Maurer School of Law: Indiana University

Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1994

Fractured Procedure: The Civil Justice Reform Act of 1990

Lauren K. Robel

Indiana University Maurer School of Law, lrobel@indiana.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/facpub>

Part of the [Civil Procedure Commons](#), [Courts Commons](#), and the [Legislation Commons](#)

Recommended Citation

Robel, Lauren K., "Fractured Procedure: The Civil Justice Reform Act of 1990" (1994). *Articles by Maurer Faculty*. 557.

<https://www.repository.law.indiana.edu/facpub/557>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.

LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Fractured Procedure: The Civil Justice Reform Act of 1990

Lauren Robel*

Federal district courts have viewed the Civil Justice Reform Act of 1990 as a mandate to adopt procedural rules inconsistent with existing law. But in this article, Professor Robel argues that the Act neither compels nor authorizes such local deviations. Citing examples from reforms underway in district courts nationwide, Professor Robel contends that courts' assertions of broad rulemaking authority rest on a misreading of the Act and of the compromise between Congress and the judiciary that led to its passage. Professor Robel cautions that the goal of national uniformity underlying the Federal Rules of Civil Procedure should not be compromised lightly. However, she argues that, while probably unwise, the Civil Justice Reform Act was within Congress' constitutional power to enact. She concludes by urging rulemakers to more carefully consider the costs and benefits of local rules.

For more than half a century, the normative vision animating federal civil procedure has been national uniformity and regularity in procedural rules. From the 1938 promulgation of the Federal Rules of Civil Procedure¹ through the 1988 amendments to the Rules Enabling Act,² Congress has remained committed to a single set of national procedural rules for federal civil litigation.³

In 1990, Congress passed the Civil Justice Reform Act (CJRA),⁴ making the federal trial courts responsible for the reduction of costs and delay. Many

---

* Associate Dean and Professor of Law, Indiana University School of Law—Bloomington. The author served as the Reporter for the Civil Justice Advisory Group for the United States District Court for the Southern District of Indiana, whose views are not represented in this paper. Many thanks to Michael Ausbrook, Daniel Conkle, Larry Dessum, Aviva Orenstein, Bill Popkin, Judith Resnik, Gene Shreve, and especially Carl Tobias for helpful comments on an earlier draft, and to Brad Manns and Robert Laudeman for research assistance.

1. The Federal Rules of Civil Procedure were transmitted to Congress on January 3, 1938. The Rules provoked controversy, causing Congress to adjourn without acting on them. Under the Rules Enabling Act (REA), Pub. L. No. 73-415, 48 Stat. 1064 (1934), the Rules became effective on September 16, 1938. Henry P. Chandler, *Some Major Advances in the Federal Judicial System, 1922-1947*, 31 F.R.D. 307, 505-12 (1963).

2. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, §§ 401-407, 102 Stat. 4642, 4650 (1988) (amending 28 U.S.C. §§ 2072-2074). The 1988 amendments were designed to exert greater control over local rulemaking and to open national rulemaking to public scrutiny. See text accompanying note 136 *infra*.

3. While Congress has appeared committed to the ideal of uniformity, that ideal has often been honored in the breach in practice in the federal trial districts. See text accompanying notes 132-139 *infra*.

4. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, §§ 101-106, 104 Stat. 5089, 5089-98 (1990) (codified as amended at 28 U.S.C. §§ 471-482 (Supp. IV 1992)).

courts have begun to implement the legislation under the misconception that it marks a major congressional departure from the conviction that federal civil procedure should be uniform across the nation. These courts believe that the CJRA launched an enormous experiment in civil procedure that promises far-reaching and unpredictable effects on federal practice.

As courts begin to wrestle with the CJRA's requirements, the range of interpretations of the legislation has become apparent. Some courts view the Act as a grant of broad authority to adopt procedures inconsistent with the Federal Rules and with other statutory mandates. Acting under color of the CJRA, districts have ordered attorneys to disclose information to their opposition without waiting for discovery requests, required participation in alternative dispute resolution as a prerequisite to trial, and even—in the most extreme case—imposed across-the-board caps on attorney fees.⁵ Responses to the Act's mandate diverge so widely that a journalist recently compared them to snowflakes.⁶ If these courts have won the power they believe the CJRA granted them, the uniformity and simplicity that distinguish federal practice under the national procedural rules are threatened more seriously than at any time since the 1938 enactment of the Federal Rules.⁷

I argue that these courts are wrong. The CJRA neither compels nor authorizes local deviations from the Federal Rules of Civil Procedure or other statutory law.⁸ While the CJRA encourages a search for local solutions to the

5. JUDICIAL CONFERENCE OF THE U.S., CIVIL JUSTICE REFORM ACT REPORT: DEVELOPMENT AND IMPLEMENTATION OF PLANS BY EARLY IMPLEMENTATION DISTRICTS AND PILOT COURTS (1992) [hereinafter JUDICIAL CONFERENCE REPORT] (discussing alternative dispute resolution, mandatory disclosure, and contingent fees).

6. Don J. DeBenedictis, *An Experiment in Reform*, A.B.A. J., Aug. 1992, at 16, 16. DeBenedictis further noted that "[t]he differences are great enough that a fat report on the early plans from a special task force of the ABA Litigation Section is largely made up of charts giving side-by-side comparisons of the courts' approaches to assorted topics." *Id.*

Not only the ABA finds interpreting the broad range of courts' responses awkward. A recent Judicial Conference Report to Congress was largely reduced to descriptions and charts tracking each district's developments. JUDICIAL CONFERENCE REPORT, *supra* note 5.

7. To review the long and difficult path towards uniformity which culminated in the Federal Rules of Civil Procedure, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1042-98 (1982). Professor Burbank notes that

[b]y 1896, the ABA's Committee on Uniformity of Procedure and Comparative Law complained that all but a few specialists in federal practice felt the need to rely on the clerk of court for guidance, and that a federal practitioner "even in his own state, [felt] no more certainty as to the proper procedure than if he were before a tribunal of a foreign country."

Id. at 1041 (quoting *Report of A.B.A. Committee on Uniformity of Procedure and Comparative Law*, 19 A.B.A. REP. 411, 420 (1896) (alteration in Burbank)). The lack of uniformity impeded the development of interstate practice. *Id.* at 1042. Burbank cites "a common view of federal practice" in the pre-Rules days: "To the average lawyer it is Sanskrit; to the experienced federal practitioner it is monopoly; to the author of text books on federal practice it is a golden harvest." *Id.* (quoting *Report of the Committee on Uniform Judicial Procedure*, 46 A.B.A. REP. 461, 466 (1921)).

8. Professor Linda Mullenix concludes that the Act was intended to allow wholesale local rulemaking in derogation of national rules. Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992) [hereinafter Mullenix, *Counter-Reformation*]; Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993) [hereinafter Mullenix, *Unconstitutional Rulemaking*]. While I share Professor Mullenix's dismay with the CJRA, I disagree with her conclusions. See notes 167-226 *infra* and accompanying text.

problems of cost and delay, it is not a broad warrant to experiment with any procedural innovations that a district deems possibly helpful in reducing cost and delay.

Part I of this article examines the federal civil justice reform process outlined in the CJRA. Part II describes various measures adopted in implementing the statute by the first thirty-four federal trial districts to do so. It focuses on the more egregious examples of districts overreading their statutory authority to effect procedural change most broadly.

Part III examines the nature of the authority the statute actually grants. It offers, and rejects, the strongest textual argument for broad local rulemaking authority through an examination of its statutory and legislative context. Part III concludes that the CJRA was never intended to permit the range of procedural innovation it has spawned. Rather, misconceptions about the scope and intent of the legislation reflect misunderstandings about the nature of the compromise reached between the judiciary and the Congress which allowed the passage of the Act. Indeed, inattention to the statute's text has contributed to the misinterpretation of the Act.

In Part IV I evaluate and reject the recent claim that the Civil Justice Reform Act is constitutionally infirm as a violation of the separation of powers. This claim takes the procedural Babel the CJRA spawned as important evidence of Congress' incompetence in the area of judicial rulemaking. While persuasive arguments exist against the wisdom of the CJRA, Congress clearly did not exceed its power by enacting it.

Part V evaluates the impulse for local procedural innovation. Our commitment to federal civil procedural uniformity has always been incomplete: Local courts regularly operate in ways that are in tension with national norms.⁹ Should this impulse for localized procedure be respected, or even nurtured? The arguments for uniformity are strong and obvious—and carried the day in 1938, when the Federal Rules of Civil Procedure were enacted.¹⁰ The substantial attraction of federal litigation is in some measure due to the simplicity and coherence of the Federal Rules. I argue that while some of the reasons offered for local procedure are defensible, many are not. Before we further compromise our commitment to national procedure, we need to evaluate the situations warranting local answers to procedural problems, as well as the nature and identity of the local proceduremakers to whom we would commit these

---

9. Development of local court procedures under the CJRA—even if unauthorized—is not unprecedented. Local rules enacted under Federal Rule of Civil Procedure 83 came under scrutiny when the Local Rules Project discovered some 800 local rules inconsistent with the Federal Rules in use in federal courts around the country. See Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2023 (1989). The Standing Committee on Civil Rules considered an amendment to Federal Rule of Civil Procedure 83 that would have allowed controlled experimentation with departures from the Federal Rules. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE Proposed Rule 83 (1991), reprinted in 137 F.R.D. 53, 152 (1991) [hereinafter PROPOSED AMENDMENTS]; see also A. Leo Levin, *Local Rules As Experiments*, 139 U. PA. L. REV. 1567, 1570 (1991) (arguing in favor of experimentation).

10. Burbank, *supra* note 7, at 1043-98.

decisions.¹¹

I. THE CIVIL JUSTICE REFORM ACT

In 1989, the Brookings Institution, at the suggestion of Senator Joseph Biden, chair of the Senate Judiciary Committee, convened a task force to study delay and cost in federal civil litigation.¹² The task force recommended a series of case-management strategies designed to streamline the process and to attack discovery abuse.¹³ Senator Biden incorporated these case-management recommendations into the legislation he introduced as the Civil Justice Reform Act of 1990.¹⁴

As first introduced, the bill would have required courts to adopt a broad range of detailed case-management procedures.¹⁵ The legislation assumed both that federal civil cases took too long and that the delay—and consequent cost—was attributable largely to lawyer avarice and judicial neglect. This implied criticism of the judiciary attracted strong opposition from federal judges.¹⁶ Through the Judicial Conference, judges voiced a series of concerns. Many felt the legislation unwisely preempted the established judicial rulemaking process. They further argued that the statute did not account for existing statutory demands on the federal courts, such as the Speedy Trial Act.¹⁷ Moreover, judges found the statute insensitive to the variety of local conditions, ranging from crowded urban dockets to relatively uncongested courts.¹⁸ In response to the judicial resistance, Senator Biden substantially restructured elements of the legislation. Most importantly, he eliminated the requirement that each district adopt identical, statutorily detailed case-management procedures.

As adopted, the CJRA requires each federal district court to implement a "civil justice expense and delay reduction plan" intended "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."¹⁹ Each plan is to be the product of cooperation between judges and those who use the courts. Therefore, courts must convene civil justice reform

11. See PROPOSED AMENDMENTS, *supra* note 9, at 152 (Proposed Rule 83).

12. See TASK FORCE ON CIVIL JUSTICE REFORM, BROOKINGS INSTITUTION, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION (1989) [hereinafter BROOKINGS REPORT]. I have previously argued that the Brookings report came up short in its evaluation of problems in the federal courts. This inadequacy is partially due to the absence of sitting federal judges on the task force. See Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115, 117-27 (1991).

13. BROOKINGS REPORT, *supra* note 12, at 3.

14. S. 2027, 101st Cong., 2d Sess. (1990). This was only the first version of the CJRA; Senator Biden later offered an amended version, S. 2648, 101st Cong., 2d Sess. (1990), as Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified in scattered sections of 28 U.S.C.). Senate Bill 2648 underwent further change prior to its enactment. See notes 83-88, 114-140 *infra* and accompanying text for a more complete account of the two versions' differences.

15. See, e.g., S. 2027, *supra* note 14, § 471(b)(2)(A) (requiring courts to adopt a case-tracking system classifying cases on intake, and specifying the provisions of an "expanded civil cover sheet" for future use in making track assignments).

16. See Robel, *supra* note 12, at 117.

17. 18 U.S.C. §§ 3161-3174 (1988).

18. See notes 118-120 *infra* and accompanying text.

19. 28 U.S.C. § 471 (Supp. IV 1992).

advisory groups composed of lawyers, litigants, and the local United States Attorney or his or her designee.²⁰ Each advisory group is charged with assessing the docket in order to identify trends in the demands on court resources and causes of excessive cost and delay.²¹

The Act, however, provides no guidance on how to identify and evaluate cost and delay, nor does it tell advisory groups how to assess whether cost and delay are actually excessive.²² Moreover, excessive cost and delay could have any number of sources beyond the group's reach, including lawyers' case-management habits, the court's managerial skills or values, clients' expectations, congressional legislation,²³ and decisions by the executive branch.²⁴ Finally, the legislation fails to suggest how to proceed in "assessing the state of the docket."

Despite the lack of legislative guidance, the completion of the docket-assessment process by some districts has supplied a wealth of information about the federal district courts. Most districts employed statistical data collected by the Administrative Office of the United States Courts.²⁵ Many courts surveyed or interviewed lawyers and—less successfully—litigants about their litigation experiences. Most also interviewed or surveyed the judicial officers in the district.²⁶

Once its evaluation is complete, the advisory group must prepare a report for the court, assessing the extent of excessive costs and delays, recommending

---

20. *Id.* § 478(b), (d).

21.

In developing its recommendations, the advisory group . . . shall promptly complete a thorough assessment of the state of the court's civil and criminal dockets. In performing the assessment for a district court, the advisory group shall—

(A) determine the condition of the civil and criminal dockets;

(B) identify trends in case filings and in the demands being placed on the court's resources;

(C) identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedures and the ways in which litigants and their attorneys approach and conduct litigation; and

(D) examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts.

Id. § 472(c)(1).

22. See Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 *FORDHAM L. REV.* 833, 850, 861-80 (1994) (discussing the underlying assumptions and analytical complexities of the "delay problem"); Robel, *supra* note 12, at 119-22 (arguing that we have few answers to the normative question of how long a case "should" take).

23. For instance, many judges have complained that the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3673, 28 U.S.C. §§ 991-998 (1988), dramatically increased their workload. See JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 137 (1990) (reporting that 90% of judges responding to a survey believed that the 1987 Sentencing Guidelines made sentencing more time-consuming). For an interesting analysis of this problem, see Kenneth G. Dau-Schmidt, *An Agency Cost Analysis of the Sentencing Reform Act: Recalling the Virtues of Delegating Complex Decisions*, 25 *U.C. DAVIS L. REV.* 659 (1992).

24. See Richard F. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 *B.Y.U. L. REV.* 461, 484-506 (1990) (discussing the effect on the federal courts of an executive decision to remove thousands of people from the Social Security disability rolls).

25. The Administrative Office releases a substantial amount of statistical information each year. See, e.g., 1992 *ADMIN. OFF. U.S. CTS. ANN. REP.*

26. See JUDICIAL CONFERENCE REPORT, *supra* note 5, ex. A.

remedial measures the court should adopt to reduce cost and delay, and suggesting the court either develop a plan or select a model one.²⁷ In making its recommendations, the advisory group must consider six "principles and guidelines of litigation management and cost and delay reduction" and six "litigation management and cost and delay reduction techniques."²⁸ These techniques, guidelines, and principles—discussed in more detail below—need only be considered; they do not have to be adopted.

