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Local Rules and the Limits of Trans-Territorial Procedure

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LOCAL RULES AND THE LIMITS OF TRANS-TERRITORIAL PROCEDURE

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ABSTRACT

Local rules have been unfairly cast as procedural villains. Their qualifications for the role are purportedly numerous, but chief among them is that they violate a fundamental principle embedded in our post-1938 procedural regime: procedural rules applied in a federal case should not be sensitive to location. It must, of course, be conceded that local rules do produce territorial variations in procedure. But in practice, the principle of trans-territoriality is aspirational, and is undermined by an array of factors—ranging from competing interpretations of written rules to the supplementation of those rules through exercises of inherent power—that inevitably contribute to location-based variations in the actual procedural requirements imposed in federal cases. Properly situated, local rules are not an outlier, but are merely one form of territorial variation among many. To assess local rules, therefore, we should not ask whether they produce territorial variation, but whether a procedural regime that permits them produces a better mix of territorial variation than one that does not. When viewed this way, local rules emerge as attractive—if not quite heroic—because they are transparent, they reflect participation by nonjudicial actors, and they promote intradistrict equality in the treatment of cases.

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INTRODUCTION

On January 13, 2010, the United States Supreme Court stayed the live broadcast of a federal trial to decide the constitutionality of California's Proposition 8.[1] In doing so, the Court took pains to avoid any discussion of the underlying merits of the case or the general question of whether federal trials should be broadcast.[2] Instead, the Court justified the stay on fairly technical grounds: the local rule used to support the broadcast order was invalid because it had been improperly amended.[3] This ruling marked only the fourth time since the introduction of the Federal Rules of Civil Procedure in 1938 that the Supreme Court has addressed local rules and local rulemaking authority.[4] Although much of the per curiam majority opinion focused on the details surrounding the promulgation of the particu-

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1. Hollingsworth v. Perry, 130 S. Ct. 705 (2010) (per curiam). It would perhaps be more accurate to say that the trial at issue in *Hollingsworth* promised to temporarily decide the constitutionality of Proposition 8. From the outset, trial participants expected an appeal and were explicitly structuring the case for eventual Supreme Court review. *See* Margaret Talbot, *A Risky Proposal*, NEW YORKER, Jan. 18, 2010, at 40, 40-41, 45-47 (describing the litigation strategy and the likelihood of eventual Supreme Court review); William C. Duncan, *The Proposition 8 Trial: Understanding the Evidence*, AM. SPECTATOR, Mar. 3, 2010, http://spectator.org/archives/2010/03/03/the-proposition-8-trial-unders (arguing that the decision to seek—and permit—broadcast was "probably driven by the ultimate goal of the case—a hearing before the U.S. Supreme Court"). On August 4, 2010, United States District Judge Vaughn Walker issued a decision declaring Proposition 8 unconstitutional. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010). That decision was subsequently stayed by the Ninth Circuit Court of Appeals, and oral argument for the appeal is currently set for December 2010. Perry v. Schwarzenegger, No. 10-16696, 2010 WL 3212786 (9th Cir. Aug. 16, 2010).

2. *Hollingsworth*, 130 S. Ct. at 709 ("We do not here express any views on the propriety of broadcasting court proceedings generally.").

3. *Id.* at 714-15. Because the issue was decided in the context of an application for a stay, the Court's opinion formally concluded that the amendment "likely did not" comply with federal law. *Id.* at 709. But the remaining language of the opinion is not similarly restrained. *See, e.g.*, *id.* at 713 ("The District Court here attempted to revise its rules in haste, contrary to federal statutes and the policy of the Judicial Conference of the United States."); *id.* at 715 ("If courts are to require that others follow regular procedures, courts must do so as well.").

4. The three other cases are *Frazier v. Heebe*, 482 U.S. 641 (1987); *Wingo v. Wedding*, 418 U.S. 461 (1974); and *Colgrove v. Battin*, 413 U.S. 149 (1973). As Justice Breyer argued in his dissent in *Hollingsworth*, the paucity of Supreme Court cases involving local rules may be due to an appropriate deference to the Circuit Judicial Councils in monitoring and policing local judicial administration. *Hollingsworth*, 130 S. Ct. at 717-18 (Breyer, J., dissenting).

lar rule at issue,[5] the opinion also bemoaned the "lack of a regular rule with proper standards."[6] This latter concern is unrelated to the procedures used to sustain the amendment, but is directed instead at local rules themselves.

Thus, the case may reflect some unease with the status of local rules in the federal system. If so, the Supreme Court is late to the party. Hostility toward local rules is as old as the Federal Rules themselves. Over the past seventy years, a steady stream of commentators and committees has recommended that the role of local rules in the federal procedural structure be reduced or eliminated.[7] The core complaint motivating these recommendations is that local rules promote procedural disuniformity. As Part I explains, the adoption of a federal system of procedural rules reflected an embrace of two forms of procedural uniformity: trans-substantivity and trans-territoriality.[8] Trans-substantive procedure requires the application of the same procedural rules regardless of substantive law; trans-territorial procedure requires the application of the same procedural rules regardless of geography. Local rules may create tension with the norm of trans-substantivity if they are used to impose different procedural requirements for different types of cases.[9] But as discussed in Part II, the larger problem with local

5. Specifically, the primary emphasis is on a rather convoluted timeline of amendments and proposed amendments, *Hollingsworth*, 130 S. Ct. at 708 (per curiam), and on whether the notice and comment period associated with those amendments satisfied statutory requirements, *id.* at 710-11 (concluding no); *but see id.* at 715-17 (Breyer, J., dissenting) (concluding yes).

6. *Id.* at 713 (per curiam).

7. *See infra* Part II.B.

8. A brief note about nomenclature is in order: the use of the label "trans-substantivity" to describe the idea that the same federal rules should apply regardless of the nature of the suit is well-accepted, and may be traced to Robert Cover. *See generally* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975). But no similarly accepted phrase describes the parallel idea that the same federal rules should apply regardless of the location of the suit. William Rubenstein has referred to this idea as "trans-venue" uniformity. William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1885 n.75 (2002). I choose trans-territoriality instead, in part to avoid any unnecessary confusion with the concept of venue, but primarily because it more closely resembles trans-substantivity in form.

9. Then again, local rules of this sort potentially would be invalid. Federal Rule of Civil Procedure 83(a) requires local rules to be consistent with federal rules, *see infra* Part II.A, and the norm of trans-substantivity derives at least in spirit from Rule 1, which dictates that the rules apply to "all civil actions and proceedings in the United States district courts." FED.

rules is that they are almost unavoidably in tension with the norm of trans-territoriality. Local rules create variations in procedural requirements precisely on the basis of geography, and for that reason, they have long been viewed as fundamentally inconsistent with the Federal Rules project.

To this point, the defense of local rules has been sporadic and largely uninspired. One recurring argument is that some rule-making authority is necessary to deal with issues that are in-escapably local.[10] At its best, this narrow argument stops well short of defending the current scope of local rulemaking power. Defenders of local rules have also argued that critics improperly undervalue the benefits of disuniformity in general and local rules in particular. Examples of the unappreciated benefits cited include the potential for local rules to act as "experiments" leading to broader procedural reform,[11] lower barriers to local procedural

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R. CIV. P. 1; *see also* Cover, *supra* note 8, at 732-33 (explaining that the trans-substantivity of the Federal Rules is in part based on the idea that one set of procedures can cover all cases).

10. *See* Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts Be Remedied by Local Rules?*, 67 ST. JOHN'S L. REV. 721, 731 (1993) ("By and large, the rules governing these matters turn on local custom. Because the need for nationwide uniformity is low, perhaps even non-existent, local rules adequately serve their gap-filling function."); Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 861-62 (1989) ("[I]t is bad to have nationally uniform rules that sweep so broadly in precluding local variation that they outlaw sensible adaptations to the kinds of problems that are more common in the mix of cases on a particular local docket than in the national mix."); Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Courts*, 68 U. COLO. L. REV. 1, 35-38 (1997) (identifying various rules in the appellate context that are matters of local concern and that should be subject to regulation by local circuit rules); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patters*, 137 U. PA. L. REV. 1999, 2047 (1987) [hereinafter Subrin, *Federal Rules*] ("[Critics] argue that local rules permit adjustment to local conditions."); Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533, 569 (2002) [hereinafter Tobias, *Local Federal Civil Procedure*] (noting that many local rules were passed to address "peculiar, problematic local conditions, which the federal rules frequently ignored").

11. *See* Steven Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?*, 14 LOY. L.A. L. REV. 213, 219 (1981) ("Local rules ... alert rulemakers to the need for changes in national rules and provide an empirical basis for making changes."); Keeton, *supra* note 10, at 859 (noting that "the very purpose of a national rule" may be "to generate and legitimize local experimentation"); Subrin, *Federal Rules*, *supra* note 10, at 2017 (discussing the Knox Committee's predictions that local rules would have great experimentation value because they would likely prove helpful in suggesting future

change,[12] and assistance with vital court administrative functions.[13] Once these countervailing benefits are properly appreciated, they may in some instances justify the cost of deviating from the ideal of nationally uniform procedure.[14] These arguments are useful because the identified benefits are real, but they remain susceptible to the response that the competing costs are too great.

This Article develops a more robust defense of local rules, one that is rooted in an acknowledgement that deviations from the norm of trans-territoriality are unavoidable and unrelated to the choice to permit local rules. Trans-territoriality has achieved a status as a fundamental procedural value, but Part III demonstrates that this value is largely aspirational in practice. The actual procedural requirements imposed on litigants are inevitably sensitive to the location of the suit—and the identity of the judge.[15] The sources of territorial variation include not just local rules, but also standing

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amendments to the Federal Rules); Tobias, *Local Federal Civil Procedure*, *supra* note 10, at 569 (describing the use of local rules as a means of experimenting with "innovative procedures for resolving litigation, especially mechanisms that promised to foster economical, prompt dispute disposition").

12. *See* A SELF-STUDY OF FEDERAL JUDICIAL RULEMAKING: A REPORT FROM THE SUBCOMMITTEE ON LONG RANGE PLANNING TO THE COMMITTEE ON RULES OF PRACTICE, PROCEDURE AND EVIDENCE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 168 F.R.D. 679, 707-08 (1995) (describing recent changes that have resulted in slower reform of the Federal Rules, including the increased opportunities for comment, increased length of report-and-wait periods, and the frenetic process resulting from the allowance of multiple proposed rule changes pending simultaneously). "It takes too long to amend a rule or create a new one, and delay not only perpetuates whatever problem occasioned the call for amendment but also invites Congress and local courts to step in." *Id.* at 708.

13. *See* Daniel R. Coquillette, Mary P. Squiers & Stephen N. Subrin, *The Role of Local Rules*, 75 A.B.A. J. 62, 64-65 (1989) (observing that local rules can "rid the court of certain routine tasks" and can assist "busy trial judges" by providing them with more specificity on how to handle daily problems for which there is not a federal rule on point); Flanders, *supra* note 11, at 263, 268 (discussing the "vital role" of local rules in assisting local "courts' efforts to manage themselves and their dockets" and describing local rules as a "powerful tool for rationalizing diverse court practices and imposing uniformity"); Subrin, *Federal Rules*, *supra* note 10, at 2017-19 (discussing how local rules can help the court manage routine tasks).

14. A related—but essentially unused—defense of local rules is that the value of territorial uniformity is itself overvalued. Amanda Frost has recently made this argument in the context of federal substantive law, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008), and the argument applies equally well, if not better, to federal procedural law.

15. *See infra* Part III.

orders,[16] procedural interpretation,[17] procedural discretion,[18] inherent authority,[19] and procedural common law.[20] Moreover, these forms of territorial variation often substitute for one another, such that the presence of a local rule may displace the use of some competing form.[21]

Thus, the debate about local rules needs to be resituated within the larger universe of territorial variation. Part IV begins that process. The choice to permit local rules is not a choice to permit territorial variation, but a choice to permit territorial variation of a certain form. And the question of whether to retain local rules, and in what capacity, turns on how local rules interact with and compare to other forms of territorial variation. Relative to those other forms, local rules emerge as preferable along several dimensions. They are transparent in the sense that they are visible, easily discoverable, and knowable in advance. They are participatory in the sense that nonjudicial actors are guaranteed a role in their creation. And they are stabilizing in the sense that they make the actual—as opposed to the formal—procedural requirements imposed within a judicial district more consistent.

I. TRANS-TERRITORIALITY AS A PROCEDURAL VALUE

Trans-territoriality, which involves the application of the same procedural rules regardless of the geographic location of the suit, was one of the guiding values in the creation of the Federal Rules of Civil Procedure.[22] Now, some seventy years after that creation, this

16. *See infra* Part III.A.
17. *See infra* Part III.B.
18. *See infra* Part III.C.
19. *See infra* Part III.D.
20. *See infra* Part III.E.
21. *See infra* Part III.
22. It certainly was not the only guiding value. *See* Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 263-64 (2009) (stating that "access"—meaning the expulsion of procedural barriers from "the opportunity to reach the merits" of a case—was an explicit target of the rulemakers); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 982 (1987) [hereinafter Subrin, *How Equity Conquered Common Law*] (discussing how the rulemakers created equity-based Federal Rules to permit "the participation of virtually unlimited numbers of people in trials" and "escape the confinement of the common law").

value is firmly entrenched and rarely questioned. Civil procedure students learn very early that the primary source to be studied is the body of procedural rules that applies in every federal court, but that state procedural rules may—and often do—vary. The idea that procedure tracks the level of the court rather than its location is accepted, and indeed seems obvious. But it is worth remembering that trans-territoriality was once an innovation, and a contested one.[23] Part I defines trans-territoriality, and describes why it was—and continues to be—perceived as valuable.

