

January 1999

## Fin-de-siecle Federal Civil Procedure

Carl Tobias

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### Recommended Citation

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**FIN-DE-SIÈCLE FEDERAL CIVIL PROCEDURE**

*Carl Tobias\**

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## INTRODUCTION

Professor Laurens Walker's *The End of the New Deal and the Federal Rules of Civil Procedure*<sup>1</sup> (*New Deal's End*) is a thought-provoking evaluation of the relationship between the New Deal's conclusion and modern civil process. Professor Walker canvasses a series of recent, puzzling changes which "present the most serious challenge to the procedural status quo since the adoption of the original Federal Rules in 1938."<sup>2</sup> The author finds that the New Deal's demise and the rejection of that regime's reliance on experts, policies of centralized federal decisionmaking, and establishment of the national government as an instrument for social reform<sup>3</sup> best explain these modifications. Professor Walker admonishes proceduralists to accept inevitable political change and to consider it when planning reform.<sup>4</sup> Asserting that "[m]ajor change in political structure and practice requires bold action,"<sup>5</sup> the writer calls for the creation of a national study group to undertake a searching review of civil process and to craft innovative remedies for present difficulties.<sup>6</sup> Professor Walker provocatively suggests as a fruitful source of solutions recent welfare reform, from which he derives purportedly promising concepts: waivers of federal strictures, enhanced local control, mandatory research, and incentives for better management.<sup>7</sup>

*New Deal's End* is the latest of Professor Walker's concerted efforts to improve procedural revision at the national level and in the ninety-four federal district courts. He has scrutinized the processes for amending federal and local civil procedures and devised constructive recommendations. The author has attacked the processes' pressure points while urging relevant decisionmakers, particularly Congress and federal judges, to employ the tools of controlled experimentation, administrative law, and economic analysis in altering procedure. Professor Walker's decade of careful work on these processes spans the very period when procedure has become increasingly balkanized. Indeed, that growing fragmentation apparently prompted the writer's abandonment of "less drastic ways to improve the current system" which he had previously championed.<sup>8</sup> The above propositions mean that *New Deal's End* deserves a response. This Essay undertakes that effort.

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1. Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269 (1997).

2. *Id.* at 1271; *see id.* at 1280-86.

3. *See id.* at 1270-71, 1273-86.

4. *See id.* at 1286-91.

5. *Id.* at 1286.

6. *See id.* at 1286-91.

7. *See id.*

8. *Id.* at 1287 (citations omitted).

My reply first descriptively and critically assesses Professor Walker's account of civil process. I find accurate much of his discussion of New Deal political principles and their effects on the initial Federal Rules as well as how those tenets were rejected or modified. Moreover, procedure has recently experienced many enigmatic changes, four of which he examines, and they may be the greatest threat to process since the 1930s. Nevertheless, Professor Walker seemingly misconceives certain aspects of the four alterations, such as their significance and the relevance of the New Deal's conclusion to the modifications, and he minimally addresses other applicable developments. In short, Professor Walker's reliance on the end of the New Deal as an explanation for the changes enables him to recount a rather neat story; however, what actually transpired appears more complex, subtle and untidy. I, therefore, offer complementary explanations for the four alterations and different views of their import while elaborating his account.

This response then affords a descriptive and critical evaluation of Professor Walker's prescriptions. I consider their scope inadvisable. The calls for daring action and for a national commission seem premature partly because procedure appears less chaotic and more responsive to treatment, especially with conventional measures, than it did three years ago when he was writing *New Deal's End*. I also find troubling the method proffered. Waivers, increased district control, and performance incentives could be ineffective. For example, the decentralization and localization suggested by Professor Walker would further undermine, and might even eviscerate, the federal rule revision process and the national, uniform, and simple system of procedure, which has facilitated expeditious, economical and fair dispute resolution since 1938.

Despite the above concerns, Professor Walker's goal of improving process and a few ways to attain this objective, such as compulsory research, are valuable. Nonetheless, I favor an approach for achieving that end through means which are similar, but comparatively moderate and potentially more efficacious. Future reform should essentially capitalize on the finest dimensions and recalibrate the less effective features of both the method recommended in *New Deal's End* and the traditional amendment processes. Illustrative are exhaustion of these conventional mechanisms, somewhat enhanced reliance on local entities, and continued emphasis on existing national institutions that have responsibility for procedure. This approach would increase district experimentation with promising measures, while it could revitalize and maintain the federal revision process and the national, consistent, and simple procedural scheme which has served Congress, the courts, and the nation well for sixty years.

Implementation of these suggestions would eliminate or at least ameliorate many complications in modern process which apparently led Professor Walker to write *New Deal's End*. If my proposals prove

inefficacious, there will be time enough at the outset of the twenty-first century to institute relatively extreme measures, namely the bold action that Professor Walker advocates. In sum, as procedure approaches the millennium, less millennial approaches may be warranted.<sup>9</sup>

## I. DESCRIPTIVE AND CRITICAL ANALYSIS OF THE DESCRIPTIVE ACCOUNT IN *NEW DEAL'S END*

In this Part, I descriptively and critically analyze each constituent in Professor Walker's explanation of current process. Consensus accompanies much in his account, although disagreement, uncertainty, and even controversy attend some of its aspects, partly because there are insufficient empirical data on which to premise conclusive determinations. I, thus, adumbrate this description by exploring additional explanations for the four alterations emphasized and different views of their importance and by assessing other significant phenomena.

### A. *The New Deal and Its End*

Professor Walker first examines essential New Deal political principles—use of experts, centralized decisionmaking policies, and the federal government's establishment as an agent of social reform—and explains how they eventually fell out of favor or came to be changed.<sup>10</sup> The author concomitantly evaluates these precepts' impacts on the 1938 Federal Rules. For instance, he shows how Congress delegated authority for adopting the Rules to the Supreme Court, which created an Advisory Committee (Advisory or Civil Rules Committee) comprised of distinguished law professors and practitioners and charged the expert entity with developing proposed measures.<sup>11</sup> The Rules Enabling Act of 1934 correspondingly centralized at the national level all procedure governing civil litigation in the federal district courts.<sup>12</sup> The Federal Rules which the Advisory Committee drafted also enabled the courts to serve as vehicles for social change.<sup>13</sup>

9. This is partly an apologia and an effort to advance dialogue. Professor Walker graciously cites my work for certain ideas, which may have been unclear, tentative or eclipsed by later developments. See *infra* notes 16, 38 & 83 (showing my involvement in changes).

10. See Walker, *supra* note 1, at 1272-80.

11. See *id.* at 1273; see also Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1934). See generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 971-72 (1987).

12. See Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (1994)); see also Walker, *supra* note 1, at 1276-77. See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

13. See Walker, *supra* note 1, at 1279; see also Geoffrey C. Hazard, *The Federal Rules Fifty*

There is some consensus regarding this account. For example, numerous writers believe that the New Deal influenced the original Rules, that Congress centralized civil process, and that the expert Advisory Committee suggested a regime which permitted the courts to be social reform agents.<sup>14</sup> However, certain features of the description are disputed. For instance, the system that Congress prescribed, the Committee proposed, and the Court adopted did not necessarily dictate the centralization of all procedural decisions, while initial Rule 83 expressly authorized districts to apply local measures which fostered decentralization. The three core New Deal principles may be less disfavored than the author claims, but even if they are, the concepts apparently retain greater applicability to process and federal courts than to welfare and states.

