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# The Expiration of the Civil Justice Reform Act of 1990

Carl Tobias\*

Ever since the United States Congress passed the Civil Justice Reform Act of 1990 (CJRA),<sup>1</sup> a minor mystery of federal court jurisprudence has been whether – and if so, precisely when – that significant and controversial legislation expired.<sup>2</sup> The measure instituted unprecedented nationwide experimentation with procedures that lawmakers intended to decrease cost and delay in civil litigation, but the statute's implementation additionally balkanized federal practice and procedure.<sup>3</sup>

Several important phenomena contributed to this mystery. First, the legislation, as enacted initially, was unclear. The CJRA required that all ninety-four federal district courts promulgate civil justice expense and delay reduction plans not later than three years from the December 1990 date on which the legislation took effect, while simultaneously authorizing every district to experiment for seven years following this December 1990 effective

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1. Pub. L. No. 101-650, tit. I, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. §§ 471-82 (1994)). See generally A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV. 877 (1993) (examining scope of CJRA and its application to other branches of government, to Federal Rules of Civil Procedure, and to independent organizations); Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994) (arguing that CJRA neither compels nor authorizes local procedural rules inconsistent with Federal Rules of Civil Procedure); Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589 (1994) (analyzing conflicting frameworks for civil procedure reform in CJRA and its immediate predecessor, Judicial Improvements and Access to Justice Act of 1988).

2. See Patrick E. Longan, *Congress, the Courts, and the Long Range Plan*, 46 AM. U. L. REV. 625, 665-66 (1997) (observing that sunset provision of CJRA "merely permits each district to cease operating under its plan," and arguing that "Congress should require each district to cease using its individualized plan once the national implications of the experiments are clear") (emphasis added); Carl Tobias, *Did the Civil Justice Reform Act of 1990 Actually Expire?*, 31 U. MICH. J.L. REFORM 887 (1998) (arguing that Congress or Judicial Conference should resolve uncertainty surrounding sunset provision of CJRA by proclaiming expiration of CJRA).

3. See generally Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992) (warning that continued implementation of CJRA by federal district courts will cause further disuniformity and complexity in civil procedure).

date with approaches that each court believed would save cost and time.<sup>4</sup> Nevertheless, the statute failed to provide specifically for expiration at the conclusion of the seven-year time frame that the legislation prescribed.<sup>5</sup>

Second, an October 6, 1997 congressional enactment, which occurred several months before the December 1997 date upon which the statute ostensibly would expire, exacerbated the lack of clarity in the CJRA.<sup>6</sup> The new legislation explicitly authorized indefinite continuation of the civil case reporting requirements that section 476 of the CJRA imposed.<sup>7</sup> Moreover, the 1997 enactment expressly stated that six of the seven other sections in the CJRA would expire.<sup>8</sup> These expiring provisions included section 472, prescribing the development and implementation of civil justice expense and delay reduction plans; section 473, describing the contents of those plans; section 474, providing for circuit court and United States Judicial Conference oversight of district court statutory effectuation; and section 475, requesting periodic district court assessments of CJRA implementation.<sup>9</sup> The provisos

4. See Civil Justice Reform Act of 1990 § 103(b), Pub. L. No. 101-650, tit. I, 104 Stat. 5089 (1990) (requiring district courts to implement plans within three years after enactment of statute, and stating that requirements of 28 U.S.C. §§ 471-78 shall remain in effect for seven years after enactment of statute). See generally Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285 (1994) (arguing that CJRA would achieve lasting improvements in procedural efficiency); Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts Be Remedied by Local Rules?*, 67 ST. JOHN'S L. REV. 721 (1993) (arguing that CJRA and 1993 amendments will cause confusion and uncertainty and will threaten future procedural reform); Levin, *supra* note 1 (expressing hope that implementation of CJRA will lead to more efficient delivery of civil justice).

