reprinted in 18 AM. J. TRIAL ADVOC. 499, 499-503 (1995). Chief Justice Rehnquist's year end reports and issues of The Third Branch, the Administrative Office of the U.S. Courts monthly publication, are replete with examples of tensions. See also infra notes 114-16, 118.}
  \item \textsuperscript{111} See \textit{supra} notes 102-05 and accompanying text.
  \item \textsuperscript{112} See \textit{supra} notes 90-92, 106-09 and accompanying text.
  \item \textsuperscript{113} See \textit{supra} notes 48-49 and accompanying text.
\end{itemize}
involves the federal courts' budget. Judges believe that Congress wants them to achieve more with fewer dollars, and members of Congress think that judges are making extravagant demands.\textsuperscript{114} A second example is Senator Charles Grassley's (R-Iowa) request for information on how judges spend their time.\textsuperscript{115} Judges, many of whom are overworked, may wonder about Congress's need for this material and its temporal expenditures. Another conflict involves attacks, apparently motivated by partisan politics, on individual judges for issuing specific decisions. This dynamic has so troubled the American Bar Association that the organization created a commission to analyze the issue of judicial independence.\textsuperscript{116}

The judiciary, for its part, recently adopted a Long Range Plan recommending that Congress restrict federal jurisdiction, an action which many members of Congress believe to be an essential legislative function, and asserting positions on other issues that primarily involved congressional policymaking.\textsuperscript{117} The federal courts have also planned courthouse construction projects and staged circuit conferences that seem lavish, even for judicial officers.\textsuperscript{118}

In sum, the lack of empirical data about the issues discussed complicates efforts to secure a sufficiently clear understanding of the federal districts on which to premise critical analyses of Disunionism's description and prescriptions. However, Professor Carrington's suggestions can be assessed by identifying with enough certainty some phenomena that are adversely affecting the courts to which he recommends solutions and by assuming that his description is accurate as to others.


\textsuperscript{118} See Victor, supra note 115, at 1144; Cowen Considers Courthouse Construction and Security, \textit{THE THIRD BRANCH}, Apr. 1996, at 10. The recent Ninth Circuit conclave in Hawaii is illustrative. The major reasons seem to be the four discussed previously, but there are others, such as changes in legal practice, some of which Disunionism mentions. See Carrington, supra note 1, at 938-44.
III. CRITICAL ANALYSIS OF PRESCRIPTIONS

A. Areas of Agreement

There is much consensus about most of Disunionism’s proposals. For example, a few observers essentially agree with its recommendation that the Judicial Conference “sweep our national courts clear of all local clutter” once the CJRA has expired.\(^{119}\) Some commentators concur “that the Civil Rules, at least, should be revised to eliminate all authorizations for variations from or elaborations or enhancements of the national rules, especially those promulgated in 1993 to accommodate CJRA.”\(^{120}\) Professor Carrington’s suggestion that a local rule become effective only after adoption by the circuit council “upon a finding that it is recommended by the district judges and is responsive to a specified local need or serves a national need for controlled experimentation to be conducted under the auspices of the Federal Judicial Center”\(^{121}\) resembles a 1991 proposed revision of Rule 83 which the Conference withdrew ostensibly in deference to ongoing CJRA experimentation.\(^{122}\) A few writers espoused this idea before the Conference supported it, and some advocated the idea’s revival after the proposal was retracted.\(^{123}\) Disunionism suggests that district judges be allowed to issue standing orders but that the orders not “exceed a length stipulated in the rules” and not be enforceable by sanctions which prejudice parties’ substantive rights, and those ideas correspondingly embody\(^{124}\) certain aspects of

\(^{119}\) See, e.g., Bromberg & Korn, supra note 67, at 20; Wright, supra note 56, at 10-11; see also Robel, supra note 109, at 58-59 (noting that the proliferation of local rules fosters confusion).


\(^{121}\) Carrington, supra note 1, at 1006.


\(^{124}\) See supra notes 78-80 and accompanying text; FED. R. CIV. P. 83, reprinted in 150 F.R.D. 400, 401 (1993); see also Levin, supra note 69; Robel, supra note 109. See generally Carrington, supra note 1, at 1006.
that 1991 proposal and of Rule 83’s 1995 amendment.\textsuperscript{125} Finally, because “[u]nrestrained localism in the federal courts is mischief serving no purpose that Congress can honorably embrace,”\textsuperscript{126} others have echoed Professor Carrington’s plea that Congress favorably view these strictures on local rules and impose them if the Conference does not.

