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The Fragmentation of Federal Rules

Erwin Chemerinsky*
and
Barry Friedman**

I. INTRODUCTION

In 1938, the Federal Rules of Civil Procedure were adopted. Their adoption represented a triumph of uniformity over localism. The lengthy debate that prefaced the adoption of the rules focused upon the value of a national set of rules, as opposed to the then-governing practice of "conformity," in which local federal practice mirrored that of the state in which the federal courts sat. Although many different arguments were offered in favor of the federal rules, at bottom the rules' proponents carried the day by arguing that procedure ought to be the same across the federal courts and the cases those courts heard.¹

Almost sixty years later, the central accomplishment of uniform federal rules is in serious jeopardy. The trend today is away from uniformity and toward localism, though perhaps not consciously so. The federal rules themselves permit individual district courts to enact their own local rules.² While concern about the impact of local rules upon the uniformity of the system of federal rules is long standing, recent years have seen a proliferation in these local rules. Although the ostensible

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1. On the enactment of the Federal Rules and the debate about localism versus uniformity, see Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989).

2. FED. R. CIV. P. 83.

purpose of these rules is not to disrupt national rule uniformity, that often is their impact. Then, in 1990, Congress adopted the Civil Justice Reform Act ("CJRA").³ The purpose of the CJRA is to achieve broad based reforms in the way federal civil cases are handled by lawyers and the courts. The primary mechanism of the CJRA, however, is individual rulemaking by the ninety-four separate district courts and their adjunct advisory committees established under the CJRA to effect reform.⁴ Further, in 1993 the Federal Rules of Civil Procedure were amended in significant ways, particularly with regard to discovery procedure. Framed against the backdrop of the CJRA, the discovery amendments offer an opt-out for any district court that chooses not to participate. Many district courts have taken this option, formulating their own variant of the discovery process.⁵ Thus, discovery also now operates quite differently in each district.

This fragmentation of procedure is not motivated by a strong drive toward localism. Almost no one is heard to offer support for the notion that the fundamental decision made in 1938 ought to be reversed. Rather, the current trend toward localism appears to be a by-product of a much broader concern about the direction and process of civil litigation generally.⁶ The perception is that federal civil litigation is facing a crisis of burgeoning dockets and escalating costs.⁷ Lacking strong central leadership, individual districts adopted local rules to address these perceived problems. Congress, caught in the reform fervor, also opted for local solutions. The Judicial Conference, when it tried its hand at reform, felt it had little choice but to continue the trend.

Whatever the impetus for the movement to localism, a topic we discuss below, its result can hardly be gainsaid. A study of local rules made seven years ago found some 5,000 local rules in existence, many of them at variance with the federal rules, not to mention one another.⁸ The CJRA expressly invites every one of the ninety-four districts to adopt its own model of how federal litigation should proceed, dealing with such

3. The Civil Justice Reform Act was part of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990). The Civil Justice Reform Act is codified at 28 U.S.C. §§ 471-482 (Supp. II 1990).

4. See *infra* notes 34-102 and accompanying text.

5. See *infra* notes 193-16 and accompanying text.

6. For a pointed critique of civil justice reform efforts generally, see Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for Moratorium*, 59 BROOKLYN L. REV. 841 (1993).

7. On the question of rising litigation costs see A. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219 (1985).

8. See Subrin, *supra* note 1, at 2020 (describing the Judicial Conference's 1988 Local Rules Project).

important topics as case management, tracking for different cases, motion practice, and alternative dispute resolution. Early results display a tremendous disuniformity among federal districts, and increasing variance from the Federal Rules of Civil Procedure. The impact of the opt-out provisions of the 1993 Civil Rules Amendments is of like effect. Some seventy years ago, during the long conversation about uniform federal rules, one commentator stated that “[t]here is no more excuse for differing judicial procedure than for differing languages in the several States.”⁹ Despite the apparent kernel of sense in this statement, today the proliferation of local rules and the trend to local models of adjudication threaten to turn federal practice into a veritable Tower of Babel in which no court follows the process of any sister court.

In this Article we critique the movement to localism in rulemaking. In doing so, we put largely to one side the very difficult and very controversial questions of whether there is a litigation “crisis” in the federal courts, whether procedural reform can or will address that crisis, and whether any particular procedure is a good one. Rather, our focus is on the somewhat more limited but perhaps ultimately most important question of whether it really is a good idea for every district court in the country to go its own way in developing civil process. Our answer, simply put, is no. The ill-considered and unmanaged proliferation of local rules is likely to exacerbate any problems there are with civil litigation. Different procedural rules will have an impact upon substantive justice. Varying procedures will lead to forum shopping, unnecessary cost, and widespread confusion. Amidst strong arguments against localism in rulemaking, there is almost no serious argument that supports it.

In Part I of this Article we detail the trend toward localism in rulemaking, treating principally the development of local rules, the Civil Justice Reform Act of 1990, and the 1993 Amendments to the Civil Rules. This Part describes the movement toward localism, and discusses some of the motivations that prompt it. In Part II we make the case for federal uniformity and against localism. In this Part we explain why fragmentation of procedure is likely to cause harm to the federal district court system and the litigants that rely upon it. In Part III we take up and respond to the arguments that are advanced in favor of localism. We conclude that for the most part those arguments have little or no merit and certainly on balance do not justify the escalating trend we are seeing toward localism. Finally, we conclude by offering a proposal to centralize rulemaking authority, while allowing some room when

9. Thomas Shelton, 30 LAW NOTES 50, 52 (1926).

variance is desirable or experimentation is required.

One ray of hope amidst the confusion of local rulemaking is a provision in the CJRA that ultimately requires the Judicial Conference to make recommendations based upon the experiences of the many district courts with their own CJRA plans.¹⁰ This provision seems to treat at least part of the current trend toward localism as temporary only; a brief study period before adoption of new uniform rules. Below we express serious concern with the CJRA's methodology in this regard, pointing out that the scientific nature of the enterprise is illusory. Nonetheless, there is promise in the mandate of subsequent review with an eye toward uniformity. It is our considered hope and judgment that after several years of procedural fragmentation, the future holds an opportunity to collect all the pieces and reverse the trend, once again imposing procedural uniformity upon the federal courts.

II. THE TREND TO LOCALISM

A. *Manifestations of the Trend*

An increasing array of important procedural issues are now dealt with in federal courts in a local, rather than a national fashion. Generally, this means that the judges in each federal district collectively make a decision as to specific procedures to be followed within that district. Sometimes, the procedures are even more localized with individual judges deciding the rules to be followed in their courtrooms. Overall, the result is that uniformity among federal districts and sometimes within them has been increasingly replaced by divergence.

There are many manifestations of this trend towards localism. Most notably, the development of local rules of procedure, the Civil Justice Reform Act, and the recent amendments to the discovery provisions of the Federal Rules of Civil Procedure all have contributed to the increasing diversity in procedures in federal courts across the country.¹¹

1. **Local Rules.** The Rules Enabling Act provides that the "Supreme

10. 28 U.S.C. § 479 (1994).

11. In addition to local rules, individual judges often adopt their own "practices," further contributing to disuniformity of rules. For an article critical of individual judges' practices see Myron J. Bromberg & Jonathan M. Korn, *Individual Judges' Practices: An Inadvertent Subversion of the Federal Rules of Civil Procedure*, 68 ST. JOHN'S L. REV. 1 (1994). Similarly, commentary has been directed at the "patchwork" of rules within each district. See Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts be Remedied by Local Rules*, 67 ST. JOHN'S L. REV. 721, 735-36 (1993).

Court and all courts established by Act of Congress may from time to time prescribe rules for conduct of their business.¹² Thus, the Rules Enabling Act clearly authorizes federal districts and federal courts of appeals to promulgate rules of procedure for cases arising within their jurisdictions. The Rules Enabling Act contains both substantive and procedural limits on what these lower courts may do in their rules.

Substantively, all such rules must be consistent with acts of Congress and with rules promulgated by the Supreme Court, such as the Federal Rules of Appellate Procedure, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence.¹³ Procedurally, in adopting local rules, courts are required to publish them in advance and allow time for public comment.¹⁴ Rules adopted by a district can be abrogated by the judicial conference of the circuit or by the Judicial Conference of the United States.¹⁵

Traditionally, local rules adopted by districts have dealt with relatively minor matters, such as the size and type of paper to be used.¹⁶ In general, the local rules have handled practical aspects of litigation not covered by the federal rules. Increasingly, however, local rules deal with much more important aspects of court procedure, and there is enormous variance among the districts.¹⁷

Not surprisingly, local rules have become especially important in areas where there have been great pressures for change in recent years: discovery; settlement; and the use of alternative dispute resolution. Concern about protracted litigation and a desire for greater efficiency have caused districts to adopt rules to better control discovery and to find ways to dispose of cases without trials.¹⁸ The discovery provisions

12. 28 U.S.C. § 2071(a) (1994).

13. *Id.* ("Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title").

14. *Id.* § 2071(b).

15. *Id.* § 2071(c)(1).

16. For example, the local rules for the United States District Court for the Northern District of California require that pleadings and motions be filed on numbered paper with ruled lines at the left and right margins. See *Local Rules of Practice for the United States District Court for the Northern District of California*, Rule 120-1. Even as to these relatively minor areas, we question the lack of uniformity. Attorneys in a single state must vary their conduct in different districts in their state, to say nothing of attorneys engaged in multi-state practice.

