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Reconsidering Procedural Conformity Statutes

Thomas O. Main

University of Nevada, Las Vegas -- William S. Boyd School of Law

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Reconsidering Procedural Conformity Statutes

By Thomas O. Main*

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I. INTRODUCTION

A sign posted in a train station in Sacramento warns customers that trains moving along the railroad tracks may be controlled electronically and without engineers. The sign is posted because people expect to see an engineer sitting in the engine of a moving train; and patrons may be alarmed when the trains otherwise move. Yet I wonder whether even electronically-controlled trains should also have engineers? Or if the sign suffices, might this approach work also for matters far beyond trains and Sacramento.

The genesis of this symposium was the creative work of Professor Glenn Koppel, who advocates a uniform code of state civil procedure as part of a new federalism in state civil justice.¹ Professor Koppel laments that most state procedural rule systems are a collection of rules that are bastards,² orphans,³ runaways,⁴ and clones⁵ of the Federal Rules of Civil Procedure—my words, not his. These state procedural rules, even if not *controlled* by remote federal rules, are heavily influenced and overshadowed by them.⁶ Professor Koppel envisions cooperation among the

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- * Professor of Law and Associate Dean for Faculty Scholarship, University of the Pacific McGeorge School of Law. Thanks to Glenn Koppel, Dean Maryann Jones, the Law Review, and the rest of Western State University College of Law for their gracious hospitality before, during, and after this symposium.
1. Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167 (2005).
 2. See e.g. Cal. Civ. Code § 1781 (2007) (code provision incorporating part of Fed. R. Civ. P. 23 into consumer class action practice).
 3. See e.g. Mass. R. Civ. P. 15 (text of rule prescribing relation-back of amendments is a prior iteration of Fed. R. Civ. P. 15).
 4. See e.g. Ariz. R. Civ. P. 16, 26.1, 30(a), 33.1, 34(b), 36(b), 37(c)(1) (state rules that foreshadowed federal efforts to constrain discovery, but with dissimilar text). See generally Carl Tobias, *A Civil Discovery Dilemma for the Arizona Supreme Court*, 34 ARIZ. ST. L.J. 615, 625-628 (2002).
 5. See e.g. Ohio R. Civ. P. 8 (replicating Federal Rule). While this volume was in production, the 2007 Style Amendments to the Federal Rules of Civil Procedure took effect, thereby disturbing the replica status of some state procedural rules. A few states will likely replicate soon.
 6. See John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2002/2003); 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 (2001).

engineers of state procedural rules to assert a leadership role in civil procedure reform—to compete with the federal model and to leverage the power of procedure.⁷

I share Professor Koppel's enthusiasm for procedural uniformity.⁸ And I, too, believe in the awesome power of procedure to vindicate substantive rights⁹ (or to undermine them, as the case may be).¹⁰ But where Professor Koppel would unionize and empower the state engineers,¹¹ I propose outsourcing. I suggest that at least some states could relinquish much of the task of rulemaking to a remote authority—to-wit, the federal rulemakers. States that enact legislation conforming their procedure to the federal model could ensure substantial intra-state uniformity and, if replicated nationally, would generate inter-state (inter-system) uniformity.

This notion of conformity by states to the federal model is a peculiar paradigm. On one hand, in many respects, conformity is the extant position. Indeed, part of Professor Koppel's frustration is the lack of creativity and initiative on the part of state governments.¹² Yet on the other hand, institutionalizing that conformity with some formal mechanism appears to raise hackles. When floating my proposal of a state statute conforming state procedure to the federal model, I was labeled contemptuous of state sovereignty and ignorant about the power of procedure, among other failings. Such criticisms I could rebut; but the tenor of their rhetoric suggested that I had struck a nerve. And after my beloved mentor Steve Subrin told me that this was my "dumbest idea yet," I knew that I had found my topic for this symposium.

Although I will focus here on state statutes conforming state civil procedure to federal civil procedure, resistance to formal conformity is undoubtedly a much larger phenomenon. For example, consider why there are no conformity statutes linking a state's ethical code to the Model Rules of Professional Responsibility—or conformity statutes linking state rules of evidence to the Federal Rules of Evidence—or

To be clear, not all state procedural regimes are mere copycats of or laggards to the federal model. Professor Koppel points out that there has also been some experimentation by states that deviates from the federal model. See Koppel, *supra* n. 1, at 1175.

7. See Koppel, *supra* n.1, at 1174.
8. Main, *supra* n. 6, at 311 ("So deeply is the idea of uniformity embedded in American legal thought that many proceduralists find it difficult or unnecessary to explain why uniformity is thought to be good.").
9. See generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004); Charles E. Clark, *Handbook of the Law of Code Pleading*, 60 (2d ed., West 1947); Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938).
10. See generally Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221 (1997); Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677 (2004); Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924 (2006); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1294-1295 (1976); Phyllis Tropper Baumann, Judith Olans Brown & Stephen N. Subrin, *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211 (1992); Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HAR. CIV. RIGHTS-CIV. LIBS. L. REV. 341 (1990).
11. Koppel, *supra* n. 1, at 1175-1176.
12. See *id.* at 1188.

conformity statutes tying commercial laws to the Uniform Commercial Code. Many or most states in fact “adopt” these and similar regimes, but they do so episodically and statically, rather than with dynamic legislation. Resistance to a more formalized outsourcing is surely the product of some complex amalgam of tradition, culture, politics, and economics. So, with or without initiative, and whether or not controlled remotely, the state rulemakers are uniformed, trained, and in position. After all, people expect to see an engineer sitting in the engine of a moving train; and citizens may be alarmed when the trains otherwise move.

In this piece I consider the merits of procedural conformity statutes, and begin to unpack the reasons for the resistance to such reforms. I suggest that one strand of that resistance may be traceable to an oft-repeated historical narrative that recounts the failure of conformity statutes. Under various process acts between 1789 and 1938, federal court procedure in law cases was governed by the procedural rules of the state court in which the federal court sat. Ultimately replaced by a set of uniform Federal Rules of Civil Procedure, conformity statutes have since been in disrepute. My narrow effort here is to examine whether the pathogens of the earlier conformity regime would similarly infect a state statute conforming state procedure to the federal model.

II. DRAFTING THE STATUTE

The procedural conformity statutes that I envision require four analytical steps. First, a state would adopt the then-current Federal Rules of Civil Procedure as their state rules of civil procedure. Second, certain terminology in the rules must be customized for state practice. For example, rules that refer to the “procedure in the United States district courts”¹³ must be customized to reflect the state trial courts of general jurisdiction.

Neither of these first two steps is especially novel. Indeed, well over half the states adopted civil rules closely patterned after the Federal Rules of Civil Procedure.¹⁴ And all states have adopted at least some parts of the federal model.¹⁵ With regard to the second step—customization—Professor Thomas Rowe surveyed those contours decades ago.¹⁶

13. Fed. R. Civ. P. 1.

14. Oakley, *supra* n. 6, at 357-358.

15. California, for example, has modeled Federal Rule 24(a) intervention as a matter of right, the discovery rules 26 through 37 and 45, and also parts of Federal Rule 23, the class action rule—even without replicating the entire corpus of the FRCP and while maintaining a reputation as among those states least influenced by the Federal Rules. *See generally* John B. Oakley, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986); Charles Clark, *Code Pleading and Practice Today in David Dudley Field Centenary Essays*, 67-70 (N.Y. Univ. School of Law 1949) (discussing federal rules in states and influence of federal rules of civil procedure).

16. *See* Thomas D. Rowe, Jr., *A Comment on the Federalism of the Federal Rules*, DUKE L.J. 843 (1979). Professor Rowe explains that the process of customization is not only about matters of terminology. When deciding how closely to follow the federal model, state rulemakers should also appreciate the federalist influence that inheres in certain federal rules. *Id.*

Of course the picture of intra-state uniformity has since faded.¹⁷ States that adopted all or substantially all of the Federal Rules for their state practice have not kept pace with all of the subsequent amendments to the Federal Rules.¹⁸ Hence, the third step of the proposed conformity statute is designed to ensure a dynamic, rather than a static conformity. Specifically, the statute must codify a process whereby later amendments to the Federal Rules are customized for state practice and incorporated into the state regime as a matter of course. In other words, the codified default would be dynamic conformity, with the state incorporating all federal amendments. In the same fashion that amendments to the Federal Rules of Civil Procedure take effect under the Rules Enabling Act through Congressional inaction,¹⁹ those same amendments would be incorporated into the state rules without any formal act of adoption by the state.

This state legislation should also include an opportunity for a state to interdict any particular amendment to the Federal Rules from being incorporated into state practice. And thus, the fourth step of the reform could be, say, a 90-day window following the effective date of the federal amendment, during which a state could affirmatively act to prevent the incorporation of the amendment into the state procedural regime. Obviously a state would not be precluded from amending any of its procedural rules outside the 90-day window, but the federal amendment would be incorporated into the regime of state rules if the state did not affirmatively act within that 90-day grace period.²⁰

The basic justification for the method is that any procedure that survives the federal rulemaking gauntlet—notice and comment, Advisory Committee, Standing Committee, Judicial Conference, the United States Supreme Court, and finally Congressional inaction²¹—should enjoy some rebuttable presumption of suitability for incorporation into state procedure in the ordinary course.

The why of all this conformity was clear enough. Our goal was to make life as simple as possible for our lawyers, particularly the young ones as they came along, so that they could not make mistakes easily. We believed that uniformity was more valuable than the detailed merit of any particular rule—that the range of choice between rule alternatives was not great enough to warrant the hazard of a lawyer making a mistake by following the wrong rule.²²

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17. See generally Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989).
 18. Oakley, *supra* n. 6; Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429 (2003).
 19. See 28 U.S.C. § 2074 (2007).
 20. This too evokes the mechanics of the Rules Enabling Act. Under 28 U.S.C. § 2074, Congress has at least seven months (from on or before May 1 to December 1) to prevent the rules from taking effect. Understand that under the conformity statute proposed here, the 90-day period between federal and state adoption would not commence until the Federal Rule had taken effect (i.e., after the period reserved for Congressional action).
 21. See 28 U.S.C. §§ 2072-2074.
 22. John P. Frank, *Local Rules*, 137 U. PA. L. REV. 2059 (1989).

