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More Modern Civil Process

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MORE MODERN CIVIL PROCESS

*Carl Tobias**

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I. INTRODUCTION

Professor Stephen Yeazell's recent essay, *The Misunderstood Consequences of Modern Civil Process*,¹ is incisive and provocative. Professor Yeazell affords novel ways of apprehending civil process while commencing the daunting task of constructing a more comprehensive and interrelated account of that process. The essay opens numerous new avenues for exploration and raises many thought-provoking questions, and its ideas will spark lively debate across a broad spectrum of issues relating to federal civil procedure and the federal courts.

In Professor Yeazell's essay, he explained that reconfiguring the civil litigation process in courts of the first instance while maintaining essentially constant the principles of appellate review since the 1930s has realigned litigation's power relationships. The focus of civil practice has moved from trials to the pretrial process, while circuit courts have scrutinized less rigorously district judges' decisionmaking. The essay asserted that modifying one constituent of the larger procedural system has unleashed the law of unintended consequences, most importantly, by shifting considerably more authority to courts of original jurisdiction and transferring some public power into the hands of private attorneys.

Professor Yeazell declined to debate the desirability of the specific procedural changes, such as enhanced judicial discretion to manage pretrial, that led to the larger transformations, but suggested the need for more thorough comprehension of the alterations and for heightened sensitivity to their interrelationships. His essay thus began to paint a comparatively comprehensive portrait of process as a system. He

1. Stephen Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 Wis. L. REV. 631.

painted a clearer picture of the modifications' connections while encouraging proceduralists to view the whole of modern process as more than the sum of its discrete parts.

This article explores a number of significant issues that *The Misunderstood Consequences of Modern Civil Process* expressly and implicitly raises. My response primarily elaborates the essay's perceptive depiction of authority's accretion in courts of the first instance by emphasizing very recent procedural developments, such as implementation of the Civil Justice Reform Act (CJRA) of 1990 and the 1993 amendments in the Federal Rules of Civil Procedure. Perhaps most striking about Professor Yeazell's essay is that the newest aspects of civil process, which he examined the least, most compellingly illustrate his ideas. Indeed, the CJRA, in vesting courts of original jurisdiction with the power not only to apply but also to make relevant procedures, additionally increases district court authority and explicitly sanctifies that enhancement as a positive value.

This article initially summarizes *The Misunderstood Consequences of Modern Civil Process*. The article then descriptively analyzes modern civil process, expanding Professor Yeazell's account and concentrating on power's accumulation in courts of the first instance. Focus is placed on several phenomena, namely the local proliferation of civil procedures, the growth of judicial discretion, and the mounting emphasis on pretrial and managerial judging, which have facilitated authority's accretion. This response next evaluates important implications of modern process and concludes with suggestions for treating the changed procedural circumstances.²

II. DESCRIPTION OF *THE MISUNDERSTOOD CONSEQUENCES OF MODERN CIVIL PROCESS*

Professor Yeazell first sketched how the Federal Rules of Civil Procedure modified the mode of civil litigation and changed the juncture at which most civil lawsuits end.³ He showed that civil process premised on those Rules has essentially substituted motions at earlier

2. I emphasize the changes, principally attributable to the Federal Rules, wrought in the district courts because those have been the focus of my work. For instance, I leave treatment of the appellate process to others. See, e.g., THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL* (1994); PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL* (1976). I correspondingly focus on procedural rather than substantive power, although Professor Yeazell treats both. I also emphasize the shift in public authority because the transfer of public power to private hands has been less significant.

3. See Yeazell, *supra* note 1, at 632-33.

litigation phases for trials, which proportionately decreased by nearly four-fifths in the half-century following the 1938 Rules' adoption.

The essay explains that the Federal Rules recalibrated the trial process by interposing numerous new steps between litigation's commencement and trial and that district judges increasingly devote their efforts to pretrial tasks, such as resolving discovery controversies, presiding at settlement conferences, and punishing attorneys for misconduct during this stage.⁴ Appellate scrutiny of the outcomes of cases pursued in district courts has correspondingly loosened, even though relevant statistics indicate that the work of circuit courts has dramatically expanded.⁵

Professor Yeazell then demonstrated how developments over the last half-century altered power relationships in the federal courts by severing a close connection between appellate and trial court procedure which had developed during the nineteenth century.⁶ In the 1800s, as trial judges began to regulate trials more comprehensively, appellate courts fashioned new procedures and closely monitored their use by trial courts. Events over the past fifty years broke the link between the two tiers. District judges have created increasingly elaborate procedural mechanisms; however, circuit courts did not concomitantly enlarge their supervisory authority. The uncoupling of this linkage between the judicial system's levels has expanded district court independence.

The essay next explored how interjecting a number of procedural steps before trial redesigned civil process in courts of original jurisdiction.⁷ The Federal Rules replaced trials with "litigation," a series of intermediate phases—discovery, claim and party joinder, and the encouragement of settlement by judges—that could have considerable tactical significance but would probably escape all judicial, but especially appellate, scrutiny.⁸ The corresponding failure to modify requirements governing appellate review, the second of a two-variable scheme,

4. *Id.* at 636-39.

5. *See id.* at 639-40. "[A]ppellate courts, though busier than ever, have decreased their control over the *outcomes* of cases filed in the trial courts." *Id.* at 640 (emphasis in original).

6. *See id.* at 640-41.

7. *See id.* at 646-47. *See also* Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1 (1984); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 961-82 (1987).

8. *See* Yeazell, *supra* note 1, at 646-60. *See also* Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5 (Summer 1991).

redistributed authority to courts of original jurisdiction and to attorneys.⁹ The Rules thus created new litigative activities, motions for counsel to file and for district judges to resolve, between pleading and trial. Because the principles of appellate jurisdiction remained static, however, many of the controversies that arose have evaded immediate appellate review.¹⁰

Professor Yeazell concluded with some guidance for those thinking about procedural change. He initially answered numerous possible objections to the essay's arguments which could be premised on other writers' work, considering certain of his contentions that diverge from these commentators' views and ideas that Professor Yeazell believed were novel.¹¹ *The Misunderstood Consequences of Modern Civil Process* then urged readers contemplating civil procedure and its modification to confront and take into account procedural connectedness and mutability.¹² Professor Yeazell candidly acknowledged that appreciation of these phenomena could move proceduralists toward "indeterminate despair," although he suggested that continuing to muddle through would be even worse.¹³

III. ELABORATION OF *THE MISUNDERSTOOD CONSEQUENCES OF MODERN CIVIL PROCESS*

A. *The 1938 Federal Rules of Civil Procedure: The New National Uniform Procedural System*

Congress, in passing the Rules Enabling Act of 1934, authorized the United States Supreme Court to promulgate procedures which would govern civil litigation in the federal district courts.¹⁴ During 1935, the Court named the original Advisory Committee on the Civil Rules and charged it with responsibility for drafting a uniform set of procedures that would cover practice in every federal district. In 1942, the Supreme Court designated the surviving members of the initial Committee as a standing Advisory Committee, and during 1956 the

9. Yeazell, *supra* note 1, at 660.

10. *See id.*

11. *See id.* at 667-76.

12. *See id.* at 676; *see also* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 840, 1030 (1984).

13. Yeazell, *supra* note 1, at 677-78; *see also* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 494 (1986).

14. *See* 28 U.S.C. §§ 2071-2074 (1988 & Supp. V 1993). *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982). *See also* Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 272-77 (1989).

Court discharged this entity; two years later, Congress assigned the responsibility for advising the Court to the Judicial Conference which appointed a permanent Advisory Committee.¹⁵

The Committee, when crafting the original Federal Rules of Civil Procedure, adopted by the Supreme Court in 1938, had numerous objectives in mind.¹⁶ The drafters meant to rectify the difficulties of common law and code procedure and practice.¹⁷ The lawyers specifically intended to remedy the highly technical character of the prior procedural systems, a phenomenon which rigid pleading exemplified.¹⁸ The Committee also sought to eliminate the complexity attributed to the 1872 Conformity Act's command that federal district judges employ procedures which closely conformed to the procedural requirements applied in the state courts of the jurisdictions where federal judges were situated.¹⁹

The Rules seemingly embodied certain procedural tenets. The drafters meant to write a national procedure code that was simple, uniform and trans-substantive²⁰ while encouraging cases' prompt, inexpensive resolution and their disposition on the merits.²¹ The Committee attempted to attain these objectives in numerous ways. For example, it fostered simplicity and merits-based resolution by limiting the signifi-

15. Order Continuing the Advisory Committee, 314 U.S. 720 (1942); Order Discharging the Advisory Committee, 352 U.S. 803 (1956); Pub. L. No. 85-513, 72 Stat. 356 (1958) (codified at 28 U.S.C. § 331 (1988)). The Judicial Conference is the policymaking arm of the federal courts.

16. See, e.g., Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 502-15 (1986); Tobias, *supra* note 14, at 272-77; see generally Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975). It is exceedingly difficult to divine the intent of the fourteen practicing attorneys and law professors, none of whom is alive today, and each Committee member probably held varying views on the wealth of issues that the Committee confronted. See Resnik, *supra*, at 498-99, 508; Tobias, *supra*, at 274. It is possible, however, to construct plausible, multiple accounts of those aspects of the drafters' work that are most relevant to the issues that Professor Yeazell raises by drawing principally upon secondary historical sources.

17. See, e.g., Subrin, *supra* note 7, at 914-21, 926-73; Tobias, *supra* note 14, at 270, 272-73.

18. See, e.g., Marcus, *supra* note 13, at 439; see generally Subrin, *supra* note 7, at 948-73. See generally CHARLES E. CLARK, *PROCEDURE—THE HANDMAID OF JUSTICE* (1965).

19. Act of June 1, 1872, ch. 255, 17 Stat. 196, 197. See generally CHARLES A. WRIGHT, *LAW OF FEDERAL COURTS* § 61 (5th ed. 1994).

20. See Cover, *supra* note 16, at 718. See generally Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501 (1992).

21. For discussion of these, and other important, objectives of the drafters, see Resnik, *supra* note 16, at 502-15; Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648 (1981); Tobias, *supra* note 14, at 272-77.

cance of pleadings, by prescribing open-ended discovery, and by restricting somewhat the number of steps in lawsuits.²² The drafters correspondingly increased uniformity by mandating that each district employ the same procedures.²³ The Committee also afforded lawyers considerable control over their litigation, especially before trial during discovery.²⁴ It concomitantly enhanced judicial discretion and trusted substantially to judges' discretion the enforcement of the Rules, which the Committee envisioned that courts would flexibly and pragmatically apply.²⁵

Particularly relevant to important issues which Professor Yeazell raises was the drafters' decision to include Rule 83.²⁶ That provision empowered all districts and individual judges to adopt local procedures, thus authorizing their promulgation of local requirements which could undermine the national, uniform, simple regime of civil procedure instituted.²⁷ The Advisory Committee did cabin this grant. The drafters apparently intended that districts would sparingly invoke Rule 83 in response to peculiar, problematic local conditions²⁸ and proscribed local rules which conflict with the Federal Rules.²⁹

In short, this account resembles in significant measure, but departs somewhat from, Professor Yeazell's description. For instance, this article agrees that the Advisory Committee's determinations to enlarge judicial discretion and emphasize pretrial would lead to authority's accre-

22. See, e.g., Subrin, *supra* note 21, at 1649-50; Tobias, *supra* note 14, at 274. See also Marcus, *supra* note 13, at 439-40.

23. See, e.g., Subrin, *supra* note 21, at 1650; Tobias, *supra* note 14, at 274.

24. See, e.g., Resnik, *supra* note 16, at 512-15; Subrin, *supra* note 21, at 1650.

25. See, e.g., Subrin, *supra* note 7, at 968-73; Tobias, *supra* note 14, at 275-76 & n.28. These basic procedural precepts should not be viewed as absolutes. Indeed, several of the tenets were in tension and even conflicted. For instance, the choices of an equity-dominated scheme, by essentially merging law into equity, and of a flexible, liberal procedural regime correspondingly expanded federal court access and encouraged complex cases which could be expensive and time consuming. See Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1592 n.13 (1994); see also *infra* notes 38, 41, 43 and accompanying text. The Rules, by affording counsel considerable, and judges somewhat less, control over litigation may have facilitated unfocused suits and broad discovery which imposed costs and delay. See *infra* notes 38, 41-43 and accompanying text.

26. See FED. R. CIV. P. 83. See generally Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2016-19 (1989).

27. See FED. R. CIV. P. 83; see also *supra* notes 18-23 and accompanying text.

28. See FED. R. CIV. P. 83 advisory comm. note. See also Subrin, *supra* note 26, at 2011-16.

29. See FED. R. CIV. P. 83. See also Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1397-99 (1992).

tion in courts of the first instance and that the drafters' decisions to expand, and accord attorneys significant control over, discovery, and to encourage the full revelation of relevant material would shift some power into private lawyers' hands. This article also concurs in the essay's suggestion that the committee evinced little self-awareness about how the procedural system that it formulated might distribute federal court authority.

