

LOCAL RULES AS EXPERIMENTS: A STUDY IN THE DIVISION OF POWER*

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Owen J. Roberts was dean of this law school when I joined the faculty in 1949. It was he who extended the offer to me to come to Penn, and for this I remain very grateful.

The vivid memories I have of Justice Roberts are from the period that followed. He was an imposing figure in the history of this school, but one tends to remember the little things. Once when a number of us were at his home, Mrs. Roberts was showing us around. When we came to the Justice's study someone remarked that it was a very simple room, certainly furnished simply. Mrs. Roberts, with evident pride and satisfaction, said: "The Justice is a simple man."

Unpretentious is perhaps a better word, and it showed in his deaning. As a very junior member of the faculty I particularly appreciated the fact that the Justice reached out to all of us. There were informal conversations on a wide variety of subjects, from international affairs to innovative techniques in legal education, and sometimes, when they served to illustrate a point, even reminiscences of his own experience as a trial lawyer.

This made for a collegial faculty, and that collegiality is very much in evidence today. Justice Roberts is rightly credited with many achievements that influenced this law school during a crucial period in its history. I mention this one seemingly less important aspect of his deanship because these remarks have profited enormously from that spirit of collegiality as practiced today.

* This paper is adapted from the Owen J. Roberts Lecture delivered in October, 1989.

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I. LOCAL RULES AND DISUNIFORMITY

A. A "Gross Affliction"

The fiftieth anniversary of the Federal Rules of Civil Procedure, in 1988, was marked with celebrations, felicitations, and toasts, but also with agendas for change and, as might be expected, divergent viewpoints.¹ My focus, however, is not on the national rules, but on local rules, the rules that pursuant to Rule 83 of the Federal Rules of Civil Procedure² a majority of the judges of any district may promulgate, to bind themselves and those who practice before them.

Important segments of the bar are most unhappy with Rule 83 and the plethora of local rules that have evolved pursuant to its authority. Like a "computer virus of indeterminate origin" they have introduced "disuniformity and complications into the procedural order."³ This is the assessment of Janet Napolitano, chair of

¹ For a list of celebrations and citations to symposia, see Subrin, *Preface to Symposium, The 50th Anniversary of the Federal Rules of Civil Procedure, 1938-1988*, 137 U. PA. L. REV. 1873 n.1 (1989). For a toast originally offered circa 1938, see Pepper, *The Advisor's Lament*, reprinted in 137 U. PA. L. REV. 1877 (1989), and for a more recent toast see Kaplan, *A Toast*, 137 U. PA. L. REV. 1879 (1989).

For reference to the Northeastern University School of Law Conference as the opportunity to "shape and nurture the next fifty years of American civil practice," see Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1905 (1989); Frank, *The Rules of Civil Procedure-Agenda for Reform*, 137 U. PA. L. REV. 1883 (1989).

It is interesting to note that in 1929, almost a decade before the Federal Rules of Civil Procedure became effective, Owen J. Roberts had advocated "a very broad rulemaking power." For a discussion of his views as expressed in Roberts, *Trial Procedure—Past Present and Future*, 15 A.B.A. J. 667, 668 (1929), see Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1031 n.65 (1982).

² As amended in 1985, Rule 83 provides:

RULES BY DISTRICT COURTS:

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

FED. R. CIV. P. 83.

³ Napolitano, *A Comment on Federal Rules, Local Rules, and State Rules: Uniformity*,

the Local Rules Subcommittee of the Arizona State Bar Civil Practice and Procedure Committee. John Frank characterizes local rules as a "gross affliction," a "plague,"⁴ while Professor Subrin, somewhat more restrained, at least in his imagery, refers to local rules as "Wild Flowers in the Garden."⁵

What is it about local rules that has engendered such intense opposition? In exploring this question it is useful to begin with the major premise that governs their promulgation and their validity: consistency with the national rules. Rule 83 is specific in requiring it;⁶ the statute mandates no less.⁷

That the power to promulgate local rules was limited to those "not inconsistent" with the national rules should occasion no surprise. A major purpose of the national rules was to achieve uniformity among federal district courts wherever located.⁸ Unfettered authority to replace the national rules with whatever a majority of judges in any given district preferred is contrary to the central purpose of the entire enterprise. Local rules were a concession to the fact that local conditions might make absolute uniformity either impossible or undesirable, but these local variations, the accommodations to local desires, were to operate in the interstices, providing a little "play in the joints," without significant impact on the national scheme.

The requirement of consistency has, however, been honored in the breach. The *Local Rules Project* commissioned by the Standing Committee on Practice and Procedure of the Judicial Conference of

Divergence, and Emerging Procedural Patterns, 137 U. PA. L. REV. 2063, 2063 (1989).

⁴ Frank, *supra* note 1, at 1898.

⁵ Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2011 (1989).

Metaphors for local rules have been around for a long time. See, e.g., HOUSE COMM. ON THE JUDICIARY, RULES ENABLING ACT OF 1985, H.R. REP. NO. 422, 99th Cong., 1st Sess. 15 n.55 (1985) [hereinafter H.R. REP. NO. 422] (quoting 1967 testimony of Professor Maurice Rosenberg characterizing local rules as a "kind of procedural Tower of Babel").

⁶ The text is quoted *supra* note 2.

⁷ See 28 U.S.C. § 2071(a) (1988), which governs rule-making by "all courts established by Act of Congress," and requires that "[s]uch rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title," i.e. the national rules.

⁸ For a rich discussion of uniformity between state and federal courts sitting in the same state, and uniformity more generally, see Subrin, *supra* note 5. See also Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 874 (1989) (providing a useful summary of reasons for local rules); *id.* at 860-62 (providing an insightful treatment of "National Uniformity and Local Autonomy").

the United States identified well over 800 instances of what it diplomatically categorized as “possible inconsistency” with federal rules or federal law.⁹ Add to that the sheer volume of local rules with which counsel must become familiar and with which they must comply,¹⁰ and one can understand the frequency and stridency of complaint.

That volume should not be underestimated. Reference to the millions of words contained in thousands upon thousands of local rules is not a figure of speech. The *Local Rules Project* identified over 5,000 local rules and one can understand the characterization of the result as cacophony rather than uniformity.¹¹ Professor Subrin aptly put it this way: “This crack in the wall of uniformity has become a gaping hole.”¹²

The picture cannot be considered complete, at least not in terms of assessing uniformity from the point of view of a lawyer who appears before a substantial number of federal judges with some regularity, without a word about standing orders of individual judges. Allow me to cite two examples, taken from the published literature, in each case describing the practice of a distinguished,

⁹ See Subrin, *supra* note 5, at 2023. *The Report of the Local Rules Project* forwarded to all Chief Judges of the district courts in April 1989 by Judge Joseph F. Weis, Jr., Chair of the Committee on Rules of Practice and Procedure, did in fact identify hundreds of local rules as actually inconsistent with existing law. See COMMITTEE ON RULES PRACTICE & PROC. OF THE JUDICIAL CONF. OF THE U.S., REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES OF CIVIL PRACTICE (1989) [hereinafter LOCAL RULES PROJECT].

Determining precisely what does and what does not constitute inconsistency is frequently complex. See, e.g., Kecton, *supra* note 8 (favoring a standard far less strict than that of the Project).

Some inconsistency appears rather picayune: a requirement that the demand for jury trial be on a separate sheet of paper rather than merely endorsed on the complaint. This is not to say that the procedure mandated by local rule may not be a boon to the particular clerk’s office and a burden to the attorney who has to become familiar with the details of local requirements. Sometimes, however, an added requirement that the summons be filed with the complaint or the complaint will not be accepted for filing, can raise a problem of the statute of limitations and defeat an action. See LOCAL RULES PROJECT, *supra*, at 16-17.

¹⁰ It has been said that a lawyer who is unaware of the provisions of a national rule is incompetent, but one who is unaware of the provisions of a local rule is insulting.

¹¹ See LOCAL RULES PROJECT, *supra* note 9. The sheer volume of local rules and the obligations imposed on counsel, particularly counsel from outside the district, to become familiar with them helps explain the emphasis placed by the *Local Rules Project* on needless duplication.