17. The most elaborate and stunning discussion of local rule disuniformity may be in the Judicial Conference's Local Rules Project's 1988 Report, discussed in Subrin, *supra* note 1, at 2020-21. See also Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011.

18. For a discussion of the reasons for the greater reliance on local rules, see text accompanying notes 117-25.

of the Federal Rules of Civil Procedure were revised in 1993 in response to the same concerns.¹⁹ Districts also have tried on their own to deal with the problems.

For example, local rules across the country impose various limits on the discovery process. Fifty-seven districts have local rules that limit the number of interrogatories; fifteen districts have rules that impose discovery cut-off dates; fifteen districts limit the number of requests for admissions; one district limits the number of depositions; and one district limits the number of requests for production of documents.²⁰ In California, each of the four federal district courts have adopted local rules that provide that discovery requests and responses generally are not to be filed with the court.²¹

Of course, as discussed below, the disparity in discovery rules has grown substantially as a result of the revision in Rule 26 of the Federal Rules of Civil Procedure that allows individual districts to opt-out of the reforms. The new version of Rule 26 came into effect on December 1, 1993. Rule 26(a) requires that certain categories of information be disclosed without awaiting a demand for discovery. Rule 26(f) requires that the parties meet and prepare a discovery plan. Rule 26(d) generally prohibits discovery until after the discovery conference has been held. As of April 1994, only one-third of the districts have adopted the discovery provisions of Rule 26(a),²² and about half of the districts have formally opted-out of the disclosure rules.²³

The result is that discovery rules are increasingly determined at the local, district level, rather than at the national level. The result is enormous disparity in practice among the districts.

Another area where local rules frequently differ is in the way they encourage settlement and the use of alternative dispute resolution ("ADR") mechanisms. One of the major changes in civil procedure in the past decade has been the rise in attention to ADR. Although the Federal Rules of Civil Procedure do relatively little to encourage the use of ADR, an increasing array of local rules on the topic have been adopted.

For example, the District of Columbia's local rules provide for

19. See, e.g., FED. R. CIV. P. 26. See discussion accompanying *supra* notes 103-16.

20. J. Stratton Shartel, *Case Tracking, Disclosure Provisions Lead the Way in District Reform Plans*, 7 *INSIDE LITIGATION* 1, 20 (1993).

21. Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 *J. LEGAL STUDIES* 647, 657-58 n.43 (1994).

22. John Flynn Rooney, *Discovery Rule Lacks Uniformity, Is Source of Confusion: Critics*, *CHI. D. BULL.*, April 23, 1994, at 17.

23. Marcia Coyle & Marianne Lavelle, *Half of Districts Opt Out of New Civil Rules*, *NAT'L L.J.*, February 28, 1994, at 5.

mediation with the consent of the parties.²⁴ In the Western District of Washington and the Eastern District of Michigan, cases are assigned to panels of three attorneys who give written notification of their evaluation of the case within one week.²⁵ The United States Court of Appeals for the Sixth Circuit recently ruled that a provision in the local rule providing that attorneys accept mediation by their silence in not objecting is permissible.²⁶ In the Northern District of California, certain civil cases are assigned to an individual attorney for evaluation.²⁷

Other districts have adopted a variety of other rules concerning ADR.²⁸ The Northern District of Ohio provides for summary jury trials where cases are presented to juries, in shortened form, for their nonbinding decisions.²⁹ In the Northern District of Oklahoma, a judge other than the one assigned to hear the case presides over settlement conferences.³⁰

Countless other topics besides discovery and the use of ADR are covered in the various local rules. Local rules sometimes address the size of the jury,³¹ the manner of service of process,³² and the procedures for summary judgment.³³ The overall result is that substantial areas of procedure are covered by local rules, and these rules differ enormously across the country.

2. The Civil Justice Reform Act. The Civil Justice Reform Act of 1990("CJRA")³⁴ was Congress' response to frequent calls for court reform in the late 1980s. According to Senator Biden, the primary proponent of the CJRA, the Act "was intended to reverse a recent trend in which one's bank balance, rather than the merits of the case, controlled a decision to file suit."³⁵ Senator Biden's concern was that the cost of federal litigation had escalated, limiting access to the courts

24. Shelby F. Grubbs, *A Brief Survey of Court Annexed ADR: Where We Are and Where We Are Going*, 30 TENN. B.J. 20, 27 (1994).

25. *Id.*

26. *Lenaghan v. Pepsico, Inc.*, 961 F.2d 1250, 1253 (6th Cir. 1992).

27. *Id.*

28. *See Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 573-74 (E.D. Pa. 1979) (discussing use of local rules concerning ADR to aid in formulating national procedures)

29. Grubbs, *supra* note 24, at 27.

30. *Id.*

31. *See Colgrove v. Battin*, 413 U.S. 149 (1973) (allowing local rule authorizing six person jury in civil cases).

32. *See Kroll Assocs. v. City & County of Honolulu*, 21 F.3d 1114 (9th Cir. 1994).

33. *See Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 416 (4th Cir. 1993).

34. 28 U.S.C.A. §§ 471-82 (Supp. 1991).

35. Joseph R. Biden, Jr., *Introduction*, 67 ST. JOHN'S L. REV. i (1993).

by many segments of society. Moreover, there were concerns about the length of time it took to litigate a case in federal court. According to the Congress, these problems of cost and delay, coupled with limitations on judicial resources, were threatening the "just, speedy, and inexpensive resolution of civil disputes in our Nation's Federal courts."³⁶

In enacting the CJRA, Congress sought to put its stamp upon the procedural process of civil litigation. Congress' broad goal in adopting the CJRA was to implement a set of changes designed to make the litigation process more efficient. The legislation as originally introduced required that each district put in place a plan to reduce cost and delay that incorporated many specific legislatively defined procedures.³⁷ For example, the legislation required differentiated case management, a discovery-case management conference in each case within forty-five days following a responsive pleading, early setting of trial dates, track-specific discovery procedures, and a provision for alternative dispute resolution.³⁸ In short, the CJRA represented an attempt by Congress to describe appropriate civil process. The legislation, as initially proposed, plainly reflected an impatience with "tinkering changes" adopted by the Judicial Conference. "By providing the necessary statutory components, Congress set the agenda for the federal courts to implement meaningful and effective reform."³⁹

There was nothing inherent in the CJRA's model for how federal litigation should proceed that required localism in rulemaking. While one might agree or disagree with the notion that Congress (rather than the courts themselves) should adopt civil process reform, uniformity often is the goal of congressional legislation. Likewise, while there has been and will continue to be deep controversy over the nature of the reforms Congress proposed, these reforms assuredly could be implemented uniformly throughout the federal district courts. Nonetheless, there were two fatal flaws in the CJRA that ultimately accounted for the fragmentation of process that resulted.

First, from the start there was a certain schizophrenia to the CJRA, for while the bill as originally introduced mandated that district court plans contain certain uniform ingredients, the legislation nonetheless required that each district draft its own plan.⁴⁰ In other words, district

36. S. REP. NO. 101-416, 10th Cong., 2d Sess. at 1-2.

37. See S.2027 (introduced Jan. 25, 1990) at 12.

38. *Id.* at 14-22.

39. Biden, *supra* note 35, at ii.

40. See § 2027 at 12 ("each United States district court shall develop a civil justice expense and delay reduction plan in accordance with this dispute"). *Id.* at 13 ("Each . . . plan shall include the following . . .").

courts were charged to do the same thing, but on a district-by-district basis. The genesis for this schizophrenia apparently was the Brookings Institute's study, *Justice for All: Reducing Costs and Delays in Civil Litigation*.⁴¹ Brookings conducted this study at the behest of Senator Biden and as a precursor for civil justice reform legislation.⁴² Indeed, the CJRA proposals essentially reflect the recommendations of the Brookings study.⁴³

At the same time as the Brookings study was recommending, and the original CJRA legislation was mandating very specific reforms, they were nonetheless insisting that the reforms come from the "bottom up." The Brookings report's "recommendations take account of the diversity of caseloads and types of litigations across different federal jurisdictions."⁴⁴ In light of these, the members of the Brookings Task Force stated they (despite many sections that seem flatly to the contrary) "do not advocate the adoption of a uniform set of reform suggestions to be applied by all district courts throughout the nation."⁴⁵ "Instead, reform must come from the 'bottom up,' or from those in each district who must live with the civil justice system on a regular basis."⁴⁶

In order to achieve "bottom up" reform, the Brookings Task Force recommended, and Congress ultimately adopted, the idea of creating an advisory group in each district to work with the district court in fashioning a plan to reduce litigation cost and delay. The advisory groups were to be "balanced," that is, to be composed of a wide variety of representatives of all segments of the community that litigated before the court, including the plaintiffs' and defense bars, public interest attorneys and government attorneys, corporate representatives and other members of the lay public.⁴⁷ These groups, composed in large part of individuals with no prior rulemaking or social science background,⁴⁸ were to assess the state of the district court docket, identify the causes of cost and delay, and develop a plan to address those causes. The plans

41. Brookings Institution Task Force, *Justice for All: Reducing Costs and Delays in Civil Litigation* (Brookings Inst., 1989) [hereinafter "Brookings Study"].

42. Brookings Study, *supra* note 41, at vii.

43. Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105, 108 (1991).

44. Brookings Study, *supra* note 41, at 11.

45. *Id.*

46. *Id.*

47. *Id.* at 12.

48. This has been a complaint of commentators. See, e.g., Linda Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 400-03 (1992); Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879, 905 (1993).

would then be forwarded to the district court for eventual adoption or modification.

