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The Legislative Role in Procedural Rulemaking through Incremental Reform

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Briana Lynn Rosenbaum*

The Legislative Role in Procedural Rulemaking Through Incremental Reform

ABSTRACT

Public policy theory generally studies two types of institutional change: major changes at critical moments and incremental change. Using an institutional public policy theoretical lens, this Article explores congressional efforts to incrementally change the substantive law through procedural change and litigation reform. While much attention has been paid to the 115th Congress's policy-based proposals, scant attention has been paid to the fact that Congress had, at the same time, proposed sweeping changes to court access. From trans-substantive measures affecting procedure in every civil case, to targeted measures changing the procedures in police misconduct cases and medical malpractice lawsuits, the legislature proposed scaling-back access to remedies in courts in almost every type of case. These bills—while seemingly “procedural”—have the potential to shape individual rights and remedies, incentives to sue, and the costs of litigation.

The Article uses an institutional incremental approach to viewing legislative procedural law change. It examines both historical and current legislative efforts at litigation and procedural reform, identifying “major” and incremental policy proposals. Viewing legislative litigation reform in this light reveals that the legislature has taken an active role in the development of procedural law and retrenchment of court access, not just through major reform legislation, but through small,

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targeted actions that can have great effects over time. This Article then provides observations on the character and efficacy of legislative procedural reform. Unlike procedure generated from the court-centered REA process, incremental legislative procedure is often targeted to, and motivated by, altering remedies in a particular substantive area, non-transparent, and unmoored from adjudication and practice-based normative values. The history suggests that procedural scholars should rethink the legislative role in shaping the adjudicatory process.

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I. INTRODUCTION

We are in a period that has been described by many scholars as rights-retrenching.¹ In the area of civil litigation, there have been concerted efforts to decrease systemic costs, limit the exposure of businesses and other defendants to litigation, and decrease exposures to liability in tort, medical malpractice, products liability, and civil rights. However, it is fairly difficult to accomplish this reform by withdrawing underlying substantive rights. Once people have certain rights, it turns out they do not appreciate them being taken away. Instead, in recent years, a clear trend has emerged using procedural rule changes as a substitute for substantive reform.

In documenting this trend, the focus in scholarship has largely been on the evolutionary retrenchment of rights via procedural reform emanating from the judicial branch.² This reflects the traditional view of federal procedural rulemaking, which sees the Rules Enabling Act as squarely placing this function in the hands of the judiciary. Whether it is drafting, studying, proposing, or interpreting procedural rules, the Supreme Court, the Judicial Conference, and individual judges are seen as the ultimate lawmaking authorities. While a number of scholars have documented and analyzed congressional efforts to engage in procedural rulemaking,³ the focus in procedural design scholarship is usually on the rare occasion that Congress has passed a

1. See, e.g., STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION Ch. 3 (2017); Jacob S. Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 9 AM. POL. SCI. REV. 244 (2004); Sarah Staszak, *Realizing the Rights Revolution: Litigation and the American State*, 38 L. & SOC. INQUIRY 222 (2013).

2. For thorough discussions of the retrenchment of procedure in the judicial branch, see, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 10 (2010); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1093 (1993) ("Congress has . . . delegated to the Court rulemaking power."); Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 145 (2015) (observing that Congress has the power to "override the administrative process, but in practice it has done so rarely").

3. See, e.g., Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 921 (1999) (citing various measures enacted by Congress as supporting the idea that Congress rarely creates an entirely new procedural system for a particular substantive area, but recognizing that it does "tinker[] with elements of the default system created by the Federal Rules of Civil Procedure"); Jessica Erickson, *Heightened Procedure*, 102 IOWA L. REV. 61 (2016) (analyzing the procedural tools

“major” procedural reform package,⁴ such as the Class Action Fairness Act of 2005 (CAFA)⁵ or the Private Securities Litigation Reform Act of 1995 (PSLRA).⁶ As is often pointed out, Congress fails to pass procedural reform (such as Rule 11 reform) more often than it succeeds.⁷

Thus, a narrative persists that Congress retains primarily a “passive role” in the procedural rulemaking process. In this Article, I question this narrative by exploring the role of Congress in the incremental development of procedural rules in the federal judicial system. I argue that Congress has played—and may continue to play—a significant role in this change. Congress repeatedly proposes and passes procedural “reform” legislation. These changes—while seemingly “procedural” and “neutral”—are usually proposed for the purpose of furthering specific substantive outcomes. And many of the modern measures have some element that is designed, either in effect or in purpose (or both), to retrench access to litigation and the courts.

Legislative procedural reform has the potential to shape individual rights and remedies, incentives to sue, and the costs of litigation for private parties. Despite this, it often receives little public attention. And, if it does, the attention is usually piecemeal or focused on the “substantive” portions of the bills. This Article shifts the focus of legislative study from formal procedural policy change to the study of incremental procedural policy changes.⁸ It does this using institutional incremental theory, a public policy approach to understanding policy change. In this way, this Article adds to a growing community of scholarship that sees procedural rulemaking as part of a larger institutional dynamic. Several actors have a role to play in its development: media, courts, bureaucracies, political parties, interest groups,

that lawmakers, including Congress, consider when attempting to reduce cost asymmetries and meritless litigation).

4. See generally JOHN C. COFFEE JR., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE* 25–132 (discussing legislative and judicial attempts to curtail class actions); Richard Marcus, *Modes of Procedural Reform*, 31 *HASTINGS INT'L & COMP. L. REV.* 157 (2008) (reviewing major legislative procedural reform efforts, including CAFA, PSLRA, and the Civil Justice Reform Act of 1990).
5. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).
6. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).
7. See *supra* notes 2–4 and accompanying text; *infra* notes 35–37 and accompanying text.
8. For a description of incremental institutional policy change, see Jacob S. Hacker, Paul Pierson & Kathleen Thelen, *Drift and Conversion: Hidden Faces of Institutional Change*, in *ADVANCES IN COMPARATIVE-HISTORICAL ANALYSIS: STRATEGIES FOR SOCIAL INQUIRY* 180–208 (J. Mahoney & K. Thelen eds., Cambridge Univ. Press 2015).

attorneys, repeat players, and the legislature. The Article adds to this conversation by focusing attention on the legislative role.

In Part II, the Article explores the court-centered REA rulemaking process and Congress's role in the same. As part of this, the critiques of the REA process are explored, as well as some of the foundational metrics procedural rule makers use when promulgating rules and the role that institutional incremental theory plays in studying modes of legislative efforts at reform. These insights offer metrics by which to judge the legislative procedural rulemaking. Next, the Article examines legislative litigation and procedural reform efforts, first over the last three decades—in Part III—and then in the 115th Congress—in Part IV. This effort is accomplished using an institutional incremental approach to viewing law change. This approach assumes that changes to underlying structural remedies can occur both incrementally, through minor changes, and through major legislative overhaul. To view this best, congressional efforts to shape litigation reform must be viewed over time. Thus, care is made to choose congressional action that has taken place without regard to targeted substance, "size," or perceived impact of the change. Doing this provides a fresh view of Congress's role in the procedural rulemaking process.