The court must then consider the report and adopt a plan.²⁹ With the exception of a limited number of demonstration and pilot courts,³⁰ the CJRA leaves ultimate control over the content of the adopted plan in the hands of the judiciary, not the advisory group.³¹ The CJRA directed all districts to complete this process by the end of 1993, although many, known as early implementation districts, chose to implement plans much more quickly.³²

II. THE CJRA PLANS

There are ninety-four federal trial districts.³³ The "bottom-up"³⁴ approach to civil justice reform adopted by the CJRA thus created ninety-four groups of practitioners, litigants, court clerks, and judges with diverse ideas on how to improve the process of litigation.

A number of these ideas clash with the existing Federal Rules of Civil Procedure. One of the more egregious examples of local rulemaking contrary to the Federal Rules and under the auspices of the CJRA involved discovery requests. At the time the early implementation districts (EIDs) adopted their plans, the Standing Committee on Civil Rules had recommended amending Federal Rule of Civil Procedure 26 to require that parties disclose information without waiting for a discovery request.³⁵ While this proposal had a rocky history, it ultimately succeeded in December 1993—a full year after the EIDs

---

27. 28 U.S.C. § 472(b) (Supp. IV 1992).

28. *Id.* § 473(a)-(b). These sections require that the district courts consider the techniques, principles, and guidelines in their evaluations.

29. *Id.* § 471.

30. See note 32 *infra*.

31. See, e.g., 28 U.S.C. § 472 (Supp. IV 1992) (requiring that district judges implement the plans); *id.* § 474(a) (stipulating that judicial circuit committees review the plans); *id.* § 474(b) (mandating that the Judicial Conference review the plans).

32. *Id.* § 471 note (reproducing Pub. L. No. 101-650, §§ 103-105, 104 Stat. 5089, 5090-97 (1990) (amended 1992)). Districts completing the process by the end of 1991 are labeled "Early Implementation Districts" and received certain funding benefits. In addition, certain courts were designated "Demonstration Program Districts." The Act requires these districts to adopt specific case-management programs. For example, while the Western District of Michigan and the Northern District of Ohio must experiment with case-tracking systems, other districts have to adopt some of the case-management techniques outlined in § 473(a)-(b). Finally, the Judicial Conference must designate "Pilot Program" districts, whose plans must remain in effect without changes for three years. *Id.*

33. JUDICIAL CONFERENCE REPORT, *supra* note 5, at 2 (describing the civil justice expense and delay reduction plans that were adopted in the first 34 districts to complete the CJRA process).

34. *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and S. 2648 Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 212 (1990) [hereinafter *Hearings*] (statement of Senator Biden).

35. PROPOSED AMENDMENTS, *supra* note 9, at 87 (Proposed Rule 26) (requiring automatic disclosure of specified core information).

adopted their plans.³⁶ Despite their passage, at the time twenty-one EID courts implemented plans requiring mandatory disclosure,³⁷ the Federal Rules of Civil Procedure clearly did not sanction these rules. Moreover, these EIDs remained indifferent to the fact that mandatory disclosure conflicted with the existing structure of discovery, which required that attorneys identify and request relevant materials from their opponents before such information would be supplied.³⁸

The Eastern District of Texas offers a second example of infidelity to national rules. It set up a case-tracking scheme that assigns some cases to tracks prohibiting discovery altogether or limiting it to mandatory disclosure items.³⁹ It also adopted an offer of judgment rule inconsistent with Federal Rule of Civil Procedure 68.⁴⁰ Moreover, the East Texas plan states that "to the extent that

---

36. The new disclosure rules' ultimate fate, however, remains subject to controversy. The Supreme Court transmitted the proposed new Federal Rules of Civil Procedure, including Rule 26, to Congress on April 22, 1993, over a remarkable dissent by Justice Scalia (joined by Justices Souter and Thomas). See Amendments to the Federal Rules of Civil Procedure and Forms, 113 S. Ct. 479 (1993). For a history of the controversy, see Randall Samborn, *U.S. Civil Procedure Revisited: Committee debates further amendments*, NAT'L L.J., May 4, 1992, at 1. The Advisory Committee first recommended mandatory disclosure, but it backed down in the face of negative comments, only to again reverse course and recommend the proposal in its final evaluation. Detractors argue that the exchange requirements both imperil the attorney-client privilege and require a large effort that could prove wasteful if the case is later settled or decided on motions. For discussions of the arguments on both sides, see Griffin B. Bell, Hugh Q. Gottschalk & Chilton Davis Varner, *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1 (1992); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 822-28 (1991); Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139 (1993).

37. JUDICIAL CONFERENCE REPORT, *supra* note 5, ex. D (detailing the mandatory disclosure plans). Most mandatory disclosure plans call for the exchange of "core case information." Generally, "core case information" includes:

- (1) The name, address, and telephone numbers of each individual likely to have information that bears significantly on any claim or defense;
- (2) A copy of, or description by category and location of, all documents and tangible things in the possession or control of the party that are likely to bear significantly on any claim or defense;
- (3) A computation of damages; and
- (4) Insurance agreements that may be used to satisfy all or part of the judgment.

Id.

Provisions vary substantially among districts. The District of Delaware, for instance, requires mandatory disclosure in civil RICO, personal injury, medical malpractice, and employment discrimination actions. In addition, parties must provide "core information" with their pleading and identify expert witnesses. In contrast, the Eastern District of New York requires exchange of "core information," documents relied on in drafting the pleading, and expert witness testimony. The District of Idaho requires the exchange of expert witness information, data upon which the expert relies, exhibits to be used, and lists of the expert's previous testimony. *Id.*

Thus, few districts adopted provisions parallel to the version of Federal Rules of Civil Procedure 26 that was ultimately adopted. FED. R. CIV. P. 26; see Tobias, *supra* note 36, at 144 (noting that many plans' disclosure schemes differed from the proposed Rule 26). The courts' reliance on the proposed amendment, rather than the one passed on to the Supreme Court, caused the divergence. Tobias, *supra* note 36, at 144.

38. See, e.g., FED. R. CIV. P. 26.

39. U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 1 (1991) [hereinafter TEXAS PLAN].

40. *Id.* at 10; see Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1416-18 (1992) (discussing conflicts between adopted plans and other authority).

the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling."⁴¹

Third, potential conflicts arise between the plans and other statutory requirements. For instance, many of the districts have implemented forms of alternative dispute resolution (ADR), while some others require litigants to participate in ADR before continuing in federal court.⁴² In 1988, Congress gave twenty district courts limited statutory authorization to experiment with mandatory reference to arbitration.⁴³ Courts have since wrestled with whether they can order parties to arbitrate—or to participate in other forms of ADR—in districts not designated by Congress for ADR use. Some of the early CJRA plans assume that the Civil Justice Reform Act not only authorizes mandatory referral to ADR, but also permits courts to adopt any form of ADR they choose. The District of Montana's plan, which sends half of all civil cases filed directly to magistrate judges without asking the litigants' prior consent as required by 28 U.S.C. § 636, offers a fourth example of possible conflicts with other federal statutory requirements.⁴⁴

Finally, certain plan provisions, such as the Eastern District of Texas' cap on contingency fees—if it is in fact authorized by the Act—raise the possibility that the CJRA dramatically expanded the power of local courts to effect substantive policies.⁴⁵

In sum, while implementing plans under the CJRA, some districts have adopted procedures clearly inconsistent with the Federal Rules of Civil Procedure. Plan provisions in other districts conflict with federal statutes other than the Federal Rules. Still other provisions sweep broadly in their regulation of attorney conduct⁴⁶ and fees, raising questions about whether the CJRA dramatically altered or expanded local courts' powers. All of these provisions starkly call into question the nature of the authority conferred upon local courts by the CJRA.

---

41. TEXAS PLAN, *supra* note 39, at 9.

42. For a description of alternative dispute resolution programs under the CJRA, see JUDICIAL CONFERENCE REPORT, *supra* note 5, ex. C.

43. 28 U.S.C. §§ 651-658 (1988); see notes 105-111 *infra* and accompanying text.

44. While litigants can request an Article III judge, they must do so within a certain time limit or waive their rights. See Tobias, *supra* note 40, at 1417.

45. TEXAS PLAN, *supra* note 39, at 7-8. Montana's Attorney Conduct Committee, created to supervise litigation conduct, also raises this possibility. See Tobias, *supra* note 40, at 1421.

46. For example, as part of its plan,

[t]he Montana District is establishing a peer review committee, composed of federal court practitioners "appointed by majority vote of the article III Judges of the district in active service," which will review the litigation conduct and discovery practices of lawyers who practice in the court. The committee will analyze litigation behavior or discovery practices at the request of any judicial officer, who will provide it with a statement describing the questionable activity.

Tobias, *supra* note 40, at 1421 (quoting U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 17 (1991)). The committee then must deliver the judge an advisory opinion on the validity of the litigant's questioned practices. *Id.* Professor Tobias notes, however, that the Montana Plan "affords few procedural prescriptions, particularly in terms of due process." *Id.*

III. AUTHORITY CONFERRED BY THE CJRA

An analysis of the authority the CJRA confers upon local courts must consider two questions: first, to what extent Congress expressly adopted provisions conflicting with preexisting statutes or rules; and second, to what extent Congress delegated to local courts the power to create and adopt provisions conflicting with such statutes or rules. For the reasons explained in Part III.B below, I conclude that while the CJRA contains several minor provisions that explicitly change preexisting law, Congress did not radically revise the *process* of rulemaking through the CJRA. Therefore, the Act does not empower local courts to make independent procedural decisions that conflict with national rules or statutes. Given my conclusion with respect to the latter question, I have resolved tensions between explicit CJRA grants of authority and preexisting authority in favor of textual interpretations that harmonize the CJRA with preexisting legislation and rules whenever possible without straining the sense of the text.⁴⁷

The CJRA represents a cautious approach to new trial court procedures. For the most part, its provisions are detailed descriptions of case-management tools already available to trial judges. In some cases, the CJRA expands those tools in limited ways, or suggests new approaches. In other cases, it authorizes more expansive use of ADR. Surprisingly, few of the adopted plans contain much discussion of the Act's authorizing provision, which I examine in detail below.

A. What Does the CJRA Authorize?

Generally, the CJRA requires districts to implement a civil justice expense and delay reduction plan.⁴⁸ More specifically, the Act details the provisions that the plans "may include."⁴⁹ The language of the Act is permissive: Only a limited number of designated districts⁵⁰ are required to include any of the listed

---

47. Since Congress did not explicitly state an intent to repeal any Federal Rules or statutes by passing the CJRA, it is tempting to cite the available statutory canon that supports the reading of the text that implies a repeal of previous statutes. But applying this canon to the CJRA is problematic. With few exceptions—most notably the pilot and demonstration districts mentioned above—federal courts need not adopt any of the CJRA provisions. I am convinced, however, that the Act should be read in a manner that harmonizes with preexisting rules and statutes because Congress neither authorized local procedural innovation conflicting with the Federal Rules, nor attempted to avoid the restrictions 28 U.S.C. § 2071 places on local rulemaking. See notes 135-139 *infra* and accompanying text.

48. 28 U.S.C. § 471 (Supp. IV 1992). The Act does not define "implementation."

49. *Id.* § 473(a)-(b).

50. The CJRA designates certain "demonstration" and "pilot" courts. For example, courts in the Western District of Michigan and the Northern District of Ohio received mandates to demonstrate systems of differentiated case management. Moreover, the Act commissioned the Northern District of California, the Northern District of West Virginia, and the Western District of Missouri to develop various other methods of reducing cost and delay. See *id.* § 471 note (reproducing Pub. L. No. 101-650, §§ 104-105, 104 Stat. 5089, 5097-98 (1990) (amended 1992)).

The Act further requested the Judicial Conference to designate 10 "pilot districts" required to include the § 473(a) provisions in their plans. *Id.* The Judicial Conference named the Southern District of California, the District of Delaware, the Northern District of Georgia, the Southern District of New York, the Western District of Oklahoma, the Eastern District of Pennsylvania, the Western District of

"principles and guidelines"⁵¹ or "techniques."⁵²

The Act contains three types of specific provisions. First, a number of case-management provisions merely duplicate or elaborate on powers already existing under the Federal Rules. Second, other provisions encourage ADR. Third, the Act includes a catch-all provision that allows courts to adopt "such other features as the district court considers appropriate after considering the recommendations of the advisory group."⁵³

1. *Provisions duplicating the Federal Rules of Civil Procedure.*

The CJRA contains a number of provisions that duplicate powers granted under existing rules. First, several of the Act's provisions encourage judicial officers to exert early control over their cases.⁵⁴ For example, section 473(a)(2) suggests "early, ongoing control of the pretrial process through involvement of a judicial officer in . . . assessing and planning the process of a case." This planning can include controlling the extent and timing of discovery, setting deadlines for filing motions, and setting "early, firm trial dates."⁵⁵

But the CJRA provisions for early and ongoing judicial management of cases duplicate powers already available to federal trial judges through Federal Rule of Civil Procedure 16. That Rule instructs judges to enter scheduling orders to control the course of the litigation and provides for pretrial and scheduling conferences to "establish[ ] early and continuing control so that the case will not be protracted because of lack of management."⁵⁶ Judges routinely used this authority for scheduling orders that "limit[ ] the time to file and hear motions," "complete discovery," and control "any other matters appropriate in the circumstances of the case."⁵⁷ The Advisory Committee noted in 1983, when Rule 16 was amended, that the rule "[shifts] the emphasis away from a conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase."⁵⁸

Second, the CJRA provides a number of suggestions for management of the discovery process. These suggestions include preparing discovery schedules

---

Tennessee, the Southern District of Texas, the District of Utah, and the Eastern District of Wisconsin. JUDICIAL CONFERENCE REPORT, *supra* note 5, at 1.

51. 28 U.S.C. § 473(a) (Supp. IV 1992).

52. *Id.* § 473(b).

53. *Id.* § 473(b)(6) (explaining that this section's objective is referred to in § 472(a)).

54. *See, e.g., id.* § 473(a)(1) (discussing "systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to [specific criteria]"); *id.* § 473(a)(2)(B) (mandating "early and ongoing control of the pre-trial process" through improved planning and scheduling to assure "that the trial is scheduled to occur within eighteen months after the filing of the complaint"); *id.* § 473(b)(1) (requiring "that counsel . . . present a discovery-case management plan . . . at the initial pre-trial conference").

55. *Id.* § 473(a)(2). The provision requiring systematic differential treatment of cases also duplicates existing authority. *Id.* § 473(a)(1).

56. FED. R. CIV. P. 16(a)(2). The CJRA also includes provisions for setting deadlines and schedules for motions practice. *See* 28 U.S.C. § 473(a)(3)(D) (Supp. IV 1992). Likewise, Rule 16 requires the court to enter a scheduling order that "limits the time . . . to file and hear motions." FED. R. CIV. P. 16(b)(2).

57. FED. R. CIV. P. 16(b)(3), (5).

58. FED. R. CIV. P. 16 advisory committee's note (1983 amendments).

and holding discovery conferences in complex litigation,⁵⁹ controlling the extent and timing of discovery generally,⁶⁰ requiring attorneys to present discovery case-management plans,⁶¹ and "encourag[ing] cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices."⁶² These recommendations again duplicate authority already available to judges through established case law⁶³ or Federal Rules of Civil Procedure 16 and 26(f). Both of these rules authorize courts to hold conferences to schedule and phase discovery, as well as to impose sanctions for the failure to participate in good faith in framing a discovery plan.⁶⁴

Under color of the CJRA, many courts have enacted mandatory information exchange provisions that require litigants to provide their opponents with specified types of information—even in the absence of specific discovery requests. The sole statutory authority for these provisions rests in section 473(a)(4), which, as noted, refers to "encouragement of cost-effective discovery" by means of "voluntary" information exchange. Interpreting this section as granting courts the authority to *require* the exchange of information strains the text.