The Brookings Report, and the subsequent legislative process, are remarkably vague about the sense of, or rationale for, this process of "bottom up" rulemaking. What explanation there is consists largely of platitudes. *In toto*, the Brookings explanation for this unprecedented process is the Task Force's belief

that the wide participation of those who use and are involved in the court system in each district will not only maximize the prospects that workable plans will be developed, but will also stimulate a much-needed dialogue between the bench, the bar, and client communities about methods of streamlining litigation practice.⁴⁹

Nor did the Brookings explanation for "bottom up" reform receive much development in the legislative process that followed. The statement itself was repeated or paraphrased repeatedly in the speeches, testimony, and reports that accompanied the CJRA.⁵⁰ Witnesses seemed to make two primary points. First, at the local level there was a store of knowledge that could be drawn upon to accomplish reform. Second, reform was more likely to succeed if it was designed by those whom it would affect.

What is intriguing about the Brookings report and the original legislation is the illusion of local control. While purporting to create a process of local option, virtually everything else about the original recommendations was mandatory. Scanning the list of Brookings recommendations makes the point succinctly:

PROCEDURAL RECOMMENDATIONS⁵¹

1. *By statute, direct all federal district courts to develop and implement within twelve months a "Civil Justice Reform Plan."*
2. *Include in each district court's plan a system of case tracking or differentiated case management.*
3. *Require in each district's tracking system the setting of early, firm trial dates at the outset of all noncomplex cases.*
4. *Set time guidelines for the completion of discovery in each district's tracking system.*

49. Brookings Study, *supra* note 41, at 12.

50. As Linda Mullenix has observed, "The same corporate, business, and insurance interests who underwrite the various Harris surveys and who participated in the Brookings-Biden task force subsequently appeared to testify in support of the wholesale revamping of federal civil procedure." Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1419 (1994).

51. These are pulled verbatim from throughout the Brookings Report.

5. Permit in each district's plan only narrowly drawn "good cause" exceptions for delaying trials and discovery deadlines.

6. Include procedures for resolving motions necessary to meet the trial dates and the discovery deadlines in each district's plan.

7. Provide in each district court's plan for neutral evaluation procedures and mandatory scheduling or case management conferences at the outset of all but the simplest of cases.

8. Require in each district's plan that authorized representatives of the parties with decisionmaking authority be present or available by telephone during any settlement conference.

9. Shorten current service provisions from 120 to 60 days.

10. Provide in each district's plan for the regular publication of pending undecided motions and caseload progress.

11. Ensure in each district's plan that magistrates do not perform tasks best performed by the judiciary. Include mechanisms for reducing backlogs in the plans of district courts with significant backlogs.

The resulting legislation differed little in tone from the Brookings recommendation. Each district was told it "shall implement" its plan, and each plan "shall include," certain elements.⁵² What followed in the legislation was an extremely detailed structure for civil case management allowing for little deviation except perhaps in the exact specification of the litigation tracks and the time deadlines for litigation on those tracks.

It is here, moreover, that the second flaw presented itself, a flaw perhaps as much of process as of substance. Senator Biden, it appears, decided to pursue judicial reform without consulting the judges.⁵³ The result was what one might have expected. "Early exchanges between representatives of the judiciary and sponsors of the legislation can only be described as acrimonious."⁵⁴ Individual judges, and the Judicial Conference as a whole, rose up to oppose the legislation.⁵⁵

The ultimate result of judicial opposition, however, may well have done as much harm as good. The Judicial Conference, recognizing that the drumbeat of reform was going to overtake it unless it did something, promptly convened a committee of judges to study the problem and

52. See *supra* note 40. See S.2027.

53. See *Hearings Before the Committee on the Judiciary, United States Senate, on S.2027, The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990*, 101st Cong., 2d Sess. 220-21 (Mar. 6, 1990); see also *id.* at 221 (statement of Hon. Aubrey E. Robinson, Jr., describing negative reaction of judges to S.2027) [hereinafter *Senate Hearings*].

54. 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, 882 (1993).

55. See *supra* note 53 (discussing negative reaction of federal bench).

present its own solution.⁵⁶ The plan finally approved by the Conference had very little substance in terms of specific steps that could or should be taken to address cost and delay. But, surprisingly, the plan did have as its cornerstone creation of individual advisory groups in each district that would help assess the docket and suggest "different measures that might be implemented to reduce cost and delay and improve case management practices."⁵⁷ District courts were instructed to "carefully consider" the advisory group reports, and to "implement the recommendations that the court concludes would be feasible and constructive"⁵⁸

The end result of this sometimes bitter dialogue between Congress and the judiciary was legislation whose only result could be tremendous balkanization of the civil rules. The idea of advisory groups and "bottom up" reform stayed in.⁵⁹ The mandatory nature of the reforms, however, was thrown out.⁶⁰ The advisory groups, largely composed of people with little or no rulemaking experience, were required to be active in each district; suggestions were made as to what they should do, but the CJRA seems to require little beyond consideration by the advisory groups. Thus, the groups were set off on their own, with little requirement of uniform results. Review of the actual provisions of the Act indicate numerous aspects designed to inhibit rather than further a coherent framework of civil practice.

First, and perhaps most important, the CJRA may well permit deviation not only among districts, but also from the broad framework of the Federal Rules of Civil Procedure, and from other provisions of the United States Code as well. There is a sharp dispute about whether Congress intended such deviation. The General Counsel of the Administrative Office has taken the view that such deviance is permitted only in very limited circumstances.⁶¹ But Professor Tobias concludes that Congress implicitly, and perhaps expressly, empowered advisory groups to suggest, and districts to adopt, procedures that

56. See Senate Hearings, *supra* note 53, at 217-18 (Statement of Hon. Aubrey E. Robinson, Jr.) (detailing Judicial Conference efforts to develop a response to S.2027).

57. See Judicial Conference Approves Plan to Improve Civil Case Management, 22 THE THIRD BRANCH No. 5, May 1990, at 1.

58. *Id.* at 2.

59. See 28 U.S.C. § 478 (advisory groups).

60. 28 U.S.C. § 473 (advisory group "shall consider and may include" CJRA principles) (emphasis supplied).

61. Levin, *supra* note 54, at 890; see also Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1448 (1994) (CJRA not intended to permit deviation from Federal Rules).

contravene provisions in the Federal Rules and the United States Code.⁶² Tobias quotes the United States District Court for the Eastern District of Texas as stating, “[T]o the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling.”⁶³ The issue awaits resolution in the courts and in the circuit and judicial conference committees that have review authority over the CJRA plans.⁶⁴

Whatever the correct legal conclusion, the reality is that district court plans *are* deviating from the Federal Rules of Civil Procedure.⁶⁵ Even the General Counsel of the Administrative Office appeared to accept deviation on discovery matters, concluding that the CJRA “expands the civil rules” in limited areas such as discovery.⁶⁶ Professor Tobias targets other explicit deviation. The Eastern District of Texas adopted an offer of judgment provision inconsistent with Rule 68.⁶⁷ The Montana District is assigning cases equally to Article III and magistrate judges, with a time-limited opt-out provision, in conflict with 28 U.S.C. Section 636(c)(2) (and perhaps with the Constitution).⁶⁸

In fact, as Tobias points out, many districts are adopting rules that not only are inconsistent with the framework of federal practice, but seem not even expressly permitted by the CJRA itself.⁶⁹ Examples are deeply troubling. The Eastern District of Texas imposed a limit on contingency fees.⁷⁰ The Western District of Missouri adopted its own mandatory, non-binding ADR program.⁷¹ The Montana District set up a peer review committee to review litigation conduct of lawyers.⁷² While the CJRA does permit adoption of “other features,” at least some of the innovations conflict with statutory or constitutional principles.⁷³

Second, the very nature of the advisory groups is likely to lead to ill-advised and balkanized reform. The chief judge was ordered to appoint the group within ninety days, and required that each group “shall be

62. Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 54-55.

63. *Id.* at 51 (quoting Civil Justice Expense and Delay Reduction Plan, at 9 (Dec. 20, 1991)).

64. TAN regarding this review authority.

65. On such conflicts see Robel, *supra* note 61, at 1452-53.

66. Levin, *supra* note 54, at 890.

67. Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1417 (1992).

68. *Id.*

69. *Id.* at 1416-17.

70. *Id.* at 1420.

71. *Id.*

72. *Id.* at 1421.

73. 28 U.S.C. § 473(b)(6) (Supp. II 1990).

balanced and include attorneys and other persons who are representatives of major categories of litigants in such court"⁷⁴ There was no requirement of, or provision for, expertise in either rulemaking or social science skills each group would desperately need. Moreover, with the exception of the United States Attorney, no member was permitted to serve for more than four years, eliminating any hope of continuity.

Third, the heart of the groups' task was entirely discretionary. The advisory groups were required to recommend measures to eliminate cost and delay, but nothing specific was required in those plans. Rather, the legislation set out six principles that the plans "may include."⁷⁵ To make matters worse, the legislation as adopted specifically required that the advisory groups "shall take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys."⁷⁶ This, quite obviously, is an invitation to disuniformity.