B. Areas of Disagreement or Uncertainty

Less consensus and considerable uncertainty attend certain features of Professor Carrington’s prescriptions. My concerns focus primarily on the institutions and people who would implement the proposals and whether such proposals have a realistic prospect of being implemented. Illustrative is the Judicial Conference’s unwillingness to restrict inconsistent local requirements, much less remove the local clutter from the federal courts, particularly if numerous districts or judges wish to maintain them.\textsuperscript{127} Since 1975, local procedures, many of which conflict with the Federal Rules, have steadily proliferated, despite substantial efforts to limit their expansion.\textsuperscript{128} This exponential increase testifies to the durability of those local requirements and to judges’ perception of the strictures’ desirability. Even if the Conference fervently wanted to eliminate all local clutter, it might not be able to effect the prohibition or to secure the necessary cooperation from districts and judges. For instance, the Conference has realized little success in implementing the recommendations of the Local Rules Project, the 1985 revision of Rule 83, and the mandates of the 1988 JIAJA, which were all intended to reduce local proliferation.\textsuperscript{129}

If the Conference were unwilling to act, or unable to achieve success, Congress might not assume the initiative. The members of Congress seem to lack sufficient interest in the minutiae of court administration and may not commit the requisite resources to developing the necessary expertise. Indeed, the 104th Congress failed to authorize a national appeals courts study, although numerous members of the body and experts believe that the situation of the circuits is now more critical than that of the districts.\textsuperscript{130} Even if Congress would focus attention on, and

\textsuperscript{125}. \textit{See} Carrington, \textit{supra} note 1, at 1006.
\textsuperscript{126}. \textit{See} Carrington, \textit{supra} note 1, at 1006.
\textsuperscript{127}. \textit{See supra} notes 86-88 and accompanying text.
\textsuperscript{128}. \textit{See supra} notes 54-118 and accompanying text.
\textsuperscript{129}. \textit{See supra} notes 70-89 and accompanying text. Nothing that I have said disparages the gargantuan efforts to rectify proliferation of certain individuals, such as Dan Coquillette, the Reporter for the Standing Committee and the Project.
devote resources to, the courts, it might not eliminate or restrict local strictures, such as standing orders, about which many district judges feel strongly. In short, I am considerably less sanguine than Professor Carrington that the Conference or Congress will effectively implement his valuable recommendations.

My concerns partly implicate the efficacy of some of Professor Carrington's prescriptions. For example, if districts or judges find CJRA procedures to be effective, they will maintain the strictures absent strong external pressure, which may not be applied. A decade of experience with Rule 83's commands governing standing orders—mandates that many judges have honored in the breach—inspires little confidence in the feasibility of Professor Carrington's suggestions regarding those orders.\(^{131}\) Moreover, his proposal that they "not be enforceable by any sanction prejudicing the substantive rights of litigants"\(^ {132}\) is in Rule 83's 1995 revision,\(^ {133}\) but it may not protect lawyers and parties who wish to preserve cordial, continuing relationships with specific districts and judges and, thus, may be unwilling to challenge enforcement.

In sum, most of Professor Carrington's prescriptions would apparently be efficacious. However, the paucity of reliable empirical information complicates the assessment of certain of these suggestions and of others about which there is less consensus. Accordingly, the last section of this essay affords recommendations for the future that primarily call for the collection of additional, and more dependable, information, and the improvement of current conditions.

IV. SUGGESTIONS FOR THE FUTURE

A. Collecting Additional Information

The dearth of reliable data on the districts and judges means that assessors should systematically compile, analyze, and synthesize better empirical information. There is a need to identify the phenomena that are responsible for the described devolution; the most problematic difficulties that districts, judges, lawyers, and parties now encounter and will experience in the future; whether anything found is sufficiently troubling to warrant treatment; and, if treatment is warranted, responses

\(^{131}\) See supra notes 73, 124-25 and accompanying text; see also supra notes 70-89, 129 and accompanying text (suggesting similar difficulties attending other commands in Rule 83 and in JIJA).

\(^{132}\) Carrington, supra note 1, at 1006.

\(^{133}\) See Fed. R. Civ. P. 83, reprinted in 150 F.R.D. 401-02 (1993); see also Carrington, supra note 1, at 1006.
that show promise of ameliorating the situation. Evaluators should specifically gather greater empirical data on local rules, individual judicial procedures, informal practices and devolution, as well as the day-to-day effects of these phenomena.

