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Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure

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BRAKING THE RULES: WHY STATE COURTS SHOULD NOT REPLICATE AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Stephen N. Subrin[†] & *Thomas O. Main*^{††}

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INTRODUCTION

We have criticized the amendments to the Federal Rules of Civil Procedure since the 1980s and the procedural changes made by United States Supreme Court decisions during the same period.¹ These

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1. Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1877–89 (2014).

amendments and changes, even if subtle and incremental, launched a new era—the Fourth Era in the grand history of American civil procedure. In this era, tragically, litigation is often perceived as a nuisance, trials are a mistake, and judicial case management is a catholicon.

In this Article, we turn our attention to state court procedure. States could follow their federal counterparts; indeed, the pursuit of uniformity can be instinctive. Yet this Article urges states to resist the siren song of uniformity in favor of more noble pursuits.

The occasion for this Article is the most recent wave of amendments to the Federal Rules which included (i) the abrogation of Rule 84 and the forms; and (ii) the incorporation of proportionality into the scope of discovery. Although these amendments, like many that preceded them, restrict litigants' access to court and also to evidence, it is not obvious that these amendments are especially consequential. Such is the nature of incremental reforms that are significant only when viewed cumulatively and retrospectively. But Chief Justice Roberts described the amendments as effecting a “significant change, for both lawyers and judges, in the future conduct of civil trials.”² Accordingly, this seems like an appropriate time to consider the extent to which states do and should replicate federal procedure.

One argument in favor of replication would exalt the quality of the federal amendment process. To be sure, federal procedural amendments go through a lengthy process that includes review by the Advisory Committee on Civil Rules, the Committee on Rules of Practice and Procedure (the “Standing Committee”), the Judicial Conference of the United States, the United States Supreme Court, and finally, the United States Congress.³ These processes include not only public hearings, but also periods during which the public is encouraged to submit comments and offer testimony.⁴ Such a lengthy and costly process—one that would be difficult for states to duplicate—might fairly be assumed to result in high quality amendments that states should, in turn, replicate. Similarly, Supreme Court opinions are the

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2. JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (2015), <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> [<https://perma.cc/6TV9-BAJT>] (“The amendments may not look like a big deal at first glance, but they are.”).
 3. Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. §§ 2072–74) (detailing the federal procedural amendment process); James C. Duff, *Overview for the Bench, Bar, and Public: The Federal Rules of Practice and Procedure*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public> [<https://perma.cc/ZU4T-P3WQ>] (last visited Dec. 28, 2016).
 4. See generally Duff, *supra* note 3 (explaining the publication and public comment process).

product of deliberate and solemn processes. Procedural and other matters that are resolved by the Supreme Court have already been litigated at trial and appellate courts, and Supreme Court cases are typically briefed and argued by expert advocates. Allowing interest groups to file amicus briefs further ensures a breadth and depth of judicial perspective.⁵

Yet the quality of the federal rulemaking and decision-making processes is not a persuasive justification for states to replicate the federal model. The supposed superiority of these federal processes is, in fact, suspect.⁶ Twenty years ago the process of federal rulemaking was under such intense criticism that the Standing Committee itself commissioned a self-study of the rulemaking process.⁷ Recently, Professor Richard Freer chronicled the persistence of many of those same criticisms, and identified new critiques, in his article, *The Continuing Gloom About Federal Judicial Rulemaking*.⁸ Observers are “gloomy” for different and even apparently contradictory reasons: the rules committee acts in haste and is too slow; the committee fails to lead and innovate on things that matter, and engages in irresponsible experiments; the committee is obsessed with trivial wordsmithing and is dangerously politicized.⁹ Unfortunately, these oppositional pairs of criticism do not cancel each other out; instead, both halves are accurate, depending on the year and the specific reform at issue. In the Conclusion, this Article rebuts any perception or presumption that any product of the federal rulemaking process is necessarily enlightened and prudent.

Interpretations of procedural changes effected by Supreme Court decisions are also suspect. Although recent empirical scholarship advises skepticism about the role of ideology at the trial court level, there are

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5. See generally Katherine Shaw, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 CORNELL L. REV. 1533 (2016) (considering the influence of amicus briefs and their authors on Supreme Court jurisprudence); Linda H. Edwards, *Hearing Voices: Non-Party Stories in Abortion and Gay Rights Advocacy*, 2015 MICH. ST. L. REV. 1327 (2015) (detailing the influence of amicus briefs in the development of abortion and LGBT rights).
 6. See generally Symposium, *State Civil Procedure*, 35 W. ST. U. L. REV. 255 (2007) (discussing class action litigation and the impact of state and federal civil procedure codes).
 7. Daniel R. Coquillette, *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, 683 (1995).
 8. Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447 (2013).
 9. *Id.* at 449 (collecting citations).

“demonstrated political effects in Supreme Court decision-making.”¹⁰ Accordingly, a state cannot replicate the Court’s changes to procedural law for its own jurisprudence without also endorsing the ideology that may be embedded in the reform. Of course, a state might share the ideology and might desire the reform’s effect, but replication would not be because of the superior quality of the decision-making by the Supreme Court. Replication would require a policy choice, and therefore, hopefully, a policy debate.

Even if the rigor and wisdom of the amendment process is an insufficient reason for states to replicate their federal counterpart, one might fairly suggest that uniformity—for its own sake—is reason enough. Yet again we would disagree. To be sure, the idea of procedural uniformity is seductive. Indeed, the idea is so deeply embedded in our thoughts that many who advocate for uniformity find it difficult or unnecessary to explain why it is thought to be good—as if it were some excellence in itself.¹¹

Whether because of the lure of simplicity, the appearance of neutrality, the likeness to science, the feel of efficiency, the imprimatur of professionalism or some combination of these, the norm of procedural uniformity enjoys virtually universal approval. Thus, it should come as no surprise that the *rhetoric* of uniformity is both pervasive and predominant in the discourse of procedural reform.¹²

For example, procedural uniformity was a central theme of the reform that led ultimately to the promulgation of the original Federal Rules of Civil Procedure.¹³

Part of the drafters’ promise of uniformity was the contemplated adoption by states of the federal model. The Federal Rules were, after

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10. See, e.g., Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014) (considering “how interactions and competition among institutions have produced the contemporary state of federal civil litigation”); see also Thomas O. Main, *Procedural Constants: How Delay Aversion Shapes Reform*, 15 NEV. L.J. 1597, 1601, 1601 nn.35–36 (2015) (collecting authorities) (recognizing skepticism about ideology’s role in trial courts).
 11. See Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 311 (2001) (acknowledging the difficulty of explaining why procedural uniformity is good).
 12. *Id.* at 311–12 (citations omitted).
 13. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 992 (1987) (recounting theoretical bases leading to the federal rule’s reformation).

all, “one of the greatest contributions to the free and unhampered administration of law and justice ever struck off by any group of men since the dawn of civilized law.”¹⁴ Further,

[t]hat state which tries to live unto itself will suffer, if it does not perish [W]e are all for one and one for all [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.¹⁵

Replication by states of the Federal Rules would streamline both the teaching and the practice of procedure. By mastering one set of procedural rules nascent lawyers would be prepared to practice in federal and state courts.¹⁶ But most states did not replicate the Federal Rules. And as this Article explores more fully in Part II, even those states that replicated the original Federal Rules have not kept pace with all of the amendments.

Part II also explores other dimensions of uniformity. Another supposed virtue of the Federal Rules of Civil Procedure was both inter-district and trans-substantive uniformity: the same procedural rules would apply in all federal courts and to all types of substantive actions. But as so often happens in life, when dreams or reforms confront reality, the outcome falls short of the expectation.

Procedural uniformity under the Federal Rules regime has unraveled at every level, not least because the generality of the rules ensured, in Professor Burbank’s apt description of trans-substantive procedure, that there would be uniformity in only “the most trivial sense.”¹⁷ Specifically, judicial discretion and attorney latitude reigned, undermining any meaningful role for the Federal Rules in a quest for uniformity.¹⁸ Under these circumstances it would be ironic—even paradoxical—for a state to replicate the federal rules for the sake of uniformity when the adopted text is so fluid and indeterminate that it cannot maintain uniformity even with itself.

Of course, the Federal Rules and their amendments could be the product of a flawed rulemaking process, fail to deliver on the promise of uniformity, and yet still be compelling content that is suitable for

14. B.H. Carey, *In Favor of Uniformity*, 3 F.R.D. 505, 507 (1943).

15. Thomas Wall Shelton, *A New Era of Judicial Relations*, 23 CASE & COMMENT 388, 393 (1917).

16. Subrin, *supra* note 13, at 974; *see generally* Janice Toran, ‘Tis a Gift to be Simple: Aesthetics and Procedural Reform, 89 MICH. L. REV. 352, 371–86 (1990) (discussing an aesthetic perspective in procedural rule reform).

17. Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 715 (1988).

18. *See infra* notes 28–46 and accompanying text.

adoption by the states. But it turns out that proponents of replication at the state level would have to make a lot of assumptions that turn out not to be true, namely that:

- the number, the substantive mix, and the stakes of federal and state caseloads, respectively, are the same;
- the state courts have the judicial resources that federal procedure pre-supposes;
- the litigants in state courts can afford federal practice;
- the federal procedural amendments, whether by actual amendment or judicial decree, are working well for most cases;
- the drastic diminution of trials and juries in federal courts are salutary for our democracy; and
- state court procedural experimentation should be discouraged.

The Conclusion reveals the misguided nature of these assumptions. This Article will give examples of the mismatch of the federal amendments for the state court caseload.

The Conclusion ends with a question for state court judges. Simply put, what do you want your role as judges to be? The federal judiciary has become a huge bureaucracy (judges represent only a small percentage of the personnel) which has essentially given up on the major role of adjudication.¹⁹ They spend little time in the court room, and, on average, “preside over a civil trial approximately once every three months.”²⁰ They, and in large measure the lawyers who appear before them, have had little experience with trials or with juries. They dispose of cases on dispositive motions and urge settlement or alternative modes of dispute resolution.²¹ The American jury is disappearing, and to have a trial is thought to be a judicial failure.²² This is not hyperbole. We hope that state judges avoid replicating this, and instead offer alternative models.