5. Civil Justice Reform Act of 1990 (codified as amended at 28 U.S.C. §§ 471-82 (1994)); see Longan, *supra* note 2, at 665 (arguing that CJRA's sunset provision is not strong enough, as it merely permits district courts to cease operating under local plans); Tobias, *supra* note 2, at 891 (analyzing whether CJRA actually expired).

6. See Act of Oct. 6, 1997, Pub. L. No. 105-53, § 2, 111 Stat. 1173 (1997) (amending CJRA).

7. See Act of Oct. 6, 1997 § 2 (adding to CJRA provision that requirements of 28 U.S.C. § 476 "shall remain in effect permanently"); see also 28 U.S.C. § 476 (requiring Administrative Office of the U.S. Courts to disclose publicly number and case names of all motions pending for longer than six months, of all bench trials submitted for longer than six months, and of all cases still pending after three years); 143 CONG. REC. S8528 (daily ed. July 31, 1997) (statement of Sen. Biden) (stating that "[t]his very effective reporting requirement will expire in December unless Congress acts"); Tobias, *supra* note 2, at 892-93 (discussing extension of section 476). See generally Charles Gardner Geyh, *Adverse Publicity As a Means of Reducing Judicial Decision-Making Delay: Periodic Disclosure of Pending Motions, Bench Trials and Cases Under the Civil Justice Reform Act*, 41 CLEV. ST. L. REV. 511 (1993) (arguing that perpetual continuation of section 476 is justified, as section 476 appears to have achieved desired effect of reducing time for resolution of motions, bench trials, and cases).

8. See Act of Oct. 6, 1997 § 2 (changing sections of CJRA that would expire in 1997).

9. See 28 U.S.C. §§ 472-75 (explaining civil justice expense and delay reduction plans); Act of Oct. 6, 1997 § 2 (observing that sections 472-75 would remain in effect for seven years

also encompassed section 477, asking the Judicial Conference to create a model civil justice cost and delay reduction plan for use by the district courts; and section 478, calling for district courts to establish advisory groups, which would assist the judges in assembling these plans.<sup>10</sup> However, the 1997 legislation did not mention the CJRA's eighth section, section 471, the provision instructing district courts to adopt civil justice expense and delay reduction plans.<sup>11</sup> There were multiple interpretations of Congress's failure to address section 471 in the 1997 enactment while specifically enumerating all seven remaining sections of the 1990 statute. Perhaps the most plausible construction was that legislators intended for section 471 to remain in effect and not to expire.<sup>12</sup>

Senators and representatives now have clarified this uncertainty by explicitly providing in section 206 of the Federal Courts Improvement Act of 2000 for section 471 of the CJRA to expire.<sup>13</sup> A rule revision proceeding that the United States Supreme Court completed in 2000 suggests that the Justices may have anticipated Congress's action or may have considered that the statute already had expired.<sup>14</sup> In the 2000 amendments to the Federal Rules of Civil Procedure, the Supreme Court omitted the express authorization it had accorded in 1993, which had allowed the federal district courts to modify or

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after enactment of statute); see also Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 FORDHAM L. REV. 833, 837-49 (1994) (discussing CJRA and judicial discretion in its implementation); Tobias, *supra* note 1, at 1602-04, 1618 (explaining provisions of CJRA).

10. See 28 U.S.C. §§ 477-78 (authorizing model plan and requiring advisory groups); Act of Oct. 6, 1997 § 2 (observing that sections 477-78 would remain in effect for seven years after enactment of statute); see also Tobias, *supra* note 1, at 1603, 1617-18 (discussing advisory groups). See generally Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879 (1993) (examining role and effect of advisory groups in developing civil justice reform plans).

11. See Act of Oct. 6, 1997 § 2 (failing to mention section 471); 28 U.S.C. § 471 (requiring district courts to implement civil justice expense and delay reduction plans); see also Tobias, *supra* note 2, at 892-93 (discussing omission of section 471 from CJRA amendment).