This figure does not include I.O.P.’s (Internal Operating Procedures) or standing orders, which are discussed in the text that follows.

¹² Subrin, *supra* note 5, at 2020.

highly regarded trial judge. Each deals with a procedure the judge has found effective and efficient in non-jury cases. One judge requires that "[i]n all non-jury cases counsel for each of the parties shall prepare proposed findings of fact and conclusions of law" to be served on opposing counsel not later than fifteen days before trial.¹³ Upon receipt of these proposed findings and conclusions of law, opposing counsel is to:

(A) Underline with red pencil those portions which he/she disputes,

(B) Underline with blue pencil those portions which he/she admits,

(C) Underline with yellow pencil those portions which he/she does not dispute, but deems irrelevant.¹⁴

Another judge requires that proposed findings of fact be served six weeks prior to the trial date. He too requires a response, although there is no color code. Instead, there is to be underlining for some purposes, bracketing for others, and the option of substituting alternative findings. If this option is exercised by one party, it triggers a reciprocal obligation on the part of the opposing party.¹⁵

My purpose is not to evaluate, certainly not to criticize; it is to describe. An awareness of the existence of standing orders and of their diversity is useful in achieving a better appreciation of what practitioners term the problem of local rules,¹⁶ but we need not

¹³ Richey, *A Federal Trial Judge's Reflections on the Preparation for and Trial of Civil Cases*, 52 IND. L.J. 111, 119 (1976) (emphasis omitted).

¹⁴ See *id.*

¹⁵ See Keeton, *supra* note 8, at 895.

¹⁶ The term "local local" rules, as distinguished from local rules, has been defined as "standing orders of general applicability which apply only to cases before an individual judge." H.R. REP. NO. 422, *supra* note 5, at 5 n.1a. In theory, one can distinguish between a rule approved by the majority of the judges of a district court which, by its terms, is applicable only to cases being heard by one of the judges and a standing order similarly limited in applicability, but entered by an individual judge on her own authority.

The advisory committee's note to the 1985 amendment of Rule 83 speaks, albeit in precatory rather than mandatory terms, to the role of the court as a whole in policing the standing orders of an individual judge. The comment reads:

The practice pursued by some judges of issuing standing orders has been controversial, particularly among members of the practicing bar. The last sentence in Rule 83 has been amended to make certain that standing orders are not inconsistent with the Federal Rules or any local district court rules. Beyond that, it is hoped that each district will adopt procedures, perhaps by

be distracted from our central concern to deal in any depth with the potential disadvantages inherent in standing orders, the advantages they may offer, and procedures that might optimize the one and minimize the other.

Local rules, even those that are inconsistent with the national rules, have an important characteristic in common with the standing orders described above. Each is designed to achieve what a judge or group of judges see as some benefit, some increment of efficiency or fairness for the litigants, the court, or the judicial system as a whole. I am not altogether unsympathetic with that effort and, indeed, I shall argue for allowing local rules that are inconsistent with the national rules (1) for a specific purpose, (2) for a specified period of time, and (3) subject to control by a mechanism which would need to be established.

B. *The Underlying Causes of Inconsistency*

Before dealing with solutions there is the need to examine the problem more carefully. It is useful to look at the present situation and to ask: Why is there, what by now must be conceded to be, rampant inconsistency between local and national rules? Approaching the problem from a historical perspective, we find a related question. Inconsistency was first identified as a problem in 1940, shortly after the Federal Rules went into effect.¹⁷ Why did the standard—"not inconsistent with"—remain unchanged and the problem continue, not only unabated, but exacerbated?

The Congress has not been unaware of the twin problems of proliferation and inconsistency in the area of local rules. Hearings have been held¹⁸ and legislation has been enacted,¹⁹ but the

local rule, for promulgating and reviewing single-judge standing orders. FED. R. CIV. P. 83 advisory committee's note (1985).

¹⁷ See *Report on Local District Court Rules*, 4 Fed. R. Serv. 2d (Callaghan) 969, 970 (1941) (abridged from REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON LOCAL COURT RULES (1940), chaired by Judge John C. Knox); Subrin, *supra* note 5, at 2016.

¹⁸ See Letter from Edward T. Gignoux to Honorable Robert W. Kastenmeier (July 22, 1983), reprinted in *Rules Enabling Act: Hearings on Oversight and H.R. 4144 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 98th Cong., 1st & 2d Sess. 104 (1983-84) [hereinafter *Hearings on H.R. 4144*]; Letter from Russell Wheeler to David Beier (July 14, 1982), reprinted in *Hearings on H.R. 4144, supra*, at 181; Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251 (1967), reprinted in *Hearings on H.R. 4144, supra*, at 314.

¹⁹ See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, Title IV, § 403(a)(1), 102 Stat. 4642, 4650 (codified at 28 U.S.C. § 2071(c)(1) (1988)),

standard itself has not been changed.²⁰ Perhaps most striking is the fact that so little attention has been focused on why it is that inconsistency persists, indeed proliferates, even while it remains a source of continuing concern.

1. "A Fluid Standard of Ambiguous Meaning"

What then are the underlying causes of inconsistency? A number of factors appear responsible for the many instances of inconsistency between local and national rules. A practitioner who feels herself aggrieved by an offending local rule becomes painfully aware of how inadequate the mechanisms for challenging such a rule really are. Nor are mechanisms unimportant; we shall consider them in due course. Mechanisms, however, are designed to enforce standards and the standard to be enforced is far from clear. Indeed, in an important work on local rules the late Professor David Roberts called consistency a "fluid standard of ambiguous meaning,"²¹ one that has not been a useful tool.²² This is certainly true as a matter of historical fact, but the term was neither abandoned nor modified in the most recent amendment of Rule 83,²³ and much of the difficulty seems to be in the way the Supreme Court has interpreted Rule 83 rather than in any difficulties inherent in the term itself.

It is useful to identify three distinct types of inconsistency, all of which are proscribed by Rule 83. A national rule says there is no need to verify pleadings and a local rule provides that in all civil rights cases the complaint must be verified.²⁴ The contradiction is direct, the inconsistency apparent.

discussed in H.R. REP. NO. 889, 100th Cong., 2nd Sess. 26-29, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5986-89; see also Subrin, supra note 5, at 2019-20 (discussing legislative action on the issue of local rules).

²⁰ Professor Roberts had called for abandoning the consistency standard in favor of articulating quite specifically the areas within which local rules would be permitted to operate. See 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, 552, 554 (1985). His criticism of the current standard as inadequate is described in H.R. REP. NO. 422, *supra* note 5, at 15.

²¹ See Roberts, *supra* note 20, at 552.

²² See *id.* at 539. Understandably, Professor Roberts sharply criticized the Judicial Conference for failure to jettison inconsistency as a standard when it proposed what eventually became the 1985 amendment to Rule 83.

²³ See *supra* note 2.

²⁴ See LOCAL RULES PROJECT, *supra* note 9, at 73 (finding this local rule in 16 jurisdictions).

The national rules provide that pleadings shall be simple and concise, and the appended forms illustrate the simplicity that is intended.²⁵ A district court accepts both the prescription and the example, choosing to quarrel with neither. However, by local rule the district court does require a pretrial memorandum, detailed, lengthy, and interpreted in the zealous spirit of an English judge still sitting in the common law era, a veritable Baron Surrebutter. As the Fourth Circuit made clear in the case of *McCargo v. Hedrick*,²⁶ such a provision is totally against what the federal rules are trying to accomplish; it is inconsistent with the spirit of the rules.

Sometimes a district court attempts, by local rule, to introduce what has been termed a basic procedural innovation. At a time when discovery was not available in admiralty (in fact, the General Admiralty Rules rather than the Federal Rules of Civil Procedure governed in those proceedings) the Northern District Court of Illinois promulgated a local rule that would have made discovery generally available in admiralty. The court acted under the authority of General Admiralty Rule 44, which empowered district courts to promulgate local rules not inconsistent with the general rules. This, said the Supreme Court in holding the rule invalid, was a basic procedural innovation, and the introduction of basic procedural innovations was beyond the proper function of local rules.²⁷ In a sense, such a local rule was inconsistent with the basic scheme of the general rules.