I. THE LACK OF UNIFORMITY

The drafters of the Federal Rules of Civil Procedure promised four species of uniformity. Inter-district uniformity and trans-substantive uniformity were to be realized from the moment of adoption. Intra-state uniformity and then inter-state uniformity were to follow in due course. Yet uniformity, whatever its rhetorical allure and supposed virtue, has been elusive as a matter of fact.

19. See *infra* notes 36–41, 124–160 and accompanying text.

20. Main, *supra* note 10, at 1627.

21. See *infra* notes 103–104, 176–179.

22. See *infra* note 179 and accompanying text.

A. Inter-District and Trans-Substantive Uniformity

With the promulgation of the Federal Rules of Civil Procedure in 1938, one set of procedural rules applied in all federal district courts across the country. This effected so-called inter-district uniformity. This uniform set of procedural rules replaced prior regimes of federal Process Acts and Conformity Acts that had required federal courts, in cases at law, to conform to the procedure of the state in which the federal court sat.²³ Under the prior regimes, one federal court was applying the common law procedure of its host state, while a federal court in another state was applying the procedural codes of its host. Such divergence was inconsistent with the emerging notion of a system of federal courts, and reforms to make a uniform procedure for the federal courts found traction. Notice, however, that the Federal Rules of Civil Procedure replaced one species of procedural uniformity (i.e., a uniform procedure within the state and federal courts of a state) with the pursuit of another, to-wit, inter-district uniformity.

A second feature of these new, uniform Federal Rules of Civil Procedure was trans-substantive uniformity—all types of substantive actions were subject to the same procedural mandate.²⁴ In other words, no matter whether the case was a simple slip-and-fall case or a complex antitrust action, federal judges would apply one and the same textual rule.²⁵ This, too, was a departure from prior regimes that tailored the procedural mandates so that they were substance-specific.²⁶ The

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23. See generally Subrin, *supra* note 13, at 930 (explaining the difficulty of deciding when to follow state or federal procedural rules); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1036–43 (1982) (discussing the Process Acts and the Conformity Act of 1872 and their influence on state and federal procedural law).
24. See generally EDWARD BRUNET, JOHN PARRY & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 9:1 (3d ed. 2006) (recounting the historical background of the trans-substantive nature of the Federal Rules).
25. See generally Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244–47 (1989) (responding to criticisms of the trans-substantive scope of the Federal Rules); see also Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 776–79 (1993) (reviewing merits and demerits of trans-substantivity).
26. See Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 379, 383 (2010) (recounting the different procedural systems used in England and the inevitability of trans-substantive rules); Subrin, *supra* note 13, at 915; Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 455 (2003) (discussing common law pleading).

drafters urged trans-substantive rules for the purposes of “uniformity and simplicity.”²⁷

The pursuit of trans-substantive uniformity—and, to some extent, also the pursuit of inter-district uniformity—led the drafters to craft rules that were elastic enough to apply in a broad range of circumstances and settings. “‘Tight will tear; Wide will wear’ was the sartorial wisdom applied by the draftsmen.”²⁸ A related aspiration of the Federal Rules was to vest judges with broad discretion; in a nutshell, the drafters wanted to let the judges judge.²⁹ But this lack of restraint, whatever its merits, means that there is a substantial amount of *ad hoc* decision-making which, in turn, necessarily creates substantial disuniformity in practice.

Even a cursory review of the Federal Rules reveals the extent to which the drafters (and amenders) rely on flexible standards, rather than predictable rules. Put a different way, the Federal Rules often do not set forth bright-line rules, but instead rely upon judicial interpretations. A complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief;”³⁰ but what exactly does that mean? Motions to amend require the judge to determine “when justice so requires.”³¹ A key inquiry in many class actions is whether “questions of law or fact common to class members predominate” over individual questions.³² The scope of discovery includes that which is “relevant”—and, now, that which is “proportional to the needs of the case.”³³ Of course, a judge may also order separate trials “for convenience” or “to avoid prejudice.”³⁴ More examples are plentiful.³⁵ The point here is simply that the Federal Rules frequently postpone—or outsource—the procedural mandate to case-by-case

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27. Subrin, *supra* note 13, at 977. *See also* Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2081–85 (1988) (arguing in favor of trans-substantive rules and noting that “procedural complexity defeats substantive rights”).
 28. Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 949 (1996) (quoting FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* 195 n.6 (William G. Hammond ed., 3d ed. 1880)).
 29. *See* Subrin, *supra* note 13, at 944–48 (chronicling the extent to which the Federal Rules were modeled on equity rather than common law antecedents).
 30. FED. R. CIV. P. 8(a)(2).
 31. FED. R. CIV. P. 15(a)(2).
 32. FED. R. CIV. P. 23(b)(3).
 33. FED. R. CIV. P. 26(b).
 34. FED. R. CIV. P. 42(b).
 35. *E.g.*, FED. R. CIV. P. 1, 4(f)(3), 8(e), 11.

determination; the virtue of such *ad hoc* decision-making comes at the expense of uniformity.

Further, the profound significance of judicial case management on the development and outcomes of cases is increasingly well-known.³⁶ The Federal Rules require judges to manage their cases through settlement conferences, status conferences, discovery conferences, and pretrial conferences.³⁷ But other than establishing a basic agenda for those conferences, the Federal Rules neither prescribe nor proscribe judicial conduct that occurs in those conferences. The notion of outsourcing, again, is an apt metaphor for this notion that the Federal Rules anticipate active judicial case management but do not circumscribe it.

Moreover, the disposition of cases while under case management has made adjudication an increasingly opaque process. Gone are the days when cases were resolved either by trial in a public courtroom or by a voluntary settlement in the shadow of a trial.³⁸ Instead, an ever-expanding constellation of actors earnestly manage cases toward settlement, toward disposition by motion, or for that rare one to two percent of cases, toward a trial.³⁹ Importantly, the emergence of a judicial bureaucracy attended this transformation of the judicial role: the number of senior judges, magistrate judges, law clerks, staff attorneys, and externs expanded to assist judges whose duties were more focused on managing cases, than on trying cases.⁴⁰ And because all of this occurs beyond the reach of procedural rules, one might fairly assume that there

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36. See generally Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1262–68 (2005) (chronicling “the ascendance of a judicial ideology that commends intensive judicial case management and active promotion of settlements”); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 992–93 (2000) (discussing how the judiciary’s institutional and adjudicatory roles have blurred); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 414–31 (1982) (evaluating the techniques and achievements of managerial judging).
37. See generally Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849 (2013) (discussing ways in which judges are becoming more involved in cases outside of their chambers).
38. See Main, *supra* note 10, at 1599 (explaining that judges often push cases towards settlement from the onset).
39. *Id.* at 1599.
40. See generally Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1456 (1983) (“The proliferation of staff and subjudges and the delegation of power to them weaken the judge’s individual sense of responsibility.”). See also Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 92–94 (2012) (documenting the contributions of senior judges).

is substantial disuniformity across districts, and probably even among the judges within a single district.⁴¹

Even at the level of text, one can find a significant amount of disuniformity in procedural practice under the Federal Rules. Federal Rule 83 authorizes districts to adopt local rules, and these rules have the force of law.⁴² The “problem of divergence between local and national rules” is persistent and consequential.⁴³ But local rules are only one source of this problem. In the late 1980s, the rulemakers’ own inquiry “found that quite a few additional requirements, variously denominated general orders, standing orders, special orders, scheduling orders, or minute orders, as well as individual judge practices” resulted in disparate practice across the system of federal courts.⁴⁴ The Civil Justice Reform Act of 1990 (CJRA) further complicated this picture, by requiring each district to adopt a plan to address the expense and delay of litigation; the CJRA unleashed “ninety-four amateur rulemaking groups . . . [to] foment[] a nationwide procedural revolution that is probably unparalleled since the enactment of the Federal Rules of Civil Procedure in 1938.”⁴⁵ Critics have described how these reforms led to a “balkanization” of procedure and turned federal practice into a veritable “Tower of Babel.”⁴⁶ Although the CJRA has technically reached

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41. See generally Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1474 (1987) (describing judicial discretion inherent in the Federal Rules); Burbank, *supra* note 17, at 715 (arguing that ad hoc decision-making sacrifices predictability); Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 679 (1997) (noting criticism that discretion in the Federal Rules prevents predictability and uniformity); Subrin, *supra* note 26, at 391 (noting that discretion empowers judges to treat similar cases differently).
 42. FED. R. CIV. P. 83; *Hollingsworth v. Perry*, 558 U.S. 183, 191 (2010).
 43. 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, *FEDERAL PRACTICE AND PROCEDURE* § 3153 (2d ed. 2014) (citing a 1991 article from a former Director of the Federal Judicial Center that referred to “rampant inconsistency between local and national rules,” and noting that “[p]olicing local divergences has proved difficult”).
 44. See Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547, 555 (1998) (citing COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE (1989)); Daniel R. Coquillette et al., *The Role of Local Rules*, A.B.A. J., Jan. 1989, at 62 (summarizing the Local Rules Project).
 45. Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 376–77 (1992).
 46. See generally Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1427 (1992) (recognizing the balkanization of procedure resulting from rules); Mullenix, *supra* note 45, at 381 n.22 (crediting Professor Rosenberg as first to use the Tower of

its sunset, the phenomenon of inter-district disuniformity persists, with a number of “pilot projects” now also layered into federal practice and procedure.⁴⁷

We have explained the level of generality demanded for trans-substantive rules, explained the broad discretion accorded trial judges, and described the local tailoring of practice and procedure across the federal system. The architects of a procedural system might fairly criticize or defend each of these choices. Our intention in this Part is simply to establish that states cannot meaningfully replicate federal procedure when the federal procedure itself boasts of an indeterminacy and flexibility that resists definition. After all, what can it mean to say that one looks like Proteus?⁴⁸

B. Intra-State and Inter-State Uniformity

The drafters of the Federal Rules envisioned that states would replicate this enlightened set of procedural rules. This anticipated conformity would run in the opposite direction of that which prevailed in actions at law under the federal Process Acts and Conformity Acts, when the federal courts followed the procedure of the state in which they sat.⁴⁹ In the new regime, as soon as a state adopted the federal model, there would be intra-state uniformity: lawyers and judges in that state would be governed by the same procedural rules, whether they were in federal or state court. And even more ambitiously, when *all* states made this transition, there would be inter-state (or inter-system) uniformity.