This analysis differs in certain respects from Professor Yeazell's account. For example, he asserted that the Federal Rules, "drafted during the New Deal as many aspects of U.S. political life were centralizing . . . decentralized power within the federal judiciary."³⁰ The Rules, as applied, and perhaps as written, may have had this effect on substantive judicial authority, but the contention is not true of the procedural regime instituted, of the rulemaking or rule revising power, or of the entities responsible for amendment.

The Advisory Committee's purposes in crafting the 1938 Rules and the provisions actually promulgated thus reflected important countervailing tendencies. The drafters clearly intended to adopt a national uniform procedural code with Federal Rules that would specifically reverse the Conformity Act's decentralizing effect and that would apply in all federal districts, subject to limited provision for local procedures.³¹ The Rules Enabling Act also authorized court rulemaking by the Supreme Court, and it correspondingly entrusted development of the original Rules and their subsequent revision to centralized national entities, namely the Advisory Committee, which were to formulate proposals that created, protected and maintained a national uniform system. Indeed, Professor Yeazell astutely acknowledged that the statute, "with its hierarchically dictated uniformity . . . represents the old regime," analogizing it to the Catholic Church, which "stood for uniformity in doctrine and practice."³²

30. See Yeazell, *supra* note 1, at 675-76.

31. See *supra* notes 19-20, 27-29 and accompanying text.

32. See Yeazell, *supra* note 1, at 672 n.134. He contrasts the Rules Enabling Act with the Civil Justice Reform Act "which abandons uniformity . . . [and] is the procedural equivalent of Luther's Ninety Five Theses" analogizing it to Protestantism which stood for a "diversity of practices according to the individual conscience." *Id.* These analogies should not be taken too literally or too far. Luther's Theses were carefully considered doctrinal developments, whereas certain important procedural developments described here apparently received little conscious thought. See *infra* note 175 and accompanying text.

Professor Yeazell and I may be addressing different concepts and could even be talking past each other. For example, I emphasize a centralized, uniform procedural system with centralized rule amendment authority and centralized rule revisors. He stresses decentralized judicial power.

B. *The First Three Decades of the Federal Rules: Keeping the Faith*

The national rule revisors, particularly the Advisory Committee and the federal judiciary, preserved, sustained and fostered fundamental tenets such as uniformity and simplicity over the thirty years following the Federal Rules' adoption in 1938, and the Rules received a warm reception.³³ The Committee proposed relatively few changes, while judges encountered little difficulty interpreting and enforcing the original Rules and praised the strictures' efficacy.³⁴ The courts retained simplicity with a general, notice pleading scheme that they pragmatically and liberally applied.³⁵ Many districts and individual judges maintained and promoted uniformity by prescribing a comparatively small number of local procedures, especially ones which contravened the Federal Rules.³⁶

Certain 1938 Rules proved to be less effective, and a few of the basic procedural tenets were undermined.³⁷ For example, open-ended discovery led to several difficulties, such as increased cost and delay, and numerous counsel capitalized on attorney control over that process to take unfair advantage of their opponents, particularly in complex cases.³⁸

Perhaps most relevant to Professor Yeazell's ideas was the willingness of some districts and individual judges to promulgate local procedures, especially provisions which conflicted with the Federal Rules,

The ideas that we emphasize can be harmonized. For instance, centralized entities could exercise centralized authority to adopt a centralized, uniform procedural system that decentralized judicial power. *See also infra* notes 71, 83, 110 and accompanying text.

33. I rely substantially here on Tobias, *supra* note 14, at 277-79; Tobias, *supra* note 25, at 1591-92.

34. *See* articles in Symposium, *The Federal Rules of Civil Procedure*, 58 COLUM. L. REV. 435 (1958); Charles E. Clark, *Clarifying Amendments to the Federal Rules*, 14 OHIO ST. L.J. 241 (1953). *See generally* Marcus, *supra* note 13, at 435; Tobias, *supra* note 14, at 277-78.

35. *See, e.g.,* Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944). *See also* Marcus, *supra* note 13, at 439-40, 445-46.

36. *See* Subrin, *supra* note 26, at 2016-19. *See also infra* notes 39-40 and accompanying text. Some revisions, such as the 1966 party joinder amendments, expanded the Rules' flexible, liberal nature and judicial discretion. *See* FED. R. CIV. P. 19, 23 & 24. *See also* Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1469 (1987) (book review) (1966 revisions made triumph of equity complete). *See generally* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pts. 1 & 2), 81 HARV. L. REV. 356, 591 (1967-68).

37. *See* Tobias, *supra* note 14, at 278; Tobias, *supra* note 25, at 1593.

38. *See, e.g.,* New Dyckman Theater Corp. v. Radio-Keith-Orpheus Corp., 16 F.R.D. 203, 206 (S.D.N.Y. 1954). *See also* Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480 (1958) (contemporaneous account); Subrin, *supra* note 7, at 982-84 (subsequent account).

thereby honoring in the breach Rule 83's proscription on inconsistency.³⁹ Indeed, a mere two years after the initial Rules' issuance, the Knox Committee reported that many local rules which pre-dated Rule 83's adoption and were in conflict had not been abrogated and that numerous local rules prescribed after the 1938 Federal Rules' promulgation were inconsistent.⁴⁰ This local procedural proliferation facilitated power's accretion in courts of the first instance and eroded national uniformity.

The original Rule 83's implementation, accordingly, illustrates the law of unintended consequences and procedural mutability and connectedness. Districts and individual judges seized upon Rule 83, which was meant to afford flexibility in addressing peculiar, difficult local conditions and whose invocation was hedged with prohibitions, particularly on adopting conflicting local requirements, to prescribe rather broad local procedures which enhanced trial court power and undermined uniformity.

This article's account thus substantially accords with Professor Yeazell's. We agree that the experiment with the 1938 Rules during the three decades after their promulgation was successful. Professor Yeazell suggested that the Rules' perceived success derived from their content. The Rules' content was probably significant, although the Rules were also successful because the national revision entities and the federal bench preserved and maintained a uniform, simple procedural system. Moreover, Professor Yeazell contended that the original Rules' structure, enhanced emphasis on pretrial, and increased judicial discretion facilitated power's accumulation in courts of original jurisdiction. Those phenomena may have been important, but so was local procedural proliferation.

C. The Federal Rules Since the 1970s: The Rise of the Reformation

During the 1970s, several developments led to growing disenchantment with the Federal Rules' regime. Numerous critics argued that the federal courts were experiencing a "litigation explosion"⁴¹ in which at-

39. See Subrin, *supra* note 26, at 2016-19. See also FED. R. CIV. P. 83; *supra* notes 26-29 and accompanying text.

40. See REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON LOCAL DISTRICT COURT RULES III 1-11 (1940). See generally Subrin, *supra* note 26, at 2016-19.

41. See, e.g., Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE at 23 (A. Leo Levin & Russell Wheeler eds., 1979); Francis R. Kirkham, *Complex Civil Litigation—Have Good*

torneys and parties were filing too many civil cases, too few of which had merit.⁴² Others voiced concern about litigation abuse, especially throughout discovery.⁴³ Some observers claimed that the Federal Rules were unresponsive to these complications and that certain aspects of the original Rules, such as their flexible, liberal nature and provision for open-ended discovery controlled by counsel, had even created the problems. A number of prescriptions for the difficulties focused on phenomena, such as pretrial's increased importance, that Professor Yeazell identified; factors, namely local proliferation, that this article examines; or considerations, such as enlarged judicial discretion and greater emphasis on managerial judging, which both treat. All of these phenomena contributed to power's accretion in courts of original jurisdiction.

1. Managerial Judging: Increased Court Control and Individual Understandings of Process

During the late 1970s, numerous judges, particularly in heavily-populated districts, such as the Northern District of California, started crafting ad hoc solutions to these complications, a practice dubbed "managerial judging."⁴⁴ Judges created a plethora of procedures that enabled them to participate more actively in civil cases, especially during pretrial. Courts used pretrial conferences to guide litigation's pace, to formulate and resolve contested issues, and to foster settlement, particularly by encouraging reliance on various alternatives to dispute resolution (ADR).⁴⁵ A number of judges more closely controlled discovery's breadth or speed, while some courts sanctioned lawyers or parties for discovery or litigation abuse.⁴⁶ Judges also developed innovative techniques, such as mandatory summary jury trials and minitrials, to

Intentions Gone Awry?, in *id.* at 211-12. See also Tobias, *supra* note 14, at 287-89 (discussing debate over litigation explosion).

42. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979); Miller, *supra* note 7.

43. See, e.g., *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975); *Order Amending the Federal Rules of Civil Procedure*, 446 U.S. 997, 1000 (1980) (Powell, J., dissenting).

44. See STEVEN FLANDERS, *CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS* (1977); Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J. L. REF. 647, 657-78 (1988). See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

45. See, e.g., Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424 (1986) (ADR); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981); Resnik, *supra* note 44, at 391-400.

46. See Peckham, *supra* note 45; Resnik, *supra* note 44, at 391-400.

address the problems.⁴⁷ These developments, which expanded judicial discretion to manage the pretrial process and which were frequently realized through the adoption of local procedures that conflicted with the Federal Rules, facilitated authority's accumulation in courts of the first instance.⁴⁸

2. *The 1983 Federal Rules Amendments: Erosion of the National Uniform Procedural System*

The 1983 amendments in Rules 11, 16 and 26 enlarged lawyers' duties to act as officers of the court, increased judges' discretion to control and manage litigation, particularly in pretrial and discovery, and commanded courts to levy sanctions when attorneys or parties contravened the revisions' requirements.⁴⁹ Amended Rule 16 enhanced district judges' power to manage litigation through the use of pretrial conferences and scheduling orders and by sanctioning rule violations.⁵⁰ Revised Rule 26 authorized courts to limit discovery's extent and pace and to sanction infractions of the provision's strictures.⁵¹ Amended

47. See E. ALLAN LIND & J. SHAPARD, *EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS* (1983); Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

48. Numerous districts and individual judges effectuated much managerial judging, particularly before the 1983 Federal Rules revisions, by promulgating local procedural requirements, a number of which conflicted with the Federal Rules. Insofar as Professor Yeazell treats managerial judging, our accounts substantially agree.

49. See Order Amending Federal Rules of Civil Procedure, 461 U.S. 1097 (1983) [hereinafter Order]; Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933 (1991). See generally ARTHUR R. MILLER, *THE 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* (1984). The adoption of revisions to Federal Rules 11, 16, and 26 during 1983, therefore, effectively codified measures that courts had applied under the heading of managerial judging. See also *supra* notes 44-48 and accompanying text.

50. See Order, *supra* note 49. See also Subrin, *supra* note 21, at 1650; Tobias, *supra* note 49, at 942-46. See generally *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1011-13 (1st Cir. 1988). Rule 16 expressly denominated numerous matters that would be appropriate for treatment at pretrial conferences: discussion of settlement prospects, of using extrajudicial processes to resolve suits, of employing special mechanisms to manage litigation that involved "complex issues, multiple parties, difficult legal questions or unusual proof problems" and of issue formulation, the advisability of amending pleadings, ways to avoid unnecessary proof, and witness and document identification.

51. See Order, *supra* note 49. See also Subrin, *supra* note 21, at 1650; Tobias, *supra* note 14, at 292 n.148. The 1983 amendments in Rules 16 and 26 and the 1985 second edition of the *Manual for Complex Litigation*, which prescribed different procedures for resolving particular types of complex cases, such as mass tort suits, by assuming that judges would tailor procedures, often ad hoc, to specific cases, increased judicial power and discretion. See Subrin, *supra*, at 1650; Tobias, *supra*, at 292 n.148.

Rule 11 augmented the two changes' prescriptions for managerial judging by mandating sanctions for the failure of counsel and litigants to perform reasonable inquiries before filing papers and required greater responsibility and accountability from lawyers.⁵²

These 1983 revisions illustrate much that Professor Yeazell suggested. All three amendments significantly expanded district courts' authority by multiplying the number of steps, and the opportunities for judicial decisionmaking, in pretrial; by imposing on attorneys an increased number of, and more onerous, obligations; and by substituting court control for lawyers' self-regulation, especially during pretrial and discovery. The revisions concomitantly extended the movement from trial to pretrial begun in 1938 and enhanced judicial discretion, much of which exercise was effectively unreviewable, to manage that process. Modified Rule 11 fostered power's accretion by enlarging judicial discretion to regulate and punish attorney and litigant misbehavior in the pretrial, and even the prefiling, stage. Amended Rule 16's provision for courts during pretrial conferences to discuss the possibilities of settlement and of employing extra-judicial alternatives for resolving disputes correspondingly vested greater authority in courts of original jurisdiction and shifted some public power into private hands.