In Part V, the Article draws on these observations and singles out Rule 11 Reform and Americans with Disabilities Act (ADA) accessibility pre-suit notification reform to provide needed insights into the nature and efficacy of legislative forays into litigation reform. In particular, this research shows that Congress has played, and continues to play, a major role in shaping the adjudicatory process. It does so not as much through major reforms, but through the combination of incremental and major reforms. It also provides new insights into the character of incremental legislative procedural reform. Unlike procedure generated from the court-centered REA process, incremental legislative procedure is often targeted to, and motivated by, altering remedies in a particular substantive area, non-transparent, and unmoored from adjudication and practice-based normative values.

In short, litigation reform has been a bread and butter conservative ideological issue for the past three decades, and procedural rulemaking has been one of the major tools used to accomplish this goal. Legislative successes in this area have shaped the procedure of federal courts in fundamental and often non-transparent ways. The history suggests that procedural scholars should rethink the legislative role in procedural rulemaking and thus, the systemic structure of the courts. By viewing a cacophony of measures targeting seemingly disparate aspects of the litigation system, a broader picture emerges of an institution that is actively engaged with the judicial and civil rulemaking bodies in the ongoing effort to evolve the litigation process.

II. COURT-CENTERED DEVELOPMENT OF PROCEDURAL LAW

The primary method of procedural rulemaking in the federal system is through the court-centered Rules Enabling Act process. Through this process, the Judicial Conference and the Supreme Court propose *Federal Rules of Civil Procedure* (FRCP) for Congress's approval. In addition, federal judges issue common law decisions or local rules interpreting or supplementing the FRCP.⁹ The process of judicial rulemaking has been subject to criticism almost since its inception. In numerous contexts, scholars have studied, documented, and at times lamented, procedural reforms (or lack thereof) that have occurred as a result. These include, *inter alia*, changes and interpretations to the pleading standard, discovery practices, class actions, judicial management, and summary judgment.¹⁰ In the last forty years, these changes have generally pointed toward retrenchment of access to courts, the scope of discovery, and the availability of jury trials.¹¹

A. The REA Process

Through the Rules Enabling Act (REA), Congress specifically delegated to the courts, specifically the Supreme Court, the role of studying, proposing, and ultimately adopting procedural rules.¹² This involves a lengthy public comment, revision, and approval process¹³ by five independent entities: the Judicial Advisory Committee; the Standing Committee on Rules of Practice, Procedure, and Evidence;¹⁴ the Judicial Conference; the Supreme Court; and, finally, Congress.¹⁵ It is worth noting that while the REA empowered the Courts to form

9. FED. R. CIV. P. 83 (authorizing local rules and judicial regulations in district courts "consistent with" federal statutes and rules).

10. See, e.g., Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1853 (2014).

11. *Id.*; see also Miller, *supra* note 2 (explaining that procedural reforms "favor[] increasingly early case disposition in the name of efficiency, economy, and avoidance of abusive and meritless lawsuits" and "retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth").

12. 28 U.S.C. § 2072 (2012).

13. 28 U.S.C. § 2073 (2012).

14. Both the Advisory Committee and Standing Committee are appointed by the Judicial Conference. By statute, these committees are to be comprised of "members of the bench and the professional bar, and trial and appellate judges." § 2073(a)(2).

15. § 2073; see Richard D. Freer, *Civil Procedure: The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. L. REV. 447, 455 (2013) (citing Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1009, 1103 (2002)).

and amend procedural rules, Congress still retains the right to reject them.¹⁶

The REA process begins with proposed Rule changes or updates from various sources, namely practitioners and legal scholars.¹⁷ The most pertinent of these are submitted to the Advisory Committee for consideration. If accepted, the Advisory Committee drafts an amendment and explanatory note. This draft goes through rounds of redrafting until a final vote approves its submission to the Standing Committee, who publishes and invites public comment on the amendment draft and note. Considering the comments received, the Advisory Committee may then approve the draft, make further amendments, or withdraw the proposed change entirely. If approved, the proposal is offered to the Standing Committee to re-publish for further public comment, make amendments to the draft, or approve for submission to the Judicial Conference.¹⁸

The Judicial Conference, held once each year, makes the final recommendation to the Supreme Court. Once reviewed by the Supreme Court, the Chief Justice submits the proposal with an effective date to Congress.¹⁹ Congress has no less than seven months to review and challenge an amended Rule.²⁰ Absent affirmative action during this review period, a new Rule is presumed to be approved by the legislature and is automatically ratified on the date prescribed by the Court.²¹

B. Critiquing the REA's Rulemaking Process and Corresponding Rule Retrenchment

The REA court-centered rulemaking model has been described as "under siege."²² As Robert Bone has observed, "The level of discontent is unprecedented in the sixty-five year history of federal rulemaking in the field of civil procedure."²³ Of late, a wide body of scholarship has documented (and largely lamented) the vast number of procedural changes that have resulted from this process that have had the effect of diminishing access to the courts. These include changes in summary judgment, class actions, pleadings, discovery, arbitration, federal jurisdiction, and broad judicial case management. Each of these changes has either limited prospective plaintiffs' access to courts and

16. 28 U.S.C. § 2074 (2012).

17. See Struve, *supra* note 15.

18. See *id.*

19. *Id.*

20. § 2074.

21. *Id.*

22. Bone, *supra* note 3, at 889; see also Porter, *supra* note 2, at 150 (describing various critiques of the rulemaking process).

23. Bone, *supra* note 3, at 889.

judicial processes or effected the incentives for plaintiffs to sue.²⁴ Such broad procedural retrenchment makes it less possible for the judiciary to resolve disputes and less likely for it to provide proper remedies for substantive harms.²⁵

The REA critiques and procedural retrenchment together are connected with two lines of inquiry. The first, a doctrinal one, explores what has caused the procedural shifts. The second, an institutional one, questions which actors are involved (and should be involved) in this process.

What explains the retrenchment of procedure in the judiciary? The drift of the procedural law and corresponding retrenchment in court access has been documented and explained exhaustively by courts and scholars. Some focus on common law decisions interpreting the FRCP narrowly, or in ways that overtly favor efficiency and cost values over access to justice. So, for example, several authors argue that the incremental, and not so incremental, changes wrought by judicial decisions like *Twombly* and *Iqbal* narrow the pleadings standards in federal courts and thus made motions to dismiss more likely.²⁶ Others focus on the work of the Judicial Conference, offering critiques of that body's efforts to shape Rules themselves.²⁷ Still others study the role of individual judges in shaping litigation procedures, including through the recent trend of managerial judging.²⁸ But, as noted, most of these dis-

24. See, e.g., Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1700 (2016) (“[T]he ethos of procedure is restrictive.”).

25. See *id.* (“[T]hese developments point towards entirely eliminating the manifestation of disputes in the court system—in other words, preventing lawsuits from being filed by raising procedural barriers to doing so.”).

26. See, e.g., Miller, *supra* note 2, at 21–23 (“*Twombly* and *Iqbal* may have transformed the relatively delineated purpose of the Rule 12(b)(6) motion into a potentially draconian method of foreclosing access based on an evaluation of the plausibility of a challenged pleading’s factual presentation How far should this threshold procedure be allowed to drift from its historical function and defined scope of inquiry?”); Steve Vladeck, *On Justice Kennedy’s Flawed and Depressing Narrowing of Constitutional Damages Remedies*, JUST SECURITY (June 19, 2017) <https://www.justsecurity.org/42334/justice-kennedys-flawed-depressing-narrowing-constitutional-damages-remedies/> [<https://perma.unl.edu/S8PJ-QSK>] (decrying the “lack of attention” paid to the Supreme Court’s decision in *Ziglar v. Abbasi*—“a decision about remedies, not rights . . . [which] will make it much harder, going forward, for almost any plaintiff to obtain relief for constitutional violations that have ceased, even though constitutional rights aren’t worth that much if they can’t be enforced”).