Finally, the Act creates an illusion of careful study and experimentation that is just that—an illusion. To read the Act one gets an idea that the CJRA is a carefully controlled study that commences with local projects and ends with comprehensive reporting on the projects that have worked, along with national direction from the Judicial Conference on the effectiveness of management techniques. The advisory groups and district courts are charged to initially and on a continuing basis assess the state of the docket.⁷⁷ The Judicial Conference is to review plans created by early implementation districts and may develop a model plan or plans.⁷⁸ Finally, section 479 of the CJRA mandated an elaborate process of information collection and reporting about the cost and delay plans.⁷⁹

The difficulty with all this is that true experimentation—which can be very valuable—requires accurate data collection and reporting, control groups, and a basis for assessing success and failure. The CJRA provides for none of this.⁸⁰ Advisory groups necessarily engaged in extremely unscientific studies of cost and delay, as well as the state of the docket. There were no national questionnaires or studies. Much of the "evidence" collected was anecdotal. As we discuss below, plans varied widely. For most of the districts there were no control groups.

74. 28 U.S.C. § 5473(b)(6) (Supp. 1992).

75. *Id.* § 473.

76. *Id.* § 472(c)(2).

77. *Id.* § 472(c).

78. See Civil Justice Reform Act, Pub. L. No. 101-650, Title I, § 103(c).

79. 28 U.S.C. § 479(c).

80. See *infra* notes 152-56 and accompanying text regarding experimentation.

As the saying goes, "garbage in, garbage out." The Judicial Conference's conclusions cannot hope to have any real value, because the "data" are so unreliable. Experiments can yield important information, but not if they are designed improperly.

Although the final results will be some time in coming, every early indication is that the very fragmentation in process one might have expected is occurring. The CJRA required a series of reports on the various plans from the district courts.⁸¹ The final report on the contents of the various plans (but not yet, obviously, on their ostensible success or failure) is not due out until December 1994. But many of the plans are available. Moreover, the Judicial Conference prepared a Model Plan, as well as documentation about the plans in early implementation and pilot districts.

The "Model Plan"⁸² is perhaps a good place to start, for it is not a model plan at all. Rather, the Introduction tells us, "no single method of case management is suitable for all courts."⁸³ For this reason, the Model Plan appears in the form of a "menu," which allows the courts to select the provisions most responsive to each court's needs.⁸⁴ What follows is perhaps best described as a smorgasbord, including numerous provisions relating to every aspect of the Act, as well as "a number of unique initiatives undertaken by individual courts to address special problem areas."⁸⁵ Given the wide variety of choices, even if districts looked only to the Model Plan, there likely would be tremendous diversity.

Opportunities for variance are rife in the Model Plan. For almost any aspect of case management there are two to four "alternatives." With regard to ADR programs alone, there are seven categories of possible ADR programs, each with several possible alternatives.⁸⁶ Under the "Ohio Northern" alternative, Early Neutral Evaluation ("ENE") is upon motion of the court or parties. The rules governing evaluation under that alternative run almost six pages in length.⁸⁷ Under the "Idaho" alternative, ENE is upon consent of all parties.⁸⁸ Under the "California Southern" alternative, ENE is mandatory.⁸⁹ Under the "Pennsylvania

81. 28 U.S.C. § 472.

82. JUDICIAL CONFERENCE OF THE UNITED STATES, MODEL CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Oct. 1992).

83. *Id.* (introduction).

84. *Id.*

85. *Id.*

86. *Id.* at 52-82.

87. *Id.* at 52-57.

88. *Id.* at 57.

89. *Id.* at 58.

Eastern" alternative, arbitration is compulsory in many civil cases in which over \$100,000 is in controversy.⁹⁰ Under the "Idaho" alternative, arbitration is available upon consent of the parties.⁹¹

Of course, the existence of these district-named alternatives reveals that the Model Plan is not a model at all, but simply an indication of the balkanization that has occurred in the Early Implementation Districts ("EIDS") under the CJRA. The Judicial Conference apparently has subscribed wholeheartedly to the idea of "bottom up" reform, adopting diversity as its plan for civil procedure. Although the Model Plan provides some commentary, by and large it leaves districts free to do anything they like, providing little guidance as to what might be preferable.

Early reports on the CJRA suggest tremendous fragmentation is occurring. The final reports on the CJRA are not yet out, but Congress required the Judicial Conference to report on the EIDs by June 1, 1992. That report comprehensively describes the CJRA plans of thirty-four EIDs, roughly one-third of all the federal districts.⁹² The report demonstrates tremendous diversity in approaches to data-gathering and rulemaking, not to speak of procedures themselves. Anyone wanting a comprehensive view of the fragmentation of civil procedure will need to read the entire report, with its numerous multi-cell charts collecting and trying to organize all the different approaches. But for a taste of the situation, this part of the report, dealing with Differential Case Management ("DCM"), may make the point succinctly:

Track Numbers. Two of the twenty-six courts that adopted DCM decided not to use formalized "tracks" for case management. The remainder established tracks numbering from two to six. Three and six track systems were the most favored, representing eight and seven of the subject courts, respectively. Four courts chose two tracks, three courts chose four tracks, and two courts chose five.⁹³

The Report on EIDs demonstrated not just inter-district divergence, but intra-district divergence as well. For example, the Western District of Missouri has an "early assessment program" for civil cases.⁹⁴ The program "is designed to encourage parties to assess their case at an

90. *Id.* at 67.

91. *Id.* at 65.

92. JUDICIAL CONFERENCE OF THE UNITED STATES, CIVIL JUSTICE REFORM ACT REPORT: DEVELOPMENT AND IMPLEMENTATION OF PLANS BY EARLY IMPLEMENTATION DISTRICTS AND PILOT COURTS (June 1, 1992).

93. *Id.* at 11.

94. *Id.* at 27.

early stage.⁹⁵ But not all cases are in the program. Of the eligible cases, one in three is randomly assigned to the program; one in three is not permitted to use the program; and in one of three cases the parties may opt-in.⁹⁶ For cases in the program, the parties must choose one of four ADR options (arbitration, mediation, early neutral evaluation, or magistrate judge settlement conference).⁹⁷ If the parties cannot choose, the choice is made for them.⁹⁸

It would be difficult to summarize the fragmentation the CJRA is yielding. Perhaps, when all is said and done, a picture *is* worth a thousand words. What follows, then, is the chart used to summarize the state of affairs in the Middle District of Tennessee following “adoption” by the district court of the advisory group’s plan.⁹⁹ Adoption is set out in quotations, for reasons that the chart makes amply clear. The vertical axis of the chart reflects key aspects of the district plan. The horizontal axis lists the judges in the district (the latter two columns are magistrate judges, who under the adopted plan have primary responsibility for case management). The chart informs users of the system of the rules that will govern their cases. It, of course, is not published in any fashion available nationally. Need we say more?

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. For what it is worth, one of us, Barry Friedman, was a member of the Middle District of Tennessee’s Advisory Committee. Despite some initial skepticism about the endeavor, Friedman was pleased with the group’s recommendations, although—as the chart indicates—it is uncertain what exactly has become of them.

Chart from June 23, 1994, CJRA Assessment Meeting
DIFFERENCES IN CASE MANAGEMENT PROCEDURES

	Nixon	Wiseman	Higgins	Echols	Morton	Sandidge	Haynes
1. Who is Case Manager?	MJ	MJ	DJ	MJ-1/2 DJ-1/2	N/A		
2. Time within which ICMC scheduled after case filed	45 days	45 days	45 days	MJ-45 DJ-90	N/A	45 days	45 days
3. Discovery Stay pre-ICMC	Yes	Yes	Yes-unless ordered in specific case	MJ-Yes DJ-No	No N/A	Yes	Yes
4. Description of Order entered after ICMC	N/A	N/A	"Order"	"Discovery Plan"	N/A	"CM Order"	"CM Order"
5. Trial Scheduled at ICMC or in initial order	No	No	Yes	No	Yes	No	No
6. Refers Dispositive Motions in CCM cases to MJs	None yet	No	Yes-but not in all cases	None yet	No		
7. Requires compliance with FRCP 26(a)(1)	No	No	No	No	Yes	No	No
8. Has indicated that, as a general rule, will require compliance with Local Rule 12(c)(6)(c)	No	No	Yes	No	Yes		
9. Stages Discovery	N/A	N/A	No-except for discovery on qualified immunity	Yes	No	Yes	Yes
10. As a general rule, enforces stay of discovery while dispositive motions pending			No	Yes	No	Yes	Yes

LEGEND: CCM Customized Case Management
 DJ District Judge
 ICMC Initial Case Management Conference
 CM Case Management
 MJ Magistrate Judge

B. *The 1993 Civil Rules Amendments*

The judiciary—or at least the Judicial Conference and the Federal Rules Committees—weighed in on the question of reform with the 1993 amendments to the Federal Rules of Civil Procedure. The most controversial of these amendments were the amendments to Rule 26, which require mandatory disclosure by the parties of certain information at the outset of litigation and without a discovery request. Three Supreme Court Justices dissented on the merits from the order transmitting the rules to Congress.¹⁰⁰ A vigorous effort was made to kill these amendments in Congress,¹⁰¹ an effort that ultimately failed more for scheduling reasons than anything else.