The developments that led to the 1983 changes and those revisions also demonstrate Professor Yeazell's allusions to the law of unintended consequences and procedure's mutable and interconnected nature. The 1938 drafters' decision to cede counsel considerable control over the pretrial process and the perceived need in 1983 to temper that determination's effects are illustrative. Some attorneys did not cooperate during pretrial. They capitalized on lawyer self-regulation for improper strategic benefit, thus necessitating increased judicial discretion to manage the pretrial phase and additionally emphasizing that stage as the dominant focus for disposition.⁵³ The notice pleading regime instituted in 1938 correspondingly foreclosed reliance on pleading as an important mode of resolution and reinforced others, namely pretrial. Flexible pleading allowed parties to avoid dismissal and to reach discovery,

52. See Order, *supra* note 49. The rule revisors changed the 1938 Rule 11, although they had minimal empirical data on the original provision which was rarely invoked. See Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927-28 (1989); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 456-57 (1993). The amendment, by mandating sanctions' imposition, reduced judicial discretion to sanction, but increased judicial power and control.

53. See Miller, *supra* note 7; Resnik, *supra* note 44, at 397. See also *supra* notes 38, 43 and accompanying text.

which improved their prospects for settling and proving cases.⁵⁴ More generally, the 1938 Rules stressed simplicity and uniformity, but the 1983 amendments emphasized prompt, inexpensive dispute resolution in treating delay, cost and excesses which the initial Rules apparently made possible through such procedural provisions as notice pleading and open-ended discovery.⁵⁵

This account of the 1983 revisions comports as a descriptive matter with Professor Yeazell's rather limited treatment of the amendments.⁵⁶ We agree that the 1983 modifications enlarged district courts' power by enhancing judicial discretion to manage the increasingly important pretrial and apparently responded to certain aspects of the uniform, flexible regime instituted in 1938. He seemingly views the decentralization of authority effected by the 1983 amendments as confirming and deepening procedural developments which commenced in 1938. This perception of the 1983 revisions' impact on power of courts of original jurisdiction appears accurate, but the amendments also represented a departure from important tenets, namely national uniformity, that animated the drafters of the original Federal Rules.⁵⁷

3. *Local Procedural Proliferation as Reformation*

a. *How Local Proliferation Occurred*

The proliferation of local procedures is important to many of Professor Yeazell's ideas and has been integral to power's accumulation in courts of the first instance,⁵⁸ but his essay minimally treated that development.⁵⁹ During 1986, the Judicial Conference commissioned the Lo-

54. See Marcus, *supra* note 13, at 439-40, 445-46; Miller, *supra* note 7.

55. The perception that the liberal, uniform system of the original Federal Rules was substantially responsible for the litigation explosion and litigation abuse concomitantly led the 1983 drafters to accord judges greater discretion in controlling the increasingly emphasized pretrial process.

56. See, e.g., Yeazell, *supra* note 1, at 657-60.

57. The composition of the institutions responsible for national rule revision may also explain the 1983 amendments. Some observers have suggested that the federal judiciary's increasing dominance of the relevant committees has led the rule revisors to draft amendments that reflect growing solicitude for the needs of the federal bench, rather than of lawyers, litigants or the public. See, e.g., Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 897 (1992); John Frank, Rule 11—The Need to Start Over (May 1, 1992) (unpublished manuscript, copy on file with author); Laura Kaster & Kenneth Wittenberg, *Reforming the Federal Rules Reformers*, NAT'L L.J., June 29, 1992, at 15.

58. I rely substantially here on Tobias, *supra* note 25, at 1595-98; Tobias, *supra* note 29, at 1397-99. See also *supra* notes 38-39 and accompanying text.

59. See Yeazell, *supra* note 1, at 672 (alluding to local rulemaking in context of discussion

cal Rules Project to assemble and organize all local rules, standing orders of individual judges, and additional local requirements.⁶⁰

In 1989, the Project issued its report finding that courts had adopted some 5000 local rules and many other procedures, variously denominated general, standing, special, scheduling or minute orders which govern local practice.⁶¹ A number of these strictures conflicted with the Federal Rules, provisions in the United States Code, or procedures in the remaining ninety-three districts. Districts and individual judges promulgated and implemented inconsistent measures, notwithstanding proscriptions on that practice in the Rules Enabling Act and in Rule 83.⁶²

The Local Rules Project ascertained that the local requirements regulated a broad range of procedural matters. The most widely adopted procedures covered the pretrial process, particularly pretrial conferences and discovery.⁶³ Quite a few courts created and applied special mechanisms for tracking and for attempting to resolve rather early in litigation routine, simple cases. Moreover, a substantial number of districts prescribed presumptive numerical limitations for interrogatories.⁶⁴

The local procedures' substance and the ways that they were adopted, communicated, and enforced appeared more responsive to the perceived needs of local judges, lawyers, and litigants, or of these

of CJRA).

60. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE (1989) [hereinafter REPORT OF THE LOCAL RULES PROJECT]. See also Daniel R. Coquillette et al., *The Role of Local Rules*, 75 A.B.A. J. 62 (1989) (summary of Local Rules Project).

61. See REPORT OF THE LOCAL RULES PROJECT, *supra* note 60. Telephone interview with Mary P. Squiers, Project Director of Local Rules Project (Feb. 21, 1992); Stephen N. Subrin, Consultant to the Local Rules Project (Feb. 15, 1992). Many individual judges applied a plethora of procedures which were not in writing. See, e.g., United States District Court for the District of Montana, Civil Justice Expense and Delay Reduction Plan 3-4 (Dec. 1991) (co-equal assignment of civil cases to Article III judges and magistrate judges). See also Letter from Judge Avern Cohn, U.S. District Court for the Eastern District of Michigan, to Carl Tobias (Feb. 13, 1994) (applying unwritten procedures). See generally Carl Tobias, *The Montana Federal Civil Justice Plan*, 53 MONT. L. REV. 91, 93 n.9 (1992).

62. See 28 U.S.C. § 2071(a) (1988 & Supp. V 1993); FED. R. CIV. P. 83. See also Subrin, *supra* note 26, at 2020-26. See generally Coquillette et al., *supra* note 60, at 62-65.

63. See REPORT OF THE LOCAL RULES PROJECT, *supra* note 60, at 1-3.

64. See, e.g., UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 2 (Dec. 17, 1991) (referring to inconsistent local procedure); UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 2 (Dec. 31, 1991) (same). See also Subrin, *supra* note 26, at 2020-26.

judges vis-à-vis the attorneys and parties, than to concerns about national uniformity and simplicity. For example, numerous districts imposed restrictions on counsel who were not members of the bars of those states in which the courts were located.⁶⁵ Some individual judges even commanded lawyers to secure advance permission before filing motions.⁶⁶ Many districts and specific judges promulgated requirements governing certain areas of practice without consulting attorneys or the public before, and sometimes after, issuing the procedures.⁶⁷

Little appellate scrutiny attended the prescription or application of these measures.⁶⁸ The small monetary amount and the ostensibly esoteric procedural principles at stake probably discouraged most potential challenges. Some lawyers or litigants possessing sufficient interest and the wherewithal to pursue the mechanisms' invalidation might have been reluctant to attack procedures adopted by judges before whom they would appear in the future. A number of those few possible challenges remaining may have involved unreviewable judicial determinations.⁶⁹

This account of local procedural proliferation confirms and elaborates certain of Professor Yeazell's ideas. It shows how local procedures were important to authority's accretion in courts of original jurisdiction and how they facilitated the transfer of some public power to private hands. Local procedures additionally emphasized and enhanced judicial discretion to manage pretrial and reduced appellate scrutiny of district judges' decisionmaking. Courts' ostensible reliance on Rule 83's narrow grant to adopt procedures much broader than the provision allows and the 1938 drafters contemplated manifests the law of unintended consequences. The experience demonstrates interconnectedness because, for instance, the local procedures' widespread adoption has seriously

65. See, e.g., MT. R. 110; E.D. VA. R. 7. See also *Frazier v. Heebe*, 482 U.S. 641 (1987). See generally Coquillette et al., *supra* note 60, at 64.

66. See, e.g., *Richardson Greenshields Securities Inc. v. Lau*, 825 F.2d 647 (2d Cir. 1987). See generally 28 U.S.C. § 332 notes (1993).

67. See FED. R. CIV. P. 83, 1985 advisory comm. note. See also 28 U.S.C. §§ 332, 2071 notes (1988 & Supp. V 1993).

68. I rely substantially here on A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991).

69. The procedures also received little scrutiny from circuit judicial councils which Congress accorded review responsibilities. See 28 U.S.C. § 332(d) (1988 & Supp. V 1993). See also *id.* notes; FED. R. CIV. P. 83, 1985 advisory comm. note; *infra* notes 73-74, 78-79 and accompanying text.

eroded the national, uniform system of procedure embodied in the Federal Rules.⁷⁰

The foregoing procedural developments that led to the accumulation in courts of the first instance of additional power could be described as a reformation. Thus perceived, authority's accretion, made possible by local proliferation and uniformity's erosion, which the "local rulemakers, each guided by individual understandings of process" had effected, was the "procedural equivalent of Luther's Ninety-Five Theses."⁷¹

b. The Judicial Improvements Act of 1988: Responses to Local Procedural Proliferation as a Counter-Reformation

The federal judiciary and Congress responded in several ways to the difficulties posed by local proliferation.⁷² The Judicial Conference championed Federal Rule 83's 1985 amendment which required that districts promulgate local rules after affording public notice and opportunity for comment and that individual-judge standing orders not conflict with the Federal Rules or local rules.⁷³ The advisory committee note which attended the revision requested that every district institute processes for issuing and monitoring these orders and urged circuit judicial councils to evaluate all local rules for validity and for consistency with Federal Rules and with local procedures in other districts.⁷⁴

One-half century after the 1938 Rules became effective, Congress passed the Judicial Improvements and Access to Justice Act (JIA) of 1988, significant purposes of which were to restrict local proliferation and to restore the primacy of the Federal Rules and of national rule revision.⁷⁵ Congress apparently intended that the statute revitalize,

70. The developments also eroded the influence of national rule revision entities, undercut their efforts to protect and maintain the national, uniform regime, and greatly complicated federal civil practice for many counsel and parties. See *infra* notes 145-62 and accompanying text.

71. Yeazell, *supra* note 1, at 672 n.134; see also *id.* (Protestants stood for a "diversity of practices according to the individual conscience"). See generally *supra* note 32, *infra* note 83.

72. I emphasize the congressional response because it could have more profound effects. The Judicial Conference commissioned the Local Rules Project to study the problems and when the Conference received the Project's Report, it issued an order requesting that the districts conform local procedures to the Federal Rules and making numerous other suggestions for treating local proliferation. See Tobias, *supra* note 25, at 1597; Tobias, *supra* note 29, at 1399. See also *supra* notes 58-71 and accompanying text.

73. See FED. R. CIV. P. 83. See also FED. R. CIV. P. 83, 1985 advisory committee's note.

74. See FED. R. CIV. P. 83, 1985 advisory committee's note.

75. Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified in 28 U.S.C. §§ 332(d)(4), 2071-2074 (1988 & Supp. V 1993)).

maintain and enhance important procedural tenets, namely uniformity and simplicity, which motivated the original Advisory Committee.⁷⁶

Congress meant to treat local proliferation by systematizing and opening to public scrutiny local procedural amendment processes. The legislation required each district court to name a local rules committee that would assist all the district's judges in formulating local procedures and to provide notice and comment when adopting new, or amending existing, local rules.⁷⁷ Congress also attempted to limit proliferation by imposing on circuit judicial councils the affirmative responsibility to scrutinize periodically all local procedures for consistency with the Federal Rules and by empowering councils to change or abolish any requirements deemed in conflict.⁷⁸ Congress seems to have intended that these mandates cover individual-judge procedures.⁷⁹

This legislative activity reinforces certain of Professor Yeazell's ideas, but in his essay he only alluded to the JIA.⁸⁰ The Act's passage apparently evinces congressional recognition that original Rule 83 had unintended consequences in that judges purportedly relied on the provision's circumscribed authorization to prescribe measures considerably broader than the Rule permitted and the 1938 drafters envisioned.⁸¹ The statute's enactment also illustrates procedural connectedness. For instance, the strictures on promulgation of local requirements probably sacrifice certain flexibility which districts and judges need to adopt procedures that will treat unusual, troubling local conditions.⁸² The legislative action correspondingly demonstrates procedural mutability. For example, the effort to restore uniformity and the primacy of the Federal Rules and of national rule revision which local proliferation eroded shows that procedural values can have changing significance over time.

76. See Tobias, *supra* note 25, at 1599-1601.

77. See 28 U.S.C. § 2071 (1988 & Supp. IV 1992).

78. See 28 U.S.C. § 332(d)(4) (1988). The JIA thus imposed a continuing obligation on the councils to review local procedures existing on the legislation's December 1, 1988 effective date and any requirements thereafter prescribed. See also Tobias, *supra* note 25, at 1623-27 (1990 CJRA effectively suspended 1988 JIA).