### B. Four Puzzling Procedural Changes

Professor Walker then analyzes what he characterizes as four “puzzling reversals of prior practice” in federal civil procedure which have occurred over the last two decades.<sup>15</sup> The writer concomitantly observes that the conclusion of the New Deal affords a general explanation for this series of important modifications and that the proposition can be employed to guide constructive future reform.

#### 1. Local Procedural Proliferation

Professor Walker asserts that the first enigmatic change commenced during the late 1970s when federal districts prescribed increasing numbers of local strictures.<sup>16</sup> He reports that the Judicial Conference of the United States responded to proliferation by commissioning a study which found that the courts had applied more than 5,000 local procedures, many of which contravened the Federal Rules or legislation.<sup>17</sup> Professor Walker contends that the 1988 Judicial Improvements and Access to Justice Act

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*Years Later: Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2241-44 (1989).

14. See, e.g., Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 502-05 (1986); Subrin, *supra* note 11, at 944-48; Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 273-77 (1989).

15. Walker, *supra* note 1, at 1280.

16. See *id.* at 1280-81; see also Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1394-1400 (1992). I served on a Ninth Circuit committee which analyzed proliferation. See *infra* note 132; Tobias, *supra*.

17. See Comm. on Rules of Practice and Procedure, Judicial Conf. of the U.S. Report of the Local Rules Project, *Local Rules on Civil Practice* (1989); see also Walker, *supra* note 1, at 1280-81. The Conference is the federal courts' policymaking arm. See 28 U.S.C. § 331 (1994).

(JIA)<sup>18</sup> “significantly altered the process of making local rules [by] requiring district courts to appoint advisory committees to assist judges in writing local rules.”<sup>19</sup> He cites my work for the idea that “Congress essentially substituted for the Civil Rules Committee ninety-four relatively amateur entities” and describes this conclusion as “striking because it suggests the original Rules project has been undermined.”<sup>20</sup> *New Deal’s End* claims that proliferation evinces growing doubts regarding the efficacy of centralization and that the JIA’s citizen participation requirements evidence legislative rejection of expertise.<sup>21</sup>

There is considerable agreement about this account’s general contours, namely that local measures have increased, but dispute attends several particulars. For example, the local requirements actually appeared soon after the initial Rules’ adoption and gradually expanded until the 1970s when districts prescribed mounting numbers of procedures under the rubric of judicial case management to treat escalating caseloads.<sup>22</sup> Proliferation might indicate some concern regarding centralization’s effectiveness, and a few districts may have been addressing the national revisors’ perceived unresponsiveness to their need for tools which would efficaciously resolve growing dockets.<sup>23</sup> Nevertheless, many courts adopted strictures to experiment with promising mechanisms, to treat unusual, problematic local conditions, and for numerous, other reasons as idiosyncratic as the peculiar interests or predilections of judges, lawyers, or litigants in specific districts. The JIA’s public involvement requirements could correspondingly reflect disavowal of expertise, but they may show congressional appreciation that citizen input can improve proposals for procedural change by providing new information and different perspectives.

Professor Walker’s assertions that local rules committees would significantly modify local revision, replace the Advisory Committee, and erode the Rules project have not yet materialized. Many local committees

18. Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified as amended in scattered sections of 28 U.S.C.).

19. Walker, *supra* note 1, at 1281; see Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century* (1998) (unpublished manuscript on file with author); see also 28 U.S.C. § 2077 (1988).

20. Tobias, *supra* note 16, at 1400; see Walker, *supra* note 1, at 1281. “Yet, this significant development lacks . . . an explanation that can guide reform.” Walker, *supra*, at 1281.

21. See Walker, *supra* note 1, at 1285; see also Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 830 (1991).

22. See, e.g., Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J. L. REFORM 647, 675-78 (1988); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2016-18 (1989); see also Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

23. I rely, in this and the next sentence, on Subrin, *supra* note 22, at 2018-26; Carl Tobias, *Some Realism About Federal Procedural Reform*, 49 FLA. L. REV. 49, 58-62 (1997).

have been quiescent or even moribund, often deferring to advisory groups appointed under the Civil Justice Reform Act (CJRA) of 1990, while the JIA which he argues fostered proliferation also expressly mandated its reduction.<sup>24</sup> The Advisory Committee has continued to study the Rules and suggest changes, as indicated. Illustrative are the 1993 amendments, the most ambitious set of revisions ever adopted, which included a major amendment of Rule 11's 1983 revision and a local option provision that permitted districts to vary applicable federal requirements; the 1996 proposal to amend Rule 23; and the revisors' recent decisions to commission empirical analyses of discovery and to eliminate opt-outs and to amend the discovery rules after receiving the results.<sup>25</sup>

## 2. Congressional Rulemaking

Professor Walker finds that the second alteration began in the 1980s when Congress abandoned its forty-year practice of deferring to other revision entities and directly amended the Rules.<sup>26</sup> The writer reports that lawmakers revised Rule 37 to authorize fee and expense awards when the United States violates discovery provisions; Rule 4 to release federal marshals from routine service of process duties; and Rule 35 to permit mental examinations by psychologists who are not doctors.<sup>27</sup> However, he considers most significant the 1995 passage of the Private Securities Litigation Reform Act (PSLRA) which purportedly amends Rule 23 in five ways, dramatically limiting the class action's scope and implementing for "securities litigation a novel and complex structure quite different from Rule 23."<sup>28</sup> Professor Walker claims that "intervention on this scale suggests a major change in legislative perception of the Rules project," while it reflects rejection of the national revisors' expertise and new-found confidence in Congress's ability to "fashion complex civil rules dealing with important substantive topics."<sup>29</sup>

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24. See, e.g., Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1600-01, 1628-29 (1994); see also *infra* text accompanying notes 45, 126, 130-33 (suggesting apparent expiration of CJRA and most groups and citing JIA mandates).

25. See Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401 (1993); *infra* notes 36-37, 48-50, 53, 60-62 and accompanying text.

26. See Walker, *supra* note 1, at 1281-83; see also Tobias, *supra* note 24, at 1598.

27. See Walker, *supra* note 1, at 1282.

28. *Id.* at 1283; see Pub. L. No. 104-67, 109 Stat. 737 (codified at 15 U.S.C. §§ 77z-1-77z-2, 78j-1, 78u-5i (Supp. I 1995)); see also Joel Seligman, *The Private Securities Reform Act of 1995*, 38 ARIZ. L. REV. 717 (1996). The PSLRA may actually be more significant because it amends nine Federal Rules.

29. Walker, *supra* note 1, at 1283, 1285; see also *Hearing Before House Judiciary Subcomm. on Courts & Intellectual Property Federal Judiciary Oversight: Protecting Small Business*, 105th Cong. (1998) (statement of Judge William T. Hodges) (criticizing 25 bills in this Congress that would directly amend Rules).