Similarly, the Act speaks of "the use of" cooperative discovery devices, not the creation of such devices. Reading the statutory language in harmony with then-existing procedure would have courts encourage litigants to make use of Federal Rule of Civil Procedure 29, which allows litigants to stipulate to modifications of discovery procedures, and thereby to agree to cooperate in discovery. Any reading of section 473(a)(4) as authorizing courts to adopt mandatory disclosure rules conflicts with the statute's reliance on "voluntary exchange" of information, as well as with its statement that such an exchange should be encouraged, not mandated.⁶⁵

---

59. 28 U.S.C. § 473(a)(3) (Supp. IV 1992).

60. *Id.* § 473(a)(2)(C).

61. *Id.* § 473(b)(1).

62. *Id.* § 473(a)(4).

63. *See, e.g.,* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2036 n.30 (1970) (discussing and collecting cases).

64. *See* FED. R. CIV. P. 37(g). The Senate Report on the CJRA explains:

The authority provided in [28 U.S.C. § 473(a)(2)(C)] is intended to supplement the authority to limit discovery currently provided for in the Federal Rules of Civil Procedure, principally in Rule 26(b)(1). The 1983 amendments to this rule were clearly a step in the right direction in the effort to control discovery. But the problems of excessive and abusive discovery remain substantial, and additional measures are necessary.

S. REP. NO. 416, 101st Cong., 2d Sess. 55 (1990). The following text reveals that the Senate was unaware of the full extent of trial judges' current powers.

As a result, subsection (a)(2)(C) gives judges and magistrates the additional authority to control discovery. The tools they might use include phasing discovery into several stages and phasing the use of interrogatories. With this clear statutory mandate, it is hoped that judges and magistrates will no longer be unsure about the degree to which they can act to reduce discovery expenses.

Id. Interestingly, a Second Circuit report the Senate Report both quotes and relies on specifically recommends that district judges both implement phased discovery and limit the use of interrogatories, while pointing out that both devices are authorized under the existing Rule 16. *Final Report of the Committee on the Pretrial Phase of Civil Cases*, 115 F.R.D. 349, 454 (1986), cited in S. REP. NO. 416, *supra*, at 55.

65. Given the controversy over mandatory disclosure provisions described in note 36 *supra*, one would expect a discussion of mandatory disclosure somewhere in the legislative history if it were, in

Two certification requirements suggested by the CJRA exemplify the modest expansions of trial court authority actually conferred by the Act. The first requires attorneys filing discovery motions to certify that they have made a good faith effort to resolve the conflict before filing.⁶⁶ This statutory requirement explicitly goes beyond anything then mandated by the Federal Rules.⁶⁷ The second—a requirement that all requests for extensions of discovery or trial deadlines be signed by both the attorney and the party—modestly expands the signature requirements of Federal Rules of Civil Procedure 11 and 26(g).⁶⁸

By authorizing judges to explore settlement in complex cases⁶⁹ and requiring parties to have attorneys with settlement authority present at conferences,⁷⁰ the CJRA also duplicates existing provisions of Rule 16, which makes discussion of settlement appropriate at all pretrial conferences.⁷¹ Several courts interpret Rule 16 as allowing a judge to compel a party—or someone else with settlement authority—to appear at a pretrial conference in order to facilitate settlement.⁷²

The Act also authorizes the “systematic, differential treatment of civil cases that tailors the level of individualized and case specific management” to factors including “case complexity, the amount of time reasonably needed to prepare

fact, contemplated by the legislation. The legislative history does not suggest, however, that anyone believed the Act conferred authority to implement such mandatory provisions. The Senate Report calls § 473(a)(4) “self-explanatory,” stating blandly in explanation that “the more voluntary and cooperative the discovery process can be made to be, the fewer costs will be incurred by all parties.” S. REP. NO. 416, *supra* note 64, at 56-57.

66. 28 U.S.C. § 473(a)(5) (Supp. IV 1992).

67. This type of requirement has seen wide adoption as a local rule. *See* MODEL LOCAL R. 37.1 (Judicial Conference of the U.S. 1989). The Judicial Conference’s Local Rules Project determined that this rule was not inconsistent with the Federal Rules, reasoning that a requirement on parties to confer before filing motions would merely supplement Federal Rule of Civil Procedure 26(f), which allows a party to move for a discovery conference if “counsel . . . has attempted without success to effect with opposing counsel a reasonable program or plan for discovery,” on the theory that after such efforts, “[counsel] is entitled to the assistance of the court.” FED. R. CIV. P. 26 advisory committee’s note (1980 amendments). The Advisory Committee had earlier indicated a desire to promote informal conferences to encourage resolution of discovery disputes. FED. R. CIV. P. 33 advisory committee’s note (1970 amendments).

68. 28 U.S.C. § 473(b)(3) (Supp. IV 1992). The purpose of the proposed signature rule is to require notification of the client whenever an attorney seeks to delay discovery or trial.

69. *Id.* § 473(a)(3)(A).

70. *Id.* § 473(b)(5).

71. FED. R. CIV. P. 16(a)(5) (listing settlement as an “objective” of pretrial conferences); FED. R. CIV. P. 16(c)(7) (providing that the possibility of settlement may be discussed at pretrial conferences); *cf.* MANUAL FOR COMPLEX LITIGATION SECOND §§ 23.1-2 (1985) (discussing the role of the court in settlement and related special problems).

72. *Dvorak v. Shibata*, 123 F.R.D. 608, 611 (D. Neb. 1988) (sanctioning attorneys who appeared at a settlement conference without settlement authority from the client under Federal Rule of Civil Procedure 16(f) as “substantially unprepared to participate”); *Abney v. Patten*, 696 F. Supp. 567 (D. Okla. 1987) (upholding a local rule requiring attendance at a settlement conference of both the lead attorney and someone with settlement authority). In *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989) (en banc), the court held that trial courts have “inherent authority” to require a represented party to appear at settlement conferences. Both the House and Senate Reports accompanying the CJRA make clear Congress’ intent to specifically authorize the result reached by the Seventh Circuit in *G. Heileman Brewing*. H.R. REP. NO. 732, 101st Cong., 2d Sess. 16 (1990); S. REP. NO. 416, *supra* note 64, at 59. *But see* David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1989-90 (finding no grant of “inherent authority” in Rule 16).

the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case.”⁷³ In other words, the legislation suggests courts should *systematically* differentiate among cases on the basis of each case’s need for individualized and case-specific treatment, an apparently nonsensical instruction.

The Senate Report suggests case tracking as one way to provide such “systematic, differential treatment.”⁷⁴ Both formal and informal case-tracking procedures predate the CJRA, however. For instance, Federal Rule of Civil Procedure 16(b) allows district courts to exempt certain categories of cases from the scheduling order requirement.⁷⁵ All district courts have used local rules to exempt such classes of cases, usually on the theory that uncomplicated cases would not benefit from even the minimal level of management a scheduling order imposes.⁷⁶ In contrast, the *Manual for Complex Litigation* stresses early identification of cases likely to be complex and time-consuming, so that they may be targeted for special management efforts.⁷⁷

The task force report that the CJRA’s sponsors relied upon suggested case-tracking schemes that assigned cases to one of up to three tracks, each with different deadlines for motions and discovery.⁷⁸ The earliest version of the CJRA took the same approach: Upon filing, each district would have assigned cases to “appropriate processing tracks that operate under distinct and explicit rules, procedures and timeframes for the completion of discovery and for trial.”⁷⁹ Although in practice such schemes could clash with provisions of the Federal Rules,⁸⁰ a close reading of the early proposal reveals that even its sponsors did not contemplate that track provisions might conflict with existing Federal Rules.⁸¹ To avoid conflict between the Act’s language and the Federal

---

73. 28 U.S.C. § 473(a)(1) (Supp. IV 1992).

74. The Report notes that this is not the only implementation method possible. S. REP. NO. 416, *supra* note 64, at 53.

75. FED. R. CIV. P. 16(b) (requiring scheduling orders “[e]xcept in categories of actions exempted by the district court rule as inappropriate”).

76. For example, Social Security appeals are often exempted from these requirements. Some courts even exempt complex cases from Rule 16. See NANCY WEEKS, DISTRICT COURT IMPLEMENTATION OF AMENDED FEDERAL CIVIL RULE 16: A REPORT ON NEW LOCAL RULES 8-10 (1984).

77. MANUAL FOR COMPLEX LITIGATION SECOND § 20.11 (1985). The *Manual* suggests a number of management strategies for such cases, including agenda items for initial conferences and discovery-control checklists. *Id.* § 40.1-2.

78. BROOKINGS REPORT, *supra* note 12, at 14-16.

79. S. 2027, *supra* note 14, § 471(b)(1)(B). The bill also contained a mechanism for resolving disputes over track assignments, *id.* § 471(b)(2)(C), and a special set of mandatory procedures for complex cases. *Id.* § 471(b)(3)(I).

80. For instance, imagine a track that grants priority to defendants in taking depositions on the theory that certain classes of cases will therefore be resolved more quickly. This hypothetical rule would be inconsistent with Federal Rule of Civil Procedure 26(d), which states that generally “methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party’s discovery.” The Advisory Committee notes that while a district court may upon motion and in the interest of justice grant exceptions, “a local court rule purporting to confer priority in certain classes of cases would be inconsistent with this subdivision and thus void.” FED. R. CIV. P. 26 advisory committee’s note (1970 amendments).

81. Most tracking provisions dealt with enforcing deadlines. See, e.g., S. 2027, *supra* note 14, § 471(b)(3) (establishing a mandatory discovery conference in the first 45 days after the filing of a responsive pleading); *id.* § 471(b)(6)(A) (setting presumptive time limits on discovery).

Rules, the current statute simply requires that case-tracking schemes work within the confines of the Rules. As the earlier legislation demonstrates, this is easily accomplished.⁸²

The obvious question is why Congress passed legislation duplicating the existing Federal Rules. The answer, in part, lies in the report upon which the original version of the Act was based.⁸³ This document argues that the 1983 amendments to the Federal Rules of Civil Procedure, although focused on increasing judicial powers to manage cases aggressively,⁸⁴ failed to change judges' behavior.⁸⁵ In its findings, the CJRA echoes the report's view, noting that plans "should also recognize that there has not been adequate utilization of available and existing tools to respond to this substantially changed civil litigation system, to control cost and delays."⁸⁶ Thus the legislation was premised on the principles and goals of the 1983 amendments and was meant to encourage their use by judges.⁸⁷ The more directive and radical approach to case management Congress originally preferred was precluded, as I explain below, by the bargain struck with judges during the Act's passage. Instead, the final legislation contains many provisions that are both precatory and redundant.⁸⁸

2. Provisions for alternative dispute resolution.

Another category of CJRA provisions involves alternative dispute resolution (ADR). Many federal trial courts have experimented with a variety of ADR devices, and Rule 16 includes "the possibility of . . . the use of extrajudicial procedures to resolve the dispute" as a pretrial conference subject.⁸⁹ The

82. As demonstrated in the text accompanying notes 113-152 *infra*, nothing in the legislative history suggests that the change in language was intended to give localities greater freedom to deviate from preexisting statutory requirements.

83. BROOKINGS REPORT, *supra* note 12, at 8-11. Reed Dickerson argues that legislative history—to count as context of a statute's enactment—"must be (1) relevant; (2) reliable and reliably revealed; (3) reasonably available to the audience (that is, shared by author and audience); (4) taken into account (that is, relied on), as constituting part of the communication, by both author and audience." Reed Dickerson, *Statutory Interpretation: Dipping Into Legislative History*, 11 HOFSTRA L. REV. 1125, 1128 (1983). Dickerson found study group reports, on which legislation is subsequently based, the most reliable form of nontextual legislative material; committee reports came in second. *Id.* at 1130-31. The Brookings Report is especially reliable in this context because the task force was "convened . . . at the behest of Senator Joseph Biden, Chair of the Senate Judiciary Committee, to address delay and cost in the federal trial courts." Robel, *supra* note 12, at 117. Furthermore, both the report's definition of the problems of cost and delay and its suggestions of the causes underlying these problems were incorporated into Senate Bill 2027 by Senator Biden. *Id.* at 128.

84. See ARTHUR S. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 20-28 (1984). Professor Miller served as reporter for the Advisory Committee that recommended the 1983 amendments.

85. BROOKINGS REPORT, *supra* note 12, at 8-9.

86. S. 2027, *supra* note 14, § 2(15).

87. The task force report is stronger, agreeing with the criticism that the 1983 amendments were too piecemeal to cause real change in judges' behavior. See BROOKINGS REPORT, *supra* note 12, at 8 (citing Maurice Rosenberg, *The Federal Civil Rules After Half a Century*, 36 MAINE L. REV. 241, 242-51 (1984)). The political bargain struck with the judges, discussed below, precluded a more radical approach to case management, whereas earlier versions of the legislation would simply have mandated "fundamental changes that would dramatically improve the system." *Id.*

88. See notes 151-152 *infra* and accompanying text.

89. FED. R. CIV. P. 16(c)(7); see Kim Dayton, *The Myth of Alternative Dispute Resolution in the*

CJRA explicitly gives courts "authorization to refer appropriate cases to alternative dispute resolution programs that . . . have been designated for use in a district court; or . . . [that] the court may make available, including mediation, minitrial, and summary jury trial."⁹⁰ It also grants courts the power to establish early neutral evaluation procedures.⁹¹

While these sections clarify the trial courts' power to adopt and use alternative dispute resolution, they leave more difficult questions unanswered. First, although the legislation authorizes courts to *adopt* the listed forms of ADR, it is unclear whether courts may *require* parties to participate before allowing them to proceed to trial.⁹² Before the CJRA, the question of courts' authority to order mandatory reference to ADR received inconsistent answers.⁹³ Unfortunately, the CJRA's text does not explicitly resolve the question. The legislative history provides no clear guidance either.⁹⁴ Congress previously manifested

---

Federal Courts, 76 IOWA L. REV. 889 (1991); Lauren K. Robel, *Caseload and Judging: Judicial Adaptions to Caseload*, 1990 B.Y.U. L. REV. 3, 23-34.

90. 28 U.S.C. § 473(a)(6) (Supp. IV 1992).

91. The CJRA allows a court to include in its plan "a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation." *Id.* § 473(b)(4). For a description of these procedures, see Robel, *supra* note 89, at 23-28.