27. See *infra* notes 50–62 and accompanying text.

28. See Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (coining the term “managerial judging” to describe hands on supervision of cases and using procedural tools to speed it along and encourage settlement); see also Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1266 (2010) (“[M]anagement’s myopic focus on speed, inherent lack of standards, inconsistent application, and marked ability to skew the merits threaten important procedural values.”).

cussions focus on the judiciary, either ignoring the role of the legislature or dismissing it outright.²⁹

Recently, however, a cadre of scholars has brought attention to the ways in which actors outside the judiciary, such as lobbyists, activists, policy experts, bureaucrats, and the legislature, have influenced the development of procedure and litigation reform.³⁰ So, scholars like Brooke Coleman, Danya Reda, and Linda Mullenix have documented the role of the media in the development of procedure.³¹ Others, including Steven Burbank, Sean Farhang, Thomas O'Main, and Stephen Subrin, have brought attention to the ways in which interest groups and political forces participate in and shape procedural rules and court access.³² Still others have shifted to the roles that influential private parties—like repeat players—have had on the development of procedure.³³ Another line of scholarship focuses on how Congress has utilized the judiciary as a means of enforcing its social policy goals: by producing private enforcement regimes and relying on the judiciary to both interpret and enforce those regimes.³⁴

While this scholarship begins to see procedure as part of a larger institutional dynamic, it nevertheless consistently also views Congress's role in that dynamic as limited. For example, while Burbank and Farhang conducted a deep and thoughtful analysis of Congress's historical efforts to pass litigation reform measures since the mid-1970s, they ultimately concluded that congressional efforts were a "failure." Similarly, Subrin and O'Main also described congressional efforts to reform procedural and litigation mechanisms throughout the Fourth Era, starting around the 1970s, as having little more than

29. See Paul R. Gugliuzza, *Patent Litigation Reform: The Courts, Congress, and the Federal Rules of Civil Procedure*, 95 B.U. L. REV. 279, 299 (2015) (describing failed attempts at congressional patent reform as "catalyzing" the courts into reforming patent law when "legislation was not politically feasible" and warning that then-proposed legislation may be an attempt to do the same).

30. See, e.g., JEB BARNES, DUST-UP: ASBESTOS LITIGATION AND THE FAILURE OF COMMONSENSE POLICY REFORM (2011); Stephen B. Burbank & Sean Farhang, *The Subterranean Counterrevolution: The Supreme Court, the Media, and Litigation Retrenchment*, 65 DEPAUL L. REV. 293, 299 (2016); Staszak, *supra* note 1, at 241.

31. See, e.g., Brooke Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1785 (2015); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1421 (1994); Danya Reda, *The Cost and Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1111–12 (2012).

32. See, e.g., SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); Burbank & Farhang, *supra* note 30, at 299; Subrin & Main, *supra* note 10, at 1848.

33. See, e.g., Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445 (2017).

34. See, e.g., BARNES, *supra* note 30; Burbank & Farhang, *supra* note 30, at 299; Staszak, *supra* note 1, at 241.

“rhetorical effect.”³⁵ Any actual, impactful “changes to federal practice and procedure,” they concluded, “have occurred with essentially no legislative input or public involvement.”³⁶

What is new is the evolving idea that Congress has played—and may continue to play—a significant role in this change. The focus in scholarship has been on the evolutionary retrenchment of rights via rules emanating from the judicial branch—either from the judges themselves or through the REA process by the Judicial Conference. There is far less focus on the same regarding the legislative branch. Scholarly analysis of procedural legislative proposals and statutes, when it happens, is usually focused on major individual reforms or solely on specific substantive areas.³⁷

One area of exception is reflected in the robust debate over the proper institution—legislative or judicial—to prescribe rules of procedure. Scholars like Robert Bone and Richard Freer have cited to both congressional procedural action and inaction to argue that the legislature has a greater role in procedural rulemaking than imagined.³⁸ For example, Bone, in his 1999 article proposing his theory of court rulemaking,³⁹ emphasized that the Judicial Conference, Advisory Committee, and the judiciary changed their conduct in response to “the intense political controversy and heated public debate” that resulted from both passed and failed legislation.⁴⁰ Similarly, Freer cites examples of congressional action to explain the Judicial Conference’s reticence to act on certain issues.⁴¹ Thus, Bone and Freer describe the congressional role as more nuanced than simply a body that passes “major” procedural packages, even if their exploration of the role was limited to its influence on the judiciary’s procedural reform efforts. While both authors were writing primarily about courts’ rulemaking processes, their insights about the legislature’s impact on procedural

35. Subrin & Main, *supra* note 10, at 1868.

36. *Id.*

37. See, e.g., Shaubin A. Tadesh, *Institutional and Political Sources of Legislative Change: Explaining How Private Organizations Influence the Form and Content of Consumer Protection Legislation*, 39 L. & SOC. INQUIRY 973 (2014). But see Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 772 (2017) (discussing procedural legislation that arises, in ad hoc fashion, to meet new needs of particular cases).

38. See Bone, *supra* note 3; Freer, *supra* note 15.

39. Bone, *supra* note 3, at 904 (arguing that greater involvement by Congress in procedural rulemaking had resulted in concrete changes to the court-centered rulemaking process); see also Erickson, *supra* note 3, at 64 (“[L]awmakers often use heightened procedure to fix the problems that transsubstantive rules cannot.”).

40. Bone, *supra* note 3, at 904; see also Erickson, *supra* note 3, at 64.

41. See Freer, *supra* note 15, at 458 (explaining that “[b]ecause it acts in the shadow of Congress—under the threat that those it disappoints can go to the Capitol—the Committee may have an incentive to stay away from topics that will push too many hot buttons” but “[i]t does so sporadically and unpredictably”).

reform deserve further exploration. One author who has taken up this mantle is Sarah Staszak, who applies institutional theory to study the retrenchment of litigation in the judiciary by multiple institutions—the judiciary, bureaucracies, legislature, interest groups, and other actors. As part of this study, she has argued that the legislature has taken a “dominant role” in the rulemaking process, at least at times.⁴² In her recent book, *No Day in Court*, she navigates beyond the conventional view of Congress as simply the body that delegates to other institutions the rulemaking role (and thus the role of enforcing private rights). Instead, she sees Congress as sometimes having a role in the retrenchment of court access.⁴³

As part of her assessment, Staszak, like other incremental theorists, has studied institutional change to “uncover less visible retrenchment strategies.”⁴⁴ She and other incremental institutional theorists do this by studying the multiple ways that policies can change, the various actors and institutions involved in the decision to change, and the political structures within which these actors and institutions operate. Importantly, this analysis can’t happen solely by studying one major legislative change in isolation.⁴⁵ Instead, an analysis of change over time is necessary to fully “capture the nature of these strategies.”⁴⁶ As Jacob Hacker has argued, one must “enlarge[] and shift[] the focus of analysis,” including “from formal rules to their social consequences,” and “from the highly visible politics of largescale reform to the subterranean political processes that shape ground-level policy effects.”⁴⁷ This kind of institutional theory lens “illuminates and clarifies the sometimes covert strategies that political actors adopt when trying to transform embedded policy commitments.”⁴⁸

This Article builds on the work of Staszak but takes a narrower view by analyzing Congress’s efforts at procedural reform. Through this narrow institutional focus, patterns emerge that help us understand how Congress exercises its power to issue rules of procedure and the unique character of such rule-reform. It also shows the unique

42. Sarah Staszak, *Institutions, Rulemaking, and the Politics of Judicial Retrenchment*, 24 *STUD. AM. POL. DEV.* 168 (2010). As Sarah Staszak has explained, “In a complex governing arrangement where institutions, each with their own entrenched interests, have to negotiate how best to govern, institutional change (of any kind) must be explained in an interbranch context.” Staszak, *supra* note 1, at 241.