Babel metaphor for local rules). *But see* Carl Tobias, *Fin-De-Siècle Federal Civil Procedure*, 51 FLA. L. REV. 641, 659 (1999) (cautioning against exaggeration of empirical data of balkanization).

47. *See, e.g.*, Laura McNabb, *Pilot Project Reduces Delay and Cost in Federal Litigation*, 41 A.B.A. SEC. LITIG., Spring 2015, at 55 (describing a pilot project “designed to streamline pretrial discovery in certain employment cases”); *see also* *Electronic Discovery Special Masters*, U.S. DIST. COURT, W. DIST. PA., <http://www.pawd.uscourts.gov/Pages/ediscovery.htm> [<https://perma.cc/5SKS-538F>] (last visited Oct. 9, 2016) (providing special masters to assist on e-discovery); JUDICIAL IMPROVEMENTS COMM. OF THE S. DIST. OF N.Y., PILOT PROJECT REGARDING CASE MANAGEMENT TECHNIQUES FOR COMPLEX CIVIL CASES (2011), http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf [<https://perma.cc/G3ML-N7LP>] (last visited Oct. 9, 2016).
48. Proteus was a Greek water god whose shape was, like the sea itself, in a constant state of change. From this feature of Proteus is derived the adjective *protean*, which means changing frequently and easily. *Proteus*, 2 SHORTER OXFORD ENGLISH DICTIONARY (5th ed. 2002).
49. *See, e.g.*, Act of June 1, 1872, ch. 255 §§ 5–6, 17 Stat. 196, 197 (obligating federal courts to follow state court procedure “as near as may be”).

Two decades after the Federal Rules were promulgated, Charles Clark, the principal drafter of the Federal Rules, wrote that “the trend of state adoption [was] proceeding apace.”⁵⁰ At that point, “state procedural systems were approximately evenly divided among procedural systems modeled on the Federal Rules, the common law and the Field Code.”⁵¹ By 1975, however, the pace of replication by states grew to a virtual standstill. A comprehensive assessment of intra-state uniformity was undertaken in 1986, when Professor John Oakley and a former student, Arthur Coon, measured “the degree to which state court civil procedure is now wrought in the image of the Federal Rules.”⁵² Although Oakley and Coon found a “pervasive influence of the Federal Rules on at least some part of every state’s civil procedure,”⁵³ they also “effectively eulogized the goal of intra-state uniformity.”⁵⁴ Based upon a comprehensive, nine-variable examination of all fifty states, the authors “were surprised to find that only a minority of states [had] embraced the system and philosophy of the Federal Rules wholeheartedly enough to permit classification as true federal replicas.”⁵⁵ Moreover, the authors found that lesser-populated states

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50. Charles E. Clark, *The Federal Rules of Civil Procedure: 1938–1958: Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 435 (1958).
 51. Main, *supra* note 11, at 321 (citing WILLIAM M. BARRON & ALEXANDER HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §§ 9.1–9.53 (Wright ed., 1960)).
 52. 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, 1368 (1986). *See also* Main, *supra* note 11, at 383 (illustrating the difficulty in achieving pure uniformity or uniformity of result).
 53. Oakley & Coon, *supra* note 52, at 1369.
 54. Main, *supra* note 11, at 322.
 55. Oakley & Coon, *supra* note 52, at 1369. Their nine criteria for “replica” status included: “(1) state civil procedure is specified in judicially promulgated rules rather than a statutory code; (2) these rules are organized and enumerated in general conformity to the scheme of the FRCP; (3) there has been a merger of law and equity into one form of civil action; (4) the substance of the state rules of civil procedure conform generally to the federal joinder rules as amended in 1966; (5) the substance of the state rules of civil procedure conform generally to the federal discovery rules as amended in 1970; (6) the state rules provide for summary judgment according to the model of the Federal Rules; (7) the rules as written and interpreted provide without qualification for the liberal conception of ‘notice pleading’ practiced in federal courts under the aegis of *Conley v. Gibson*; (8) to the extent the terms of the state rules or their interpretations are otherwise idiosyncratic or unconventional by federal standards, such variation in practice is not at bottom inconsistent with the Federal Rules’ philosophy of ‘procedure as the handmaiden of justice’; and (9) the state courts regard precedent and commentary construing counterpart provisions of the Federal Rules as persuasive authority in the construction of the state rules.” *Id.* at 1374–75.

represented a disproportionately large share of states that had adopted the Rules: of the ten most populous states, only Ohio had modeled the Federal Rules, and eleven of the fifteen least populous states were replicas.⁵⁶ Even when a “looser test than replication was applied to classify states as generally following the model of the Federal Rules, the resulting tally embraced a majority of states but a minority of our national population.”⁵⁷

In 2003, Professor Oakley took a second look at intra-state uniformity and found even less of it.⁵⁸ He concluded that the Federal Rules were “less influential in state courts today than at anytime [sic] in the past quarter-century” and that they “have lost credibility as avatars of procedural reform.”⁵⁹ This decline of intra-state uniformity is not because states that adopted the Federal Rules many decades ago are adopting some alternative procedural system. Rather, it is because the states do not adopt the amendments to the Federal Rules that have been made in the ensuing years.

The number of amendments to the Federal Rules is striking, and is increasing.⁶⁰ The original set of Rules took effect seventy-nine years ago. In the first forty years of their history, they were amended five times.⁶¹ In the latter half of their history, the Federal Rules have been amended an additional nineteen times.⁶² About two-thirds of the Rules have been

56. *Id.* at 1413, 1427–28.

57. *Id.* at 1369.

58. John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 355 (2003).

59. *Id.*

60. *See generally* Main, *supra* note 26, at 480–81 (listing the years in which the Federal Rules were substantially amended).

61. The Rules were amended in 1948, 1961, 1963, 1966, and 1970. We are ignoring technical amendments that were made in 1941, 1951, 1968, 1971, 1972, and 1975; if these were included in the tally, the Rules were amended eleven times in their first thirty-nine years.

62. The Rules were amended in 1980, 1983, 1985, 1991, 1993, 2000, 2001, 2002, 2003, 2005, 2006, 2007, 2008, 2009, 2010, 2013, 2014, 2015 and 2016. The next set of proposed amendments, published for public comments, is already in the queue. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure (Aug. 12, 2016), <http://www.uscourts.gov/file/20163/download> [<https://perma.cc/6NZ7-464W>]. We are ignoring technical amendments that were made in 1987, 1988, 1995, 1997, 1998, 1999; if these were included in the tally, the Rules were amended twenty-five times in the past thirty-nine years.

amended at least four times.⁶³ In 2003, one of us wrote that “[o]nly ten of the original Federal Rules of Civil Procedure have never been amended.”⁶⁴ Four years thereafter, there were none.⁶⁵

Because even the so-called replica states seldom keep pace with these amendments, intra-state uniformity steadily declines over time. Not all of these amendments are significant, though. To get a better sense of whether there was intra-state uniformity on the more significant matters, this Article focuses on six signature amendments to the Federal Rules since 1983. Our admittedly arbitrary list included:

- the 1983 and 1993 amendments to Rule 11;⁶⁶
- the 2003 amendments to Rule 23;⁶⁷

63. FED. R. CIV. P. 1, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 43, 44, 44.1, 45, 50, 52, 53, 54, 55, 56, 58, 60, 62, 65, 65.1, 66, 68, 69, 71.1, 72, 73, 77, 79, 81, 82, 84 & 86.

64. Main, *supra* note 26, at 481.

65. See Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure 25–26 (June 2, 2006) (illustrating that the 2007 Style Amendments altered every Federal Rule of Civil Procedure). See generally Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761 (2004) (explaining the Federal Rules of Civil Procedure Style Project aims to alter every rule); Jeremy Counsellor, *Rooting for the Restyled Rules (Even Though I Opposed Them)*, 78 MISS. L.J. 519, 520 (2009) (referring to the Style Amendments as an unnecessary undertaking that created problems for lawyers and judges); Freer, *supra* note 8, at 471–72 (arguing that “[a]mendments to the Federal Rules should be like faculty meetings: rare and purposeful”).

66. The 1983 amendment added bite to the certification obligations triggering sanctions, and the 1993 amendment responded to the criticism that the 1983 amendments went too far. See generally STEPHEN B. BURBANK, AM. JUDICATURE SOC’Y, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11* (1989) (presenting the findings of a task force created to analyze Federal Rule of Civil Procedure 11); JEROLD S. SOLOVY ET AL., *SANCTIONS UNDER FEDERAL RULE OF CIVIL PROCEDURE 11* (1996) (addressing all Supreme Court decisions that concerned sanctions under Federal Rule of Civil Procedure 11 from the 1983 to the 1993 Amendment); Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171 (1994) (reviewing and examining the shortcomings of the 1983 amendments); Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1, 3, 11 (2002) (discussing the 1983 and 1993 amendments).

67. The 2003 amendments rewrote several sections of the class action rule, including the timing of the class certification decision, the content of class notices, the appointment of class counsel, and the judicial approval of settlements. See generally Georgene Vairo, *What Goes Around, Comes Around: From the Rector of Barkway to Knowles*, 32 REV. LITIG. 721, 765 (2013) (discussing the 2003 amendments to Rule 23); Symposium, *Clear Notices, Claims Administration, and Market Makers*, 18 GEO. J. LEGAL

- the 1993 and 2000 amendments to Rule 26;⁶⁸
- the 1991 amendment to Rule 48;⁶⁹
- the 1991 amendment to Rule 50;⁷⁰ and
- the 2003 amendment to Rule 51.⁷¹

Because we were also curious about an amendment that happened much earlier, this Article also examines a seventh event, namely:

- the 1966 amendment to Rule 15.⁷²

ETHICS 1223 (2005) (noting Rule 23 amendment requiring plain-language notices to potential class members).