79. See 28 U.S.C. § 2071 notes (1988 & Supp. IV 1993). The statute made the amendment process exclusive in an effort to prevent districts and judges from avoiding the requirements by denominating local procedures something else, such as a standing order. See 28 U.S.C. § 2071(f) (1988 & Supp. V 1993).

80. Indeed, he treats it so minimally that I do not even attempt to reconcile our accounts. See Yeazell, *supra* note 1, at 672 n.134.

81. See Tobias, *supra* note 25, at 1595-98; see also *supra* notes 26-29, 39-40 and accompanying text.

82. See Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 869-71 (1989). See also Levin, *supra* note 68.

These developments, particularly in Congress, five decades after the 1938 Rules took effect, therefore, could be characterized as a counter-reformation against power's devolution from the center to the local trial courts, insofar as local procedural proliferation facilitated that development. Thus viewed, the strictures on proliferation, especially in the 1988 JIA but also in Rule 83's 1985 amendment, "declaring holy war on the local rulemakers, each guided by individual understandings of process . . . would constitute [a] Council of Trent and the start of the real procedural counter-reformation."⁸³

4. *The Civil Justice Reform Act of 1990: The Deepening Reformation, or, A Funny Thing Happened on the Way to the Counter-Reformation*

Congressional passage of the Civil Justice Reform Act of 1990 and statutory effectuation essentially suspended implementation of the 1988 JIA's directives which were meant to limit local procedural proliferation. The way that Congress enacted the CJRA, the legislation's requirements, and its effectuation tellingly illustrate many of Professor Yeazell's ideas and enrich his account of modern civil process, although he tersely examined the statute.⁸⁴

a. *Statutory Passage*

In early 1990, Senator Joseph Biden, the Chair of the Senate Judiciary Committee, introduced a bill which was substantially premised on suggestions for improving the civil justice system—suggestions that were developed by a task force comprising diverse federal court users.⁸⁵ This legislation was quite controversial. Numerous judges criticized the measure because it required that each district implement a number of procedures to reduce expense and delay. Others thought that the bill

83. See Yeazell, *supra* note 1, at 672 n.134. I obviously have taken this quotation out of context because Professor Yeazell so minimally treats the JIA. See also *supra* notes 32, 71, *infra* note 110 and accompanying text.

84. See Yeazell, *supra* note 1, at 672-73. I rely substantially here on Tobias, *supra* note 25, at 1601-04.

85. See S. 2648, 101st Cong., 2d Sess. (1990). See also SENATE COMM. ON THE JUDICIARY, S. REP. NO. 416, 101st Cong., 2d Sess. 13-14 (1990). The task force found considerable dissatisfaction with the federal civil justice system, determined that increasing expense and delay in civil litigation threatened court access for numerous individuals, and suggested that federal courts institute reforms principally involving judicial case management, discovery, and ADR. See TASK FORCE ON CIVIL JUSTICE REFORM, THE BROOKINGS INSTITUTION, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 5-6, 12-19 (1989) [hereinafter BROOKINGS REPORT].

constituted a congressional effort to micro-manage the courts which bypassed or potentially threatened the normal federal rule revision process and the work of the Federal Courts Study Committee which Congress had commissioned in the 1988 JIA.⁸⁶ Indeed, the proponents of the 1990 legislation evinced little cognizance that the JIA had passed a short two years earlier, and there apparently was no attempt to harmonize the measures. The Judicial Conference eventually developed a "Fourteen-Point Plan" which responded to Senator Biden's bill.⁸⁷ Following hearings and negotiations with the Conference, Congress enacted a modified version of the legislation in November 1990.⁸⁸

The CJRA was controversial at the time of passage and has remained so. Some critics question whether the federal courts have experienced serious delay. Two important 1990 studies found less delay, especially in the sense of time to disposition, than many suggested.⁸⁹ Additional observers contend that the Act does not treat significant causes of cost and delay, namely the criminal justice system.⁹⁰ Moreover, the statute's express purpose was the encouragement of experimentation with local procedures for reducing expense and delay in civil litigation, to the nearly complete exclusion of other important process values and procedural tenets, particularly uniformity.⁹¹ The CJRA also established unrealistic goals and time frames and created entities which lacked expertise or assigned them unclear responsibilities. Much of the Act conflicted with, and its implementation effectively suspended, the 1988 JIA's initiatives aimed at local proliferation.⁹² This brief descrip-

86. See S. REP. NO. 416, *supra* note 85, at 4-6, 10, 30-31. See also Pub. L. No. 100-702, 102 Stat. 4642, 4644 (commissioning Federal Courts Study Committee).

87. See S. REP. NO. 416, *supra* note 85, at 4-6, 30-31; see also Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115, 128 (1991). This judicial opposition was somewhat ironic because the CJRA increased courts' power and discretion, particularly to manage the increasingly emphasized pretrial with inconsistent local procedures.

88. See 28 U.S.C. §§ 471-479 (1988 & Supp. V 1993); see also S. REP. NO. 416, *supra* note 85, at 3-6.

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

90. See, e.g., Avern Cohn, *A Judge's View of Congressional Action Affecting the Courts*, 54 LAW & CONTEMP. PROBS., 99, 100-03 (Summer 1991); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 400-01 (1992). Of course, the 1994 federal crime legislation will exacerbate this problem.

91. See *infra* notes 93, 97-98 and accompanying text. See also Burbank, *supra* note 36, at 1466-71 (discussing process values). But cf. 28 U.S.C. § 471 (1988 & Supp. V 1993) (stating explicit purpose of civil justice plans was to facilitate court access, an important process value).

92. For example, Congress identified or created instrumentalities to monitor statutory effec-

tion of the 1990 legislation's passage and considerable material that follows, therefore, epitomize many of Professor Yeazell's ideas.

b. Statutory Requirements and Implementation

The CJRA required that by December 1993 all districts adopt civil justice expense and delay reduction plans which were "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."⁹³ The courts were to issue the plans after examining reports and recommendations developed by advisory groups,⁹⁴ entities that the districts named ninety days after the Act's passage and which were to have balanced composition.⁹⁵ The district courts analyzed the groups' reports and suggestions and considered including in plans the eleven statutorily-prescribed principles, guidelines, and techniques and any other procedures that they believed would reduce delay and cost.⁹⁶ In short, the CJRA's advocates hoped that this method for generating reform "from the bottom up" would promote innovation while improving communication and fostering consensus among federal court users and within and across federal districts.⁹⁷

It is important to emphasize that the eleven measures provided in the legislation exclusively govern pretrial and significantly increase dis-

tuation but assigned the entities comparatively unclear responsibilities which decreased their ability to treat the proliferation of inconsistent local procedures fostered by the CJRA. *See* Tobias, *supra* note 25, at 1617-27; Carl Tobias, *Recalibrating the Civil Justice Reform Act*, 30 HARV. J. ON LEGIS. 115 (1993). *See also* S. 2047, 103d Cong., 2d Sess (1994) (proposing extension of statutory time frames); *see infra* note 95.

93. Judicial Improvements Act of 1990, § 103(b)(1), 28 U.S.C. § 471 notes (1988 & Supp. V 1993); 28 U.S.C. § 471 (1988 & Supp. V 1993).

94. 28 U.S.C. § 472 (1988 & Supp. V 1993).

95. They were to include lawyers and other persons representative of civil litigants. *See* 28 U.S.C. § 478 (1988 & Supp. V 1993). Groups were to evaluate the "state of the court's civil and criminal dockets"; "identify trends in case filings and in the demands being placed on the court's resources"; and designate the "principal causes of cost and delay in civil litigation" in the district. *See id.* § 472. The groups' recommendations were to treat the particular needs and circumstances of the district, its parties, and their counsel while guaranteeing that all of them contribute significantly to "reducing cost and delay and thereby facilitating access to the courts." *See id.* § 472.

These groups and their duties show how Congress selected entities and assigned them responsibilities which could increase power's accretion primarily by exacerbating local procedural proliferation and inconsistency, which increased cost and delay. For example, numerous advisory groups lacked balanced composition, while the above statutory requirements may have led them to draft recommendations that appeared more solicitous of the needs of local judges, attorneys and parties than of national uniformity.

96. *See* 28 U.S.C. §§ 472-73 (1988 & Supp. V 1993).

97. *See* Tobias, *supra* note 25, at 1604.

strict judges' discretion to manage this phase.⁹⁸ By comparison, several of the mechanisms expressly seek to limit judicial involvement in the disposition of disputes and even encourage lawyers and litigants to resolve privately part or all of their controversies.⁹⁹

The CJRA's twelfth open-ended prescription constituted an implicit invitation that courts adopt and apply local procedures which contravene the Federal Rules, United States Code provisions and other districts' procedures.¹⁰⁰ A number of courts apparently relied on the statute's last proviso to implement measures that conflict with external requirements, while numerous districts correspondingly seemed to depend on the eleven prescriptions, particularly those covering discovery, to effectuate inconsistent local procedures.¹⁰¹ Nothing in the statute or its legislative history appeared to proscribe these conflicts.¹⁰² Of course, every court invoked all twelve prescriptions to adopt different procedural permutations.¹⁰³

98. Section 473(a) prescribes six principles and guidelines for managing litigation and reducing expense and delay: creation of a system for tailoring case management to meet the unique circumstances of each case, early judicial involvement to establish timelines, discovery conferences, voluntary and cooperative discovery, strict limits on discovery motions, and increased use of ADR. See 28 U.S.C. § 473(a) (1988 & Supp. V 1993). Section 473(b) provides five litigation management and cost and delay reduction techniques: requirements for parties' joint development of discovery case management plans, for party representation at pretrial conferences by counsel with authority to bind parties regarding matters previously designated by the court, that requests for extensions of discovery completion deadlines and for trial postponement be signed by attorneys and litigants so requesting, for neutral evaluation programs, and that party representatives with authority to bind them in settlement discussions be present or available by telephone during settlement conferences. *Id.* § 473(b).

99. See, e.g., § 473(a)(4)-(6), (b)(1), (4) (1988 & Supp. V 1993).

100. In formulating a plan, the court "shall consider and may include . . . such other features as the district court considers appropriate after considering the recommendations of the advisory group. . . ." 28 U.S.C. § 473(b)(6) (1988 & Supp. V 1993).

101. See U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 9 (1991) (forcefully asserting local prerogatives by declaring that "[t]o the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling"); see also Tobias, *supra* note 29, at 1417, 1421 (providing examples of apparent reliance on last proviso); *id.* at 1416 (providing examples of dependence on eleven prescriptions).

102. See Lauren K. Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447-49 (1994). See also CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 438-39 (5th ed. 1994); A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV. 877, 888-94 (1993).

103. Many judges have inconsistently interpreted the new local procedures, and some have not even applied certain provisions that their districts adopted. See Tobias, *supra* note 25, at 1621-22. Moreover, numerous lawyers and litigants have encountered difficulty finding, understanding and complying with the applicable requirements. One important reason for this is that procedures may be part of plans, local rules, individual-judge procedures, orders or informal prac-

The CJRA, as passed, written and implemented, therefore, clearly illustrates many of Professor Yeazell's major ideas. Perhaps most critical, the above descriptive analysis compellingly reaffirms his central thesis that the legislation extends an essential element of the 1938 Rules: the "dominance of control by the court of original jurisdiction."¹⁰⁴ The evaluation specifically shows that the Act's provision for enhanced judicial discretion to manage the increasingly emphasized pretrial, through the adoption of local procedures, particularly inconsistent ones, facilitated authority's extension.

Congress entrusted practically all aspects of statutory effectuation to the essentially unreviewable, nearly absolute discretion of courts of the first instance.¹⁰⁵ The districts had and exercised effectively unfettered discretion to select advisory group members, to consider those groups' reports and suggestions and the CJRA's prescribed measures, to adopt local requirements governing virtually any procedural area, even those already covered in the Federal Rules or the United States Code, and to apply those procedures.¹⁰⁶

The statutorily-authorized provisions and the procedures which the courts actually implemented expanded district judges' discretion to manage pretrial while enlarging the emphasis on that process. For ex-

tices, some of which are easily accessible only to local attorneys and parties. For example, a few districts never reduced to written form applicable automatic disclosure procedures, leaving resolution to local practices or understandings. *See id.* at 1618 n.188.

In fairness, the CJRA and its implementation had numerous positive features. Congress structured the Act in certain ways that should have limited disuniformity, cost and delay, while numerous districts instituted procedures that may save expense or time. Some problems might have been attributed more to courts' interpretation and effectuation than to the legislation's language. For instance, Congress may have considered the twelfth procedural prescription a narrower grant of authority than a number of judges did. *See id.* at 1619. Moreover, should the CJRA sunset in 1997 as scheduled, district courts will retain little of that power which the Act accorded them. *See also infra* notes 165, 192-93 and accompanying text.