A. From Conformity to Uniformity

The introduction of the Federal Rules marked a departure from the prevailing stance of conformity with state procedural rules to a compelling stance of uniformity across all federal districts. The conformity regime was governed by the Conformity Act of 1872,[24] although cruder forms of conformity had been in place since 1789.[25]

An interesting and important connection exists between the procedural value of trans-territoriality and the doctrine associated with *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), which instructs federal courts sitting in diversity to apply federal procedural laws. This rule was also designed in part to promote federal uniformity—and to discourage variations created by the need to follow local rules. *See, e.g.*, Lumbermen's Mut. Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963) ("One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules."); Rubenstein, *supra* note 8, at 1888. Indeed, the reason cited by the Supreme Court for granting review in *Hanna v. Plumer*, 380 U.S. 460, 463 (1965), was a "threat to the goal of uniformity of federal procedure." Thus, the allure of uniform federal procedure has generated hostility over time toward local variations of any kind, whether the result of federally created local rules or an obligation to enforce state-created procedural rules.

23. The account presented here is brief and somewhat stylized. For a more thorough history of events leading up to the passage of the Rules Enabling Act, 28 U.S.C. §§ 2071-2077 (2006), see generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Subrin, *How Equity Conquered Common Law*, *supra* note 22.

24. Conformity Act of 1872, ch. 255, §§ 5-6, 17 Stat. 196, 197.

25. *See* Burbank, *supra* note 23, at 1037. This cruder form required federal courts to use the "forms of writs, executions and other process" that were the "same as now used in ... [state] courts respectively in pursuance of the [original Conformity Act of 1789]." Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276. Unfortunately, that language was interpreted to define the applicable federal procedure as the state procedure that existed in 1789, with the result that subsequent modifications to state procedural rules were simply ignored. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825). Stephen Burbank has referred to this 1792 version of conformity as "static," and the 1872 version that replaced it as "dynamic." Burbank, *supra* note 23, at 1037-40.

Under the Conformity Act, federal courts were required, subject to caveats,[26] to apply the "practice, pleadings, and forms and modes of proceeding" of the states where they sat.[27] This predictably resulted in a balkanized set of federal procedural rules that broke down along state lines, and therefore generated what at first blush looks like the exact opposite of uniformity.[28] But in fact, the conformity regime was designed to promote rather than destroy uniformity, although the particular uniformity envisioned was intrastate rather than interdistrict.[29] That is, conformity had as its goal the creation of a single set of procedural rules that would apply within a given state, regardless of whether a given case was filed in federal or state court.[30]

One problem with the conformity regime was that it did not serve its vision of uniformity particularly well. In part this failure was due to incomplete coverage. The Act applied only in the common law context; federal equity cases were governed by a different set of procedures—defined by federal common law and the Supreme Court by way of its supervisory power—than state equity cases.[31] In addition, the failure was due to the less-than-ironclad requirements within the scope of coverage. The Act required only that federal courts approximate state procedures "as near as may be" and in "like causes,"[32] which left sufficient wiggle room for courts to deviate

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26. *See infra* notes 31-34 and accompanying text.

27. Conformity Act § 5. As with the earlier forms of the conformity acts, equity and admiralty cases were excluded.

28. Indeed, in some respects, the Conformity Act regime was even worse because it also created balkanization between procedure in federal common law cases, which were governed by the Conformity Act, and procedure in federal equity and admiralty cases, which were governed by the Supreme Court's rulemaking authority.

29. *See* Nudd v. Burrows, 91 U.S. 426, 441 (1875) (explaining that the purpose of the Conformity Act was "to bring about uniformity in the law of procedure in the Federal and State courts of the same locality"); Z.W. Julius Chen, Note, *Following the Leader:* Twombly*, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1464 (2008) ("The primary goal from the time of the original Conformity Act was to spare the bench and bar from having to work within two procedural systems.").

30. *See, e.g.*, *Nudd*, 91 U.S. at 441.

31. *See* Burbank, *supra* note 23, at 1039; David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1974 (1989) (recognizing the lack of uniformity between federal and state courts within a single state even under the conformity regime). The Conformity Act also did not apply to admiralty cases. But this did not have the effect of creating disuniformity because admiralty jurisdiction is exclusive.

32. Conformity Act § 5.

from true conformity and create variations on state procedures that confused and frustrated the bar.[33] In the end, despite the goal of creating a uniform set of procedures applicable within a state, the result under the Conformity Act was the creation of a jumbled and complex procedural mess.[34]

Another more significant problem with the conformity regime was that its premise—its vision of uniformity—came under attack at the turn of the twentieth century. The complete story is a long one involving many characters, but a key figure for present purposes is Thomas W. Shelton, who proposed the resolution in 1911 that eventually led to the introduction of the Rules and who chaired the initial 1912 ABA Committee on Uniform Judicial Procedure.[35] Perhaps more than anyone else, Shelton is responsible for making national uniformity—as opposed to intrastate uniformity—the prevailing procedural vision.[36] In doing so, Shelton ran headlong into Senator Thomas J. Walsh, who staunchly defended the conformity regime until his death in 1933.[37] The battle between Shelton and Walsh was in large measure a battle between competing visions of uniformity. Shelton prioritized uniformity across the federal system, although he also assumed that intrastate uniformity would follow because states would willingly follow the federal example.[38] Walsh, on the other hand, was deeply suspicious of that

33. *See* Burbank, *supra* note 23, at 1041 (concluding that the Conformity Act "afforded numerous opportunities for federal courts to decline conformity to state law").

34. *See id.* at 1042 ("[T]he potential complexity of an action drawing on so many sources of procedural law[ ] made the practitioner's job difficult."); *Report of Committee on Uniformity of Procedure and Comparative Law*, 19 A.B.A. REP. 411, 420 (1896) (suggesting that a federal practitioner, "even in his own state, feels no more certainty as to the proper procedure than if he were before a tribunal of a foreign country").

35. *See* Burbank, *supra* note 23, at 1049.

36. *See id.* ("Shelton argued that uniformity of procedure was essential, along with uniformity of interpretation, to the goal of uniformity of law ... and saw a federal model, prepared by the Supreme Court, as the best hope for national uniformity."); Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 388 (1935); Stephen N. Subrin, *A New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1651 (1981) [hereinafter Subrin, *Civil Procedure*].

37. *See* Clark & Moore, *supra* note 36, at 388.

38. *See* S. REP. NO. 64-892, pt. 1, at 21 (1917) (stating that both convenience and merit would lead to state adoption); Clark & Moore, *supra* note 36, at 387 (recognizing "an unusual opportunity" for "developing a procedure which may properly be a model to all the states"); Subrin, *Civil Procedure*, *supra* note 36, at 1650 ("Proponents retorted that the uniform federal rules would be a model adopted by the states.").

assumption and feared that the real effect of uniform federal rules would be to create disuniformity between the state and federal courts.[39] Walsh viewed true national uniformity as a practical impossibility and would have selected to maintain intrastate uniformity as the most practical approach for the majority of practicing lawyers.[40]

Of course, Shelton's vision eventually carried the day,[41] helped by the death of Walsh and the ascent of Homer Cummings as Attorney General.[42] Uniformity across all federal districts became the aspirational standard with the passage of the Rules Enabling Act of 1934,[43] and was formally achieved with the promulgation of Rule 1, which specified that the Rules were to apply in the "district courts of the United States."[44] But although it is accurate to say that the Federal Rules reflect the triumph of federal trans-territoriality over intrastate conformity, that statement does not go far enough. More must be said about precisely why trans-territoriality became so valued.[45] Trans-territoriality triumphed because it was a means to desired ends, and those ends are considered next.

B. The Ends of Trans-Territoriality

Over time, proponents of trans-territoriality have identified a variety of benefits associated with geographic uniformity in federal procedure. The primary original benefits were the facilitation of na-

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39. *See* Clark & Moore, *supra* note 36, at 394.

40. *See* Burbank, *supra* note 23, at 1063-64 (noting that Walsh described himself as "for the one hundred who stay at home as against the one who goes abroad" (quoting *Simplification of Judicial Procedure: Hearings Pursuant to S. Res. 552 Before the Subcomm. of the S. Comm. on the Judiciary*, 64th Cong. 28 (1915))).

41. Although it did not carry the day until after Shelton himself had left the scene.

42. *See* Burbank, *supra* note 23, at 1095-96 (discussing Cummings's role).

43. 28 U.S.C. §§ 2071-2077 (2006).

44. FED. R. CIV. P. 1 (1938). In 1948, the Rule was amended slightly to "in the United States district courts." FED. R. CIV. P. 1; *see also* Monarch Ins. Co. v. Spach, 281 F.2d 401, 408 (5th Cir. 1960) ("The broad aim [of the Rules Enabling Act], especially in fields of practice, was to reverse the philosophy of *conformity* to local state procedure and establish ... an approach of uniformity within the whole federal judicial trial system.").

45. *See* Subrin, *Federal Rules*, *supra* note 10, at 2000 (quoting Connor Hall's complaint that uniformity was too often presented "as if it were some excellence in itself" (citing Copy of Manuscript of Connor Hall (Oct. 15, 1926) mailed to the Editor, A.B.A. J., requesting publication, at 2)).

tional legal practice and the promotion of nationalized commerce.[46] Later, benefits sounding in equality and efficiency were emphasized: uniform procedure can assist in generating like outcomes in like cases and can do so with fewer resources being devoted to litigation and to the rulemaking process.[47] Each of these benefits is enhanced substantially if uniformity exists not just across federal districts, but between the federal and state systems. Proponents of trans-territoriality identified this complete procedural uniformity as a separate end to be attained by the adoption of federal rules, and concluded that this end was not only possible but also likely because state rulemakers would quickly and willingly mimic their federal counterparts.[48]

1. Nationalization

The standardization of procedural rules across federal districts reflected a desire to promote, or at least to respond to, the nationalization of both commerce and legal practice. With respect to commerce, proponents of procedural uniformity emphasized economic nationalization and the associated decline in the relevance of state borders as justifications for pursuing a body of procedure that could be applied without reference to geography.[49] Along those lines, Shelton urged uniformity in procedure as a predicate to the support of commerce because it "give[s] an assurance of interstate judicial relations as fixed, necessary and useful as fixed interstate commercial relations."[50]

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46. *See infra* Part I.B.1.

47. *See infra* Parts I.B.2-3.

48. *See infra* Part I.B.4.

49. These concerns also supported arguments for complete procedural uniformity because some cases involving commerce could not be brought in federal court. *See infra* Part I.B.4. There are also parallels here to arguments made in the domain of personal jurisdiction and choice of law during roughly the same period. *See* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 1 (1963) (recognizing that choice of law doctrine was dramatically altered when "members of our society, in both their personal and business activities, increasingly disregard[ed] the existence of state boundaries"); Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 453-54 (2004) (discussing how the creation of the minimum contacts test in *International Shoe* demonstrated the decreasing importance of state boundaries).

50. *See* Subrin, *Federal Rules*, *supra* note 10, at 2003 (quoting THOMAS W. SHELTON, SPIRIT OF THE COURTS 147-48 (1918)); *see also* Thomas W. Shelton, *An American Common Law*

The legal practice argument is related. Shelton lamented that lawyers representing national corporations could not easily navigate the numerous federal courts in which cases might be brought because of the barriers created by the conformity regime.[51] To facilitate the national practice of law, then, it was necessary to remove those barriers and permit lawyers to cross state and district lines freely. As David Shapiro has described it, the Rules were designed to permit "lawyers who went into any federal court ... to know what to expect and not to have to undergo an initiation period or to rely heavily on the wisdom of local practitioners."[52] A final argument blends the economic nationalization and legal profession concerns: the complexity and unpredictability of the fragmented procedural system was leading many national corporations to pursue alternatives—such as arbitration—rather than litigation, and national rules would have the desirable effect of encouraging a return to the courtroom.[53]

2. Equality and Fairness

A second concern raised in the movement toward trans-territoriality relates to equality and fairness. Many proponents of federal rules worried that state procedural systems were inferior, and that the conformity regime operated in practice to bind federal courts to apply undesirable procedures.[54] The inferiority of many state

in the Making—The Habit of Thinking Uniformity, 30 LAW NOTES 50, 52 (1926) ("There is no more excuse for differing judicial procedure than for differing language in the several States.").

51. *See Simplification of Judicial Procedure: Hearings Pursuant to S. Res. 552 Before the Subcomm. of the S. Comm. on the Judiciary*, 64th Cong. 13 (1915) (statement of Thomas W. Shelton, Chairman, Uniform Judicial Procedure Committee of the American Bar Association) (stating that federal courts "are what are called United States courts, but instead I call them New York City courts").

52. Shapiro, *supra* note 31, at 1974; *see also* Coquillette, Squiers & Subrin, *supra* note 13, at 64 (arguing that the Federal Rules were designed to allow a lawyer admitted in one federal jurisdiction to practice in any other with ease).

53. Subrin, *Federal Rules*, *supra* note 10, at 2005 (arguing that uniform, simple rules—which encourage corporate participation in court forums—imply centralized rulemaking); Subrin, *How Equity Conquered Common Law*, *supra* note 22, at 960 (noting the ability of nonlitigation forums to apply clear, simple rules).

54. *See, e.g.*, Burbank, *supra* note 23, at 1042. At some level, federal courts could avoid this result even under the conformity regime by taking advantage of the wiggle room that

systems was attributed, at least in part, to the fact that most state procedural rules derived from a legislative process.[55] The introduction of a national process driven instead by dedicated rulemakers was expected to lead to the development of rules that were not just uniform, but also better.[56]

Even apart from any such qualitative improvements, the fact that the Rules are applied uniformly across the federal system promotes two different forms of equality. First, trans-territoriality contributes to an appearance of neutrality in the sense that all cases—and all litigants—are governed by the same set of rules. These notions of equality and neutrality are admittedly quite formal, but even formal equality may enhance legitimacy and increase acceptance of the rules and the system of adjudication more generally. Ultimately, though, trans-territorial procedure is connected to a more substantive notion of equality, one that emphasizes the similar treatment of similar cases.[57] The conformity regime meant that parallel cases were often subject to substantially different procedures, and these procedural variations could often directly lead to variations in case outcomes. The application of uniform procedural rules throughout the federal system promised to reduce such inequities.[58] Thus, the trans-territoriality principle is intended to promote not just neutrality, but also fairness.