Thirteen years later the Supreme Court had before it a local rule promulgated by the District Court of Montana, which provided for a six-person jury in civil cases, a much remarked upon departure from the traditional twelve. The rule was challenged as a basic procedural innovation, inappropriate for introduction by local rule. The Supreme Court thought the change could hardly be considered basic since the reduction in the number of persons serving on the jury "plainly does not bear on the outcome of the litigation."²⁸ It

²⁵ Moreover, under Rule 84 as amended, these forms are declared "sufficient under the rules," to remove any possible doubt about their sufficiency. See FED. R. CIV. P. 84.

²⁶ 545 F.2d 393 (4th Cir. 1976).

²⁷ See *Miner v. Atlass*, 363 U.S. 641 (1960).

²⁸ *Colgrove v. Battin*, 413 U.S. 149, 163-64 & n.23 (1973). In an interesting paper delivered at a conference on local rules at Boston College on November 12, 1987, Professor Burbank suggests that "if we are to take questions of power seriously . . . we cannot confine ourselves to the Supreme Court's few pronouncements in the area—or put more provocatively, we cannot take *Colgrove v. Battin* seriously." S. Burbank, Conference on Local Rules 2 (Nov. 12, 1987) (unpublished manuscript).

held the rule valid, contributing significantly to the widespread adoption of six-person juries, although not to precision in defining consistency as the term is used in Rule 83.²⁹

The use of local rules to curtail abuse in the use of interrogatories is particularly illuminating, underscoring basic discrepancies in the attempt to define consistency. I refer specifically to limiting the number of interrogatories to a figure specified in the local rule, in some instances to as few as twenty, in others thirty or even fifty. There is no such limit in Rules 26 or 33 of the Federal Rules of Civil Procedure. Moreover, the advisory committee specifically refused to impose a limitation in terms of numbers and they further refused to provide for local option, which would have authorized such limitations.³⁰ The advisory committee opted for case by case controls on the use of interrogatories.

The *Local Rules Project* characterized local rules establishing such limitations as basically in conflict with the national rules, and yet found that fifty-four of the ninety-four districts had such limitations in place.³¹

Judge Robert E. Keeton, currently serving as chair of the Committee on Rules of Practice and Procedure of the Judicial Conference, has argued that since a litigant may make a motion seeking permission to file additional interrogatories, so long as the burden of proof is not placed on the movant there is no conflict.

Professor Burbank goes on to discuss *Miner v. Atlass* as a "preemption," denying local rules the right to deal with certain subjects that are to be limited to national rulemaking. *See id.* at 2-3.

²⁹ In *Frazier v. Heebe*, 482 U.S. 641 (1987) (striking down a local rule relating to the admission of attorneys, promulgated by the Eastern District Court of Louisiana), the Court acted pursuant to its supervisory powers over the lower federal courts, thus avoiding the need to address the constitutional question. The opinion by Justice Brennan found that the Supreme Court has the obligation "to ensure that these local Rules are consistent with 'the principles of right and justice.'" *Id.* at 645. The opinion, however, also quoted the requirement that the rules not be inconsistent with the national rules. *See id.* at 646.

Chief Justice Rehnquist, joined by Justices O'Connor and Scalia, dissented on the ground that the Court had no such authority, neither under its supervisory power nor under its power to strike down invalid local rules. In his dissent, the Chief Justice described the four inquiries that the Court undertook in addressing challenges to the validity of local rules: whether they conflicted with an Act of Congress, whether they conflicted with the national rules, whether they were constitutionally infirm, and whether the subject matter governed by the rule was within the power of a lower federal court to regulate. *See id.* at 654 (Rehnquist, C.J., dissenting) (citing *Colgrove*, 413 U.S. at 159-60, 162-64 and *Miner*, 363 U.S. at 651-52).

³⁰ *See* LOCAL RULES PROJECT, *supra* note 9, at 96.

³¹ *See id.*

What a fine line to draw! The issue, of course, is not whether the limitation is good or bad, but rather whether it is consistent with the national rules. At the least, the suggested distinction reflects the difficulty of applying the "not inconsistent" test in a principled and yet satisfactory manner.

In light of some of these difficulties, one can almost welcome the refreshing candor that lies behind some local rules that have, in effect, prefaced local rules with a clarifying preamble stating: "The national rule notwithstanding . . ."

2. Challenging Inconsistent Rules: The Mechanisms Available

The absence of agreement concerning what we mean by consistency is certainly more important than the procedural problems inherent in the effort to deal with local rules that are admittedly inconsistent. The latter, however, cannot be ignored. It is quite clear that the mechanisms for challenging local rules on the ground that they are inconsistent with the national rules have, historically, been inadequate. Appellate review is not readily available. Theoretically, appeal is virtually always an option; realistically, this is rarely the case. What litigant, what litigator, would willingly suffer an adverse final judgment by flouting a rule promulgated by the majority of the judges of the court in which the case is being tried, no matter how clear the inconsistency may appear?³² There have in fact been cases in which appellate courts did pass on the validity of local rules. Some of these have been significant,³³ but as an effective means of assuring compliance with the limitations imposed by Rule 83 and the underlying statute, this traditional mechanism of review of lower court actions is simply unequal to the task.

Two new mechanisms of policing local rules have been developed quite recently: one involves the circuit councils and the other an arm of the Judicial Conference of the United States. The Congress has given the circuit judicial councils explicit authority to

³² Where failure to comply with a local rule has resulted in dismissal without any consideration of the merits by the trial court, appeal on the ground that the local rule is void for inconsistency can be expected and may be successful. *See, e.g., Hall v. Commissioner*, 805 F.2d 1511 (11th Cir. 1986) (noting failure to attach a motion for rule nisi along with the complaint).

ⁱ Prerogative writs, such as mandamus, are available in some circumstances and can in those circumstances be used to gain appellate review. *See Colgrove*, 413 U.S. at 150. By definition, however, they are rarely available.

³³ *See supra* notes 26-29 and accompanying text.

abrogate local rules,³⁴ and the Advisory Committee notes to the 1985 amendment of Rule 83 make clear that the authority vested in the councils was intended to be accompanied by a reciprocal obligation. The judicial councils are expected to undertake their own review of local rules, even existing rules, and to evaluate them in terms of prudential concerns, e.g., inter-district uniformity, as well as technical validity.³⁵ It is noteworthy that an administrative arm of the judiciary, a circuit council, is asked to review and, where appropriate, to abrogate local rules promulgated by a district court.³⁶

Even before the Congress acted, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States commissioned what is known as the *Local Rules Project*, a careful analysis of each local rule currently in effect in each of the district courts. In an initial report over 500 pages long, the *Project* identified inconsistencies and redundancies, inviting the attention of each court to the local rules considered problematic.

These two mechanisms should be viewed as complementary, each reinforcing the other. The Judicial Conference, operating through its committees, and supported by appropriate research, can provide initiative and guidance, a welcome alternative to the initiative traditionally provided, and provided inadequately, by the adversary system.³⁷ The task of assuring that duly promulgated

³⁴ See 28 U.S.C. § 2071(c)(1) (1988). This legislation, and the amended Rule 83, permits the judicial council of each circuit to abrogate local rules that are inconsistent with the national rules or statutes. It might be argued that "[e]ach judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit," *id.* § 332(d)(1), Congress had already vested that power in the circuit councils. See 7 J. MOORE, J. LUCAS & K. SINCLAIR, *FEDERAL PRACTICE* ¶ 83.02 (2d ed. 1990). In any event, the authority to abrogate has now been vested by the Congress in explicit terms.

³⁵ The Advisory Committee noted its "expectation . . . that the judicial council will examine all local rules, including those currently in effect, with an eye toward determining whether they are valid and consistent with the Federal Rules, promote inter-district uniformity and efficiency, and do not undermine the basic objectives of the Federal Rules." FED. R. CIV. P. 83 advisory committee's note (1985).

³⁶ See Letter from Professor Stephen Burbank to the Committee on Practice and Procedure (Feb. 27, 1984), reprinted in *Rules Enabling Act of 1985: Hearings on H.R. 2633 and H.R. 3550 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 24, 29 (1985) (discussing the question of the power of a judicial council to nullify a local rule and, in that context, noting a 1937 proposal, ultimately rejected, that would have required the approval of a majority of the circuit judges of a circuit as a precondition for promulgation of a local rule).