104. *See* Yeazell, *supra* note 1, at 672.

105. These exercises of discretion were effectively unreviewable. The statute failed to provide for judicial review, and I am aware of very few direct challenges to courts' exercise of authority under the legislation, even to the adoption of inconsistent procedures. *See* Edwin J. Wesely, *The Civil Justice Reform Act; The Rules Enabling Act; The Amended Federal Rules of Civil Procedure; CJRA Plans; Rule 83—What Trumps What?*, 154 F.R.D. 563, 570-72 (1994). The CJRA, therefore, increases local power by decreasing appellate review of district court decision-making. *See also supra* notes 5-9 and accompanying text.

106. It is important to emphasize, as Professor Yeazell states, that the CJRA places considerable responsibility in local districts for making the procedures. *See* Yeazell, *supra* note 1, at 672. It is equally significant to appreciate that the statute may only effect a minor extension of developments that local procedural proliferation had already begun. *See supra* notes 39-40, 58-71 and accompanying text.

ample, many districts exercised increased discretion, particularly to control pretrial, by requiring that lawyers and litigants participate in additional activities, such as pretrial conferences, or prepare more papers, such as specialized discovery plans, while enhancing opportunities for district court decisionmaking before trial.¹⁰⁷ Because the CJRA expressly encouraged local experimentation, and numerous districts apparently treated certain of the Act's eleven provisions and the twelfth open-ended prescriptions as implicit invitations to adopt inconsistent requirements, local proliferation served as an important vehicle for authority's accumulation in courts of original jurisdiction.¹⁰⁸

The CJRA and its effectuation accordingly reduced the 1988 JIA to considerably less than a counter-reformation and made it analogous to an aborted minor rebellion which only temporarily and minimally disrupted power's accretion in courts of the first instance. The 1990 legislation has clearly fostered the accumulation of additional authority in courts of original jurisdiction and has probably facilitated that power's consolidation. Even those local procedures which achieved the statute's goal of decreasing cost or delay might well have enhanced this authority at the expense of uniformity or important process values, such as fairness or court access.¹⁰⁹ Professor Yeazell accurately observed that the Act is "not the Council of Trent, but the rise of the Anabaptists, not a counter-reformation but the deepening of Protestantism."¹¹⁰ Indeed, the legislation, by according district courts author-

107. See Tobias, *supra* note 28, at 1414, 1418-22.

108. It bears reiteration that the statute facilitated power's accretion by creating institutions and assigning them duties which fostered this shift and which effectively suspended the initiatives prescribed by the 1988 Act. An additional example is that the composition and instructions of monitoring entities, namely circuit review committees, made them justifiably reluctant to scrutinize procedures that districts adopted under the CJRA. See *id.* at 1406-13. Correspondingly, the circuit judicial councils were probably unwilling to discharge the 1988 Act's broader responsibility to review and alter inconsistent local procedures which the 1990 CJRA apparently authorized districts to adopt. See Tobias, *supra* note 25, at 1618-22. See also *supra* note 95.

The CJRA also exemplifies the shift of public authority into the private realm. Several statutorily-prescribed procedures and a number of measures that districts in fact effectuated transferred some public power into the hands of private attorneys. See *supra* note 99 and accompanying text.

109. See Tobias, *supra* note 25, at 1623-27; Tobias, *supra* note 29, at 1423-27. See also *infra* notes 141-62 and accompanying text.

110. See Yeazell, *supra* note 1, at 672. Professor Yeazell chides Professor Mullenix for denominating the CJRA a "counter-reformation" that reversed a trend in the 1983 Rules. Both may be correct in certain ways, and their apparent disagreements primarily involve the imprecision of analogies derived from history. Professor Mullenix suggests that the CJRA departed from the national, uniform aspect of the 1938 procedural system, which had departed in turn from the technicality and rigidity inherent in earlier procedural schemes and the Conformity Act, while she

ity to create as well as implement applicable procedures, enhances this power. Most significantly, the Act expressly treats the increase as an affirmative good.

The passage of the CJRA, the statute's requirements, and its effectuation afford striking examples of other phenomena, such as procedural connectedness and mutability and the law of unintended consequences, that are important to Professor Yeazell's essay. The institutions created, the experimentation with local measures encouraged, and the procedural tenets promoted by the Act reflect little apparent attention to potential conflicts with related entities, measures and precepts, which Congress had prescribed a mere two years earlier. It is not surprising that numerous features of the 1990 CJRA are inconsistent, and irreconcilable, with the 1988 JIA.

The 1990 statute's goal of reducing expense and delay by fostering local experimentation with innovative procedures inexorably led to the proliferation of local procedures, some of which were conflicting, and jeopardized the 1988 JIA's purpose of limiting both proliferation and inconsistency.¹¹¹ Those cost and delay reduction objectives correspondingly have direct antecedents in several 1938 procedural tenets that the 1983 Federal Rules revisions were meant to revive, while the expense and delay which the 1990 Act is intended to decrease are partly attributable to the 1938 Rules' uniform system that the 1988 JIA attempted to reinvigorate.

Additional dimensions of the statute concomitantly evidence limited ability to view process very broadly, much less systemically. For instance, the CJRA's enactment ostensibly evinces great legislative concern about delay in civil cases, even though time to disposition in the federal courts had remained comparatively constant over the preceding twenty years.¹¹² In passing the Act, Congress seemed to ignore the criminal justice system which profoundly influences the time and

was not addressing power's accretion. See Mullenix, *supra* note 90. Professor Yeazell apparently agrees with much of that part of her treatment. For example, he characterizes the CJRA, "which abandons uniformity [as] the procedural equivalent of Luther's Ninety Five Theses" analogizing it to Protestantism, which stood for a "diversity of practices according to the individual conscience," while he states that the "Rules Enabling Act, with its hierarchically dictated uniformity" represented the old regime, analogizing it and the 1938 Rules to the Catholic Church which "stood for uniformity in doctrine and practice." See Yeazell, *supra* note 1, at 672 n.134. See also *supra* notes 32, 71.

111. Insofar as the 1990 statute effectively suspended initiatives aimed at reducing local proliferation and inconsistency which Congress instituted a mere two years previously or increased cost or delay, the legislation illustrates the law of unintended consequences.

112. See *supra* note 89 and accompanying text.

money required to resolve the federal civil docket.¹¹³ Professor Yeazell aptly summarized the CJRA when he stated that, absent a "more comprehensive sense of how process works, we can look forward only to blind vacillation between the points of a swinging pendulum as we grasp at various 'reforms,' each bringing its own unappreciated second order effects."¹¹⁴

5. *The 1993 Federal Rules Amendments: Additional Deepening of the Reformation*

The most ambitious set of revisions to the Federal Rules in their half-century history became effective on December 1, 1993.¹¹⁵ Several amendments, particularly in conjunction with earlier procedural developments, such as those involving the 1983 Federal Rules revisions and civil justice reform, inform or elaborate much of Professor Yeazell's thinking, although he minimally examined the new provisions. I emphasize the changes in Rule 11 governing sanctions and Rule 26 prescribing automatic disclosure because they were the most controversial modifications and are most relevant to the issues that his essay treated.

a. *Rule 11*

Rule 11's 1993 revision took effect a decade after the major 1983 amendment, which was intended to curb litigation abuse, such as the pursuit of frivolous litigation, by requiring that attorneys and parties conduct reasonable prefiling inquiries and by mandating judicial imposition of sanctions.¹¹⁶ The 1983 version, which was the most controversial alteration in the Rules' half-century history, engendered thousands of reported opinions, many more unreported decisions, much informal activity, and considerable unnecessary and costly satellite litigation. At the same time, it seemed to have chilling effects, particularly on resource-poor litigants.¹¹⁷ Numerous lawyers and parties seized on the provision for strategic benefit or as a means of recouping the expenses of suit.

113. See *supra* note 90 and accompanying text.

114. See Yeazell, *supra* note 1, at 677-78.

115. See Supreme Court of the United States, Amendments to the Federal Rules of Civil Procedure and Forms, reprinted in 146 F.R.D. 401 (1993) [hereinafter *Amendments*].

116. See *id.* at 419-20. See also Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. No. 171 (1994); *supra* note 52 and accompanying text.

117. See, e.g., Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988-89); Walker, *supra* note 52, at 455-59. See also Burbank, *supra* note 52.

This experience with Rule 11's 1983 revision, therefore, illustrates a number of Professor Yeazell's ideas, particularly relating to procedural mutability and connectedness and the law of unintended consequences. For example, the 1993 amendment's principal purpose is the correction of complications with the 1983 version, which itself was meant to remedy perceived litigation abuses apparently facilitated by the 1938 Rules' uniform, simple regime. The 1983 version was over-used, misused and even abused, and had other unanticipated side effects, namely satellite litigation.¹¹⁸

The most important changes in the revised Rule 11 impose a continuing duty to track and withdraw papers that lose merit, provide a safe harbor for parties which modify or retract offending papers twenty-one days after notification of infractions, and leave to judicial discretion the sanctions that courts levy for rule violations.¹¹⁹ The 1993 amendment, therefore, retains the 1983 provision's focus on pretrial, and even prefiling, conduct of lawyers and litigants, imposing significant responsibilities on them, and on judicial control over that behavior.¹²⁰ The safe harbor's requirement of notice and an opportunity to remedy deficiencies within three weeks before parties may file motions with the court could correspondingly increase pretrial activities in which attorneys and parties must participate while shifting some public power into private hands.¹²¹ The recent revision, by trusting sanctions decisions to district courts, probably enhances their discretion and power to manage the early stages of the litigation process.¹²²

b. Automatic Disclosure

The amendment of Rule 26(a) instituting automatic disclosure, which requires that parties exchange important information about their

118. See, e.g., Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775 (1992); Walker *supra* note 52, at 455-59. But cf. FED. R. CIV. P. 11 Advisory Committee's note, reprinted in 97 F.R.D. 165, 167 (1983) (admonishing judges about potential chilling effects).

119. See *Amendments*, *supra* note 115, 146 F.R.D. at 420-23. See also Tobias, *supra* note 118.

120. The safe harbor reduces somewhat judicial control. See *infra* note 121 and accompanying text. See also *supra* note 52 and accompanying text.

121. For example, movants must prepare notices, while targets must respond to notices, possibly by undertaking additional research. See Tobias, *supra* note 118, at 1785.

122. Making sanctions discretionary may limit judicial power and control. See *supra* note 52. See also Tobias, *supra* note 25, at 1610 (discussing 1993 Congressional efforts to defer Rule 11's effective date); Carl Tobias, *Why Congress Should Not Revise Rule 11*, 160 F.R.D. 275 (1995) (discussing 1995 Congressional efforts to amend Rule 11).

cases prior to traditional discovery, was the most controversial formal proposal to revise the Federal Rules ever developed.¹²³ Nearly all segments of the organized bar opposed the original proposal which the Advisory Committee developed because the critics could not ascertain precisely what must be divulged, believed that disclosure would impose an additional layer of discovery, thought that the proposal would create ethical conflicts with clients, and were concerned that it might increase expense and delay.¹²⁴

The Advisory Committee responded to this opposition by withdrawing the initial proposal in February 1992, but the Committee revived a modified disclosure provision two months later which was approved by the remaining rule revision entities.¹²⁵ The United States House of Representatives voted to delete automatic disclosure; however, the Senate unexpectedly failed to act and the disclosure amendment went into effect on December 1, 1993.¹²⁶

The aspect of the new Rule which is most relevant to the issues that Professor Yeazell treated was the inclusion of a local option mechanism, which authorized all ninety-four districts to alter the Federal Rule revision or to reject it completely.¹²⁷ Numerous districts relied on this provision to prescribe local disclosure procedures that vary from the Federal Rule amendment or to eschew it totally.¹²⁸ Indeed, a small number of courts even left the decision about applying any disclosure requirements to the discretion of each judge in the district.¹²⁹ Fewer

123. I rely substantially here on Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 3 (1993); Carl Tobias, *Collision Course in Federal Civil Discovery*, in 145 F.R.D. 139, 140 (1993); Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 265-66 (1992).

124. See *Amendments*, *supra* note 115, 146 F.R.D. at 512 (Scalia, J., dissenting); Bell et al., *supra* note 123, at 28-32; Tobias, *supra* note 123, at 141.

125. See Tobias, *supra* note 25, at 1612; Ann Pelham, *Panel Flips, OKs Discovery Reform*, LEGAL TIMES, Apr. 20, 1992, at 6.

126. See H.R. 2814, 103d Cong., 1st Sess. (1993); 139 CONG. REC. H8746-47 (daily ed. Nov. 3, 1993).

127. See *Amendments*, *supra* note 115, 146 F.R.D. at 431. See also *id.* at 427, 437, 478 (prescribing local option for Rule 16 pretrial conferences, Rule 30 and 33 presumptive limits on interrogatories and depositions, and Rule 54 costs); *infra* note 139 (Rule 16).