The 1993 amendments exacerbate the problem with fragmentation of the federal rules. The amendments generally are rife with provisions permitting district courts to opt-out from the federal rule by local rule or order of the court. Opt-out provisions extend to a variety of rules both minor and significant, ranging from the “meet and confer” requirement of Rule 26(f) to modification of the newly presumptive number of interrogatories or depositions permitted under the rules.¹⁰²

We are unaware, prior to the adoption of the Rule 26 amendments, of any other such provisions permitting districts to opt-out of federal rules. There have been rules—Rule 16 comes notably to mind—that left certain procedures to the discretion of the district court.¹⁰³ Moreover, for better or for worse, local districts might adopt their own general rules regarding such discretionary features. But no rule we can pinpoint simply gave district courts the option of ignoring the rule.¹⁰⁴

The history of the new mandatory disclosure rule, Rule 26(a), highlights more than any other deep problems with the rulemaking process and the resultant balkanization of the federal rules. When the mandatory disclosure rule was proposed in August of 1991, it ran into a gale of criticism from the bench and bar. In addition to attacking the rule on the merits, critics argued that widespread change of this nature

100. See 113 S. Ct. 581 (Scalia, J., dissenting, joined by Justices Thomas and Souter) (dissenting from transmission of rules); *Id.* at 575 (statement of Justice White expressing concern about rulemaking process).

101. See *Thumbs Down From House Rule Changes*, CONGRESSIONAL QUARTERLY WEEKLY REPORT, Nov. 6, 1993 at 3057.

102. See, e.g., FED. R. CIV. P. 26(a) (“Except to the extent otherwise stipulated or directed by order or local rule, . . .”); accord FED. R. CIV. P. 26(a)(4); 26(b); 26(d).

103. FED. R. CIV. P. 16.

104. See Lauren K. Robel, *Mandatory Disclosure and Local Abrogation: In Search of a Theory of Optional Rules*, 14 REV. LITIG. 49, 50, 59 (1994) (discussing unprecedented nature of Rule 26 and questioning sense of rule deviation).

was inappropriate given the experimentation encouraged under the CJRA. In their CJRA plans, several districts had previously adopted some form of mandatory disclosure requirement. Responding to these criticisms, the Advisory Committee initially withdrew the proposal, only to reinsert it at the last moment albeit with some substantive changes. The Advisory Committee Notes indicate that the Committee felt that to wait for the results of the CJRA experimentation period would delay the reforms too long—another five years.¹⁰⁵

In a nod to the CJRA, however, the Advisory Committee did decide to permit courts by local rule or order of the court to opt out of the mandatory disclosure provisions in whole or in part.¹⁰⁶ In essence, the result is a national standard from which courts may opt-out, rather than the CJRA's approach of inviting courts to opt-in if they choose. The mandatory disclosure provision was voted down in the House of Representatives, and the Committee Report expresses a preference for the latter approach.¹⁰⁷ As will be obvious in a moment, this may be a distinction without a difference from the perspective of uniformity.

The adoption of the mandatory disclosure rules demonstrate numerous problems with the rulemaking process in general. Perhaps the most pervasive is, again, the sad state of what seems to be accepted as experimentation. The Advisory Committee Notes appear to rely upon "the experience of district courts that have required disclosure of some of this information . . .," and the "far more limited, experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated . . ." by the new rule.¹⁰⁸ In his dissent, Justice Scalia chided the Advisory Committee for not awaiting more detailed study.¹⁰⁹ So too did the Committee Report from the House of Representatives.¹¹⁰ But in the latter case, at least, the further study was to be provided by the process of CJRA experimentation, a process that we already have seen is somewhat less than scientific. One may comfortably add to this problem with "junk science" a certain hubris on the part of those involved in the rulemaking process, who displayed an odd eagerness to achieve reform at any cost, and over vast opposition.

105. FED. R. CIV. P. 26(1)(1) advisory committee's notes (1993 Amendments). See Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1445 (1994) (reviewing failure to conduct study before changing discovery rule).

106. FED. R. CIV. P. 26(1)(1), advisory committee notes (1993 Amendments).

107. See H. R. REP. NO. 103-319, 103d Cong., 1st Sess., at 5 (1993).

108. FED. R. CIV. P. 26 advisory committee's notes (1993 Amendments).

109. 113 S. Ct. at 5-6.

110. H. R. REP. NO. 103-319 at 5.

The result of the rulemaking process is nothing that can seriously be called a rule at all. On March 1, 1994 the Federal Judicial Center released a compilation of federal district court practice regarding the mandatory disclosure provisions of Rule 26.¹¹¹ The results of the compilation defy easy summary because so many district courts are doing so many different things. The compilation itself includes a five-page table showing the practices of the district courts, with this attempt at tallying:

Nature of the Court's Response	Number of Courts
Courts whose decisions are final and where FRCP 26(a) is in effect	32
Courts whose decisions are final and where FRCP 26(a) is not in effect (a)(1) only is not in effect	6
Courts whose decisions are final and where FRCP 26(a) is not in effect but that have other provisions for disclosure	4
The individual judge is explicitly given authority to require disclosure	21
Local rules or the CJRA plan require disclosure	13
Courts whose decisions are provisional	8
FRCP 26(a) provisionally is not in effect	30
(a)(1) only is provisionally not in effect	25
Local requirements are in place	12
(a)(1)-(3) are provisionally not in effect	6
Local requirements are in place	13
FRCP 26(a) provisionally is in effect	2
	5 ¹¹²

The report states that "few of the fifteen largest districts, as measured by number of judgeships, are fully implementing Rule 26(a)."¹¹³

Of course, counting the practices of districts themselves minimizes the extent of diversity. In many of the districts, the decision whether to engage in mandatory discovery is left to individual judges, and judges are likely to have practices strung out on a continuum. Moreover, districts (and individual judges) may, and do, pick and choose among the various new provisions of Rule 26.

The result is a hodgepodge, one for which it is difficult to see the benefits. The diversity of practice is troubling, because discovery most assuredly is a practice that affects substantive rights and litigation

111. See 1994 U.S.S.C.A.N. No.3, 103rd Cong., 2d Sess., at 130.

112. *Id.* at 6135-36.

113. *Id.* at 6136.

outcomes. Undoubtedly, if the relevant information is available, there will be forum and judge shopping based upon the diverse application of the rules. Moreover, there is no serious argument that experimentation justifies this crazy-quilt, for the nature of the exercise promises highly conflicting and unscientific results.

C. *Why the Trend to Localism?*

No single factor accounts for the increased reliance on local decisions concerning procedural rules. Above all, concern with managing the enormous caseloads of the district courts has led to calls for procedural reform and the enactment of local rules throughout the country. In 1975, for example, 117,320 new civil cases were filed in federal courts,¹¹⁴ and 230,509 new civil cases were filed in 1992.¹¹⁵

The growth in the caseload can be dealt with in only three possible ways. One would be to increase the number of judges. Although there has been some increase in the size of the federal bench, the result still has been a substantial increase in the number of civil cases filed per judge.¹¹⁶ In 1975, approximately 293 cases were commenced per judge;¹¹⁷ now it is about 355 cases per judge.¹¹⁸ There is no indication that Congress is prepared to create enough new judges to deal with the increased volume of cases in federal courts.¹¹⁹

A second way to deal with the growing caseload is for Congress to curtail some aspects of federal jurisdiction. For example, a few years ago Congress increased the jurisdictional amount in diversity cases from in excess of \$10,000 to in excess of \$50,000.¹²⁰ The Federal Court Study Commission proposed other ways of decreasing the caseload in federal courts, including abolishing diversity jurisdiction.¹²¹ Again,

114. 1977 Annual Report of the Director of the Administrative Office of the United States Courts, table 11, at 189 (1977).

115. 1992 Annual Report of the Director of the Administrative Office of the United States Courts, table c, at A1-48 (1993).

116. See William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651, 699 (1994).

117. 1977 Annual Report of the Director of the Administrative Office of the United States Courts, table 15, at 205 (1977).

118. 1992 Annual Report of the Director of the Administrative Office of the United States Courts, table 5, at 7 (1993).

119. Increasing the number of federal judges is controversial, with some claiming substantial disadvantages to a great increase in the size of the federal judiciary. For a review of these arguments see Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67 (1990).

120. 28 U.S.C. § 1332 (1988 amendment).

121. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURT STUDY COMMITTEE 14 (1990).

although there have been some efforts in this regard, major reductions in the scope of federal jurisdiction are unlikely.

That leaves the final alternative: managerial reforms. Procedural rules are changed to try to make courts more efficient and better able to handle the crush of their caseloads. For example, the local rules discussed above that encourage settlements and require, or at least promote, the use of ADR are efforts to free up judicial resources. The Civil Justice Reform Act required each district to devise plans for better case management and thus fostered this trend towards localism.¹²² Local rules are much easier to change and to adopt than are revisions in the Federal Rules of Civil Procedure. Thus, as districts perceived a need for additional reforms to make procedures more efficient they changed their local rules and adopted new rules to cover matters that previously had been unregulated.

At the same time, the lack of consensus as to how to deal with the rise in the federal courts' caseload also is responsible for the greater divergence among districts. Allowing individual districts to opt-out of the new version of Rule 26 was a political compromise in response to strong opposition to the disclosure provisions. Likewise, permitting individual districts to implement various discovery rules reflects a lack of national agreement and a compromise to allow the matter to be handled locally. There is a widespread sense of discovery abuse, but no agreement as to how to solve the problem. The result, especially after allowing districts to opt-out of new Rule 26, is enormous divergence in discovery procedures across the country.

Allowing matters to be resolved at the local level also has a political benefit for decisionmakers: they can duck deciding a hard question by leaving it to local rules to handle. Especially in highly controversial areas where any particular solution is likely to produce intense disagreement, local rules allow the Judicial Conference to propose solutions, but not encounter political heat because the actual choices are made at the local level.