Dynamic procedural conformity could be pursued regardless of the particular federal model then in place. And indeed I am trying to take a wide arc around the question whether the current Federal Rules of Civil Procedure are the right rules for any particular state's practice. Instead I wish to focus on conformity itself—and, particularly, conformity statutes.

III. EVALUATING THE PROPOSAL

Conformity invokes one of procedural reforms and reformers' most consistent and fundamental themes—uniformity.²³ The roots and appeal of the norm of uniformity are already well established.²⁴ Accordingly, I sketch here only the advantages and disadvantages of intra-state procedural conformity. Of course conformity could be generated by (i) dynamic conformity statutes, (ii) static conformity statutes,²⁵ or (iii) by other assimilative forces such as culture.²⁶ In some states the latter two of these three may already be in place, establishing some conformity. But to the extent that conformity is beneficial and desired, dynamic conformity statutes offer the most enduring and transparent medium of delivery. The wisdom and feasibility of dynamic conformity states are analyzed in this part.²⁷

First, conformity between federal and state procedure could, over time, help democratize federal practice. Although many lawyers practice in both federal and

23. Main, *supra* n. 6, at 312.

24. See generally Subrin, *supra* n. 9; Subrin, *supra* n. 17; Janice Toran, 'Tis a Gift to Be Simple': *Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352 (1990).

25. See Main, *supra* n. 6.

26. For a discussion of how cultural forces can assimilate textually dissimilar rules see Main, *supra* n. 6, at 312.

27. My list has an interesting parallel in *Report of the Committee on Uniform Judicial Procedure*, 6 ABA J. 509 (1920), which identified the following benefits to be derived from uniform federal rules:

- (1) A modernized, simplified, scientific, correlated system of federal procedure meeting the approval of the Federal Supreme Court and participated in by the judges and lawyers.
- (2) The improvement of state court procedure through the adoption of the federal system as a model.
- (3) The possibility and the probability of state uniformity through the same course.
- (4) The institution of court rules in lieu of the statutory or common law procedure modified by statute.
- (5) [T]he foundation for fixed interstate judicial relations, as permanent and correlated as interstate commercial relations.
- (6) The advantage of the personal participation of the lawyers and judges in the creation and gradual perfecting of a scientific system of rules.
- (7) The certainty of immediately detecting an imperfection and the promptness with which it can be corrected.
- (8) The doing away with the longtime now necessary for the simplest relief at the hands of Congress because of the multitude of other business pressing for attention upon that great body of statesmen.
- (9) The doing away with the force of law now possessed by every procedural statute and the substitution therefor of a system of flexible judge-made rules, not liable to reversible error if justice be done by the judgment entered.
- (10) It is the only way that nation-wide uniformity is possible, and yet not compulsory, the psychology of which is important where state pride is an element.
- (11) It will awaken a keen sense of responsibility and a new and an unselfish participation on the part of the members of the Bench and Bar.
- (12) It will create an equitable division of power and duty between the legislative and judicial departments of government.

state courts, a divide between the bars persists.²⁸ Fluency with a single procedural schemata could bridge that gap²⁹—although unfortunately the population learning the new language would be the state court practitioners, already the more marginalized of the two populations.³⁰ Still, a federal court practice is important for clients who might benefit from having their case heard in a federal rather than a state court.³¹ And a federal court practice is especially important in light of Congress's recent expansion of federal court jurisdiction to include local matters once thought to be within the exclusive province of state courts.³²

Second, conformity could improve the federal rulemaking process. Were state procedure tied to the federal system, a constituency much larger than federal court

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28. See Stephen N. Subrin & Margaret Y.K. Woo, *Litigating in America: Civil Procedure in Context*, 17-18, 85-90 (Aspen Publishers 2006); see generally Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).
29. Ironically, advocates of uniform federal rules made a similar argument:

[I]t is manifest that the small practitioner will be substantially benefited because, with a uniform system of simple courtmade rules, he will find the door of no federal court closed in his face and will no longer need the association of one of the expert federal court practitioners now found at every Bar. They will start in together with the new system. It is the experts who would be expected to oppose this bill upon selfish grounds but they have been too patriotic to do it. The objection is as unworthy as it is unfounded because it places the small practitioner in the attitude of being willing to defeat improvement in the administration of justice for the sake of his personal convenience or profit, as has been pointed out, a sentiment that we feel assured will be promptly repudiated when brought to their attention. Report of the Committee, *supra* n. 27, at 515.

30. Again, these arguments are recycled. A similar concern arose in the context of the debate leading to uniform federal rules: "Some lawyers might be inconvenienced in having to learn a new system." *Id.* at 514. The drafters of that *Report* answered:

[L]awyers have not sunk so low that they would put their personal comfort or advantage or even their lives ahead of the sacred duty of assuring a reasonable certainty of justice or of improving their noble and responsible profession. Viewing it in a lighter sense, it [is] as if one rebelled against the laws of sanitation because of the trouble of taking a bath. The bankers have accepted and are profiting by a complete reorganization of their business. Lawyers have sufficiently demonstrated that they are equally as patriotic. *Id.*

The *Report* then addressed a similar objection "that the small practitioner and the country lawyer could not afford to learn the new system for the few cases he would command," but answered: "This connotes a spirit of selfishness and lack of patriotism unjust to the lawyers of small practice, who have always stood for the best in American life and its advancement because they had the time as well as the disposition to give thought to purely public matters. Their voice has been oftener heard upon the Hustings than that of any other vocation." *Id.* at 514-515.

31. Richard Posner, *The Federal Courts: Challenge and Reform*, 142-145 (Harvard University Press 1985) (discussing factors lawyers consider in choosing between federal and state court); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 395-396 (1992) (presenting survey results showing that the removal decision is influenced by different procedures, amount of damage awards, jury pools, judicial competence, and time-to-trial, among other perceived or actual differences); Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 799 (1995) (arguing that federal judges are more competent with respect to constitutional issues); see also Liebmann, *Fourteen Points for the Forum Chooser*, MD. B.J. 13, 13-15 (Jan. 1981) (listing fourteen factors for practitioners to consider when choosing between federal and state court).
32. Class Action Fairness Act of 2005, Pub. L. 109-2. See Symposium, 156 U. PA. L. REV. (2008) (forthcoming).

practitioners and litigants would have a stake in amendments to the Federal Rules.³³ Presumably this would lead to increased interest and participation in federal rulemaking; and that increased participation, in turn, could lead to better rulemaking practices—perhaps fewer and better amendments.³⁴

Third, conformity of federal and state procedure would establish a single procedural system within a state for law schools to teach and for bar examiners to test. Many law schools would no longer have to ignore state procedure, where, in fact, almost all litigation in the United States occurs.³⁵ And under a conformity regime, those few law schools that presently teach state procedure (and the bar examiners that test it) could focus on the mastery of procedure's conceptual framework rather than superficial checklists highlighting differences between the two systems.

Fourth, conformity would provide legislatures with a stable and predictable procedural platform for drafting substantive law. For anyone who believes in the power of procedure, there should be discomfort with the notion that the same substantive law can be executed by fundamentally different procedural regimes. For unless a legislature is indifferent to the level of deterrence that its law achieves, the substantive law must include assumptions about the relevant pleading standard, joinder rules, the availability *vel non* of broad discovery (including experts), and so forth.³⁶

For example, if a legislative enactment is calibrated such that the cause of action includes an element of *intent*, that substantive law may yield one result in a jurisdiction that has notice pleading and liberal discovery, but a different result even with identical facts in a jurisdiction that is, say, experimenting with the pleading of evidence, has resurrected a version of Rule 11 that is vintage 1983, allows little or no discovery, and promises an accelerated trial date. Two cases may have the same facts and be subject to the same substantive law; but if the two cases are subject to different procedures, there may be different outcomes. One way of characterizing this phenomenon is that the legislative will presumes a certain enforcement mechanism; and the legislature deserves to know what that procedural schemata will be. Intra-state procedural uniformity is one step closer toward greater certainty.

Fifth, and finally, conformity statutes move us closer to some sort of approximation of procedure on a global stage. While the adoption by one state of a dynamic conformity regime might be the tiniest of small steps, a critical mass of adopting states would help define what is "American civil procedure." This effort is

33. See B. Ostrom, N. Kauder & R. LaFountain, *Examining the Work of State Courts, 2001: A National Perspective from the Court Statistics Project* (National Center for State Courts 2001) (recounting that 97% of litigation in the United States occurs in state courts).

34. For criticism of federal rulemaking practice and results, see generally Stephen B. Burbank, *The Underlying Assumptions of the Federal Rules of Civil Procedure: Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 841-842 (1993); Stephen B. Burbank, *Honoring David Shapiro: Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677; see also Main, *supra* n. 18, at 479-486 (detailing the complication, trivialization, and ossification of the Federal Rules of Civil Procedure).

35. See B. Ostrom et al., *supra* n. 33.

36. See generally Thomas O. Main, *The Death of Procedure* (manuscript on file with author).

useful not only for those of us looking for an expenses-paid trip to the Hague or elsewhere to discuss a new world order of procedure at some clothing-optional conference where we can flaunt our French and disclaim our President. Moreover, it is important because, as just discussed, substantive law is built upon a procedural infrastructure. And when the substantive law is unhinged from that procedure, fidelity to the legislative will can be compromised.³⁷ On the world stage—where substantive and procedural laws can vary dramatically—this phenomenon becomes evermore pronounced.