12. See Longan, *supra* note 2, at 665 (observing that sunset provision permits, but does not require, courts to cease operating under CJRA plans); Tobias, *supra* note 2, at 892 (observing that omission of section 471 could evidence congressional intent for section 471 not to expire). *But see* Biden, *supra* note 4, at 1294 (stating that at termination of experimental period, uniformity will return to federal judicial system); *cf.* Tobias, *supra* note 2, at 893 (affording arguments that suggest section 471 expired in 1997).

13. See Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 206, 114 Stat. 2410, 2414 (2000) (adding section 471 to list of expired provisions). Congress appropriately titled this specific section "Sunset of Civil Justice Expense and Delay Reduction Plans." *Id.*

14. See COURT RULES: AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, FEDERAL RULES OF EVIDENCE, FEDERAL RULES OF CRIMINAL PROCEDURE, AND FEDERAL RULES OF BANKRUPTCY PROCEDURE, 192 F.R.D. 340, 385 (2000) [hereinafter COURT RULES] (stating that 2000 amendments to federal rules restore uniformity to disclosure practice and to other aspects of discovery by eliminating provisions authorizing local rules).

to refuse to apply certain important federal discovery provisions.<sup>15</sup> The Advisory Committee Notes accompanying the 2000 federal rules revisions concomitantly admonished that the Supreme Court had withdrawn the permission for district divergence from the federal discovery rules in an effort to rectify or to ameliorate the national inconsistency in procedure that the 1993 amendment and the CJRA had created.<sup>16</sup>

Many of the above developments have increased conflicts substantially between local procedural mandates and numerous applicable federal rules, especially those governing civil procedure, and have enhanced disuniformity among the ninety-four federal district courts. For example, a significant number of cost- and time-saving measures that districts inserted in their civil justice expense and delay reduction plans contravened analogous Federal Rules of Civil Procedure. Courts premised the adoption and enforcement of inconsistent local strictures on the CJRA, which encouraged districts to employ mechanisms that would conserve resources and time, and on the 1993 federal rules revisions, which empowered and invited courts to reject or change several federal discovery amendments.<sup>17</sup> A majority of districts

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15. See *id.* at 377-97 (deleting references to local rules from federal rules and explaining that reason for deletion is return to uniformity in federal court procedure). See generally Morgan Cloud, *The 2000 Amendments to the Federal Discovery Rules and the Future of Adversarial Pretrial Litigation*, 74 TEMPLE L. REV. 27, 45 (2001) (discussing amendments' elimination of ability of district courts effectively to opt out of federal rules that require automatic disclosure of certain discovery information by adopting contradictory local rules); Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 SMUL. REV. 229, 233 (1999) (same); Carl Tobias, *The 2000 Federal Civil Rules Revisions*, 38 SAN DIEGO L. REV. 875, 881 (2001) (same). The Court included this provision in the 1993 federal rules amendments to accommodate experimentation under the CJRA that the districts were simultaneously conducting. See SUPREME COURT OF THE U.S., FEDERAL RULES OF CIVIL PROCEDURE: AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, 146 F.R.D. 401, 431-32, 437 (1993) [hereinafter 1993 AMENDMENTS] (authorizing district courts to opt out of certain discovery rules by adopting their own local rules); *id.* at 629 (stating that "[a]uthorization of these local variations is, in large measure, included in order to accommodate the Civil Justice Reform Act of 1990"). See generally Paul D. Carrington, *Learning From the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 300-01 (1994) (observing that Rules Enabling Act amendment of 1988 required all local rules to be affirmatively consistent with federal rules); Tobias, *supra* note 1, at 1616-17 (stating that CJRA and 1993 federal rules amendments essentially suspended 1988 legislation's requirement of consistency between federal and local rules).

16. See COURT RULES, *supra* note 14, at 384 (observing that "[t]he Rule 26(a)(1) initial disclosure provisions are amended to establish a nationally uniform practice"); see also *id.* at 391 (observing that "[s]ubdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities").