Consensus, especially as to increased legislative amendment, accompanies this broad outline, but differences exist, particularly regarding intervention's significance. For example, there were only three direct revisions during the 1980s, two of which tinkered with Rules 37 and 35.<sup>30</sup> Rule 4's 1983 amendment was apparently so flawed that the Supreme Court revamped it in 1993, an alteration to which Congress acquiesced.<sup>31</sup> The author may also overstate the PSLRA's importance, although he correctly observes that the law is the most significant example of direct revision. For instance, since the 1960s, provisions in much social legislation, such as civil rights and environmental statutes, have modified procedure to facilitate litigation by the Acts' intended beneficiaries.<sup>32</sup> Professor Walker correspondingly contends that intervention of the magnitude witnessed by the PSLRA indicates a profound change in Congress's view of the Rules project, suggesting disavowal of the revisors' expertise and greater self-assurance that it can craft sophisticated strictures for complex areas.<sup>33</sup> However, his assertions might accord lawmakers too much credit. Most did not consider, or only dimly perceived, these ideas in voting, while adoption appears attributable more to the securities, accounting, and other affected interests that drafted critical portions of the PSLRA and orchestrated a gargantuan lobbying effort which narrowly secured passage,<sup>34</sup> or to the fulfillment of promises in the Contract With America (Contract) when the Republican Party captured control of Congress.<sup>35</sup>

It is important to remember that lawmakers did not approve other central legal reforms in the Contract or significant rule revision proposals in the 1990s, even as they enacted the PSLRA. For instance, Congress refused to pass the Attorney Accountability Act, which would have fundamentally amended Rule 11 soon after its major 1993 revision.<sup>36</sup> Congress also rejected a concerted campaign to amend Rule 11's 1993 revision which reversed the provision's 1983 amendment, the most

30. See *supra* note 27 and accompanying text.

31. See FED. R. CIV. P. 4 (1993 amendment); see also Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733 (1988). This undercuts the claim of new-found confidence, but it did occur a dozen years before the PSLRA's passage.

32. Provisions govern standing, intervention and fee shifting. See, e.g., 33 U.S.C. § 1365 (1994); 42 U.S.C. § 2000e-5(k) (1994); 42 U.S.C. §§ 7604, 9613 (1994); see also John Leubsdorf, *Class Actions at the Cloverleaf*, 39 ARIZ. L. REV. 453, 453-55 (1997).

33. See Walker, *supra* note 1, at 1283, 1285.

34. See, e.g., James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 515 (1997); Carl Tobias, *Reforming Common Sense Legal Reforms*, 30 CONN. L. REV. 537, 550-53 (1998); see also Seligman, *supra* note 28.

35. See Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699 (1995).

36. See H.R. 988, 104th Cong. (1995); see also Tobias, *supra* note 35, at 721-24, 729-31; Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L. J. 171 (1994).

controversial alteration in the Federal Rules' history.<sup>37</sup>

### 3. Mandatory Local Reform

Professor Walker considers the third puzzling reversal to be the 1990 CJRA "which invited wholesale local modifications of the Rules"<sup>38</sup> by requiring all ninety-four districts to establish advisory groups comprised of counsel and parties who would draft a plan with cost and delay reduction procedures.<sup>39</sup> The author credits Professor Linda Mullenix for identifying the Act's "truly remarkable structural" ramifications:<sup>40</sup> "Congress has taken procedural rulemaking power away from judges and their expert advisors and delegated it to local lawyers."<sup>41</sup> He claims that plan strictures differ across districts and with the Federal Rules, thus continuing the decentralization movement commenced by local proliferation; intimates that the advisory groups displace the Civil Rules Committee; and argues that Congress dramatically altered basic court rulemaking by assigning responsibility to local entities instead of legislating rules.<sup>42</sup>

There is consensus about the general description of compulsory local reform, but the specifics are rather controversial. Perhaps most important, Professor Walker seems to overstate the CJRA's purposes and effects. First, Congress prescribed instrumentalities consisting of local attorneys and litigants to capitalize on expertise and ingenuity in the districts as well as a core set of identical principles, guidelines, and techniques.<sup>43</sup> Second, most advisory groups did little after submitting their recommendations, some of which judges rejected, while few courts adopted dissimilar measures or ones that conflicted with the Federal Rules, aggressively applied strictures in plans once promulgated, or fully complied with other

37. See H.R. 2979, 103d Cong. (1993); see also S. 400, 105th Cong. (1997); William J. Hughes, *Reflections from the House: Congressional Reaction to the 1993 Amendments to the Federal Rules of Civil Procedure*, 18 SETON HALL LEGIS. J. 1, 1-2 (1993).

38. Walker, *supra* note 1, at 1283; see also Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified at 28 U.S.C. §§ 471-482 (1994)); Tobias, *supra* note 16, at 1394. I serve on the District of Montana CJRA advisory group and have written on the CJRA. See, e.g., Tobias, *supra* note 24, at 1628-29.

39. See Walker, *supra* note 1, at 1283; see also 28 U.S.C. §§ 471-473, 478; Tobias, *supra* note 24, at 1602-04.

40. Walker, *supra* note 1, at 1283-84; cf. Lauren K. Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994).

41. Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 379 (1992); see also Walker, *supra* note 1, at 1284.

42. See Walker, *supra* note 1, at 1284; see also *supra* notes 19-21 and accompanying text.

43. See 28 U.S.C. §§ 473, 478; see also Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285 (1994); Tobias, *supra* note 16, at 1418-20. Senator Biden was chair of the Judiciary Committee and the CJRA's chief sponsor.

CJRA commands, such as mandates for preparing annual assessments.<sup>44</sup> Third, Congress apparently intended that statutorily-prescribed groups and mechanisms would expire with experimentation's conclusion, and enforcement today is extremely limited.<sup>45</sup> These local entities and measures, therefore, have minimally threatened the national revision institutions which have continued to study the Rules and suggest amendments, when warranted,<sup>46</sup> and the uniform, simple procedural regime.

In short, the CJRA as written was a modest reform, and many districts rather narrowly implemented it. The legislation, thus, constitutes no real change and will clearly have a less profound impact on the national revisors, the amendment process, and the Federal Rules than Professor Walker predicts, particularly if the CJRA has expired and if the provisions in the 1988 JIA and Rule 83 which proscribe local proliferation receive application.<sup>47</sup>

#### 4. Optional Rules

The fourth alteration that Professor Walker identifies is the 1993 amendments which authorize districts to "opt-out" of requirements in the Federal Rules.<sup>48</sup> Half of the courts seemed to eschew the national strictures governing mandatory pre-discovery disclosure.<sup>49</sup> The author relies on Professor Lauren Robel's work for the ideas that optional provisions suggest the Advisory Committee's "lack of commitment" to a controversial revision and "represent starkly the lack of consensus about even the most fundamental aims of our procedural system."<sup>50</sup> He declares that opt-outs continue the decentralization trend seen in proliferation and that "[t]his notable rejection of centralization and expertise requires a rationale."<sup>51</sup>

There is considerable agreement that the optional provisions posed difficulty. However, it is unclear exactly how problematic they were. The opt-outs may reflect justifiable concern regarding the efficacy of the highly controversial disclosure technique or commendable deference to

44. See, e.g., Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547; Edward D. Cavanagh, *Congress' Failed Attempt to Spur Efficiency: The Legacy of the Civil Justice Reform Act*, LEGAL TIMES, Nov. 25, 1996, at 28; see also 28 U.S.C. at §§ 472, 475.

45. See Biden, *supra* note 43; Tobias, *supra* note 44; *infra* notes 130-33 and accompanying text; see also *supra* text accompanying note 34.

46. See *supra* note 25 and accompanying text.

47. See *infra* notes 69, 126-33 and accompanying text. I have moderated my earlier views that the CJRA might have more lasting effect. See Tobias, *supra* note 16; Tobias, *supra* note 24.

48. See Walker, *supra* note 1, at 1284; see also Lauren K. Robel, *Mandatory Disclosure and Local Abrogation: In Search of a Theory for Optional Rules*, 14 REV. LITIG. 49, 50 (1994).