Of course dynamic conformity statutes could also be problematic, and there are several concerns that deserve serious attention. First, query whether certain characteristics that inhere in state and federal court practices demand different procedures. After all, state courts handle much more litigation, and with a different composition of subject-matter caseload.³⁸ The stakes of the typical litigation matters may well be very different in state and federal courts;³⁹ the quality of lawyering and/or judging might vary;⁴⁰ there might be significantly more pro se litigants;⁴¹ and so forth. Does it follow, then, that the procedural rules should likewise be different for the two court systems?

We might observe that, empirically, both intra-state uniformity and intra-state disuniformity appear to work. Many states replicated the then-Federal Rules with success.⁴² And this would seem to suggest that, at least in those locales, federal and state court practice are not *necessarily* so different as to *require* different procedural regimes. Indeed, this should not surprise since nearly every case that proceeds in federal court could instead be pursued in state court.⁴³ And, in many respects, vice versa.⁴⁴

But this is not to suggest that disuniformity cannot work. Indeed, other states have maintained their own procedural regimes without formally adopting all of the Federal Rules; and they have done so without seriously complicating the practice of law or seriously undermining enforcement of the substantive law.

The evidence that substantial procedural uniformity works may be more compelling, however, than the evidence that substantial disuniformity works. As already mentioned, the influence of the Federal Rules on state practice has been

37. See generally, Thomas O. Main, *The Death of Procedure* (manuscript on file with author).

38. See B. Ostrom et al., *supra* n. 33.

39. Theodore Eisenberg, *Use It or Pretenders Will Abuse It: The Importance of Archival Legal Information*, 75 *UMKC L. REV.* 1 (2006); Larry Lyon et al., *Straight From the Horse's Mouth: Judicial Observations of Jury Behavior and the Need for Tort Reform*, 59 *BAYLOR L. REV.* 419 (2007).

40. Posner, *supra* n. 31, at 143-144.

41. Drew A. Swank, *The Pro Se Phenomenon*, 19 *BYU J. PUB. L.* 373, 376 (2005) (reviewing statistical analyses of federal and state court pro se matters).

42. Oakley, *supra* n. 15.

43. With few exceptions, federal court jurisdiction is concurrent with state courts. See generally Michael Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 *U. PITT. L. REV.* 383 (1991); Posner, *supra* n. 40, at 185.

44. See 28 U.S.C. § 1332, including revisions thereto effected by the Class Action Fairness Act of 2005, *supra* n. 32.

tremendous.⁴⁵ And national legal education and a legal culture have a demonstrable assimilating influence even on procedural rules that differ in form.⁴⁶ Accordingly, it is not at all clear just how much dissimilarity presently exists between federal and state procedures. Of course, with a more ambitious procedural federalism initiative we might soon have a data set to examine the consequences of more profound divergence.

Second, conformity is a bad idea if the federal rulemaking process is so flawed that any expansion of its influence should be discouraged. For example, much like the risk associated with the broad distribution of tainted food, the dangers of something noxious can be minimized by decentralizing its manufacturing and distribution processes. In this metaphor we might imagine Rule 23 filling the role of California spinach tainted with *E. coli*; and maybe the style amendments are the Chinese pet food tainted with aminopterin.

That certain interests would have even more to gain by controlling the process of federal procedural rulemaking is cause for concern. To the extent that the federal rulemaking process is flawed, quarantine (to prevent its spread) is one response, but surely an unsatisfactory one. That response assumes that the pathogens in the federal rulemaking process have not also infected state rulemaking. And to the extent that state rulemaking is not contaminated, why retreat rather than—dare I say, “surge?” As already stated above, in a conformity regime, with the increased stakes in federal rulemaking, there could be increased participation in the federal rulemaking process and perhaps a slower, more thoughtful, better rulemaking process.⁴⁷

A third area of concern focuses on a host of technical issues. For example, a state that adopted dynamic conformity legislation would have to develop a method for dealing with all of the conflicts between a new procedural regime and the existing corpus of substantive and procedural law. This is not an especially new phenomenon, however, as it is not uncommon for a state to have procedures codified within substantive laws (and substantive sections of the codes) that are inconsistent with the more generally-applicable procedural codes or rules. Adoption of some interpretive maxim determines whether the specific controls the general, or that the latest in time controls, and so on. Along these same lines, a state might announce that subsequent legislative enactments might trump the procedural rules only with a “clear statement” of intention to do so. I see these as modest challenges many of which could even be addressed in the exercise of drafting.

Much more significantly, the legislative enactment of dynamic conformity statutes could run afoul of state constitutional mandates. In some states, the task of procedural rulemaking is assigned by constitutional mandate to the judiciary.⁴⁸ In

45. See Oakley, *supra* n. 6.

46. Main, *supra* n. 6.

47. See *supra* nn. 33-34.

48. See *e.g.* Ariz. Const. art. VI, § 5(5) (“The Supreme Court shall have . . . Power to make rules relative to all procedural matters in any court.”); Colo. Const. art. VI, § 21 (“The supreme court shall make and promulgate rules governing the administration of all courts and shall make and promulgate rules governing practice and procedure in civil and criminal cases, except that the

others, the rulemaking authority is shared by the judicial and legislative branches.⁴⁹ Even in those many states where the legislatures have enacted statutes conferring rulemaking authority to the courts,⁵⁰ the authority may not have been theirs to give.

general assembly shall have the power to provide simplified procedures in county courts for the trial of misdemeanors.”); Mich. Const. VI, § 5 (“The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.”); *see also* Richard S. Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1 (1975-1976) (discussing exclusive power of the Connecticut judiciary over rules of practice and procedure as implied power under state constitution).

49. Alaska Const. art. IV, § 15 (“The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.”);
Mo. Const. art. V, § 5

The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended in whole or in part by a law limited to the purpose.

- Vt. Const. ch. II, § 37 (“The Supreme Court shall make and promulgate rules governing the administration of all courts, and shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. Any rule adopted by the Supreme Court may be revised by the General Assembly.”);
W. Va. Code Ann. § 51-1-4

The supreme court of appeals may, from time to time, make and promulgate general rules and regulations governing pleading, practice and procedure in such court and in all other courts of record of this State. All statutes relating to pleading, practice and procedure shall have force and effect only as rules of court and shall remain in effect unless and until modified, suspended or annulled by rules promulgated pursuant to the provisions of this section.

50. *See e.g.* Ga. Code Ann. § 15-2-18(a)

The Supreme Court and the Justices thereof shall have the power to prescribe, modify, and repeal rules of procedure, pleading, and practice in civil actions and proceedings in the courts of this state (b) Whenever the Supreme Court adopts or prescribes any rules under this Code section, the rules shall be reported by the court to the General Assembly at the next regular session thereof or at an extraordinary session authorized by law to consider and ratify them. The rules shall not take effect until they have been ratified and confirmed by the General Assembly by an Act or resolution thereof (e) This Code section shall not be construed as constituting an abandonment or disclaimer of the power of the General Assembly to enact laws regulating procedure in the courts of this state.

- Me. Rev. Stat. Ann. tit. 4 § 8

The Supreme Judicial Court has the power to prescribe, by general rules . . . the forms of process, writs, pleadings and motions and the practice and procedure in civil actions at law . . . They take effect on such date not less than 6 months after their promulgation as the Supreme Judicial Court may fix. After their promulgation the Supreme Judicial Court may repeal, amend, modify or add to them from time to time with or without a waiting period. After the effective date of said rules as promulgated or amended, all laws in conflict therewith are of no further force or effect.

- Mass. G.L. c. 213 § 3

The courts shall, respectively, make and promulgate uniform codes of rules, consistent with law, for regulating the practice and conducting the business of such courts in cases not expressly provided for by law, for the following purposes: First, Simplifying and shortening pleadings and procedure. Second, Prescribing the terms upon which

Debates about the locus of the rulemaking authority are neither new nor resolved.⁵¹ In states with constitutions that allocate the rulemaking power to the legislature, conformity legislation should be least problematic. In states where courts make rules as a matter of legislative grace, conformity legislation could revive a simmering controversy. And in states with constitutions expressly allocating the rulemaking authority to the judiciary, state constitutional reform could be necessary.⁵²

A separate constitutional hurdle for conformity legislation could be the propriety of what might fairly be characterized as a *delegation* of state authority to the federal government. Is this tolerable? Questions about delegation running in the *opposite* direction have been asked and answered. For example, the Assimilative Crimes Act incorporates certain state criminal laws as federal law governing federal enclaves within those states.⁵³ And in *United States v. Sharpnack*, the Act was challenged as an unconstitutional delegation to the states of Congress's legislative power.⁵⁴ The Court rejected this argument, explaining that:

Rather than being a delegation by Congress of its legislative authority to the States, [the Act] is a deliberate continuing adoption by Congress for federal enclaves of such unpre-empted offenses and punishment as

amendments will be allowed . . . Third, Conducting trials . . . Fifth, Giving a party such notice of the evidence which is intended to be offered by the adverse party . . . Eighth, Expediting the decision of causes and securing the speedy trial thereof.

Nev. Rev. Stat. § 2.120

(1) The supreme court may make rules not inconsistent with the constitution and laws of the state for its own government, the government of the district courts, and the government of the State Bar of Nevada (2) The supreme court, by rules adopted and published from time to time, shall regulate original and appellate civil practice and procedure, including, without limitation, pleadings, motions, writs, notices and forms of process, in judicial proceedings in all courts of the state, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits.

Wyo. Stat. 5-2-114 (“The supreme court of Wyoming may from time to time adopt, modify and repeal general rules and forms governing pleading, practice and procedure, in all courts of this state, for the purpose of promoting the speedy and efficient determination of litigation upon its merits.”).