43. See SARAH STASZAK, *NO DAY IN COURT* (2015) (citing as examples of congressional role in entrenchment re-directing rights enforcement (e.g., to ADR) and changing the incentives (e.g., by removing attorneys’ fees to make it more difficult for some people to litigate)).

44. *Id.* at 216–19.

45. *Id.* at 211–19.

46. *Id.* at 217.

47. Hacker, *supra* note 1, at 243.

48. *Id.*

hazards of congressional incremental procedural reform: namely, that it is often (1) targeted to, and motivated by, altering remedies in a particular substantive area, (2) non-transparent, and (3) unmoored from adjudication and practice-based normative values. To the extent that one believes procedural rulemaking should promote certain values, those of us who study procedural design should also be aware of procedural rulemaking that occurs contrary to those values.

C. Exploring the Role of Congress in Rulemaking

As can be seen below, Congress is actively participating in procedural rulemaking. But this fact raises several normative questions. If Congress is legislating in the area of procedure, should it be? And if it should, what metric should the legislature be using to create these rules? A full exploration of these questions is beyond the scope of this Article. However, an initial review will provide a preliminary metric by which to judge the identified legislative action.

A critical question among procedural institutional scholars is which actors should be promulgating and implementing procedural reforms. Congress undoubtedly holds the power to regulate procedure.⁴⁹ However, that doesn't answer the question of whether it should.

Those that write about methods of procedural reform posit a number of reasons why it might be a good idea for Congress to legislate in this area. One reason is jurisdictional: Congress can legislate in procedural areas that rulemaking bodies like the advisory committee and the judiciary cannot. Some measures like caps on attorneys' fees, measures shortening statutes of limitations, and procedures applicable in only certain kinds of cases, have both "substantive" and procedural elements, and are thus arguably outside the power of courts and the Advisory Committee to regulate.⁵⁰ Accordingly, Congress undoubtedly has some role to play in procedural reform.

In addition to the jurisdictional argument, there are pragmatic reasons posited for congressional action on procedural reform. One is that Congress may be needed as a check when rule-makers and the judiciary do not act or when they act in a way that is contrary to the

49. Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1684, 1688 n.37 (2004). But see Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1319–22 (1993) (arguing that the Enabling Act codifies a constitutional limitation "that prevents Congress from compromising the constitutional independence of the judiciary by invading the inherent power of the judiciary to create rules of practice and procedure for the courts"); Robert J. Pushaw Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 739 (2001).

50. See David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 416 (2010).

interests of stakeholders.⁵¹ Even after the 1988 Amendments to the REA, designed to make the rulemaking process more transparent, representative, and informed, scholars continue to question the notion that the Judicial Conference is a “neutral” body of experts in the area of rulemaking authority. Thus, the Conference has been criticized as too closely aligned with judicial interests,⁵² naturally limited by its members’ own personal and professional experiences, undemocratic and unaccountable,⁵³ unrepresentative,⁵⁴ and focused on busywork rather than meaningful change.⁵⁵ All of these have been posited as explanations for reluctance to create meaningful reform at the Judicial Conference level. Regardless of the reason, if judges won’t or can’t act, lawyers and their clients can turn to the legislature to “fill in the gaps” where procedural reform failed at the rulemaking level.⁵⁶

That said, even assuming some form of congressional action is appropriate, this doesn’t mean that reform must (or should) originate from Congress. One of the benefits of the Judicial Conference and Ad-

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51. Burbank, *supra* note 49, at 1713 (arguing that policy change is preferable by actors who are democratically accountable).
 52. Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 515 (1996) (citing a study by Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994) (arguing that judges will opt for rules that optimize their own private utility by maximizing judicial efficiency and power, even at the expense of economic efficiency)).
 53. See, e.g., Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 754–59 (1993); see, e.g., Richard Briles Moriarty, *And Now for Something Completely Different: Are the Federal Civil Discovery Rules Moving Forward into a New Age or Shifting Backward into a “Dark” Age?*, 39 AM. J. TRIAL ADVOC. 227, 266 (2015) (offering a critique of the 2015 Amendments to the Federal Rules, and arguing that the “cause” of argued failure in these changes results from the “exercise of unchecked power” by the Chief Justice, who appoints all members of the Committees); Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1303–08 (2006).
 54. See, e.g., Brooke Coleman, *Civil-izing Federalism*, 89 TUL. L. REV. 307, 310–11 (2014) (arguing that in procedural cases, the Justices’ views of the litigation system are better predictions of their position than their alleged commitments to federalism).
 55. See, e.g., Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 930 (2009) (explaining that Congress would be needed for certain rule reforms that might violate the REA); Freer, *supra* note 15, at 468; see also Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 489 (1993) (offering a critique of the “incremental” rulemaking process of the Advisory Rules Committee).
 56. See Burbank & Farhang, *supra* note 1 (“When rulemakers are judges, and when justification for rule changes must be publicly articulated in light of a public evidentiary record, in addition to (and potentially contradicting) judicial experience and common sense, they may be reluctant to become involved in controversies in which their decisions can be tarred with a political label.”).

visory Committee process is that, unlike Congress much of the time, the court-centered REA process uses empirical evidence to support its decision-making. Furthermore, the Committee actively engages with a wide variety of participants in the judicial process, including legal experts, practitioners, and judges.⁵⁷ Although Congress can (and often does) hold hearings and listen to public feedback, it does not have the established public notice and comment procedures that have led to the current version of the Rules.

Even assuming that Congress is a proper body to affect procedural rulemaking, one must also consider the values that should drive that process. Of course, this question is a complex one, greatly debated among procedural scholars.⁵⁸ Therefore, the following articulation of principles guiding procedural rulemaking is not meant to be exhaustive. Instead, it gives a hint of the possible considerations that procedural lawmakers can, and do, take into account when drafting procedural rules. A key point to make is that these values are all grounded in a broad view of adjudicative practice.

One place to start is the REA itself. Since Congress revised the REA in 1988, procedural rulemaking has been marked by several guiding principles, chief among them being that the process of procedural reform will be open, deliberative, informed, and representative.⁵⁹ Congress enshrined these in the REA as a response to strong criticism of the previous REA process, which was often described as opaque, autocratic, elitist, and uninformed.⁶⁰

One example is the REA's public notice and comment and representation requirements. In 1988, Congress specifically required that Advisory Committees "shall consist of members of the bench and the professional bar, and trial and appellate judges."⁶¹ The stated purpose behind such a requirement was to "provide[] for greater participation by all segments of the bench and bar."⁶² Furthermore, Congress imposed a number of requirements designed to ensure open debate and a fully informed process. It required that the Conference publish its pro-

57. Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 MINN. L. REV. 2167, 2189 (2017); see also Mitchell Pearsall Reich, *Incomplete Designs*, 94 TEX. L. REV. 807, 843 (2016) (discussing generally theories of institutional design).