³⁷ The Judicial Conference, however, should not be expected to take action to

local rules are both valid and appropriate is assigned to the circuit councils; they are charged with the obligation and vested with power equal to the task.

Preliminary review of the changes effected to date is not overly encouraging, although the problem is too complex and the time that has elapsed too short to make any definitive assessment.³⁸ It is clear, however, that at least some judicial councils are involved in the process of oversight and are having an impact.³⁹

The important point, however, is that the present proposal to recognize and to permit local rules that are inconsistent with the

abrogate particular district court local rules. See 28 U.S.C. § 2071(c)(2) (1988) (describing the role of the Conference with respect to local rules promulgated by courts other than the district courts). Whatever the outer limits of its authority, it would be totally inappropriate for the Conference to be viewed as the revising authority for the local rules of 94 district courts.

³⁸ The *Report of the Local Rules Project* was distributed to the chief judges of the district courts in April 1989 with a cover letter from the chair of the Judicial Conference Committee on Practice and Procedure. See *supra* note 9. Included was a list of questionable rules adopted by the particular district as well as the more general material termed the treatise. In the summer of 1990, we examined the local rules of each district to learn what changes had been effected in the rules characterized as objectionable because of inconsistency. No attempt was made to evaluate the response to objections because of redundancy or unnecessary repetition of the national rules.

While a fair number of rules had been deleted and some amended, it is fair to characterize the results as far from reflecting general compliance. How soon should one expect compliance to be evident? This is a difficult question, for there must be a fairly significant period for adoption of amendments. This is particularly true under the current statute which requires notice and comment. In addition, one must allow time for printing and general distribution. One circuit, for example, reported that although the work of review and revision has been under way for some time, it was expected that another six months would be needed for the project to be completed.

In addition, the *Local Rules Project* itself indicated that certain local rules were being forwarded to the Advisory Committee for consideration of the desirability of amendment of the national rules. This was true with respect to limitations on the number of interrogatories. See LOCAL RULES PROJECT, *supra* note 9, at 99. Understandably, one should not expect 54 of the 94 districts to abrogate their local rules in the interim. See *supra* text accompanying notes 30-31.

³⁹ A telephone survey of the offices of the circuit executives in January 1991 yielded instances in which the circuit councils had discussed particular local rules and the district courts had taken action in conformity with that discussion. One circuit reported that a standing order was abrogated. Another circuit reported a procedure under which a district court could obtain an informal advisory opinion prior to formally promulgating a rule.

It is useful to recall that an appellate court, acting on a request for a writ of mandamus directed to a district court judge, will frequently indicate no need for the writ to issue formally once the court has made its views known. This is a form of civility that can also operate with respect to the circuit councils and the district courts.

national rules, albeit in limited circumstances and under controlled conditions, is not dependent on the effectiveness or ineffectiveness of mechanisms designed to extirpate inconsistency. If anything, the more effective new mechanisms become in eliminating inconsistencies, the more important it is to consider the need for a safety valve, a system for tolerating, and perhaps even fostering, inconsistent alternatives in a limited number of districts.

II. ON THE UTILITY OF INFORMED INCONSISTENCY

In order to evaluate the present situation properly, it is necessary to go beyond the narrow technicalities of what is or is not consistent and inquire whether inconsistency is necessarily bad. Are there redeeming features to inconsistency that may help explain why courts seem so determined to read the requirement of consistency as though it were not there?

I suggest that we are dealing with nothing less than how courts, impatient with the failure of the national system to solve pressing, indeed urgent, procedural problems, utilize local rules in an effort to shape pragmatic solutions. In short, we are dealing with the dynamic of procedural progress, or to use a more neutral term, one route to procedural change.

Judges perceive problems: discovery abuse, frivolous civil rights suits, or simply inordinately heavy caseloads. Solutions are proposed, and the judges either have confidence in them or are willing to try them because others have confidence in them.⁴⁰ Local rules offer the most expeditious means of experimenting.⁴¹

Court-annexed arbitration for ordinary civil suits below a specified amount in controversy provides a good example. Until the

⁴⁰ This is the usual pattern. *See infra* notes 45-47 and accompanying text. However, where problems become sufficiently pressing, a court may be willing to experiment without anyone being confident in the success of the proposal; all that is required is that it appears worth trying under the theory that doing something is better than nothing.

⁴¹ Prior to the amendment of § 2071 in 1988, the judges of the court could act without consulting any other authority and with no need to involve the bar or even to inform the bar in advance of promulgation, if they so chose. Since the amendment, notice and the opportunity to comment is, of course, required, *see* 28 U.S.C. § 2071(b) (1988), but it hardly serves as an impediment if the court feels strongly about the proposed rule. *See id.* § 2071(e) (allowing a court to prescribe rules without notice or the opportunity to comment if the court determines that there is an immediate need for the rule). Of course, even prior to the amendment, some judges would go to great lengths to involve the bar in the planning of innovations, both to assist in refining the proposed rule and to insure support after promulgation.

passage of the Judicial Improvements and Access to Justice Act of 1988,⁴² there was no specific legislative authority for such programs. When the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, popularly known as the Pound Conference, convened in April 1976, one of its major themes was increased utilization of alternative means of dispute resolution.⁴³ The American Bar Association, a co-sponsor of the Conference, appointed a Follow-Up Task Force, which was chaired by Griffin Bell, formerly a judge of the Court of Appeals for the Fifth Circuit and soon to become Attorney General in the Carter Administration.⁴⁴ One of the recommendations of the Task Force was increased use of court-annexed arbitration to help courts cope with mounting caseloads.⁴⁵ The federal courts were mentioned specifically, and when Judge Bell became Attorney General he actively urged experimentation with court-annexed arbitration in three federal district courts. Courts that adopted the program did so by promulgating a local rule.

Use of local rules to launch these alternative dispute resolution programs has been roundly condemned as a blatant example of a basic procedural innovation, proscribed by the Supreme Court as inappropriate for local rules.⁴⁶ At the same time, it has been defended as clearly within the scope of a district court's rule-making power.⁴⁷ Would the technicality of inconsistency have deterred the proponents?

Consider civil rights litigation. District after district requires that the complaint in such cases be verified, directly contrary to Rule 11.⁴⁸ And sometimes by rule and sometimes by judicial decision, new standards of specificity in the pleading of these cases

⁴² Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified in scattered sections of 28 U.S.C., arbitration title codified at 28 U.S.C. §§ 651-58 (1988)).

⁴³ See Sander, *Varieties of Dispute Processing*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 65 (A. L. Levin & R. R. Wheeler eds. 1979).

⁴⁴ See *id.* at 295.

⁴⁵ See *id.* at 309.

⁴⁶ See Roberts, *supra* note 20, at 544 (introducing his discussion of these rules as follows: "[a]nother type of local rule exists that is so violently at odds with some of the most fundamental policies embodied in the federal rules that it is almost inconceivable that a district court would adopt it").

⁴⁷ See Levin & Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29, 49-51 (1985). It should be noted, however, that this work relies heavily on the provisions of Rule 16 as amended in 1983. Professor Roberts' work was published posthumously in 1985. However, the major programs were implemented by local rule prior to the amendment of Rule 16.

⁴⁸ See LOCAL RULES PROJECT, *supra* note 9, at 73-76.

have been introduced.⁴⁹ How can such action be defended? Basically, when the inconsistency is not simply ignored, the attitude is one of the end justifying the means: we will achieve improvements.

On a more sophisticated level the argument is made that there is a perceived good in diversity, in allowing experiments on a small scale. Local rules will inform national rulemaking, thus benefitting the system as a whole. In this vein, Judge Jack Weinstein, a foremost authority in the area of rulemaking, has referred to the district courts as laboratories,⁵⁰ and it is clear that as a society we value laboratories and their research as an important national resource.