Assessors can rather easily secure much material that enhances understanding of the districts and judges. For example, many local strictures not embodied in local rules could be gleaned from computerized services, a recent publication that includes the procedures and the ninety-four districts and specific judges. CJRA experimentation also has generated helpful information that currently exists in many documents, such as annual assessments that the statute commands districts to assemble, or as raw data found in court records. Evaluators, districts and judges must preserve instructive material compiled under the CJRA and must employ that information to analyze the districts' present circumstances.

Certain data that the CJRA requires to be formally gathered, examined, and synthesized is, or will soon be, available. Most important is the RAND Corporation's thorough study of ten pilot courts' experimentation. The Federal Judicial Center (FJC) is also concluding its evaluation of five demonstration districts. The RAND and FJC reports will underlie the recommendations regarding expense and delay reduction that the Judicial Conference must tender to Congress by June 30, 1997. The RAND and FJC studies and the raw data on which they are premised could be valuable sources of information on devolution, local proliferation, other problems facing the districts, and the efficacy of various local strictures, especially their effectiveness in decreasing cost and delay.

Assessors also must scrutinize material that is not as accessible. Particularly significant, but somewhat elusive, are data on less formal activities of districts and judges. For instance, courts or judges may employ unwritten procedures or informally invoke local strictures while applying the procedures in ways that yield no written product, principal-

134. See, e.g., DIRECTORY OF FEDERAL COURT GUIDELINES (1996); see also LOCAL RULES PROJECT, supra note 35 (alluding to some local strictures that are not local rules).


136. See DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT, A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (FJC 1997) [hereinafter FJC STUDY]; see also Judicial Improvements Act of 1990 § 104(c).

ly because attorneys and litigants are reluctant to challenge the judges. However, evaluators should be able to collect the requirements from districts, judges, lawyers, or parties and can learn about their less formal enforcement and other informal judicial actions from these sources, especially counsel or litigants that have been affected. Quite important, and very difficult to gauge, will be the impacts of these less formal activities on attorneys and parties in planning litigation strategy. For example, assessors might seek to ascertain the number of potential cases which are not filed and how many lawsuits counsel and clients bring in alternative fora, pursue less vigorously, or settle prematurely due to concern about offending districts or judges in whose courts they will appear.

Evaluators should determine whether districts and judges apply strictures, or take additional actions, that favor local lawyers and parties over others and benefit “repeat players” more than less frequent participants. Assessors also could explore whether local proliferation or the CJRA has encouraged forum-shopping because, for instance, the expense and time required to find, master and comply with new procedures; to file papers and attend conferences; and to conclude cases, increases the appeal of alternatives, such as state court or private dispute resolution.

Evaluators should additionally scrutinize devolution. They might attempt to identify sources other than docket growth. For example, the CJRA’s purpose of capitalizing on the ingenuity of judges, attorneys, and parties in the districts to discover efficacious measures for reducing cost and delay has fostered procedural inconsistency and actions analogous to those of the Eastern District of Texas. The authorizations for local variations from the Federal Rules that were in the 1993 federal revisions, albeit to accommodate CJRA experimentation, similarly facilitated devolution.

138. Even successful challenges of two districts’ opt-out procedures for securing consent to assignment of civil cases to magistrate judges received unpublished dispositions. See Excel Indus., Inc. v. Eastern Express, Inc., No. 95-1948 (W.D.N.C. Dec. 14, 1995), appeal dismissed, 72 F.3d 126 (4th Cir. 1995); Laird v. Chisholm, No. 94-35710 (D. Mont Apr. 26, 1996), appeal transferred, 85 F.3d 637 (9th Cir. 1996). Indeed, the Montana rule remains in effect, despite the challenge. See MONT. R. 105-2(d). This example emphasizes the need for researchers to interview actual participants in litigation. The judicial officer who told me of this suggested that he satisfies Laird when conferences are scheduled by informing participants of their opportunity to consent to jurisdiction. Telephone Interview with Leif “Bart” Erickson, U.S. Magistrate Judge for the District of Montana (Nov. 13, 1996).