49. See Walker, *supra* note 1, at 1284. Many "substituted other disclosure rules." *Id.*

50. Robel, *supra* note 48, at 51; see also Walker, *supra* note 1, at 1284-85.

51. Walker, *supra* note 1, at 1285.

Congress's passage of the CJRA and to ongoing experimentation with various disclosure mechanisms, which was an effective way to develop the best procedure, rather than doubts about centralization and expertise.<sup>52</sup> Moreover, the revisors recently rectified the complications that the optional provisions created by sponsoring empirical studies and proposing the opt-outs' elimination and the reinstatement of national discovery requirements, which arguably signify what Professor Walker might term renewed commitments to centralization and expertise.<sup>53</sup> The opt-outs' truncated existence and limited application to several aspects of discovery in some districts, mean that they were primarily symbolic.

### C. *The End of the New Deal*

Professor Walker concludes the third part of *New Deal's End* with numerous illustrations of how the rejection of the New Deal's central tenets—expertise, centralization and the federal government as an agent of social reform—explain the four modifications emphasized, while he proclaims that “[t]he end of the New Deal provides a general explanation for the recent puzzling changes in federal civil rule structure.”<sup>54</sup>

The author suggests that disavowal of expertise explicates certain alterations. For instance, he finds rejection of the delegation to experts of responsibility for rule revision in direct amendment.<sup>55</sup> Professor Walker correspondingly contends that legislative refutation of expertise partially explains the major intervention in rule revision witnessed by the PSLRA's striking Rule 23 provisos.<sup>56</sup> Moreover, he considers expertise's disavowal a powerful explanation for the 1988 JIA's strictures promoting public participation in rule amendment and for Congress's trust in “representative group[s] of citizens assembled on a district-by-district basis.”<sup>57</sup>

Professor Walker also asserts that doubts involving centralization afford insights into some modifications. The author finds that these concerns paralleled proliferation's growth, while the decentralization movement begun by proliferation received impetus from widely divergent

52. See, e.g., Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 304-06 (1994); John B. Oakley, *An Open Letter on Reforming the Process of Revising the Federal Rules*, 55 MONT. L. REV. 435, 437-38 (1994).

53. See Comm. on Rules of Practice and Procedure of the Jud. Conf. of the U.S., Proposed Amendments to the Federal Rules of Civil Procedure, 179 F.R.D. 357 (1998); see also *infra* note 122 and accompanying text; Walker, *supra* note 1, at 1285-86.

54. Walker, *supra* note 1, at 1285. I addressed above some of these examples; hence, footnoted, rather than textual, responses are warranted here. Compare *supra* notes 21, 29 and accompanying text with *infra* notes 56-57 and accompanying text.

55. See Walker, *supra* note 1, at 1285; see also *supra* notes 26-37 and accompanying text.

56. See Walker, *supra* note 1, at 1285-86; see also *supra* notes 28-37 and accompanying text.

57. Walker, *supra* note 1, at 1285; see also *supra* text accompanying notes 19-25, 38-47.

CJRA reform plans which increased local measures and additionally balkanized procedure.<sup>58</sup> The writer detects “further clear evidence of doubt about the benefits of centralization” in the novel 1993 opt-out rules which continue the trend.<sup>59</sup>

Professor Walker argues that concerns respecting the proper role of the federal government in social reform enhance comprehension. He considers illustrative the first proposed revision in Rule 23 since its major 1966 amendment<sup>60</sup> and claims that the new form of class action meant only to facilitate settlement, if adopted, will be the most significant revision in three decades.<sup>61</sup> The author finds that doubts about the federal government and courts as reform agents explain the measure’s support for settlement which would diminish judges’ opportunities to conduct active policymaking through the adjudication of disputes.<sup>62</sup>

The most instructive example of Professor Walker’s reliance on the New Deal’s end as an explanation is his contention that proliferation, CJRA mandatory local reform, and the 1993 optional rules evince centralization’s rejection and “suggest that federal civil practice is now much more than before a matter of local determination, a situation consistent with the analysis of contemporary politics.”<sup>63</sup> However, the rather favorable prospects for limiting proliferation, the CJRA’s modest commands, narrow effectuation and apparent expiration in 1997, and the national revisors’ recent decision to rescind opt-outs<sup>64</sup> have several implications. They show that the writer may overstate what in fact has happened, that the developments were principally symbolic, and that any movement toward localism is one of degree and clearly no paradigm shift, while the New Deal’s demise apparently has limited explanatory force.<sup>65</sup>

#### D. *Summary By Way of Friendly Critique*

This illustration, and a number of additional examples which I examined in considering the four puzzling reversals, and the New Deal’s conclusion as the reason for them, indicate certain difficulties with

58. See Walker, *supra* note 1, at 1285; see also *supra* text accompanying notes 16-25, 38-47.

59. Walker, *supra* note 1, at 1285; see also *supra* notes 48-53 and accompanying text.

60. See Comm. on Rules of Practice and Procedure of the Jud. Conf. of the U.S., Proposed Amendments to the Federal Rules of Civil Procedure, 167 F.R.D. 559 (1996); see also Walker, *supra* note 1, at 1286.

61. See 167 F.R.D. at 559; see also Walker, *supra* note 1, at 1286. See generally Symposium, *Mass Torts: Serving Up Just Desserts*, 80 CORNELL L. REV. 811 (1995).

62. See Walker, *supra* note 1, at 1286; see also Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Resnik, *supra* note 14, at 528-29, 549-51; Symposium: *The Institute of Judicial Administration Research Conference on Class Actions*, 71 N.Y.U. L. REV. 1 (1996).

63. Walker, *supra* note 1, at 1285; see also *supra* notes 58-59 and accompanying text.

64. See *supra* notes 44-46, 53, *infra* notes 130-33 and accompanying text.

65. I had concerns about localism, but recent events moderated its effects. See *supra* note 9.

Professor Walker's descriptive account. One important complication is the author's valiant but ultimately unsuccessful attempt to afford a single explanation for procedure's current condition.

The story of modern process, comprising a complex constellation of phenomena, is richer and subtler as well as more dynamic and fragmented than *New Deal's End* intimates. Perhaps most trenchant are the apparently conflicting, or at least mixed, developments in procedure over the last two decades. For example, Congress addressed proliferation with the 1988 JIA but exacerbated it with the 1990 CJRA and partially amended numerous rules by passing the 1995 PSLRA, even while rejecting direct revision of Rule 11's 1993 amendment during the 103rd and 104th Congresses and of many other Rules in the 1990s.<sup>66</sup> During 1983, the Supreme Court revised Rules 11, 16, and 26 to codify and facilitate the managerial judging which districts had conducted with proliferating strictures since the 1970s.<sup>67</sup> In 1993, the Justices substantially changed Rule 11's 1983 amendment, significantly modified the 1983 revisions of Rules 16 and 26, and adopted the opt-out provisions that fostered proliferation.<sup>68</sup> During 1985 and 1995, the Court amended Rule 83 in an effort to reduce proliferation.<sup>69</sup> During 1998, the national revisors proposed altering Rule 26 again and eliminating opt-outs.<sup>70</sup>

These and numerous additional actions which *New Deal's End* treats or which I explore above demonstrate that "procedural progress" is ephemeral and incremental, often constituting two steps forward and one step back, lateral movements, and occasional reversals.<sup>71</sup> The developments illustrate the difficulty in fully apprehending a number of recent events, particularly by overestimating their importance, because the actions can be aberrations or temporary detours or have more symbolic than practical impact. For instance, Congress has directly amended two insignificant provisions and the Supreme Court overhauled the 1983 legislative revision of Rule 4 a decade later, while even the PSLRA, which is broader and could have actual effect, partially amended certain rules only in securities litigation.<sup>72</sup> The CJRA's limited mandates, circumscribed

66. See *supra* notes 28-29, 35-43, *infra* notes 130-33 and accompanying text.

67. See Amendments to Federal Rules of Civil Procedure, 461 U.S. 1095, 1095-1104 (1983); *supra* notes 22-23 and accompanying text.