58. For an in-depth discussion of the various articulated rationales for procedural rulemaking, see Bone, *supra* note 3.

59. See Struve, *supra* note 15, at 1108–09 (describing the principles underlying the 1988 Amendments to the REA).

60. *Id.* at 1108; see generally Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A. J. 579 (1975) (offering early criticism).

61. 28 U.S.C. § 2073(a)(2) (2012). *But see* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1065 (2016) (criticizing the current process for continuing to promote homogeneity by failing to require diversity among members of the committee).

62. § 2073(a)(2).

posed amendments, open its meetings to the public, and provide written notice of meetings and minutes to interested persons.⁶³

While the drafters of the 1988 changes stated that their intent was, in part, to “parallel the openness requirements of the House and Senate committees and subcommittees,” the analysis below shows clear contrasts between REA Advisory Committee Rulemaking and congressional incremental procedural reform. The formalities of notice, public access, and information to the public are fulfilled through processes such as judiciary committee mark-up hearings and committee reports. However, incremental legislative procedural reform is also often non-transparent in that it easily masks both substantive intent and impacts on the wider judicial adjudicatory process.

Another place to look is the FRCP. Rule 1 of the FRCP describes the purpose of civil procedure rules as “to secure the just, speedy, and inexpensive determination of every action and proceeding.”⁶⁴ In this Rule, the drafters articulate an interest in choosing rules that balance the costs to the litigation system, such as expense and delay, as well as benefits, such as reducing the risks of mistaken outcomes and increasing truth-finding.⁶⁵ Also implicit in Rule 1 is a principle of neutrality. The Rule requires that the above principles be applied in “every action and proceeding.” Dave Marcus has argued that this is a recognition that procedural rules—at least those rules emanating from the court-centered REA process—should be neutral, applying to every case equally, and without substantive effect, to the extent possible.⁶⁶

That procedural and litigation reforms affect substantive rights is subject to little debate. It is an accepted wisdom that procedure will “help or hurt certain parties and classes of cases in different ways.”⁶⁷ And further, that procedure is not “neutral” in the sense that it can never be considered separate from substantive law is little questioned.⁶⁸ Even the most critical historical procedural scholars agree that changes to procedural rules have impacts.⁶⁹ The point of contention for procedural scholars is *what* impacts these changes have and whether those changes are positive.

63. See Struve, *supra* note 15, at 1111.

64. FED. R. CIV. P. 1.

65. See, e.g., Michael Bayles, *Principles for Legal Procedure*, 5 L. & PHIL. 33, 41–57 (1986) (analyzing principles of procedure).

66. Marcus, *supra* note 50, at 418.

67. Phyllis Tropper Baumann, *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 299–300 (1992).

68. *Id.*; Lahav, *supra* note 24, at 1697–1704.

69. John Leubsdorf, *The Myth of Civil Procedure Reform*, in CIVIL JUSTICE IN CRISIS 54, 63–65 (A.A.S. Zuckerman ed., 1999).

Some see procedure and substance as so intricately intertwined that it is impossible to tell the difference between them and thus, to disentangle their effects.⁷⁰ Indeed, it is counterproductive to do so, as misnaming a law or a rule as “procedural” will only mask its actual effects on the underlying substantive rights. These effects can be intended by the rule-drafters or unintended. For example, Phyllis Tropicper Baumann argued in the Title VII context that procedural rules, especially those designed to be “neutral” in nature, have a disparate impact on those who are least empowered and have fewer resources.⁷¹

Others view the ideal procedure, especially “trans-substantive” procedure (or procedure to be uniformly applied across all subjects), as neither helping nor hindering particular parties. Instead, it is merely a process by which rights are vindicated.⁷² To best understand this perspective, one might view procedure as a doorway and the entire panoply of substantive rights as contained in the room you are walking into. One might close that door, partially or in full, and thus cut off access to those rights, but doing so will not change either: (1) the nature of the substantive rights or (2) the fact that the door is still the same access point for all rights.

Some have argued that procedural neutrality is required by courts only, as it is only the judiciary that is limited by the REA to implementing “procedure,” not substance.⁷³ To be sure, there is little doubt that Congress has the power to change substance through procedure, and there is a good argument that Congress is the proper institution to do so.⁷⁴ But just because it can, doesn’t mean it should. There is value in “neutral” procedural rules—or rules unmotivated by a desire to change substantive law—apart from the limited judicial role. As Bone has argued, processes of procedural rulemaking must be justified by broader practice-based normative values—not just “substance.”⁷⁵ If they are not, then a proposed rule can increase the likelihood of mistaken application. For example, a rule that changes the procedure in only one substantive area may have direct, and possibly unintended, application in another. There may also be indirect effects on the trajectory of procedural reform. For example, while a change may have been motivated by a specific substantive aim, others could argue that it nevertheless evinced certain procedural normative

70. *See, e.g.*, Baumann, *supra* note 67, at 239.

71. *Id.*

72. For a critique of this view, see *supra* notes 70–71 accompanying text.

73. Marcus, *supra* note 50, at 421 (developing a metric that would require all substance-specific procedural rules to be regulated by Congress in part because Congress is best able to articulate why lawsuits in one kind of case should be treated differently than in other kinds of cases).

74. *Id.*

75. Bone, *supra* note 3.

principles (such as congressional support for speedy resolution of civil rights cases) that should be transferred to other types of cases.

III. HISTORICAL LITIGATION REFORM IN CONGRESS – ONGOING LEGISLATIVE INVOLVEMENT IN SHAPING THE ADJUDICATORY PROCESS

The below study of congressional action (and inaction) on litigation reform gives us reason to doubt the conventional view in procedural scholarship that Congress as a body should be relegated to a minor role in the litigation and procedural reform process.

Over the last three decades, Congress has implemented reforms touching on almost every aspect of litigation in federal courts: from securities, to antitrust, to prison litigation, to class actions, to multidistrict litigation. It has enacted major reforms, like that in 1976 creating multidistrict litigation, and incremental reforms, like various changes over time to sanctions and fee-shifting statutes that affect incentives to sue. This history shows that the federal legislature has shaped the procedure of federal courts in fundamental, and often non-transparent, ways. It also suggests that we should rethink our insular and targeted approach to legislative treatment of litigation reform. Instead, it counsels a broader look at the cacophony of measures targeting seemingly disparate aspects of the litigation system.

It cannot be doubted that, since the passage of the Rules Enabling Act of 1934, the bulk of procedural rules in the federal judicial system have been devised by the courts. Whether by the judges themselves, through case development and individual discretionary decision-making, or through coalitions of judges implementing broadly applicable rules, such as the FRCP or local rules, the courts have a vast amount of power and ability to shape access to courts in civil litigation.