51. Compare Edson Sunderland, *The Exercise of the Rule-Making Power*, 12 ABA J. 548, 549 (1926) with Roscoe Pound, *The Rule-Making Power of the Courts*, 12 ABA J. 599, 600 (1926); see generally Richard S. Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 34 (1975-1976) (“[T]he regulation of procedure in litigation was considered a normal and appropriate legislative task throughout most of the nineteenth century. In the second and third decade of [the twentieth] century, a strong movement developed to transfer the rulemaking function to the courts.”); *id.* at 27-43.
52. Reform could be necessary because a rule that prospectively incorporates other rules may not be the sort of judicial rulemaking contemplated by the constitution. Of course the classic judicial function is *applying* general rules to concrete individual situations. The authority to *formulate* general rules—to apply to people and situations not specified—is traditionally a legislative function. Although some state constitutions authorize the *courts* to engage in rulemaking, dynamic conformity could test the outer limits of the rulemaking authority. See generally Jack B. Weinstein, *Reform of Court Rule-Making Procedures*, 4-5 (Ohio State University Press 1977).
53. 18 U.S.C. § 13(a); see also 18 U.S.C. § 1955 (criminalizing a gambling business which is “a violation of the law of a State or political subdivision in which it is conducted”).
54. *U.S. v. Sharpnack*, 355 U.S. 286 (1958); see Anthony J. Bellia, Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 867 n. 195 (2005).

shall have been already put in effect by the respective States for their own government.⁵⁵

In fact, the Supreme Court has never held the prospective incorporation of state law by Congress to be unconstitutional.⁵⁶

Although the constitutionality of a prospective incorporation of federal law by the state would vary from state to state, there are many examples of state statutes that rely on the authority of, or in effect delegate authority to *federal* agencies and statutes. For example, the Michigan Supreme Court recently upheld a statute that barred products liability actions for drugs approved by the Federal Food and Drug Administration, even in the future.⁵⁷ Wisconsin courts have enforced state legislative efforts to incorporate future amendments to the Federal Vocational Rehabilitation Act.⁵⁸ Many state tax regimes prospectively incorporate elements of Federal tax law.⁵⁹ And in many jurisdictions, it appears that prospective incorporation is constitutionally permitted provided the legislative intent is clear.⁶⁰

In states less sanguine about the prospective incorporation of another sovereign's law, however, dynamic conformity statutes could prove much more problematic.⁶¹ In these jurisdictions, a reformer might be able successfully to

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55. *Sharpnack*, 355 U.S. at 293-294. The Court also cited with approval other examples of prospective incorporation in federal legislation. See *id.* at 294-296 (citing cases upholding the constitutionality of the Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified at 27 U.S.C. § 122); the Black Bass Act, ch. 346, 44 Stat. 576 (1926) (repealed 1981); the Johnson Act, 15 U.S.C. § 1171 (1994)).
56. *Bellia*, *supra* n. 54, at 867 n. 195; but see *id.* (“[Nevertheless,] scholars have argued that there are theoretical and historical considerations that render the point far from settled.”) citing Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1371 (1996) (noting that in *Sharpnack*, dissenting Justices Douglas and Black argued that “prospective adoption” of state laws was equivalent “to an unconstitutional abdication of federal legislative authority”); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1484-1485 (2000) (explaining that one of these considerations is the “nondelegation doctrine”).
57. *Taylor v. Smithkline Beecham*, 658 N.W.2d 127 (Mich. 2003).
58. See *Dane Co. Hosp. and Home v. Lab. and Indus. Review Commn.*, 371 N.W.2d 815, 824 (Wis. Ct. App. 1985) (“In incorporating this federal rehabilitation law, the Wisconsin legislature has not delegated its legislative authority . . . This is not an unconstitutional delegation.”).
59. See e.g. *Parker Affiliated Co. v. Dept. of Revenue*, 415 N.E.2d 825, 831 (Mass. 1981) (citing cases); see generally Jim Rossi, *Institutional Design and The Lingering Legacy of Antifederal Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1236 (1999) (“Courts have upheld state legislature delegations of authority to a federal agency, including future lawmaking authority, even where the state nondelegation doctrine has not been met.”). For example, in *McFaddin v. Jackson*, the Tennessee Supreme Court upheld a statute that made individual retirement plans taxable if subject to the federal estate tax, but exempt if excluded from the federal estate tax. 738 S.W.2d 176, 176-177 (Tenn. 1987).
60. See e.g. *A. L. Campbell, Jr. v. T.D. Hunt*, 155 S.E.2d 682, 684 (Ga. Ct. App. 1967); *Haw. Providers Network, Inc. v. AIG Haw. Ins. Co.*, 98 P.3d 233, 241 (Haw. 2004); *Suburban Sav. & Loan Assn. v. Commr. of Banking of State of N.J.*, 375 A.2d 1185, 1191 (N.J. Super. App. Div. 1977).
61. See e.g. *Scappaticci v. S.W. Sav. & Loan Assn.*, 662 P.2d 131, 134 (Ariz. 1983) (“The Arizona Legislature can incorporate by reference only such laws and regulations as exist at the time they enact legislation and cannot constitutionally adopt future changes which might occur.”); *Clemens v. Harvey*, 525 N.W.2d 185, 189 (Neb. 1994) (rejecting prospective adoption of Social Security Act; “the adoption of an act of Congress to be passed in the future would be an unconstitutional attempt on the part of the Legislature to delegate legislative authority to Congress”).

Some jurisdictions send mixed messages. Compare *People v. Kruger*, 48 Cal. App. Supp. 3d 15, 19 (1975) (“It is, of course, perfectly valid to adopt Existing statutes, rules, or regulations of Congress or of another state, by reference; but the attempt to make Future regulations of another

distinguish the prospective incorporation of procedural rules from the dynamic incorporation of substantive law; given the so-called auxiliary nature of procedure, the delegation of rulemaking authority to another sovereign may be perceived as qualitatively different. More persuasively, I think, reformers could emphasize the unique significance of achieving procedural uniformity.⁶² For example, in *In re Lasswell*,⁶³ a California Court of Appeals upheld a state statute which in effect adopted the National Industrial Recovery Act and provided that when Federal authorities fixed a code for the operation of any interstate industry, that code automatically became the state code therefor. The court reasoned that the relation of state and interstate industrial and unemployment emergencies justified uniformity of code provisions.⁶⁴ Of course an amendment to the state constitution is the last resort. Indeed, it appears that some states, in the interest of uniformity and simplification, have felt that it was desirable and necessary to effect constitutional reform.⁶⁵

A third technical issue concerns the possibility of some sort of recursive loop if the Federal Rules presume a separately functioning procedural *system* but through conformity the state simply refers back to the federal system. But with so much experience with state conformity already, this seems to pose no real obstacle. Relatedly, parts of Rules that the state is without the authority to enforce would need to be addressed in the customization. Federal Rule 4(k) is one such example. But again, many states have already tackled such issues.⁶⁶

IV. CONTEMPLATING THE ANOMALY

It is understandable why people expect to see an engineer sitting in the engine of a moving train. And it is understandable why the citizens of a state would expect a state procedural rulemaking enterprise. But when the trains and rules are, as a practical matter, being controlled remotely, the allocation of resources could be questioned, the force reduced, and a sign hung. But although the sign hangs at the train station in Sacramento, California, where electronically-controlled trains move about, state rulemaking committees diligently and conscientiously assume their posts.

jurisdiction part of the state law is generally held to be unconstitutional.”) with *State School Bldg. Fin. Comm. v. Betts*, 216 Cal. App. 2d 685, 692 (1963) (“Incorporation by reference of the law generally on a particular subject includes not only the contemporary law but future amendments.”); see generally *Dean v. Kuchel*, 37 Cal.2d 97, 100 (advising that Constitutional language should not be construed as a limitation on legislative power in the absence of a clearly stated restriction).

62. See Charles A. Warren, *Federal Process and State Legislation*, 16 VA. L. REV. 546, 562-564 (1930) (noting that the Supreme Court in 1872, 1875, and 1887 did not question Conformity Act’s constitutionality but rather saw it as reducing the inconvenience of having to follow different procedures in state and federal courts of the same locality).
63. 1 Cal. App. 2d 183 (1934).
64. *Id.* See also *People ex rel. Pratt v. Goldfogle*, 242 N.Y. 277 (1926); *Commonwealth v. Alderman*, 119 A. 551 (Pa. 1923).
65. See N.Y. Const. art. 3 § 22; Colo. Const. art. 10, § 19; see also *Anderson v. Tiemann*, 155 N.W.2d 322 (Neb. 1967).
66. See Rowe, *supra* n. 16.

If conformity statutes could be useful and can be enacted, why aren't they more popular? Although we find prospective incorporation in certain limited contexts explored above, why isn't there at least one state with a conformity statute linking a state's ethical code or rules of evidence or commercial law or civil procedure rules to the various extant Model Rules, Uniform Rules, Federal Rules, and so forth? Importantly, the answer to that question is not that the states reject those other regimes wholesale; to the contrary, the states tend to adopt much of them, albeit episodically and statically.⁶⁷

Opposition to conformity statutes can be dressed up as a federalism argument with emphasis on the sovereign role of states. To be sure, some states might have their own agenda, an active rulemaking apparatus, and an end product of which they should be proud. But for jurisdictions that instead have state rules that are but bastards, orphans, runaways, and clones of the federal or model rules, neither state pride nor a superior end-product can justify their approach. Remember that dynamic conformity statutes do not prevent intended deviations on the part of state rule makers wary of a federal rule: a state can slow the train, stop the train, or switch to stagecoaches at any point in time.

Tradition, culture, politics, and economics may be among those forces that repress consideration of conformity statutes. One strand of that resistance may also be the currency of a narrative that tells a cautionary tale about conformity statutes. Conformity statutes prescribed the procedure in law cases in federal courts for more than one hundred and forty years. But once conformity was rejected and replaced in the 1930s, the historical narrative is frequently reduced to something short and sour: the conformity acts failed.⁶⁸ A fuller account of that history appears in the next two parts.