68. The 1993 amendment to the discovery rule introduced mandatory initial disclosures, among other reforms. *See generally* Linda S. Mullenix, *Adversarial Justice, Professional Responsibility, and the New Federal Discovery Rules*, 14 REV. LITIG. 13 (1994) (discussing the controversial 1993 amendment to Rule 26(a)); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998) (considering the use of initial and expert disclosures under the 1993 amendments to the Federal Rules). The 2000 amendments modified the mandatory disclosure obligation so that a party need only disclose information supporting its claims rather than all relevant information.
69. The 1991 amendment to Rule 48 removed the presumption that juries consisted of twelve members. *See generally* Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1 (1993) (transcribing a speech in opposition to amendments to Rule 48 of the Federal Rules by the Chief Judge for the United States Court of Appeals for the Eighth Circuit); Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability*, 79 JUDICATURE 263, 264 (1996) (explaining the negative effects and consequences of smaller juries).
70. The 1991 amendment to Rule 50 jettisoned the terms “directed verdict” and “JNOV” or “judgment notwithstanding the verdict” in favor of “judgment as a matter of law” and “renewed judgment as a matter of law,” respectively. This was not a substantive change, but it is important terminology for federal practice. The Advisory Committee’s Note explains that the terminology was changed because the former terms concealed the close relationship between the two motions. At the same time, however, the Note suggested that parties who used the old terminology should not be penalized. This change is one scholar’s example of needless wordsmithing by procedural amendment. *See* Freer, *supra* note 8, at 470 (explaining the unnecessary costs of changing Rule 50).
71. The 2003 amendment to Rule 51 substantially rewrote the rule regarding jury instructions. The amendment clarified that an objection must be made on the record and it clarified when objections must be made. The amendment rule permits plain error review even when a party fails to properly object, provided the error affects substantial rights.
72. The 1966 amendment to Rule 15 added the notice and mistake components to the criteria for relation-back of amendments. Prior to the amendment the rule allowed relation-back whenever the claim arose out of the same transaction or occurrence as the pleaded claim. The prior rule, however, did not express address amendments that added *parties*; the prior rule addressed only amendments that added *claims*. *See* Harold S. Lewis, Jr., *The Excessive*

Although we do not claim these are necessarily the most important amendments, each of the enumerated amendments effected a change that might fairly be described as a signature event for the Federal Rules.

A snapshot of this research is attached in Exhibit A. The table reveals that none of the twenty-three replica states has adopted all seven of the signature amendments. In fact, only seven states have adopted at least half of them. Because states have not adopted the amendments to the Federal Rules, navigating the procedure in the state courts is like walking through a time machine that transports one to an earlier era of federal procedure. For example, in almost all of the replica states, the class action rule is the Federal Rule circa 2003. In two of the replica states, the rule on relation-back of amendments is essentially the Federal Rule circa 1965. If one were to travel from New Mexico to Arizona to Utah, one could sample practice under the text of three different versions of Federal Rule 11, namely circa pre-1983, circa 1983–1993, and circa post-1993, respectively. Yet all three of these states are generally thought to be among the category of states that follow the federal model. Again, this Article’s point is simple: there is not absolute uniformity even in the so-called replica states.

This analysis of intra-state uniformity has focused on textual uniformity. This focus could be dangerously misleading. There is some evidence that textually dissimilar rules may nevertheless be applied uniformly *in practice*.⁷³ As one might well expect, a local culture can have some assimilative effect on disparate textual mandates as judges, lawyers, and other repeat actors influence the application of law.⁷⁴ This would be especially likely in circumstances where the textual mandate is not drafted with exactitude to constrain its application. Uniformity in practice, even if not in form, could be good news in the sense that procedure may not be as disuniform, chaotic or complex as it appears. But if form and practice need not be aligned, then one must also ponder the reverse, to-wit: that uniformity in practice may not follow naturally from textual uniformity. And indeed, the same study that found a similarity of pleading standards in three states notwithstanding the fact that those states not had adopted the federal pleading rule also found a surprising dissimilarity in summary judgment practice notwithstanding the fact that those same states had adopted the federal summary judgment rule.⁷⁵ These findings suggest that both uniformity and disuniformity may ultimately be beyond the control of (textual) rule-makers.

History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision, 85 MICH. L. REV. 1507, 1515–21 (1987) (discussing the history of Rule 15(c) and the impact of the 1966 amendment).

73. Main, *supra* note 11, at 381–82.

74. *Id.*

75. *Id.*

II. ADDITIONAL REASONS WHY FEDERAL PROCEDURAL AMENDMENTS AND JUDICIAL PROCEDURAL CHANGES SHOULD NOT BE REPLICATED BY THE STATES

A major reason for the states to replicate federal procedural law would be to provide uniformity, making it easier for judges, lawyers, law professors, and law students to master civil procedure by studying and utilizing only one procedural regime. This Article has now explained why that rationale lacks merit. But there are multiple other reasons why federal procedure is severely mismatched to state procedural needs.

A. The Drafters: A Lack of Neutrality and Vision Skewed by Discovery in the “Big Case”

Since the mid-1970s, the Federal Rules of Civil Procedure have been amended and federal procedure altered by three different casts of characters: the Advisory Committee on Civil Rules, the majority of the Supreme Court of the United States, and the judges on the federal district courts. Fortunately, there has been a good deal of prior scholarship about all of them. Importantly, there is no evidence that any of these three groups have the needs and concerns of *state* court judges, lawyers, or litigants in mind. Indeed, it appears that these three groups do not even represent the full range of *federal* court stakeholders.

Professors Stephen Burbank and Sean Farhang, two scholars who are uniquely qualified to discuss the composition and disposition of federal rulemakers, have meticulously analyzed the composition and votes of members of the Advisory Committee and Supreme Court Justices with respect to federal procedural rules and interpretations of procedural statutes.⁷⁶ Burbank and Farhang examined every Advisory Committee proposal affecting the private enforcement of rights that was forwarded to the Standing Committee from 1960 to 2011.⁷⁷ There

76. Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 656–61 (2013). See generally Burbank & Farhang, *supra* note 10 (mapping the Supreme Court’s decisions on private rights of action related to the Federal Rules); Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559 (2015) (analyzing information about Advisory Committee members and their proposals to amend the Federal Rules). Professors Burbank and Farhang have collected much of their work in STEPHEN BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (Cambridge Univ. Pr. 2017) (forthcoming).

77. Burbank & Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, *supra* note 76, at 1576–1580. Proposed changes in the Federal Rules are suggested to the Advisory Committee by committee members, judges, lawyers, interest groups, citizens, and other individuals and

were twenty-nine such proposals, which covered thirty-nine separate items.⁷⁸ They found that “[f]rom 1991 through 2011, the net balance favored defendants in every year in which a proposal was made.”⁷⁹ The current “predicted probability that a proposed amendment would favor plaintiffs” is an astonishing zero.⁸⁰

From 1960 to 2013, there have been a number of trends in the composition of the Advisory Committee that go a long way toward explaining the current pro-defendant bias. The original Advisory Committee that started meeting in 1934 and drafted the initial Federal Rules of Civil Procedure was composed entirely of practitioners and academics. “In the last quarter century, judges have constituted a majority of the Committee in every year.”⁸¹ The Advisory Committee members are appointed by the Chief Justice of the Supreme Court. The Chief Justices have all been appointed by Republican presidents since 1971, and the judicial appointees to the Advisory Committee have been disproportionately appointed by Republican presidents. Burbank and Farhang put it this way: “The probability of committee appointment or reappointment of judges appointed to the bench by Republican presidents is about 1.5 times larger than that of Democratic appointees.”⁸² Party affiliation need not influence patterns of behavior when it comes to the choice of procedural rules, but it would be startling if ideology were not relevant when judges are in effect acting in a legislative, rather than judicial, capacity.⁸³

There has also been a shift in the ideology of practitioners on the Advisory Committee. Burbank and Farhang demonstrate that since the 1990s the practitioners have shown a substantial shift toward corporate/business representation.⁸⁴ Their research is consistent with what Alan Morrison of the Public Citizen Litigation Group observed decades ago: the rulemaking committees include fewer lawyers than in the past, and the lawyers who are named to the committee “are predominantly from large firms, principally people who represent defendants.”⁸⁵

organizations. For an overview of the rulemaking process, see Duff, *supra* note 3.

78. Burbank & Farhand, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, *supra* note 76, at 1576–77.

79. *Id.* at 1579.

80. *Id.* In the early 1960s, there was an eighty-eight percent chance that a proposed amendment would favor plaintiffs. *Id.*

81. *Id.* at 1568.

82. *Id.* at 1576.

83. *Id.* at 1571–72.

84. *Id.* at 1591.

85. *Id.* at 1588 (citing *Rules Enabling Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the*

In a carefully documented article on the amendment to the Federal Rules in 2000 that attempted to limit the scope of discovery under Rule 26, Professor Jeffrey Stempel demonstrated how every stage of the amendment process from the Advisory Committee through the Standing Committee and Judicial Conference was strongly influenced by a pro-corporate defendant bias and that elite attorneys, largely representing large corporations, were highly influential in proposing the amendment and getting it passed.⁸⁶ When that amendment was approved by the Judicial Conference, the chair of the rulemaking committee celebrated this “extremely good news” in a memo to the American College of Trial Lawyers (ACTL), a bar interest group “that had spent ‘thousands of hours’ lobbying for it.”⁸⁷ That memo also noted that credit was due to a member of the ACTL who sat on the Advisory Committee when it was considering the proposal.⁸⁸

More recently, Patricia Hatamyar Moore offered an incisive critique of the substance of the 2015 amendments and the rulemaking process that produced them.⁸⁹ Moore exposed the emptiness of the rulemakers’ contention that the amendments were supported by empirical evidence.⁹⁰ Specifically, the rulemakers relied on subjective opinion surveys and ignored the objective evidence.⁹¹ Moore also revealed the systematic preference for defendants’ viewpoints and the relative silencing of plaintiffs’ voices.⁹² Specifically, the perspective of plaintiffs and their lawyers were underrepresented on the rulemaking committee and at the hearings.⁹³

The drafters of amendments at the Advisory Committee level largely operate under the influence of the massive and expensive dis-

Judiciary, 98th Cong. 29 (1985) (statement of Alan Morrison, Director, Pub. Citizen Litig. Grp.)).

86. Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 610–11 (2001).
87. Burbank & Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, *supra* note 76, at 1592 (citing Memorandum from Robert S. Campbell, Jr., to the Members of the Fed. Civil Procedure Comm., Am. Coll. of Trial Lawyers 1, 3 (Sept. 16, 1999) (on file with authors)).
88. *Id.*
89. Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083 (2015).
90. *Id.* at 1087.
91. *Id.* at 1090–91.
92. *Id.* at 1086–87.
93. *Id.* at 1098–99.

covery that often takes place in extremely large or complex civil litigation.⁹⁴ Numerous studies have repeatedly shown that in the vast majority of cases there is either no discovery or discovery that is proportionate to the stakes involved in the litigation.⁹⁵ Perhaps five to fifteen percent of the cases, predominantly complex litigation, have enormous and expensive discovery.⁹⁶ But the multiple amendments to the federal rules attempting to curtail discovery, including mandatory discovery, limitations on numbers, limitations on scope (most recently the proportionately amendment), and increased case management apply to all cases, the vast majority of which were not a problem. As discussed in Part B below, the state court civil case load does not include a large number of these huge cases, and in Part C below the amendments have not been wise for even the federal case load. We and others have written at great length previously how the myth of widespread litigation abuse has been perpetuated by the business and anti-regulation communities, distorting the dialogue about procedural reform.⁹⁷

A majority of the Supreme Court's pleading, summary judgment, class action, compulsory arbitration, and justiciability jurisprudence, starting in the 1980s, has been similarly influenced by a mindset that assumes, without empirical support, that civil litigation is in some sense "out of control" and infused with discovery abuse.⁹⁸ In the *Twombly* and *Iqbal* decisions, heading back in the direction of fact pleading, the Court explicitly references massive discovery as a rationale for more rigorous pleading requirements.⁹⁹ Again, trans-substantive procedure plays a part in the mismatch of the rule change that must apply to all federal civil litigation—large, medium, and small.

There is an enormous amount of procedural scholarship demonstrating that a central tenet of the Rehnquist and Roberts Supreme Courts has been anti-civil litigation, anti-rights enforcement, and anti-

94. See, e.g., Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597 (1998) (discussing research into the cost of litigation, including the expenses associated with discovery).

95. Subrin & Main, *supra* note 1, at 1850 n.61.

96. Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Proposals*, 52 SMU L. REV. 229, 248 (1999); Suja A. Thomas & Dawson Price, *How Atypical Cases Make Bad Rules: A Commentary on the Rulemaking Process*, 15 NEV. L.J. 1141, 1147–49 (2015).

97. Subrin & Main, *supra* note 1, at 1869–972.

98. Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085 (2012).

99. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558–60 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 670, 672, 674, 678–79 (2009).

government regulation.¹⁰⁰ Burbank and Farhang again use precise and careful empirical research to demonstrate the conservative ideology behind Supreme Court decisions impacting and reducing the private enforcement of rights.¹⁰¹ Whether one agrees with these trends or not, it would be difficult to argue that they are non-ideological and balanced.

The federal district courts' influence on procedural change is more nuanced, in that appointees of both Republican and Democratic administrations moved in the direction of curtailing the right to trial through the use of pre-trial procedures.¹⁰² The most noteworthy incursions have been through the use of judicial case management in which district court judges urge settlement and the use of Alternative Dispute Resolution methods.¹⁰³ Again, discovery was often said to require judicial constraints; the judicial control through case management was also predicated on burgeoning federal case loads, although the number of newly-filed federal civil cases each year has been nearly constant for the past three decades.¹⁰⁴ After the case management development had already occurred, it was encapsulated in the Amendment to Rule 16, enlarging the topics to be covered during pretrial conferences. As noted in Part C, this is very relevant to state court adoption, because multiple conferences have been added, each capable of increasing expense in the vast majority of cases that require no or little judicial management—another reason to be cautious about state court replication.

100. See, e.g., Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 309–10 (2013) (discussing the “deformation” of civil procedure in federal courts); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 368 (2010) (“The Supreme Court’s capitulation to defendant requests for more stringent pleading standards in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* is the clearest evidence of procedure’s tilt towards restrictiveness.”). For a close look at how that philosophy informs recent procedural rulemaking, see Moore, *supra* note 89 (discussing how federal rulemaking committee members appointed by Chief Justice Roberts influenced recent procedural amendments limiting discovery).

101. Burbank & Farhang, *supra* note 10, at 1570–80.

102. The federal courts of appeals also played some role in the anti-litigation and anti-trial jurisprudence that pervaded the federal courts starting in the mid-1970s, and expanding in the 1980s. Some of the Circuit Court decisions anticipated Supreme Court anti-plaintiff jurisprudence. For instance, the requirement of more rigorous pleading in municipal liability cases, in order to protect official immunity by foreclosing discovery at the pleading stage, was duplicated in *Iqbal*, which insulated federal officials from discovery by dismissing the case due to inadequate pleading.

103. See Subrin & Main, *supra* note 1, at 1853–54, 1861–67 (discussing strategies courts use to resolve cases early in the litigation process).

104. See Main, *supra* note 10, at 1600 & n.26.

B. The Differences Between State and Federal Civil Caseloads

This Article has shown that many members of the federal Advisory Committee on Civil Rules and the majority of the Supreme Court had a vision of the role of civil litigation that may not correspond to the preferences and needs of state courts. This is particularly true because of their focus on big cases and the large amounts and costs of discovery in such cases. It makes sense to ask whether the bulk of civil cases commenced in state courts require the emphasis on reigning in discovery that might be appropriate in large, complex cases. We think that this emphasis was misguided at the federal level, because even there most cases did not and do not have disproportionate discovery to the stakes involved in the case.¹⁰⁵ The mismatch is even more pronounced when one compares the civil caseloads of state and federal courts.

Before looking at some comparative data, it is perhaps helpful to remember that Charles Clark, the Reporter to the original Advisory Committee, who was a principal draftsman of the 1938 Federal Rules, said all along that even the civil caseloads of the federal courts might require different procedures for simple and complex cases. “In studying the business of the federal courts, he noted that the docket had simple diversity cases, as well as increasing numbers of cases in which the government was a party. He suggested that some sorting mechanism might be required.”¹⁰⁶ The differences between the state and federal dockets are equally stark, and probably more so.

Although it is difficult to obtain state court data that is kept in a uniform way throughout the states and that reflects the state courts in the entire nation, the National Center for State Courts conducted a survey for civil cases (excluding domestic relations matters) disposed of during the fiscal year ending in June 30, 2013 in ten of the forty-five counties that participated in all four iterations of previous Civil Justice Surveys of State Courts. These were urban counties in ten diverse states and the attempt was to choose counties that together were representative of state litigation in the country. “The 925,344 cases comprise approximately five percent (5%) of state caseloads nationally.”¹⁰⁷

In civil state court cases resulting in a judgment, the monetary values are relatively modest, with a mean amount of \$9,267 and the

105. See *supra* note 96 (examining the social and political reasons for enacting an amendment limiting the scope of discovery in the Federal Rules of Civil Procedure).

106. Stephen N. Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, in JUDGE CHARLES EDWARD CLARK 115, 148 (Peninah Petruck ed., 1991).

107. NAT’L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iii (2015), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> [<https://perma.cc/7JPP-VBNC>].

50th interquartile range of \$2,441.¹⁰⁸ Only 0.2% of the cases had judgments in excess of \$500,000.¹⁰⁹ The authors of the report note that although debate concerning criticism of the American civil justice system focuses on high-value tort and commercial contract disputes, they “comprised only a small proportion” of the survey caseload.¹¹⁰ They blame the misperceptions about state court civil litigation on the media emphasis on federal high-value and complex litigation, and perhaps on the experience of repeat player lawyers with such cases. They note, as does this Article, the problems of using the same procedures for all cases, and state that their findings make clear that “very few cases need as much time or attention as the rules provide and, ironically, many of them likely take longer and cost more to resolve as a result.”¹¹¹

One difference between the federal and civil dockets is, of course, based on what subject matter jurisdiction has been allocated to federal district courts.¹¹² That the federal caseload is primarily based on federal question cases, diversity cases in which the amount in controversy exceeds \$75,000, and cases in which the United States is a party, already distinguishes the federal district court docket. Then, too, there are cases of exclusive federal jurisdiction, such as cases arising out of bankruptcy, patents and copyright, admiralty, and the Sherman Antitrust law. Excluding bankruptcy, because such cases are not brought in federal district courts, other examples of exclusive federal jurisdiction are apt to be complex and large, with the possible exception of admiralty.

But the more normal docket of the federal courts is also a good deal different from that of the state trial courts. There is much more data about federal cases, but here, too, there are empirical difficulties in the compilation and categorization of data.¹¹³ Nonetheless, the state survey and a recent article by Professor Hatamyar Moore on federal district court civil caseload data for 2012–2013¹¹⁴ permit us to be certain that the state and federal civil dockets are substantially different. Here are a few examples of the differences. The top six categories of federal civil case filings in 2013 were tort (twenty-four percent), prisoner (twenty percent), civil rights (twelve percent), contract (nine percent), social

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 36.

112. See 28 U.S.C. §§ 1331–40 (2012) (providing the rules for subject matter jurisdiction).

113. See, e.g., Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1183–84, 1198, 1208–09 (2015) (discussing several empirical studies, including their flaws and findings).

114. *Id.*

security (seven percent), and labor (six percent).¹¹⁵ Although, as previously mentioned, both the federal and state data pose categorization problems that inevitably make comparisons imperfect, there are still undeniable differences that indicate that the caseloads are by no means similar.