128. See, e.g., E.D. LA. R. 6.06E; D. ME. R. 18(g). See also DONNA STIENSTRA, FEDERAL JUDICIAL CENTER, IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS' RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26 (1995); Alfred W. Cortese, Jr. & Kathleen L. Blaner, *Mandatory Disclosure Rule 26(a)(1): Not The Rule of Choice* (1994).

129. See N.D. ILL. R. 2.04D; U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 2-4 (1993). See also John Flynn Rooney, *Discovery Rule Lacks Uniformity, Is "Source of Confusion": Critics*, CHI. DAILY L.

than fifty districts ultimately chose to adopt the Federal Rule revision.¹³⁰ That amendment also permits judges and litigants to change its requirements in individual cases.¹³¹

The local option provision is very important because it enlarges the power and discretion of courts of original jurisdiction. Most significantly, it entrusts to those courts not only the authority to formulate procedures governing an important aspect of the increasingly emphasized pretrial process but also empowers districts and individual judges to prescribe and apply local measures that conflict with the applicable Federal Rule and with requirements in the remaining districts. The local option mechanism thus expressly authorizes local procedural proliferation and significantly multiplies the possibilities for inconsistency, while it clearly complicates, and may increase cost and delay in, federal civil litigation.¹³²

The provision also illustrates procedural mutability and connectedness and the law of unintended consequences. For example, the 1993 Federal Rules amendments, the first major test of the new federal rule revision process which the 1988 JIA prescribed, included requirements that exacerbated local proliferation of inconsistent procedures, a significant problem at which the statute was specifically directed.¹³³ Concomitantly, local option's ostensible purpose was to accommodate CJRA experimentation with procedures that would save expense and time, but its inclusion has complicated civil practice and probably increased cost and delay.

The profound symbolic importance of the local option provision could well eclipse its substantial practical significance. Numerous observers of federal civil procedure have long considered the Advisory Committee to be the "Defender of the Faith" in the national, uniform procedural system that the 1938 Rules embodied.¹³⁴ When the Committee, apparently for reasons of political expediency or to salvage its

BULL., Apr. 23, 1994, at 17.

130. See *Half of Districts Opt Out of New Civil Rules*, NAT'L L.J., Feb. 28, 1994, at 5. See also STIENSTRA, *supra* note 128; Cortese & Blaner, *supra* note 128; Rooney, *supra* note 129.

131. See FED. R. CIV. P. 26(a)(1), *Amendments*, *supra* note 115, 146 F.R.D. at 432.

132. For example, the applicable procedures are difficult to locate, understand and satisfy. See Tobias, *supra* note 25, at 1614. See also *supra* notes 127-30 and accompanying text.

133. See Tobias, *supra* note 25, at 1600-01, 1613-15. See also *supra* notes 75-79 and accompanying text.

134. See, e.g., Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991); Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, LAW & CONTEMP. PROBS., Summer 1988, at 67.

flagging influence, acceded to an approach that facilitated power's accretion by leaving to district judges the adoption of potentially inconsistent procedures covering an important component of the increasingly emphasized pretrial, exacerbating disuniformity and complexity, the Committee dealt an enormous symbolic, and perhaps mortal, blow to the notion of a national uniform code of procedure.¹³⁵ Borrowing from the religious allusions of Professors Mullenix and Yeazell, it was as if the Catholic Church had authorized every parish to adopt views on significant issues of religious practice, such as contraception, that effectuated the individual perspectives of the local parishioners.¹³⁶

The disclosure procedure itself illustrates several important concepts proffered by Professor Yeazell. Automatic disclosure facilitates power's accumulation by enlarging the emphasis on pretrial and judicial discretion to manage this process as well as increasing the number of steps, requirements, and opportunities for district court decisionmaking at that stage, "frontloading" litigation even more. The authorization for judicial modification in specific cases enhances trial court power and discretion, while the provision for party stipulation and for attorneys to meet and confer about disclosure shifts some public authority into private hands.¹³⁷ The phrasing of the Federal disclosure amendment also illustrates the law of unintended consequences. For example, the requirement to disclose information "alleged with particularity in the pleadings" encourages more specific pleading and thus conflicts with notice pleading under Federal Rule 8.¹³⁸

c. Rule 16

The 1993 amendment in Rule 16 specifically authorizes district judges to require that a party or its representative attend pretrial conferences or be available by telephone in considering settlement possibilities, to control discovery's extent and timing and to encourage settlement and the use of special extra-judicial procedures, such as ADR.¹³⁹ These provisions facilitate power's accretion in several ways. They enhance judicial discretion to manage pretrial and to require that

135. I am indebted to Lauren Robel for this idea.

136. See *supra* notes 32, 71, 110 and accompanying text.

137. See *supra* note 131 and accompanying text.

138. See FED. R. CIV. P. 26(a)(1), *Amendments*, *supra* note 115, at 431. See generally Marcus, *supra* note 13.

139. See FED. R. CIV. P. 16, *Amendments*, *supra* note 115, at 427-31. See also *id.* at 427 (including local option provision).

lawyers and litigants participate in more activities before trial, increase the number of pretrial steps and emphasize this process, and expand opportunities in pretrial for judicial decisionmaking, much of which will be effectively insulated from appellate review.¹⁴⁰

In sum, the above procedural developments, but especially very recent ones, namely the 1993 amendments and civil justice reform, as they elaborate important earlier developments, illustrate many of Professor Yeazell's ideas. Most important, they show that enhanced judicial discretion to manage the increasingly emphasized pretrial, made possible by local procedural proliferation, has facilitated power's accumulation in courts of the first instance.

IV. IMPORTANT IMPLICATIONS OF MODERN CIVIL PROCESS

Professor Yeazell's essay was primarily descriptive, although he did identify certain consequences of several procedural phenomena that he discussed. For example, Professor Yeazell carefully examined some problematic implications of not appreciating and taking into account modern civil process' interconnected and mutable character and possible detrimental effects of procedural change.¹⁴¹ Nonetheless, he addressed minimally or left untreated other important consequences, principally relating to power's concentration in courts of original jurisdiction. This section analyzes such ramifications.

The accumulation in these courts of substantially more authority, particularly power that is effectively unreviewable and for which judges are essentially unaccountable, is not without consequence; it can significantly affect federal court judges, lawyers, and litigants, as well as Congress, procedural revision entities, and the civil justice system.¹⁴² Perhaps most important, authority's accretion places enormous trust in the judgement of a single individual and enlarges considerably the great power of the state, which federal judges exercise.¹⁴³

140. The authorization to encourage settlement and the use of special extra-judicial procedures could shift some public power into private hands. See *supra* note 138 and accompanying text. The most recent manifestation of the procedural phenomena examined above is the ninth tenet of the "Contract With America." See Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699 (1995).

141. See Yeazell, *supra* note 1, at 631-32, 676-78. I rely substantially here on Tobias, *supra* note 29, at 1422-27.

142. See, e.g., Tobias, *supra* note 29, at 1422-27; Tobias, *supra* note 25, at 1625-32.

143. See Robert M. Cover, *The Supreme Court, 1982 Term-Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). See also Judith Resnik & Dennis E. Curtis, *Images of Justice*, 96 YALE L.J. 1727 (1987).

The invocation of increased authority, and, indeed, its very existence, can benefit attorneys and parties that possess economic or political power, are "repeat players" or are located in a specific district and advantage courts of the first instance vis-à-vis nearly all other individuals and institutions.¹⁴⁴ Courts of original jurisdiction may employ and even abuse their enlarged authority, especially to manage the pretrial process which local procedural proliferation frequently facilitates, in numerous ways that unfairly disadvantage certain counsel and litigants. Professor Yeazell included a trenchant illustration of how district judges can exercise this enhanced power in the pretrial phase to control and attempt to terminate civil disputes by, for instance, coercing settlements from unwilling litigants and parties.¹⁴⁵

The accumulation of authority, made possible by the increasing emphasis on pretrial, the ever-growing number of steps in that stage, the mounting requirements for drafting, filing and signing papers and for participating in conferences during the phase,¹⁴⁶ and the expanded judicial decisionmaking necessitated at this juncture,¹⁴⁷ most detrimentally affects those attorneys and litigants who have the least financial and political power. An obvious example of these propositions is that the need to research and craft the documents and to be involved in the

144. These assertions are subject to several caveats, such as the ideas that the authority's exercise can vary considerably among districts, individual judges and case types and may depend substantially on factors, such as judges' political perspectives and temperament. See Tobias, *supra* note 29, at 1424. See also Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (discussing repeat players). I also appreciate that the contention may seem crudely instrumental, although a recent study in the context of employment discrimination litigation showed that some judges have applied procedures in ways that disadvantaged and even disproportionately affected plaintiffs. See Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211 (1992).

145. See *Lockhart v. Patel*, 115 F.R.D. 44 (E.D. Ky. 1987). See also Yeazell, *supra* note 1, at 657-59. The power's exercise was particularly blatant in *Lockhart*, and it was invoked against an insurance company. The power's exercise frequently is more subtle, and it is invoked considerably more often against lawyers and parties with less power and resources. See, e.g., *Strandell v. Jackson County, Ill.*, 838 F.2d 884 (7th Cir. 1988); *Williams v. Georgia Dep't of Human Resources*, 789 F.2d 881, 883 (11th Cir. 1986). See also Baumann et al., *supra* note 143.

146. It is important to remember that certain of these requirements elaborate or complement the already substantial demands, such as those in Rules 11, 16, and 26. See *supra* notes 49-57, 116-40 and accompanying text.

147. The increased demands imposed on courts during pretrial have adversely affected federal judges. For instance, courts' responsibilities to preside over a greater number, and broader variety, of litigation conferences, many of which are increasingly complicated, and to make more decisions consume scarce judicial resources and limit their discharge of other duties. See Tobias, *supra* note 29, at 1423.

activities additionally strains the lawyers' and parties' already scarce resources while complicating their efforts to prove cases, reach trial and conclude suits.¹⁴⁸

The concentration in district courts of authority, especially as encouraged by growing judicial discretion which the original Federal Rules and many amendments since 1938 have bestowed, has similarly affected attorneys and parties with few resources or minimal political influence. Judicial discretion is an instrument of power whose exercise generally has the most deleterious effects on these lawyers and litigants.¹⁴⁹ For instance, courts can employ the vast discretion invested in them by numerous Federal Rules to demand that these attorneys and parties submit papers or participate in conferences or in ADR which can further drain their limited time, money, and energy and make litigation's pursuit more complex.¹⁵⁰

The accretion in courts of original jurisdiction of authority, particularly as facilitated by local procedural proliferation, has had other significant pragmatic effects, namely the additional complication of federal civil practice. For example, the local proliferation which the CJRA's implementation exemplifies and compounds, has made it more difficult for all lawyers and parties, but especially those who have little money or power or are located outside a particular district, to find, understand, and comply with local requirements. A number of these requirements, as written or applied, have specifically disadvantaged these counsel and litigants.¹⁵¹

The accumulation of power has also been important to the phenomenon of contracting procedural opportunities. These shrinking possibilities are illustrated by the imposition of numerical limitations on interrogatories and depositions,¹⁵² which disproportionately affect parties who lack resources or access to material that is relevant to their cases because they need greater discovery to secure this information.¹⁵³

Many district judges informally employ the enhanced authority,

148. The enhanced emphasis on pretrial and the deemphasis of trials can detrimentally affect certain lawyers and litigants, who pursue, for example, personal injury or job discrimination litigation because they are more likely to succeed before juries in trials. *See generally* Baumann et al., *supra* note 144.

149. *See* Burbank, *supra* note 36, at 1470.

150. *See* Tobias, *supra* note 29, at 1422-27. *See also* Tobias, *supra* note 25, at 1623-24.

151. *See* Tobias, *supra* note 29, at 1422-27; Tobias, *supra* note 25, at 1614-15.

152. *See* FED. R. CIV. P. 30(a)(2), 33(a), *Amendments*, *supra* note 115, 146 F.R.D. at 449, 461.