A sense of federalism, or more precisely, localism, also explains the increasing lack of uniformity. Although all federal courts are part of the same federal judicial system, there is a view that solutions are often best arrived at locally. In part, this is based on a sense that local participation will produce more satisfaction with the rules and therefore make them easier to implement. In part, too, there is a view that problems and needs vary across the country and that local rules can best be tailored to local concerns.

122. 28 U.S.C. § 471.

Finally, the trend towards local rules is exacerbated by the relatively minimal oversight by federal courts of appeals. The courts of appeals, and the Judicial Conference, have the authority to overrule the local rules. Yet, this is very rarely done. Court of appeals judges seem to defer to district court judges as to matters of procedure in the district courts. The courts of appeals seem much more willing to accept disuniformity among districts than to invalidate local rules.

All of these pressures push in one direction: ever more matters covered in local rules and ever more divergence among districts in their rules of procedure. Below we argue this trend should be reversed.

III. THE CASE FOR UNIFORMITY

A primary justification for adopting the Federal Rules of Civil Procedure was to increase the uniformity in procedural rules in federal courts across the country. Prior to the adoption of the Federal Rules of Civil Procedure, a federal district court was supposed to follow the procedural rules for state courts in that state.¹²³ Rules thus varied enormously among federal courts as state law determined the federal courts' procedural rules. In response to an enormous disparity among federal courts in procedures, the Federal Rules were adopted with "the very purpose . . . of providing for a single uniform system of procedure."¹²⁴

But more than a half century after the adoption of the Federal Rules, is uniformity still a value worth seeking? Are there greater benefits in allowing diversity in the procedural rules among the federal districts? In addressing these questions, initially we consider the benefits of uniformity that are compromised or lost with the trend to localism that is described above. Then, we respond to the claimed benefits of localism—such as local customs, differences in dockets, and experimentation—and argue that these are largely illusory and do not justify the current trend away from uniformity.

A. *The Benefits of Uniform Federal Rules*

Prior to the adoption of the Federal Rules of Civil Procedure, the Conformity Act of 1872¹²⁵ required that federal courts conform to the procedural rules of the state courts.¹²⁶ Specifically, the Conformity Act

123. Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORNELL L.Q. 443, 451 (1935).

124. *Id.* at 448.

125. Act of June 1, 1872, ch. 255, § 5, 17 stat. 197.

126. *Id.*

required that

the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity or admiralty cases, shall conform, as near as may be, to the practice, pleadings, and forms and modes of procedure existing at the time in like causes in the courts of record in the State within which such district courts are held.¹²⁷

The result, by definition, was an enormous divergence of procedure in federal courts. There was "great disuniformity in practice among the federal courts, which varied widely from the archaic to the relatively modern, depending on the varying practice among the states."¹²⁸

There is thus no doubt that the creation of the Federal Rules of Civil Procedure was motivated, in part, by the desire for uniform procedures in the federal courts.¹²⁹ The justifications for uniformity in the 1930s are still powerful today.¹³⁰ Indeed, today few question the value of uniformity. If asked whether the Federal Rules should be abolished and replaced entirely by local rules, it is safe to say that virtually no judge or attorney would make that choice. The trend towards localism is paradoxical because it coexists with a strong consensus that uniform procedural rules are desirable.

There are many commonly accepted values to uniformity. First, uniform federal rules are more fair to litigants. When rules vary among districts, the costs of litigating can vary enormously. For example, districts with strict limits on discovery might be much less expensive to litigate in than districts without limits on discovery. The outcome of cases can depend not on the merits, but on the district and its procedural rules. The result of a case might be different in a district which pressures settlement and the use of ADR compared with one that does not. It seems unfair that the result in federal courts might turn on geography.

The response to this, however, is that such disparity is an inherent part of a large nation and that diversity can be a good thing. For example, criminal laws and penalties vary greatly among the states. Why then should procedures not vary among federal districts to reflect differing needs and views?

The difference is that federalism accords to each state great latitude

127. *Id.*

128. JAMES FLEMING, ET AL., *CIVIL PROCEDURE* 20 (4th ed. 1992).

129. See William D. Mitchell, *Uniform State and Federal Practice: A Demand for More Efficient Judicial Procedure*, 24 A.B.A. J. 981 (1938).

130. In addition to the values discussed here, see Janice Toran, *Tis a Gift to Be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352 (1990) (discussing the aesthetics of procedural simplicity).

in devising its own laws so long as they are not inconsistent with the Constitution and federal laws. A consequence of this is that there will be disparity among the states in both the law's substance and procedure. But the federal courts are supposed to be a single system. Within that system it is unfair for the outcome to depend on the accident of location.

Second, uniformity is desirable to avoid forum shopping. The more local rules cover important matters and the more that such rules vary, the greater the amount of likely forum shopping. For instance, if one district has a requirement for mandatory ADR and another does not, lawyers are likely, at times, to choose where to file based on their desire to have or to avoid such mechanisms. Similarly, a lawyer's desire to have or to avoid the mandatory disclosure provisions of the new discovery rules will affect, and perhaps determine, where the case is filed.

The response to this is to question whether forum shopping is undesirable. The presumption in many areas of procedural law is that forum shopping is something to be avoided. For example, the landmark case of *Erie Railroad v. Tompkins*,¹³¹ which held that state law should be used in diversity cases, was based, in large part, on a desire to decrease forum shopping.¹³² Yet, what is undesirable about litigants selecting the forum where they believe that they have the best chance of succeeding? Certainly, litigants choose whether to file a case in federal or state court partly based on an assessment of where they have the greatest chance of prevailing. Likewise, a litigant might choose to file in one state or another, or in one district or another, based on an assessment of the judges in each jurisdiction and their likely views on the issues at stake.

Perhaps the dislike of forum shopping is based on an inchoate sense that it is wrong to have results turn on the choice of forum. But put in this way, the opposition to forum shopping seems to assume a degree of fungibility among judges and a degree of formalism that is unrealistic and simply wrong.

The opposition to forum shopping might be the sense that it is unfair that results vary depending on geography within the federal system. This, of course, means that the forum shopping argument is just another way of expressing the fairness claim discussed above.

There also is an efficiency-based reason for wanting to discourage forum shopping. The more the two sides in a lawsuit see the costs or outcome depending on the district where the case is litigated, the more there will be fights over venue and jurisdiction. Uniformity in procedur-

131. 304 U.S. 64 (1938).

132. 304 F.2d 603, 74-75 (1938).

al rules thus eliminates one reason why the parties might have lengthy and costly fights over the location of the litigation.

This is closely related to a third justification for uniformity: the benefits of standardization. If rules vary among districts, lawyers must expend substantial time learning the individual rules for each district. Inevitably, lawyers will sometimes err in dealing with unfamiliar procedures, leading to additional court time in admonishing attorneys and in enforcing compliance. Standardization is more efficient and decreases the costs of litigation.

Lawyers increasingly practice in a nationwide market for legal services. Such nationalism is good in that it increases the competition among lawyers and allows more specialization. The greater the divergence among local rules, the harder it is for the out-of-state attorney to practice in a different jurisdiction. Although such localism might be a boost to the local bar, it is the type of parochialism that is ultimately inefficient. In *California*, a plaintiff in San Diego should not be encouraged to choose a San Diego attorney over one from Los Angeles or San Francisco simply because the San Diego attorney knows the local rules better than the other lawyers.

B. The Supposed Benefits of Local Rules

Despite what we believe are good arguments against a fragmented system of local rules, there are those who argue that local rules serve their purposes. In this section we address the primary arguments in favor of local rules. Our conclusion is that there are very few instances in which local rules are necessary or appropriate. Further, we conclude that there should be a central system for reviewing proposed local rules, in order to ensure that a local rule is necessary and furthers a purpose that outweighs the disadvantages of rule fragmentation.

1. Local Custom. One of the arguments advanced most frequently in favor of local rules is "local custom." The argument seems to have two related pieces; first, that conditions differ in different districts requiring different rules, and second, that local actors simply are familiar with doing things a certain way. For example, just two years after the Federal Rules of Civil Procedure were adopted, a committee of district judges charged to study local rules concluded that "varying local conditions made 'absolute uniformity in the local rules of the district courts . . . impracticable and inadvisable.'"¹³³

To the extent that the argument rests on local custom, it seems to be

133. Subrin, *supra* note 1, at 2017 (quoting the Knox Report).

a thin argument indeed. Stephen Flanders explains that the practice of law is specific to a jurisdiction "in a degree unheard of in professions such as medicine or engineering."¹³⁴ He goes on to say, "Federal judges, for the most part, are products of the locations they serve."¹³⁵ Diversity is a necessity in federal courts so that they can respond not only to local expectations and practice but also to specific institutional demands."¹³⁶ Putting the very last piece aside for a moment, this sounds a good deal more like an explanation of why local rules do exist than why they should. Undoubtedly it is convenient for locales to have rules that reflect local practice, particularly to the extent that "local practice" means "the same as practice in the state courts." This very argument, however, was rejected when the federal rules were adopted. One of the primary arguments in favor of the Conformity Act was that it would be easier for practitioners in a locale to have to learn only one set of rules. The federal rules were adopted despite this plea, however, largely because it was felt that a system of national courts should run under uniform rules. In other words, national uniformity won out over local uniformity.¹³⁷

What made sense in 1938 makes even more sense today. While it is certainly correct that much of the practice of law for many practitioners is local, it also is true that increasingly the practice of law is crossing not only state but national boundaries.¹³⁸ The premise of the federal courts is that they reflect one court system doing the nation's business. Permitting a profusion of local rules for the simple reason that local practitioners are familiar with them inappropriately disadvantages litigants and their counsel coming from out of state. Absent some better reason, it is insufficient simply to argue in favor of local rules for no other reason than that locals like to do things a certain way.