To continue the metaphor, however, we have very busy laboratories, some ninety-four of them, but virtually no one is

⁴⁹ See, e.g., *Siegert v. Gilley*, 895 F.2d 797, 801 (D.C. Cir. 1990) (requiring "a higher [pleading] standard than that generally provided for in the Federal Rules" in *Bivens* claims alleging unconstitutional motive), *aff'd on other grounds*, 111 S. Ct. 1789 (1991). Chief Judge Wald dissented in part, arguing that plaintiff should be allowed limited discovery in order to enable him "to supplement his originally, perhaps necessarily, sketchy complaint." 895 F.2d at 807 (Wald, C.J., dissenting in part). The Supreme Court affirmed the court of appeals on the ground that plaintiff had alleged no violation of a liberty interest, without reaching the question of the propriety of a heightened pleading standard. See 111 S. Ct. 1789.

In *Rotolo v. Borough of Charleroi*, 532 F.2d 920 (3d Cir. 1976), the court reversed dismissal of two civil rights complaints for failure of the district court judge to allow plaintiff an opportunity to amend. It nevertheless reaffirmed a heightened pleading standard in civil rights claims observing that plaintiff's "allegations state no facts upon which to weigh the substantiality of the claim." *Id.* at 923. Judge Gibbons, concurring and dissenting, objected to the pleading standard on the ground that the court had no authority to contravene Rule 8 of the Federal Rules of Civil Procedure. See *id.* at 927 (Gibbons, J., concurring and dissenting).

Rotolo continues to be cited with approval. See *Colburn v. Upper Darby Township*, 838 F.2d 663, 666 (3d Cir. 1988). In *Freedman v. City of Allentown*, 853 F.2d 1111 (3d Cir. 1988), the court recognized that its "specificity rule in civil rights cases may on the surface appear to be in tension with the liberal notice pleading approach of the Federal Rules of Civil Procedure," but noted that district courts are required to permit amendments and, further, that plaintiff is entitled to a reasonable amount of discovery "to help . . . make the necessary showing to prove her case." *Id.* at 1114 (citing *Colburn*, 838 F.2d at 670).

The *Local Rules Project* reports that 32 districts "have local rules requiring civil rights actions to be filed on standard forms available from the court." LOCAL RULES PROJECT, *supra* note 9, at 77. It finds these "inconsistent with existing law" and recommends that they be rescinded. See *id.* The *Project* notes that, while probably intended to aid prisoners, such local rules "could also be a hurdle to civil rights litigants and especially to *pro se* litigants." *Id.*

⁵⁰ See Letter from Judge Jack Weinstein to Steven Flanders (March 29, 1978), quoted in Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?*, 14 LOY. L.A.L. REV. 213, 219 n. 35 (1981).

collecting data. With a few notable exceptions, results are reported on the basis of impressions: "We think this is working . . . the bar seems satisfied, or at least the bar can live with it." A notable exception is probably the Eastern District of Pennsylvania, which has from the very beginning of its court-annexed arbitration program been collecting data and reporting it.⁵¹ This practice had a profound effect on the shaping of the authorizing legislation when the Congress acted in 1988.⁵²

The focus of our attention at this juncture should not be on extirpating all inconsistency, but rather on harnessing and controlling it for the benefit of the judicial system as a whole. The district court forays speak to underlying problems and inform us of perceived solutions. We should affirmatively encourage useful experimentation, controlled experiments, because we need, and want, and can profit from them. One might suggest that we can achieve a greater measure of consistency in the long run by channeling and controlling, rather than fighting to eliminate inconsistency.

A. *The Advisory Committee's 1983 Proposal*

In 1983 the Advisory Committee on Rules of Civil Procedure endorsed the basic idea of utilizing local rules as experiments, including it in a proposed amendment to Rule 83.⁵³ That proposal was duly forwarded to the Standing Committee on Practice and Procedure and circulated for comment to bench and bar by the Standing Committee.⁵⁴ In the notes accompanying the draft the Advisory Committee credited the work of Stephen Flanders,⁵⁵ a strong defender of local rules, who himself had credited Judge Weinstein.⁵⁶

⁵¹ See, e.g., Broderick, *Compulsory Arbitration: One Better Way*, 69 A.B.A. J. 64, 64-65 (1983); see also, Broderick, *Court-annexed Compulsory Arbitration: It Works*, 72 JUDICATURE 217, 220 (1989) (stating that from the time the program was initiated in February 1978 to June 30, 1988, 17,006 of the total 71,588 civil cases were put into the arbitration program and that of these, 15,779 had been terminated and only 388 required trial *de novo*.)

⁵² See *Court-annexed Arbitration and Experimentation: Hearings on H.R. 4341 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary*, 99th Cong., 2d Sess. 3-16 (1986) (testimony of Judge Raymond Broderick of the Eastern District of Pennsylvania).

⁵³ See *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 98 F.R.D. 339, 353, 370-73 (1983) [hereinafter *Proposed Amendments*].

⁵⁴ See *id.* at 371-73.

⁵⁵ See *id.* at 372 (citing Flanders, *supra* note 50, at 219).

⁵⁶ See Flanders, *supra* note 50, at 219 n.35. Judge Weinstein extolled local rules

Consistency with the national rules was not to be required of rules that were avowedly experimental. It was not that inconsistency was permitted; the statute provided unambiguously to the contrary. It was simply that experimental local rules were to be immunized from challenge on the ground of inconsistency for a period of two years.⁵⁷

The proposal was seriously flawed and was soon abandoned. The most serious problem was lack of authority to promulgate a rule that would have been in violation of the governing statute. Congress had explicitly prohibited local rules inconsistent with the national rules;⁵⁸ flatly contradicting the statute, the amendment stated that inconsistency is sometimes permissible. Couching that permission in procedural terms—prohibiting a challenge on the ground of inconsistency for a period of years—could not camouflage the contradiction.⁵⁹ In short, the basic idea was good, but authority was lacking.⁶⁰

as encouraging "initiative and imaginative development of new ideas in a variety of different settings." *Id.* He also applauded the use of local rules as "laboratories." *See id.*

⁵⁷ Public notice and the opportunity to comment was to be required in advance of promulgation, and prior approval by the judicial council of the circuit was also to be required in the case of experimental rules. *See Proposed Amendments, supra* note 53, at 370.

⁵⁸ Section 2071 empowers "all courts established by Act of Congress" to promulgate local rules which "shall be consistent with . . . [the] rules . . . prescribed" by the Supreme Court. 28 U.S.C. § 2071(a) (1988).

⁵⁹ It might be argued that the grant of power to the Supreme Court in 28 U.S.C. § 2072, pursuant to which the national rules are promulgated, provides an independent basis for Rule 83 and hence for local rules. As a corollary, if the Supreme Court provides in Rule 83 for inconsistent local rules under specified conditions, and Congress has allowed that provision to become law, there is no need to conform to the restrictions of § 2071. This analysis, however, is of doubtful validity. *See Burbank, Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions about Power*, 11 HOFSTRA L. REV. 997, 1011 (1983). Moreover, as a matter of policy it would appear desirable to involve the Congress at the authorization stage in shaping what is, in a very literal sense, a basic procedural innovation, at least with respect to the procedure of fashioning and testing new rules. *See infra* note 68 and accompanying text.

⁶⁰ There were other respects in which the proposal could have benefitted from revision, for example the two-year limit on certain experiments. Alternatives will be discussed *infra* text accompanying notes 101-03.

B. *More Recent Developments*

Rule 83 was in fact amended in 1985, with no mention of experimentation or permissive inconsistency with the national rules. A deep silence concerning local rules as experiments might have been thought to have relegated that proposal to the irrelevant past. That, however, has not been the case; the silence has not been long sustained. In 1985, a very valuable contribution to the literature of local rules by the late Professor David Roberts, published posthumously in the *University of Puget Sound Law Review* (actually completed after his death by associates), endorsed experimentation by local rule.⁶¹ The specific subject is treated quite briefly, but with insight and with conviction.

Most recently, Professor Laurens Walker, focusing on the need to move from hunch and guess to soundly derived data as a basis for drafting and amending procedural provisions, has argued that the most cost-effective pattern of experimentation is restricted field experimentation, i.e. by local rule promulgated in specific districts.⁶² The time is propitious for examining in some detail the conditions on which local experimentation inconsistent with the national rules should be allowed.