92. Several courts have adopted mandatory ADR programs through their CJRA plans. For example, the Eastern District of Texas requires mandatory mediation in most cases, as does the Southern District of West Virginia. JUDICIAL CONFERENCE REPORT, *supra* note 5, ex. C at 6-7. The Southern District of California implemented a requirement that "a non-binding mini-trial or summary jury trial shall be ordered in all cases where the potential judgment does not exceed \$250,000 and the use of this procedure will probably resolve the case." *Id.* pt. I at 27. This requirement also provides "[n]on-binding arbitration/mediation" in "all even numbered simple contract and tort cases (excluding FTCA) where the potential judgment does not exceed \$100,000 and in every even numbered trademark and copyright case." *Id.*

93. Several trial courts found authorization for mandatory orders in Rule 16 or the court's inherent authority. See *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 48 (E.D. Ky. 1988) (approving mandatory reference to summary jury trial authorized under Federal Rules of Civil Procedure 16(a)(5), (c)(7), (10), (11) or inherent authority); *Cincinnati Gas & Elec. Co. v. General Elec.*, 117 F.R.D. 597, 599 (S.D. Ohio 1987) (finding authority in both Rule 16 and the court's inherent power to manage its own cases), *aff'd*, 854 F.2d 900 (6th Cir.), *cert. denied*, 489 U.S. 1033 (1988). One court found the authority to send a case to mandatory court-annexed arbitration in Rule 83's authorization of local rules. *Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 574-77 (E.D. Pa. 1979) (validating a local, experimental rule requiring compulsory nonbinding arbitration); see also *New England Merchants Nat'l Bank v. Hughes*, 556 F. Supp. 712, 715 (E.D. Pa. 1983) (holding that failure to follow court procedure requiring mandatory arbitration precluded defendant from demanding a *de novo* trial). A federal appellate court upheld a local rule requiring mandatory mediation on the ground that since it was not inconsistent with any Federal Rule of Civil Procedure it was authorized under Rule 83. *Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266, 269 (6th Cir. 1985). In contrast, the Seventh Circuit refused to uphold an order requiring a party to participate in a nonbinding summary jury trial, finding neither inherent nor Rule 16 authority for the order. *Strandell v. Jackson County*, 838 F.2d 884, 886-88 (7th Cir. 1988).

94. The analysis of legislative history with respect to ADR is particularly unclear because the CJRA passed as part of broader legislation including other titles; some of these included provisions on ADR. Early versions of the CJRA, such as Senate Bill 2027, included broader powers to adopt ADR. But Congress ultimately narrowed these powers. See S. 2648, *supra* note 14 (making the CJRA Title I of the Judicial Improvements Act of 1990). Earlier versions of Title III of the Judicial Improvements Act, such as the Federal Courts Study Committee Implementation Act of 1990, also contained provisions relating to ADR. For an analysis of this history, see Dayton, *supra* note 89, at 949-50. However, when Congress decided only to implement the "noncontroversial" recommendations of the Federal Courts Study Committee, lawmakers deleted the Title III provisions concerning ADR. H.R. REP. NO. 734, 101st Cong., 2d Sess. 16 (1990). No evidence in the legislative history supports the assertion that

extreme caution in authorizing mandatory referrals to ADR in the federal courts, due to concerns about the effects of additional costs on litigants and about the potential effect on the exercise of the Seventh Amendment right to a jury trial in civil actions.⁹⁵ Nevertheless, the authorization given in the text to "refer" appropriate cases to ADR forms a stronger basis for a claim for such authority than does Rule 16(c)(7), which simply suggests discussing "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute, at least with respect to the ADR procedures listed in the statute."⁹⁶

A second question is whether the CJRA permits courts to adopt arbitration programs.⁹⁷ This issue requires consideration of both the statutory text and the CJRA's interaction with previous legislation. First, the Act allows courts to include "authorization to refer appropriate cases to alternative dispute resolution programs that—(A) have been designated for use in a district court; or (B) the court may make available, including mediation, minitrial, and summary jury trial."⁹⁸ It does not mention arbitration as one of the ADR techniques that a court "may make available."⁹⁹ An earlier version of the Act provided much broader authority for ADR and included arbitration as one of the forms of ADR a court could "make available."¹⁰⁰ This earlier version differs importantly from

---

deleting the ADR provisions from the Federal Courts Study Committee bill affected the language of the CJRA.

The evidence on the issue of mandatory reference is ambiguous. Both the Senate and the House Reports cite *Hume v. M&C Mgmt.*, 129 F.R.D. 506, 509-10 (N.D. Ohio 1990) (holding that federal district judges lack authority to summon persons to serve as summary jurors), and state that the CJRA would "eliminate any doubt [about the authority to conduct summary jury trials] that might exist in some courts." S. REP. NO. 416, *supra* note 64, at 57; H.R. REP. NO. 732, *supra* note 72, at 15. *But see* Dayton, *supra* note 89, at 950 (noting that *Hume* involved a voluntary summary jury trial requested by the parties, and cannot, therefore, answer clearly whether courts can require participation in the listed ADR devices).

95. Compare, for instance, the procedural safeguards Congress enacted when it authorized the use of mandatory arbitration in some districts in 1988. Court Reform and Access to Justice Act of 1988, 28 U.S.C. §§ 651-658 (1988).

96. FED. R. CIV. P. 16(c)(7). Professor Dayton argues that Rule 16 is extremely weak authority for the proposition that districts can adopt court-annexed ADR procedures on a district wide basis, since the rule refers only to discussing the use of "extrajudicial" procedures. Dayton, *supra* note 89, at 934. Dayton also points out that courts have looked to Federal Rule of Civil Procedure 83—allowing local rules not inconsistent with national rules—for authority to institute such procedures. *Id.* at 938-43 (rejecting this interpretation of Rule 83); *see also* David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 544-45 (1985) (describing local rules authorizing mandatory ADR as "violently at odds" with the entire structure of the Federal Rules of Civil Procedure).

97. Several courts which previously had not utilized arbitration programs have created them in their plans. JUDICIAL CONFERENCE REPORT, *supra* note 5, ex. C (reporting that the Southern District of California implemented mandatory ADR, including arbitration, for certain cases while the Northern District of Georgia and the Northern District of Ohio implemented mandatory and voluntary nonbinding arbitration, respectively). 28 U.S.C. § 658(1) did not designate any of these courts among those permitted to employ mandatory arbitration procedures.

98. 28 U.S.C. § 473(a)(6) (Supp. IV 1992).

99. *Id.*

100. Senate Bill 2027 required that each plan have

[a] comprehensive program providing for adjudication and, in appropriate cases, alternative dispute resolution, which would make available to the parties and their counsel the full range of alternative dispute resolution mechanisms, including mediation, arbitration, minitrial, and summary jury trial. If such program includes the mandatory reference of certain cases to an

what appears in the final Act: Not only has arbitration been removed from the list of authorized ADR programs, but the enacted legislation adds a reference to ADR programs "designated for use" in a particular court.¹⁰¹ While the two sections potentially overlap—a court could "designate for use" a form of ADR not listed as one it could "make available"¹⁰²—the more plausible reading of this language requires resort to a broader statutory framework.

There are two possible readings. First, the CJRA itself designates certain courts as "demonstration districts," requiring them to implement some of the principles, techniques, and guidelines mentioned in section 473(a) and (b). Three of the demonstration districts must "experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution, that such district courts and the Judicial Conference of the United States shall select."¹⁰³ The "designation" in section 473(a)(6)(A) could, therefore, refer to this section of the Act. Since the courts and the Judicial Conference are not directed to any particular ADR programs, it is plausible to read the section as allowing broad experimentation with all forms of ADR, including arbitration, but only in three districts.

The second possibility requires a broader statutory inquiry. In 1988, Congress enacted legislation authorizing a limited experiment in arbitration in twenty trial courts.¹⁰⁴ That legislation designated those courts to refer certain cases to arbitration programs they themselves conducted as a prerequisite to trial.¹⁰⁵ Thus, "designation" as used in the CJRA might refer to courts selected under this earlier legislation to experiment with arbitration.¹⁰⁶ If so, the Act does not expand the use of arbitration beyond the experimental districts designated in the earlier statute.

The 1988 legislation is explicitly experimental. Authorization for the arbitration program remained subject to repeal in 1993 and achieved only provisional renewal.¹⁰⁷ Only ten of the twenty courts authorized to operate

---

alternative dispute resolution mechanism, provision shall be made for motions to exempt a case from the mandated procedure.

S. 2027, *supra* note 14, § 471(b)(10).

101. 28 U.S.C. § 473(a)(6)(A) (Supp. IV 1992).

102. I have been unable to find any legislative materials on this point.

103. See 28 U.S.C. § 471 note (Supp. IV 1992) (reproducing Pub. L. No. 101-650, § 104(b)(2),

104 Stat. 5089, 5097 (1990), as amended by Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 505, 106 Stat. 4506, 4513 (1992)).

104. Court Reform and Access to Justice Act of 1988, 28 U.S.C. §§ 651-658 (1988). The 1988 legislation extends an experimental program dating from an 1978 experiment in three district courts initiated by the Department of Justice. In 1984, Congress authorized an additional eight districts to participate in the 1978 arbitration programs. H.R. REP. NO. 889, 100th Cong., 2d Sess. 32-33 (1988). Congress increased to 20 the number of districts authorized to participate in court-annexed arbitration programs in 28 U.S.C. § 658 (1988). For a description of some of these programs, see E. ALLAN LIND & JOHN E. SHAPARD, FEDERAL JUDICIAL CENTER, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (1981); Robel, *supra* note 89, at 24-25.

105. See 28 U.S.C. §§ 651-658 (1988). The statute limits the kinds of cases that may be referred to arbitration without the consent of the parties. *Id.* § 652(b) (explaining that courts may refer civil cases only where money damages not in excess of \$100,000 are sought).

106. The 1988 Act lists the courts authorized to use arbitration. *Id.* § 658.

107. The 1988 legislation required that the arbitration program expire "5 years after the date of enactment of this Act." Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702,

arbitration programs can *require* parties to participate.¹⁰⁸ The cases for referral also remain limited: The statute exempted cases involving complex or novel legal issues, or in which legal issues predominated.¹⁰⁹ The legislation also protects claims based on violations of federal rights from mandatory arbitration¹¹⁰ and carefully details the right to seek trial de novo after an arbitration award—the latter since the ultimate passage of the legislation hinged, in part, on preservation of litigants' Seventh Amendment right to a jury trial.¹¹¹ Finally, the Federal Judicial Center continually evaluates the statutory arbitration programs.¹¹²

The CJRA should be read with the 1988 legislation in mind, and arbitration authority should be limited (if it is found to exist at all) to the three demonstration districts the CJRA authorized to experiment with ADR. Nothing in the text warrants a broader reading, and the legislative history, with its express deletion of arbitration authority, offers no additional support.

3. *Summary.*

None of the principles, techniques, or guidelines discussed so far authorize broad procedural innovation in the mandated expense and delay reduction plans. Instead, the CJRA pairs encouragement of judges to use case-management tools already available with a modest and self-conscious expansion of those tools. The Act also clarifies the courts' power to adopt certain kinds of ADR techniques.

B. *The Argument for Broad Rulemaking Power*

There are two arguments in support of viewing the CJRA as a broad delegation of rulemaking authority to local courts. First, it could be argued that by styling the statutory case-management procedures as "principles" or "guidelines," Congress revealed a desire to view these procedures as exemplars for further innovation. However, the specificity of the directions in the Act and the history of the legislation discussed below weaken this position.

A stronger argument emerges from the text of section 473(b). After outlining five "techniques" that might be adopted by trial courts, section 473(b)(6)

---

§ 906, 102 Stat. 4642, 4664 (1988). On December 14, 1993, Congress extended that deadline to December 31, 1994. Judicial Arbitration Act of 1993, Pub. L. No. 103-192, § 1(a), 107 Stat. 2292, 2292 (1993) (to be codified at 28 U.S.C. § 651 note).

108. Section 657(a) authorizes district courts named in § 658(1) to refer cases to arbitration. It is not a blanket license, however. See notes 109-110 *infra* and accompanying text. Courts described in § 658(2) may only send cases to arbitration with the parties' consent.

109. 28 U.S.C. § 652(c) (1988).

110. *Id.* § 652(b) (precluding referring such cases without the consent of the parties).

111. *Id.* § 655; see, e.g., *New England Merchants Nat'l Bank v. Hughes*, 556 F. Supp. 712, 714 (E.D. Pa. 1983) (upholding a compulsory arbitration program against a 7th Amendment challenge); *Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 568-71 (E.D. Pa. 1979) (holding that a local rule mandating arbitration for cases seeking less than \$50,000 in damages is not so burdensome as to interfere with the 7th Amendment right).

112. 28 U.S.C. § 651 note (1988); see BARBARA MEIERHOEFER, *FEDERAL JUDICIAL CENTER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS* (1990) (reporting to Congress pursuant to the 1988 legislation).

states that the trial court plan may include "such other features as the district court considers appropriate after considering the recommendations of the advisory group."¹¹³ Nonetheless, this provision's history reveals that Congress did not intend to confer broad authority to experiment with procedures believed helpful in reducing cost and delay without regard for their consistency with the Federal Rules.

The earliest version of the CJRA, Senate Bill 2027,¹¹⁴ did not provide for any local control over the content of expense and delay reduction plans. As explained above, the legislation was based on a task force report critical of federal judges' reluctance to use the case-management tools provided by the 1983 amendments to the Federal Rules of Civil Procedure.¹¹⁵ Had this first version of the Act passed, each district would have been required to adopt a number of detailed case-management measures, including an elaborate case-tracking system.¹¹⁶ Hence, while the bill contained a statement about local court flexibility in its findings, it cautioned that flexibility had to be exercised "within certain well-defined and uniformly applied parameters."¹¹⁷ In truth, there was very little room for local flexibility in Senate Bill 2027, a fact that was cited as a virtue by one of its chief supporters.¹¹⁸

The Judicial Conference voiced its opposition to the proposed legislation. First, judges questioned the wisdom of imposing such detailed case-management requirements on courts across the country irrespective of the nature of their caseloads or the speed of their dockets.¹¹⁹ In fact, most of the opposition from the Judicial Conference and various bar groups concerned the mandatory case-management requirements. Thus, the focus of their lobbying was on allowing trial judges greater discretion under the Act.¹²⁰

---

113. 28 U.S.C. § 473(b)(6) (Supp. IV 1992).

114. S. 2027, *supra* note 14.

115. BROOKINGS REPORT, *supra* note 12, at 8. This criticism is repeated in the findings accompanying the bill. See S. 2027, *supra* note 14, § 2(15).

116. For instance, Senate Bill 2027 would have required every trial district to adopt a "differentiated system of case management" that would "assign cases . . . to appropriate processing tracks that operate under distinct and explicit rules, procedures and timeframes for the completion of discovery and for trial." S. 2027, *supra* note 14, § 471(b)(1)(B). This case-tracking system was to be implemented through a system of classification at intake: "[C]ases shall be classified on intake through an expanded civil cover sheet, which the clerk of each district court, designated track coordinator or other person to whom track assignment responsibilities have been delegated would use in making the initial track assignment." *Id.* § 471(b)(2)(B). The system would be coupled with an elaborate set of mechanisms to resolve disputes over track assignments. *Id.* § 471(b)(2)(C). The procedures for cases on the complex track were outlined in detail in the bill. *Id.* § 471(b)(3).

117. S. 2027, *supra* note 14, § 2(12); cf. BROOKINGS REPORT, *supra* note 12, at 10-11.

118. The fact that Senate Bill 2027 would have increased uniformity among district courts was central to the argument in its favor presented by Patrick Head, Vice-President and General Counsel of FMC Corporation and one of four nonjudge witnesses testifying in its favor. Head's prepared statement noted that a significant cost associated with having a national practice is the need to "identify and comply with diverse local court rules . . . . Consequently, any procedural reform that would increase procedural uniformity among federal courts would represent a direct savings to us." *Hearings, supra* note 34, at 22, 23 (statement of Patrick Head).

119. See *id.* at 333-34 (statement of Judge Robert F. Peckham); see also Robel, *supra* note 12, at 128-29 (detailing the opposition to the bill).