139. See Biden, supra note 48, at 1286; see also supra notes 36, 50-53, 81 and accompanying text.

140. See, e.g., supra note 138. But see supra notes 50, 53 and accompanying text.

141. See Stempel, supra note 54, at 58 n.2; see also supra notes 51, 95-100, 109 and
that district judges lacked authority to invoke procedures in ways which unfairly disadvantaged lawyers or litigants.\textsuperscript{142} Moreover, certain aspects of the proliferation and of less formal activities that seem to evidence devolution may actually be symptoms of the problem, rather than sources of it. For instance, the Montana District relies on an opt-out provision for securing consent to magistrate judge jurisdiction in civil cases.\textsuperscript{143} This reliance reflects a good faith attempt to treat the pressures created by escalating caseloads and to augment existing judicial capacity by exploiting a valuable available resource, more than an effort to deprive parties of Article III judges or to accumulate power.\textsuperscript{144}

Once assessors have assembled the material above, they must analyze and synthesize it. Evaluators should clarify and refine the meaning of “proliferation” by ascertaining exactly how widespread the phenomenon is; whether it consists of conflicting, duplicative, or supplemental local rules, individual judicial procedures or informal practices; why courts apply the measures and the effects of that application. Assessors could specifically seek to verify Professor Carrington’s assertion that much proliferation derives from efforts of groups of judges to solve serious local problems without considering the adverse systemic consequences of inconsistency.\textsuperscript{145} Many experts, such as CJRA Advisory Group Reporters, have observed this dynamic and concur in Professor Carrington’s evaluation.\textsuperscript{146}

Assessors might also attempt to detect district and judicial patterns that involve local procedures, less formal activities, and devolution. For

\textsuperscript{142} See, e.g., Richardson Greenshields Sec. v. Lau, 825 F.2d 647, 652 (2d Cir. 1987) (stating that a court may not prevent a party from filing documents allowed by the Federal Rules); Williams v. Georgia Dep’t of Human Resources, 789 F.2d 881, 883 (11th Cir. 1986) (disallowing a court’s use of a “directed verdict” at an improper point in a federal case).

\textsuperscript{143} See MONT. R. 105-2(d).

\textsuperscript{144} See MONT. R. 105-2(d); see also supra note 32 and accompanying text. But see supra notes 111, 115 and accompanying text. Insofar as devolution reflects courts’ accumulation of power, it may be at the expense of Congress, lawyers, or parties.

\textsuperscript{145} See Carrington, supra note 1, at 946; Keeton, supra note 123, at 860-61; see also infra text accompanying notes 155, 159 (examining the relationship between local rule proliferation and varying local conditions).

\textsuperscript{146} Illustrative are the experiences of Professors John Oakley, UC Davis School of Law; Lauren Robel, University of Indiana School of Law; and George Walker, Wake Forest University School of Law, who serve on multiple courts committees. Assessors must obviously consult many sources in more districts, perhaps by using the work of the Local Rules Project and the Ninth Circuit and scrutinizing districts which are diverse in terms of the judges, lawyers, litigants, or caseloads or of dynamics, such as advisory committee composition and duties. See supra note 35; Tobias, supra note 72, at 359-60; infra notes 147-48, 175-76 and accompanying text; see also supra note 138 (affording example suggesting need to interview those familiar with procedures).
instance, numerous judges, lawyers, and parties in some districts in the West practically equate magistrate judges with Article III judges for the purpose of resolving civil litigation, and the responsibilities discharged by these magistrate judges apparently differ from the duties of their counterparts in certain courts located in relatively urbanized areas. Individual judicial procedures correspondingly seem more prevalent in districts that serve heavily populated locales. Valuable examples of the research that I envision are Rule 11 studies conducted by the FJC and the American Judicature Society (AJS), evaluations of local strictures by the Local Rules Project which the Judicial Conference commissioned, similar evaluations by the Ninth Circuit District Local Rules Review Committee under the auspices of the Judicial Council, and the analyses of CJRA experimentation which the RAND Corporation and the FJC have performed.

Assessors ought to investigate a few concepts that Professor Carrington briefly treats. One important idea is the notion of local legal culture. Evaluators could explore whether this precept informs comprehension of the devolution detected or of other phenomena that substantially affect the districts. Two authors who were involved in the AJS Rule 11 study persuasively questioned whether the local legal culture idea, which researchers previously have used in the criminal law context, felicitously applies to civil litigation.