C. *Allocation of Power and the Conditions of Experimentation*

To vest unfettered discretion in each district to "experiment" as it sees fit, would be a prescription for disaster. It is hard to conceive of any change in the national rules, introduced for any period of time, that could not qualify in absolute good faith as an effort to experiment with a preferred local provision.⁶³ The

⁶¹ See Roberts, *supra* note 20, at 554.

⁶² See Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, LAW & CONTEMP. PROBS. 67 (Summer 1988). This valuable work, although appearing in a volume which carries the date of Summer 1988, was not distributed in time to be available to the author in October 1989 when the Roberts Lecture, on which the present piece is based, was delivered.

In the context of alternative dispute resolution, the Federal Court Study Committee made the following recommendations in 1990: "Congress should broaden statutory authorization for local rules for alternative and supplementary procedures in civil litigation, including rules for cost and fee incentives," and "Congress should authorize and provide funds for sustained experimentation with alternative and supplementary techniques, subject to the guidelines recommended below and any other limitations Congress may deem advisable." REPORT OF THE FEDERAL COURT STUDY COMMITTEE 81, 83, 85-86 (1990).

⁶³ Notice and comment might prove something of a deterrent, but the judges

significant question is under what conditions, with what controls exercised by what mechanisms should experimentation be allowed?

To answer that question it is useful to take note, at least briefly, of the division of power as it currently relates to rule-making. The Congress and the judiciary share power in the matter of rule-making. That is familiar enough.⁶⁴ Within the federal judicial system some power is vested nationally, in the Supreme Court and the Judicial Conference for example;⁶⁵ some is vested regionally, in the circuit councils for example;⁶⁶ and some is vested locally, in the judges of the district courts.

With the enactment of provisions calling for notice and the opportunity to comment as a prerequisite for adoption of local rules, the judiciary no longer has the authority to promulgate local rules without some measure of participation by "outsiders." In this limited sense, power is no longer vested exclusively in governmental entities. The views of others must be solicited and presumably considered; an opportunity to be heard must be extended to the bar and, I would suggest, as a prudential matter, it should be extended to other consumers as well.⁶⁷

1. The Need for Legislation

Any program of experimentation by local rule should be authorized by Congress.⁶⁸ Such authorization need not be and

retain the authority to promulgate. Moreover, notice and comment does not necessarily provide the court with the views of lawyers who do not reside in the district, but who regularly appear before the court in the course of a national practice.

⁶⁴ Although it borders on the trite, it may be well to remember that the 1983 proposal for amendment of Rule 83 fell precisely for the failure to recognize this fact.

⁶⁵ On the role of the Supreme Court see, e.g., 28 U.S.C. § 2072(a) (1988) (stating "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure"), and on the role of the Judicial Conference see, e.g., *id.* § 2073 (a)(1) (stating "[t]he Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules under this section"). Moreover, the various rules committees are committees of the Judicial Conference.

⁶⁶ See 28 U.S.C. § 2071(c)(1) (1988); FED. R. CIV. P. 83.

⁶⁷ As previously noted, although a rule promulgated without affording the bar the opportunity to comment would be invalid, once that opportunity is afforded, the majority of the active judges of the district may act as they deem appropriate. In this sense, they do not share power. Moreover, the opportunity to comment may be afforded by a variety of mechanisms; it certainly does not contemplate service of papers on every member of the bar and on interested consumer groups.

⁶⁸ The reference is to a duly enacted statute that is presented to the President. In one sense, if the Supreme Court promulgates an amended Rule 83 which provides for experimentation by local rule, even rules inconsistent with the national rules, and

should not be for each experiment, but rather for a system of experimentation under conditions defined generally in the legislation. In a narrow sense, legislation is needed to authorize experiments that are inconsistent with the national rules. More generally, experimentation by local rule is in itself a basic innovation in the rule-making process in which the Congress should be involved. This is particularly true if such experiments include random assignment of cases to control groups, permitting some litigants to experience the benefits thought to accrue from a new rule, while other litigants are denied the opportunity solely to make possible rigorous evaluation of the effects of the change.⁶⁹ There is no reason to believe that Congress would not give its approval to such a rule. On the contrary, there is every reason to believe, on the basis of recent history, that congressional approval would be forthcoming.⁷⁰

A new statute is not, however, a prerequisite of all further experimentation by local rule. Absent a problem of inconsistency with the national rules, innovations at the district level, implemented by local rule, are not proscribed and the study of data generated as a result is certainly not proscribed. Such experimentation has in fact taken place in the past, quite legitimately, and the possibility of further experimentation, undefined in scope, has recently been recognized, if not validated, by the Congress. The history of the

Congress fails to express its disapproval, the Congress has "approved". This may have been the theory behind the 1983 proposal. The fact is, however, that inaction is not the equivalent of affirmative passage of an amended statute authorizing inconsistent local rules for purpose of experimentation. For one thing, there has been no presentment affording the President the opportunity to veto. See *supra* note 59; see also Burbank, *supra* note 59, at 1011 (discussing this argument further).

⁶⁹ See Walker, *supra* note 62, at 81-83 (discussing EXPERIMENTATION IN THE LAW: REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW (1981) [hereinafter EXPERIMENTATION IN THE LAW]). For further details concerning the composition of the committee and other aspects of its work, see *infra* note 89 and accompanying text.

⁷⁰ In this regard the experience with respect to court-annexed arbitration, discussed below, is instructive. See *infra* notes 71-77 and accompanying text.

The unique role of Congressman Robert W. Kastenmeier of Wisconsin, chair of the Subcommittee on Courts, Intellectual Property and the Administration of Justice of the House Judiciary Committee during the relevant period, should also be noted. After 32 years in the House, Kastenmeier is no longer in the Congress. For a tribute to Kastenmeier and the "strong working relationship" between him, his chief counsel, Mike Remington, and the courts, see *Kastenmeier Wraps Up Distinguished Congressional Career*, THE THIRD BRANCH, Dec. 1990, at 1. For recent evidence of congressional interest in experimentation and the evaluation of experimental programs, see Judicial Improvements Act of 1990, Pub. L. No. 101-650, Title I, § 105(c), 104 Stat. 5089, 5098.

provisions governing court-annexed arbitration, included in the Judicial Improvements and Access to Justice Act,⁷¹ is instructive.

For well over a decade federal courts had, by local rule, instituted court-annexed programs of alternative dispute resolution⁷² and Congress appropriated funds for these programs. The requests for funds were processed through the appropriation committees and subcommittees, and until 1988 no substantive legislation had been enacted expressly permitting court-annexed arbitration in federal district courts. Such legislation, it should be noted, fell under the jurisdiction of the Judiciary Committees. Opinions differed as to whether such legislation was needed, but in 1988 the Congress did enact a comprehensive statute governing court-annexed arbitration, to become effective in the spring of 1989. The legislation lists ten districts by name as authorized to have such programs and then provides that the Judicial Conference of the United States may authorize ten additional districts to institute such programs.⁷³ There is a five-year sunset provision and there are limitations, for example on jurisdictional amount and on permissible sanctions.⁷⁴

The legislation recognized, confirmed, and extended an experimental program, which remained clearly experimental. However, there were other experiments in federal district courts, including programs that utilized other forms of alternative dispute resolution.⁷⁵ To avoid the risk that this legislation would be read as casting doubt on any of these other programs, the Act includes a striking provision. Section 904 provides, in its entirety: "Nothing in this title, or in chapter 44, as added by section 901 of this Act [court-annexed arbitration] is intended to abridge, modify, or enlarge the rule making powers of the Federal judiciary."⁷⁶

It is clear that the Congress did not want its action with respect to court-annexed arbitration to be read as making any statement with respect to other experiments or other local rules.⁷⁷

⁷¹ See Pub. L. No. 100-702, §§ 901-07, 102 Stat. 4642, 4659-64 (codified at 28 U.S.C. §§ 651-58 (1988)).

⁷² See Levin & Golash, *supra* note 47, at 29. For variations in the details of these programs, see *id.* at 32 n.15.

⁷³ See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901, 102 Stat. 4642, 4659-63 (codified at 28 U.S.C. § 658 (1988)).

⁷⁴ See *id.* §§ 901, 906, 102 Stat. 4659-60, 4664 (codified at 28 U.S.C. §§ 651 note, 652 (1988)).