17. See 28 U.S.C. § 471 (1994) (requiring each district court to implement civil justice expense and delay reduction plan); 1993 AMENDMENTS, *supra* note 15, at 629 (observing that 1993 Federal Rules' authorization of local variations was meant to accommodate CJRA provisions); see also Paul D. Carrington, *A New Confederacy? Disunionism in the Federal*

accepted these invitations by eschewing or by modifying the federal proviso that covered mandatory pre-discovery, or automatic disclosure.<sup>18</sup> Other courts imposed related local discovery commands and additional requirements that departed from analogous federal rules or acts of Congress.<sup>19</sup> The CJRA and the 1993 federal rules amendments also effectively suspended the nascent implementation of responsibilities for promoting uniformity imposed on district courts and on circuit judicial councils by the Judicial Improvements and Access to Justice Act (JIA) of 1988 as well as by Federal Rule of Appellate Procedure 47, Federal Rule of Bankruptcy Procedure 9029, Federal Rule of Civil Procedure 83, and Federal Rule of Criminal Procedure 57.<sup>20</sup> The JIA

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*Courts*, 45 DUKE L.J. 929, 1006 (1996) (arguing that Judicial Conference should revise Federal Rules of Civil Procedure to eliminate all authorizations for local court deviations from federal rules); Robel, *supra* note 1, at 1455-64 (discussing scope of local rules that CJRA authorizes); *supra* notes 4 and 15 (discussing implementation of CJRA).

18. See DONNA STIENSTRA, FED. JUDICIAL CTR., IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS' RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26, at 5, reprinted in 182 F.R.D. 304, 310 (1998) (reporting that forty-five district courts had opted out of Rule 26(a)(1), seven of remaining districts had significantly revised rule). Compare D. MONT. R. 200-5(a) (mandating initial discovery requirements different from corresponding federal rule), and W.D. WASH. CR 26 cmt. (observing that Western District of Washington has chosen to opt out of analogous federal rule requiring mandatory initial disclosure of certain information), with 1993 AMENDMENTS, *supra* note 15, at 606-12 (amending federal discovery rule to require mandatory initial disclosure of certain information, except as provided by local rule). See generally Tobias, *supra* note 1, at 1614 (remarking on various reactions, largely negative, of district courts to Rule 26(a)(1)).

19. See Carrington, *supra* note 17, at 930 (observing that Eastern District of Texas's rules are "substantially more coercive" than Federal Rules of Civil Procedure). Compare FED. R. CIV. P. 68 (describing offer of judgment local rule), with U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN art. 6(9) (1991) (describing offer of judgment and deviating from Rule 68 in following ways: attorney's fees are incurred if final judgment is less than amount of offer by 10%, rather than less than or equal to amount of offer, attorney's fees accrue upon rejection of offer, rather than on making of offer, and government may opt out of compliance with this rule); compare 28 U.S.C. § 636 (1994) (discussing jurisdiction, powers, and temporary assignment of magistrate judges and requiring consent to be given freely), with U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 3-4 (1991) (requiring consent to magistrate judge jurisdiction unless litigant gives timely notice of objection to jurisdiction). See Carrington, *supra* note 17, at 987-96 (arguing that CJRA does not authorize courts to change requirements in Rule 68); Robel, *supra* note 1, at 1452-54 (observing potential clash between CJRA and Federal Rules of Civil Procedure, and arguing that CJRA neither compels nor authorizes local rules inconsistent with Federal Rules of Civil Procedure); Tobias, *supra* note 3, at 1416-22 (discussing CJRA's suggestion that courts may adopt local rules contrary to Federal Rules of Civil Procedure and detailing courts' implementation of such rules).