This latter version of equality was implicit in the nationalization argument, although it was not often made explicitly during the development of the Rules.[59] In order for businesses, which were increasingly engaged in interstate commerce, to anticipate legal responsibilities, national legal uniformity looked ever more desirable. This line of thinking led to a movement for uniform substantive laws,[60] which naturally grew to include procedures as

existed in the Conformity Act. *See supra* notes 32-33 and accompanying text.

55. *See* Subrin, *Federal Rules*, *supra* note 10, at 2003.

56. *Id.* at 2001.

57. For discussions of this substantive concept of procedural equality, see Rubenstein, *supra* note 8, at 1893-97; Subrin, *Federal Rules*, *supra* note 10, at 2047.

58. Keeton, *supra* note 10, at 860 (emphasizing the role of uniform rules in ensuring that cases are "resolved in an evenhanded way so like cases are treated alike").

59. *See* Subrin, *Federal Rules*, *supra* note 10, at 2006 ("This 'uniform federal rules' theme ended up with four strands: interdistrict court uniformity, intrastate uniformity, trans-substantive uniformity, and, although this was not stressed, uniformity of result.").

60. *See, e.g.*, S. REP. NO. 70-440, pt. 2, at 10 (1928) ("The development of the economic

well.[61] Again, to the extent that states maintained different procedures, the attraction of federal rulemaking as a salve was diminished because like cases could still receive differing procedural treatment based on whether the case was filed in federal or state court. And again, the response was that federal-state disuniformity was more tolerable than federal intradistrict disuniformity, and that full uniformity was the expected and inevitable end of the federal rulemaking movement.[62]

3. Efficiency

A third claimed benefit of trans-territoriality is enhanced efficiency in the federal procedural system. To a large extent, efficiency claims are retreads of the claims already discussed, albeit with a different emphasis. For example, in addition to arguing that lawyers would benefit from uniform federal rules because they would be able to practice nationally, Shelton and others emphasized that uniform rules would save client resources by permitting them to retain a single firm to respond to federal liability that was national in scope.[63] Another source of waste that proponents of national uniformity targeted was the time and effort devoted to sorting out whether the state rule or the federal rule should apply in a given situation, both at the trial and appellate levels.[64] Trans-

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resources of the country has brought with it problems that know no boundaries, and a growing consciousness of the commercial necessity for national uniformity both in law and its administration.").

61. To be sure, there was not a complete overlap between the movement for uniform laws and the federal rule making movement. In particular, many did not see the two as related because they did not view procedure as having a meaningful impact on substantive outcomes. *See* Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 329 (2008) ("The 1938 Federal Rule drafters thought that substance had little, if any, role to play; in their view, most procedural rules could be justified by process values without referring to substance at all.").

62. *See* Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 539 n.118 (2006) ("[A] simple, scientific, correlated system of rules, such as would be prepared and promulgated by the Supreme Court of the United States, would prove a model that would, for reasons of convenience as well as of principle, be adopted by the states." (quoting Thomas W. Shelton, *A New Era of Judicial Relations*, 23 CASE & COMMENT 388, 393 (1916))).

63. *Simplification of Judicial Procedure: Hearings Pursuant to S. Res. 552 Before the Subcomm. of the Comm. on the Judiciary*, 64th Cong. 13-14 (1915) (statement of Thomas W. Shelton, Chairman, Uniform Judicial Procedure Committee of the American Bar Association).

64. *See* S. REP. NO. 64-892, pt. 1, at 2 (1917) ("That cases should be delayed month after

territoriality greatly reduced those resources by making the Federal Rules presumptively applicable.[65] And if states were to follow the federal lead, then the efficiencies attributable to trans-territoriality would be much greater still, in part because lawyers would need to master only a single set of procedural rules, and in part because time and energy would need to be devoted to only a single rulemaking process.

4. Complete Uniformity

All of the preceding benefits of trans-territorial procedure in the federal system were undermined at least to some extent by the fact that states remained free to create their own procedural systems. This meant that cases could be subject to differing procedural requirements depending on where they were filed, thus creating just the sort of complexity that Shelton and others sought to avoid. By itself, the imposition of federal uniformity did nothing to guarantee the "fixed" system that corporations apparently desired. And the confusion wrought by the project of federal trans-territoriality was arguably far worse for practicing lawyers because it affected those who practiced within the territorial boundaries of a single state.[66] Rather than creating the complete uniformity that would produce meaningful benefits for the economy and the bar, the Federal Rules appeared to promise an exchange of one form of partial uniformity for another.

Proponents of the Federal Rules conceded that complete uniformity should be the goal, and they considered that goal attainable

month, and sometimes year after year, should be reversed and tried and retried, upon mere matters of practice that in no way touch the essential merits, is one of the reproaches in the administration of the law which has had a greater tendency to bring the practice of the courts into disrepute than any other thing."); W.M. Lile, *Uniform Procedure at Law in the Federal Courts*, 76 CENT. L.J. 214, 214 (1913).

65. Again, there is a similarity to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *See supra* note 22. In *Erie*, the Supreme Court arguably created inefficiency by requiring parties and judges to litigate the question of which procedures apply in diversity cases. *See Erie*, 304 U.S. at 78-80. *Hanna v. Plumer* reduced much of that inefficiency by making the Federal Rules presumptively applicable when on point. 380 U.S. 460, 473-74 (1965).

66. This was Walsh's primary argument against trans-territoriality. He argued that most lawyers still practiced within a single state, and that uniform federal procedure would disrupt their practice for the proposed benefit of those few who practiced nationally. Subrin, *Federal Rules*, *supra* note 10, at 2008.

and even likely under their approach. In their view, states were likely to follow the lead of the Federal Rules, and the eventual result would be not just the introduction of federal uniformity, but the restoration of intrastate uniformity as well.[67] Early returns along these lines were promising,[68] and some states continue to replicate the Federal Rules in the interest of preserving intrastate uniformity.[69] But we have never come close to universal adoption of the Federal Rules, and indeed the most recent sustained study found that the gap between federal and state procedures is widening.[70] Despite the failure in practical terms to achieve it, complete procedural uniformity remains a goal that animated the selection of a new system of federal rules over the existing conformity regime.

II. LOCAL RULES AS A PROCEDURAL SCOURGE

If trans-territoriality is one of the heroes of the federal procedural regime, then local rules have been steadily cast in the role of the villain. Because local rules are the most visible source of territorial

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67. To borrow Stephen Subrin's phrase, "[t]he federal rules were to be an enlightened magnet." *Id.* at 2026; *see also* Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1170, 1179 (2005); Shapiro, *supra* note 31, at 1974-75 (describing the rulemakers as "sufficiently imbued with their mission to hope that their rules would set a model that the states themselves would want to follow"). The idea that a federal standard would be an "enlightened magnet" that states would find irresistible is reminiscent of the Supreme Court's flawed assumption with respect to federal general common law in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). States in that context proved themselves willing to resist the allure of the federally created example, and they have done so in this context as well. *See infra* note 69.

68. *See* Chen, *supra* note 29, at 1437 (discussing the development of "federal replica" states—states that have adopted the Federal Rules—beginning with Arizona in 1940); Subrin, *Federal Rules*, *supra* note 10, at 2026-28 (noting that four southwestern states were relatively quick to adopt the Federal Rules verbatim—Arizona (1940), Colorado (1941), New Mexico (1942), and Utah (1950)—with the goal of fostering a procedural system that practitioners could easily navigate).

69. *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1377 (1986) (classifying twenty-three states as federal replicas, many of whom identify intrastate uniformity as their guiding value).

70. *See* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 358 (2002) (finding that 62 percent of the United States population lives in jurisdictions "governed by substantially nonfederal systems of procedure" and that state movements toward replicating the federal procedural system were "noticeably slackening").

variation in the federal procedural system, they are the most obvious deviation from the aspirational norm of trans-territoriality. Part II reviews the long-standing and ongoing debate over local rules. It first describes the current approach toward local rules in the federal system and explains how that approach has changed over time, particularly with respect to promulgation and enforcement. It then reviews the numerous complaints that have been laid at the feet of local rules, most of which are rooted in a commitment to trans-territorial procedure and a parallel resistance to territorial variation.

A. A Primer on Local Rules

The authority for local rules is clear and unassailable: Federal Rule of Civil Procedure 83(a), which has been part of the Federal Rules since their inception, permits district courts to "make and amend rules governing [their] practice."[71] The scope of the authority provided is not unlimited, however; local rules must be consistent with—but not duplicative of Acts of Congress and rules.[72] Although that limitation is not insignificant, it leaves substantial room for district courts to create a set of localized procedures, and every district court has done so.[73] The resulting ninety-four sets of local rules are, like the Federal Rules, formal and fixed. Unlike the Federal Rules, however, local rules are not subject to the rule-making process outlined in 28 U.S.C. §§ 2072-74, but are instead

71. FED. R. CIV. P. 83(a)(1). Local rules must be issued after "notice and an opportunity for comment," and must be supported by a majority of the district judges comprising a district court. *Id.*

72. *Id.* For a time, it looked as though another limitation, created not by the Rules themselves but by the Supreme Court, might be imposed: local rules should not introduce "basic procedural innovations." Miner v. Atlass, 363 U.S. 641, 650 (1960) (favoring the formal rulemaking process and its "mature consideration of informed opinion"). But the Court has not appeared willing to police the limitation, and the experience with civil jury size seriously undermines its force. *See* Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1582-83 (2003) (discussing the Supreme Court's decision in *Colgrove v. Battin*, 413 U.S. 149, 159-60 (1973), which upheld local rules changing the size of the civil jury).

73. For a list of current local rules, see United States Courts, Local Court Rules—United States District Courts, http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/LocalCourtRules/USDistrictCourt.aspx (last visited Oct. 13, 2010).

promulgated after notice and comment and upon a majority vote of district judges.[74]

Local rules vary considerably in both content and significance. Many local rules announce technical and relatively mundane requirements related to issues like filing and motions practice.[75] Rules detailing paper size and method of binding are staples of local rules,[76] designed primarily to facilitate the work of the clerk's office. But not all rules fit that description, and some impose substantial procedural requirements. For example, many districts now have local rules that structure the summary judgment process, including details relating to the form and nature of the filings that must be submitted.[77]

Because local rules vary from district to district, lawyers who practice in multiple districts must master multiple sets of formal procedural packages.[78] Thus far, the Advisory Committee has responded to the burdens imposed by interdistrict variations in local rules not by removing or narrowing the authority to issue them,[79]

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74. FED. R. CIV. P. 83(a)(1).

75. *See, e.g.*, E.D. CAL. R. 121(b) ("The regular office hours of the Clerk at Sacramento and Fresno shall be from 9:00 a.m. to 4:00 p.m. each day except Saturdays, Sundays, legal holidays, and such other times so ordered by the Chief Judge."). More recently, local rules describing electronic filing requirements have become common. *See, e.g.*, W.D.N.C. R. 5.2.1(B) ("All documents submitted for filing in this district shall be filed electronically unless expressly exempted from electronic filing either by the Administrative Procedures or by the assigned judge.").

76. *See, e.g.*, E.D. CAL. R. 130(b) ("All documents presented for conventional filing or lodging and the chambers courtesy copies shall be on white, unglazed opaque paper of good quality with numbered lines in the left margin, 8-1/2" x 11" in size, and shall be flat, unfolded (except where necessary for presentation of exhibits), firmly bound at the top left corner, prepunched with two (2) holes (approximately 1/4" diameter) centered 2-3/4" apart, 1/2" to 5/8" from the top edge of the document, and shall comply with all other applicable provisions of these Rules.").

77. *See, e.g.*, N.D. ILL. R. 56.1. For a discussion of cases enforcing this rule, see *infra* notes 87-89 and accompanying text.

78. *See* G.J.B. & Assocs., Inc. v. Singleton, 913 F.2d 824, 831 (10th Cir. 1990) ("Counsel appearing before the district court are duty-bound to know the practice of the district court.").

79. In the 1985 amendments, the Advisory Committee did alter the rule "to enhance the local rulemaking process by requiring appropriate public notice of proposed rules and an opportunity to comment on them." FED. R. CIV. P. 83 advisory committee's note (1985). But this modification retained the scope of local rulemaking authority, and was explicitly made "without impairing the procedural validity of existing local rules." *Id.* Several commentators have suggested that the authority for local rulemaking authority be narrowed. *See, e.g.*, Linda J. Rusch, *Separation of Powers Analysis as a Method for Determining the Validity of Federal District Courts' Exercise of Local Rulemaking Power: Application to Local Rules Mandating*

but instead by instituting measures designed to facilitate identification and compliance and to decrease sanctions for noncompliance in certain cases.[80] In particular, the 1995 amendments to Rule 83 included two notable new provisions. First, Rule 83(a)(1) was modified to require local rules to "conform to any uniform numbering system prescribed by the Judicial Conference of the United States."[81] This addition was intended to avoid "unnecessary traps for counsel and litigants" by "mak[ing] it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue."[82] Second, the same set of amendments added a provision—Rule 83(a)(2)—that prevents the court from depriving a party of rights as a result of a "nonwillful failure to comply" with a "local rule imposing a requirement of form."[83] Again, the Advisory Committee's notes reflect an awareness that lawyers may be burdened by the complexities of local rules, and may therefore be unaware or forgetful of formal requirements contained therein.[84]

Alternative Dispute Resolution, 23 CONN. L. REV. 483, 497 (1991) (arguing that the federal courts' judgment about procedure should be subordinated to congressional judgment in order to "ensure that Congress makes the important decisions about procedure").