153. *See, e.g.,* Tobias, *supra* note 29, at 1424; Tobias, *supra* note 117, at 495-96.

especially when managing pretrial, while much of that and numerous additional exercises of power escape appellate scrutiny. This authority's application can adversely affect all attorneys and litigants, although its invocation most disadvantages those lawyers and parties who possess limited resources and power, chilling their enthusiasm, as they have little ability to resist the authority's imposition. Much described above correspondingly means that public interest organizations, such as the NAACP or the Natural Resources Defense Council, which litigate in multiple districts, encounter considerable difficulty vindicating rights and interests in the Constitution and congressional statutes.¹⁵⁴

Courts exercising this increased power can invoke it at the expense of Congress, thereby eroding legislative branch authority.¹⁵⁵ For instance, when federal districts or individual judges adopt local procedures that conflict with Federal Rules or provisions in the United States Code, the local strictures undermine those national requirements and bypass the congressional review prescribed for Federal Rules revision in the Rules Enabling Act.¹⁵⁶ Insofar as district judges promulgate, interpret or apply local procedural provisions in ways which improperly discourage attorneys and parties, such as civil rights plaintiffs, whose vigorous pursuit of litigation Congress specifically admonished courts to facilitate in substantive, procedural and fee-shifting statutes, that judicial activity correspondingly frustrates legislative intent and enhances judicial power vis-à-vis congressional authority.¹⁵⁷

Power's accretion, particularly as fostered by local procedural proliferation, has had deleterious institutional effects, diminishing the authority and prestige, while undercutting the efforts, of national rule revision entities such as the Advisory Committee.¹⁵⁸ These institutions have generally trained their substantial expertise and system-wide

154. See, e.g., Tobias, *supra* note 29, at 1423. See also Tobias, *supra* note 117, at 495-98.

155. See Tobias, *supra* note 49, at 961-63 (describing and criticizing judicial application of the 1983 amendment to Rule 11).

156. To the extent that district judges rely on the 1990 CJRA to adopt inconsistent local procedures, this frustrates legislative intent in the 1988 JIA to limit inconsistent local procedures and violates Rule 83's prohibition on inconsistency. Nonetheless, judges have honored these in the breach, and the 1990 statute seems to authorize inconsistency. See *supra* notes 26-29, 39-40, 59-71, 75-79, 100-03, 106-08 and accompanying text.

157. See Tobias, *supra* note 29, at 1425. The activity also undermines the statutory beneficiaries' vindication of substantive rights. See *id.* See also *supra* notes 142-54 and accompanying text.

158. See, e.g., Paul D. Carrington, *The New Order in Judicial Rulemaking: Factional Politics is Jeopardizing the Federal Rulemaking Process*, 75 JUDICATURE 161 (1991). See also Tobias, *supra* note 29, at 1426.

viewpoint on the preservation, maintenance and improvement of a national, uniform procedural scheme, have developed Federal Rules amendments that are best for all ninety-four districts and have afforded some check on district judges' exercise of excessive or abusive power, particularly when prescribing and applying local requirements.¹⁵⁹ Federal civil procedure's increased localization, by instituting a procedural regime that is based on less expertise and is more provincial and by decreasing the perceived need for Federal rule revision, has apparently limited the national revisors' influence and even called into question their relevance.¹⁶⁰

Power's accumulation in courts of original jurisdiction, particularly that promoted by greater judicial discretion to control the increasingly emphasized pretrial, has adversely affected the civil justice system. The earlier procedural developments, such as expanded managerial judging, especially as elaborated by the CJRA's implementation—requiring that lawyers and parties produce more papers and participate in more activities, multiplying litigation's steps, and enlarging ADR's significance—arguably complicate efforts to discern the truth and to reach lawsuits' merits while reducing the quality of justice attained.¹⁶¹ Respect for the civil litigation process declines when the public thinks that the procedures available or the nature of justice can vary significantly in specific districts, that the character of justice reflects cases' size or subject matter, that attorneys' or parties' resources affect justice's quality, or that complexities or technicalities prevent or frustrate the vindication of rights.¹⁶²

159. See, e.g., Mullenix, *supra* note 134; Tobias, *supra* note 49, at 961-63.

160. See, e.g., Mullenix, *supra* note 90; Tobias, *supra* note 29, at 1426.

161. Indeed, the consummate irony of these earlier procedural developments, as adumbrated by the CJRA's effectuation is that they will probably have impacts quite different from ones which Congress envisioned: they could well foster enhanced delay and cost in civil litigation, reduced federal court access, fewer equitable dispositions, and less merits-based resolutions. See Tobias, *supra* note 29, at 1426-27. See also *supra* notes 85-86, 93, 96-98 and accompanying text.

162. See Tobias, *supra* note 29, at 1427. The shift of former public authority into private hands has had certain effects that resemble those ascribed to the accumulation of power in courts of the first instance. The transfer of authority has generally provided advantages to lawyers and litigants who have superior resources, are repeat players, or are local. Conversely, this transfer has disadvantaged those without these attributes. More specifically, procedures that encourage or command participation in private forms of ADR minimally burden lawyers and litigants with significant resources and power, while at the same time pressuring resource-poor litigants into participating, and thus incurring expenditure of limited time, money and energy. See also *supra* notes 142-54 and accompanying text.

V. SUGGESTIONS FOR THE FUTURE

Professor Yeazell afforded an account of modern civil process which was considerably more descriptive than prescriptive, although he provided valuable general suggestions for seeing that process and alluded to some specific recommendations. I am less constrained and, indeed, I feel obligated to prescribe. This section initially proposes a modest approach, primarily implicating the most immediate aspects of civil process, which could be instituted in the near future. This section then explores potential solutions that might be implemented in the long term.¹⁶³

The second and third parts of this response showed how earlier procedural developments, which managerial judging exemplifies, as augmented by quite recent ones, namely the CJRA's implementation that local procedural proliferation facilitates, place too much unreviewable power in courts of original jurisdiction, while the fourth section explained why this authority should be restricted. This article recognizes that the power could be reduced in numerous ways, such as enhancing appellate court scrutiny of its exercise, decreasing judicial discretion to manage pretrial, or deemphasizing that process.

A helpful initial step would be to limit somewhat the authority of courts of the first instance by restoring and maintaining the primacy of a national, uniform system of civil procedure. This approach may generally be realized by capitalizing on the best, and eliminating or ameliorating the least desirable, features of the 1988 JIA and the 1990 CJRA and their implementation, including those 1993 Federal Rules revisions which involved civil justice reform, most notably provision for local option and automatic disclosure.¹⁶⁴

It remains rather early to posit very definitive conclusions about experimentation under the CJRA, because comparatively conclusive determinations must await the rigorous evaluation of the reform's effectuation, particularly the efficacy of those procedures that judges implemented. Nonetheless, the experimentation and assessment which have

163. I am all too aware of the difficulty of formulating comprehensive recommendations, for reasons so ably articulated by Professor Yeazell. Moreover, certain practical realities, such as the likelihood of judicial resistance to limiting power and of congressional resistance to change pending evaluation of CJRA experimentation, frustrate efforts to enunciate very ambitious proposals. Thus, while the task is daunting, the problems with modern civil process are sufficiently serious to warrant positing some suggestions. I attempt to identify and account for the effects that these recommendations will have.

164. See Tobias, *supra* note 25, at 1627-34. See also *supra* notes 72-140 and accompanying text.

been performed thus far suggest that Congress should allow the Act to sunset as scheduled in 1997.¹⁶⁵

Those mechanisms which proved very effective in reducing expense or delay and which comport with other important process values, such as uniformity, simplicity and open court access, must receive nationwide application by including them in the Federal Rules.¹⁶⁶ The measures that appeared promising, but were insufficiently efficacious to justify national implementation, should be designated for additional, selective testing with a process modeled on a 1991 proposed amendment to Rule 83 which was reportedly retracted in deference to civil justice reform experimentation.¹⁶⁷ District judges correspondingly ought to abrogate less effective procedures, especially mechanisms that conflict with the Federal Rules or the United States Code.

Illustrative of these propositions are the provisions for local option and automatic disclosure. These provisions have seriously undermined national uniformity, created considerable confusion, and imposed increased cost and delay.¹⁶⁸ The ongoing application of various disclosure techniques might indicate that one is particularly efficacious, and the measure should then be embodied in a Federal Rule.¹⁶⁹

This approach also effectively prescribes reattainment of the 1988 procedural status quo and the systematic implementation of the 1988 JIA's provisions through which Congress intended to restore the pri-

165. See Tobias, *supra* note 25, at 1629-30. See also Judicial Improvements Act of 1990, 28 U.S.C. § 471 notes (1993) (Implementation of Plans, § 103(b)(2)); see *infra* notes 193-94 and accompanying text.

166. It now appears that certain procedures in the broad areas of case management, ADR and discovery will be most efficacious. See also Burbank, *supra* note 36, at 1466-71 (discussing process values); Judicial Improvements Act of 1990, 28 U.S.C. § 471 notes (1993) (Pilot Program, § 105(c)) (prescribing approach for pilot districts similar to that in text).

167. The proposal authorized districts with Judicial Conference approval to adopt for not greater than five years experimental local rules which contravene Federal Rules. See Judicial Conference of the U.S. Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendment to Federal Rule of Civil Procedure 83, *reprinted in* 137 F.R.D. 53, 152-54 (1991). See Tobias, *supra* note 25, at 1633. The Supreme Court recently adopted an amendment to Rule 83 which will take effect in December, 1995, unless Congress modifies it. The amendment proscribes local rules that are "duplicative of Acts of Congress" or the Federal Rules. It also prohibits the imposition of sanctions for "noncompliance with any requirement not in federal law, federal rule, or the local district rules, unless the alleged violator has been furnished in the particular case with actual notice of the requirement." Federal Rules of Civil Procedure, Amendments to Federal Rules of Civil Procedure, *reprinted in* 160 F.R.D. 149, 152 (1995).

168. See *supra* notes 123-38 and accompanying text.

169. I realize that ongoing application is proceeding under both the CJRA and the 1993 Federal Rule amendment; however, they are sufficiently intertwined to justify using disclosure here. See *supra* notes 102, 123-38 and accompanying text.

macy of national, uniform procedure; to open the Federal Rules amendment process; and to regularize and open local procedural revision while limiting local procedural proliferation. The effectuation of the 1988 statute's elements, especially governing local procedure, which the 1990 Act's implementation essentially suspended, and the above-suggested resolution of CJRA experimentation could decrease considerably the accretion of power ascribed to local proliferation, reduce somewhat authority's accumulation attributed to increased judicial discretion and even limit power's growth resulting from greater emphasis on managerial judging and pretrial.

The course of action proposed might have certain disadvantageous effects. For instance, the recommendations may circumscribe the flexibility of district courts and individual judges to apply procedures that treat peculiar, problematic local conditions, including expense and delay, or restrict trial court discretion to punish litigation abuse. However, Rule 83's proposed amendment, which would authorize measured experimentation with inconsistent, innovative mechanisms for improving federal civil procedure, should be responsive to these concerns.¹⁷⁰ Implementation of the JIA's commands relating to local procedural proliferation might prove costly and, indeed, expense was one important reason for the mandates' limited effectuation.¹⁷¹ Systematizing and opening the local procedural amendment processes could additionally politicize them and, therefore, effectively replicate complications, such as local favoritism, which accompanied CJRA experimentation.¹⁷² These possible detrimental impacts, most of which are comparatively minor or can be ameliorated, seem less significant than the need to curtail "excessive" judicial authority.¹⁷³

This approach is also rather limited. For example, it treats somewhat less systematically other phenomena, namely enlarged judicial

170. See *supra* note 167 and accompanying text. Courts could also invoke their substantial inherent authority. See *Chambers v. NASCO*, 501 U.S. 32, 42-51 (1991).

171. Telephone Interviews with Andrew Tietz, Assistant Circuit Executive, U.S. Court of Appeals for the First Circuit (July 20, 1994); David Pimentel, Assistant Circuit Executive, U.S. Court of Appeals for the Ninth Circuit (July 22, 1994) See also Carl Tobias, *Suggestions for Circuit Court Review of Local Procedures*, 52 WASH. & LEE L. REV. 359 (1995).

172. See *supra* note 95; cf. Mullenix, *supra* note 134 (making similar arguments regarding national rule revision); see also Tobias, *supra* note 29, at 1404-06; *supra* notes 77, 79 and accompanying text.

173. For example, the loss of flexibility will be small and can be ameliorated. See *supra* note 167 and accompanying text. The cost of limiting inconsistent local procedures is correspondingly minor and can be minimized by employing volunteer assistance of the bar or law professors. See Telephone Interviews with Andrew Tietz and David Pimentel, *supra* note 171.

discretion and increased emphasis on pretrial and managerial judging, that have been important to authority's accretion. The basic, structural, and even entrenched nature of the phenomena and the complications, such as probable judicial resistance, in realizing more meaningful modification suggest that broader reform should await the institution of the proposed initial step. The fact that every major development in modern civil process, except for the 1988 JIA, underlay those phenomena attests to their engrained quality, the considerable difficulty of securing greater change, and the propriety of caution. Indeed, current civil procedure could well be so fragmented that it is preferable to seek a modicum of stability before undertaking more complex tasks.¹⁷⁴

Professor Yeazell so persuasively articulated the problems of fashioning systemic solutions for the complications of modern civil process that it is advisable to move outside the ordinary channels which modify procedure. For example, he accurately asserted that unselfconscious tinkering, in the form of a "series of incremental changes in trial court procedures, each defensible and sensible in itself," by the national rule revisors and by Congress in the 1990 legislation contributed to process' present condition.¹⁷⁵ These institutions are precisely the ones that would be central participants in any effort to alter procedure through the normal modification mechanisms.