68. See Amendments to Federal Rules of Civil Procedure, 146 F.R.D. at 419-47; see also *supra* notes 35-36, 48-51 and accompanying text.

69. See FED. R. CIV. P. 83, 1985 & 1995 amendments; see also Tobias, *supra* note 19.

70. See *supra* note 53 and accompanying text. The 1996 proposal to amend rule 23 to facilitate settlement has not advanced beyond the Advisory Committee. See *supra* notes 60-62 and accompanying text.

71. See Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 812-23 (1993); see also Marcus, *supra* note 22, at 675-78.

72. See *supra* notes 27-29 and accompanying text.

implementation and ostensible expiration, and the 1993 opt-outs' apparently restricted application may mean that they were exceptions, brief diversions, or largely symbolic.<sup>73</sup> The history of process might well be a "series of attempts to solve the problems created by the preceding generation's procedural reforms."<sup>74</sup>

Professor Walker's effort to impose order upon, much less offer a lone explanatory theory for, so many fluid and diffuse, albeit interrelated, developments is correspondingly fraught with peril.<sup>75</sup> Each has multiple sources, to some of which he does not advert and others of which are difficult to isolate, allow for, or identify.<sup>76</sup> Illustrative is proliferation. Districts may have applied strictures to resolve increasing cases, to remedy peculiar, local complications, or to experiment with promising measures—ideas that seem tangentially related to the end of the New Deal—or for numerous, additional reasons which resist felicitous delineation.<sup>77</sup> In the final analysis, one overarching idea, even a concept as creative and capacious as the New Deal's demise, cannot capture all of the forces that have animated the process since the 1970s.

Despite these concerns, Professor Walker realizes considerable success because his thought-provoking description clarifies comprehension of procedure. Indeed, members of Congress and the federal judiciary as well as scholars have found troubling, and have attempted to address, the four reversals, while many observers agree with much else, such as growing balkanization, which he describes.<sup>78</sup> Unfortunately, certain ways that the author apparently misperceives modern process might have led him to develop inadvisable recommendations.

## II. DESCRIPTIVE AND CRITICAL ANALYSIS OF THE PRESCRIPTIONS IN *NEW DEAL'S END*

In the last section of his article, Professor Walker derives insights from recent political events to specify reform's scope and method.<sup>79</sup> The writer urges proceduralists to accept inevitable political change and consider it when planning reform but candidly admits that they may differ about how

73. See *supra* notes 44-53, 64-65 and accompanying text.

74. Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 1030 (1984).

75. See generally Walker, *supra* note 1.

76. See *id.*

77. See *supra* note 23 and accompanying text. Caution is also warranted in extrapolating from the four changes or the New Deal's end to generalize about procedure.

78. See, e.g., Avern Cohn, *A Judge's View of Congressional Action Affecting the Courts*, 54 LAW & CONTEMP. PROBS. 99, 99 (1991); Hughes, *supra* note 37, at 3-8; Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631.

79. See Walker, *supra* note 1, at 1289-90.

to do so.<sup>80</sup> The lack of empirical data and temporal perspective on relevant developments and their complex, dynamic nature confound efforts to assess his proposals. However, I can evaluate them by identifying the principal problems for which he posits suggestions.

### A. Scope

When examining reform's scope, Professor Walker asserts that "[m]ajor change in political structure and practice requires bold action" and calls for a national commission or study entity to canvass present process and to formulate recommendations for improvement.<sup>81</sup> The author modestly finds that "less drastic ways to improve the current system," some of which he had earlier proffered, may be insufficient, that "the case for fundamental review is now powerful [, and that] the changed political circumstances suggest the need for a general review by some group different from the bodies currently employed."<sup>82</sup> By way of contrast, he considers and deems deficient two recent endeavors which traditional entities undertook. Professor Walker claims that proposals developed in a rule revision survey by the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) "seem[] unlikely to produce much effective reform."<sup>83</sup> The writer believes that most of the prescriptions, which implicate only management of the existing process are narrow and fail to address the critical difficulties posed by the altered political situation while finding several inadequate.<sup>84</sup> He similarly characterizes the Guidelines for Drafting and Editing Court Rules, a "blackletter statement of principles' for modern rule-drafting," as unresponsive to recent political changes because they focus on style.<sup>85</sup>

There is consensus about certain features of his recommendations. Numerous federal courts observers agree that many complications, which are problematic enough to warrant remediation, plague modern procedure and have attempted to craft solutions.<sup>86</sup> Several people have urged that some study group conduct a basic analysis or have proposed moving

80. *See id.* at 1286.

81. *Id.* at 1286-87.

82. *Id.* at 1287. His ideas remain salient, would be improvements, and should be applied.

83. *Id.*; *see* Subcomm. on Long Range Planning, Comm. on Rules of Practice, Procedure and Evidence of the Judicial Conf. of the U.S., *A Self-Study of Federal Judicial Rulemaking*, 168 F.R.D. 679, 683-84 (1995); *id.* at 695 n.50 (showing my participation).

84. *See* Walker, *supra* note 1, at 1287-88.

85. *Id.* at 1288; *see also* Bryan A. Garner, *Administrative Office of the U.S. Courts, Guidelines for Drafting and Editing Court Rules* (1996).

86. *See* Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929 (1996); Mullenix, *supra* note 41, at 379; Robel, *supra* note 48, at 49-50; *see also supra* note 78.

outside the ordinary rule revision process.<sup>87</sup> Few would quarrel with Professor Walker's contention that the efforts of conventional entities discussed above will lead to meaningful reform.

Disagreement does attend other aspects of the suggestions. His calls for bold action and for a searching study appear premature because process seems less splintered and more settled and amenable to remediation than it was in 1996 when he authored *New Deal's End*. For instance, a recent Ninth Circuit review of fifteen districts' measures has promise for curtailing proliferation, and many courts no longer employ entities or mechanisms prescribed under the CJRA, which has essentially expired.<sup>88</sup> Congress's acute disinterest in resolving the CJRA's fate suggests that Congress is less disposed to make procedural policy. The national revisors' empirical studies of discovery and their new proposal for amending the discovery provisions and abolishing opt-outs may manifest revitalized commitments to expertise, centralization, uniformity, and recapturing primary responsibility for process.<sup>89</sup>

In short, procedure today is not perfect or even greatly improved, but it does appear less turbulent and fractured, and more responsive to treatment, than in recent years. The prospects for solving or at least ameliorating the major difficulties with process seem considerably better. It, therefore, appears preferable at this juncture to exhaust the existing mechanisms for modifying procedure.

### B. Method

Professor Walker urges that a study group explore contemporary models to reconfigure the Federal Rules by capitalizing on post-New Deal restructuring in other fields. He offers the example of welfare reform, which purportedly shares important similarities with the Rules in the context of New Deal politics: both "were centralized in the national government during the 1930s, [were] designed by a small group of experts and . . . enhanced the federal role in social reform."<sup>90</sup> Measures for adjusting welfare programs to new political realities, thus, might receive analogous application to the Rules and yield "four strong candidates . . . : the use of waivers, enhanced local control, mandatory research, and use of incentives."<sup>91</sup>

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87. See, e.g., Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 854-55 (1993); Carl Tobias, *More Modern Civil Process*, 56 U. PITT. L. REV. 801, 839 (1995).