Professor Carrington recognizes that judges' productivity, lawyers' civility and parties' willingness to fund litigation vary among districts but "seldom suggest reasons for material differences in the procedures employed in different districts," while local disparities reflect "differences in the styles and values of particular groups of judges," not

147. See supra note 144 and accompanying text.
148. This is based on discussions with many who are familiar with the phenomenon.
149. This is based on discussions with many who are familiar with the phenomenon and with procedural review. Early experience with Rule 11's 1983 revision similarly revealed that participants in civil litigation in urban districts were much more willing to invoke the provision, perhaps because lawyers, litigants and judges in these locales interacted less frequently. See Georgene Vairo, Rule 11: A Critical Analysis, 118 F.R.D. 189, 200 (1988); see also Thomas E. Willging, The Rule 11 Sanctioning Process (1988).
150. See Willging, supra note 149; Lawrence C. Marshall et al., The Use and Impact of Rule 11, 86 NW. U.L. Rev. 943, 976-79 (1992) (examining statistically the frequency of Rule 11 action in districts of various sizes).
151. See Local Rules Project, supra note 35; Tobias, supra note 72, at 359.
152. See RAND PILOT STUDY, supra note 135; FJC STUDY, supra note 136.
153. See Herbert M. Kritzer & Frances Kahn Zemans, Local Legal Culture and the Control of Litigation, 27 LAW & SOC'Y REV. 535 (1993); see also Marshall, supra note 150, at 976-79 (examining empirical data about regional litigation characteristics).
154. See Carrington, supra note 1, at 945.
varying local conditions.\(^{155}\) In contrast, Professor Lauren Robel finds local conditions the best justification for discrepancies, cautioning that the "stuff of docket management" animates local revision.\(^{156}\) She also states that a "defensible reason for local rulemaking lies in the persistence of local legal cultural norms governing such practices as the speed with which a case proceeds to trial or how aggressively discovery is conducted"\(^{157}\) but has difficulty arguing that the "needs of litigants and attorneys within an individual case vary substantially" among districts.\(^{158}\) She further asserts that the "belief that the rulemakers got it wrong [inspires] local court tinkering with the Federal Rules."\(^{159}\) In short, the local legal culture notion and its applicability to civil litigation are not clearly understood, although the concept appears sufficiently promising to deserve additional exploration.

Another idea, which has received little investigation but which warrants more, is the effect of the federal procedural developments on state civil procedure because many jurisdictions model their strictures or revision processes on the federal analogues.\(^{160}\) Phenomena, such as devolution, which have been manifested at the federal level may be reflected in numerous states. For example, some Montana state district courts condition the right to civil trials on good faith participation in settlement conferences, although they have little authority for doing so.\(^{161}\) Quite a few jurisdictions have concomitantly eschewed adoption of the 1993 federal amendments governing Rule 11 and automatic disclosure.\(^{162}\) In short, the federal system's somewhat chaotic condition may well have further fragmented state procedure in a number of jurisdictions.\(^{163}\)

\(^{155}\) Id. at 946 (concluding that local knowledge about housekeeping matters which vary across districts need not be transmitted by written commands).

\(^{156}\) Robel, supra note 48, at 1483-84.

\(^{157}\) Id. at 1484.

\(^{158}\) Id.

\(^{159}\) Id.; see also supra notes 139-40 and accompanying text (suggesting sponsors premised CJRA on preference for local experimentation).


\(^{162}\) See, e.g., MONT. R. CIV. P. 11, 26; W. VA. R. CIV. P. 11, 26; see also supra notes 93-100, 104 and accompanying text. See generally Carl Tobias, Automatic Disclosure and Disuniformity in the Ninth Circuit, 41 WAYNE L. REV. 1385, 1386 (1995) (noting the variation of disclosure procedures among districts).

\(^{163}\) See generally Oakley & Coon, supra note 160, at 1427; Edward F. Sherman, A
Suggestions for collecting additional information that more directly involves expanding caseloads, national rule revision, and interbranch conflicts require limited examination here for several reasons. First, much greater applicable material, which thoroughly ventilates the relevant issues, has already been compiled, so that the phenomena are rather clearly understood. Second, the problems identified seem considerably less amenable to treatment. For example, there is a plethora of empirical data on docket growth and methods of responding to it, while numerous observers agree on the major solutions.\(^\text{164}\)

The federal amendment procedures also were extensively studied before the 1988 JIAJA modified them, and certain research apparently precipitated the changes.\(^\text{165}\) The 1993 revision process that constituted the initial major test of the new procedures might warrant more analysis, but it has already received several searching critiques, two of which were penned by Professor Carrington.\(^\text{166}\) The JIAJA, which opened and politicized the amendment process, and the current state of national politics make some of the problems of amendment intractable in the near term.\(^\text{167}\) Moreover, the two-century history of interbranch conflict means that there is voluminous material on congressional and judicial tensions, which may be inevitable and resistant to remediation.