120. See *Hearings, supra* note 34, at 212 (testimony of Judge Aubrey E. Robinson, Jr.); *id.* at 335-43 (statement of Judge Peckham); Diana E. Murphy, S. 2648, *The Judicial Improvements Act of 1990*:

In addition, judges believed that the CJRA represented a dangerous deviation from the rulemaking process envisioned in the Rules Enabling Act (REA).¹²¹ The REA contemplates that committees of the Judicial Conference will propose rule changes to the Conference, and that these proposals will be transmitted to the Supreme Court and then, if approved, to Congress.¹²² Moreover, pursuant to two provisions added in 1988 with the intent to open the rulemaking process to public scrutiny,¹²³ the REA requires committees charged with rulemaking responsibility to hold their meetings in public—after public notice—to ensure that proposed rules are subject to comment before this transmission.¹²⁴ Judges expressed particular concern over promulgating national procedural norms without the careful deliberation, notice, and period for comment that characterize rulemaking under the REA but which did not precede the introduction of the CJRA.¹²⁵

The first attempt to meet judicial concerns was in Senate Bill 2648, a modified version of Senate Bill 2027.¹²⁶ Senate Bill 2648 represented a compromise requiring courts to adopt the procedures listed in what is now section 473(a), while leaving them free to reject what is now section 473(b).¹²⁷ The language allowing district courts to adopt “such other features as [they] con-

---

The concerns of federal judges, 74 JUDICATURE 112 (1990) (explaining her concerns, as the then-president of the Federal Judges Association, about the bill's impact on case scheduling); see also Robel, *supra* note 12, at 128; Ann Pelham, *Shall vs. May: Judges Rebel Over One Word in Civil Reform Bill*, LEGAL TIMES, Oct. 15, 1990, at 6.

121. 28 U.S.C. §§ 2071-2077 (1988 & Supp. IV 1992). Individual judges and the Judicial Conference made their strongest statements of their concerns about deviating from the REA rulemaking process during the hearings on Senate Bill 2648, the first legislative attempt to address some of the judges' concerns. See, e.g., *Hearings*, *supra* note 34, at 353-59 (statement of Judge Walter T. McGovern). Representatives of the Judicial Conference first expressed these concerns, however, at the hearings on Senate Bill 2027. See, e.g., *id.* at 221 (statement of Judge Robinson) (“These are procedural matters that should be handled through the normal, Congressionally-mandated Rules Enabling Act process.”). Senator Biden and his staff certainly knew the Conference's views on this matter already, as the Conference had appointed a task force to work with the Judiciary Committee on the bill. *Id.* at 309-10 (statement of Senator Biden).

122. 28 U.S.C. §§ 2073-2074 (1988).

123. The Judicial Improvements and Access to Justice Act of 1988 shortened 28 U.S.C. § 2072 and added 28 U.S.C. §§ 2073 and 2074. Pub. L. No. 100-702, § 401, 102 Stat. 4642, 4648-50 (1988).

124. 28 U.S.C. § 2073(c)(1)-(2) (1988). See Judge Robert E. Keeton: *A Look at Rulemaking in the Federal Judiciary*, THIRD BRANCH, Mar. 1993, at 10-11 (interview). Judge Keeton, the chairman of the Judicial Conference Committee on Rules of Practice and Procedure, notes that the committee is receiving a substantially increased number of comments. *Id.* at 11.

125. Judge Peckham explained the Judicial Conference's fears of harm to the rulemaking process: Congress recently reviewed and re-codified that process, taking care to build into it procedures that assure that before nationally applicable rules of procedure are imposed they are considered most deliberately by thoughtful and experienced judges, lawyers, and law professors over a substantial period of time, and that the lawyers and litigants . . . are given ample opportunity to articulate their reactions, point out potential problems, and add suggestions. As we who have sat on the bench for some time have discovered, sometimes painfully, procedural matters are extraordinarily complex. They can not only influence, but fix, the outcome of litigation. New rules can have a great many unforeseen consequences. And it takes the most considered deliberation to be sure that the dynamic between new programs and established practices is constructive. Thus it is crucial that inputs from all affected quarters be sought before procedural change is imposed.

Hearings, *supra* note 34, at 333-34 (statement of Judge Peckham).

126. S. 2648, *supra* note 14.

127. *Id.* § 473(b).

sider[ ] appropriate after considering the recommendations of the advisory group,"¹²⁸ first appears in Senate Bill 2648, but there is little mention and no discussion of it in either the Senate or the House Reports accompanying the Act.

But the fact that the entire legislative history lacks discussion of the language argues against concluding that Congress intended to confer broad authority to alter or ignore the Federal Rules of Civil Procedure.¹²⁹ Granting such authority would not have responded to judicial concerns and would have resulted in an even more serious deviation from the rulemaking process than the CJRA already represented. Instead, the timing of the language's appearance suggests that its insertion was an attempt to assuage judges' concerns about congressional "micromanagement" of the work of trial judges.¹³⁰

Section 473(b)(3) was not intended to confer broad authority to develop local procedures inconsistent with the Federal Rules. If it had, it would represent a dramatic departure from the ordinary rulemaking process—a departure Congress had recently rejected.¹³¹ The continuing controversy over the use of local rules under Federal Rule of Civil Procedure 83 and the congressional response to that controversy in 1988 reveals how dramatic a departure this reading constitutes.

Under Federal Rule of Civil Procedure 83, district courts may promulgate local rules "not inconsistent" with the Federal Rules.¹³² The proliferation of local rules, with their corresponding inconstancy to the text and spirit of the Federal Rules, came under the scrutiny of both the Judicial Conference and the Congress.¹³³ While the Judicial Conference's Local Rules Project engaged in

---

128. 28 U.S.C. § 473(b)(6) (Supp. IV 1992). Both congressional reports state that "subsection (b)(6) allows each district court to consider any other provisions that it considers appropriate after considering the recommendations of its advisory group." S. REP. NO. 416, *supra* note 64, at 59; H.R. REP. NO. 732, 101st Cong., 2d Sess. 17 (1990).

129. Moreover, language in the reports accompanying Senate Bill 2648 argues strongly against a conclusion that the Senate precipitously changed direction from its earlier bill. The Senate Report that accompanied the final, amended version of the bill argues that the legislation is necessary to provide justice to all citizens through a "minimal level of efficiency and economy" that would allow judges "sufficient time for . . . thoughtful and deliberate adjudication." S. REP. NO. 416, *supra* note 64, at 2.

130. See *Hearings, supra* note 34, at 349 (comments of Senator Biden); see also Ann Pelham, *Biden, Judges Negotiate Civil Reform*, LEGAL TIMES, May 14, 1990, at 7.

131. It is a truism of statutory construction that the law does not dramatically change unless Congress says so explicitly. See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 395-96 403-04 (1991). There is nothing either in the explicit statutory text or the legislative history to suggest that Congress believed it was altering the result of the 1988 legislation.

132. FED. R. CIV. P. 83. The Rule also empowers magistrates and judges to regulate practice "in any manner not inconsistent with these rules or those of the district in which they act," thus allowing for even more localization of practice, all within the context of a set of national norms. *Id.*

133. In 1984, the Judicial Conference authorized its Committee on Rules of Practice and Procedure to study and treat the problems that the local proliferation of rules causes. The following year, the Conference empowered the Reporter of the Committee to collect and organize all the district court rules, as well as other judicial commands that operate like rules, into one source. The Reporter was also instructed to design a project to study the growing number of divergent local rules. This "Local Rules Project" discovered that the 94 federal court districts had an aggregate of almost 5000 local rules, "not including many 'sub-rules,' standing orders and standard operating procedures." COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE 1 (1989).

studying and cataloging the variety of local rules, lawmakers introduced amendments to the statutory rulemaking power in Congress.¹³⁴

The legislation, which passed in 1988, was intended to provide a significant check on local rulemaking.¹³⁵ First, it requires "appropriate public notice and an opportunity for comment" to precede the adoption of local rules.¹³⁶ Second, it formalizes a system of review of local district court rules by judicial councils within a circuit, and authorizes those councils to abrogate local rules inconsistent with the Federal Rules.¹³⁷ Third, the statute states that it is the exclusive avenue for prescribing local rules, thereby attempting to avoid the promulgation of the equivalent of local rules under various other rubrics, such as "standing orders."¹³⁸

The other changes the 1988 legislation imposed repeated the emphasis on openness and accountability in the rulemaking process. Congress repealed the old REA and replaced it with separate sections designed to open national rulemaking to public scrutiny, and to give Congress a longer time period during which it could interrupt the rule-establishing process.¹³⁹

Thus, prior to the CJRA, Congress' most recent venture into the realm of judicial rulemaking was to impose greater controls and more accountability on rulemaking at every level of the federal courts. Against this background, it is hardly plausible that the CJRA, which began its life as a bill giving no rulemaking authority to local courts, could have been transformed into a charter for local court independence, allowing courts to implement local procedures without regard for either national norms or the notice and comment requirements so recently enacted by Congress.¹⁴⁰

Reading the CJRA to allow local procedural change in derogation of the

---

134. The text of the original rulemaking statute read as follows: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." 28 U.S.C. § 2071 (Supp. 1952) (current version at 28 U.S.C. §§ 2071-2077 (1988 & Supp. IV 1992)).

135. Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 403(a)(1), 102 Stat. 4642, 4650 (1988) (codified as amended at 28 U.S.C. §§ 2071-2074 (1988 & Supp. IV 1992)).

136. 28 U.S.C. § 2071(b) (1988).

137. *Id.* § 2071(c)(1). A subsequent and coordinate amendment to 28 U.S.C. § 332 requires that the judicial councils perform a substantive review of these rules. *Id.* § 332(d)(4) (Supp. IV 1992).

138. *Id.* § 2071(f) (1988).

139. *Id.* §§ 2072-2074.

140. The CJRA does not require notice and comment before implementation of a plan. Instead, it requires that the advisory group report be "made available to the public." *Id.* § 472(b) (Supp. IV 1992). Unlike the substantive review of local rules now required by § 332, the CJRA contains an extensive review process but no obvious authority for the reviewers to do anything other than to make suggestions. *See id.* § 474(a)(1) (providing that the chief judge of each district court and the chief judge of the court of appeals for that circuit shall together "review each plan . . . and make suggestions for additional actions"); *id.* § 474(b)(2) (mandating that the Judicial Conference shall review each plan and "may request the district court to take additional action if the Judicial Conference determines that such court has not adequately responded to [relevant local conditions]").

The CJRA's legislative history contains an extensive discussion of the REA in response to the Judicial Conference's concern that the CJRA represented an unwarranted congressional venture into rulemaking, derogating the REA procedure. *See* S. REP. NO. 416, *supra* note 64, at 10-12. While the Report contains a strong statement of congressional power to engage in rulemaking, there is no suggestion that unabridged local rulemaking—a recent concern of Congress—is being instated.

Federal Rules would also place the Act in tension with the recently revised 28 U.S.C. § 2071. As noted above, the purpose of section 2071 was to assure that all local rulemaking—by whatever name—remain consistent with the Federal Rules and other congressional enactments. Although it is possible to harmonize the CJRA and section 2071 by assuming that plan provisions containing directions to lawyers should be implemented through local rules,¹⁴¹ this reading would not, of course, aid those seeking expanded rulemaking authority. Federal Rule of Civil Procedure 83, which authorizes local rules, and section 2071 both require that local rules not conflict with either the Federal Rules or other federal laws.

To be sure, the legislative reports contain somewhat ambiguous¹⁴² discussions of “building reform that proceeds from ‘the bottom up.’”¹⁴³ Indeed, some Senate Report statements might be read as encouraging local procedural innovation. The Report quotes approvingly from the testimony of Judge Robert Peckham that “[s]ome of the most important reforms that have happened in the federal judicial system have been locally created and have been spread throughout and later adopted.” The Report continues: “That notion, quite simply, lies at the heart of [the CJRA].”¹⁴⁴

While it is possible that these remarks reveal that Congress embraced local proceduralism, such a conclusion is unlikely. Rather, the Report notes Judge Peckham’s complaint that locally created innovations experience ineffective dissemination. The report then states that the CJRA, by assuring a “systemwide approach,” overcomes this problem.¹⁴⁵ Further, the Report’s lengthy discussion of the case-management techniques the Act actually contained suggests that the sponsors believed the CJRA embodied and codified the best of the local reforms to which Judge Peckham referred.¹⁴⁶

Moreover, statements that appear to support local procedural innovation must be viewed in the context of the whole report, which emphasizes the CJRA’s necessity on the basis that it represents a national strategy, premised on “general and widely accepted principles of litigation management and cost reduction.”¹⁴⁷ The congressional belief that local courts should exert a degree of control over whether to implement the techniques the Act suggested does not

---

141. The CJRA does not define “implementation.” Thus, a requirement that such provisions go through the ordinary process for local rulemaking would not offend the legislation.

142. It is clear that Congress envisioned factfinding as the primary local role. For instance, the purpose of the advisory groups is to assure that local problems are thoroughly identified. S. REP. NO. 416, *supra* note 64, at 14-15 (indicating that “legislation allows for a ‘determination of problems in local areas to be made at the local level . . . as opposed to a broad-based national level’ ” (quoting *Hearings*, *supra* note 34, at 27 (statement of Bill Wagner)). Congress also hoped that the advisory groups’ participation would encourage local support for the plans. *Id.* at 15-16; *see also* Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 60 BROOKLYN L. REV. 879 (1994) (describing the evolving conception of the advisory groups’ role under the CJRA).

143. S. REP. NO. 416, *supra* note 64, at 14 (quoting 136 CONG. REC. S416 (daily ed. Jan. 25, 1990) (statement of Senator Biden)).

144. *Id.* at 15 (quoting *Hearings*, *supra* note 34, at 315 (testimony of Judge Peckham)).

145. *Id.* at 16.

146. *Id.* at 16-30.

147. *Id.* at 30. In an attempt to forestall the proposed legislation, the Judicial Conference adopted a “Fourteen Point Program” of case management. The program, however, failed to obviate the need for

support the larger proposition that Congress approved the adoption of plans inconsistent with other federal laws. The legislative record does not mention the need for, or the authorization of, such power.

What, then, was intended by section 473(b)(6)? One can begin to give it content by recognizing that the primary concern motivating judges opposed to earlier bills was the desire to maintain flexibility in managing their dockets.¹⁴⁸ Many management strategies are not obvious subjects for rulemaking. Courts, for example, might adopt internal operating procedures specifying how to assign cases if one judge develops a backlog of motions. A court could similarly decide to assign visiting judges solely to criminal cases so as to expedite civil cases.¹⁴⁹ Moreover, the required advisory group assessment might recommend that a court struggling with timely decision of motions prioritize them or adopt a policy of rescheduling trial dates when the court fails to decide motions within twenty days of trial.¹⁵⁰ An advisory group might also suggest new trial-scheduling strategies.

The point is that a huge layer of case management has never been thought a rulemakers' concern.¹⁵¹ This is the aspect of trial court management that judges worried about protecting, in part because it is probably the most sensitive to local conditions. Senate Bill 2027 provoked controversy not because it contained amendments to the Federal Rules of Civil Procedure; it didn't. Instead, it included instructions to federal trial judges directed at exactly this docket-management layer of procedure—requirements that judges create case tracks or schedule trials in a certain way. These innovations in docket-management procedure embodied the "micromanagement" about which judges complained. They knew from experience that case tracking did not make sense in rural districts and that a statutory command to schedule all civil trials within eighteen months, for instance, could wreak havoc with the docket of a court burdened with drug prosecutions.¹⁵²

Section 473(b)(6) thus embodies a workable compromise. It allows judicial discretion in the areas where it has traditionally existed, but gives the courts the benefit of an "outside look," by advisory groups, at their internal procedures. It is not, nor was it intended to be, a charter for local rulemaking.