88. See *supra* notes 44-45, *infra* notes 126-29, 132 and accompanying text.

89. See *supra* note 53, *infra* notes 126, 136-38 and accompanying text. *But see supra* note 29.

90. Walker, *supra* note 1, at 1288 (citations omitted).

91. *Id.* at 1289.

The author explains that waivers facilitate short-term change by permitting exceptions from generally applicable national requirements.<sup>92</sup> Increased district control accommodates long-term modification by assigning non-federal entities responsibility for implementation's specifics, subject to national oversight that assures a degree of local similarity.<sup>93</sup> Research mandates accord the alteration a practical dimension, while incentives encourage attempts to satisfy policy goals.<sup>94</sup> Professor Walker finds these concepts particularly attractive because they should foster needed change by diminishing the focus on disputed political values.<sup>95</sup>

He next applies the method's four features to procedural reform.<sup>96</sup> First, legislation could authorize districts to waive federal rules with approval of the Administrative Office of the United States Courts (Administrative Office), thereby expanding local control yet preserving national oversight.<sup>97</sup> Second, over time a series of waivers might increase delegation, subject to several limitations.<sup>98</sup> For example, individual courts could prescribe their own procedures restrained only by certain general principles, such as notice pleading or liberal discovery.<sup>99</sup> The author contends that this approach would permit the enforcement of broad federal policies but afford enhanced flexibility to treat local conditions and experiment.<sup>100</sup> Third, a statute might include research commands and even suggest appropriate methodologies.<sup>101</sup> For instance, courts which assemble information according to designated techniques could modify specific rules.<sup>102</sup> Fourth, incentives might be employed to encourage enterprise in case resolution by, for example, lifting federal strictures when districts demonstrate successful docket management.<sup>103</sup>

There is some consensus about various facets of the method recommended.<sup>104</sup> A few legal scholars have endorsed, albeit in principle, the precepts of increased local control and mandatory research<sup>105</sup> or

92. *See id.* at 1289-90.

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.* Another possibility, "requir[ing] conformity to local state procedure," would produce interstate uniformity. *Id.* at 1290 n.180; *see also* Subrin, *supra* note 22, at 2005-11.

100. *See* Walker, *supra* note 1, at 1290.

101. *See id.* at 1291.

102. *See id.*

103. *See id.*

104. *See id.*

105. *See, e.g.,* A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1590-93 (1991); *see also* Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683 (1998).

ancillary features, such as the notion that empirical data should underlie federal rule revision.<sup>106</sup> Indeed, these ideas were integral to the 1991 proposed amendment of Rule 83 which the national revisors withdrew out of respect for contemporaneous CJRA testing.<sup>107</sup>

However, disagreement and controversy attend the method. As general matters, waivers, enhanced local control, and incentives could impose a system which is an administrative and practical nightmare and even a prescription for chaos. For instance, CJRA implementation suggests, and Professor Walker recognizes, that districts and their advisors might rely on the three concepts to apply measures which are more solicitous of the needs of local judges, lawyers, and parties than of national uniformity and simplicity, thus compounding balkanization.<sup>108</sup>

Each of the "four strong candidates" would apparently entail disadvantages. Waivers, increased local control, and incentives that permit the removal of federal requirements could undermine the national, consistent simple regime of procedure embodied in the original Rules which has facilitated prompt, inexpensive and fair dispute resolution.<sup>109</sup> For example, an incentive structure that rewards courts which "successfully manage" litigation by excusing their enforcement of federal strictures might be less equitable because more or faster dispositions may not produce fairer substantive results or because it could deprive parties of the procedural tools that they need to prove cases.<sup>110</sup> A scheme which encourages all ninety-four districts to secure removal or waivers of the 86 Federal Rules at different times also means that disparate requirements might govern litigation in every court and that the entire system could be in perpetual flux.

The prospects for enlarging local control but maintaining national oversight, especially through the Administrative Office, are not very auspicious. Limited, and perhaps failed, effectuation of similar monitoring under the CJRA and the JIA by the Judicial Conference and circuit review

106. See, e.g., Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927-28 (1989); Samuel Estreicher, *Foreword: Federal Class Actions After 30 Years*, 71 N.Y.U. L. REV. 1, 8 (1996).

107. See Comm. on Rules of Practice and Procedure, Jud. Conf. of the U.S., Proposed Rules: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, 137 F.R.D. 53, 153 (1991).

108. See Carrington, *supra* note 86, at 963-64; Tobias, *supra* note 16, at 1405-06; see also *supra* notes 19-21, 41-43 and accompanying text.

109. See FED. R. CIV. P. 1; see also Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325 (1995); Resnik, *supra* note 14, at 502-15; Tobias, *supra* note 14, at 272-77.

110. See FED. R. CIV. P. 1; see also Cohn, *supra* note 78, at 99; Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115 (1991); Tobias, *supra* note 16, at 1422-27; Tobias, *supra* note 24, at 1602.

entities, institutions which are comprised of Article III judges, inspire little confidence in the Administrative Office which has less independence, while the Advisory Committee's proposed 1991 amendment of Rule 83 lodged analogous responsibility in the Conference.<sup>111</sup>

CJRA experimentation correspondingly indicates that greater district control would worsen the above problems, namely fragmentation, and introduce others, such as erosion of national rule revision.<sup>112</sup> Local procedure would become more diverse among the ninety-four courts and depart further from the Federal Rules. The difficulty of finding, mastering, and satisfying different local measures would increase civil cases' complexity and expense and would frustrate efforts of lawyers and parties to litigate in multiple districts. Federal mandates' waiver and removal and enhanced local control, thus, might well prove more disruptive than opt-outs.

The research provisions prescribed seem constructive because reliance on empirical material that evaluators have systematically collected, analyzed and synthesized should improve the quality of proposals for modifying procedure. However, numerous districts may lack the requisite expertise and resources to design and complete the type of research projects which Professor Walker envisions.

The method that *New Deal's End* suggests, therefore, would significantly complicate federal civil practice. The decentralization and localization recommended could additionally splinter the already fractured condition of process and leave it less expert and more parochial. Indeed, Professor Walker's prescriptions would apparently exacerbate certain of procedure's worst features, principally balkanization, which he most vociferously criticizes.

In sum, his approach may improve process, but the relative paucity of dependable empirical data, especially regarding welfare reform's efficacy and applicability to procedural change, complicates assessment of central ideas in *New Deal's End*. The last section, accordingly, provides suggestions that should enhance process with means which resemble Professor Walker's method but that are less extreme and, thus, potentially more effective.<sup>113</sup>

111. See Levin, *supra* note 105, at 1588-93; Tobias, *supra* note 16, at 1406-09; Tobias, *supra* note 23, at 60-61; *infra* notes 130-33, 144 and accompanying text.

112. See Walker, *supra* note 1, at 1284.

113. See *id.* at 1290-91. In the end, he does not definitively show that the analogies between states and federal districts and between welfare and procedural reform are apposite or that process's problems are sufficiently severe to warrant rather extreme solutions. The 50 states are very different units of government than the 94 districts with dissimilar purposes, constituencies and relationships to the national government. Each court is part of a broader system comprising 94 districts which ostensibly resolve civil litigation similarly by applying analogous measures. These strictures, their revision process, the national, uniform, simple system and the procedures' reform, thus, depart

### III. SUGGESTIONS FOR THE FUTURE

These recommendations warrant comparatively limited examination in this response because a number have been explored elsewhere or can be felicitously implemented by applying or adjusting approaches which now exist or have been analyzed. For example, many scholars have written articles on the topics;<sup>114</sup> expert evaluators, such as the RAND Corporation and the Federal Judicial Center (FJC), have scrutinized some relevant issues;<sup>115</sup> and circuit judicial councils, federal districts, and individual judges have employed certain of the concepts.<sup>116</sup> Moreover, reliance on existing or recalibrated mechanisms, including the 1988 JIA's provisions for limiting proliferation<sup>117</sup> or invocation of previously-broached techniques, namely the 1991 proposed revision in Rule 83 for facilitating experimentation with promising measures,<sup>118</sup> would apparently improve procedure and effectuate much of Professor Walker's method.