67. See authorities cited in *supra* nn. 2-6.

68. See e.g. James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and The Rule of Law*, 41 VAL. U. L. REV. 517, 566 (2006) ("The Conformity Act . . . hardly lived up to its name and itself led to considerable uncertainty."); Mary Margaret Penrose & Dace A. Caldwell, *A Short and Plain Solution to the Medical Malpractice Crisis: Why Charles E. Clark Remains Prophetically Correct About Special Pleading and the Big Case*, 39 GA. L. REV. 971, 1004 n. 187 (2005) ("This system was quickly perceived as 'highly unsatisfactory.'") (citation and quotation omitted); Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions By Statute or Procedural Rule*, 79 IND. L.J. 711 (2004) ("The Conformity Act failed to achieve its purpose."); Main, *supra* n. 18, at 470 n. 250 ("Most people agreed that the Conformity Act was a failure."); Fleming, James, Jr. et al., *Civil Procedure* § 1.8 at 23-24 (5th ed. 2001) (Conformity Act "caused great disuniformity in practice among the federal courts."); David Shapiro, *Federal Rules 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1974 (1989) (Act did "not result [] in uniformity"). Perhaps even more ignominious for the Conformity Act is the treatment given this history in some of the civil procedure casebooks; see e.g. Jack H. Friedenthal et al., *Civil Procedure: Cases and Materials* (9th ed., West/Thomson/Foundation Press 2005) 450-497 (ignoring the Conformity Acts in a 47-page chapter about "The Development of Modern Procedure").

V. RECOUNTING THE BASICS

Experimentation with the idea of conformity occurred very early in our nation's history. Congress passed the first Process Act of September 29, 1789,⁶⁹ to prescribe the forms of writs and process for the new federal courts (in suits at common law). It provided:

That until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process and rate of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the Supreme Courts of the same.⁷⁰

Conformity was intended “to allay as far as possible jealousy between the State and Federal Governments and to relieve the fears of encroachment by the latter.”⁷¹

The first Process Act was to be a temporary measure, so Congress revisited federal procedure in its subsequent sessions.⁷² Congress considered other approaches to rulemaking, including giving the Supreme Court the authority to promulgate uniform federal rules,⁷³ yet ultimately chose conformity again in the Permanent Process Act of May 7, 1792.⁷⁴ This Act prescribed conformity in the “forms and modes of proceeding,” but was subject to “alteration by the respective courts or by rules which the Supreme Court of the United States might think proper to prescribe for the other courts of the United States.”⁷⁵

For decades the federal courts, following a “course of prudence and duty” and in a “spirit of moderation and comity,” conformed as nearly as practicable to the administration of justice in the state courts.⁷⁶ But two sources of friction had emerged: first, the Process Act was thought to prescribe conformity to state law as of 1789;⁷⁷ and second, the Process Act applied only to the thirteen original States. With regard to the latter, the federal courts often conformed to the practice in the new states even without a mandate.⁷⁸ But the former proved more problematic: the federal court could either adopt the state practice through rules of court⁷⁹ or “conform” to a state practice even when that practice was no longer recognized in the state of its origin.⁸⁰ Eventually, the

69. 1 Stat. 93, 1st Cong., 1st Sess. (Sept. 29, 1789).

70. 1 Stat. 93, 1st Cong., 1st Sess. (Sept. 29, 1789).

71. Charles Warren, *Federal Process and State Legislation*, 16 VA. L. REV. 421, 427 (1929-1930).

72. *See id.*

73. *See* 1 Annals of Cong. 1886 (1790); *Report of the Attorney General*, Dec. 27, 1790; Warren, *supra* n. 71, at 427-434.

74. 1 Stat. 275, 2d Cong., 1st Sess. (May 8, 1792).

75. *Id.* Similar rulemaking authority was accorded the federal courts in Section 17 of the Judiciary Act of 1789. Further, a 1793 statute broadened this authority in more explicit terms. *See* 1 Stat. 335, 2d Cong., 2d Sess. (Mar. 2, 1793).

76. *Fullerton v. Bank of the U.S.*, 26 U.S. 604, 614 (1828).

77. *Wayman v. Southard*, 23 U.S. 1, 32 (1825).

78. Warren, *supra* n. 71, at 435-436.

79. *See* text accompanying *supra* n. 75.

80. *See e.g. Homer v. Brown*, 57 U.S. 354 (1854).

new states and new laws prompted two more acts—in 1828 and 1842⁸¹—to update federal practice. However, recognizing “the danger of providing for conformity with future and necessarily unknown and unknowable state legislation,” these acts, too, provided only for strict conformity as of the date of the legislation.⁸² To adopt state law as it would develop in the future, Chief Justice Marshall thought problematic since it could amount to states regulating the procedures governing federal courts.⁸³ However, federal courts were still vested with the authority to enact rules adopting state practices.

“From 1828 to 1872 the Federal Courts adapted their practice and processes to those of the States without much difficulty.”⁸⁴ One reason for the success of this system was the fact that, in general, up to the year 1848, the principles of common law pleading prevailed throughout the states.⁸⁵ But adaptation slowed once “reformed” or code pleading was introduced in several states.⁸⁶ Some federal courts embraced the codes to remain in lockstep with the states, “while in other states, common law procedure ruled in federal court from the graveyard of static conformity.”⁸⁷ Hence an increasing number of lawyers thus found it necessary to master—or at least to become familiar with—procedural systems that were fundamentally different.⁸⁸

On June 1, 1872, a new federal process act was passed to address the inconsistency resulting from optional static conformity under the earlier acts.

That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.⁸⁹

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81. See 4 Stat. 278, 20th Cong., 1st Sess. (May 19, 1828); 5 Stat. 499, 27th Cong., 2d Sess. (Aug. 1, 1842).
 82. Edgar B. Tolman, *The Origin of the Conformity Idea, Its Development, the Failure of the Experiment, the Evils Which Resulted Therefrom, and the Cure for Those Evils*, 23 ABA J. 971, 972 (1937).
 83. See *Wayman v. Southard*, 23 U.S. 1 (1825).
 84. Warren, *supra* n. 71, at 557. See also Tolman, *supra* n. 82, at 972 (“The faults inherent in the general conformity act did not manifest themselves to any serious extent, so long as the state practice continued to follow the English pattern.”).
 85. See generally Joseph H. Koffler & Alison Reppy, *Handbook of Common Law Pleading*, 19-27 (1969); Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988).
 86. *Id.*; Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORNELL L.Q. 443, 446 (1934-1935). After New York adopted its Code of Civil Procedure, the spread of the codes proceeded in two waves: with twenty states adopting code pleading by the end of Reconstruction; a second wave near the end of the nineteenth century led to adoptions in a handful of additional states. See Henry Upton Sims, *The Problem of Reforming Procedure*, 21 YALE L. J. 215, 216 (1911-1912).
 87. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1038-1039 (1982). For federal cases critical of the codes, see e.g. *Randon v. Toby*, 11 How. 493, 517 (1850); *McFaul v. Ramsey*, 20 How. 523 (1858). Professor Warren suggests that the Court’s criticism of the codes prevented several states from adopting them. See Warren, *supra* n. 71, at 560.
 88. Charles Hepburn, *The Historical Development of Code Pleading*, 153 (W.H. Anderson & Co. 1897).
 89. 17 Stat. 196.

Although there was some debate about whether the “notwithstanding” proviso abrogated the whole of the court’s rulemaking power under earlier acts,⁹⁰ the thrust of the act was to replace static conformity with dynamic conformity.

Under the new Conformity Act, the federal courts were obliged to conform automatically their action “as near as may be” to any procedure which then existed or which might in the future exist in the State Courts.⁹¹ The Act has surprisingly little legislative history.⁹² But, as the Supreme Court declared:

The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the Federal and State courts of the same locality. It had its origin in the code enactments of many of the States. While in the Federal tribunals the common-law pleadings, forms, and practice were adhered to, in the State courts of the same district the simpler forms of the local code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the courts of the United States which it prescribes. The remedy was complete.⁹³

The notion of dynamic conformity seems to have been well-received at the outset of this new era.⁹⁴

But the honeymoon was short. An 1876 editorial in the *American Law Review* explained: “[t]he simplification attempted by the Practice Act [of 1872] has not been protective of the results hoped. On the whole, the practice has become looser but not really easier.”⁹⁵ A decade later a bill was introduced to repeal the Conformity Act.⁹⁶ That proposal failed, but discontent grew in an atmosphere of uncertainty and confusion regarding when federal courts conformed and when they did not:

The ambiguities that grew up around the Conformity Act made federal practice confusing and frustrating. “When removed,” protested a Missouri lawyer in 1927, “the case will be tried in a court in which the

90. Compare Tolman, *supra* n. 82, at 972 and Jack B. Weinstein, *Reform of Court Rule-Making Procedures*, 4-5 (Ohio State University Press 1977) with Armistead Dobie, *Handbook of Federal Jurisdiction and Procedure*, 587 (West 1928); Subrin, *supra* n. 17, at 2012 & n. 65 (1989). The Conformity Act did not limit the court’s authority to make rules for equity cases, see § 917 of the Revised Statutes of 1878; procedure in equity was always on a separate track and were never subject to a conformity mandate. See Main, *supra* n. 6 (many states didn’t have equity courts); Burbank, *supra* n. 87, at 1039-1040.

91. Warren, *supra* n. 71, at 562.

92. *Id.* at 562.

93. *Nudd v. Burrows*, 91 U.S. 426, 441 (1875); see also *Lamaster v. Keeler*, 123 U.S. 376, 387 (1887) (“The new codes of procedure did not require an accurate knowledge of the intricacies of common law pleading; and to obviate the embarrassment following the use of different systems in the two courts the section mentioned of the act of 1872 was adopted.”).