---

legislation—indeed, the Senate Report states that the program itself demonstrates "why a legislative approach is needed." *Id.*

148. See note 121 *supra*.

149. See JUDICIAL CONFERENCE REPORT, *supra* note 5, at 13-14.

150. See U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, REPORT OF THE CIVIL JUSTICE ADVISORY GROUP 48-50 (1991) [hereinafter INDIANA PLAN] (recommending prioritization of motions and rescheduling trial dates).

151. The 1983 amendments to the Federal Rules of Civil Procedure—especially the amendments to Rule 16—were intended to prod judges into active case management at an earlier point in the litigation. See MILLER, *supra* note 84, at 21 (revealing that an informal survey indicated that one- to two-thirds of federal trial judges already participated in active case management prior to the amendments). But like most rulemaking, these amendments exist not only to strengthen judges' powers, but also to clarify lawyers' duties, from preparation to discuss settlement to participation in a case management plan discussion. In contrast, court procedures concerning trial settings, case-assignment practices, or motions priorities all affect lawyers, but do not impose duties upon them.

152. See Murphy, *supra* note 120, at 112, 114; see also *Hearings*, *supra* note 34, at 360-61 (testimony of Judge Diana E. Murphy).

C. *Beyond the Federal Rules: Substance in the Plans*

While concern about deviations from the Federal Rules of Civil Procedure remains acute, there are perhaps more serious questions to address. The plan adopted by the Eastern District of Texas, for instance, caps contingency fees and limits expenses chargeable to clients,¹⁵³ despite the Supreme Court's pronouncements that matters of cost and fee allocation are "for the legislature, not the courts."¹⁵⁴ Other plans contain similarly substantive provisions.¹⁵⁵

The distinction between "substance" and "procedure," though central to the REA, is an elusive¹⁵⁶ yet functional concept.¹⁵⁷ The Eastern District of Texas announced its goal in capping attorneys' fees—and it is the same substantive goal announced by the Congress in the CJRA: cutting the costs of civil litigation.¹⁵⁸ That goal involves—or should involve—weighing a number of substantive policies, including access to attorneys for those unable to pay standard rates as well as the cap's effect on the availability of legal services. The Texas court argues that the CJRA assumes that a reduction in legal activity during discovery will reduce costs, but notes that this will not benefit contingency fee

---

153. Article V of the Texas Plan bases the caps on the underlying assumption of the CJRA that reducing legal activity during discovery through a plan will reduce the cost to litigants who pay for legal services on an hourly basis.

Whether such presumed reductions become a reality remains to be seen. . . . However, no such reduction from these measures will inure to the benefit of litigants who retain counsel on a contingency fee basis. The court, therefore, adopts the following maximum fee schedule for contingency fee cases (whether filed originally in this court or removed from state court):

(1) Contingency fees in non-statutory cases:

A fee of 33-1/3% of the total award or settlement.

(2) Expenses:

Expenses incurred by attorneys that are directly related to the costs of litigation of individual cases shall be deducted from the award or settlement before any calculation or distribution is made for attorneys' fees. No deduction is permitted for general office overhead expenses. Moreover, attorneys are prohibited from charging interest on any money advanced for expenses.

TEXAS PLAN, *supra* note 39, at 7-8.

154. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (rejecting a postjudgment interest rule that would date interest from the verdict, rather than the judgment, and noting that "the allocation of the costs accruing from litigation is a matter for the legislature, not the courts"); *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240, 247 (1975) (holding that only Congress can make an exception to the "American rule" for fee allocation and that "it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in [this way]").

155. *See, e.g., Tobias*, *supra* note 40, at 1421 (noting Montana's plan to establish an attorney review committee).

156. *See, e.g., Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (arguing that the Constitution's creation of the federal courts "carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either"); Paul D. Carrington, "Substance" and "Procedure" in the *Rules Enabling Act*, 1989 DUKE L.J. 281 (exploring the meanings of "substance" and "procedure"). John Hart Ely noted some time ago that "procedural" rules can affect "substantive rights." John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724 (1974).

157. *See, e.g., Burbank*, *supra* note 7, at 1190 ("[I]f lawmaking in an area necessarily involves the consideration of public policy—policies extrinsic to the process of litigation—the choices in that area are for Congress." (footnote omitted)).

158. TEXAS PLAN, *supra* note 39, at 7.

clients.¹⁵⁹ While the court is correct in its assumptions, the Act by its terms does not affect the Texas court policy. Nor is it obvious that it empowers the Texas court to do so.¹⁶⁰

The statutory tasks allotted to the civil justice advisory groups, as well as the groups' composition, do not suggest that Congress viewed them as competent to weigh sensitive policy.¹⁶¹ As noted above, their charge is to assess the docket and to recommend measures to the courts. Detailed statutory language limits their discretion in making recommendations. While the groups should reflect the various constituencies who use the courts, there is no requirement that they do so.¹⁶² Nothing suggests that advisory group functions should include choosing between competing, and compelling, public values.

The CJRA's dual goals of reducing cost and delay in civil litigation while increasing access to justice require difficult and controversial weighing of competing policies. Congressional rulemaking control has always been premised on concerns about the allocation of federal powers, and, in particular, on a concern that the legislature, not the courts, engage in "policy choices with a predictable and identifiable impact on rights claimed under substantive law."¹⁶³ Despite its ambitious title, the relatively modest provisions of the CJRA do not arrogate to local federal judges—with or without advisory groups—the power to effect substantive reforms of this nature. From its conception through its enactment, the CJRA was much too suspicious of federal judges to accommodate such a reading.

IV. THE CONSTITUTIONALITY OF CONGRESSIONAL RULEMAKING

Of course, a close reading of the statutory text is unnecessary if the CJRA was beyond Congress' power to enact in the first place. In a recent article, Professor Linda Mullenix argues exactly that. She asserts that in enacting the CJRA, Congress violated constitutional separation of powers norms, arguing that the CJRA has "effectively repealed the Rules Enabling Act . . . [and] has by fiat stripped the judicial branch of a power that uniquely bears on the federal judicial function: the power to prescribe internal rules of procedure for the

---

159. *Id.*

160. Interestingly, Judge Robert Parker, the former Chief Judge of the Eastern District of Texas, also chairs the Judicial Conference's Committee on Court Administration and Case Management, the body charged with overseeing the CJRA's implementation.

161. See Robel, *supra* note 142, at 896-904 (describing the actual composition of advisory groups appointed under the CJRA and arguing that the groups' makeup does not ensure consideration of diverse viewpoints).

162. 28 U.S.C. § 478 (Supp. IV 1992) (describing the appointment process for members); see Robel, *supra* note 142, at 893-96 (describing a nationwide survey of advisory group members and concluding that the groups do not effectively represent all constituencies of the federal courts).

163. Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1019-20. I agree with Burbank's argument that "when the Supreme Court makes law through supervisory court rules, it is engaged in an enterprise that, both practically and normatively, is different in important respects from the enterprise in which the Court, or any federal court, is engaged when it makes federal common law." *Id.* at 1021. Professor Burbank elaborates upon his reading of the REA in Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 700-10 (1988).

federal courts.”¹⁶⁴ In her view, the CJRA took “procedural rulemaking power away from judges and their expert advisers and delegated it to local lawyers.”¹⁶⁵ In addition, Professor Mullenix posits that the REA creates a *statutory* limitation on Congress’ rulemaking power that Congress cannot ignore.¹⁶⁶ However, neither the Constitution nor the REA place the type of constraints Professor Mullenix suggests on Congress’ involvement in rulemaking.

A. Does the CJRA Violate Separation of Powers?

Professor Mullenix states: “My thesis is simple: the Civil Justice Reform Act revokes the Rules Enabling Act and authorizes unconstitutional rulemaking. The Act violates the separation of powers doctrine and substantially impairs the ability of the federal courts to control their internal processes and the conduct of civil litigation.”¹⁶⁷ Implicit in this argument are two controversial assertions: (1) that the Constitution requires the current REA division of labor between the judiciary and the legislative branch; and (2) that the Constitution mandates that the federal courts control their “internal processes” free of congressional supervision. I disagree with both assertions. Moreover, the CJRA does not violate Professor Mullenix’s interpretation of the separation of powers doctrine, even if it were justified, because the Act leaves the judiciary holding ultimate control over the content of the civil justice reform plans.

By statute, federal procedural rules are initiated by the judicial branch¹⁶⁸ subject to congressional approval.¹⁶⁹ The familiar statutory allocation of power between Congress and the courts relies on the distinction between substance and procedure: As has been the case since the first REA was passed in 1934,¹⁷⁰ the Supreme Court is free to “prescribe general rules of practice and procedure” so long as those rules do “not abridge, enlarge, or modify any substantive right.”¹⁷¹

---

164. Mullenix, *Counter-Reformation*, *supra* note 8, at 379.

165. *Id.*

166. *Id.* at 424. The Senate described Congress’ rulemaking authority as both plenary and exclusive, a position that need not be accepted in order to accept the CJRA. *Id.* (citing S. REP. NO. 416, *supra* note 64, at 10). Professor Mullenix states that the Senate’s argument on the rulemaking allocation issue “fails to recognize that the Rules Enabling Act has clearly assigned *substantive* rulemaking power to Congress and *procedural* rulemaking power to the federal courts. In essence, then, the Rules Enabling Act governs and limits congressional rulemaking power.” *Id.* at 427.

167. *Id.* at 382.

168. 28 U.S.C. §§ 2071-2073 (1988 & Supp. IV 1992).

169. *Id.* § 2074. “Congressional approval” may misdescribe the process. Since the 1988 Rules Enabling Act amendments, rules proposed by the Court under § 2072 or § 2073 go into effect unless Congress acts to prevent their implementation within seven months after the Chief Justice reports the proposed rules to Congress. *Id.* § 2074(a).

170. Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (current version at 28 U.S.C. §§ 2071-2077 (1988 & Supp. IV 1992)).

171. 28 U.S.C. § 2071(a)-(b) (1988). Professor Burbank explains:

The historical evidence compels the view that the limitations imposed by the famous first two sentences of the [Rules Enabling] Act

[T]he Supreme Court of the United States shall have the power to prescribe by general rules . . . the forms of process, writs, pleading, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.

In order to assess this arrangement's constitutionality, one must ascertain the constitutional source of the power to make procedural rules. The Supreme Court recognizes three general sources of judicial power. First, Article III defines the exercise of judicial power as primarily confined to deciding "cases" and "controversies."¹⁷² Second, the Court recognizes that Article I gives Congress limited power to delegate to the judiciary powers beyond the Article III powers, so long as the delegation does not threaten "an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States,"¹⁷³ assign "tasks that are more properly accomplished by [other] branches,"¹⁷⁴ or otherwise "impermissibly threaten[] the institutional integrity of the Judicial Branch."¹⁷⁵ Third, the Court maintains that federal courts have "inherent" authority to exercise certain nonadjudicatory powers.¹⁷⁶

The Supreme Court, then, has identified two specific sources of judicial rulemaking power. It primarily describes its ability to promulgate general rules of procedure as congressionally delegated. Article III offers a second, independent, albeit limited, source of rulemaking power. Congress' authority to adopt the CJRA, then, depends on the extent the Constitution requires judicial participation in rulemaking. In turn, what the Constitution requires depends on the relationship between the power the Court views as delegated and the power it describes as either explicit in Article III or inherent.

---

were intended to allocate power between the Supreme Court as rulemaker and Congress and thus to circumscribe the delegation of legislative power . . .

Burbank, *supra* note 7, at 1025 (quoting 48 Stat. at 1064).

172. The Supreme Court has explained:

Article III of the Constitution confines the federal courts to adjudicating actual "cases" and "controversies." . . . [T]he "case or controversy" requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded . . . . The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government.

Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting U.S. CONST. art. III, § 2); *see also* Morrison v. Olson, 487 U.S. 654, 677 (1988) (holding that an independent counsel's subpoena power does not violate either Article III or the separation of powers doctrine); Worth v. Seldin, 422 U.S. 490, 498 (1975) (enumerating standing requirements to gain access to federal court adjudication); Flast v. Cohen, 392 U.S. 83, 101-06 (1968) (granting taxpayer standing to challenge the expenditure of federal funds to purchase textbooks for a parochial school).

173. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (upholding Congress' grant to the Commission of jurisdiction over common law counterclaims); *see also* *Mistretta v. United States*, 488 U.S. 361, 362 (1989) (asking whether the challenged practice "prevents the Executive branch from accomplishing its constitutionally assigned functions" (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977))); *Morrison*, 487 U.S. at 683-84 (upholding the constitutionality of the 1978 Ethics in Government Act's independent counsel provisions).

174. *Morrison*, 487 U.S. at 680-81.

175. *Mistretta*, 488 U.S. at 383 (quoting *Schor*, 478 U.S. at 851).

176. *See, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46-49 (1991) (discussing the inherent power to sanction litigants for bad faith conduct); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987) (discussing the inherent power to initiate contempt proceedings and to appoint counsel to prosecute them); *In re Snyder*, 472 U.S. 634, 643 (1985) (explaining the inherent power to suspend or disbar attorneys). For the most part, this asserted inherent authority is consistent with a vision of separated powers that recognizes the courts' need to be able to protect the integrity of their processes without undue reliance on the political branches. *See, e.g.*, *Young*, 481 U.S. at 796 ("The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches.").

Article III's "case or controversy" requirement is not an obvious source for a general judicial rulemaking power—at least not as interpreted by the Supreme Court. The Court might have viewed Article III's command that the federal courts adjudicate cases as implicitly granting courts the power to create rules of general application in order to govern that adjudication. The Court has not done so. Instead, it describes Article III's requirements in terms of the quality of the dispute presented for adjudication and the relationship of the litigants to that dispute.¹⁷⁷

The Court describes its ability to make rules of general application as a delegated power.¹⁷⁸ Chief Justice Marshall first identified the Necessary and Proper Clause¹⁷⁹ as the source of this power, stating that "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."¹⁸⁰ Chief Justice Marshall was convinced that it was within Congress' power to make rules of procedure "without the intervention of the Courts."¹⁸¹ Thus, it was clear that Congress could "delegate to the courts the power of altering the modes . . . of proceedings in suits."¹⁸²

In fact, for most of our early history, "Congress, rather than the Supreme Court, played the leading role in determining what procedural rules the

---

177. See note 172 *supra*.

178. To the extent that rulemaking is not described as a delegated power, it is discussed as an aspect of inherent authority (or "supervisory power"). See, e.g., *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 225 (1946) (forbidding discriminatory jury selection processes under the Court's "power of supervision over the administration of justice in the federal courts").

179. U.S. CONST. art. I, § 8, cl. 18. This clause gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.*

180. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (discussing congressional power to regulate the proceedings of the federal courts).

181. *Id.* at 143. In evaluating the constitutionality of a 1793 act granting courts the power to draw up rules in order to conduct their business, Chief Justice Marshall concluded:

It will certainly not be contended, that this might not be done by congress. The courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleading, and other things of the same description. It will not be contended, that these things might not be done by the legislature, *without the intervention of the Courts*; yet it is not alleged, that the power may not be conferred on the judicial department.

Id. (emphasis added).