The argument takes on a bit more force when proponents of localism seek to justify local rules on the ground that local conditions differ, requiring a different set of procedures. This may be what Flanders is getting at when he discusses "specific institutional demands,"¹³⁹ and it certainly is what the framers of the CJRA had in mind when they

134. Steven Flanders, *Local Rules in Federal District Courts: Userpation, Legislation, or Information?* 14 *LOY. L.A. L. REV.* 213, 263 (1981).

135. *Id.*

136. *Id.* at 263-64.

137. See generally Subrin, *supra* note 1, at 1999-2011. See also Herbert M. Kritzer & Frances Kahn Zemans, 27 *LAW & SOC. REV.* 535, 549-52 (1993) (questioning existence of "local legal culture" in federal districts).

138. See Barry Friedman, *Federalism's Future in the Global Village*, 47 *VAND. L. REV.* 1441, 1458 (1994) (discussing how GATT will internationalize the practice of law).

139. Flanders, *supra* note 137, at 263-64.

advocated "bottom up" reform. Beginning with the Brookings Institute Study there was recognition that "our recommendations take account of the diversity of caseloads and types of litigation across different federal jurisdictions."¹⁴⁰ Dockets may differ significantly in districts due to a heavy caseload of criminal cases, or a concentration of products liability cases such as asbestos or breast implants.

While the argument for local rulemaking based upon diversity has some superficial appeal, it does not hold up well under close scrutiny. As we stress above, procedure affects substance; the way the rules work affects outcomes. It may well be that certain districts are laboring under numerous criminal cases, and so it is more convenient to change the way civil cases are handled in order to free up judicial time. Rural districts may simply have smaller caseloads making it easier to deal with the docket without substantial reform. But despite these factors, we are troubled by the answer being to change the procedure in a class of cases to accommodate others. While this might, within a district, seem an appropriate approach, across district lines it serves to exacerbate unfairness. The answer to overburdening should come from Congress, either in the form of new judgeships or curtailed jurisdiction. Concededly congressional reform has been slow in coming in the past, but it seems to do little good to take the heat off by developing a special assembly line for general civil cases that must be handled expeditiously to make way for other cases.

Indeed, the closer one looks the more doubtful the argument becomes. The advocates of local choice based on local custom or diversity unfortunately do not offer numerous examples of necessary diversity in local rules. More often, the argument is stated at a high degree of generality. When examples are given, however, the practice of fragmentation appears even odder. For example, Professor Cavanagh suggests that "minutiae" such as "time limits for filing and responding to motions, the form and content of briefs, the content of final pretrial orders, and whether the court will entertain oral argument on motions," is not the stuff of federal rules, and "by and large . . . turn on local custom."¹⁴¹ As long ago as the Knox Committee Report, local rules were seen as necessary regarding "rules of admission of attorneys to practice, calendaring motions, and assignment of cases for trial."¹⁴²

It is readily apparent that many of these "minutiae" have the ability substantially to affect rights, and virtually none of the items is such that

140. Brookings Study, *supra* note 41, at 11.

141. Cavanaugh, *supra* note 11, at 731.

142. REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON LOCAL DISTRICT COURT RULES III (1940) at 7-9, *quoted in* Subrin, *supra* note 1, at 2017.

local rules are required. The availability of oral argument, or the time available to file motions are good examples of rules that can affect an outcome. The very diverse practices of the federal circuit courts with regard to oral argument are troubling. Oral argument is important or it is not; there ought to be some consensus. Surely the importance of oral argument does not vary by circuit.

Similarly, rules that treat "minutiae" are not (simply for this reason) appropriate for local variance. We discuss below the problem of whether and when local rules are necessary to fill the interstices of the federal rule. Answers may differ depending upon circumstances. But the need for a set of less weighty rules is not an argument that those rules be different in every jurisdiction of the country. It is the nature of such rules that they are numerous and multiply. A danger of the rulemaking process is that rules become the panacea for every problem. While this problem must be addressed, it will not help matters to have the problem addressed in every district. This will only contribute to delay, cost, and unfairness to out-of-district litigants.

2. Information and Management. Some local rules are justified as essentially housekeeping matters. For example, some local rules "simply provide[] mundane information for lawyers about how, where, and when the court operates."¹⁴³ Stephen Flanders offers this as a primary and important function of local rules. He cites as examples the hours of the clerk's office, and rules about case assignment.¹⁴⁴ Another category of rules that Flanders conjoins are rules relating to management, rules that are "essential tools in implementing court policy in administrative matters."¹⁴⁵ "Matters such as determining the balance between 'free press' and 'fair trial' concerns, dismissing cases for failure to prosecute and interrogating jurors after verdict all involve regulation of the conduct of lawyers, and are clearly within a court's discretion."¹⁴⁶ Simply pointing to housekeeping purposes does not truly justify local rules, however, as a distinction between Flanders' categories makes clear. The first category—rules that simply inform—are unobjectionable, precisely because they are not rules. If they merely inform, but do not require anything of lawyers, then the provision of information is commendable. The only question is whether the

143. Flanders, *supra* note 137, at 262.

144. *Id.* at 262-63.

145. *Id.* at 218.

146. *Id.* at 218-19.

information needs to be packaged as a "rule."¹⁴⁷

To the extent that the local rules require conduct of lawyers, however, these rules—be they for "administrative matters," "management," or whatever—still are going to implicate the concerns we discuss above. The labels themselves are, to a certain extent, misleading in that they mask what might be a very real impact on substantive rights. An evident example of Mr. Flanders' own is "dismissing cases for failure to prosecute."¹⁴⁸ These rules are rules, and appropriately are covered in the section immediately following.

3. Interstitial Rules. Many rules are justified on the ground they are interstitial. Often-times this is explicit, as when Professor Cavanaugh explains that local rules are beneficial when they "fill in the gaps left by national rules."¹⁴⁹ Other times interstitial rules are explained as being within the district court's discretionary authority.¹⁵⁰ Interstitial rules prove to be a difficult topic, though less so after some ground is cleared away.

First, it comes as at least some surprise that there is a debate about whether local rules in conflict with federal rules should be permitted. Rule 83 explicitly prohibits this, and for what would seem to be good reason.¹⁵¹ What, after all, is the point of having a national rule if local districts may deviate at will? Nonetheless, both the CJRA and the 1993 Amendments appear to contemplate local rules inconsistent with national standards. The CJRA is unclear as to this, but many districts have adopted plans inconsistent with the federal rules. The 1993 Amendments have an explicit opt-out provision, so in a sense local choice is not "inconsistent" with the federal rule. In either event the trend is a bad one, and probably results from an inability to reach consensus on the national level.

Second, the field of interstitial rules is—or ought to be—markedly smaller than the "gaps" in the federal rules. One interpretation of

147. Having said this, two related points present themselves. First, obviously any information also in a sense is a rule. If the clerk's office is open between 9:00 a.m. and 5:00 p.m., then one must file papers between those hours. Second, one reasonably might question the amount of "information" that really must differ from district to district. Why not have the clerk's offices open at the same time throughout the country so attorneys do not need to guess or try to locate the local rule? Despite these two points, we are willing to assume there is some information (directions to the courthouse?) that is useful to all lawyers, might differ among districts, and ought to be published.

148. Flanders, *supra* note 137, at 219.

149. Edward D. Cavanaugh, *supra* note 11, at 731.

150. See generally Flanders, *supra* note 137, at 221.

151. See FED. R. CIV. P. 83.

interstitial rules might allow for any rule not flat out contradicted by the federal rules. This, however, is too broad a definition. For example, the federal rules, until recently, set no limits on interrogatories or depositions. By local rule, however, limits were set in some districts. This type of local rule strikes us as too fundamentally different in policy from the federal rules to be taken as "interstitial." Interstitial rules ought to be those that either fill in the local rules where wide discretion is granted, or clear up something left unclear by the national rules. An example might be a local rule setting out the procedure for drafting a Rule 16 order. Rules of broader scope than this might also be appropriate, but they should be seen for what they are: an attempt to formulate important new policy. As such, we deal with them below in the section on experimentation.

With these understandings in mind, we take the general position that although there might be some narrow compass for interstitial local rules, such rules still should be the exception. Indeed, we believe that such rules never should be permitted to take effect without central approval. While this position no doubt will be controversial, it rests on well-reasoned views about the appropriate level of case management.

In our view, local rules are the least optimal of possible case management techniques, and result most often from an inability or unwillingness to make case management decisions at the optimal level. Much rulemaking is simply seen as beneath the dignity of a national rule or rulemaking body. On the other hand, it is bothersome for a district judge to have to make decisions on a case-by-case basis. But the result is decisionmaking at a level calculated to be least efficient.