But the courts have not acted alone. Congress has stepped in to regulate judicial procedure. Scholars documenting these efforts often come to the conclusion that congressional efforts to effect litigation reform were either ineffectual, or when they were successful, rare instances of legislative intrusion on what is otherwise a judicial domain. However, viewing congressional litigation reform efforts through an institutional incrementalism lens, clearer patterns of congressional involvement emerge. Congress plays a significant role in shaping rules of procedure through both major and targeted rule revision and through incremental methods like drift and layering. Furthermore, Congress has enjoyed more success at procedural and litigation reform when ideologies among various actors and institutions happen to align and/or when efforts are targeted and limited.

In order to understand how the current efforts of Congress to shape litigation reform fit into a broader legislative incremental re-trenchment of access to courts, this Article first examines previous ef-

forts over time. Only then can one see the how these reforms succeed and what effects they might have.⁷⁶

A. Litigation Reform in the 1980s

Between 1970 and 1980, the federal civil caseload doubled following “an unprecedented expansion of private rights of action.”⁷⁷ This drastic rise in litigation is widely accepted to be the result of both federal statutes that created new “federal rights and private rights of action by which to enforce those rights” and new “attorneys’ fee provisions” that provided public interest lawyers with resources to pursue litigation.⁷⁸ Attorneys and organizations were using the legal system to bring lawsuits to enforce rights which were seen by some as being “injurious to the interests of business and government.”⁷⁹ Because of this, curbing the rise in litigation was a priority of the Reagan administration and other conservative leaders because it was seen as conflicting with the administration’s regulatory reform agenda and policies.⁸⁰

It is at this time that the narrative of “frivolous litigation” gained significant traction.⁸¹ Activists viewed the litigation system’s most serious ills—huge case backlogs, long delays and high trial costs—as driven in large part by an explosion of meritless litigation.⁸² This, despite the fact that the data—even then—suggested that the “litigation explosion” theory was not entirely accurate. Evidence suggests that litigation discovery costs were not as outrageously high as reform proponents characterized it, and that costs are in fact “tied to the stakes in the case.”⁸³ Danya Reda explains in her research of the “cost and delay narrative” that the Advisory Committee cited such evidence in deciding not to amend the rules regarding the discovery process in 1970.⁸⁴ Through the 1970s to the 1990s, other studies showed similar results, suggesting that litigation costs were not too high.⁸⁵

76. See STASZAK, *supra* note 43, at 217. In her excellent book, *No Day in Court*, Sarah Staszak focuses broadly on the multiple institutions—the Rules Committee, political actors, courts, bureaucracies—that retrench judicial power. This Article has a narrower focus on congressional incremental reform efforts.

77. Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 372–73 (2016).

78. Gilles, *supra* note 77, at 378.

79. Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1551 (2014).

80. *Id.*

81. Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 521–22 (1996).

82. *Id.*

83. Reda, *supra* note 31, at 1111–12.

84. *Id.* at 1112.

85. *Id.* at 1111–16.

In addition to the Administration's focus, by the early 1980s, "a deregulatory movement was afoot, primarily catalyzed by businesses, trade associations, state and local officials, and newly emergent conservative public interest groups."⁸⁶ Interest groups like the Pacific Legal Foundation, Americans for Tort Reform Association (ATRA), and the U.S. Chamber of Commerce (Chamber), sought to impact the status of litigation both through legislative change and by litigation.⁸⁷

In part spurred by these interest groups, Republicans in Congress introduced numerous litigation reform measures during the 1980s. Some of the failed efforts at reform mirror efforts that appear before Congress today. For example, in 1981 Republicans proposed a bill that would grant full immunity from civil damages suits for police officers who conducted illegal searches and seizures in violation of the Fourth Amendment.⁸⁸ This bill's immunity provision is a more sweeping version of the burden-shifting device that appears in the Back the Blue Act of 2017.⁸⁹ Another example is a 1982 bill that was proposed to repeal the attorneys' fee-shifting provision in the Civil Rights Attorney's Fees Awards Act of 1976.⁹⁰ This bill targets the plaintiffs and plaintiffs' attorneys' ability to enforce the civil laws by removing the ability to fund the enforcement lawsuits. Similar legislation appeared before Congress in the Fairness in Class Action Litigation Act of 2017 (FICALA), which restricts attorneys' fees in a number of ways, including by limiting fees in class actions to a percentage of money actually distributed to the class and in centralized MDL proceedings to 20% of the monetary recovery.⁹¹

Although many efforts at legislative reform were not successful during this time, some were. This, despite the fact that "the Reagan administration's law reform objectives were profoundly inhibited by Democratic control of one or both chambers of Congress."⁹² Burbank and Farhang, in their empirical study of litigation reform efforts in Congress, cited just two antitrust litigation reform measures that passed during this period—measures which limited the availability of damages in antitrust cases.⁹³ However, Congress also considered or passed other procedural measures. For example, during this period, Congress also passed the Judicial Improvements and Access to Justice Act of 1988 (JIA), which changed the process for amending the Federal Rules to require notice and comment procedures and solicitation of

86. Burbank & Farhang, *supra* note 79, at 1551.

87. *Id.*

88. H.R. Res. 4259, 97th Cong. (1981).

89. *See infra* subsection IV.B.2.

90. *See* Burbank & Farhang, *supra* note 79, at 1563.

91. Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong., at § 105 (2017) (as passed by the House on Mar. 9, 2017).

92. Burbank & Farhang, *supra* note 79, at 1567.

93. *Id.* at 1563.

public comment.⁹⁴ The JIA also sought to overhaul procedural rules at the local level by requiring that amendments to local rules be consistent with national procedural rules and also follow notice and comment practices.⁹⁵ In enacting this legislation, Congress deliberately waded into procedural waters, changing the process of procedural rulemaking in the federal courts.⁹⁶

Furthermore, it is during this period that Congress began to take seriously its power to review and block proposed Rules of Procedure. Beginning in the 1970s and through the 1980s, it first blocked the Advisory Committee's Proposed Rules of Evidence and then subsequent amendments to criminal procedural rules.⁹⁷ Congress also quashed proposed changes to Rules 4 and 68 that would have incentivized settlements.⁹⁸

A number of scholars have also documented the efforts of conservative reformists to utilize the courts as a forum for legal change during this time.⁹⁹ This approach included appointing federal judges, Justice Department officials, and other legal officials that supported tort litigation and regulatory reform. This reliance on the courts to enact litigation reform is seen as largely successful. Examples of litigation reform changes in the courts in the 1980s include the courts' decisions tightening pleadings standards in civil rights cases and the Supreme Court's summary judgment trilogy broadening the availability of summary judgment before trial.¹⁰⁰

Although this analysis of congressional involvement in litigation reform begins in the 1980s, perhaps the best example of congressional involvement in procedural design occurred in the late 1970s with 28 U.S.C. § 1407, the Multidistrict Litigation (MDL) statute.¹⁰¹ Through this statute, passed by Congress in 1976, the legislature implemented one of the most significant changes to federal procedure in modern

94. Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1599–1600 (1994).

95. *Id.*

96. *See id.* at 1599 (describing the goals of the legislation as to “modernize, regularize, and open the national and local procedural amendment processes” and likely to “reinvigorate numerous procedural tenets, such as uniformity, simplicity, and trans-substantivity, which animated the drafters of the original Federal Rules in 1938.”).

97. *Id.* at 1598.

98. Sarah Staszak, *Procedural Change in the First Ten Years of the Roberts Court*, 38 CARDOZO L. REV. 691, 702 (2016).

99. *See* DAVID VOGEL, *FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA* 246–65 (1989); Burbank & Farhang, *supra* note 79, at 1567 (citing ROBERT E. LITAN & WILLIAM D. NORDHAUS, *REFORMING FEDERAL REGULATION* 119–32 (1983)).