Once evaluators have assembled, assessed, and synthesized applicable information, they probably can identify more precisely devolution's sources, whether that and other phenomena are troubling enough to require treatment and, if so, potential solutions. The completion of these tasks should precede attempts to afford very specific guidance regarding remedies. I can, however, offer general ideas by delineating possible sources of difficulty and by making certain assumptions. For instance, if expanding caseloads are reducing professionalism, assessors might examine many measures aimed at decreasing them, namely shrinking

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\(^\text{164}^\) One is to limit the caseloads by narrowing jurisdiction, an approach which Congress seems loath to implement. See supra note 57 and accompanying text; see also Dragich, supra note 63, at 16. The other is to treat the increasing suits with many measures that have received exhaustive evaluation. See, e.g., Baker, supra note 10, at 187-97; sources cited supra note 45; see also supra note 51 and accompanying text (suggesting congressional reluctance to appropriate resources for courts to resolve cases).


\(^\text{167}^\) See supra notes 106-09 and accompanying text.
jurisdiction, or aimed at treating docket growth, such as increasing resources. 168 Were local proliferation causing expense and delay, evaluators could analyze more effective means of limiting it or could consult ideas in the new CJRA studies. 169 If the federal amendment process is proving problematic, assessors might consider recommendations for improvement in the Judicial Conference Long Range Plan or in the Standing Committee’s recent study of rulemaking. 170 Evaluators should scrutinize the benefits and disadvantages of a broad spectrum of promising measures for addressing the districts’ most pressing problems. They will thereby enable Congress and the judiciary to select felicitous approaches.

B. Improving Existing Conditions

It would be preferable to gather, analyze, and synthesize the above information before proffering suggestions. However, by assuming that the phenomena identified are sufficiently problematic to require treatment, I can afford numerous recommendations that address the observed devolution and other major complications that districts are encountering. Moreover, my ideas can be recalibrated as additional material becomes available.

1. Local Procedural Proliferation and National Civil Rule Revision

Perhaps most importantly, several entities must undertake a number of actions that would revitalize and thoroughly implement the initiatives instituted by the Judicial Conference and Congress primarily in the 1980s and focused on limiting local proliferation and restoring the preeminence of the national rule revision process. 171 Congress should first allow the CJRA to sunset in 1997 and should clearly state that districts and judges are to abolish local procedures that were adopted


169. See supra notes 135-37; infra notes 175-76 and accompanying text.


171. See supra notes 33-35, 70-80 and accompanying text; see also Carrington, supra note 1, at 1006 (making similar suggestions). I treat proliferation and the national revision process first because they are more important to the issues in this response.
The courts and judges in turn must abrogate those strictures.

Circuit judicial councils, districts, and judges should then effectuate the 1988 JIAJA, Rule 83's 1985 and 1995 amendments, and the Conference efforts to implement the findings of the Local Rules Project. For example, districts and judges should promptly comply with the 1985 revision's mandate that standing orders not contravene the Federal Rules or federal district rules and should satisfy the advisory committee note's request that districts adopt processes to prescribe and oversee the orders. Councils might consult the Ninth Circuit Council's efficacious discharge of its review duties under the JIAJA. The success attained by this entity in monitoring fifteen districts' procedures suggests that other councils might achieve similar results, especially if Congress allocates funds and the CJRA—which frustrated JIAJA effectuation—sunsets. I recognize that this view is controversial. For instance, national experience indicates that the framework instituted in 1988 has proved rather ineffective because authority was too broadly diffused and because some councils lacked the will or resources to realize the normative vision of national uniformity which animated Congress.

Assuming that councils, districts, and judges will carefully implement the above ideas, the national revisors must then attempt to revive the federal amendment process and reattain primary responsibility for procedural change. The opening and politicizing of national and local revision procedures effected by the 1988 JIAJA could complicate this endeavor. As Professor Mullenix has astutely admonished, if Congress values public participation, there cannot be too much of it. She perceptively predicted, and the 1993 amendment process showed, that those dissatisfied with the federal revisors' work will take their case directly to Congress, thus bypassing or undermining the national amendment process. Given the apparent reluctance of Congress to