In state courts, tort cases represent seven percent of the docket compared to twenty-four percent in federal court,¹¹⁶ and contract cases represent sixty-four percent of the docket compared to nine percent in federal court 2003 amendments to Rule 23.¹¹⁷ Moreover, it is quite clear that the state contract cases are not usually complex. Thirty-seven percent of them are debt collection, twenty-nine percent are landlord-tenant, and seventeen percent are foreclosure cases.¹¹⁸

It is also significant that there are huge variations among the counties in the diverse states in the state survey. For instance, in Cook County, Illinois, eighty-two percent of the cases are contract and five percent are small claims; in Marion County, Indiana, eight percent are contract and eighty-two percent are small claims. Cook County has ten percent tort cases and Santa Clara County, California has nine percent tort cases, while Maricopa County, Arizona has one percent tort cases.¹¹⁹ Such variations reveal important differences between state and federal courts, between and among states, and even within a state. Each may have distinct procedural needs. And, of course, different types of cases within a state or county might best be dealt with through different procedures. This is further discussed in Section E, which specifically deals with the importance of state experimentation.

Another way of looking at the differences between the state and federal dockets is to consider the amount of time that given cases, on average, require. The Administrative Office of the U.S. Courts (AO) “has devised a system of ‘weights’ to apply to different types of cases,” dependent on an estimate of the amount of time judges will be likely to spend on such cases.¹²⁰ “The average civil case is weighted about 1.0, which the AO calculates is about 441 minutes.”¹²¹ Many of the highest ratings are for Death Penalty Habeas Corpus (12.89), Environmental Matters (4.79), Civil RICO (4.78), Civil Rights Voting (3.86), and

115. *Id.* at 1209.

116. NAT’L CTR. FOR STATE COURTS, *supra* note 107, at 18.

117. *Id.*

118. *Id.* at 19.

119. *Id.* at 18.

120. Hatamyar Moore, *supra* note 113, at 1191 (citations omitted).

121. *Id.*

Antitrust (3.45) cases; none of these show up at all as separate categories in the state survey.¹²² Obviously, state courts can have some extremely large and complex cases, and these may be best served by the full panoply of procedural steps that have become the norm in federal court. But just as it makes little sense to apply such ample and expensive procedure (largely introduced through rule amendments and judicial opinions since 1980) to all types of federal cases, it surely makes little sense for the less well-staffed and less well-funded state courts¹²³ to follow suit.

C. Ineffective and Unwise Amendments at the Federal Level

In our earlier paper *The Fourth Era of American Civil Procedure*, we explained that the original Federal Rules of Civil Procedure were predicated on a vision of simplicity and ease of access to the courts.¹²⁴ Some of the ways this was accomplished were through liberal pleading requirements, ease of amendment, broad discovery, and more expansive joinder. Lawyers were given great latitude to craft their cases as they saw fit. The idea was to have civil cases decided on the merits, either through settlement, informed by needed discovery, or trial, having eliminated through pleading and discovery those issues that were not in dispute.¹²⁵ Motions to dismiss at the pleading stage or through summary judgment were extremely rare.¹²⁶ We called this original Federal Rule jurisprudence “the third era”; the eras characterized by common law and code pleading were the first and second, respectively.

We have no illusions that the Third Era was perfect. In fact, we have noted that the liberality of this era, inviting some overreaching by some lawyers in some cases, inevitably led to a backlash and attempts to reign in the wide-openness of that Third Era procedure—both by amending rules and by boldly reinterpreting extant rules.¹²⁷ But that response (establishing some of the hallmarks of this present Fourth Era) has not addressed the problems of cost and delay in big (or small) cases, and has exacerbated problems of access and fairness for ordinary cases. Importantly, then, for states with caseloads that feature large numbers of routine cases, the procedures and judicial reinterpretations of the federal courts are an especially poor fit.

Here are some examples. Many of the Fourth Era changes to federal procedure add steps that apply, or can apply, to most cases. These

122. *Id.*

123. *See infra* Part II.D.

124. Subrin & Main, *supra* note 1.

125. *Id.* at 1845–46.

126. *Id.*

127. *See id.* at 1858–59, 1859 n.100.

include required initial disclosure, discovery conference, scheduling conference, pre-trial conference, providing expert opinions, providing lists of witnesses and their testimony, and meetings or discussions among lawyers before conferences and motions.¹²⁸ These all involve time and expense for lawyers, and often for their clients. The more rigorous pleading requirements dictated by *Twombly* and *Iqbal*¹²⁹ include two increased expenses: the expense that must go into the drafting of the complaint, and the expense required in bringing and litigating (often through lengthy briefs) the motion to dismiss. The increased use of summary judgment in federal courts, memorialized in the famous trilogy of Supreme Court cases, increases the need for discovery and, more importantly, leads to extensive preparation and use of affidavits and expensive preparation of briefs.¹³⁰ In addition, of course, is the preparation and presentation of oral arguments, to the extent that they are permitted.

Each time a change is made in the scope of discovery provisions, allegedly in an attempt to reduce discovery, there is increased incentive to bring motions attacking alleged violations of the rules. This was true when the definition of what is permitted was altered in 2000 (eliminating “subject matter”) and in the recent amendment, adding a proportionality requirement (and thus increasing the plaintiff’s burden) for all discovery. Amendments to Rule 11 (first in 1983, and somewhat liberalized in 1990) also provided an invitation for motions seeking sanctions—again, usually against plaintiffs.¹³¹

There are five major reasons why the shift to the Fourth Era of American Civil Procedure was unwise. First, it was unsupported by data. The allegations that civil litigation in America is out of control is not borne out by facts. There is no evidence that discovery is excessive in the majority of cases.¹³² There is no evidence that a substantial number of cases brought by lawyers are frivolous.¹³³ There is no evidence

128. *E.g.*, FED. R. CIV. P. 26(a).

129. *See supra* note 99 (raising the pleading standard to one of “plausibility”).

130. *See* Subrin & Main, *supra* note 1, at 1851 & n.69 (explaining how judicial decisions transforming summary judgment into the “focal point of litigation” resulted in inefficient litigation).

131. *See* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1957–62 (1989) (discussing amendments to Rule 11); BURBANK, AM. JUDICATURE SOC’Y, *supra* note 66, at 57, 65, 67–68 (noting the disproportionate incidence of Rule 11 motions for sanctions on plaintiffs and their counsel).

132. *See* Subrin & Main, *supra* note 1, at 1850–51, 1887 & nn.61–63 (collecting authorities) (disclaiming the popular narrative that discovery is often excessive and costly).

133. *See id.* at 1887 & n.281 (collecting authorities) (stating that the Fourth Era has eliminated frivolous cases that may have otherwise gone to trial).

that Americans are litigious; in fact, the opposite is true.¹³⁴ Most Americans do not litigate harms to them.¹³⁵ There is no evidence of widespread misuse of punitive damages.¹³⁶ There is no evidence that juries, by and large, are irresponsible.¹³⁷ There is no evidence that most cases take too long.¹³⁸ There is no evidence that case management by judges is effective, other than setting and keeping firm dates for the conclusion of discovery and for trial.¹³⁹ There is, however, substantial evidence that the business community, and those of a conservative persuasion, set out to discredit plaintiff lawyers, civil litigation, and juries and endeavored to have conservative judges appointed to the federal courts—and that they succeeded.¹⁴⁰

Second, trans-substantive procedure, having the same procedures available for all civil cases, regardless of substance or stakes, is pernicious. The Fourth Era procedure, for the most part, applies to large, medium, and small cases in federal court. This needlessly adds expense. There is substantial evidence that it is considerably more expensive to try the same type of case in federal court than in state court.¹⁴¹

Third, Fourth Era procedure wastes judicial time. The data is startling.

134. *See id.* at 1887 & nn.276–77 (collecting authorities) (providing evidence that Americans today are not more litigious than Americans in the past and other nations).

135. *See id.* at 1885 & n.259 (collecting authorities) (explaining the judiciary’s desire to resolve cases before trial).

136. *See id.* at 1887 & n.281 (collecting authorities) (“[P]unitive damages are infrequently awarded, are generally modest in size, and have not increased substantially over time.”).

137. *See id.* at 1883 & n.248 (collecting authorities) (stating that multiple studies indicate jurors take their jobs seriously).

138. *See id.* at 1887 & n.278 (collecting authorities) (providing that most cases are resolved in a year or less); Main, *supra* note 10, at 1612–15 (demonstrating the relative constancy since 1963 of the time from filing to termination in the median case, the big case, and the small case).

139. *See* Subrin & Main, *supra* note 1, at 1886 & n.270 (collecting authorities) (providing that although there are numerous case management strategies, the most effective are setting cut-off dates to end discovery and firm trial dates).

140. *See id.* at 1869–75 (collecting authorities) (providing a brief history of the conservative movement in law schools, which bled into the federal judiciary).

141. *See* Herbert M. Kritzer et al., *Courts and Litigation Investment: Why Do Lawyers Spend More Time on Federal Cases?*, 9 JUST. SYS. J. 7, 12, 15 (1984) (detailing the significant differences between the rules of procedure in federal and state courts).

The number of [civil] cases decided ‘without court action’ [in federal court] has fallen from fifty-three percent in 1963 to nineteen percent in 2012. Thus, although fourth era judges seldom try cases, they are performing some ‘court action’ at a rate that is almost three times the baseline [1963] amount. This means that, assuming everything else were held constant, in thirty-four percent of contemporary [federal civil] cases the courts expend precious judicial resources on matters that the third era resolved without any court action at all. Moreover, the fourth era is no faster at resolving cases than was the third era.¹⁴²

Fourth, and this is perhaps the most galling, the cases that most require judicial case management and constraints are the massive, high stakes, complex cases that have enormous amounts of discovery. The Fourth Era procedure in federal court puts many limitations on the amount of each type of discovery, and, as we have seen, requires multiple conferences and other requirements. But in most of the provisions the parties, according to the Federal Rules, can agree to opt out.¹⁴³ And this they usually do in the large and complex cases that the procedures were designed to control. Consequently, the federal courts have added constraints and often extra expense for all cases, based on the evidence of abuse in large cases alone, and much of the constraint is not applying to those large cases. There is no evidence that the amendments to the Federal Rules, whether through the formal process or by judicial opinions, have made much of a dent in the massive discovery and large expense and time that are associated with the large, complex case.¹⁴⁴

142. Subrin & Main, *supra* note 1, at 1886; *see also* Main, *supra* note 10, at 1618–27 (evidencing the differences between the various eras in the procedure and handling of cases).