100. Bone, *supra* note 81, at 521.

101. Act of Apr. 29, 1968, Pub. L. No. 90-296, § 1, 82 Stat. 109, 109 (as amended by Act of Sept. 30, 1976, Pub. L. No. 94-435, § 303, 90 Stat. 1383, 1396).

times. Perceiving the need for a venue-shifting statute to aid in centralization of aggregate litigation (which only Congress could authorize), Judge Becker of the Third Circuit and members of the Judicial Conference conceived of and spearheaded the MDL statute.¹⁰² After conducting background research, those judges convinced Congress to enact a “minimum level” of authorizing legislation that delegated rulemaking authority and interpretation to the MDL Panel.¹⁰³

The MDL statute is largely seen as a judge-driven reform, in part because it was conceived by judges and in part because Congress left to the judiciary the interpretation and implementation of the law. The resulting statute, 28 U.S.C. § 1407, still stands as a model of power-sharing across branches. Congress enacted broad trans-substantive procedural reform but first used the procedural knowledge, research, and expertise of the body of experts available to them. Importantly, Congress affirmatively chose this course as a way to get the so-called litigation explosion in check. But, as will be seen, this solution to the litigation “problem” soon became, itself, seen as converted by other groups. Later congresses have grappled with this problem, including attempts to amend the MDL statute directly or through other means.

B. Litigation Reform in the 1990s

During the 1990s, Republicans continued to focus on litigation reform, as shown by the actions of both the George H.W. Bush Administration and congressional Republicans during the Bush and Clinton Administrations. During the Clinton Administration, there was much less focus in the executive branch on reforming litigation. However, congressional Republicans, who had a majority in Congress following the 1994 midterms, were led by Newt Gingrich, who was “the chief spokesperson, articulator, and advocate for the conservative civil justice reform movement.”¹⁰⁴ The Contract with America, a campaign pledge made by Republican federal legislative candidates in the 1980s, made litigation reform a key pillar of its political agenda. The Contract’s ninth precept was to impose “reasonable limits on punitive damages and reform of product liability laws to stem the endless tide of litigation.”¹⁰⁵ Procedural scholars see this as a period of culmination, when the “philosophical roots of the civil justice reform movement” were most clearly articulated by various institutional actors,

102. Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 880–81 (2017).

103. *Id.*

104. Linda S. Mullenix, *Strange Bedfellows: The Politics of Preemption*, 59 CASE W. RES. L. REV. 837, 849–51 (2009).

105. U.S. Republican Party, *The Republican “Contract with America,”* (1994), <http://global.oup.com/us/companion.websites/9780195385168/resources/chapter6/contract/america.pdf> [<https://perma.unl.edu/34AK-3BA6>].

including the judiciary, the administration, lobbyists, and primarily conservative members of Congress.¹⁰⁶

These reform efforts resulted in many successes. One of these is the Civil Justice Reform Act of 1990 (CJRA). The CJRA (sponsored by Senator Joe Biden) required each federal district court to create a plan to reduce the expenses and delays of civil litigation.¹⁰⁷ These plans were to help manage litigation and reduce cost and delay, including early judicial involvement to establish timelines, discovery conferences, strict limits on discovery motions, and increased use of ADR.¹⁰⁸ The CJRA was also influenced by pro-business, insurance, and defendant organizations and interest groups.¹⁰⁹ In enacting the CJRA, Congress was also influenced by a task force on civil justice reform organized by Senator Biden, the Brookings Institution, and the Foundation for Change, which studied the problems of civil justice in federal courts and “determined that mounting cost and delay in civil litigation threatened court access for many individuals and groups.”¹¹⁰

Another institution at play in the implementation of the CJRA—and in the efforts at litigation reform generally in the 1990s—was the media. Scholars such as Marc Galanter, Reda, and Mullenix have documented the role that the media has played in overstating the “high” costs of litigation and discovery and in pushing a narrative of rising litigiousness in American society. Mullenix specifically documented the media’s impact on the passage of the CJRA, describing how the media helped spread unsubstantiated “myths of litigiousness and discovery abuse to an uncritically receptive public” through nationally syndicated columns and publication of speeches preaching the need for reform.¹¹¹ “By the early 1990s,” she said, “these myths had so insinuated themselves into the public consciousness that politicians (tapping into public sentiment) found it politically expedient to further exploit and spread the myths.”¹¹²

106. See Mullenix, *supra* note 104, at 845–52 (describing the “1980s civil justice reform critique”).

107. See 28 U.S.C. § 471 (1994).

108. Tobias, *supra* note 94, at 1603.

109. Mullenix, *supra* note 31; see also Reda, *supra* note 31, at 1123–24 (noting that these groups financed surveys to provide statistical evidence for the CJRA, testified on the Act’s behalf, and advocated for its passage).

110. Mullenix, *supra* note 31, at 1415; Tobias, *supra* note 94, at 1601. *But see* Mullenix, *supra* note 31, at 1411–15 (arguing that the study was heavily impacted by misconceptions and incorrect assumptions about the litigation process).

111. *Id.* at 1404.

112. *Id.*; see also Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 744–47 (1998) (concluding, after empirical study, that the media over reported medical malpractice and product liability cases).

It is perhaps not surprising, then, that it is during this period that we see the enactment of two bills that have their roots in the Contract with America: the Prison Litigation Reform Act (PLRA) and the Private Securities Litigation Reform Act (PSLRA). Although these two provisions are often analyzed in isolation, these provisions can best be seen as part of an incremental reform process, rather than as individual legislative actions.

Congress passed the Private Securities Litigation Reform Act, over a presidential veto, in 1995. This statute was part of the broader Common Sense Legal Reforms Act (CSLRA),¹¹³ which embodied several of the goals of the ninth precept of the Contract with America.¹¹⁴ The CSLRA contained other provisions that did not pass, most notably for this discussion the Attorney Accountability Act of 1995,¹¹⁵ which included trans-substantive amendments to Rule 11 similar to the current Lawsuit Abuse Reduction Act of 2017 (LARA) that would have made sanctions under Rule 11 mandatory, and to Federal Evidence Rule 702 that would limit the types of expert testimony available in civil cases.

The PSLRA enacted requirements for court approval and appointment of lead plaintiffs in securities class actions, including heightened class certification requirements.¹¹⁶ It also established heightened pleading standards in securities actions and directed the court to stay discovery under specified circumstances.¹¹⁷ Furthermore, through the PSLRA, Congress amended and partially repealed Rule 11 as applied in securities cases. The Act makes sanctions mandatory in these cases and requires a mandatory finding regarding Rule 11 compliance by all parties upon final adjudication.¹¹⁸ Like much of the legislation chronicled here, the PSLRA was particularly the result of Congress's desire to curb frivolous securities litigation.¹¹⁹ Congress also acted on the

113. Common Sense Legal Reforms Act of 1995, H.R. 10, 104th Cong. (1995).

114. Carl Tobias, *Reforming Common Sense Legal Reforms*, 30 CONN. L. REV. 537, 537 (1998).

115. *Id.* at 537, 553. The Attorney Accountability Act of 1995 was passed by the House but not the Senate. *Id.* at 537.