20. See generally Carrington, *supra* note 17, at 963 (observing tension between JIA's limitation of local rulemaking in 1988 and CJRA's encouragement of local rulemaking in 1990); Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1 (1997) (discussing decreasing consistency between

and the respective federal rules requested that the districts and the councils undertake periodic review of local provisions for consistency and redundancy with federal rules and statutes, and that they abolish or alter any local measures that were conflicting or repetitive.<sup>21</sup> The districts and councils seemingly discontinued oversight because they found little reason to scrutinize inconsistent strictures that the CJRA and the 1993 Federal Rules of Civil Procedure revisions ostensibly authorized and because the JIA budgeted no funds for performing review. All of the developments surveyed, therefore, have made federal civil practice more fragmented now than at any time since the Supreme Court's 1938 adoption of the original Federal Rules of Civil Procedure,<sup>22</sup> whose central purposes were the institution and maintenance of a national, uniform procedural regime.<sup>23</sup>

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local rules and Federal Rules of Appellate Procedure); Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533 (2002) (offering suggestions on how to reduce inconsistency between local and federal procedural rules); Mary Josephine Newborn Wiggins, *Globalism, Parochialism and Procedure: A Critical Assessment of Local Rulemaking in Bankruptcy Court*, 46 S.C. L. REV. 1245 (1995) (examining role of local bankruptcy rules in bankruptcy law).

21. See 28 U.S.C. §§ 332(d)(4) (1994) (requiring judicial council of each circuit to review periodically local district rules promulgated under 28 U.S.C. §§ 2071 and 2072 for consistency with federal rules and statutes and to modify or eliminate inconsistent local rules); 28 U.S.C. § 2071 (authorizing courts to promulgate local rules that are consistent with congressional acts and with rules promulgated under 28 U.S.C. § 2072); FED. R. APP. P. 47 (requiring same consistency from local rules of each court of appeals); FED. R. BANKR. P. 9029 (authorizing courts to promulgate local rules that are consistent with congressional acts and with rules promulgated under 28 U.S.C. § 2075); FED. R. CIV. P. 83 (authorizing courts to promulgate local rules that are consistent with congressional acts and with rules promulgated under 28 U.S.C. §§ 2071 and 2072); FED. R. CRIM. P. 57 (authorizing courts to promulgate local rules that are consistent with congressional acts and with rules promulgated under 28 U.S.C. §§ 2071 and 2072).

22. 1 F.R.D. LV (1938) (setting forth text of Federal Rules of Civil Procedure as promulgated in 1938); see Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 380 (1992) (remarking that CJRA is "at war with the concept of uniform procedural rules" adopted in 1938 by Federal Rules of Civil Procedure); Robel, *supra* note 1, at 1448 (stating that "if . . . 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"); Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547, 548 (1998) (stating that "the federal rules' fundamental tenets, such as uniformity and simplicity, are now more eroded than at any time since the Supreme Court first promulgated those rules in 1938").

23. See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1042-98 (1982) (setting forth history of Rules Enabling Act and explaining how such history affects interpretation of Rules Enabling Act); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) (examining influence of rules of equity in creation of Federal Rules of Civil Procedure); see also Carrington, *supra* note 17, at 944-52 (observing that original federal rules left room for local procedural discretion to achieve substantive justice, but questioning wisdom of allowing even "housekeeping practices" to vary between districts).

Several significant consequences follow from lawmakers' decision to pass section 206 of the Federal Courts Improvement Act of 2000, a proviso which clarifies that the 1990 civil justice reform legislation has expired.<sup>24</sup> One result is that the federal district courts no longer may rely on the CJRA as a source of power, allowing them to prescribe local procedures that conflict with corresponding federal rules or with United States Code provisions. Of course, this conclusion derives additional support from the 2000 federal rules revisions, which expressly rescinded authorization for local discovery mandates that diverged from their federal counterparts.<sup>25</sup> All ninety-four courts, accordingly, must eliminate any local measures that they had instituted under the CJRA.<sup>26</sup> Most courts now have abrogated these strictures. For instance, the Eastern District of California specifically withdrew local discovery requirements that it had applied pursuant to the 1990 legislation or to the 1993 federal rules amendments before the December 2000 date on which the 2000 federal rules revisions became effective.<sup>27</sup> The Central District of California, the District of Nevada, and the Southern District of New York concomitantly repealed similar local provisos on December 1, 2000,<sup>28</sup> while the Northern District of California and the District of Montana rescinded related local commands during 2001.<sup>29</sup>