143. *See* Subrin & Main, *supra* note 1, at 1850 & n.62 (collecting authorities) (observing that parties may opt out of complex discovery to avoid high costs).

144. It is true that in both *Twombly* and *Iqbal* dismissals at the complaint stage have eliminated discovery. The first was a country-wide anti-trust case and the second involved high ranking federal officials. We have seen no evidence that these are typical; in fact, some scholarship has suggested that it would have been wise for the Supreme Court to base its more rigorous pleading requirements on the uniqueness of this type of anti-trust case under federal substantive law and on official liability doctrine, thus foreclosing the trans-substantive effect of the decisions.

Fifth, much of Fourth Era civil procedure increases judicial discretion. As discussed above, these rules provide very little or no guidance for lawyers.¹⁴⁵ Moreover, cognitive biases by judges, notwithstanding good intentions, have already proven to be inevitable.¹⁴⁶ Much of Fourth Era procedure has negatively impacted plaintiffs more than defendants, especially in civil rights cases.¹⁴⁷ One price of trans-substantive procedure is that drafters are forced to use wide-open, non-defining language, so that it applies to complex, large cases. This in turn impacts smaller ones, which comprise the bulk of the docket. As discussed below in Part E, the state courts have already found ways to craft more defining rules, thus aiding lawyers and judges by providing more predictability and less discretion than are fostered by current federal procedure.

*D. Changes in Federal Civil Procedure Require Judicial Resources
Not Available in State Courts*

As Judge Richard Posner has explained in his study of the federal courts, “there is no doubt that the average conditions of employment in state judicial systems are inferior to those in the federal system.”¹⁴⁸ One visual manifestation is the proliferation of new, expensive, and large federal courthouses built in the past several decades; this construction presents a stark contrast to the many aging state court buildings.¹⁴⁹ Of even more importance is the enormous growth of federal judicial personnel that provide aid to the relatively small number of federal Article III judges.¹⁵⁰ Writing in 1996, Posner explained that “[s]ince 1960, the total number of Article III judges has not quite

145. See *supra* notes 24–35 and accompanying text (noting aspects of vagueness and lack of clarity in the rules under the various reforms).

146. See Subrin & Main, *supra* note 1, at 1879 & nn.228–229 (collecting authorities) (“There is an abundance of evidence of cognitive biases and illusions to which we know judges are not immune.”).

147. *Id.* at 1847–49, 1854 & nn.40–45, 51, 55, 58, 82 (collecting authorities).

148. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 37 (1996).

149. See Judith Resnik, *Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 *IND. L.J.* 823 (2012) (detailing the funding and construction of the immaculate federal court buildings). See generally JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (2011) (providing an in-depth history of courts and their iconology around the world).

150. See Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 *GEO. L.J.* 2589, 2601–10 (1998) (describing the relationship of federal judicial power and the personnel who aid the judges in exercising it).

tripled, while the total number of federal judicial employees has increased approximately fivefold.”¹⁵¹ In fact, “[j]udges’ salaries and fringe benefits were 20 percent of the federal judicial budget in 1960 but only 9 percent in 1980.”¹⁵²

Federal judicial personnel include legions of secretaries, full time clerks, full time attorney assistants, and magistrate judges.¹⁵³ Moreover, there are multiple law student interns and growing numbers of special masters.¹⁵⁴ Federal judges on senior status provide a substantial amount of further judicial assistance.¹⁵⁵ Between 1986 and 2013, full time magistrate positions increased twenty-eight percent.¹⁵⁶ By 2012, there were 541 full-time magistrate judges aiding the 602 sitting federal district court judges. It is conservatively estimated that senior judges carry a workload that is twenty-five percent of the work of active judges.¹⁵⁷

All of this person-power at the federal level is essential for carrying out the roles required of federal district court judges under current procedure. It makes little sense for most under-funded and under-staffed state courts to attempt to replicate all of the conferences and motions mandated or allowed by the Federal Rules. Nor is the active case management that is the norm in federal court a good idea for the bulk of state civil litigation. This is true for two major reasons: first, there is no evidence that such management is needed or helpful for most cases (except for setting and keeping firm discovery cut-off and trial dates¹⁵⁸) and second, such case management requires time that can be spent on other judicial functions.

The dearth of state judicial resources compared to the federal courts is particularly unfortunate given the caseloads confronting state judges. Posner points out that although state “judges have less staff support than federal judges,” the state courts of general jurisdiction “have on average almost three times as many civil cases on their docket and almost six times as many criminal cases as federal district judges,

151. POSNER, *supra* note 148, at 8.

152. *Id.* at 8–9.

153. *See supra* note 40 (explaining why the addition of staff weakens judges’ sense of responsibility).

154. *See, e.g.*, POSNER, *supra* note 148, at 9 (citing Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2151 (1989)) (noting the increase in the use of special masters to reduce pre-trial burdens).

155. *See* Burbank, Plager & Ablavsky, *supra* note 40.

156. Hatamyar Moore, *supra* note 113, at 1188 (citations omitted).

157. *Id.*

158. Subrin & Main, *supra* note 1, at 1886.

although the average state court case is shorter and easier than the average federal court case.”¹⁵⁹ Moreover, many state court judges, unlike their federal counterparts, must campaign and raise money for election and reelection. “In addition, substantially reduced budgetary resources since the economic recession of 2008–2009 have exacerbated problems in civil case processing in many state courts.”¹⁶⁰

E. The State Courts Have Been Experimenting With Better Rules and Methods for Civil Litigation—and They Should Continue To Do So

The previous portions of this Article force one to conclude, we believe, that it does not make sense for the state courts automatically to adopt amendments or changes to federal procedure, whether they were brought about by formal Rule amendments or judicial decisions. Those who have promulgated the changes have not had the needs of state courts in mind, and for the most part they have been motivated by large scale, complex litigation in which they perceive that discovery is excessive. The Supreme Court’s understanding of the Rules Enabling Act that authorized the Supreme Court to promulgate uniform federal rules has been that the same federal procedural rules must apply to all cases, regardless of substance or size. As we have seen, this has added multiple steps and points of judicial discretion that do not make sense for the bulk of federal litigation. Such time consuming and expensive additional steps, and such non-defining standards that have been introduced (such as “sufficiency of evidence” at the summary judgment stage, “plausibility” at the pleading stage, and “proportional” at the discovery stage) do not seem necessary or helpful for most state civil cases. Moreover, the state courts do not have the personnel to preside over the multiple conferences that have been introduced into federal procedure (such as scheduling and pre-trial conferences), nor do they have the resources to decide preliminary dispositive motions in large numbers of cases.

The state empirical survey previously referred to demonstrates that state court judges and attorneys who practice before them have recognized such state limitations. For instance, where summary judgment motions have come to be a central part of federal litigation, they

159. POSNER, *supra* note 148, at 38.

160. NAT’L CTR. FOR STATE COURTS, *supra* note 107, at iii. *See generally* Dianne Molvig, *Court Funding: Security at Risk*, WIS. LAW. (Jan. 1, 2016), <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=89&Issue=1&ArticleID=24549> [https://perma.cc/5XET-XWNV] (noting that when states lose funding, the burden often shifts to county budgets, which have even less money, compromising justice and court security).

represent only one percent of the dispositions in the states.¹⁶¹ One reason the many formalities and steps of federal procedure have not taken hold at the state level is probably because so much of state civil litigation proceeds without lawyers for at least one party. “One of the most striking findings in the dataset was the relatively large portion of cases (76%) in which at least one party was self-represented, usually the defendant.”¹⁶² In about half of the state cases (forty-six percent) a judgment was entered that most of the time was probably a default judgment.¹⁶³

The state survey points out how much procedural experimentation is already taking place at the state level, notably in California, Georgia, Colorado, New Jersey, Pennsylvania, and Texas. “For example, some states have designated and implemented programs targeting specific types of cases, especially related to business, commercial, or complex litigation.”¹⁶⁴ Many states have varied the amount of discovery permitted for lower stakes cases.¹⁶⁵ These reforms have received tragically little attention in academic circles, which tend to focus exclusively on federal procedure.

Importantly, the states have important advantages over the federal system when it comes to experimenting with ways to improve the litigation of civil cases. In many, if not most, instances they will not be constrained by the sense that the rules must be trans-substantive. Moreover, they can gear their procedures to the specific needs and cultures of their states. Different regions of the country have “distinctive political and institutional properties that depart from the federal model in important ways.”¹⁶⁶ Also, the methods for achieving procedural change at the state level may be less cumbersome than at the federal level, permitting more ease of experimentation and change, if what is tried proves unsatisfactory.

Also noteworthy is that the state survey showed that state cases are resolved by trial 3.5% of the time,¹⁶⁷ significantly more than the one

161. NAT’L CTR. FOR STATE COURTS, *supra* note 107, at iv.

162. *Id.*

163. *Id.*

164. *Id.* at 4.

165. *See, e.g.*, Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, *supra* note 26, at 394 & nn.74-75 (noting various states have different tracks for discovery, allowing smaller cases to be expedited through the process more efficiently).

166. *See, e.g.*, Burbank, Farhang & Kritzer, *supra* note 76, at 714 (citations omitted) (referring to what students of legislative regulatory policy have found).

167. NAT’L CTR. FOR STATE COURTS, *supra* note 107, at 25. Only 0.1% were jury trials. *Id.*

percent of current federal civil litigation. We have written extensively elsewhere on the importance of trials and juries to American democracy.¹⁶⁸ Perhaps the federal system can learn from the states what procedural methods make it more possible for the citizenry, judges, and legal profession to gain the benefits accruing from actual trials. By having the states experiment with different procedural models and tracks, perhaps one can learn that some states are not only efficient, in terms of cost and delay in the processing of cases, but also at the same time are able to conduct a higher percentage of trials, many of which are jury trials.

