But the Feds Do It That Way!

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Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 **Case W. Res. L. Rev.** 501 (2016).

Although state courts handle roughly ninety-five percent of all civil cases, federal procedural law dominates reform initiatives, academic discussions, and legislative attention. In line with this federal focus, there continues to be a push for state court systems to conform their civil procedural rules to the most recent amended version of the Federal Rules of Civil Procedure. In their new article, Stephen Subrin and Thomas Main reject this unreflective state emulation of federal procedure.

Subrin and Main begin by demonstrating that the original promise that the Federal Rules would lead to universal uniformity has not been met. They track this lack of uniformity across four dimensions.

First, the promise of trans-substantive uniformity has not been met. That desire pushes Federal Rules drafters toward a standards-based approach, as opposed to a rules-based approach, to procedural law. This, in turn, leads to substantial disuniformity in practice, given the discretion inherent in a standards-based system.

Second, the promise of uniformity across federal districts has not been met. Subrin and Main point to the explosion of Local Rules made pursuant to Federal Rule 83; the Civil Justice Reform Act of 1990, with its requirement that each district adopt a plan to address the expense and delay of litigation; and general orders, standing orders, special orders, scheduling orders, minute orders, and other practices of individual judges, all of which diminish uniformity across federal districts. *See, e.g.*, Guidelines and Orders (D. Kan. 2017).

Third, prior to the adoption of the Federal Rules in 1938, the Conformity Act of 1872 provided intrastate uniformity of procedure (at least for suits at law) between state courts and federal courts sitting in the same state. While the adoption of the Federal Rules disrupted this intrastate uniformity, the drafters assured the bar that the states would soon adopt the Federal Rules and restore intrastate uniformity. While small-population states by and large adopted the Federal Rules as their state procedural model by the mid-1970s, nine out of ten of the largest-population states still have not. And, Subrin and Main claim, even the adopting states themselves often decline to enact newly promulgated, substantial amendments to the Federal Rules.

Fourth, because they assumed states would adopt the Federal Rules as a model, the drafters promised interstate uniformity of procedure as well. For the reasons recounted above, this promise has not been met, either. Subrin and Main's point in demonstrating these failings in the creation of intra-jurisdictional uniformity is to suggest that the entire goal of creating unity by way of textual rule is quixotic. Thus, they suggest, the entire goal of seeking state and federal procedural unity is not a sound one.

In the second half of the article, Subrin and Main more pointedly address why states' unreflective emulation of the Federal Rules constitutes poor policy. They offer numerous grounds for consideration:

1. The Federal Civil Rules Advisory Committee has been biased toward defendants for decades, recounting a series of studies in support of this proposition. The Federal Committee obsesses over "big discovery" cases, although such cases form a very small statistical slice of the federal civil docket, (I hope the reader will excuse one lengthy parenthetical, but this is a point worth repeating often: There is no empirical evidence for the idea

that discovery is explosively expensive in the overwhelming majority of cases. *See* Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., *National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference* 43 (2009), (concluding that, at the median, discovery cost about 1.6% of the stakes for plaintiffs and 3.3% of the stakes for defendants in 2009 with the median stakes coming in at $160,000); Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 **Duke L.J.** 765, 773–74 (2010) (finding that "[discovery] costs are generally proportionate" to client stakes in the litigation); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 **B.C. L. Rev.** 525, 525, 531 (1998) finding similar results just ten years earlier); *see also* James S. Kakalik et al., Inst. for Civil Justice, *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data* xxvii (1998), http://www.rand.org/pubs/monograph_reports/2009/MR941.pdf ("Discovery is not a pervasive litigation cost problem for the majority of cases."). Explosive discovery cost cases account for 5%-15% of cases, depending on the year or the study. *See, e.g.,* Suja A. Thomas & Dawson Price, *How Atypical Cases Make Bad Rules: A Commentary on the Rulemaking Process*, 15 **Nev. L.J.** 1141, 1147–49 (2015).) much less the state court dockets.