Take the frequently offered example of establishing page limits on brief, or other matters about the form and contents of briefs. Whether the rule should be national or case-by-case may depend upon the type of brief at stake, but there is little apparent benefit to a local rule. The circuit courts have their own elaborate rules about contents of briefs and page limits. The reason for this local choice is unclear, however. Appellate briefs are similar, and vary little from case to case in their particulars. That is why circuit-wide rules suffice, with exceptions granted by motion. Yet, there is no reason for rules to differ circuit by circuit either. This creates inefficiency, expense, and unfairness, all to no appreciable end. Another example is presumptive discovery limits. It seems difficult to avoid the conclusion that if limits are desirable they ought to be set on a case-by-case basis. Every case is different. Some cases may profit from no interrogatories except the most basic, and a long series of depositions. In other cases a deposition of anyone but the plaintiff may be unnecessary. But district courts are looking to find a way to avoid the difficulty of managing discovery on a case-by-case basis.

Thus, they draft local rules in the hope the rules will solve the problem. Local rules are a Procrustean bed likely to satisfy no one.

Particularly in light of our discussion about local custom, it should be clear that rarely if ever should a rule turn on conditions unique to a district. If a rule is needed it is not too trivial to be promulgated nationally. If a rule is not needed, it is not needed. By the same token, cases are different and require differentiated management. By this we do not mean tracking, which is just an ill-fitting rule of its own. We mean that most cases require the careful attention of a district judge. Judges may not like this task. But it will not solve anything to promulgate one size fits all rules to substitute for individualized case management.

Having said all this, we concede there may well be examples of rules that are necessary and appropriate at the local level. We would not seek to rule them out entirely. But by the same token, we think it essential to establish a mechanism by which local rules are tested by some entity other than the local judges who favor the rule. We suggest that mechanism below.

4. Districts as Laboratories. In a bow to a fashionable rationale for federalism, one of the most frequent defenses of local rules is that beneficial national rules are often the product of local reforms. To hear the story told—and we have no doubt it is a true one in this regard—local judges think up solutions to local problems and adopt them as local rules, several similar approaches are tried in different places, then the experiments that seem to work get adopted as national rules.¹⁵² If local rulemaking is eliminated, critics argue, this process of experimentation will be lost.

While the “local rules as laboratories for experimentation” has merit in theory, it runs into serious difficulty in practice. Below we propose a way in which district courts could be used for true procedural experimentation. But as currently operating, these laboratories are as likely to yield incorrect results as correct ones. Moreover, there is no reason that experimentation must operate from the bottom up, and more reason to believe that in fact it would operate far better from the top down.

What currently passes for experimentation only may do so in the very loosest sense. Many critics, while applauding in theory the idea of experimentation before procedural change, nonetheless have been

152. See, e.g., A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1579 (1991).

sharply critical of the way in which that experimentation is occurring.¹⁵³ Leo Levin, former director of the Federal Judicial Center, puts the case succinctly:

To experiment without paying due regard to the resulting data is an exercise in self-contradiction. Nor can impressionistic accounts of the effects of particular procedures substitute for hard data. By the same token, it is of little use to collect data produced by experiments that are so poorly or improperly designed that they cannot serve as the proper basis for solid conclusions. Moreover, it has been wisely said that where human subjects are involved, a poorly or improperly designed experiment "is by definition unethical."¹⁵⁴

Levin's comment highlights serious deficiencies in both the front and back ends of current process. First, the "design" of existing experiments is extremely poor. For the most part they seem not to be designed at all, but simply put into operation in districts that want to try something new. This method of experimentation stands in sharp contrast to, for example, that suggested by Professor Laurens Walker, who argues that procedural innovation be tested in true field experiments and quasi-experiments designed to yield valid and significant data.¹⁵⁵ Accomplishing this would involve designing experiments to rule out as far as possible any cause for results other than the innovation being tested, to establish control groups against which the innovative districts may be compared, and to ensure to as great an extent as possible that the results are generalizable to the context in which they will operate. Professor Walker's description of the process of scientific experimentation indicates why the CJRA, including countless surveys promulgated by CJRA advisory groups operating with no training in the relevant techniques, is unlikely to yield valid information.

Second, innovation often is put into operation on the basis of what ostensibly is data, but for the most part reduces to isolated anecdotes. The hearings before the Biden Committee on the CJRA stand as a crowning example. One would hope Congress was not making decisions

153. See, e.g., Levin, *supra* note 155, at 1581, 1590; Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS. 67 (Summer 1988); Linda S. Mullenix, *supra* note 48, at 403-04.

154. Levin, *supra* note 155, at 1590.

155. See Walker, *supra* note 156, at 75-77. See also Deborah R. Hensler, *Researching Civil Justice: Problems and Pitfalls*, 51 LAW & CONTEMP. PROB. 55 (1988) (discussing difficulties with empirical study of civil justice system); Marc Galanter, Bryant Garth, Deborah Hensler & Frances Kahn Zemas, *Viewpoint: How to Improve Civil Justice Policy*, 77 JUDICATURE 185 (1994) (arguing for better data collection on civil justice system indicator).

about national procedural innovation based on random stories about what one judge did with a particular case, or upon vague reports of what was accomplished in a district with some innovation. Yet a reader of the hearing transcript is left to almost no other conclusion.

Moreover, experiments should not be designed without some sense of the difficulty they pose. Many of the problems we identify with procedural fragmentation necessarily are present when controlled experimentation occurs. For example, both inefficiencies of differing procedures across districts and procedural unfairness from different applicable rules will result. At least in a controlled experiment, however, there can be attention to minimizing these costs, or to maximizing the value of data collected while the costs are incurred.

On balance we believe some careful experimentation may be both commendable and necessary. Particularly in light of procedural change that seems particularly innovative and far-reaching, it would be better to test new ideas before using the entire country as a guinea pig. The adoption of, and changes to, Rule 11, as well as the new mandatory disclosure rules are examples of procedural innovation that might well have benefitted from testing before implementation. Experimentation, however, is hardly an argument for local rules fashioned by local districts operating on their own. Recall that the argument about experimentation is offered to support local rulemaking autonomy. But we believe quite the contrary is true. In an important article Professors Rubin and Feeley make the point, in the context of discussing the federal system, that experimentation may be effected best with strong central control, rather than letting each state go its own way.¹⁵⁶ While we reserve judgment on the Rubin/Feeley argument in the context of federalism generally, the argument certainly holds sway in the rulemaking context.

True experimentation should occur with strong central control. There should be national debate about which experiments to pursue, and central control to ensure the experiments (to the greatest extent possible) actually yield results. Much of the difficulty we have identified with existing stabs at experimentation prevails because districts are proceeding on their own. From a central standpoint, experiments can be designed and implemented across districts.

IV. CONCLUSION

As must be evident, we believe the current proliferation of local rules

156. Edward L. Rubin & Malcolm Feeley, *Federalism & Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 910 (1994).

and the trend to localized reform and innovation is ill-advised. The very purpose of a system of Federal Rules of Civil Procedure was uniformity, and the case has not been made, nor seriously attempted, to overthrow that regime. Rather, the trends we observe are all the more disturbing because they are occurring without careful consideration, or as a matter of political compromise unrelated to the goals of a functioning procedural system.

For the most part we believe uniform national rules are a good idea, and local rules a bad one. Uniformity is desirable for reasons including efficiency and substantive outcome fairness. Local rules are undesirable because they interfere with the system of uniformity and by-and-large offer little real benefit. By the same token, we concede there is some role for disuniformity in appropriate circumstances. The most prominent example is probably the need for some controlled experimentation. But there also may be instances in which local rules are needed to account for local condition.

Ultimately we believe that a stronger system of central control is essential to reassert uniformity while dealing with instances in which local rules are appropriate. While we leave for another day the question of what that central authority should be, it seems at least initially that the authority ought to be an adjunct to, and under the control of, the Judicial Conference. We say that with at least some misgiving, however, because we are concerned that a body composed entirely of judges may overvalue anecdotes and opinions about reform and be insufficiently attentive both to social science process and to the needs of court users.¹⁵⁷

At any rate, our proposal is a simple one, with four basic pieces.

1. No local rules should be permitted to go into effect without approval of the central authority. The criteria for approval should be whether there is a unique local problem that requires its own rule, and whether the unique problem is such that solving the problem justifies the cost of disuniformity.

2. Proposed rules that do not meet the above criteria nonetheless should be considered for national adoption. We should discard the

157. In this regard we note the current debate about the composition of the Rules Advisory Committees. It is at least our tentative view that whatever central control there is ought to have adequate representation by court users as well as judges, with good assistance from qualified social scientists. We also note the current discussion of whether the rulemaking process really should be one that follows a pluralistic political model, as many argue. It again is our tentative view that even if rulemaking should occur in some other fashion, good rulemaking still may require decisionmakers other than judges, who may overrule their expertise in procedural reform, and discount the skills of other professionals.

notion that trivial matters are inappropriate for a national rule. If there is a needed rule, it should be national in scope. National rulemakers should carefully consider whether the subject matter of the proposal should be dealt with on a case-by-case basis. If not, and if a rule is needed but the rule does not deal with a unique local situation, the solution should be a national rule.

3. There should be no opting out of federal rules. The Federal Rules of Civil Procedure should be uniform and national in scope. Political pressures should not be resolved by simply deferring questions to local choice.

4. Finally, experimentation is to be encouraged on a national basis, through carefully considered and developed experiments. When rules deal with significant innovation, the central authority should consider an experiment. Experimentation necessarily must be limited, which means proposals will compete against one another. Significant procedural innovation ought to proceed on the basis of valid data, with some advance idea of pitfalls and how they can be addressed.

In sum, we believe there may be some place for local rules. But even that decision should be made nationally. For the most part the Federal Rules of Civil Procedure should be the rules by which all lawyers play.