Justice Brandeis was correct.¹⁶⁹ One advantage of our federal system is the ability of states to experiment and to teach the rest of the country, including the federal judiciary, what they have learned. All should remember that the *Second* Era of American civil procedure was initiated by reforms to state, not federal procedure; namely, the Field Code. Perhaps the Fifth Era will likewise emanate from the states.

CONCLUSION: THE HIGH STAKES IN THE QUESTION OF WHETHER THE STATE COURTS SHOULD REPLICATE FEDERAL PROCEDURE

This Article has provided a number of reasons why the state courts should not adopt the changes to federal procedure that have occurred in the past quarter century. Nevertheless, questions more profound than mere replication lurk. Specifically, how do state judges view the place of civil litigation in our democracy? And how do state judges view their roles?

Historically in the United States, civil litigation had numerous functions, in addition to resolving disputes without the parties engaging in violence. After all, one could resolve disputes by flipping coins or rolling dice. But our country, especially in the last half century, has chosen to use private lawyers bringing civil lawsuits to define and

168. *E.g.*, Subrin & Main, *supra* note 1; Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399 (2011) ([T]rials in open court resulting in decisions by either a judge or a jury have been thought to be constitutive of American democracy.); Main, *supra* note 10. For an especially eloquent defense of the importance of the jury trial in our country, see Sheldon Whitehouse, *Opening Address*, 162 U. PA. L. REV. 1517 (2014) (opening a University of Pennsylvania conference commemorating the 75th anniversary of the Federal Rules of Civil Procedure).

169. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

enforce public norms and social policy. As Burbank and Farhang have documented, Congress used fee-shifting and damages-multipliers to help create a private bar that would enforce public law through civil litigation; the alternative, of course, was a dramatic increase in federal executive bureaucracy.¹⁷⁰ Discovery, so ridiculed by anti-litigation rhetoric, has been a vital part of the ability to use civil law suits to enforce law.¹⁷¹

Our democracy has also valued trials in open court as a means of permitting our citizens to air and decide their grievances.¹⁷² Civil litigation, especially through the use of juries, has been important in providing community input to the application of somewhat amorphous concepts, such as reasonableness, proximate cause, intent, bad faith, unfair competition, and discriminatory intent.¹⁷³ Juries also educate the public about the importance of the rule of law, permit lay citizen participation in governance, and provide some break on concentrated power; the Constitution enshrines a right that society long has cherished.¹⁷⁴ Yet federal procedure has diminished the importance of trials and juries in favor of a process of decision-making that is bureaucratic and opaque. Do state judges want to contribute to this diminution of the importance of trials and juries?¹⁷⁵

Of equal importance, and in concert with the diminution of the American trial and the American jury, the historic roles of judges in the United States have been dramatically altered and reduced. It was previously thought that the primary role of judges was to preside over

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170. Burbank & Farhang, *supra* note 10, at 1547–51 (discussing the “rise of the litigation state”); see also SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010) (arguing that governmental regulation created today’s reliance on private litigation for dispute resolution).
171. See, e.g., Stephen B. Burbank, *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?*, 34 REV. LITIG. 647 (2015) (describing the various social benefits of discovery).
172. See, e.g., Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public’s Role in Court-Based ADR*, 15 NEV. L.J. 1631 (2015) (describing the benefits of allowing citizens to participate in the judicial process).
173. See Subrin & Main, *supra* note 1, at 1879 & n.229 (citing Burbank & Subrin, *supra* note 168, at 401–02 (2011)) (discussing the importance of the citizenry’s role in deciding questions of mixed fact and law).
174. See, e.g., Whitehouse, *supra* note 168 (arguing the multiple benefits of a civil jury); Subrin & Main, *supra* note 1, at 1880–84 (stating that citizens can help answer mixed questions of fact and law while keeping those powerful members of society on an “equal footing”).
175. Subrin & Main, *supra* note 1 (discussing the changing characteristics of the civil docket that may explain the judiciary’s departure from the use of trials).

trials and to decide motions necessary to promote fair trials. Such roles contributed to high settlement rates, with little or no further judicial involvement.¹⁷⁶ Motions to dismiss at the pleading stage or through summary judgment were extremely rare in federal courts,¹⁷⁷ and fortunately are apparently not the norm in many state courts today.¹⁷⁸ Judges in federal courts have become part of a large bureaucracy and have, to a large extent, become case managers, with the goal of disposing of civil cases without trial. Many federal judges feel that the trial of a case is evidence of judicial failure.¹⁷⁹

The debate on the extent to which state courts should replicate federal procedure as it has evolved since the 1980s should include, in our view, what state judges think their judicial roles should be and how they see the place of civil litigation in our democracy. The state courts handle about ninety-five percent of the civil caseload in the United States; the views of state court judges on these critical questions about the judicial role and the place of civil litigation in our society are of momentous importance.

It is important that the state courts, for the most part, have an advantage over the federal system when it comes to procedural rules. They are not bound by a “one size fits all” constrictor. They have the opportunity to devise rule-bound systems, with clear cut-off times and discovery amounts, whereby the bulk of cases can be litigated with few procedural steps and hurdles, while larger cases can be judicially managed on a more hands-on basis. They have the opportunity to experiment with different procedures for different case-types and to determine whether some cases would benefit from such crafting. At the same time, state judges have the opportunity to embrace their historic roles as judges.

176. *Id.* at 1885. *See also* Main, *supra* note 10, at 1624.

177. *Id.* at 1844–45.

178. NAT’L CTR. FOR STATE COURTS, *supra* note 107, at 35. For example, there were 5,815 dispositions by summary judgment in the 820,893 dispositions. It is uncertain what number of dispositions in the survey were based on granted dismissals at the pleading stage, but given the nature of the bulk of the cases, it is not likely to be a high percentage.

179. Subrin & Main, *supra* note 1, at 1861–62, 1873–74.

Exhibit A: Replication of Federal Amendments by States that have Adopted the FRCP

EXHIBIT A

Replication of Federal Amendments by States that have Adopted the FRCP

This Exhibit offers specific data to support the conclusions that are presented supra in Part II.B. States that are thought to be replica states are represented in the first column. The remaining columns correspond to each of seven signature amendments to the Federal Rules of Civil Procedure. A solid square in a cell symbolizes the replication by that state of the federal amendment. Anything less than a solid square suggests something less than replication. A legend detailing the significance of each symbol follows the table.

	11	15	23	26	48	50	51
AL	☐	■	☐	☐	☐	■	☐
AK	☐	■	☐	■	☐	☐	
AZ	■	■	☐	■	☐	■	
AR	■	■	☐	☐	☐	☐	☐
CO	■	■	☐	■	☐	☐	☐
DE	■	■	☐	☐	☐	☐	☐
DC	■	■	☐	☐	■	■	■
GA	☐	■	☐	☐		☐	
HI	■	■	☐	☐	☐	■	
ID	☐	■	☐	☐	☐	☐	
IN	☐	■	☐	☐	☐	☐	
KS	☐	■	■	☐	☐	■	☐
KY	■	■	■	☐	☐	☐	☐
ME	☐	■	☐	☐	☐	■	
MA	☐	☐	☐	☐	☐	☐	☐
MN	■	■	☐	☐	■	■	■
MS	☐	■		☐	☐	☐	
MT	■	■	■	☐	☐	■	■
NV	■	☐	☐	☐	☐	■	■
NM	☐	■	☐	☐	☐	■	
NC	■	☐	☐	☐	☐	☐	
ND	■	■		☐	■	■	■
OH	☐	■	■	☐	☐	☐	☐
OK	■	■	☐	☐		☐	
RI	■	■	☐	☐	■	■	☐
SC	☐	■	☐	☐	☐	☐	☐
SD	■	■	☐	☐	☐	■	■
TN	■	■	☐	☐	☐	☐	
UT	■	☐	☐	■	☐	■	
VT	■	■	☐	☐	☐	☐	☐
WA	■	■	☐	☐	☐	■	
WV	■	■	☐	■	☐	■	☐
WY	■	■	☐	■	☐	■	☐

LEGEND

- Rule 11: 1983 and 1993 amendments**
- ☐ Adopted neither the 1983 nor 1993 amendments (i.e., FRCP circa pre-1983)
 - Adopted the 1983 amendments, but not the 1993 amendments
 - ☐ Adopted the 1983 and 1993 amendments, but with significant modifications
 - Adopted the 1983 and 1993 amendments
- Rule 15: 1966 amendments**
- ☐ Did not adopt the 1966 amendments (i.e., FRCP circa pre-1966)
 - Adopted the 1966 amendments
- Rule 23: 2003 amendments**
- ☐ Rule deviates substantially from any version of the FRCP
 - ☐ Did not adopt the 2003 amendments (i.e., FRCP circa pre-2003)
 - ☐ Adopted the 2003 amendments, but with significant modifications
 - Adopted the 2003 amendments
- Rule 26: 1993 and 2000 amendments**
- ☐ Adopted neither the 1993 nor 2000 amendments (i.e., FRCP circa pre-1993)
 - Adopted the 1993 amendments, but not the 2000 amendments
 - ☐ Adopted the 1993 and 2000 amendments, but with significant modifications
 - Adopted the 1993 and 2000 amendments
- Rule 48: 1991 amendments**
- ☐ Rule deviates substantially from any version of the FRCP
 - ☐ Did not adopt the 1991 amendments (i.e., FRCP circa pre-1991)
 - ☐ Adopted the 1991 amendments, but with significant modifications
 - Adopted the 1991 amendments
- Rule 50: 1991 amendments**
- ☐ Did not adopt the 1991 amendments (i.e., FRCP circa pre-1991)
 - Adopted the 1991 amendments
- Rule 51: 2003 amendments**
- ☐ Rule deviates substantially from any version of the FRCP
 - ☐ Did not adopt the 2003 amendments (i.e., FRCP circa pre-2003)
 - Adopted the 2003 amendments