172. See supra notes 135-37 and accompanying text.
173. See supra notes 33-35, 70-80 and accompanying text.
174. See supra notes 72-73 and accompanying text.
175. See Tobias, Suggestions for Circuit Court Review of Local Procedures, supra note 72; Tobias, supra note 83; Telephone Interview with Professor Lauren Robel, University of Indiana School of Law (Nov. 15, 1996). To help ameliorate the condition of the courts, districts and judges might review and abrogate or change conflicting strictures.
176. See Tobias, supra note 83; Telephone Interview with Professor Lauren Robel, supra note 175; see also infra note 195 and accompanying text (suggesting alternatives, if Congress eschews council review).
177. See Mullenix, supra note 106, at 800; see also Oakley, supra note 90, at 436-37.
178. See Mullenix, supra note 106, at 802; supra notes 93-100 and accompanying text.
reduce public involvement,\textsuperscript{179} this conundrum seems unsolvable and can only be ameliorated.

The rule revisors, districts, judges, and Congress might institute certain actions that may improve the current circumstances.\textsuperscript{180} They could make the judicial system’s needs a paramount concern and could exercise more restraint in the rule amendment processes. For example, the national revisors should propose, and Congress should acquiesce in, rule changes that will best serve all interests affected by federal civil litigation. These interests include the needs of districts, judges, lawyers, parties and the public for prompt, inexpensive, and fair dispute disposition and the congressional need in having its statutes enforced effectively.\textsuperscript{181} The rule revisors should solicit and seriously consider the maximum feasible input of relevant interests but must strenuously resist special pleading of particular people or groups that seek to derive tactical or other benefits from procedural modifications.\textsuperscript{182} Districts and judges might attempt to reduce erosion of the national revision process effected by local proliferation. Courts and judges could refrain from applying inconsistent local strictures in the absence of a strong need to treat peculiar local conditions that the Federal Rules do not address or to experiment with measures that may improve dispute resolution.\textsuperscript{183}

Revitalizing the national amendment procedures also will require that Congress defer more to this process and exercise greater restraint when making procedural policy than it has in recent years.\textsuperscript{184} For example, Congress nearly rejected Rule 26’s 1993 revision covering automatic disclosure,\textsuperscript{185} and many judges considered the 1990 CJRA an unwarranted effort to prescribe court procedures.\textsuperscript{186} Congress should avoid

\begin{footnotesize}
\begin{enumerate}
    \item \textsuperscript{179} See Oakley, supra note 90, at 436 (stating that Congress is increasingly receptive to the public’s input).
    \item \textsuperscript{180} See Stempel, supra note 141, at 98-102 (discussing participation in the rulemaking process).
    \item \textsuperscript{181} See Fed. R. Civ. P. 1; supra notes 8, 12 and accompanying text. See generally Patrick Johnston, Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1, 75 B.U. L. Rev. 1325 (1995) (examining the policy behind Rule 1).
    \item \textsuperscript{182} See supra note 99 and accompanying text. Cf. supra notes 106-09, 177-78 and accompanying text (suggesting problems with too open a process).
    \item \textsuperscript{183} Cf. infra note 187 and accompanying text (suggesting Constitution and Rules Enabling Act recognize Congress’ interest in rule revision); see also supra notes 121-23, 181 and accompanying text.
    \item \textsuperscript{184} See Tobias, supra note 26, at 1627-28 (suggesting congressional deference to rulemaking when appropriate). See generally Walker, supra note 166, at 476-84 (describing a proposal for rulemaking procedure).
    \item \textsuperscript{185} See Hughes, supra note 99, at 1-4; supra notes 99-100 and accompanying text.
    \item \textsuperscript{186} See supra notes 48, 113 and accompanying text.
\end{enumerate}
\end{footnotesize}
such action and should only modify federal rules amendments that it clearly deems inadvisable. Congress should defer to the national revisors’ significant expertise, as civil rule amendment is a central, if not a core, responsibility of the courts, even though the Constitution and the Rules Enabling Act recognize Congress’s interest in revision. Congress also could make less procedural policy, particularly by including fewer strictures in statutes and by restricting jurisdictional grants; that congressional action has undercut the Federal Rules’ national, uniform nature and the federal amendment process.

In short, the rule revisors, districts, judges and Congress must institute measures that will enable the national amendment procedures to reattain predominance and to operate in a more “normal” environment, perhaps imposing moratoria on federal and local revision. Once normalcy has been reacquired, it should be possible to ascertain whether this process can efficaciously address devolution and other critical difficulties confronting the districts.