It appears better, therefore, to create an entity, such as a national commission on civil procedure, which could embark upon the type of extensive study and painstaking work of developing solutions that Professor Yeazell suggested was indicated.¹⁷⁶ This entity must have the requisite resources, independence and expertise to collect, analyze and synthesize those data which are responsive to the questions that he raised.

The commission should rely substantially on much helpful material which has recently been assembled. An invaluable source will be the wealth of information that is compiled and assessed in the unprecedented nationwide experimentation that is proceeding pursuant to the CJRA. Additional promising sources could be the 1990 report of the Federal Courts Study Committee¹⁷⁷ and the insights gleaned from the

174. See, e.g., Mullenix, *supra* note 90; Robel, *supra* note 101; see also Tobias, *supra* note 25, at 1614 & n.168 (alluding to several calls for moratoria on reform).

175. Yeazell, *supra* note 1, at 677. See also Tobias, *supra* note 25, at 1602-05, 1623-28 (1990 legislation); *supra* notes 83-114 and accompanying text.

176. See, e.g., Levin, *supra* note 102, at 900; Tobias, *supra* note 25, at 1627 & n.228. The guidance that follows is rather theoretical and selective. See also *infra* note 188.

177. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990); see also *supra* note 86

1988 JIA's implementation.¹⁷⁸ The commission may also want to gather and evaluate considerable new data.¹⁷⁹

The most important issue which the commission should attempt to resolve is whether courts of original jurisdiction now possess too much power. If the entity determines that this authority is excessive, it should evaluate civil process as a whole and craft solutions which have varying degrees of specificity while identifying and accounting for the reforms' effects. Assuming *arguendo* that the commission finds the power too substantial, this body could develop proposals which would directly limit district judges' authority. For instance, increased circuit court review of the power's invocation may restrict it, although such scrutiny would additionally burden appellate judges.¹⁸⁰

The entity might correspondingly formulate solutions which treat those particular phenomena, namely enhanced judicial discretion, local procedural proliferation, and greater emphases on pretrial and managerial judging, that have facilitated authority's accretion. For example, the systemic nature of judicial discretion, which pervades much of modern civil process and many Federal Rules, makes it an unlikely prospect for thorough modification but a possible candidate for incremental change.¹⁸¹ The growing emphasis on managerial judging and local procedural proliferation concomitantly seem narrower. After all, managerial judging is principally a style of judging. The adoption of inconsistent local rules, if not individual-judge procedures, is a comparatively discrete problem whose routinization was promoted by CJRA experimentation and therefore probably made more amenable to amelioration.¹⁸² Nevertheless, both managerial judging and local prolifera-

and accompanying text.

178. See Tobias, *supra* note 25, at 1604-07; see also *id.* at 1621-24 (1990 CJRA effectively suspended much of 1988 JIA's implementation aimed at local proliferation).

179. See also Tobias, *supra* note 25, at 1633 (providing other helpful sources); *infra* notes 186-88 and accompanying text (same).

180. See Yeazell, *supra* note 1, at 639-40. I could posit additional, general suggestions which would directly limit power. Those, and even more specific, recommendations may depend substantially on what the commission finds and, in any event, should probably await the conclusion of CJRA experimentation. See *supra* note 163.

181. The 1966 party joinder amendments and the 1983 revisions in Rules 11, 16 and 26 are illustrative but not unusual. See *supra* notes 36, 49-57 and accompanying text. See also *infra* note 195 and accompanying text (suggesting rule revisors consider discretion in drafting new proposals). The emphasized pretrial is also an unlikely prospect for thorough modification, because, for instance, it seems to be an important structural component of the Federal Rules.

182. CJRA experimentation clarified the critical nature of inconsistency while exacerbating it. See Tobias, *supra* note 25, at 1623-27; Tobias, *supra* note 29, at 1422-27. Local proliferation can be rectified or ameliorated, if the CJRA sunsets and the JIA and Rule 83 are properly imple-

tion remain rather ubiquitous and difficult to address comprehensively, because, for instance, numerous districts and many specific judges practice managerial judging and apply inconsistent local requirements, especially under the rubric of civil justice reform.¹⁸³

The four procedural phenomena can also be viewed in the context of specific procedural requirements. Federal Rule 16, governing pretrial conferences, is illustrative.¹⁸⁴ The provision's revision could limit power's accumulation by restricting local proliferation and judicial discretion and by deemphasizing managerial judging and the pretrial process, even as these changes might sacrifice courts' flexibility to handle litigation abuse and to fashion procedures for saving expense and time during pretrial.¹⁸⁵

The commission as well could consult the thinking of several procedure scholars to which Professor Yeazell alluded and the efforts of numerous judges and many writers who have participated in lively debate and have formulated suggestions regarding the best twenty-first century process.¹⁸⁶ For instance, Professor Stephen Subrin developed a provocative proposal for better integrating substance and procedure which might treat important concerns, such as increasing judicial discretion and enhanced emphasis on pretrial.¹⁸⁷ Professor Judith Resnik championed the adoption of a second set of Federal Rules for complex cases, a recommendation which could limit somewhat local procedural proliferation and courts' discretion to manage pretrial.¹⁸⁸

mented. See *supra* notes 26-29, 72-83, 165 and accompanying text.

183. Numerous judges will resist changes relating to managerial judging and local procedural proliferation, although a number will not because the judges rely minimally on them. Implementation of the strictures on local proliferation in Rule 83 and the JIA should generally limit proliferation, although they may restrict judicial flexibility. *But cf. supra* note 167 and accompanying text (providing proposal to amend Rule 83 that balances need to treat proliferation with need for flexibility).

184. Rule 16 would also be a good candidate for treatment in the normal rule revision process. See *infra* notes 195-97 and accompanying text.

185. For example, elimination of the local option provision in Rule 16 would limit proliferation and judicial discretion. See also *supra* notes 139-40 and accompanying text (discussing Rule 16's 1993 amendment); *supra* notes 168-69, *infra* notes 196-97 and accompanying text (discussing local option). See generally Keeton, *supra* note 82.

186. A valuable starting point is the work of all of the scholars mentioned in the last section of Professor Yeazell's essay. Particularly active federal judges include Judge Richard Posner, Judge Ralph Winter, Judge Robert Parker, and Judge William Schwarzer.

187. See Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 5 (1994).

188. See Judith Resnik, Comments on Preliminary Draft of Proposed Amendments to Federal Rules of Civil Procedure (1991) (copy on file with author). Were the Advisory Committee to implement that recommendation, the Committee might recapture the procedural initiative and

If a commission is not created, those institutions, including Congress and national and local rule revisors, such as the Advisory Committee, federal districts and individual judges, that participate in future procedural policymaking, should implement the above prescriptions, when applicable, and be attentive to Professor Yeazell's admonitions. These decisionmakers should generally attempt to delineate and take into account proposed changes' effects on modern process and on important specific considerations, such as judicial power and discretion, expense and delay, and court access, while subjecting all proposals developed to public scrutiny.¹⁸⁹

Relatively broad, structural, and entrenched procedural policymaking involving, for instance, authority's accumulation, seems peculiarly appropriate for congressional treatment, although it will also implicate delicate interbranch relationships typified by court rulemaking.¹⁹⁰ When Congress envisions procedural modification of that or any significant magnitude, therefore, it should closely consult with the federal judiciary whose insight and cooperation will be crucial to the success of every procedural change initiated.¹⁹¹ The national rule revisors should be cognizant of their historical propensity to fix or ameliorate narrow problems, especially involving particular Rules, rather than to view civil procedure comprehensively, much less to see process systemically.¹⁹²

improve its somewhat tarnished reputation. See *supra* notes 134-36 and accompanying text. But see *infra* note 192.

This guidance is deliberately meant to be selective rather than to provide a comprehensive roadmap implicating modern civil procedure, or process. Moreover, much may depend on the results of a commission's work and the indicated responses and on what CJRA experimentation shows. Congress is also unlikely to create a commission, until it secures the results of CJRA experimentation. See *infra* notes 193-94 and accompanying text.

189. The decisionmakers, in making broad procedural policy or narrower determinations involving, for instance, specific Federal Rules, should apply a finely-calibrated analysis which clearly identifies, considers, and balances, when indicated, the maximum number of relevant considerations. See Tobias, *supra* note 25, at 1592 n.13, 1629 n.237.

190. See Mullenix, *supra* note 90, at 379-82, 399-400; Tobias, *supra* note 25, at 1625.

191. For example, if Congress found district court authority excessive and considered limiting it or decided to treat the four procedural phenomena that have facilitated power's accretion, consultation with the federal judiciary would be essential. See also *supra* notes 84-91 and accompanying text (recounting instructive experience with CJRA's passage).

192. See, e.g., Harold Lewis, *The Excessive History of Federal Rule 15(c) and its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507 (1987); Marcus, *supra* note 13, at 494; Carl Tobias, *Amending the Other Party Joinder Amendments*, 139 F.R.D. 519 (1992). Cf. Tobias, *supra* note 25, at 1595 n.30, 1632 n.253 (suggesting need for empirical data on experimentation with proposals for improving Federal Rules). See also *supra* note 175 and accompanying text. In fairness, the Advisory Committee has recently addressed broader topics, such as sanctions, while

More specific guidance can be afforded. For example, Congress ought to decide whether the CJRA will sunset by remembering that the Act and statutory effectuation enlarged the authority of courts of original jurisdiction, encouraged local procedural proliferation, and enhanced judicial discretion, especially with regard to the management of the additionally emphasized pretrial.¹⁹³ Congress should keep in mind that the accretion of power and local proliferation fostered by the CJRA's implementation eroded legislative branch authority, that proliferating inconsistent procedures frustrate a major purpose of the 1988 JIA, and that the 1990 and 1988 statutes need to be harmonized.¹⁹⁴

When the Advisory Committee formulates, and other rule revision entities review, proposals for amending Federal Rules, they should be alert to power's accumulation and to the four phenomena responsible for accretion. For instance, the Advisory Committee might attempt to restrict district judge authority and discretion by writing more specific proposals.¹⁹⁵ A concrete example relating to local proliferation is the recent experience with the local option provision for automatic disclosure, which has increased inconsistency, fostered confusion and imposed expense and delay.¹⁹⁶ The revisors should substitute for local option a mechanism that is premised on the withdrawn 1991 proposed amendment in Rule 83 because it better accommodates the conflicting needs to limit, as well as to apply and to experiment with, inconsistent local procedures.¹⁹⁷

Districts and individual judges should be attentive to the problems which accompany the adoption and enforcement of local requirements, especially procedures that conflict with the Federal Rules, United States Code provisions or strictures in other districts. Most impor-

the rule revisors worked assiduously to develop the 1993 amendments and were generally responsive to public input. *See* Tobias, *supra* note 25, at 1610. *See also supra* notes 115-40 and accompanying text.

193. *See supra* notes 84-114 and accompanying text.

194. *See supra* notes 164-73 and accompanying text (suggestions for harmonizing); Tobias, *supra* note 25, at 1623-34 (more specific suggestions). I realize that this guidance is somewhat limited. *See also infra* note 197.

195. I recognize the need to afford some discretion and flexibility to treat specific problems that arise and the difficulties entailed in writing precise proposals. *See* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983).

196. *See supra* notes 123-38, 168-69 and accompanying text.

197. *See supra* note 167 and accompanying text. Considerably more guidance regarding the normal rule revision processes could be afforded. An important example is that Congress and the Supreme Court should assume very limited roles as ultimate gatekeepers. *See* Tobias, *supra* note 25, at 1628 & n.231. *See also supra* notes 184-85, 188 and accompanying text (providing additional examples).

tantly, the courts and judges ought to abolish all local measures, particularly those prescribed by specific judges, which are unnecessary or inconsistent; include the maximum number of remaining requirements in local rules; and reduce to writing all local procedures.¹⁹⁸ Districts and judges should also retain the requisite flexibility to experiment with measures that contravene Federal strictures and to apply mechanisms which respond to troubling, peculiar local circumstances.¹⁹⁹

VI. CONCLUSION

The Misunderstood Consequences of Modern Civil Process contributed substantially to understanding of process. This article has attempted to elaborate Professor Yeazell's valuable work by expanding on his account, especially of power's accretion in courts of the first instance, with immediate developments in process. This response also considers significant implications of modern process and affords suggestions for treating the changed procedural circumstances. If those responsible for modern civil process implement these recommendations and apply Professor Yeazell's ideas, they should be able to improve process in the twenty-first century.

198. See Tobias, *supra* note 25, at 1629.

199. See *id.* See also *supra* note 167 and accompanying text. A word on the shift of public power into private hands is warranted. All procedural policymakers in making and applying procedures should remember that this phenomenon generally disadvantages resource-poor litigants whom Congress has admonished should be treated solicitously. See *supra* notes 142-57 and accompanying text.