⁷⁵ See Levin & Golash, *supra* note 47, at 36-42.

⁷⁶ See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 904, 102 Stat. 4642, 4663 (codified at 28 U.S.C. § 651 note (1988)).

⁷⁷ See *infra* text accompanying note 100 (discussing the possibility of allowing

2. Permission to be Inconsistent

Under this proposal a district court⁷⁸ would need permission to be inconsistent with the national rules even for the purpose of experimentation. Such a requirement is essential to avoid the possibility of disruptive disuniformity. For example, it is hard to envision a district court being allowed, even on a trial basis, to forbid all discovery in all cases for a two year period. Even an experimenting district court remains part of the federal judicial system. A local rule with lesser sweep, one abolishing all interrogatories for a similar period, or all discovery in all cases under \$50,000 also seems highly problematic.

Then there are prudential concerns. Some proposals may arguably be against congressional policy and thus undesirable, not because the judiciary would lack the authority, but rather because it may be unwise to exercise it. Take the imposition of attorney fees as sanctions, or the elimination of a statutorily granted right to attorney fees as a sanction for misconduct in the course of the litigation. The question is not power but prudence.⁷⁹

Routine bifurcation of liability and damages for trial is another example, discussed in the literature,⁸⁰ of a proposal thought not suitable for implementation by local rule because it is too likely to affect the substantive outcome of litigation.

Who shall be charged with granting or, perchance, even withholding the requisite permission? Many models for a suitable mechanism for administration of these requirements are available.⁸¹ One must ask first whether this authority shall be vested regionally or nationally. The answer is not self-evident, but on balance the importance of a national perspective weighs heavily in

inconsistency where it serves the goal of experimentation, even with "basic procedural innovations").

⁷⁸ Although this Paper focuses on local rules promulgated by district courts and on experimentation by district courts, the courts of appeals also have local rules and also have the need to experiment. The same is true of bankruptcy courts, although the relation of the latter to the district courts may require rethinking of certain specifics. The basic analysis is intended to be applicable to all federal courts other than the Supreme Court.

⁷⁹ See Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REF. 425 (1986).

⁸⁰ See Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rulemaking Power*, 14 VAND. L. REV. 831, 834 (1961).

⁸¹ See *supra* note 57 (noting that the 1983 preliminary draft of an amendment to Rule 83 called for authorization by the judicial council of the circuit); Roberts, *supra* note 20, at 553 (calling for approval by the Judicial Conference of the United States).

favor of vesting this authority in a single mechanism, charged with acting on requests from all over the country, and hence one which must be national rather than regional.

A number of factors argue for this conclusion. There are times when the same experiment should be undertaken in different districts located in different parts of the country. The possibility of random selection, not in terms of individual litigants but in terms of district courts, has already commanded attention.⁸² It is far less problematic, in terms of the normal reaction of individuals familiar with "our federalism," to accept significant differences in procedure based on geography rather than random identification of individuals who find themselves in the same court before the same judge. Instrumentalities organized by circuit would be cumbersome in terms of developing and monitoring such programs.

Experiments, even if designed toward a single end, need not be identical, nor need the variations all be tried in the same circuit. Again, a national perspective is preferable. Finally, sensitivity to the concerns expressed earlier—the need to avoid disruptive disuniformity and to consider conflicting congressional policies—seems best protected through a national mechanism.⁸³

Given the desirability of a national perspective, alternative mechanisms are still possible. The Judicial Conference Committee on Rules Practice and Procedure offers the advantage of an existing structure, one with a tradition of high quality leadership. Nevertheless, one must ask whether experimentation by local rule would be a major concern of this busy Committee or an added chore of relatively peripheral significance. Further, would this Committee be hospitable, and be perceived as hospitable, to experimentation designed to challenge operating principles and policy decisions adopted by the Committee in the course of its primary duties?

A new committee of the Judicial Conference charged with supervising and administering a program of experimentation would offer the advantage of a fresh perspective from which to view

⁸² See Walker, *supra* note 62, at 75 n.47; EXPERIMENTATION IN THE LAW, *supra* note 62, at 20.

⁸³ Relations with Congress often require informal consultation rather than the yes-no decision-making typical of adjudication. The Brookings Institution has successfully sponsored a number of productive seminars at which representatives of the judiciary have met with key congressional personnel and members of the Judiciary Committees, for example, in informal sessions to help define problems and explore possible solutions. See Cannon & Cikins, *Interbranch Cooperation in Improving the Administration of Justice: A Major Innovation*, 38 WASH. & LEE L. REV. 1 (1981).

proposals brought to the committee as well as initiatives suggested by the committee. This alternative appears clearly preferable.

The new committee and the presently existing committees would complement each other. Some overlap in membership would be essential, but this is not difficult to achieve. As will be more fully developed below, coordination with existing agencies as well as with other Judicial Conference committees would be highly desirable and statutory models exist to assure precisely that type of coordination.⁸⁴

3. Assuring Productive Laboratories

To experiment without paying due regard to the resulting data is an exercise in self-contradiction. Nor can impressionistic accounts of the effects of particular procedures substitute for hard data.⁸⁵ By the same token, it is of little use to collect data produced by experiments that are so poorly or improperly designed that they cannot serve as the proper basis for solid conclusions. Moreover, it has been wisely said that where human subjects are involved, a poorly or improperly designed experiment "is by definition unethical."⁸⁶

Permission to promulgate a local rule that conflicts with a national rule should be conditioned on an experimental design that may be expected to yield valid data and to facilitate the collection and reporting of that data.⁸⁷

Beyond questions of scientific validity, ethical considerations arise in connection with the decision to deny certain individuals the opportunity to benefit from a procedure presumptively beneficial,

⁸⁴ For a more encompassing treatment of inter-branch relationships, see JUDGES AND LEGISLATORS (R. Katzmann ed. 1988). Note also that coordination between committees, e.g., the Advisory Committee on Civil Rules and the Committee on the Administration of the Federal Magistrates System, has been necessary and successful. See also *infra* note 93-94 and accompanying text (discussing duties of the Director of the Administrative Office of the United States Courts).

⁸⁵ See Walker, *supra* note 62, at 68 (citing Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 367 (1986)).

⁸⁶ EXPERIMENTATION IN THE LAW, *supra* note 62, at 15 (quoting Rutstein, *The Ethical Design of Human Experiments*, in EXPERIMENTATION WITH HUMAN SUBJECTS 384 (P. Freund ed. 1970)).

⁸⁷ We need not enter the controversy as to whether any design that does not incorporate a control group, randomly selected, can be valid or even be termed an "experiment". Compare Walker, *supra* note 62, with EXPERIMENTATION IN THE LAW, *supra* note 62, at 16-21 (discussing such alternatives as Comparison-Group Designs and Before-After Designs).

while that right is accorded to other individuals randomly selected. While it is true that society might learn a great deal from a sustained program of sentencing convicted offenders on a random basis, one receiving the maximum permissible jail sentence and another released on parole, it is highly doubtful that any such program of experimentation would be viewed as "ethical" so as to allow it to be implemented by a court of this country.⁸⁸

It would be wrong to view the committee charged with supervising experimentation as a corporate Commissar of Ethics. It is appropriate, however, for such a committee to be concerned that any court proposing an experiment consider the ethical implications of a particular course of conduct. A committee appointed by Chief Justice Warren E. Burger and chaired by Chief Judge Edward D. Re of the United States Court of International Trade,⁸⁹ grappled with these problems and prepared a list of the factors to be considered and the procedures to be followed when would-be researchers confront these issues.⁹⁰ One need only ask that these issues be considered, but one should demand no less.

Technical support is essential in planning and evaluating the types of programs here envisioned. Similarly, professional support of the highest quality would also be needed to evaluate and interpret the data generated. Logistical support for such tasks as data gathering would also be required. Such support could be provided by the Federal Judicial Center, an agency created by Congress, which is charged not only with conducting research in

⁸⁸ This is not to minimize the possibility of successful constitutional challenge on equal protection grounds. For a discussion of the legal basis for controlled experiments in the context of local rules see Walker, *supra* note 62, at 70, 75. See also EXPERIMENTATION IN THE LAW, *supra* note 62, at 67-76 (discussing authority and procedures for undertaking program experiments).