2. State and federal systems face meaningfully different dockets and different docket concerns. Awards in state court are radically lower, with nearly 75% of matters resolving for less than $5200. More parties are unrepresented in state court, with 75% of matters involving at least one pro se party. Matters resolve more rapidly in state court, with nearly 75% of matters coming to resolution in less than a year. And state-court cases skew greatly toward non-complex collection actions, with contract claims accounting for 66% of the state dockets and torts accounting for but 7% of the docket.
3. The multiplicity of post-1938 amendments to the Federal Rules have rendered federal procedure more expensive to litigants, more time consuming, and more subject to judicial discretion. Doubling down on the expense point, they argue that the federal approach requires more judicial-branch financial resources than most states can afford.
4. States can and should experiment with procedure.

There is much to appreciate in this paper. Subrin and Main's argument constitutes a helpful reminder that state courts are not a discount brand of the federal courts. They are different institutions performing different tasks, working under different funding models, and serving different stakeholders. As someone who works on his state civil rules advisory committee, I appreciate the reminder that the needs of the state courts often are substantially different from those of the federal system's. I fully embrace their full-throated federalism approach in principle.

Other aspects of the paper, however, gave me some pause. Subrin and Main express great discomfort with district court discretion in procedure, typically on the ground that a standards-based approach does not lead to uniformity. Assuming this is true, I do not see why a state court system should overly care about uniformity in procedural outcomes *per se*, assuming uniform application of a discretionary standard. This is to say, I do not see Subrin and Main make the argument that discretionary standards *per se* are to be avoided in state courts where, one presumes, there is not a historical commitment to uniformity akin to that found with the Federal Rules. Discretion often is good. Implementing state procedural policy though adjudication could avoid many of the problems with rules in the first place, because case-by-case decisionmaking is more flexible, dynamic, and incremental than rulemaking, in addition to being cheaper and easier to utilize in some circumstances.

For these reasons, administrative law—which is my favored interpretive approach to procedural matters—contains several doctrines that allow administrators to exercise equitable discretion and soften the hard edges of bright-line rules in particular cases. As Glen Staszewski and I have discussed elsewhere, trial-court discretion can be a sound procedural policy precisely because trial-court judges are typically better situated than rules drafters or appellate judges to make fine-grained procedural decisions based on their relevant experience and perspective.

Several of Subrin and Main's arguments described above can be fairly grouped under an agency-capture heading. To be sure, the federal Civil Rules Advisory system has flaws—big ones, as I have outlined in prior work. Yet there may still

be good reason for states to adopt the content of the Federal Rules. First, state-court rule drafters are not freed from these same political and capture concerns. Many states craft rules as statutes. Yet, I do not believe state legislators *en masse* will have greater expertise in this area than the Federal Advisory Committee or be less pressured from intensive interest-group lobbying than the Federal Advisory Committee. Often, a policy of "Our state follows the federal rules" stops a lot of injury off the top. Second, even in states that have advisory drafting committees, there is little evidence that these drafters will not have biases and concerns over capture, be they pro-defense or otherwise, similar to the Federal Advisory Committee's. Third, as Subrin and Main argue, state judiciary budgets are under extreme stress, meaning there are no funds for the empirical work, which we have at the federal level, that should inform sound state rule creation. Lastly, because the Federal Advisory Committee's work is high-profile, various interest groups can organize to follow the Committee's recommendations closely and object to reforms these competing interest groups deem ill-advised. For example, in response to the aggressive anti-discovery amendments flowing out of the 2010 Duke Conference, more than 2300 comments were lodged with the Federal Committee. These organized movements forced substantial changes to the amendments proffered. It is not clear to me that proposed state procedural reforms have the same avenues for dissent, even if they are as closely watched as the Federal Committee's work—which seems a dubious proposition in many states to begin with. The point is that a preference for state-level rulemaking should not idealize state rule-drafting processes. They make sausage in the state house as well.

These thoughts aside, any serious student of procedure should read this piece. It is thoughtful. It is provocative. It is well researched. And it is a lot of fun to read. Download it while supplies last!

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