While the Advisory Committee has declined to decrease the authority for local rulemaking, it has also declined to increase it. Most notably, the Committee withdrew two proposed amendments to Rule 83 that would have permitted district courts to introduce local rules that were inconsistent with the Federal Rules, at least on an experimental basis. *See* Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, *reprinted in* 137 F.R.D. 53, 153 (1991) ("With the approval of the Judicial Conference of the United States, a district court may adopt an experimental local rule inconsistent with [the Federal Rules]."); Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, and Rules Governing Section 2255 Proceedings in the United States District Courts*, *reprinted in* 98 F.R.D. 337, 370 (1983) ("When authorized by the judicial council, a district court may adopt on an experimental basis for no longer than two years a local rule that may not be challenged for inconsistency with [the Federal Rules]."); *see also* Marcus, *supra* note 72, at 1584 n.95.

80. Congress has intervened, too. *See* 28 U.S.C. § 2071(c)(1) (2006) (permitting the "judicial council of the relevant circuit" to modify or abrogate local rules).

81. FED. R. CIV. P. 83(a)(1).

82. FED. R. CIV. P. 83 advisory committee's note (1995).

83. FED. R. CIV. P. 83(a)(2).

84. FED. R. CIV. P. 83 advisory committee's note (1995) ("[A] party should not be deprived of a right to a jury trial because its attorney, unaware of—or forgetting—a local rule directing that jury demands be noted in the caption of the case, includes a jury demand only in the body

Although the addition of Rule 83(a)(2) limits the availability of sanctions, it simultaneously confirms that some local rules—namely, those that do not impose "a requirement of form"—may be enforced to deprive a party of rights. Local rules in that category essentially operate as functional equivalents to the federal rules; district courts demand compliance and may strictly enforce the rules or impose sanctions when procedural requirements are not followed. Some districts include specific provisions highlighting the availability of sanctions for violations of local rules.[85] But even in the absence of such a provision, sanctions for failure to heed the requirements of local rules have been upheld when challenged in the appellate courts.[86] For example, in a series of cases, the Seventh Circuit has affirmed the entry of summary judgment in cases in which a nonmovant fails to comply with the procedural requirements of Northern District of Illinois Rule 56.1.[87] In doing so, the court has recognized that the rule "impose[s] a burden on the attorneys for the parties,"[88] but has nevertheless emphasized that "strict, consistent, 'bright-line' enforcement is essential to obtaining compliance ... and to ensuring that long-run aggregate benefits in efficiency inure to district courts."[89]

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of the pleading.").

85. *See, e.g.*, M.D. ALA. R. 1.2 ("The court may impose a sanction for the violation of any local rule. Imposition of sanctions will lie within the sound discretion of the judge whose case is affected.").

86. Not all efforts to impose sanctions for violations of local rules have been upheld. *See, e.g.*, Zambrano v. City of Tustin, 885 F.2d 1473, 1480 (9th Cir. 1989) ("[W]e do not think that the imposition of financial sanctions for mere negligent violations of the local rules is consistent with the intent of Congress or with the restraint required of the federal courts in sanction cases."). But in cases where the sanction has been viewed as an abuse of discretion, the basis for that finding has been that the sanction imposed was not proportional to the violation at issue, not that local rules are entitled to a lesser degree of enforcement than the Federal Rules.

87. *See, e.g.*, Koszola v. Bd. of Educ. of Chicago, 385 F.3d 1104, 1109 (7th Cir. 2004); Waldridge v. Am. Hoechst Corp., 24 F.3d 918, 921-22 (7th Cir. 1994) (collecting cases where strict enforcement of local summary judgment rules has been upheld). Implicit in *Koszola* and other cases decided after the 1995 addition of Rule 83(a)(2) is a determination that N.D. ILL. R. 56.1 does not merely impose a "requirement of form."

88. Markham v. White, 172 F.3d 486, 490 (7th Cir. 1999).

89. Midwest Imps., Ltd. v. Coval, 71 F.3d 1311, 1316 (7th Cir. 1995).

B. A Primer on Local Rules Critique

Notwithstanding their pedigree, local rules have faced consistent criticism since the Federal Rules were promulgated in 1938. Part II.B undertakes a short review of that criticism, which has taken many forms, ranging from claims that frequent deviations from trans-territoriality are inconsistent with the original intent of Rule 83 to claims that such deviations are undesirable for various functional reasons. Particulars aside, the core criticism of local rules is that they disrupt the trans-territoriality that is a central procedural value of the federal system.

An initial complaint is that the fundamental constraint that local rules be consistent with, and not duplicative of, existing federal rules has frequently been ignored.[90] From the very beginning, federal districts introduced local rules that were at least arguably inconsistent with the Federal Rules, and as early as 1940 a federal committee commented on the danger such rules imposed to the goal of national uniformity.[91] Similarly, in the 1980s, the Judicial Conference sponsored a Local Rules Project, which found and catalogued a variety of local rules that seemed to contradict the consistency limitation in Rule 83.[92] The existence of local rules that directly conflict with extant federal rules has the potential to undermine the supremacy of the federal rulemaking process.[93] Not only is this theoretically troubling, but it also contributes to a practical problem: counsel will reasonably be uncertain about whether the federal rule or the local rule will ultimately be enforced.[94]

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90. *See* Subrin, *Federal Rules*, *supra* note 10, at 2019-20 (noting that a 1985 Judiciary Committee report "identified several problems concerning local rules, such as their promulgation without sufficient input, the tremendous numbers of such rules, and the frequent conflict between local rules and the Federal Rules").

91. *See* Report on Local District Court Rules, 4 Fed. R. Serv. (Callaghan) 969 (1940) [hereinafter Knox Committee Report].

92. *See* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE LOCAL RULES PROJECT 1-7 (1988).

93. Sisk, *supra* note 10, at 5 (discussing the destruction of procedural uniformity within the appellate system due to the promulgation of local rules that conflict with the Federal Rules of Appellate Procedure).

94. *Id.* at 5-6; Subrin, *Federal Rules*, *supra* note 10, at 2016-17 (noting that local rules "create inconsistencies in practice among the various districts and leave doubt and uncertainty in the minds of the bench and bar" (quoting Knox Committee Report, *supra* note 91, at 11)).

Restricting local rules to only those that comply with the consistency restraint would address these problems, of course, and indeed many critics have called for more rigorous enforcement of the clear language of Rule 83.[95] But most criticisms of local rules go much further, and target even those rules that undeniably comply with that language. These broader critiques are based in part on a claim that the intended scope of Rule 83 was sufficiently narrow that local rules would be used only sparingly.[96] Proposals to permit and even encourage broad authority for localized rulemaking were considered but rejected, and ultimately national uniformity was embraced as the prevailing model.[97] Although Rule 83 was still included in the final product, its inclusion did not signify a desire to promote local rules as a means of filling any gaps that might have been left open by the Federal Rules. Rather, the Rule was intended to provide authority only for the rare occasions when the federal rulemakers deliberately left gaps to be filled by local needs.[98] Thus, the use of Rule 83 for a broader gap-filling purpose is against the spirit of the federal design, even if the resulting local rules technically comply with the consistency restraint.

The preceding argument is not merely a technical one about intent. Critics also cite a functional reason to interpret and apply narrowly the authority conferred by Rule 83: the proliferation of local rules creates a morass of applicable rules in the federal system

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95. *See* 12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3152 (2nd ed. 1973); David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 540-42 (1985) (arguing that a failure to enforce the consistency requirement of Rule 83 has allowed for the promulgation of local rules directly in conflict with their federal counterparts).

96. Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 944 (1996) (discussing the intent of the rulemakers that Rule 83 be used only on the rare occasions that functionally demand localization); Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 784 (1995) ("Absent some better reason, it is insufficient simply to argue in favor of local rules for no other reason than that locals like to do things a certain way."); Tobias, *Local Federal Civil Procedure*, *supra* note 10, at 538 ("The Committee apparently envisioned that districts would sparingly invoke Rule 83 to address unusual, troubling local circumstances and expressly prohibited the adoption of local procedures which conflicted with the federal rules.").

97. *See supra* notes 35-44 and accompanying text.

98. Carrington, *supra* note 96, at 944; Tobias, *Local Federal Civil Procedure*, *supra* note 10, at 538 (discussing the Advisory Committee's intent to have judges "sparingly invoke Rule 83").

that directly conflicts with the procedural goals served by trans-territoriality.[99] Local rules run counter to the goal of nationalization because they disadvantage nonlocal counsel—often explicitly so.[100] At the extreme, variations in local rules also threaten the equal treatment of like cases and may contribute to forum shopping.[101] This result is especially troubling because districts often fail to explain the reasons for their adoption of a particular rule, which increases the likelihood that participants and observers will perceive variations as random rather than well considered.[102] Finally, local rules are viewed by many as a source of inefficiency in federal practice, both because lawyers must devote resources to mastering multiple sets of local rules and because clients may be forced to retain local counsel for each federal district involved in a complex case.[103]

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99. Critics also complain that local rules undermine the procedural value of trans-substantivity. *See, e.g.*, Subrin, *Federal Rules*, *supra* note 10, at 2025-26 (noting that the use of local rules to fashion different procedures for particular types of cases in different locations "reduces intrastate and interdistrict court procedural uniformity").

100. Chemerinsky & Friedman, *supra* note 96, at 784 ("The premise of the federal courts is that they reflect one court system doing the nation's business. Permitting a profusion of local rules for the simple reason that local practioners [sic] are familiar with them inappropriately disadvantages litigants and their counsel coming from out of state."); Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1484 (1994) ("Local procedures typically favor local bars.").

101. Keeton, *supra* note 10, at 860 (noting that national uniformity serves the fundamental interest that disputes should be treated alike and resolved on the merits, rather than being subject to manipulation based on judge shopping or forum shopping).

102. Carrington, *supra* note 96, at 945-46 (noting that "the primary task of each federal court is essentially the same in all districts, and the differences among them seldom suggest reasons for material differences in the procedure employed in different districts"); Tobias, *Local Federal Civil Procedure*, *supra* note 10, at 577 (discussing the loss of respect for the civil litigation system that occurs when the public "believes that the procedures available or the character of justice can vary substantially across districts, that the nature of justice reflects lawsuits' magnitude or subject matter, that attorneys' or clients' resources affect the quality of justice, or that complexities or technicalities preclude or restrict the vindication of rights").

103. *See, e.g.*, Coquillette, Squiers & Subrin, *supra* note 13, at 62 (noting that the only safe course of action for a client whose case spills into multiple federal districts may be to "retain additional counsel in each federal district for the case"); Sisk, *supra* note 10, at 6, 31 (arguing that local rule variations "complicate practice and increase the cost of compliance with procedural rules" while simultaneously requiring "inordinate expenditures of attorney time on relatively minor matters"); Tobias, *Local Federal Civil Procedure*, *supra* note 10, at 575 ("The need to search for, understand, and comply with increasingly arcane local requirements may well have imposed greater expense and delay in federal civil litigation.").

A different strain of criticism focuses on perceived deficiencies in the way that local rules are promulgated and reviewed.[104] Whereas federal rules are introduced only after a thorough process that includes a broad group of participants and several layers of review, the process leading to the introduction of local rules is relatively more truncated.[105] For one thing, fewer participants are involved. Of course, it is precisely the narrower geographical scope of the participants that permits local rules to reflect local, rather than national, priorities. Even so, the lack of broader input has led to some concern that local rules are adopted on the basis of inadequate information.[106] In addition, there are fewer steps in the process leading to the adoption of local rules. For many years, that process essentially consisted of deliberation involving only the judges of the relevant local district.[107] Although Rule 83 has been amended to now require an opportunity for notice and comment, district judges remain the ultimate arbiters of whether local rules are adopted or abandoned. This has led to a concern that local rules are often a simple reflection of the temporary whims of the majority of a district's judges.[108] That concern in turn is exacerbated by the

104. Some of these process concerns have been addressed by modifications to Rule 83. In particular, the 1985 rule amendments responded to criticisms regarding the lack of nonjudicial input "by requiring appropriate public notice of proposed rules and an opportunity to comment on them." FED. R. CIV. P. 83 advisory committee's note (1985); Hollingsworth v. Perry, 130 S. Ct. 705, 708-12 (2010) (per curiam) (emphasizing the role of notice and comment in the promulgation of local rules); *supra* note 79.

105. Flanders, *supra* note 11, at 256-57 (describing the method by which local rules are promulgated as "failing to meet the high standard set by the national process" and noting that the practice of consulting with a committee of local practitioners during the drafting of local rules "is the exception rather than the rule" (quoting 12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3152, at 220 (2nd ed. 1973))); Keeton, *supra* note 10, at 860 (suggesting that the safeguards of the federal rulemaking process—widespread involvement of national actors and extensive deliberation by those actors—make it more desirable than the system of individualized promulgation for local rules).

106. *See* Subrin, *Federal Rules*, *supra* note 10, at 2019-20 (identifying the lack of "sufficient input" during promulgation of local rules as one of the problems identified in a 1985 Judiciary Committee report on local rules).

107. *See* Coquillette, Squiers & Subrin, *supra* note 13, at 62 (complaining about the lack of opportunity for notice and comment under the pre-1985 version of Rule 83).