94. See e.g. 6 AM. L. REV. 748 (1872).

95. As quoted in Warren, *supra* n. 71, at 564 n. 53.

96. See 18 AM. L. REV. 464 (1884). The bill prescribed that the equity rules would have applied in law cases. See Warren, *supra* n. 71, at 567-568 n. 65.

law is administered in many respects vitally different from a state court.” Removal, a California attorney complained ambiguities that grew up around the conformity Act made federal practice five years later, forced attorneys to confront “the intricate mazes of Federal practice and procedure.” In the federal courts, concluded one scholar, procedural “principles and their applications are often hazy and uncertain, and they vary widely in the different states.” Successful navigation through trial required either long familiarity with the local federal practice or some preventive research. Reliance on procedural “conformity” proved as often a trap as a guide to attorneys who appeared in the federal courts only rarely. The great majority of lawyers, including most of those who represented poorer individuals in ordinary tort and contract actions, fell into that last category. The attorneys who represented corporations and who frequently or habitually removed often did not.⁹⁷

By the turn of the twentieth century, there was considerable anti-conformity-act rhetoric. A “distinguished commentator” said the decisions under the Conformity Act and its predecessors amounted to “hideous confusion and shifting uncertainty.”⁹⁸ A federal practitioner “even in his own state, f[elt] no more certainty as to the proper procedure than if he were before a tribunal of a foreign country.”⁹⁹ “To the average lawyer it is Sanskrit; to the experienced federal practitioner it is monopoly; to the author of text books on federal practice it is a golden harvest.”¹⁰⁰

The criticism was not unanimous, however. In fact, contemporaneous with the proposal to *repeal* the Conformity Act, was another committee’s suggestion that the Conformity Act be *extended* to apply to suits in equity as well as those at law.¹⁰¹ Many members of the bar, of the judiciary, and of Congress defended the Conformity Act against its attackers.¹⁰² Senator Thomas Walsh, the progressive Senator from Montana, insisted that “conformity with state procedural law worked quite well for the vast majority of lawyers.”¹⁰³ Even an informal poll of federal judges in 1926, favored the status quo by a margin of 2-1 over a proposal to replace conformity with uniform federal rules.¹⁰⁴

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97. Edward A. Purcell, Jr., *Litigation and Inequality*, 54 (Oxford 1992) (citing Letter from Edwin A. Krauthoff to George W. Norris, (Oct. 18, 1927), George W. Norris Papers, Tray 42, Box 2, Filed: “S. 3151 (70th),” Library of Congress; Letter from Matthew A. McCullough to George W. Norris, (Jan. 18, 1932)), George W. Norris Papers, Library of Congress, Box 198, File: “Limiting Jurisdiction of Federal Courts (71st and 72nd) Congress; Dobie, *Handbook of Federal Jurisdiction*, at 580).
 98. Charles Alan Wright, *Law of Federal Courts* § 54, at 369-370 (5th ed., West 1994).
 99. Burbank, *supra* n. 87, at 1041 (quoting *Report of ABA. Committee on Uniformity of Procedure and Comparative Law*, 19 Am. Bar Assn. Rep. 411, 420 (1896)).
 100. *Report of the Committee on Uniform Judicial Procedure*, 46 Am. Bar Assn. Rep. 461, 466 (1921).
 101. See 8 Am. Bar Assn. Rep. 66 *et seq.* 323. The report was signed by David Dudley Field, among others. See Warren, *supra* n. 71, at 568 & n. 67.
 102. See Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 693 (1988); Burbank, *supra* n. 87, at 1041 nn. 107-108 (1982).
 103. Subrin, *supra* n. 17, at 2007; see also Subrin, *supra* n. 9, at 943 n. 200 (“proposals for uniform civil federal rules were defeated during this period, in large measure because most lawyers and congressmen apparently thought the Conformity Act . . . worked tolerably well”).
 104. Subrin, *supra* n. 9, at 958 n. 284.

But the gainsayers ultimately prevailed in 1934, when “the hideous conformity act was relegated to the limbo of ‘old, unhappy, far off things.’”¹⁰⁵ Professor Sunderland, with a eulogy befitting a despot, remarked: “[N]o tears will be shed by the bar of this country over the fact that the immense body of judicial decisions as to what matters are or are not controlled by the conformity act, no longer have any value except for the legal historian.”¹⁰⁶

VI. REVISITING THE FAILURE

In this part, I explore in greater detail the failure—or perceived failure—of the Conformity Act of 1872. This effort does not unearth the history to declare a winner in the battle between those who attacked conformity and those who defended it. An autopsy of that kind would likely reveal that both the virtues and vices of conformity were exaggerated. The exercise undertaken here is to identify the separate strains of criticism with an eye toward understanding whether the same pathogens would infect state statutes conforming state procedure to federal procedure. For discussion purposes, the fault lines of the Conformity Act of 1872 are grouped into four overlapping categories.

A. *The Approximation Mandate*

For some, the “great difficulty” under the Conformity Act was the lack of a precise statutory mandate.¹⁰⁷ The act conformed the federal practice, pleadings, and forms and modes of proceeding in civil causes at law to the state model only “‘as near as may be’—not as near as may be *possible*, nor even as near as near as may be *practicable*.”¹⁰⁸ Of course this vagueness was intentional—designed to allow enough flexibility to avoid injustice or inconvenience that a literal reading might require.¹⁰⁹ But because the exact nature of the limitation was not easily defined, conformity was unpredictable.¹¹⁰ Justice Swayne identified examples both inside and outside the statutory mandate in an 1876 opinion:

Where a state law, in force when the act was passed, has abolished the different forms of action, and the forms of pleading appropriate to them, and has substituted a simple petition or complaint setting forth the facts, and prescribed the subsequent proceedings of pleading or practice to raise the issues of law or fact in the case, such law is

105. Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 262 (1939).

106. See Edson R. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. & B. 5, 6 (1938); see also Thomas Wall Shelton, *Uniform Judicial Procedure—Let Congress Set the Supreme Court Free*, 73 CENT. L.J., 319, 319 (1911) (cited in Burbank, *supra* n. 102, at 1111).

107. Clark, *supra* n. 86, at 451.

108. See *Indianapolis & St. Louis R.R. Co. v. Horst*, 93 U.S. 291, 301 (1876).

109. See *id.* at 301 (“This indefiniteness may have been suggested for a purpose.”); *Mexican C. Ry. Co. v. Rinkney*, 149 U.S. 194, 207 (1893) (“it would not be practicable, without injustice or inconvenience, to conform literally to the entire practice prescribed for its own courts by a state in which federal courts might be sitting”).

110. Hepburn, *supra* n. 88, § 182 at 158.

undoubtedly obligatory upon the courts of the United States in that locality. There may be other things, not necessary now to be specified, with respect to which also it is binding. But where it prescribes the manner in which the judge shall discharge his duty in charging the jury, or the papers which he shall permit to go to them in retirement, as in *Nudd v. Burrows*, or that he shall require the jury to answer special interrogatories in addition to their general verdict, as in this case, we hold that such provisions are not within the intent and meaning of the act of Congress, and have no application to the courts of the United States.¹¹¹

Following Justice Swayne's lead, conformity applied "in the main to the pleading stage of the trial"—and in fact, within that sphere, generated "a very considerable degree of conformity."¹¹²

Further perspective about practice under the Conformity Act is offered in *Jurisdiction and Procedure in United States Courts*, a book authored by attorney Robert M. Hughes and published in 1906—around the midpoint of the Act's tenure. In the hornbook, Mr. Hughes discusses the relevance of the Conformity Act as to each of fifteen stages of procedure in law cases:

Process. "Except as to the method of signature [which is prescribed by federal statute] . . . the form of the process in the state courts on the common-law side can be used in the federal courts."

Attachments. "The state attachment laws in force on June 1, 1872, and any later ones adopted by rule of court, are available in the federal courts in common-law causes, except as against a nonresident not personally served in the district."

Appearances. "[T]he federal courts have a discretion to disregard this provision of the state court."

Parties. "The rules as to parties to actions are substantially similar to those prevailing in the state courts of the locality, subject to certain exceptions incident to the nature of the federal courts and the character of their jurisdiction."

Pleading. "The pleading in the federal courts is substantially similar to that in the state courts of the locality."

Continuances. "The granting or refusing of a continuance in a federal court is a matter of discretion with the judge."

Trial. "The making up of the jury in the federal courts is largely under the court's control, and it may adopt the state practice or not, as it thinks fit."

Evidence. "The evidence in the federal courts is taken in a manner similar to that prevailing in the state courts, except that the federal

111. *Indianapolis*, 93 U.S. at 300 (citing *Nudd v. Burrows*, 91 U.S. 426 (1875)); *Indianapolis*, 93 U.S. at 301; *Sherry v. Oceanic Steam Nav. Co.*, 72 Fed. 565, 566 (S.D.N.Y. 1895).

112. Clark, *supra* n. 86, at 452.

courts have certain rules of their own relating to the taking of depositions.”

Instructions to Jury. “In instructing a jury the federal courts are not bound by the state practice . . . [Also, a] federal judge may direct a verdict where the facts are undisputed, or the preponderance of evidence is so strong that reasonable men should not differ as to the deductions to be drawn from it.”

Bill of Exceptions. “In the form and other procedure relating to such bills the federal courts have their own rules, and do not regard the state practice.”

Verdict. “The federal courts, though not compelled to do so, conform in a general way to the practice of the state courts in relation to the form of, and rules governing the verdict; but they are not bound by state statutes requiring the courts to submit to the jury special questions of fact, and requiring the jury to make special findings in pursuance of such submissions.

Motion for New Trial. “The federal courts follow the usual practice of common-law courts in regard to new trials, and do not feel bound in this respect by state practice.”

Motion in Arrest of Judgment. “The practice of the federal courts in respect to motions in arrest of judgment corresponds to the general common-law doctrine.”

Judgment. “While the federal courts will follow the state practice as to the mere form of the judgment, their control over it from that time forward is regulated by the federal decisions and statutes, and not by the state practice.