2. Interbranch Cooperation

In addition to the above propositions regarding interbranch conflicts, members of both branches should attempt to exercise greater restraint, to communicate better and to cooperate more. Congress and the bench may cede responsibility or at least be solicitous in areas that clearly involve core duties of the coordinate branch. Congress could pass fewer procedural statutes and limit jurisdiction more. Judges might evince increased deference to Congress in fields, namely federal court jurisdiction, as to which the Constitution accords Congress much power.

Resolution of the fate of the CJRA, which is scheduled to sunset in 1997, affords an auspicious occasion for the districts and members of each branch to work together. District judges could offer insights derived from CJRA experimentation. The Judicial Conference will consult this input and the RAND and FJC studies in deciding on

188. See Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 BROOK. L. REV. 841, 856 (1993); Tobias, supra note 26, at 1614 (noting a suggested moratorium urged by CJRA Advisory Group in the Eastern District of New York); see also Oakley, supra note 90, at 445 (suggesting postponement of rule reform until after an assessment of jurisdictional problems and needs).
189. See Tobias, supra note 26, at 1627-28 (suggesting a cooperative approach to improvement of rulemaking); Walker, supra note 123.
190. See, e.g., supra notes 110-18 and accompanying text.
191. See U.S. CONST. art. II.
changes to the Federal Rules and on recommendations to Congress.\textsuperscript{192} For example, CJRA measures that reduced expense or delay might be included in the Rules.\textsuperscript{193} Congress will rely on the Conference suggestions in ascertaining whether the statute should expire. If Congress permits the Act to sunset, districts and judges must then eliminate all inconsistent CJRA procedures.

The statute’s expiration also will offer an excellent opportunity to assess the JIAJA’s implementation and whether circuit councils have effectively discharged their review duties.\textsuperscript{194} If Congress concludes that the councils have been ineffective, it might analyze other approaches or perhaps place councils on notice that they must promptly improve the situation. The options are varied. Congress could create a new, or charge an existing, centralized institution in the Judicial Conference or the FJC with responsibility for national oversight of local procedures; for communicating among councils, districts, and federal amendment entities; and for recommending that inconsistent local strictures replace corresponding Federal Rules or be abrogated.\textsuperscript{195}

3. Devolution

In addition to the stated ideas involving the observed devolution,\textsuperscript{196} I can proffer more specific suggestions. To the extent that expanding federal court jurisdiction and concomitant caseload growth promote devolution, Congress could constrict, or at least refrain from enlarging, jurisdiction and authorize greater resources or other measures to treat the increasing dockets.\textsuperscript{167} Judges might exercise restraint in applying local procedures or taking less formal actions that unfairly disadvantage attorneys and litigants or erode the Federal Rules’ national, uniform character while invoking mechanisms that efficaciously address caseload increases without these impacts. Insofar as devolution reflects unauthorized or other inappropriate activity, judges must cease this behavior. If they persist, Congress could statutorily proscribe improper conduct, while counsel and litigants should challenge the judges’ actions and appeals courts must reverse them.

\textsuperscript{192} See supra notes 135-37 and accompanying text.
\textsuperscript{193} See supra note 53; see also supra notes 135-37 and accompanying text.
\textsuperscript{194} See supra notes 70, 82-88, 175-76 and accompanying text.
\textsuperscript{195} I am indebted to Lauren Robel for these ideas.
\textsuperscript{196} See, e.g., supra notes 57-63, 139-44 and accompanying text.
\textsuperscript{197} See supra notes 57, 164, 168 and accompanying text.
4. A Final Word to District Judges

The optimistic tone of my suggestions may expose them to the same criticism that I lodged at Professor Carrington’s prescriptions. However, most district judges believe that the Judicial Conference and its rule revision entities are solicitous of their needs and that Congress is not the courts’ enemy. In the final analysis, the judges must conclude that it is in their best interest and in the best interest of the judicial system for judges to exercise self-restraint in halting or at least ameliorating the devolution and other difficulties that are perceived. Should the judges institute these actions, they will vitiate the need for, or simply render irrelevant, external regulatory controls.

V. CONCLUSION

Disunionism is a valuable critique of much that is wrong with the federal districts. My response attempts to elaborate Professor Carrington’s account by exploring additional sources of devolution and other problems facing the courts. If the districts, judges, and Congress heed his admonitions while gathering information and implementing measures which I suggest, they should be able to improve the condition of the districts as the courts enter the twenty-first century.