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24. See Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 206, 114 Stat. 2410, 2414 (2000) (providing for sunset of CJRA, specifically for 28 U.S.C. § 471, which required district courts to implement plans to reduce expense and delay in civil trials).

25. See COURT RULES, *supra* note 14, at 385 (observing that "[t]he amendments remove the authority to alter or opt out of the national disclosure requirements by local rule, invalidating . . . local rules . . . that purport to create exemptions from – or limit or expand – the disclosure provided under the national rule").

26. See *id.* (observing that 2000 amendments invalidate local rules contradictory to Federal Rules of Civil Procedure).

27. See E.D. CAL. R., available at [http://207.41.18.73/caed/staticother/page\\_459.htm](http://207.41.18.73/caed/staticother/page_459.htm) (last visited Apr. 17, 2002) (showing elimination of local rule 26-252, which set forth local limitations on discovery and which district court had promulgated and had enforced pursuant to 1993 federal rules amendments).

28. See D. NEV. L. R. (describing December 1, 2000 repeal of local discovery rules 26-1(a) through 26-1(c) and referring parties to federal discovery rules); S.D.N.Y.R., available at <http://www.nysd.uscourts.gov/rules/rules.htm> (last visited Apr. 17, 2002) (showing December 1, 2000 repeal of local civil rule 26.4, by which district court had explicitly opted out of Rule 26(a)(1)); General Order No. 00-8 (C.D. Cal. 2000) (adopting December 1, 2000 amendments to local rules), *superseded by* General Order No. 01-07 (C.D. Cal. 2001), available at <http://www.cadc.uscourts.gov/GenOrders> (last visited Apr. 17, 2002) (adopting revised local rules); Order Adopting Amendments to the Local Rules of Practice (D. Nev. 2000), available at <http://www.nvd.uscourts.gov/nvd/localrules/nst/Local+Rules?OpenFrameset> (last visited Apr. 17, 2002) (ordering amendments to local rules, effective December 1, 2000).

29. See Changes to the Local Rules of the Court (N.D. Cal. 2001), available at <http://www.cand.uscourts.gov> (last visited Apr. 17, 2002) (releasing notice of changes in local rules "to bring them in conformity to the recent modifications in the Federal Rules of Civil Proce-



The federal district courts and the circuit judicial councils also should revitalize and thoroughly effectuate duties that the JIA, as well as the federal appellate, bankruptcy, civil, and criminal rules, imposed by scrutinizing all local procedures for uniformity and redundancy with federal rules and statutes and by changing any local provisions that conflict or are repetitious.<sup>30</sup> The Civil Justice Reform Act of 1990 and the 1993 federal rules amendments had essentially suspended implementation of these responsibilities, which the districts and councils should comprehensively effectuate as soon as practicable.<sup>31</sup> Senators and representatives might correspondingly appropriate sufficient resources for the district courts and the councils to discharge those important duties. Moreover, Congress or the Supreme Court should seriously consider prescribing a 1991 proposed revision to Federal Rule of Civil Procedure 83, as well as incorporating this suggested modification into the analogous federal appellate, bankruptcy, and criminal provisions that pertain to local requirements.<sup>32</sup> The decade-old recommended amendment would have authorized district courts to experiment for a five-year period with promising, inconsistent local measures if the districts secured approval from the Judicial Conference.<sup>33</sup> The Judicial Conference Committee on Rules of Practice and Evidence, which is one of the principal rule revision entities, withdrew that

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ture"); D. MONT. R. 26.1(b), available at <http://www.mtd.uscourts.gov/mtd/documents.nsf/local+rules> (last visited Apr. 17, 2002) (replacing inconsistent local automatic disclosure provision adopted under 1993 federal rules revisions with 2000 federal disclosure amendment).