Execution. “State remedies, in the nature of execution in force on June 1, 1872, and any later ones adopted by rule of court, are available in the federal courts in common-law causes.”¹¹³

This perspective, too, suggests that there was substantial conformity at the earlier stages of litigation, and greater divergence at the later stages. But interestingly, Hughes does not present the divergence as particularly problematic or complicated for federal court practitioners. Indeed, in a 600-page volume about federal court practice, he allocates only twenty-two pages to the procedure in law cases.¹¹⁴

113. Robert M. Hughes, *Handbook of Jurisdiction and Procedure in United States Courts*, 355-357 (West 1904).

114. The Chapters in the book are as follows: Of the Source of Federal Jurisdiction and the Law Administered by Federal Courts; The District Court—Its Criminal Jurisdiction and Practice; The District Court—Criminal Jurisdiction—Miscellaneous Jurisdiction; The District Court—Bankruptcy; The District Court—Miscellaneous Jurisdiction; The Circuit Court—Original Jurisdiction; The Circuit Court—Jurisdiction by Removal; Procedure in the Ordinary Federal Courts of Original Jurisdiction—Courts of Law; Procedure in the Ordinary Federal Courts of Original Jurisdiction—Courts of Equity; Appellate Jurisdiction—The Circuit Court of Appeals; Appellate Jurisdiction—The Supreme Court; Procedure on Error and Appeal.

Of course publication of the handbook coincides with Roscoe Pound's famous speech fomenting an agenda of reform that led ultimately to the replacement of conformity with uniform federal rules three decades later.¹¹⁵ That reform movement had reason to reveal (if not also exaggerate) the failures of conformity;¹¹⁶ to that end, reformers published lists of cases documenting the "Instances of Failure to Conform to State Practice."¹¹⁷ Items on such lists typically included matters pertaining to service,¹¹⁸ evidence,¹¹⁹ trial procedure,¹²⁰ post-trial motions,¹²¹ enforcement of judgments,¹²² and the like.¹²³

On one hand, even the lengthy lists enumerating the "notable exceptions to conformity"¹²⁴ may not convey the true variation since there was no way of knowing *beforehand* what the determination would be.¹²⁵ Each application invoked the broad discretion of the trial judge. Hence, the items on one list of "exceptions" could be found on another's list of examples of conformity.¹²⁶ The common characteristic of the vast majority of appellate decisions from this era is that the trial court's exercise of discretion was affirmed.¹²⁷ Even appellate decisions, then, failed to establish definite contours of conformity.

On the other hand, however, the lists also suggest that the uncertainty was a transitional phenomenon that had largely resolved itself. For example, the list of "Instances of Failure to Conform to State Practice" included in a 1920 ABA report is simply recycled over the course of the next decade.¹²⁸ One might have expected the "evils" of conformity to spawn.¹²⁹ Even more telling, the most recent identified

115. See generally Subrin, *supra* n. 9.

116. See generally Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1692 (2004) (suggesting reformers "had an incentive to paint with a broad brush"); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 782 (1993) (referring to the reformers' "inflammatory bombast" about the "supposed crisis" under the Conformity Act); Subrin, *supra* n. 17, at 2007 (chronicling the debate).

117. *Report of the Committee*, *supra* n. 27, at 514, 525-527.

118. See e.g. *Bracken v. Union P. Ry. Co.*, 56 Fed. 447 (8th Cir. 1893); *Shepard v. Adams*, 168 U.S. 618 (1898); *Southern P. Co. v. Denton*, 146 U.S. 202 (1892); *Mexican C. Ry.*, 149 U.S. 194.

119. See e.g. *Union P. Ry. Co. v. Botsford*, 141 U.S. 250 (1891); *Potter v. Natl. Bank*, 102 U.S. 163 (1880); *King v. Worthington*, 104 U.S. 44 (1881); *Whitford v. Clark Co.*, 119 U.S. 522 (1886); *Ex parte Fisk*, 113 U.S. 713 (1885).

120. See e.g. *City of Lincoln v. Power*, 151 U.S. 436 (1894); *U.S. Mut. Accident Assn. v. Barry*, 131 U.S. 100 (1889); *Newcomb v. Wood*, 97 U.S. 581 (1878).

121. See e.g. *Newcomb*, 97 U.S. 581.

122. See e.g. *Atl. & P. R. Co. v. Hopkins*, 94 U.S. 11 (1876).

123. See e.g. *Nudd*, 91 U.S. 426 (1875); *Vicksburg & M.R.R. Co. v. Putnam*, 118 U.S. 545 (1886); *St. Louis, I. M. & S. R. Co. v. Wickers*, 122 U.S. 360 (1887); *City of Lincoln*, 151 U.S. 436; *Patton v. U.S.*, 281 U.S. 276 (1930); *Am. Publg. Co. v. Fisher*, 166 U.S. 464, 468 (1897); *Brewer v. Jacobs*, 22 Fed. 217 (1884).

124. *Report of the Committee*, *supra* n. 27.

125. *Conformity by Federal Courts to State Procedure*, 35 HARV. L. REV. 602, 604-606 (1921-1922).

126. See e.g. *Report of the Committee*, *supra* n. 27; *Conformity by Federal Courts*, *supra* n. 125.

127. See cases cited in *supra* nn. 118-123.

128. See ABA, *supra* n. 27 at 525; *Report of the Committee on Uniform Judicial Procedure*, 50 ABA Rep. 539, 557 (1925); *Report of the Committee on Uniform Judicial Procedure*, 54 ABA Rep. 514, 523 (1929). See generally Burbank, *supra* n. 87, at 1067-1068 ("From 1920 through 1929, the core of the ABA Committee's annual report remained the same from year to year.").

129. Please note the title of Tolman, *supra* n. 82.

“failure” on these lists is a case from 1898—which was well over twenty years before publication of the list.¹³⁰ Indeed, with only three exceptions, all of the cited cases are from at least *thirty* years prior.¹³¹

Given the dubious mechanism for effecting dynamic conformity under the 1872 act, one actually would expect even more profound problems. Turning our attention to the proposed state conformity legislation, an approximation mandate is unnecessary. Indeed, a statute along the lines of that proposed in Part I would generate *textual rules* rather than approximating language requiring judicial interpretation. This option was unavailable to the Congress enacting the Conformity Act of 1872 because that legislation imposed conformity to each of thirty-seven different sources (states). Although the textual rules themselves may, of course, be subject to varying interpretations,¹³² there would be no question as to the rules’ applicability in the state proceeding.

B. The Legislative Scope

A related fault line that contributed to the demise of the conformity regime was the scope of the legislation. By its terms, the Conformity Act applied only to circuit and district courts.¹³³ So it did not control the manner of obtaining a review¹³⁴ nor did it undertake to prescribe appellate procedure.¹³⁵ Moreover, the statute required conformity (or, more precisely, conformity “as near as may be”) regarding only the “practice, pleadings, and forms and modes of proceeding.”¹³⁶ Accordingly it was not obvious whether matters pertaining to the administration of the trial—including jury instructions, new trial motions, verdict forms, evidentiary issues, and other matters discussed in the immediately preceding section—were even within the intended scope of the statute. Much like the approximating language “as near as may be” invited contention, the scope of the words practice, pleadings, and forms, and modes all required attention.

130. See authorities cited in *supra* n. 128.

131. Similar to the suggestion in the text accompanying *supra* nn. 86-88, it is important to note that the adoption of code pleading ceased in 1897. So again, once the source procedure stabilized, the problems with conformity may have subsided.

132. See Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOKLYN L. REV. 1155, 1159 (1993); Stephen Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1474 (1986-1987) (book review); Main, *supra* n. 6.

133. The circuit courts contemplated by the Conformity Act since have been eliminated.

134. It would seem that unfamiliarity with federal procedure as to obtaining a review would be just as prevalent, and would prejudice a litigant as much as unfamiliarity with any other step in the proceedings. It is, however, well established that the Conformity Act does not apply here. *Fishburn v. Chi. M. & S. P. R. Co.*, 137 U.S. 60 (1890) (bill of exceptions); *Chi. Life Ins. Co. v. Tiernan*, 263 Fed. 325, 330 (8th Cir. 1920) (motion for a new trial not a condition precedent to a review); *McBride v. Neal*, 214 Fed. 966 (7th Cir. 1914) (writ of error).

135. Appellate proceedings are governed entirely by acts of Congress, the common law, and ancient English statutes. *Camp v. Gress*, 250 U.S. 308, 317 (1919); *McKeon v. C. Stamping Co.*, 264 Fed. 385 (3d Cir. 1920).

136. See *supra* nn. 91-97 and accompanying text.

Further, even were the mandate in the Conformity Act crystal clear, there would have persisted ambiguity because of Section 918 of the Revised Statutes which read:

The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.¹³⁷

Judges thus had the discretion to conform only “as near as may be” under the Conformity Act and the court also deviate by adopting a rule.

And further still, the Conformity Act did not apply to the large number of matters regarding practice and procedure already the subject of Congressional legislation.¹³⁸ For example, because Congress had legislated directly upon the mode of proof in the trial of actions at law—it must be “by oral testimony and examination of witnesses in open court, except as hereinafter provided.”¹³⁹ So, generally, in the matter of the competency of witnesses, the mode of examination, the production and admissibility of evidence, the federal courts were not bound by the rules and usages that governed the state courts.¹⁴⁰ Congress has legislated upon a large number of matters, such as the disregarding of defects of form and allowance of amendment, consolidation of cases of a like nature, when the right to litigate *in forma pauperis* exists, when and how service by publication may be had, the time when the defendant in a removed case must plead, and so on in a wide variety of situations.¹⁴¹

Returning to consideration of the proposed state conformity legislation, again it would appear that such challenges would not be present since the proposed regime produces an actual corpus of rules, rather than an ambiguous conformity mandate. However, the rules generated by the regime could conflict with other state statutes

137. 17 Stat. 196.