182. *Id.*; see also *Livingston v. Story*, 34 U.S. (9 Pet.) 632, 656 (1835) (holding that in authorizing Congress to create the lower federal courts, Article III also authorized Congress to create modes of procedure for those courts).

federal courts would follow."¹⁸³ In addition to enacting the Judiciary Act,¹⁸⁴ beginning in 1789, Congress directed the federal courts to borrow state procedures through the various Conformity Acts¹⁸⁵ and adopted acts authorizing the Supreme Court to promulgate rules in equity and admiralty.¹⁸⁶ In the absence of statutes on point, "the Supreme Court tended to construe the federal courts' authority narrowly, concluding that Congress must have intended the federal courts to follow the local procedural rules when it had not provided otherwise."¹⁸⁷

Reiterating its holding that Congress may confer rulemaking authority on the judiciary, the Court in *Mistretta v. United States*¹⁸⁸ traced the history of judicial rulemaking under the REA, quoting its earlier language from *Sibbach v. Wilson*: "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States."¹⁸⁹ The Court has recognized that it is exercising a delegated power not only when it makes rules of general application under the various enabling acts, but also when exercising administrative power through the judicial councils and the Administrative Office of the United States

---

183. Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1436 (1984). Congress has recently shown renewed interest in direct involvement in the civil rules. See Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 460-62 (1993) (describing congressional amendments of Federal Rules of Civil Procedure 4, 35, and 37). And if one looks beyond the narrow confines of civil procedure, Congress appears to remain involved in procedural rulemaking in numerous other areas. For example, half of the amendments subsequent to Congress' 1975 passage of the Federal Rules of Evidence have originated in Congress, not in any judicial branch rulemaking committee. Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 859 (1992). In 1974, Congress also "enacted a year-long postponement of the effectiveness of amendments to the Federal Rules of Criminal Procedure," in order to ensure a "meaningful congressional review of the issues raised by those rules." Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-Examination*, 61 A.B.A. J. 579, 579 (1975).

184. Judiciary Act of 1789, ch. 20, 1 Stat. 73. Professor Beale notes that several sections of the Judiciary Act regulated procedure. Beale, *supra* note 183, at 1436. See Judiciary Act §§ 9(d), 29, 30, 33, 1 Stat. at 77, 88, 91 (relating to jury trial, venue in capital cases, jury selection, oral testimony, depositions, and bail).

185. Act of Sept. 29, 1789, ch. 21, 1 Stat. 93, 93-94 (directing federal courts to follow the procedures used in state courts in their geographic areas); Act of May 19, 1828, ch. 68, 4 Stat. 278 (extending the 1789 Conformity Act to newly admitted states).

186. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (extending the Conformity Act to equity cases); Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516, 518 (authorizing the Supreme Court to promulgate rules for admiralty cases); see Burbank, *supra* note 7, at 1037 n.90.

187. Beale, *supra* note 183, at 1438. Thus, Professor Mullenix's claims that Congress has not participated in procedural rulemaking and that the Supreme Court's recognition of congressional rulemaking power appears only in "*dicta*" in two Supreme Court cases construing the Rules Enabling Act" are incorrect. Mullenix, *Unconstitutional Rulemaking*, *supra* note 8, at 1327.

188. 488 U.S. 361 (1989).

189. *Id.* at 387 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941) (finding that plaintiff must submit to a court-ordered physical examination)); see also *id.* at 386 n.14 (stating that "rulemaking power originates in the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch").

Courts.¹⁹⁰ These powers, while not defined in Article III, may be delegated to the courts because they “do not trench upon the prerogatives of another Branch and . . . are appropriate to the central mission of the Judiciary.”¹⁹¹

From our earliest history, then, and despite the protestations of a celebrated scholar,¹⁹² the Court has described its rulemaking power as delegated.¹⁹³ In fact, both scholars and justices¹⁹⁴ have questioned whether the courts should have accepted the delegation: Rulemaking is neither “part of the case adjudication process” nor “ancillary” to that process¹⁹⁵ and therefore exposes the judiciary to involvement in essentially political decisions—at a cost to the protection from politics a strict interpretation of Article III provides the judiciary.

More than history, however, supports the Court’s position that Congress has “undoubted power”¹⁹⁶ to regulate federal court procedures. Judicial procedures

---

190. *Id.* at 388-89.

191. *Id.* at 388.

192. Dean Wigmore believed the rulemaking power belonged to the Court alone. John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928). Other commentators agree in part with Dean Wigmore’s arguments. See Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 630 (1957) (arguing that courts have inherent, and supreme, authority to prescribe rules “for the establishment and maintenance of the machinery essential for the efficient administration of judicial business”). Dean Pound, while agreeing that rulemaking is an inherent judicial function, believed that Wigmore’s constitutional position could not be sustained in the face of 75 years of legislative rulemaking and Court acquiescence. Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599, 601 (1926). For an analysis and rejection of Wigmore’s position, see Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167, 192-193 (1979).

193. Professor Beale notes that “[a]lthough the records of the Constitutional Convention and the debates on ratification shed little light on the question whether the grant of judicial power conferred the exclusive authority to formulate procedural rules, both Congress and the Supreme Court have consistently viewed congressional regulation of judicial procedural matters as appropriate.” Beale, *supra* note 183, at 1466 (footnote omitted). Beale notes the argument that “the framers felt no need to define ‘the judicial Power’ because they accepted as their general model the English and colonial courts, which formulated their own rules of procedure and evidence.” *Id.* at 1466 n.217. However, she rejects that argument because “the overall structure of the Constitution implies certain limits on the federal courts which did not limit the powers that were exercised by the English and colonial courts,” such as the restriction against recognizing federal common law crimes. *Id.*

194. In a famous statement, Justices Black and Douglas voiced their opposition to the Court’s promulgation of amendments to the Federal Rules of Civil Procedure, “many [of which] determine matters so substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation which . . . the Constitution requires to be initiated in and enacted by the Congress and approved by the President.” Amendments to Rules of Civil Procedure for the United States District Courts, 374 U.S. 861, 865-66 (1963) (dissenting statement of Black & Douglas, JJ.) (footnotes omitted).

195. MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 21 (2d ed. 1990). After showing that Article III does not justify the power to promulgate federal rules, Professor Redish notes that such rules

operate on all litigants, with the binding effect of law. The Court’s function in the process of promulgation of the Rules today virtually amounts to the adoption of legislation. Thus, in promulgating the Rules for congressional approval, the Court is inherently intertwined in the legislative process. One could reasonably ask, what activity could represent a more striking departure from the tradition judicial function of case adjudication than a direct and immediate role in the enactment of legislation?

Id. As Professor Redish laments, however, the Court would not likely agree that the delegation here exceeds that allowed in *Morrison* or *Mistretta*. *Id.* at 22.

196. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941); see also *Hanna v. Plumer*, 380 U.S. 460, 473 (1965) (explaining that “*Erie* and its offspring cast no doubt on the long-recognized power of Congress

influence the determination of substantive rights. The indeterminate division between substantive and adjective law argues for a strong congressional role in rulemaking, both because Congress is a democratically elected, policymaking branch,¹⁹⁷ and because the Supreme Court's decision to accept or reject procedural revisions is final.

The cases accepting congressional power to engage in procedural rulemaking have long coexisted with cases authorizing certain acts on the basis of "inherent" judicial power. The courts generally claim this power in two areas. First, since 1943 the Court has asserted a "supervisory authority over the administration of criminal justice in the federal courts."¹⁹⁸ Since declaring this power, the Court has "announced general rules of procedure and evidence for federal criminal proceedings" in numerous cases.¹⁹⁹ A similar assertion of power in civil cases is rare. *Thiel v. Southern Pacific Co.*²⁰⁰ is the most frequently cited example. The Court justifies its exercise of supervisory power in these cases with its concern for the integrity of the federal courts' processes and its reluctance to condone inequitable executive practices.²⁰¹

Congress occasionally responds to these decisions announcing procedural rules with legislation.²⁰² Moreover, the Court has upheld congressional reversal of its supervisory opinions, explaining that the judiciary's power to issue rules of general procedure "exists only in the absence of a relevant Act of Congress."²⁰³

---

to prescribe housekeeping rules for federal courts" (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938))).

197. See JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 92 (1977) ("The traditional vision of tripartite government, at least as formulated by the framers of the Constitution, reveals Congress as the source of policy-making power.").

198. *McNabb v. United States*, 318 U.S. 332, 341 (1943) (discussing the admissibility of evidence in a federal murder trial). The Court argued that "[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence" and therefore excluded the defendant's confession because it resulted from illegal coercion. *Id.* at 340.

199. Beale, *supra* note 183, at 1449; see also *Rosales-Lopez v. United States*, 451 U.S. 182, 190-92 (1981) (exercising supervisory power to regulate voir dire); *United States v. Hale*, 422 U.S. 171, 177-80 (1975) (using supervisory powers to regulate witness impeachment); *Ballard v. United States*, 329 U.S. 187, 190-96 (1946) (prohibiting the discriminatory exclusion of women from jury service in federal criminal trials).

200. 328 U.S. 217 (1946) (holding that federal juries should be chosen from a cross-section of the community). In *Peters v. Kiff*, 407 U.S. 493, 500 n.9 (1972), a plurality of the Court described *Thiel* as a supervisory power case.

201. Justice Brandeis first articulated this view in *Casey v. United States*, 276 U.S. 413, 425 (1928) (Brandeis, J., dissenting). The Court later adopted this view in *McNabb*, 318 U.S. at 347.

202. For instance, Congress rejected the holding in *Jencks v. United States*, 353 U.S. 657, 668-69 (1957) (requiring the government to comply with orders to produce any statements of government witnesses to be used at trial). *Jencks Act*, Pub. L. No. 85-269, 71 Stat. 595 (1957) (codified at 18 U.S.C. § 3500 (1988)). Congress also nullified the decision in *McNabb* through the Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, § 701(a), 82 Stat. 197, 210 (1968) (codified as amended at 18 U.S.C. §§ 3501-3502 (1988)).

203. *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959); see also *Thomas v. Arn*, 474 U.S. 140, 148 (1985) ("Even a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions. A contrary result 'would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.'") (quoting *United States v. Payner*, 447 U.S. 727, 737 (1980))).

The Court has advanced, primarily in contempt and disciplinary cases, an Article III-based vision of inherent authority that responds to separation of powers concerns and offers a second source of rulemaking authority.²⁰⁴ These cases suggest that the federal courts have inherent power to the extent *necessary* to exercise their adjudicative function. For instance, the power to sanction contempt is "inherent in all courts" because "its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of judgments."²⁰⁵ To avoid reliance on the other branches in vindicating their authority, courts claim the inherent power to appoint an attorney to prosecute contempt,²⁰⁶ to sanction bad faith conduct,²⁰⁷ or even to suspend attorneys from practice before the court.²⁰⁸ The Supreme Court has nonetheless held since its earliest cases that Congress can regulate the contempt power, so long as it does not render it inoperative.²⁰⁹

The Court has deferred to Congress' assessment of the inherent authority

204. In a recent dissent, Justice Scalia explicitly identified Article III as the constitutional source of the Court's power to protect "the integrity of its proceedings." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 58 (1991) (Scalia, J. dissenting).

205. *Ex Parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873). A half-century later, the Court elaborated:

That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power.

Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry., 266 U.S. 42, 65-66 (1924); *see also Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911) (explaining that "the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law").

206. The Court in *Young v. United States ex rel. Vuitton et fils S.A.*, 481 U.S. 787 (1987), argued that the courts' "long settled" authority to begin contempt proceedings necessitates the authority to appoint private counsel. Thus, Federal Rule of Criminal Procedure 42(b)'s "assumption that private attorneys may be used to prosecute contempt actions reflects the longstanding acknowledgement that the initiation of contempt proceedings to punish disobedience to court orders is part of the judicial function." *Id.* at 793-95. The Court further described its inherent authority as "essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." *Id.* at 796.

207. *See Chambers*, 501 U.S. at 46-51 (holding that a district court could invoke its inherent power to sanction bad faith conduct by assessing attorneys' fees); *cf. Link v. Wabash Ry.*, 370 U.S. 626, 629-33 (1962) (discussing federal trial courts' inherent power to dismiss a plaintiff's action *sua sponte* for failure to prosecute).

208. *See In re Snyder*, 472 U.S. 634, 643 (1985) (explaining that the inherent authority to suspend lawyers derives from the lawyer's role as an officer of the court); *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 530 (1824) (noting the inherent power to control admission to the bar and to discipline attorneys).

209. *See United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812) (construing the implied power to punish for contempt narrowly, so that any further reach needs congressional authorization). Rejecting a challenge to congressional power to require a trial by jury in Clayton Act contempt cases, the Supreme Court stated:

So far as the inferior federal courts are concerned, however, it is not beyond the authority of Congress to regulate [the contempt power]; but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it may be regulated within limits not precisely defined may not be doubted.

Michaelson, 266 U.S. at 66 (1924) (citations omitted); *see also Felix Frankfurter & James M. Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1022 (1924) (explaining that "[a]s an incident to their being, courts must have the authority 'necessary in a strict sense' to enable them to go on with their work" (quoting *Craig v. Hecht*, 263 U.S. 255, 280-81 (1923) (Holmes, J.))).

and supervisory powers, generally accepting its regulation of subjects or rules announced in inherent authority cases. This deference is in keeping with the strongest view of the Court's power to make procedural rules, which grounds the power in Article III. This argument suggests that the power is ancillary, analogous to the ancillary powers of the President under Article II.²¹⁰ Thus the Court's implied rulemaking authority, although generally recognized, should be subservient to Congress' except where the Court exercises its power in defense of judicial authority or integrity.²¹¹ By and large, this is how the Court has treated it.²¹²

However, acceptance of neither the Court's nor Congress' strongest statements about Congress' rulemaking authority²¹³ is necessary to recognize the CJRA as constitutionally benign. Even if we assume—as do most commentators²¹⁴—that the power to enact procedural rules is best shared between the Congress and the judiciary, the CJRA leaves ultimate control over its implementation to the judiciary, with few exceptions.²¹⁵ While the Act requires each

210. See Beale, *supra* note 183, at 1470-73 (elaborating on this analogy).

211. Professor Beale takes a contrasting view, allocating Congress more power:

A generous interpretation of the courts' ancillary authority under article III is fully consistent with the Court's recognition that Congress may establish comprehensive rules of procedure and may alter judicially fashioned procedural rules. The necessary and proper clause expressly empowers Congress to legislate to give effect to the powers of the other branches. If the implied ancillary authority of the executive and the judiciary under articles II and III is given a generous interpretation, it will overlap with the legislative authority under the necessary and proper clause. This does not pose a substantial problem, however. In the case of a conflict, the text of the necessary and proper clause reflects the expectation that Congress would enact laws to govern the other branches of government.

Id. at 1472 (footnotes omitted).

212. But see *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821) (holding that Congress' inherent power to try contempts committed in its presence was only "the least possible power adequate to the ends proposed"). Professor Van Alstyne has commented that in ancillary powers cases, the judiciary has ordinarily been awkward and uncomfortable in passing upon executive (and judicial) claims of ancillary authority unsupported by Acts of Congress. It has been rightly "awkward," not because such claims cannot affect the President's business or the judiciary's business, for clearly they can, but rather because the elements of judgment and compromise entailed in those claims are the very essence of *political* judgment—the natural preserve of legislative determination.

William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 OHIO ST. L.J. 788, 805 (1975). Thus, Professor Mullenix's claim that "[p]rocedural rulemaking is an inherent power of the courts," is much too broad a statement of the nature of this inherent authority. Mullenix, *Unconstitutional Rulemaking*, *supra* note 8, at 1297.

213. Professor Mullenix focuses on the Senate Report's response to the separation of powers arguments federal judges advanced in the CJRA hearings. The Senate Report argued that Congress' rulemaking authority was superior to the judiciary's. See Mullenix, *Counter-Reformation*, *supra* note 8, at 428-32 (citing S. REP. No. 416, *supra* note 128, at 9-10); Mullenix, *Unconstitutional Rulemaking*, *supra* note 8, at 1289 (same).