30. See *supra* notes 20-21 and accompanying text (detailing statutes and rules promoting consistency among local rules and federal rules).

31. See Tobias, *supra* note 1, at 1624-25 (remarking that CJRA's implementation and 1993 changes to Federal Rules of Civil Procedure effectively supplanted efforts of JIA to return uniformity and simplicity to federal procedure by reducing local procedural proliferation); see also Tobias, *supra* note 20, at 533-34 (observing that CJRA essentially suspended local court implementation of duties imposed by JIA and by 1985 amendment to Rule 83 to review local rules for consistency with Federal Rules of Civil Procedure and to eliminate inconsistent rules). But see Robel, *supra* note 1, at 1467-68 (arguing that Congress did not intend for CJRA to give local courts authority to alter or to ignore Federal Rules of Civil Procedure).

32. See COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PROPOSED RULES: PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE 79-82, reprinted in 137 F.R.D. 53, 152-55 (1991) [hereinafter 1991 PROPOSED RULES] (proposing amendment to Federal Rules of Civil Procedure to allow local courts to adopt rules inconsistent with federal rules if Judicial Conference of U.S. approves, rule is consistent with provisions of 28 U.S.C., and rule is temporary); see also Levin, *supra* note 1, at 892-94 (analyzing why Congress is preferable entity to institute this change); Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, LAW & CONTEMP. PROBS., Summer 1988, at 67 (recommending restricted field experiments to test proposed amendments to Federal Rules of Civil Procedure before adoption of amendments).

33. See 1991 PROPOSED RULES, *supra* note 32, at 79-82 (proposing amendment to Rule 83 to authorize, under certain conditions, local rules inconsistent with Federal Rules of Civil Procedure).

1991 proposal, apparently out of deference to contemporaneous testing under the 1990 civil justice reform legislation and has not subsequently revived this approach, which would balance the needs for expanding experimentation and for enhancing uniformity.<sup>34</sup>

A provision in the Federal Courts Improvement Act of 2000 clearly states that the CJRA has officially expired.<sup>35</sup> If those individuals and institutions responsible for federal practice and procedure implement the suggestions proffered above, they probably would improve practice by increasing consistency between local requirements and federal rules and statutes.

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34. See JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 59 (1995) (stating that "[l]ocal rules should be limited 'in scope and 'not inconsistent' with national rules"); *supra* note 15 and accompanying text (observing that 2000 Federal Rules of Civil Procedure amendments do not allow district courts to opt out of federal discovery requirements). Compare 1991 PROPOSED RULES, *supra* note 32, at 152-55 (proposing amendment to Rule 83 that would allow courts to experiment with local rules inconsistent with federal rules, subject to conditions), with *Table of Contents*, JUDICIAL CONFERENCE OF THE U.S., PROPOSED AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE (1992) (showing deletion of proposed amendment to Rule 83). See generally Levin, *supra* note 1, at 891-92 (observing that Supreme Court might have lacked authority to implement 1991 amendment to Rule 83, as rule would have interfered with implementation of CJRA); A. Leo Levin, *Local Rules As Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1582-83 (1991) (observing that Supreme Court lacked authority to adopt 1983 amendment to Federal Rules of Civil Procedure that would immunize local rules from challenge on grounds of inconsistency with federal rules for period of two years because Congress explicitly had prohibited local rules inconsistent with federal rules); Walker, *supra* note 32 (arguing for testing of amendments to Federal Rules of Civil Procedure in restricted field experiments before implementing amendments).

35. Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 206, 114 Stat. 2410, 2414 (2000).



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