108. Flanders, *supra* note 11, at 218 (noting that many critics of local rules believe that these rules are usually "developed with minimal consultation and often represent the whims and idiosyncrasies of temporary majorities of judges"); Keeton, *supra* note 10, at 860 ("[N]ationally uniform rules protect ... against the tyranny of any unduly willful renegades among us trial judges."); Subrin, *Federal Rules*, *supra* note 10, at 2042.

limited and ineffective review of local rules by the appellate courts and the Judicial Conference.[109]

A final set of complaints emphasizes the relationship between local rules and the federal rulemaking process. For example, Erwin Chemerinsky and Barry Friedman have argued that the local rulemaking device permits federal rulemakers to avoid difficult questions that should properly be resolved at the national level.[110] Conversely, local actors who perceive a need for a shift in the rules may focus their efforts at the local level rather than seeking desirable national reform.[111] Lauren Robel has similarly suggested that local rules undermine the federal rulemaking process because they are too often rooted in a sense that a national rule is incorrect rather than simply incomplete.[112] Thus, local rules in practice may represent a form of disobedience, and one that deflects energy away from a valuable national conversation about the desirability of the Federal Rules.

III. THE UNIVERSE OF TERRITORIAL VARIATION

Local rules are the most obvious form of procedural disuniformity, and also the most frequently criticized. But they are certainly not the only form. Part III widens the lens to resituate local rules as one form of territorial variation in the federal system among many. Some varieties, like standing orders, are quite similar in nature and function to local rules. Others, like variations in interpretation or the exercise of judicial discretion, are structurally different. Local rules create formal variations in the body of procedural rules; by

109. *See* Flanders, *supra* note 11, at 218 (describing the inadequacy of the appellate process for monitoring the validity of local rules); Sisk, *supra* note 10, at 51 (discussing limited review by the Judicial Conference).

110. Chemerinsky & Friedman, *supra* note 96, at 779 (explaining that local rules can politically benefit federal decision makers by allowing them to "duck deciding a hard question by leaving it to local rules to handle," especially in highly controversial areas where proposed solutions are likely to produce intense disagreement).

111. *Id.* (finding that a sense of localism may contribute to the lack of uniformity in local rules because individuals may feel that local solutions will produce more satisfaction and are easier to implement).

112. Robel, *supra* note 100, at 1484 ("Local court tinkering with the Federal Rules is rarely inspired by the disutility of a Rule under local conditions. Rather, it is inspired by a belief that the rulemakers got it wrong.").

contrast, differences in interpretation create differences in the way that formally uniform rules are applied in practice. Such differences arguably do not create disuniformity at all, but only if one accepts a cramped and unrealistic view of uniformity.[113] Finally, other varieties, like the use of inherent authority and the development of procedural common law, occur outside the domain of the Federal Rules themselves. Again, this might suggest that the formal uniformity of the Rules is not threatened. But even if that is true, these varieties contribute to territorial variations in the procedural requirements that are imposed and enforced, whether as the result of a formal rule or not.

A. Standing Orders

Unlike local rules, which operate at the level of the district court, standing orders operate more narrowly, at the level of the individual district judge. The present authority for standing orders is the same as that for local rules,[114] and the permissible scope of standing orders is similarly limited by a consistency requirement. But requiring standing orders to be consistent with federal law, federal rules, and local rules still leaves room for variation. So it is unsurprising that standing orders vary significantly in terms of their level of detail and the nature of their requirements.[115]

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113. *See* Subrin, *Federal Rules*, *supra* note 10, at 2047-48 (arguing that uniformity should encompass uniformity of result, and not simply textual uniformity). For further discussion of this point, see *infra* Part IV.A.

114. Rule 83(b) permits a judge to "regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district." FED. R. CIV. P. 83(b). This language was originally added as a part of the 1985 amendments to Rule 83, and was moved to subsection (b) as part of the 1995 amendments. Prior to 1985, the authority of judges to issue and enforce standing orders was understood to be part of the court's inherent authority. *See infra* Part III.D. For a general discussion of standing orders, see Myron J. Bromberg & Jonathan M. Korn, *Individual Judges' Practices: An Inadvertent Subversion of the Federal Rules of Civil Procedure*, 68 ST. JOHN'S L. REV. 1 (1994).

115. Many standing orders clarify the judge's preference with respect to scheduling. So, for example, in the Northern District of Illinois, Judge Milton I. Shadur's standing orders set cases for status conferences forty-nine days after filing of the complaint, whereas Judge Robert W. Gettleman sets cases for status sixty days after filing. *See* United States District Court: Northern District of Illinois, Judge, http://www.ilnd.uscourts.gov/home/Judges.aspx (follow individual judge hyperlink; then follow "Initial Status Conference" hyperlink) (last visited Oct. 13, 2010). Other standing orders impose requirements that are fairly substantive in nature. For example, Judge Frank D. Whitney (W.D.N.C.) requires that

The requirements for creation and promulgation of standing orders are remarkably informal. Unlike federal rules, which must pass through the formal rulemaking procedures outlined in 28 U.S.C. §§ 2072-2074, and unlike local rules, which must receive the support of a majority of the district judges after a notice and comment period dictated by Rule 83(a),[116] standing orders can simply be issued by an individual district judge. At least in theory, this informality is counterbalanced by two restrictions on standing orders that go beyond the consistency requirement already discussed. First, the Advisory Committee's notes express a "hope[ ] that each district will adopt procedures, perhaps by local rule, for promulgating and reviewing single-judge standing orders."[117] More importantly, the 1995 amendments acknowledge "that courts rely on multiple directives to control practice," and that "the sheer volume of directives may impose an unreasonable barrier."[118] As with the amendments relating to local rules, Rule 83(b) responds to that barrier not by circumscribing the permissible scope of standing

> Every preliminary motion shall ... include, or be accompanied by, a brief statement of the factual and legal grounds on which the motion is based. *A memorandum of law shall always state the "Bottom Line Up Front"*—that is, the introductory paragraph(s) shall: (i) identify with particularity each issue in dispute; (ii) concisely (i.e., in one or two sentences) state why the party should prevail on the issue, directing the Court's attention to what the party believes to be the controlling legal authority or critical fact in contention; and (iii) if applicable, state the remedy or relief sought.

Initial Scheduling Order, Misc. No. 3:07-MC-47 (Doc. No. 2), sec. 3, subsec. b, para. iii, *available at* http://www.ncwd.uscourts.gov/Documents/Whitney/StandingOrderGoverningCivilCaseManagement.pdf. Finally, some standing orders impose requirements that directly contradict the parallel local rule. For example, Judge Sidney A. Fitzwater (N.D. Tex.) modifies local civil rule 16.4, which requires a pretrial order to be submitted at least ten days before the scheduled date for trial, by forcing proposed orders to be submitted no later than fourteen days prior to the date of the trial setting. United States District Court: Northern District of Texas, Requirements for Chief District Judge Sidney A. Fitzwater, http://www.txnd.uscourts.gov/judges/sfitz_req.html (last visited Oct. 13, 2010).

116. 28 U.S.C. § 2071(b) (2006) also requires notice and comment before a local rule may be issued.

117. FED. R. CIV. P. 83 advisory committee's note (1985). *See* Carl Tobias, *Suggestions for Circuit Court Review of Local Procedures*, 52 WASH. & LEE L. REV. 359, 364 (1995) ("[S]ome circuit judicial councils initiated rigorous efforts, and others made laudable attempts, to comply with the requirements that Rule 83 and the 1988 JIA imposed on them."). *But see* Bromberg & Korn, *supra* note 114, at 9 ("Unfortunately, however, judicial councils have not taken an active role in reviewing the consistency of either local district court rules or individual judges' standing orders and practices with the Federal Rules.").

118. FED. R. CIV. P. 83 advisory committee's note (1995).

orders, but by requiring actual notice be given to litigants before standing orders may be enforced to impose a "sanction or other disadvantage."[119] Actual notice is often achieved by making standing orders publicly available on a court website and by referring parties to those orders.[120]

Standing orders that meet the consistency and notice requirements may be enforced, and sanctions for noncompliance have withstood challenges on appeal. In *Tucker v. Colorado Department of Health & Environment*, for example, the Tenth Circuit affirmed the entry of summary judgment after the nonmovant failed to comply with a standing order that required specific references to the record.[121] In essence, the judge's standing order in *Tucker* was treated as an equivalent to the local rules at issue in the Seventh Circuit cases described above,[122] except that a finding of actual notice was required to justify enforcement. But not all appellate courts have put standing orders on an equal footing with local rules, and some have expressed hesitation about the imposition of sanctions for nonwillful failures to comply. An example of this more restrained approach is found in *United States v. Brown*.[123] There, the Ninth Circuit acknowledged that violations of local rules may be sanctioned absent a finding of bad faith, but refused to apply the same standard to standing orders.[124] Although both local rules and standing orders are explicitly authorized by Rule 83, the court

119. FED. R. CIV. P. 83(b) ("No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.").

120. *See* FED. R. CIV. P. 83(b) advisory committee's note (1995) ("Furnishing litigants with a copy outlining the judge's practices ... would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained."); *see also* Tucker v. Colo. Dep't of Pub. Health & Env't, 104 F. App'x 704, 707-08 (10th Cir. 2004) (finding "actual notice" satisfied where district judge issued a case management order that "notified counsel that they could receive copies of the summary judgment rules from the clerk's office and from the court's website").

121. *Tucker*, 104 F. App'x at 707 ("Pursuant to [Rule 83(b)], a district judge may establish personal 'standing orders' regulating practice before his court (and subsequently punish parties for violating those rules), so long as (1) those procedures are consistent with federal law and the Rules of Civil Procedure; and (2) the violating party had 'actual notice' of the rule.").

122. *See supra* notes 87-89 and accompanying text.

123. 62 F. App'x 165, 165 (9th Cir. 2003).

124. *Id.*

recognized a distinction in treatment based on the fact that standing orders are issued without notice and comment.[125] Accordingly, the district court's sanctioning authority with respect to standing orders was deemed to derive from inherent authority rather than congressional authority.[126]

Regardless of the precise standard necessary to sustain sanctions for noncompliance, the role of standing orders in shaping the procedural landscape should not be ignored. They represent an important source for procedural requirements that are judicially controlled, and that vary even within a given federal district.

B. Procedural Interpretation

Local rules and standing orders create differences in the formal rules that apply to a given case. Properly understood, the overall procedural package consists not just of federal rules, but also of local rules and standing orders,[127] and each of these latter components may vary from district to district, or from court to court. But actual differences in the formal procedural requirements are not the only source of procedural variation. Disuniformity may also result from differences in the interpretation and application of uniform rules. Put differently, federal rules are like statutes, regulations, and constitutional provisions: they are often ambiguous, and courts must resolve that ambiguity through interpretation.

Part of the Supreme Court's self-definition of its role in the federal system is to resolve interpretive ambiguities.[128] Thus, the extent of disuniformity attributable to ambiguity is tempered by Supreme Court intervention and clarification. But the Court has certainly not resolved every ambiguity in the Federal Rules, and variations in interpretations persist. For example, the work-product protection in Rule 26(b)(3) shields from discovery many documents

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125. *Id.*

126. The Ninth Circuit had previously found that the sanctioning authority associated with violations of local rules derives from both inherent and congressional authority. *See* Zambrano v. City of Tustin, 885 F.2d 1473, 1479 (9th Cir. 1989).

127. And arguably also orders issued pursuant to the court's inherent authority. *See infra* Part III.D.

128. *See* Frost, *supra* note 14, at 1569.

prepared "in anticipation of litigation."[129] Although this protection is not new, and can be directly traced to Supreme Court action,[130] the Court has never resolved the meaning of the "in anticipation of litigation" requirement. Left to their own devices, the circuit courts have developed competing tests, one requiring that a document be "prepared 'because of' existing or expected litigation,"[131] and the other requiring that a document be prepared "primarily or exclusively to assist in litigation."[132]

Moreover, even when the Court has attempted to impose a uniform interpretation, disuniformity often remains because the Court's rulings are themselves subject to variable interpretation. The evolving meaning of Rule 8(a)(2), which requires that a complaint include "a short and plain statement of the claim," presents a recent illustration along these lines. The classic interpretation of that language in *Conley v. Gibson* emphasized that the pleading requirements under the rules are rooted in notice, and perform only a very weak screening for legal sufficiency.[133] In response to perceptions of frivolous lawsuits and caseload pressures, some appellate courts began to read the language of Rule 8(a)(2) to raise the pleading bar and require facts beyond those that would provide

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129. FED. R. CIV. P. 26(b)(3).

130. *See* Hickman v. Taylor, 329 U.S. 495, 497 (1947).

131. United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998).

132. United States v. El Paso Co., 682 F.2d 530, 542 (5th Cir. 1982). For an extended discussion of these competing tests, see Claudine Pease-Wingenter, *Prophetic or Misguided?: The Fifth Circuit's (Increasingly) Unpopular Approach to the Work Product Doctrine*, 29 REV. LITIG. 121 (2009) (complaining that the "because of" standard results in "an abbreviated scope" of work-product protection in the Fifth Circuit). There are numerous other examples of competing rule interpretations that have gone unresolved by the Supreme Court. For a sampling, see Natasha Dasani, Note, *Class Actions and the Interpretation of Monetary Damages Under Federal Rule of Civil Procedure 23(b)(2)*, 75 FORDHAM L. REV. 165, 197 (2006) (describing a circuit split in the interpretation of the Advisory Committee's note regarding the availability of monetary damages in class actions certified under Rule 23(b)(2)); Daniel R. Fine, Comment, *Defining the Appellate Universe: Does FRCP 52(b) Impose a Duty on Litigants?*, 75 U. CHI. L. REV. 1633, 1640-44 (2008) (comparing approaches to whether a Rule 52(b) motion is required to preserve appeal of inadequate findings by a district judge); Kirin K. Gill, Comment, *Depose and Expose: The Scope of Authorized Deposition Changes Under Rule 30(e)*, 41 U.C. DAVIS L. REV. 357, 369-72 (2007) (discussing competing approaches to the meaning of "changes in form or substance" under Rule 30(e)).

133. Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (emphasizing that a motion to dismiss for failure to state a claim should be granted on legal insufficiency grounds only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

notice.[134] In two cases a decade apart, the Supreme Court emphasized that the plain language of the Rules permits heightened pleading only for claims of fraud or mistake, and reaffirmed the *Conley* standard for all remaining claims.[135] That the Court felt the need to take and decide a second case on the same basic issue suggests that its initial effort failed to settle the interpretive instability that prompted the intervention. In 2007, the Court disrupted whatever stability it had secured in its prior efforts by revisiting the pleading question yet again, this time to undo much of what *Conley* had settled fifty years earlier by inserting in its place a "plausibility" standard that is far from self-defining.[136] Most recently, in *Ashcroft v. Iqbal*, the Court reaffirmed its commitment to the plausibility regime, confirmed the application of that regime to all federal civil cases,[137] and characterized the determination of

134. *See, e.g.*, Arnold v. Bd. of Educ., 880 F.2d 305, 309 (11th Cir. 1989) ("[I]n an effort to eliminate nonmeritorious claims on the pleadings and to protect public officials from protracted litigation involving specious claims we, and other courts, have tightened the application of Rule 8 to § 1983 cases."). Either that, or they interpreted Rule 9(b) to permit a court to impose "heightened pleading" beyond the two claims specifically mentioned. The history of resistance to the "notice pleading" standard created by Rule 8(a)(2) actually goes back much further. *See, e.g.*, *Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure*, 13 F.R.D. 253 (1952); Baim & Blank, Inc. v. Warren-Connelly Co., 19 F.R.D. 108, 109 (S.D.N.Y. 1956) (imposing a heightened pleading standard for antitrust claims). The Supreme Court's decision in *Conley v. Gibson*, 355 U.S. 41 (1957), quieted that resistance to some extent, but not entirely. *See* Valley v. Maule, 297 F. Supp. 958, 960 (D. Conn. 1968) (imposing heightened pleading for civil rights claims); *see also* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) (describing the widespread practice by federal courts of imposing heightened pleading standards "in direct contravention of notice pleading doctrine").

135. Swierkiewicz v. Sorema, 534 U.S. 506, 511-14 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).

136. *See generally* Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions To Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61 (2007); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008). *Erickson v. Pardus*, 551 U.S. 89 (2007) (per curiam), which the Court decided just weeks after *Twombly*, further exacerbated the uncertainty because it seemed to reaffirm the pre-*Twombly* notice pleading standard. Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of* Twombly *and* Iqbal, 51 WM. & MARY L. REV. 1997, 2012 (2010).

Of course, it is questionable how much disruption *Twombly* actually created because it is unclear whether interpretive stability ever existed with respect to Rule 8(a)(2). *See* Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984) (suggesting that courts never really believed the *Conley* language).

137. The plausibility standard does not apply to those cases covered by alternative pleading regimes, such as Rule 9(b) or the Private Securities Litigation Reform Act. *See generally* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002) (comparing

what constitutes plausibility as "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[138] The first two of these actions arguably improves the clarity of pleading standards; the third all but assures that interpretive differences will linger in the lower courts indefinitely.[139]

C. Procedural Discretion

A third source of procedural disuniformity is discretion provided by the Rules themselves.[140] Many procedural rules establish fixed requirements that do not permit discretion; rules establishing time limitations are examples.[141] But many other rules operate much

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judicially imposed pleading standards with the heightened statutory pleading requirements in the Private Securities Litigation Reform Act and the Y2K Act); Jeffrey A. Parness et al., *The Substantive Elements in the New Special Pleading Laws*, 78 NEB. L. REV. 412 (1999) (reviewing statutory pleading standards).

138. 129 S. Ct. 1937, 1950 (2009).

139. *See* Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 61 n.42 (2010) (comparing critics' varying definitions of what constitutes a "conclusory" allegation to satisfy the "New Pleading" standard); Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal, 94 MINN. L. REV. 505, 520-26 (2009) (describing how different circuits have interpreted the *Iqbal* standard); *see also* Edward A. Hartnett, *Taming* Twombly*, Even After* Iqbal, 158 U. PA. L. REV. 473, 498-503 (2010) (noting that baseline assumptions and judge's experiences must inherently factor into determinations of plausibility); Suja A. Thomas, *The New Summary Judgment Motion: The Motion To Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15, 18 (2010) (arguing that the pleading standard after *Iqbal* makes the motion to dismiss equivalent in standard—and possibly in effect—to a motion for summary judgment).

In part because of the disuniformity and lack of stability generated by judicial interpretations of federal rules, Catherine Struve has criticized judicial assertions of broad interpretive authority in the context of the Federal Rules. *See generally* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1119 (2002) (criticizing broad interpretive authority in the context of federal rules). According to Professor Struve, the rule making process implies that courts should approach interpretation narrowly.

140. Interpretation might also be viewed as a form of discretion provided by the Rules. *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1970 (2007) (referring to "[i]nterpretive [d]iscretion," and arguing that some rules may be "*purposefully* written in vague language precisely so trial judges could adapt them to the circumstances of specific cases"). But for purposes of clarity, I treat the two distinctly, and refer here only to explicit delegations of discretionary authority contained within the Rules.

141. FED. R. CIV. P. 50(b) (specifying twenty-eight days after a jury verdict as the time limit for renewing a motion for judgment as a matter of law); *see also* FED. R. CIV. P. 6(a) (explaining how to measure a twenty-eight day limitation); FED. R. CIV. P. 6(b)(2) (removing

differently, and instead direct the court to exercise case-specific discretion.[142] To the extent that different judges exercise the discretion afforded them under the rules differently, the result will be disuniformity in the procedures actually applied in a given case.[143] In other words, uniform rules do not necessarily guarantee uniform procedures, even in the absence of interpretive ambiguity.

The most discussed area of procedural discretion in recent years has been the case management authority provided by Rule 16.[144] The received wisdom regarding Rule 16 suggests that the 1983 amendments created space for judges to become much more aggressive during pretrial case management.[145] What that account misses is that judges were already exercising significant discretion under the pre-amendment version of the rule, so much so that the "metamorphosis was virtually a *fait accompli*."[146] What led to the

judicial authority to extend the twenty-eight day limit under Rule 50(b)). But many rules establishing time limits may themselves be subject to judicial discretion. *See* FED. R. CIV. P. 6(b) (generally permitting the court to extend time "for good cause").

142. Subrin, *How Equity Conquered Common Law*, *supra* note 22, at 923 n.76 (identifying thirty-six distinct federal rules that explicitly delegate case-specific discretion). Indeed, rules fitting this description may be rules in name only. *See generally* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (discussing the forms of rules and standards).

143. *See* Subrin, *How Equity Conquered Common Law*, *supra* note 22, at 982-85 (arguing for stricter rules to reduce discretion and promote procedural consistency).

144. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 379-80 & n.20 (1982) [hereinafter Resnik, *Managerial Judges*]; Shapiro, *supra* note 31, at 1969-72.

145. *See* Mary Kay Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385, 407 n.130 (1987) ("The focus on pretrial management is reflected in the total revision of [R]ule 16 in 1983 providing specific authority for early judicial control of case scheduling."); Robert B. McKay, *Rule 16 and Alternative Dispute Resolution*, 63 NOTRE DAME L. REV. 818, 823 (1988) ("Rule 16 was amended in 1983 to make specific what had probably been intended from the beginning—that the trial judge was indeed the ruler, not only of the pretrial conference, but of the entire pretrial process."). The amendments to Rule 16 did more than just "create space," of course; they also required early judicial involvement in all cases, subject to categorical exclusions created by district courts. By adding a requirement of judicial involvement, the amendments to Rule 16 signaled that judges not only had authority to manage cases, but were expected to use it. *See* Marcus, *supra* note 72, at 1588 ("Beginning in 1983, Rule 16 was amended to require case management activity by all judges in most cases, *and to encourage more managerial activity than was required*.") (emphasis added); Kent Sinclair & Patrick Hanes, *Summary Judgment: A Proposal for Procedure Reform in the Core Motion Context*, 36 WM. & MARY L. REV. 1633, 1647 (1995) ("Only with the revision of Rule 16 in 1983, when a 'mandatory' obligation to generate schedule orders was grafted onto the text, did the pretrial rule begin to pressure judges to assume a managerial posture.").

146. Shapiro, *supra* note 31, at 1992.

rise of managerial judging was not a formal change in Rule 16, but a change in the willingness of courts to exercise the authority they already possessed.[147] This is not to say that the 1983 amendments were meaningless,[148] but they certainly did not introduce the concept of judicial discretion to the area of case management.

The discretion provided in the current version of Rule 16 is also entirely consistent with the original design of the Federal Rules,[149] which contemplated case-based discretion exercised by judges from their very inception.[150] Roscoe Pound, whose 1906 speech at the American Bar Association is often credited with triggering the American procedural revolution,[151] was a "lifelong proponent of judicial discretion."[152] Charles Clark, who served as the chief drafter of the Rules thirty years later, felt similarly.[153] Reflecting those influences, the 1938 set of Federal Rules had an equitable orientation,[154] and authorized the exercise of judicial discretion at several

147. A variety of factors contributed to this, from increasing caseload pressures to changes in how and when cases were assigned to judges. For full accounts of the managerial judging story, see generally E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981); Resnik, *Managerial Judges*, *supra* note 144.

148. For a discussion of the actual changes wrought by the 1983 amendments, see Shapiro, *supra* note 31, at 1984-87.

149. *See* Stephen N. Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, *in* JUDGE CHARLES EDWARD CLARK 115-16 (Peninah Petruck ed., 1991) [hereinafter Subrin, *Charles E. Clark*] ("[R]ecent procedural reforms that grant judges additional power to shape and control litigation are consonant with Clark's outlook.").

150. Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 201 (1997) (noting that the original Federal Rules were "founded upon judicial discretion").

151. Marcus, *supra* note 72, at 1575-76; Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906).

152. Marcus, *supra* note 72, at 1576; *see also* Subrin, *How Equity Conquered Common Law*, *supra* note 22, at 944-48 (recounting Pound's efforts to promote judicial discretion).

153. *See* Subrin, *Charles E. Clark*, *supra* note 149, at 116 ("At the heart of Clark's procedural outlook was his support of non-defining (what we now call 'open-textured') procedural rules; a corollary was his belief that judges should be granted broad discretion to interpret those rules. Clark distrusted lawyers and trusted judges.").

154. *See* Marcus, *supra* note 72, at 1563 ("[T]he Federal Rules of Civil Procedure ... draw their essence more from the relaxed and discretionary background of equity than the confining orientation of the common law."); Subrin, *How Equity Conquered Common Law*, *supra* note 22, at 922 ("The underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law.").

points. For example, from the beginning, Rule 15 has instructed judges to permit amendments to pleadings "when justice so requires,"[155] and Rule 42 has permitted—but not required—judges to consolidate or sever issues for trial.[156] Understood in this context, the story of Rule 16—and of other areas of increased discretion in federal procedural practice[157]—is one of adjustment rather than one of invention.

Of course, adjustments can be meaningful, too, and many academic commentators have complained that the recent trend has been to increase discretion to undesirable levels.[158] To the extent

155. FED. R. CIV. P. 15(a).

156. FED. R. CIV. P. 42. Another example of the longstanding commitment to judicial discretion in connection with the Federal Rules is Rule 1, which states that the Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." 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, 1330 (1995).

157. In other contexts, the exercise of judicial discretion is arguably cabined by the existence of specific factors that must be considered. *See, e.g.*, FED. R. CIV. P. 19(b), 23(b)(3). *See also* Bone, *supra* note 140, at 1969. But in practice, factors impose a small to nonexistent restraint on the exercise of discretion because they tend to be "very general and frequently just repeat what any sensible judge would consider anyway." *Id.*

Another important chapter in the recent story of procedural discretion is Rule 11. The 1983 amendment to Rule 11 was designed to strengthen the Rule, and that was accomplished in part by removing judicial discretion. Marcus, *supra* note 72, at 1595 & n.136 (noting that "Rule 11 expressly mandates the imposition of sanctions once a violation is found" (quoting Albright v. Upjohn Co., 788 F.2d 1217, 1222 (6th Cir. 1986))). But the experiment with a "no discretion rule" led to persistent criticism, *see* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989), and lasted only ten years. In 1993, the Rule was amended once more to restore judicial discretion to impose sanctions. *See Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 401, 507 (1993) (Scalia, J., dissenting) (arguing that the revisions would "render the Rule toothless").

But procedural discretion stories do not always end with increased discretion, and the experience with local opt-outs under Rule 26(a)'s automatic disclosure provisions may provide a counterexample. When introduced in 1993, Rule 26(a) permitted local courts to choose not to require automatic disclosures, but in 2000, the Rule was amended to remove the discretion to opt out, and was done so in order "to establish a nationally uniform practice." FED. R. CIV. P. 26 advisory committee's note (2000); *see also* Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 915 (2002) (describing opposition to the 2000 amendments from federal judges).

158. *See, e.g.*, Maureen Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 SMU L. REV. 493 (1997); Bone, *supra* note 140, at 1968-69; Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 277 (1991); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 45 (1995) ("The powers assumed by managerial judges, however, evade the important checks that the framers

that procedural discretion has indeed been expanding, it may be attributable to the increased involvement of judges in the rule-making process.[159] But a precise account of that trend is not essential here. What is clear is that judicial discretion now has a major role to play in procedure,[160] and it was ever thus.[161]

D. Inherent Authority

Beyond rules and standing orders, judges may also govern the behavior of litigants and parties during the course of litigation through the exercise of inherent authority. Inherent authority describes "incidental actions that federal judges take without a specific statutory grant as needed to exercise their primary 'judicial power' of deciding cases."[162] As that description suggests, the source of inherent authority is different from the more formal procedural mechanisms discussed thus far, both of which can be traced to statute.[163] Despite the fact that neither statute nor rule directly

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assumed would prevent judicial arbitrariness."); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 631 (arguing procedural reform has resulted in a "realignment of power").