138. *Goldey v. Morn. News*, 156 U.S. 518 (1898); *Harkness v. Hyde*, 98 U.S. 476 (1879); *Hills & Co. v. Hoover*, 220 U.S. 329 (1911); *Chappell v. U.S.*, 160 U.S. 499 (1896); *Luxton v. N. River Bridge Co.*, 147 U.S. 337 (1893); *Allnut v. Lancaster*, 76 Fed. Rptr. 131, 134 (1896); *Chappell*, 160 U.S. 499, 513 (1896); *Seeley v. Kan. City Co.*, 71 Fed. Rptr. 554 (1896); *King v. Worthington*, 104 U.S. 44, 50 (1881); *Ex parte Fisk*, 113 U.S. 713, 720 (1884); *Randall v. Venable*, 17 Fed. Rptr. 162, 164 (1883); *Amy v. Watertown*, 130 U.S. 301, 304 (1888); *Chamberlain v. Mensing*, 47 Fed. Rptr. 435, 436 (1891); *Lancaster v. Keeler*, 123 U.S. 376, 388 (1877); *Citizens' Bank v. Farwell*, 56 Fed. Rptr. 570, 573 (1893).

139. U.S. Rev. Stats. § 861; cf. *Ib.*, § 863.

140. *See Whitford v. Clark Co.*, 119 U.S. 522, 525 (1886); *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70 (1927); *Davis Cleveland C.C. & St. P. Ry.*, 217 U.S. 157 (1910); *Union P. R.R. v. Botsford*, 141 U.S. 250 (1891); *see also Hanks Dental Assn. v. Intl. Tooth Crown Co.*, 194 U.S. 303 (1904). In the federal courts, questions of admissibility of evidence in civil common law cases are governed by § 34 of the Judiciary Act of 1789, U.S. Rev. Stat. § 751 (1878), 28 U.S.C.A. § 725 (1928); questions of the competency of witnesses in civil cases are governed by the provisions of U.S. Rev. Stat. § 858 (1878) as amended, 28 U.S.C.A. § 631 (1928); *see Leach, State Law of Evidence in Federal Courts*, 43 HARV. L. REV. 574 (1930).

141. *Clark, supra* n. 86, at 451-452.

effected through the standard legislative process. As stated in Part II, this would require certain maxims of interpretation to determine the relative priority.

C. *The Limitations of Federal Courts*

Yet another related category of issues that plagued the Conformity Act is the unique status of federal district courts. These trial courts are ordained and established by Congress, vested only with the jurisdiction and authority given to them by Congress (and that which arises by necessary implication).¹⁴² Accordingly, these courts could not follow a state practice which changed the limits of their jurisdiction, nor one which conflicted with a federal procedural statute.¹⁴³ Further, the Constitution and federal substantive statutes are binding on the federal courts and they cannot conform to a state practice when the result would be to deprive a litigant of any benefit of any Constitutional guarantee or right created by Act of Congress.¹⁴⁴ Although a read of the cases invoking this meme of limited jurisdiction yields little to suggest a genuine concern about overreaching,¹⁴⁵ the refrain is compelling nonetheless.

Of course the authority of state courts is more generalized, limited instead by state constitutional law. Issues that might arise under state constitutions were discussed in Part II.

D. *The Separation of Law and Equity*

The fourth—and, again related—fault line that undermined the conformity effort was the merger of law and equity in the code states.¹⁴⁶ The entire conformity regime was premised on the separation of law and equity, with conformity undertaken only as to the former.¹⁴⁷ When the codes abolished (or at least purported to abolish)¹⁴⁸ the distinction between law and equity, conformity to the state procedure in law cases became a more complicated endeavor. Of course federal judges viewed the code merger of law and equity as one of the many failings of the reformed procedure—undermining the notion of federal conformity to state procedure altogether.¹⁴⁹ But the merger of law and equity under the codes also meant that state and federal courts were

142. U.S. Const. art. III.

143. *Mexican C. Ry. Co., v. Duthie*, 189 U.S. 76, 77-78 (1903) (amendment); *Chappell v. U.S.*, 160 U.S. 499, 513 (1896) (manner of trial in condemnation proceedings); *S. P. Co. v. Denton*, 146 U.S. 202, 208 (1892) (district in which actions shall be brought); *Silvas v. Ariz. Copper Co.*, 213 Fed. 504, 508-509 (D. Ariz. 1914) (security for costs); *Munster v. Weil Corset Co.*, 261 U.S. 276, 279 (1923); *Meisukas v. Greenough Coal Co.*, 244 U.S. 54, 58 (1917); *Cain v. Com. Publg. Co.*, 232 U.S. 124, 133-134 (1914); *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 112-113 (1898).

144. *Conformity by Federal Courts*, *supra* n. 125, at 603.

145. *See supra* n. 143.

146. *Id.* *See generally* Subrin *supra* n. 9; Main, *supra* n. 18, at 464-476.

147. *See Bennett v. Butterworth*, 52 U.S. 669 (1850). Procedure in equity cases was never subject to conformity. Indeed, because some states did not have equity courts, there would have been no state equity procedure to serve as a source. Equity was governed by court rules promulgated by the Supreme Court in 1822, 1842, and 1912. *See* Main, *supra* n. 18, at 469-470.

148. *See generally* George H. Jaffin, *Federal Procedural Revision*, 21 VA. L. REV. 504 (1934-1935).

149. *See supra* nn. 96-100.

fundamentally different. Federal courts then viewed the distinction between law and equity as essential and inherent—even required by the United States Constitution:¹⁵⁰ “The constitution of the United States requires that the distinction between common law and equity procedure shall be maintained, and the two jurisdictions cannot be confused and mixed either by a state statute or rules of the federal court.”¹⁵¹ Conformity to state procedure thus was perceived by federal courts as not only a bad idea, but also constitutionally problematic.

Of course, the merger of law and equity has been achieved (or at least accepted) in the federal courts and in almost all state courts.¹⁵² Accordingly, this fault line that contributed to the instability of the conformity regime would not also destabilize the state conformity legislation proposed in this piece.

VII. CONCLUSION

My goal in this piece was to explore the feasibility of state legislation conforming state civil procedure to the federal model. Such reform could be rejected for three basic reasons: (1) states should instead pursue their own unique, sovereign interests; (2) federal procedure is a mess and should be rejected by any constituency with the choice; and (3) conformity statutes do not work.

Reasons (1) and (2) include normative choices, about which I am largely agnostic in this piece. I have touted certain benefits of intra-state procedural uniformity.¹⁵³ I have observed that substantial intra-state uniformity may already exist.¹⁵⁴ And I have suggested that outsourcing could be accomplished without foregoing state sovereignty or control over the rulemaking process.¹⁵⁵ But the proposal I have outlined here is but an option; states with an agenda and an active rulemaking apparatus are not subjects of criticism here.

Reason (3) has been my primary focus. I was intrigued by the narrative that the Conformity Acts failed, and I wondered how 140 years of history under those acts could be so easily summarized. A cautionary tale about conformity legislation inheres in that narrative, and I undertook to explore its persuasiveness and relevance. So my effort was to revisit that history with an eye toward the feasibility of contemporary conformity statutes—feasibility not for all states, but for *some*; and not for all regimes where there is a federal or a model to which states might conform, but perhaps for *some*.

My inquiry yields several observations. First, by all accounts practice under the Process Acts worked quite well until the introduction of code pleading in the latter

150. See e.g. *Whittenton Mortg. Co. v. Memphis Packet Co.*, 19 Fed. 273, 280 (W.D. Tenn. 1883). See generally Main, *supra* n. 18.

151. *U.S. v. Swan*, 65 Fed. 647, 652 (6th Cir. 1895).

152. The federal courts ultimately warmed to the idea of merging law and procedure and undertook the same reform when promulgating uniform federal rules of civil procedure. See Subrin, *supra* n. 9.

153. See *supra* nn. 28-37 and accompanying text.

154. See *supra* nn. 2-6 and accompanying text.

155. See *supra* Part IV.

half of the nineteenth century.¹⁵⁶ Imprudent reform and/or stubborn federal judges created the patchwork that occasioned the dynamic Conformity Act, which in turn, led to other problems.¹⁵⁷ But when the federal courts were conforming to the familiar and relatively stable state common law procedures, the regime worked.¹⁵⁸ This observation would seem to bode well for state conformity legislation, given the relative stability of the federal model. Of course it would also suggest that problems could arise if or when the federal model is substantially revised.¹⁵⁹

Second, conformity was problematic. Particularly with regard to the Conformity Act of 1872, I outlined four overlapping categories of fault lines that were manifest in cases decided during that era. Courts struggled with the mandate to apply state practice and procedure “as near as may be” and also struggled to locate that mandate within a larger universe of statutory and constitutional constraints on their judicial authority. Although we know that conformity stood in the way of a new procedure that ushered in an era¹⁶⁰ of judge-made rules that simplified procedure and merged law and equity, the failures of conformity may have been exaggerated, but not manufactured.¹⁶¹

But the narrative about these failures of conformity should have little currency in the context of state legislation pursuing state conformity to the federal model. Indeed, with few exceptions the instances of failure that complicated federal conformity to state practice are simply irrelevant to the potential for state legislation to effect dynamic conformity with the Federal Rules. Accordingly, state legislation conforming state procedure and practice to the Federal Rules appears to be an eminently feasible option. While remaining largely agnostic as to whether any particular state should adopt the conformity legislation proposed here, this piece should be part of an ongoing conversation that suggests that the wisdom of such a course of action should turn on the suitability of the Federal Rules for state court practice, and not on the viability of conformity legislation itself.

All aboard?

156. *See supra* nn. 76-88 and accompanying text

157. *Id.*

158. *Id.*

159. Of course a state is not locked into a conformity regime. The state could change its course at any time.

160. *See supra* nn. 115-116 and accompanying text.

161. *See supra* Part VI.