Prescriptions related to the compilation, assessment, and synthesis of additional applicable information on current process are also illustrative. Writers have proffered quite a few ideas respecting that material.<sup>119</sup> Much instructive information is correspondingly available,<sup>120</sup> such as the insights generated on proliferation by the Local Rules Project's continuing work<sup>121</sup> on mandatory local reform by analyses of CJRA testing,<sup>122</sup> and on opt-outs by the Advisory Committee discovery study. Sufficient material exists today, even though evaluators could gather and scrutinize greater and more reliable information. For instance, there is a wealth of material on the seven-year CJRA experiment which deserves collection before it is lost or

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dramatically from the substance, and even the process of, welfare. Managing public assistance or entitlement programs differs from resolving federal civil cases or even administering justice in a court of law. Finally, the lack of empirical data limits greater exposition of these ideas, while modern procedure's more settled state and its enhanced amenability to treatment mean that the existing processes explored below should suffice.

114. See, e.g., Carrington, *supra* note 86; Robel, *supra* note 48, at 50; Subrin, *supra* note 22, at 2016-18.

115. See *infra* notes 122, 128.

116. See *infra* notes 130-32 and accompanying text.

117. See *infra* note 131 and accompanying text.

118. See *supra* note 107 and accompanying text.

119. See, e.g., Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597 (1998); Oakley, *supra* note 52, at 437-38; Tobias, *supra* note 23, at 68-75.

120. See *supra* note 17 and accompanying text.

121. See *infra* note 128.

122. See, e.g., James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613 (1998); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998); see also *supra* note 53 and accompanying text.

memories of those involved fade, while assessors might refine the large quantity of available raw data, such as the information that RAND, the FJC, and districts assembled.<sup>123</sup>

It would be preferable to base suggestions on the maximum feasible amount of dependable, empirical material which expert, independent evaluators have systematically compiled, analyzed and synthesized. However, I can offer numerous recommendations that could address procedure's difficulties which Professor Walker and additional observers identify by assuming that they are troubling enough to warrant remediation and by relying on the plethora of current information. My proposals also can be recalibrated as more material becomes available or as assessors refine available information.

The four changes that the author scrutinizes, and related developments which others have examined, have created problems that require treatment. These phenomena have essentially undermined the national, uniform, and simple trans-substantive regime of the original Federal Rules, which has facilitated expeditious, economical and equitable dispute resolution.<sup>124</sup> In fairness, that characterization is an ideal which Congress, national rule revisors, districts, and judges often honored in the breach, while their efforts to promote such disposition ironically may have eroded this scheme. My suggestions are intended to revitalize and maintain the system and the federal amendment process, which have worked well for six decades, and to foster application of measures that will address unusual local difficulties or whose testing could improve the Rules. The approach, therefore, basically employs Professor Walker's method but with less potential disruption. Congress can implement most of these ideas, although the judiciary, through national and local revision entities, districts, and judges, might effectuate many.<sup>125</sup>

#### A. *The CJRA and Its Expiration*

Congress must definitively resolve the fate of the CJRA that was scheduled to expire in 1997. It is unclear whether the Act did sunset then, and, thus, whether statutorily-prescribed strictures, which fragmented

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123. See *infra* note 128; Mullenix, *supra* note 105, at 683 (finding a "wealth of statistical information" on discovery in studies cited in *supra* note 122). In fairness, little data on welfare reform and its applicability to procedure exist because Congress only reformed welfare in 1996.

124. See *supra* note 109 and accompanying text.

125. My ideas may be insufficiently realistic as a political matter. The CJRA and the PSLRA further fragmented, and Congress has recently seemed rather unconcerned about the process. However, these may be aberrations. The provisions for limiting proliferation in the JIA, Rule 83 and the 1991 proposal to amend Rule 83 had potential. Thus, the venerable system should be permitted to work as originally intended before jettisoning it.

procedure and complicated civil practice, remain applicable.<sup>126</sup> Lawmakers should evaluate CJRA testing and identify the mechanisms that were sufficiently effective to deserve inclusion in the Federal Rules or legislation and those which were less efficacious, yet promising, for additional experimentation or for consideration in the national revision process. For example, Congress indefinitely extended CJRA case reporting mandates related to disposition times in 1997,<sup>127</sup> but did not address the Act's other aspects, especially whether the measures tested were salutary enough to warrant broader application.<sup>128</sup> Once lawmakers have so classified the procedures, they must clearly state that the CJRA has expired and that districts must eliminate all entities, namely advisory groups, and all local provisions invoked thereunder. The courts should abrogate or merge those institutions which conflict with existing bodies<sup>129</sup> and abolish the strictures that violate or duplicate the Federal Rules, statutes, or district local rules, even if Congress does not conclusively resolve the CJRA's fate.

These proposals should eliminate many proliferating mechanisms which districts and judges prescribed during the 1990s principally pursuant to the CJRA. The recommendations would essentially reinstate the procedural status quo that obtained when Congress and the Supreme Court adopted those features of the 1988 JIA and of Rule 83's 1985 revision which they intended to decrease proliferation.

### B. *Limiting Local Proliferation Under the JIA and Rule 83*

Circuit judicial councils, district courts, and individual judges must implement the provisos in the JIA and the 1985 and 1995 amendments of Rule 83 that proscribe local measures which conflict with or repeat the Federal Rules, legislation, or district local rules. For instance, courts and judges who have yet to effectuate Rule 83's command that standing orders not contravene or duplicate the above provisions should expeditiously

126. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 482(b)(2), 104 Stat. 5089, 5096; see also Mullenix, *supra* note 41, at 379. See generally Carl Tobias, *Did the Civil Justice Reform Act of 1990 Actually Expire?*, 31 U. MICH. J.L. REFORM 887 (1998).

127. See Pub. L. No. 105-53, § 2, 111 Stat. 1173 (1997).

128. Congress could consult studies and recommendations on the pilot and demonstration programs by the Judicial Conference, RAND and the FJC, but they make few conclusive suggestions as to specific measures and essentially support reinstating the procedural status quo, even though the underlying data collected may be helpful. Congress could also evaluate devices tested in the other 79 districts. Mechanisms in the general areas of case management, discovery and alternatives to dispute resolution seem efficacious, and some particular techniques, such as telephonic conferences, save time or money. See Tobias, *supra* note 44.