⁸⁹ Other members of the committee included Alvin J. Bronstein of the National Prison Project of the A.C.L.U., Professor Alexander M. Capron of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Chief Judge Wilfred Feinberg of the U.S. Court of Appeals for the Second Circuit, Jane Frank-Harman, Esq., Professor Paul A. Freund, Professor Gerald Gunther, Professor Alasdair McIntyre (Philosophy and Political Science), Dean Norman Redlich, Jerome J. Shestack, Esq., Judge Joseph T. Sneed of the U.S. Court of Appeals for the Ninth Circuit, Judge Abraham D. Sofaer of the U.S. District Court for the Southern District of New York, and Professor June Louin Tapp (Child Psychology and Criminal Justice Studies). Advisors included Joel Zimmerman of the National Center for State Courts, Assistant Attorney General Daniel J. Meador, and Assistant Attorney General Maurice Rosenberg. William B. Eldridge, Director of Research, Federal Judicial Center and his colleagues Gordon Bermant, E. Allan Lind, and John E. Shapard served as staff.

⁹⁰ See EXPERIMENTATION IN THE LAW, *supra* note 62, at 49-65.

judicial administration but also with stimulating research by others.⁹¹ If additional funding is needed to accomplish these goals, it would be money well spent.⁹²

The closest coordination between diverse elements of the federal judicial system would be necessary in implementing a program of experimentation adequate to the needs of that system. Congress has, however, patterns to follow. For example, by statute, the Director of the Administrative Office of the United States Courts sits on the Board of the Federal Judicial Center,⁹³ and the Director of the Center sits, again by statute, on the Advisory Committee of the National Institute of Corrections.⁹⁴

District courts would not be obliged to gain permission for experimentation unless a proposed provision would conflict with the national rules.⁹⁵ Nevertheless, it would be desirable to stimulate collection of data even where local rules are not inconsistent with national rules.⁹⁶ With the Federal Judicial Center prepared—and funded—to grant technical and professional assistance to district courts in aid of such experimentation on a far broader scale than heretofore, we might hope for a far more intensive program of learning what does and does not work well as we adjust our procedures to cope with new problems and new challenges. There is so much more we need to know to make access to justice a reality

⁹¹ See 28 U.S.C. §§ 620-29, 623(a)(6) (1988).

⁹² See Walker, *supra* note 62, at 72-77 (offering an analysis of the cost and benefits of research methods).

⁹³ See 28 U.S.C. § 621(a)(3) (1988).

⁹⁴ See 18 U.S.C. § 4351(b) (1988).

⁹⁵ The prohibition against a rule that conflicted with a statute or abridged substantive rights would remain unaffected. The national committee on experimentation would have no authority to approve a local rule that ran afoul of these provisions, even to encourage experimentation.

⁹⁶ A primary purpose of local rules was to provide flexibility in order to meet local conditions. We have much to learn about which conditions are indeed local and whether there is, indeed, a great degree of commonality among the problems each district conceives as unique to it.

In this connection, it is useful to note that while Professor Walker's focus is on experimentation in aid of the national rules, the present proposal is not so limited. There may be situations in which options by district are desirable, even with the general desirability of uniformity in mind. This may be so because of genuinely local conditions or it may be because the resultant disuniformity is minor. Nor does this imply that local rules should deal only with "trivial" issues, however trivial be defined or perceived. For example, practicing lawyers, academics, and deputy clerks may have different opinions on the significance of local rules, promulgated pursuant to Rule 77(c) of the Federal Rules of Civil Procedure, determining whether the clerk's office should be open on Saturdays and, if so, for how long.

for more people in our society, that incremental progress, of any significance at all, should be welcomed.

4. Consistency Revisited

Earlier we considered the difficulty in defining consistency for purposes of interpreting Rule 83,⁹⁷ contributing to what Professor Roberts has termed the "myth of uniformity."⁹⁸ He called for "bright-line" guidance;⁹⁹ in contrast, the proposal offered here envisions controlled inconsistency. Rather than undertaking a new verbalization, whether by defining categories appropriate for local rule-making or otherwise,¹⁰⁰ we would create a mechanism for allowing inconsistency when inconsistency serves a defined, useful purpose: that of experimentation. The problem of definition is not eliminated. But the primary justification for tolerating uncontrolled inconsistency, the effort to remedy perceived defects, to improve conditions, would no longer exist since experimentation with the identical solutions, designed to the same end, would be available. In short, controlled inconsistency that promised useful results would replace uncontrolled inconsistency, which frequently has little to offer.

The fact that inconsistency with the national rules will not carry with it an automatic veto of an effort to improve, only a set of conditions designed to optimize the potential, argues for a stricter approach in defining inconsistency. Appropriate programs of court-annexed arbitration, for example, would be allowed on an experimental basis whether or not they were categorized as inconsistent; yielding useful information that could benefit other courts and, conceivably, the system as a whole.

5. Sunset Provisions

Two separate sunset provisions are required. First, experiments, even when undertaken by local rule, must come to an end. The label "experiment" is not another device for amending or ignoring the national rules.¹⁰¹ Yet, fixing in advance a term appropriate

⁹⁷ See *supra* text accompanying note 21.

⁹⁸ See Roberts, *supra* note 20, at 537.

⁹⁹ See *id.* at 554.

¹⁰⁰ Professor Roberts would have Rule 83 "explicitly delineate those areas in which local rulemaking is appropriate." *Id.*

¹⁰¹ After evaluating the data generated by an experiment or a series of experiments, the Advisory Committee may recommend, and there may be duly "enacted"

for all experiments is most difficult. The two years proposed in the 1983 draft amendment of Rule 83 is clearly inadequate.¹⁰² Pre-testing, gathering, and then analyzing data, publishing, and thereafter, if all goes well, amending the national rules will, almost inevitably, take longer.

It would be desirable to fix a maximum period, perhaps five years, for individual experiments. This might be done by resolution of the Judicial Conference. The committee in charge of experimentation would be authorized to fix shorter periods, perhaps subject to extension.

There should also be a sunset provision for the project itself, the statute authorizing experimentation by local rules. Sunset, of course, does not imply inevitable termination. Congress may always take legislative action, either to extend, to modify or to make permanent. Termination is merely the price paid for inertia.

Fixing a suitable period for the statute itself to be in effect is most difficult. We are not dealing with a single experiment in a single district court, or a group of experiments all commenced at about the same time. We are dealing with a process and one must allow for start-up time. There should be a report on the experience under the statute, and a minimum period of one year thereafter for Congress to consider reauthorization.¹⁰³ Tentatively, one might suggest a ten-year sunset provision, with specific authority for ongoing experiments begun before the beginning of the tenth year to continue.

CONCLUSION

The program suggested here is a modest one. It does not seek to straight-jacket district courts, but rather to legitimate much of what has in fact been going on, and to encourage still further experimentation. There remains a great deal of room, and need, for innovation. For example, we are reminded, with increasing force in recent months, that asbestos cases as a class may need to be treated differently than ordinary contract disputes for pleading

a provision for local option with respect to a particular procedure. This, too, is an option which eliminates the need for endless "experimentation."

¹⁰² See Walker, *supra* note 62, at 84.

¹⁰³ Cf. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 906, 102 Stat. 4642, 4664 (codified at 28 U.S.C. § 651 note (1988)) (providing for repeal of the arbitration portion of the Act five years after the date of enactment, November 19, 1988).

purposes as well as for discovery and scheduling. Shall we acknowledge, openly and candidly, that this may be true of other classes of cases?¹⁰⁴

Our judges and the leaders of the bar are creative and innovative. Above all, this proposal seeks to assure optimal use of the data generated in the exciting laboratories of our district courts, laboratories dedicated to the advancement of justice.

¹⁰⁴ For a flavor of the current debate concerning the desirability of trans-substantive rules of procedure see Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067 (1989) and authorities cited therein. See also Civil Justice Reform Act of 1990, Pub. L. 101-650, § 102 (5)(A), 104 Stat. 5089 (1990) (noting that “[t]he Congress makes the following findings: . . . (5) Evidence suggests that an effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including—(A) the differential treatment of cases that provides for individualized and specific management according to their needs, complexity, duration, and probable litigation careers”).