214. See, e.g., WEINSTEIN, *supra* note 197, at 77 (pointing out that "[t]here have been serious suggestions, however, that the legislature can have no role in rule-making. Generally this claim has been ignored by those charged with the practical task of running government."); A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 42 (1958) (arguing that the balance of powers is designed to allow courts to "maintain an effective, flexible and thorough-going control over their . . . procedure, with the possibility of ultimate legislative review in cases where important decisions of public policy are necessarily involved").

215. Ten federal districts are designated as "pilot" districts and are required to implement six of

district court to implement a civil justice expense and delay reduction plan "after consideration of the recommendations of an advisory group," it does not require that the district courts adopt any of the advisory groups' recommendations.²¹⁶ In fact, many courts rejected some of the offered recommendations.²¹⁷

The Act also mandates that a committee comprised of the chief judges of each district court in the circuit, the chief judge of the circuit's court of appeals, and the Judicial Conference of the United States review the plans.²¹⁸ While Congress asked for periodic reports from the Judicial Conference and the Administrative Office of the United States Courts,²¹⁹ it has not retained any direct control over the plans' content. Professor Mullenix's concern that "Congress has taken procedural rulemaking power away from judges and their expert advisors and delegated it to local lawyers"²²⁰ therefore overstates the CJRA's impact.

Moreover, the CJRA's provisions do not impair judicial authority. The Act neither strips the judiciary of its power to decide cases nor sets up serious impediments to the adjudication of cases.²²¹ For the most part, CJRA provi-

---

the management techniques outlined in the CJRA. 28 U.S.C. § 471 note (Supp. IV 1992) (reproducing Pub. L. No. 101-650, § 103(c), 104 Stat. 5089, 5097 (1990)). Five districts are named as "demonstration" districts, required by the act to experiment with various case-management techniques. *Id.* (reproducing Pub. L. No. 101-650 § 104, 104 Stat. at 5097). The Judicial Conference has the responsibility to choose the demonstration districts based on its assessment. See notes 32 & 50 *supra*; text accompanying note 103 *supra*.

216. 28 U.S.C. § 472(a) (Supp. IV 1992).

217. Compare INDIANA PLAN, *supra* note 150, at 60-70 (recommending adoption of nonmandatory alternative dispute resolution measures) with JUDICIAL CONFERENCE REPORT, *supra* note 5, at 76 (noting that the court rejected this recommendation).

218. 28 U.S.C. § 474(a)-(b) (Supp. IV 1992). Professor Tobias notes that the Judicial Conference delegated its oversight functions to a Committee on Court Administration and Case Management; the resulting review was not particularly stringent. Tobias, *supra* note 40, at 1409-11. Professor Tobias argues that institutional constraints make serious oversight of the local plans unlikely. *Id.* at 1407-08.

219. See 28 U.S.C. § 471 note (Supp. IV 1992).

220. Mullenix, *Counter-Reformation*, *supra* note 8, at 379; see also Mullenix, *Unconstitutional Rulemaking*, *supra* note 8, at 1319 (characterizing the CJRA as a "wholesale withdrawal from the courts of control over their own internal procedure").

221. Professor Mullenix misplaces her reliance on *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), to demonstrate the unconstitutionality of the CJRA. Mullenix, *Unconstitutional Rulemaking*, *supra* note 8, at 1307. *Northern Pipeline* is one of four recent Supreme Court cases involving conflicts between the legislative and judicial branches. See *Mistretta v. United States*, 488 U.S. 361, 374-79 (1989) (upholding the constitutionality of the United States Sentencing Commission); *Morrison v. Olson*, 487 U.S. 654, 683-84 (1988) (upholding the constitutionality of independent counsel); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1978) (upholding agency jurisdiction over common law counterclaims). Of the four, the Court found congressional infringement on the separation of powers only in *Northern Pipeline*. From this Mullenix concludes that if a CJRA provision violates the doctrine, "it will be to the extent this legislation suffers constitutional defects as severe as the . . . provisions invalidated in *Northern Pipeline*." *Id.* at 1307.

An examination of *Northern Pipeline* reveals its tangential and tenuous relationship to the issues in the CJRA. *Northern Pipeline* involved a challenge to the Bankruptcy Act of 1978, which invested non-Article III bankruptcy judges with

all of the "powers of a court of equity, law, and admiralty," except that they "may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." In addition to this broad grant of power, Congress has allowed bankruptcy judges the power to hold jury trials; to issue declaratory judgments; to issue writs of habeas corpus under certain circumstances; to issue all writs

sions simply suggest that case-management practices need both scrutiny and enhancement. The legislation implements Congress' judgment that the problems of cost and delay in the federal courts require comprehensive attention. It is not beyond congressional power to diagnose a problem of national scope which affects access to justice and then to contemplate measures to address that problem. Congress' view is probably empirically flawed, and its execution less than elegant.²²² But the Constitution does not place the subject of this legislation beyond the scope of Congress' power.

B. *Does the CJRA Violate Statutory Limits on Congressional Rulemaking?*

As previously discussed, the Rules Enabling Act divides the responsibility for promulgating rules between the courts and Congress. The REA, however, leaves Congress the ultimate responsibility to approve civil procedural rules: The Court must submit proposed rules of general application to Congress and give that body sufficient time—seven months—to consider them and to disapprove them if it wishes.²²³

Nevertheless, Professor Mullenix argues that the CJRA violates this statutory division of responsibility by arrogating to Congress the power to make purely procedural rules.²²⁴ But it is unusual to speak of Congress as bound by the terms of previous legislation, unless the legislative division of authority is

---

necessary in aid of the bankruptcy court's expanded jurisdiction; and to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Act].

458 U.S. at 55 (quoting 28 U.S.C. § 1481 (Supp. IV 1980)) (citations omitted).

The legislation violated basic Article III principles, which, the Court noted, command that "[t]he judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III." *Id.* at 58-59. The Act assigned bankruptcy judges most of the jurisdiction of an Article III judge, while withholding the Article III protections of life tenure and protected compensation. *Id.* at 60.

In *Northern Pipeline*, the Act's supporters argued that since Article I empowered Congress to create legislative courts, it could have thus "constituted" the bankruptcy courts as their equivalents. *Id.* at 63. The Court, however, rejected this assertion. It viewed situations allowing Article III creation of legislative courts as "exceptional" and grounded in constitutional text or in historical consensus. *Id.* at 68-70.

At a minimum, then, a challenge to the CJRA that relies on *Northern Pipeline* must assert that the legislation delegates Article III "judicial power" to a body constituted without Article III protections. The Court has never considered rulemaking authority per se to be an attribute of the judicial power under Article III. See text accompanying notes 177-180 *supra*. Even if it were, the assertion that local advisory groups have been "delegated" that power is unconvincing, since the judiciary controls the content of the plans. Much of Professor Mullenix's argument hinges on accepting her debatable characterization of procedural rulemaking as a core Article III function on a par with adjudication, and of the advisory groups as being "vested" with that authority. See Mullenix, *Unconstitutional Rulemaking*, *supra* note 8, at 1313-14.

222. See Robel, *supra* note 12, at 117-31.

223. See 28 U.S.C. § 2074 (1988).

224. Discussing the Senate's claim that it had exclusive rulemaking authority, for instance, Professor Mullenix remarks that

the Senate's argument is flawed because it establishes a principle of rulemaking allocation without reference to rulemaking content. Thus, the Senate's position fails to recognize that the Rules Enabling Act has clearly assigned *substantive* rulemaking power to Congress and *procedural* rulemaking power to the federal courts. In essence, then, the Rules Enabling Act governs and limits congressional rulemaking power.

Mullenix, *Counter-Reformation*, *supra* note 8, at 427 (citing S. REP. NO. 416, *supra* note 64, at 10).

constitutionally required. I have argued it is not.²²⁵ A delegation need not, therefore, impair the ability of the delegator to exercise concurrently the power it has delegated.²²⁶

V. A CAUTIONARY NOTE ON LOCAL PROCEDURE

Many courts have erroneously viewed the Civil Justice Reform Act as a charter for local court procedural independence. However, I began this article by noting that localism has always been the rebellious stepchild of the Federal Rules of Civil Procedure.²²⁷ For example, as of 1988 there were approximately 5000 local rules promulgated under the authority of Federal Rule of Civil Procedure 83, so many that a Judicial Conference Committee proposed an amendment to Rule 83 to authorize controlled experimentation with inconsistent local rules.²²⁸

Commentators widely agree that national uniformity in federal procedural rules is a good idea. Uniformity reduces costs and—although this is less empirically verifiable—increases professionalism. It also improves access to federal courts by allowing attorneys to master a single body of procedural law. Finally, uniformity reduces surprise and works toward the goal of deciding cases on the merits. Why, then, is the impulse for local variation so persistent? What accounts for the strength of the urge to view the CJRA as a font of local procedural authority? Does the strength of this urge indicate that Congress should consider granting courts this power in reality?

There are both laudable and lamentable motivations for local variation, but the former rarely result in procedural rules. The spectrum of local conditions, ranging from congested and overworked urban courts to the relative quiet of

---

225. Were the power to control case-management practices essential to the judicial power, then the CJRA might be open to challenge under *Myers v. United States*, 272 U.S. 52 (1926). In *Myers*, the Court struck down a statute that required senatorial approval of an inferior executive officer's removal, finding the power to remove such officers at will necessary to the power of appointment. *Id.* at 121-22. More recent Court precedent questions the utility of identifying "core functions." *Morrison*, 487 U.S. at 688-90 (limiting the application of *Myers*).

226. See *In re Chapman*, 166 U.S. 661, 671-72 (1897) (upholding a congressional grant of concurrent power that enables both the District of Columbia and Congress to punish contempt of Congress).

227. See notes 9-11 *supra* and accompanying text.

228. PROPOSED AMENDMENTS, *supra* note 9, at 152-53. The proposed amendment would have authorized district courts to adopt an "experimental local rule inconsistent with [the Federal Rules of Civil Procedure] if it [was] consistent with the provisions of Title 28 of the United States Code and [was] limited in its period of effectiveness to five years or less." *Id.* at 153. Some commentators have also recommended experimentation with inconsistent local rules. See, e.g., Levin, *supra* note 9, at 1584-85 (arguing in favor of a provision similar to Proposed Rule 83). Other commentators have strongly opposed this position. See e.g., Roberts, *supra* note 96, at 537, 549-55.

Unfortunately, the CJRA appears to have discouraged the Standing Committee on Civil Rules from pursuing a proposed amendment to Rule 83 that would have allowed controlled experimentation with local procedures. If we can learn anything from recent experience, it is that these local impulses need desperately to be informed by an accountability to national norms; and the proposed amendment insists on accountability both by limiting the duration of any local rule inconsistent with national rules, and by requiring Judicial Council approval for such experimentation. However, the proposed rule is itself inconsistent with the 1988 amendments to the Rules Enabling Act prohibiting local rules that are inconsistent with Federal Rules or other federal legislation. 28 U.S.C. § 2071(f) (1988). If we are to engage in local procedural experimentation, then, Congress will have to amend the REA to make it possible.

rural courts, offers the most defensible reason for local variation. Variation in local conditions, however, has little to do with the concerns that result in procedural rulemaking. Rather, it is the stuff of docket management—how to move cases smoothly from filing to disposition, to schedule trials, and to monitor service under chaotic or calm conditions.

Another defensible reason for local rulemaking lies in the persistence of local legal cultural norms²²⁹ governing such practices as the speed with which a case proceeds to trial or how aggressively discovery is conducted. Indeed, it may be that our national obsession with discovery control ought to focus primarily on the relatively few jurisdictions where discovery abuse has proved a problem.²³⁰

But it is difficult to argue that the needs of litigants and attorneys within an individual case vary substantially from Georgia to New York, that Georgia litigants need only a third of the discovery devices New York litigants do, or that attorneys in Kansas somehow demand a different summary judgment system.²³¹ Local court tinkering with the Federal Rules is rarely inspired by the disutility of a Rule under local conditions. Rather, it is inspired by a belief that the rulemakers got it wrong.²³² This position should be viewed with suspicion, both because there is a method of securing rule changes that respects national concerns and because deviations from that method are notoriously difficult to challenge.²³³

Moreover, without disparaging the work of the attorneys who sit on advisory groups, it should be noted that there are incentives for local attorneys to enact local procedures: Local procedures typically favor local bars.²³⁴

---

229. Cf. THOMAS W. CHURCH, JR., JO-LYNNE Q. LEE, TERESA TAN, ALAN CARLSON & VIRGINIA MCCONNELL, NATIONAL CENTER FOR STATE COURTS, PRETRIAL DELAY: A REVIEW AND BIBLIOGRAPHY 46-48 (1978) (referring to the notion of a "local discretionary system").

230. Our endless tinkering with discovery and sanctions rules, the most recent examples of which are illustrated by the December 1993 amendments to Federal Rules of Civil Procedure 26 and 11, might actually be attempts to use national rules to solve problems that vary strongly by locality.

231. See *Brown v. Crawford County*, 960 F.2d 1002, 1008-09 (11th Cir. 1992) (invalidating a local procedure used by the Middle District of Georgia that effectively precluded parties from filing summary judgment motions).

232. Judge Keeton notes, "[A]s a trial judge myself perhaps I will be forgiven for stating the point bluntly—nationally uniform rules protect . . . against the tyranny of any unduly willful renegades among us trial judges." Robert Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 860 (1989).

233. Challenging local rules presents difficulties on two fronts. First, the standard against which such rules are judged—consistency with national rules—is itself difficult to apply. See Levin, *supra* note 9, at 1573-76 (tracing the roots and inconsistencies of this ambiguous standard); Roberts, *supra* note 96, at 539 & n.8 (tracking the application of the standard in the case law). Second, the litigants are unlikely to challenge local rules with the mechanisms presently available. See Levin, *supra* note 9, at 1576 (arguing that the traditional mechanisms are "inadequate"); Roberts, *supra* note 96, at 546-47, 553 ("The impact of the rules on individual litigants is usually too glancing to warrant appeal, and so they remain unchallenged.").

234. Even if we are convinced that local regulation of certain procedural matters is defensible, we should still be concerned about the identity of the proceduremakers. We have not really had to face this issue under the regime of Federal Rule of Civil Procedure 83 and the 1988 amendments to the REA, both of which require fidelity to national rules. We will certainly have to face questions of this nature in the world of new Federal Rule of Civil Procedure 26, which allows local variation. See FED. R. CIV. P. 26 *passim*.

If we are to learn anything from recent experience under the CJRA and the Local Rules Project, it is the strength of the urge to institute an improved, *local* way of doing things. Before we abandon our longstanding commitment to a uniform national procedure, however, we need to better understand the situations in which local procedures are more desirable than national ones—and we need to take a more cautious approach to local decisionmaking than the Civil Justice Reform Act offers.

VI. CONCLUSION

As it moved through Congress, the CJRA generated an enormous amount of controversy and ill will between the judiciary and the Act's Senate sponsor. In retrospect, the process would have been less fractious if the federal judiciary had been more intimately involved in the legislation's conception. Disliking the Act Congress gave them, some federal districts have extended the legislation in ways likely to destroy important procedural values. I hope this article helps focus the debate on the Act's terms, rather than on the interbranch disagreements about the wisdom or constitutionality of the legislation. Careful analysis of the CJRA teaches that the congressional mandate to reform civil justice does not require ignoring values that have served federal procedure well. Courts should remain sensitive to the costs they impose by straying from national norms. While the Civil Justice Reform Act makes differences in case-management practices among districts inevitable, it does not authorize, nor should it result in, the abandonment of the Federal Rules of Civil Procedure.