159. *See* Bone, *supra* note 140, at 1974 ("[J]udges have come to dominate membership on the Civil Rules Advisory Committee in recent years and judges tend to favor broad discretion."); *see also* Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 627 (1994) (using public choice analysis that assumes that judges will seek to enhance their latitude as a way of serving their self-interest). *But see* Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647, 648 (1994) (resisting the self-interest assumption).

160. *See* Stephen Yeazell, *Judging Rules, Ruling Judges*, LAW & CONTEMP. PROBS., Summer 1998, at 229, 240 ("At virtually every stage of the process ... the Rules grant judges enormous discretion in the conduct and resolution of disputes.").

161. Marcus, *supra* note 72, at 1615 ("Taken in big picture terms, then, the Federal Rules construct has survived, and the current gravitation toward increased discretion does not threaten to dislodge it in a serious way."); Shapiro, *supra* note 31, at 1994 ("The history of Rule 16 ... suggests both the inevitability and the desirability of significant discretion in areas such as pretrial management.").

162. Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 738 n.4 (2001); *see also* Daniel Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1805 (1995) (defining the term as "the authority of a trial court ... to control and direct the conduct of civil litigation without any express authorization in a constitution, statute, or written rule of court").

163. Local rules are authorized directly by 28 U.S.C. § 2071(a) (2006) ("[A]ll courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."). They are further authorized by Rule 83. Standing orders lack direct statutory authority, but are authorized by Rule 83 and therefore may claim indirect statutory authority

authorizes it, the exercise of inherent power nevertheless has a long judicial pedigree, justified "by general references to Article III, traditional equitable or common law practices, efficiency, prudence, or separation of powers."[164]

Although inherent authority operates outside of the formal rules, it is not boundless, and its legitimate exercise is generally limited to certain recognized areas. In the civil context, the most relevant domain for inherent authority is the management of litigation and control of case dispositions.[165] But within that domain, the scope of a court's inherent authority is quite broad; judicial recognition of authority to control litigation predates the introduction of the Federal Rules,[166] and the Rules have therefore been interpreted as being written against the backdrop of inherent power.[167] As a result, courts have approved the use of inherent authority even in circumstances that appear to be inconsistent with the more formal requirements of the Federal Rules. For example, the Supreme Court cited inherent authority to approve a sua sponte dismissal of a case for failure to prosecute, even though Rule 41 by its clear terms

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through 28 U.S.C. § 2072. 28 U.S.C. § 2072; FED. R. CIV. P. 83. As discussed above, the power to impose sanctions for violations of local rules and standing orders has been viewed by some courts to stem from inherent authority rather than from the rules themselves. *See infra* text accompanying note 172; *see, e.g.*, United States v. Brown, 62 F. App'x 165, 165 (9th Cir. 2003) (defining inherent authority as the source of power to sanction noncompliance with standing orders).

164. *See* Pushaw, *supra* note 162, at 739, 760-82 (extensively reviewing and criticizing these justifications).

165. This includes the related ability to impose sanctions for failure to comply with orders designed to facilitate case management. *See id.* at 764-79. An unrelated area where inherent authority has been regularly invoked—"supervising the administration of criminal justice"—is not relevant for present purposes. *Id.* at 738, 779-82.

166. *See, e.g.*, Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) (recognizing "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants").

167. *See* Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962) ("The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."); G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 653 (7th Cir. 1989) (en banc) ("[T]he inherent power of a district judge—derived from the very nature and existence of his judicial office—is the broad field over which the Federal Rules of Civil Procedure are applied. Inherent authority remains the means by which district judges deal with circumstances not proscribed or specifically addressed by rule or statute."); Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co., 771 F.2d 5, 11-12 (1st Cir. 1985).

refers only to dismissals upon motion by the defendant.[168] More recently, an en banc Seventh Circuit considered whether a district judge can require a represented party to attend a settlement conference.[169] Rule 16(a) authorizes a judge to order "the attorneys and any unrepresented parties to appear,"[170] and the traditional negative implication from that specification would suggest that represented parties may not be compelled to attend. Even so, the court approved the judge's order, citing inherent authority to fill in the "gap" left by the rule.[171]

In sum, courts can issue orders and impose sanctions under the guise of inherent authority, and the exercise is relatively unchecked. From time to time, the Supreme Court has acknowledged that "inherent powers are shielded from direct democratic controls" and has urged "restraint and discretion."[172] But in practice, efforts to challenge the exercise of inherent powers are tricky, both because parties may rightfully worry about provoking sanctions or judicial ill will,[173] and because challenges are reviewed on appeal under the very forgiving "abuse of discretion" standard.[174] Thus, at the extreme, inherent authority permits the district judge to act as "a local chancellor,"[175] and the written rules—whether federal, local, or standing orders—do not adequately define the body of procedures

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168. *Link*, 370 U.S. at 629-32.

169. *Heileman*, 871 F.2d at 650.

170. FED. R. CIV. P. 16(a).

171. *Heileman*, 871 F.2d at 652-53. For a discussion—and criticism—of how courts strategically create gaps in procedural rules to justify the use of inherent power, see Samuel P. Jordan, *Situating Inherent Power Within a Rules Regime*, 87 DENV. U. L. REV. 311, 313-15 (2010).

172. Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980). In the domain of sanctions, courts have been somewhat more aggressive about monitoring the exercise of inherent authority, and have generally required that a district judge make a finding of bad faith before imposing sanctions on that basis. *See, e.g.*, Mendez v. County of San Bernardino, 540 F.3d 1109, 1131 (9th Cir. 2008); Schlaifer Nance & Co. v. Estate of Warhol, 194 F.3d 323, 338 (2d Cir. 1999); Elliott v. Tilton, 64 F.3d 213, 217 (5th Cir. 1995); Ross v. City of Waukegan, 5 F.3d 1084, 1090 (7th Cir. 1993). *But see* Hoffman v. Constr. Protective Servs., Inc., 541 F.3d 1175, 1180 (9th Cir. 2008); Dubay v. Wells, 506 F.3d 422, 433 (6th Cir. 2007).

173. Resnik, *Managerial Judges*, *supra* note 144, at 402, 413, 425, 430.

174. *See* Meador, *supra* note 162, at 1805, 1816; Pushaw, *supra* note 162, at 764. Challenges may also be difficult for the additional reason that many exercises of inherent authority may occur off the record, and may therefore be essentially unreviewable. *See* Resnik, *Managerial Judges*, *supra* note 144, at 411-13, 424-31.

175. Carrington, *supra* note 96, at 943.

applicable in a given case. Orders entered under the guise of the court's inherent authority are part of the overall procedural package, and variations in practice with respect to that authority also contribute to procedural disuniformity across cases.

E. Procedural Common Law

A final form of procedural disuniformity stems from areas not reached by the rules, but governed instead by procedural common law. Examples here include preclusion, abstention, and forum non conveniens. These relatively broad swaths of the procedural landscape have never been subject to formal rulemaking, but instead are governed by judicially-created doctrines. In this at least, procedural common law is similar to inherent authority.[176] Indeed, Amy Coney Barrett has suggested that the similarities between the two are much greater and that inherent power may be viewed as a partial source of the judicial authority to develop procedural common law.[177] Even if there is some overlap in authority, it is useful to distinguish procedural common law from the exercises of inherent power discussed in Part III.D. The primary functional distinction between the two is that procedural common law is subject to normal doctrinal development. Courts understand that their role is to create a prospective and generally applicable set of common law rules.[178] Inherent power, by contrast, is often used to justify the imposition of case-specific procedural requirements.[179]

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176. Inherent power and procedural common law are also similar in the sense that they may be constrained—at least up to a point—by the introduction of formal rules or statutes. *See* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 842-46 (2008).

177. *Id.* But she does not conclude that inherent power is the only source of that authority; rather, "federal courts can exercise a common law authority over procedure analogous to their common law authority over substance." *Id.* at 883.

178. Bone, *supra* note 140, at 1967 n.17; Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79, 111-14 (2006).

179. Put differently, the procedural requirements discussed in Part III.D are examples of inherent power being used "in the weak sense." Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1686 (2004) [hereinafter Burbank, *Procedure, Politics, and Power*].

IV. RETHINKING TRANS-TERRITORIALITY—AND REFRAMING LOCAL RULES

Widening the lens on territorial variation ultimately leads to a richer understanding of trans-territoriality as a procedural value, and of the function of local rules within our procedural system. Trans-territoriality may be an aspirational goal, but it is not one that is realistically attainable. There will always be variations in procedural requirements that are sensitive to location. Moreover, the forms of territorial variation are numerous and overlapping, such that the use of one can often substitute for another. All of this suggests that the debate about local rules should be reframed. It is not a question simply of whether to permit territorial variation in any absolute sense, but whether to permit a certain form of territorial variation. The answer to that question turns on whether local rules have features that are desirable relative to other forms of territorial variation that they may displace.

A. Inevitability and Exchangeability

Trans-territoriality is achievable if it requires nothing more than formal uniformity in the language of the written rules that are applied throughout the federal system. Viewed this way, local rules are problematic because they contribute to formal and explicit differences in written rules. Of the competing forms of territorial variation discussed in Part III, however, only standing orders raise similar concerns.[180] Interpretations and exercises of discretion occur within the rules, but do not affect their formal language. Uses of inherent power and the creation of procedural common law are even less worrisome because they fall outside the domain of the written rules altogether. Thus, local rules emerge as the primary—and perhaps the only—deviation from the trans-territorial ideal, and the argument for their elimination appears straightforward and compelling: remove local rules, and the promise of trans-territoriality is fulfilled.

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180. And given the formalistic nature of this conception of trans-territoriality, even standing orders might be distinguished from local rules on the grounds that only the latter are denoted as "rules." *See supra* Part III.A.

Unfortunately, this thin conception of trans-territoriality is inconsistent with the ends that trans-territorial procedure is intended to achieve.[181] Most obviously, a focus on the language of written rules serves only a very formalistic notion of equality. To further a more robust interest in equality, a sufficient amount of procedural consistency is required to ensure that similar cases are treated equally.[182] Superficial uniformity is therefore insufficient, and the proper emphasis instead should be on the actual procedural requirements that are imposed. Given that emphasis, any source of territorial variation raises concerns.

Formal uniformity also fails to meaningfully promote the nationalization of legal practice. A fixed set of rules means that lawyers need only memorize one set of words and numbers, but it does not put them in a position to enter a federal courtroom in an unfamiliar district without having "to rely heavily on the wisdom of local practitioners."[183] Again, a practicing lawyer is ultimately concerned with the actual procedural requirements that may be imposed, which requires more than a mere understanding of what the written rules say. In short, the value of trans-territoriality suggests something more than a formal uniformity of written rules. And given a more robust conception, local rules look much less like an outlier. To the contrary, each of the forms of variation discussed in Part III represents a deviation from the trans-territorial ideal.[184]

Of course, it should also be clear that trans-territoriality in this robust sense will always be aspirational rather than actual. It is not practical to create a procedural regime that imposes procedural

181. *See supra* Part I.B.

182. *See* Subrin, *How Equity Conquered Common Law*, *supra* note 22, at 982-85.

183. Shapiro, *supra* note 31, at 1974.

184. To be sure, some of the forms discussed in Part III are not "territorial" in precisely the same way as local rules. Local rules create procedural differences that apply throughout a federal judicial district; thus, the relevant territory is defined along district lines. The territorial divisions associated with competing forms are occasionally broader. For example, when an appellate court has interpreted a rule in a particular way, the relevant territory is demarcated by circuit lines. More often, the divisions are narrower. When an individual judge chooses how to exercise procedural discretion, or whether to supplement the formal rules with a procedural requirement justified by inherent power, the relevant territory is limited to the individual courtroom. Despite these distinctions in the physical scope of the variation, each of the forms discussed contributes to differences in procedural requirements that are attributable to the location of the suit, and each therefore undermines the goal of uniformity embodied by the value of trans-territoriality.

requirements that are not sensitive to the location of the suit. Rather, the creation of a set of procedural rules that applies across the federal system will inevitably involve territorial variation in one form or another. Local rules should therefore be viewed as one potential component of an inevitable mix of territorial variation. So situated, the question of whether they should be retained—and in what role—becomes more complex. It is not enough simply to ask whether local rules disrupt territorial uniformity, for at some level of course they do. Instead, the appropriate question is whether a procedural regime that permits local rules produces a better mix of territorial variation than one that does not.

Reframing the question in this way does not necessarily entail a different conclusion. Even if trans-territoriality cannot be fully achieved, it still might support an effort to root out deviations wherever possible. Some competing forms—such as interpretation[185] and the exercise of inherent power[186]—may be impossible to eliminate, but local rules may remain an attractive target that would reduce the total amount of territorial variation in the procedural system. What this misses, however, is that the forms of territorial variation are interrelated and transposable, at least to some extent. That is, the introduction of a local rule can often serve to displace a competing form of territorial variation. Many local rules define requirements that might otherwise be imposed through a standing order or an exercise of inherent power, whereas others channel the exercise of judicial discretion or fix meaning that might otherwise be selected through interpretation. In short, local rules do not exist in a vacuum, and their presence or absence will have ancillary effects on the overall level and composition of territorial variation in the procedural system.[187] A proper understanding of their desirability

185. Even Professor Struve concedes that some judicial interpretation will necessarily accompany the introduction and application of a set of procedural rules. *See* Struve, *supra* note 139, at 1102.

186. Commentators and courts have long suggested that the legislative power to limit inherent power is itself limited, although uncertainty remains about the precise scope of the limitation. *See, e.g.*, Burbank, *Procedure, Politics, and Power*, *supra* note 179, at 1688.