129. Advisory groups realized their purposes and conflict with local rules committees under the JIA and, thus, should be abolished or merged with them. See Tobias, *supra* note 24, at 1628.

comply.<sup>130</sup> Circuit councils, which have similarly failed to evaluate local procedures and abrogate or alter those that are inconsistent or repetitive as the JIA and Rule 83's 1995 revision mandate,<sup>131</sup> must promptly do so. The councils could capitalize on the Ninth Circuit's efficacious discharge of these responsibilities.<sup>132</sup> The court's careful scrutiny of fifteen districts' strictures indicates that other councils might attain analogous success, particularly if Congress appropriates funds for monitoring and the CJRA, which essentially suspended the commands' implementation, expires. Should the duties' performance not improve because authority to eliminate or change violative measures is overly diffuse or councils lack the resolve or resources to increase uniformity, Congress might consider more extreme approaches, such as a standing committee on local procedures which could police proliferation rather rigorously through centralized oversight.<sup>133</sup>

The effectuation of these recommendations would reduce conflicting and redundant local requirements that existed in 1988 and measures that courts or judges have applied since then outside the context of CJRA experimentation. The suggestions should contribute to the revival and maintenance of the federal rule amendment process and of a national, uniform, simple trans-substantive procedural regime.

### *C. Additional Suggestions for Improving National Revision and Modern Procedure*

A number of additional actions could improve the federal revision process and current procedure. The institutions which study the Rules and develop proposed amendments, Congress, district courts, and judges must make the needs of the civil justice system paramount, exercise appropriate restraint, and cooperate more when modifying procedure.<sup>134</sup> For example, the national revisors ought to recommend, and lawmakers should acquiesce in, rule changes that will best serve all whom litigation affects. The rule amendment entities should also honor the citizen participation mandates in the JIA and Rule 83 by seeking and scrutinizing the greatest possible input of applicable interests when considering suggested alterations, while they must be alert to and reject the efforts of those who could secure strategic or other advantages from modifications.<sup>135</sup>

130. See FED. R. CIV. P. 83(b); see also FED. R. CIV. P. 83, 1985 advisory comm. note.

131. See 28 U.S.C. §§ 332(d)(4), 2071(a),(c) (1994); FED. R. CIV. P. 83, 1995 amendment.

132. See DISTRICT LOCAL RULES REVIEW COMMITTEE, REPORT TO THE NINTH CIRCUIT JUDICIAL COUNCIL (1997). See generally Tobias, *supra* note 19, at 79.

133. See Tobias, *supra* note 23, at 79.

134. See *id.* at 77.

135. See 28 U.S.C. §§ 2071(b), 2073 (1994); FED. R. CIV. P. 83; see also Hughes, *supra* note 37, at 1-4 (finding much input in 1993 revision process); Tobias, *supra* note 24, at 1599-1601 (analyzing mandates). *But cf.* Mullenix, *supra* note 21, at 830 (analyzing mandates' problems).

The national revisors might also revitalize and sustain the federal amendment process and the national, consistent, simple scheme by recapturing primary responsibility for procedural change. One helpful means of doing so is to rescind the local option provisions which govern discovery in the 1993 Federal Rules modifications, an endeavor that the Standing Committee has already initiated.<sup>136</sup> The strictures undermine national entities and processes and the Federal Rules,<sup>137</sup> while the revisors, by prescribing opt-outs, may have evinced insufficient commitment, and even indifference, to preserving a national, uniform code of procedure.<sup>138</sup>

Reviving and perpetuating the federal amendment process and the national, consistent, simple regime will correspondingly require that Congress accord greater deference to federal revision and be more restrained when making procedural policy than it recently has.<sup>139</sup> Solons should refrain from directly amending the Rules and only modify proposals developed through the extensive revision process which they find clearly unwarranted.<sup>140</sup> Lawmakers must accede to the national amendment institutions that have accumulated much relevant expertise, especially regarding effective procedures, while the entities are ostensibly less political and recommend revisions which are best for the civil justice system.<sup>141</sup> Deference is concomitantly indicated because rule amendment is an important, if not a core, judicial responsibility, even though the Constitution and the Rules Enabling Act recognize Congress's interest in revision.<sup>142</sup>

Lawmakers should also limit their procedural policymaking. The CJRA's passage epitomized that phenomenon, and many judges considered the Act an ill-advised attempt of a co-equal branch to micromanage the courts.<sup>143</sup> Congress must insert fewer strictures in statutes, and it might even delete existing requirements, namely the PSLRA's commands related to class actions, as they undercut the federal

136. See *supra* note 53 and accompanying text. Congress or districts could abrogate opt-outs or local rules adopted thereunder, but respect for federal revision suggests deference.

137. Expiration of the CJRA, which was a major reason for opt-outs' inclusion in the 1993 federal revisions, and adoption of Rule 83's 1991 proposed revision should obviate the need for opt-outs. See *supra* notes 52-53, 126-29, *infra* note 144 and accompanying text.

138. See, e.g., Oakley, *supra* note 52, at 437-38; Robel, *supra* note 48, at 50; Tobias, *supra* note 23, at 64. But see Carrington, *supra* note 52, at 304-06. For more ideas on recapturing responsibility, see Oakley, *supra* note 52, at 446-48; Tobias, *supra* note 23, at 77-79; *supra* notes 134-35, *infra* note 144.

139. See Tobias, *supra* note 24, at 1627-28.

140. See *id.*

141. See *id.*

142. See U.S. CONST. art. III, §§ 1-2; 28 U.S.C. §§ 2071-2077 (1994).

143. See, e.g., Cohn, *supra* note 78, at 99; Mullenix, *supra* note 41, at 399-401; Robel, *supra* note 40, at 1450. But see Biden, *supra* note 43.

amendment process and the national, uniform, simple, trans-substantive scheme. However, solons should prescribe procedure when important policy reasons or questions of authority warrant congressional action. One trenchant example is a 1991 change in Federal Rule 83, which would have empowered districts that secured Judicial Conference approval to test conflicting local measures for five years, but which the national revisors retracted in deference to ongoing CJRA implementation.<sup>144</sup> This tempered approach deserves legislative adoption because it carefully balances the need for constructive experimentation with proliferation's restriction and because Congress is the preferable entity to authorize departures from the JIA's prohibition on inconsistent and redundant local mechanisms.<sup>145</sup>

Districts and individual judges could correspondingly promote the rejuvenation and maintenance of the national amendment process and the procedural regime by limiting their erosion which proliferating strictures effect.<sup>146</sup> For instance, courts and judges should cease prescribing new, and abolish or alter current, requirements that contravene or repeat Federal Rules, statutes, or district local rules, unless they must treat peculiar problems which those provisions do not address or experiment with measures that will enhance process.<sup>147</sup> Of course, the 1991 proposed change in Rule 83 would be responsive to these contingencies.<sup>148</sup>

The above suggestions should improve federal revision and procedure in many ways. For example, both might be revitalized and sustained if Congress exercised more restraint in the amendment process and in making procedural policy. The system of centrally coordinated testing would foster promising experimentation, could reduce duplicative research as well as conflicting and redundant district strictures, and should vitiate the need for opt-outs. This scheme would also effectuate several features, such as increased local control and mandatory research, of Professor Walker's method with less disturbance of longstanding, efficacious arrangements.

#### IV. CONCLUSION

*New Deal's End* significantly advances comprehension of modern federal civil procedure. I have attempted to elaborate Professor Walker's informative description and to recommend more felicitous means for achieving the goal of his provocative prescriptions. If those responsible for

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144. See *supra* note 107 and accompanying text.

145. See Levin, *supra* note 105, at 1585-86; Tobias, *supra* note 24, at 1616; see also *supra* note 32 and accompanying text (analyzing procedures Congress included in statutes).

146. See *supra* notes 130-33 and accompanying text; see also Tobias, *supra* note 19.

147. See FED. R. CIV. P. 1, 83; see also *supra* notes 109, 124, 129-32 & 136.

148. See *supra* notes 107, 144-45 and accompanying text.

**process implement my suggestions, they can improve procedure at the beginning of the twenty-first century.**