187. Although local rules can substitute for other forms of territorial variation, they will not always do so. Therefore, the availability of local rules as a form of territorial variation may generate some overall increase in the level of disuniformity within the federal system. But that does not necessarily mean that we should seek to eliminate local rules. Ultimately, we should be concerned not just about the amount of territorial disuniformity, but also about its quality. Consideration of the overall mix of territorial variation in a system that permits

and function thus requires a consideration of the way that they interact with—and compare to—competing forms of territorial variation. Part IV.B engages in such a comparison, and concludes that local rules have some significant advantages that should lead to acceptance of, and perhaps even enthusiasm for their role in the procedural framework.

B. A Comparative Assessment of Local Rules

When compared with competing forms of territorial variation, local rules emerge as desirable along several dimensions. They are transparent, which—contrary to common understanding—means that they facilitate national practice. They involve significant levels of participation and input from judges, as well as from nonjudicial actors. And they apply uniformly throughout a judicial district and across time, which promotes a desirable form of equal treatment among cases.

1. Transparency and Nationalization

Local rules are transparent in the sense that they are visible and easily discoverable. This is not altogether surprising, given that many of the recent amendments to Rule 83 have been designed explicitly to facilitate those qualities. For example, the current version of Rule 83(a)(1) requires district courts to "conform to any uniform numbering system prescribed by the Judicial Conference of the United States."[188] Thus, local rules now track the numbering of the Federal Rules, which makes it easy for lawyers familiar with the latter to locate counterparts in the former. This task is made even simpler by the fact that local rules are now posted on court websites, often in a searchable format.[189] As a result, a lawyer interested in

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local rules may lead us to tolerate the former to enhance the latter.

188. FED. R. CIV. P. 83(a)(1). Prior to this requirement, district courts used a variety of competing numbering systems for local rules, which made it difficult to find and compare local rules. *See* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT ON LOCAL RULES 17 (2004), *available at* http://www.uscourts.gov/uscourts/RulesandPolicies/rules/Final_Local_Rules_Report_March_%202004.pdf (listing districts not in compliance with the Uniform Numbering System).

189. In some districts, the court website includes a search function. *See, e.g.*, United States District Court: Northern District of Illinois, Local Rules, http://www.ilnd.uscourts.gov/home/

discovering local rules relating to summary judgment in a particular district can do so either by looking at Local Rule 56 or by performing a basic search of the local rules. Local rules are also transparent in the sense that they are defined in advance. They are promulgated according to a set process,[190] become enforceable on a set date, and generally are not applied retroactively.[191] This means that they, like the Federal Rules themselves, represent a set of procedural requirements that are not only discoverable, but discoverable prior to any interaction with the court.[192]

Most competing forms of territorial variation are relatively less transparent. Standing orders basically track local rules in that they are available on court websites and are predefined, but they need not conform to any particular organizational structure, which at the margins makes them more difficult to navigate.[193] If the governing

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LocalRules.aspx?rtab=localrule (last visited Oct. 13, 2010). In other districts, there is no search function, but the rules are available as a downloadable document that can be searched. *See, e.g.*, United States District Court: District of Montana, Local Rules, http://www.mtd.uscourts.gov/rules.htm (last visited Oct. 13, 2010) (providing a downloadable PDF of the court's rules).

190. *See supra* notes 73-74 and accompanying text.

191. FED. R. CIV. P. 83(a)(1) ("A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit."); *see also* Wash. Mobilization Comm. v. Cullinane, 400 F. Supp. 186, 190 n.2 (D.D.C. 1975) (finding that a local rule relating to requirements for class certification promulgated after the filing of the complaint would not apply retroactively to class certification determination), *rev'd in part on other grounds*, 566 F.2d 107 (D.C. Cir. 1977); Boring v. Medusa Portland Cement Co., 63 F.R.D. 78, 80 (M.D. Pa. 1974) ("Our local rules ... have no retroactive effect.").

192. Of course, there are downsides to predefinition. Relative to some other forms of territorial variation such as discretion and inherent authority, local rules are more inflexible precisely because they involve the predefinition of procedural requirements rather than the development of requirements within the context of specific cases. So to the extent we prefer specific and contextual requirements, we may prefer to eschew local rules in favor of those other forms. Indeed, the choice to embed a discretionary standard within a generally applicable federal rule may reflect a conclusion that contextual judgment is needed. This suggests that we should not expect local rules to be capable of displacing other forms that permit contextual decision making. But short of total displacement, there is still room for local rules to eliminate or narrow discretion in some instances, such as when the selection of a discretionary standard reflects a failure to reach a national consensus on a more fixed rule.

193. Rule 83(b) specifies that standing orders may not be enforced absent "actual notice" in advance to the alleged violator. FED. R. CIV. P. 83(b). This requirement might be strictly enforced to ensure that nonuniform numbering or organization will not disadvantage lawyers and parties, but in practice the Internet publication of a judge's standing orders in toto has been viewed to satisfy the requirement of actual notice. *See supra* notes 119-21 and accompanying text.

appellate court has interpreted a particular rule provision, then that interpretation is like a local rule in the sense that it is discoverable and knowable in advance, although the method of discovery takes a different form. In the event that there is no binding interpretation by the appellate court, the diligent lawyer's next move would be to research interpretations at the district court level, either by the presiding judge or her colleagues. But these earlier interpretations are merely predictive,[194] and for that reason they are not discoverable in the same manner as local rules and binding interpretations. Moreover, the task of compiling and reconciling competing interpretations by multiple district judges is not nearly as straightforward as the identification of a governing local rule. Areas governed by procedural common law function similarly to interpretation: in the absence of a binding appellate decision, lawyers will rely on uncertain predictions based on prior decisions at the district court level.

Areas governed by discretion and inherent authority are less transparent still. Although the discretionary standard may be knowable in advance, the way that any given judge will choose to implement that discretion is much more difficult to ascertain. Again, prior opinions may help, but their predictive value is arguably weaker because of the context-specific nature of discretionary decisions. A larger problem is that most exercises of discretion will not find their way into a published opinion at all, and so the informational cue provided by prior cases will be incomplete.[195] Instead, the best predictive source with respect to discretion-based

194. This is true even of prior interpretations by the same district judge. A district judge who has interpreted a rule in a particular way in a previous case may be likely to adopt the same interpretation again, but that result is not compelled because traditional stare decisis principles do not apply to district judges. Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1015, 1070 (2003); *see also* Midlock v. Apple Vacations W., Inc., 406 F.3d 453, 457-58 (7th Cir. 2005); Threadgill v. Armstrong World Indus., Inc., 928 F.2d 1366, 1371 (3d Cir. 1991).

195. This point applies in the interpretive context, too. Not all interpretations will be reduced to a formal opinion, although perhaps actions based on interpretation are relatively more likely to trigger a written explanation than those based on discretion. *See* Judge Diane Wood, Remarks from Panel 2: Tools for Ensuring that Settlements Are "Fair, Reasonable, and Adequate," at the FTC Workshop on Protecting Consumer Interests in Class Actions (Sept. 13-14, 2004), *in* 18 GEO. J. LEGAL ETHICS 1197, 1213 (2005) (stating many opinions happen "quietly in the chambers of the judges" and one will have "a distorted view of what's going on if you're looking only at the published opinions").

procedural requirements is prior experience with the judge. Lawyers seeking to know how the broad authority provided under Rule 16 will be exercised are likely to ask other lawyers who have experience practicing before the judge. As for inherent authority, because it is used less frequently, and perhaps less predictably or consistently, the available predictive information is even more limited. Thus, while it is true that procedural requirements are transparent inasmuch as they cannot generally be enforced without first being made explicit, it is also true that lawyers and parties will be hard pressed to know what those requirements might be at the outset of the case.

All of this turns one of the traditional arguments against local rules on its head. Critics of local rules have long argued that local rules discourage the nationalization of legal practice, and therefore are in tension with one of the original goals of trans-territorial procedure.[196] The basis for that complaint is that nonlocal counsel are burdened by the need to discover and master local rules. But regardless of whether local rules are permitted, a lawyer must familiarize herself with the local legal culture to practice effectively in a new geographic district, or even in front of a new judge within the same district. In practice, local rules may serve to level the playing field by formalizing that local legal culture and presenting it in a visible way. Put differently, if local rulemaking authority is removed, territorial variation will not disappear, but will become embedded in less visible forms, and the disadvantage presented to the outsider will be exacerbated rather than relieved.

2. Participation and Quality

Local rules also involve input from nonjudicial actors. Again, this is the result of intentional changes to the local rulemaking process that have been designed to enhance participation rights. To begin, the current version of Rule 83 requires a period for notice and comment before local rules are promulgated, which gives an avenue for participation to anyone who might be affected by a proposed rule change.[197] Moreover, many recent developments in local rules have

196. For a discussion of the nationalization goal of trans-territoriality, see *supra* Part I.B.1.

197. FED. R. CIV. P. 83. This requirement is of fairly new vintage, and was introduced to address concerns about the insulated nature of the local rulemaking process. *See supra* notes

their roots in the Civil Justice Reform Act of 1990, which requires the creation of an advisory committee that consists of a mix of judges and others "who must live with the civil justice system on a regular basis."[198] Taken together, these process reforms mean that local rules now reflect the input of nonjudicial actors both at the stage of initial drafting, and at the stage of postdrafting consideration.

Admittedly, these participation rights remain weak. Nonjudicial actors have no final role in the rulemaking process; the ultimate decision about whether to adopt a local rule remains firmly in the hands of the district judges themselves.[199] In other words, nonjudicial actors are granted a voice in the process but denied a vote. Moreover, the rights that exist are imperfect. Although anyone may participate in the notice and comment process, in practice the voices raised are likely to be local. Consequently, the input generated may be skewed, and the resulting rules may favor local interests.[200]

But even if limited and imperfect, these participation rights distinguish local rules from competing forms of territorial variation. Standing orders, for example, involve no formal participation rights other than the standard right to appeal.[201] As for the remaining forms of territorial variation, the ability of nonjudicial actors to participate is generally limited to participation in the litigation process itself. That is, a lawyer involved in a particular case may have an opportunity to argue on behalf of her preferred interpretation, or on behalf of her preferred exercise of discretion, and that argument may contribute to the development of the procedural rules imposed

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105-08 and accompanying text.

198. 136 CONG. REC. S101-108 (daily ed. Jan. 25, 1990) (statement of Sen. Biden).

199. And another potential form of participation in the process—appellate challenge of the rules actually adopted—has been generally resisted by the appellate courts. *See* Flanders, *supra* note 11, at 217-18 (describing the failure of appellate courts to monitor and enforce statutory limitations on the proper scope of local rules). Even if appellate courts were more aggressive, however, they would be authorized to act only when an adopted rule is inconsistent with the rulemaking authority provided by Rule 83. In other words, the appellate courts could not impose a competing local rule on the basis of preference alone.

200. *See supra* notes 104-08 and accompanying text. But of course, the presence of local input, even if disproportionate to nonlocal input, does not guarantee that the resulting rules will be skewed.

201. *See supra* notes 116-19 and accompanying text (describing the process for promulgating standing orders).

in the case.[202] But this case-specific participation is different in kind from the ability to contribute to the development of generally applicable rules that the local rulemaking process provides, especially because the number of participants in that latter process is potentially much greater and more diverse.

3. Scope and Equality

The scope of local rules differs from the scope of competing forms of territorial variation in two respects. First, the territorial scope of local rules is not the same as competing forms. Local rules apply throughout a federal district. Standing orders, as well as exercises of discretion and inherent power, operate more narrowly at the level of the individual district judge. Rule interpretations may operate at that level, too, although they can also be broader, as when the Supreme Court or the appellate court has issued an interpretation. The territorial scope of procedural common law may also range from the district level to the national level, depending on the status of doctrinal development. Second, the temporal scope of local rules is not the same as competing forms. Once promulgated, local rules apply prospectively to all cases, at least until amended. They share this stability with standing orders, appellate interpretations, and some procedural common law. But other competing forms are less stable. Interpretations made by district judges are governed by the law of the case principles, but do not have any precedential value that extends beyond the judgment. Exercises of discretion and inherent power are similar; a district judge may exercise discretion to impose a procedural requirement in one case, and then decline to impose that requirement in the next case, even if the two cases are similar.

These differences in scope have effects in terms of how similar cases are treated. The notions of equality embedded in the design of our procedural system demand that similar cases reach similar outcomes, and this demand for equality is sensitive to both territory and time. Because they apply to every case throughout a federal district, local rules have the salutary effect of making the procedural

202. And even this form of participation is not guaranteed. A court need not ask for input from lawyers before interpreting a rule or exercising rule-based discretion.

requirements imposed by judges within that district more consistent. And because they are stable unless formally amended through an established process, they also make those requirements more consistent over time. In some circumstances, a different form of territorial variation may better promote equality, but local rules offer a mix of territorial and temporal consistency that is relatively attractive.

Of course, local rules do not serve the equality interest perfectly. Variations in procedural requirements will undoubtedly remain even in a regime that permits local rules, and variations in the treatment of similar cases may therefore result. But because these variations track district lines, they may be more acceptable than other variations that appear much more random. Put differently, differences in outcomes based on the district where the case is filed may be less damaging to our intuitions of fairness than differences in outcomes based on the judge within a district to whom a case is assigned.

CONCLUSION

The essence of the traditional complaint about local rules is that they create geographic variations in the federal system, and that those variations undermine the procedural value of trans-territoriality. Procedural uniformity is good; local rules disrupt uniformity; therefore, local rules must go. This argument is facially attractive, but ultimately unconvincing. It views local rules as an outlier, as an obstacle to the fulfillment of an ideal. But in practice, territorial variations in procedural requirements are common and inevitable, and the sources of those variations are numerous and transposable. If we broaden the lens on territorial variation, the debate about local rules looks much different. The choice is not between two procedural systems, one with territorial variation and one without. It is between two profiles of territorial variation, one that includes local rules and one that does not.