116. 15 U.S.C.A. § 77z-1(2)(A) (West 1997); George F. Sanderson III, *Congressional Involvement in Class Action Reform: A Survey of Legislative Proposals Past and Present*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 315, 331 (1999); *see also* Tobias, *supra* note 114, at 550–53 (outlining the sanctions, class action requirements, and heightened pleading requirements for plaintiffs in securities lawsuits).

117. *See* 15 U.S.C. §§ 77z-1(b), 78u-5 (2012).

118. §§ 77z-1(c), 78u-4(c).

119. John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 BUS. LAW. 335, 339–40 (1996).

heels of two Supreme Court decisions that intimated litigation abuses in securities litigation.¹²⁰

Other litigation reform measures in the CSLRA legislative agenda did not pass, which may show some restraint on the part of Congress. However, the fact that the PSLRA and PLRA did, with a Democratic President, is no small matter.¹²¹ In both cases, the focus in hearings and in the media was on the litigation crisis in the courts, with little to no evidence to support these assertions.¹²²

The PLRA imposed a number of restrictions on lawsuits brought by inmates, including limitations on attorney's fees, increased possibility of sanctions for unmeritorious lawsuits, and heightened screening requirements.¹²³ Like the PSLRA, the PLRA was also enacted to stem what was seen as a rising tide of frivolous litigation, brought by prison inmates. Here again, media played an important role in the legislation's passage. As Kermit Roosevelt has documented, "The National Association of Attorneys General solicited from its members eye-catching lists of 'top ten' frivolous lawsuits, which were then distributed to the press."¹²⁴ Roosevelt explained how the stories like "the inmate who sued over the lack of salad bars on weekends," and the inmate who sued under the Eighth Amendment because he received creamy peanut butter instead of chunky fed a narrative with rich detail.¹²⁵ Politicians repeated these stories—in addition to the statistics showing that the number of prisoner lawsuits had increased from 42,263 in 1990 to 68,235 in 1996—on the Senate floor.¹²⁶ The legisla-

120. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994) ("[L]itigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1974))), *superseded by statute*, Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737, *as recognized in* *Stoneridge Inv. Partners, LLC v. Sci. Atlanta, Inc.* 552 U.S. 148, 162 (2008); *Gustafson v. Alloyd Co.*, 512 U.S. 561, 572 (1995) (narrowly construing § 12(2) of the Securities Act of 1933 in part out of reluctance to find that Congress intended to create "vast additional liabilities that are quite independent of the new substantive obligations the [Securities] Act imposes.").

121. Tobias, *supra* note 114, at 537.

122. Avery, *supra* note 119, at 339–40 (describing the testimony in Senate hearings on the PSLRA as "focused on the perception of a securities litigation crisis" and based on anecdotal evidence but explaining that "the empirical evidence was inconclusive").

123. Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1778–79 n.122 (2003).

124. *Id.* at 1777.

125. *Id.*

126. *Id.* at 1771, 1777 (arguing that during this time the number of incarcerated people also rose, so this litigation increase was not solely because prisoners were bringing more suits).

tion had its intended effect after its enactment—from 1995 to 2000, the number of suits brought by prisoners fell from 41,679 to 25,504.¹²⁷

In addition to the “major” reforms often noted during this period, Congress also acted to change or alter litigation procedure in a significant number of minor, or targeted, ways.¹²⁸ In 1996, Congress passed a law prohibiting class action lawsuits by immigrants challenging the validity of the immigration system or determining an individual’s immigration status.¹²⁹ Also in 1996, Congress placed a number of restrictions on the Legal Services Corporation (LSC), a public non-profit organization established by Congress in 1974 to provide legal assistance to low-income Americans. The 1996 amendments prevented LSC-funded legal services organizations from bringing class action lawsuits on behalf of their clients and representing specific categories of clients, including prisoners, most immigrants, and persons challenging segregation of schools.¹³⁰ Others have argued that the effect of this measure is to prevent organizations that accept public funds from “assist[ing] a large number of clients efficiently and to effect[ing] systemic change.”¹³¹ In addition, by preventing representation of certain plaintiffs, the measure effectively discourages actions that promote social welfare reform.¹³²

Other examples of congressional litigation reform measures during this period include laws that (1) authorized states to bring *parens patriae* actions on behalf of citizens of the state in antitrust cases “effectively precluding class actions and limiting damages in those suits;”¹³³ (2) increased the preclusive effect of employment discrimination lawsuits by binding nonparties to consent decrees;¹³⁴ and (3) prohibited fee awards in section 1983 actions against judges for actions taken while acting in a judicial capacity.¹³⁵

C. Litigation Reform in the 2000s

Litigation reform has continued as a priority for the Republican Party through the George W. Bush and Obama presidencies, just as in

127. *Id.* at 1779.

128. See John Leubsdorf, *Class Actions at the Cloverleaf*, 39 ARIZ. L. REV. 453, 453–54 (1997); Sanderson, *supra* note 116, at 331 n.103 (documenting reform efforts in class actions through the 1990s).

129. See Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 306(a)(2), 110 Stat. 3009-607 (1996).

130. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321-53 (1996).

131. Sanderson, *supra* note 116, at 332.

132. *Id.* (citing Leubsdorf, *supra* note 128, at 454).

133. *Id.* at 333 n.103 (citing 15 U.S.C. § 15c (1994)).

134. See STASZAK, *supra* note 43, at 194–95 (discussing the passage of the Civil Rights Act of 1991).

135. 28 U.S.C. § 2412 (2012).

previous decades. Of course, the success of litigation reform efforts became markedly reduced when President Obama wielded a veto pen. Nevertheless, throughout this time-period, one can find numerous examples of litigation reform, including “major” procedural reforms like the Class Action Fairness Act and more targeted, incremental reforms.

The Class Action Fairness Act of 2005 (CAFA) was a diversity statute enacted to federalize large class actions.¹³⁶ Its ultimate goal was to reduce the number of “certified classes and thereby relieve defendants of liability for state law causes of action.”¹³⁷ CAFA provided federal courts with expanded diversity jurisdiction over class action lawsuits. Instead of requiring complete diversity, a federal court now has jurisdiction over an action so long as there is minimal diversity—if one class member is from a different state than one defendant. CAFA also changed the rules regarding the amount-in-controversy, providing that this requirement is met so long as the aggregate class as a whole pleads an amount that exceeds \$5 million.¹³⁸

Proponents of the bill included the Chamber of Commerce, the National Association of Manufacturers, and other business-friendly groups.¹³⁹ This legislation has been much-discussed and much-maligned, largely due to the effect it has had of federalizing class action practice in the United States.¹⁴⁰ Although proponents of current legislative class action reform efforts appear to take it for granted that the federal forum is the proper venue for class actions and other mass actions, this is far from being a given precept. To the contrary, the notion that the operation of a procedural device could result in “federalizing” a significant proportion of state law litigation (as CAFA does), raises troubling federalism questions that endure today.¹⁴¹ Legislators at the time debated these and related issues, including what role the federal courts and state courts should play in the resolution of aggregate disputes, the ability of federal courts to protect interstate commerce through expanded diversity jurisdiction in aggregate litigation,

136. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.); see David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1252 (2007) (detailing the rationales behind CAFA).

137. Marcus, *supra* note 136.

138. Class Action Fairness Act § 1715(b), 28 U.S.C. § 1715(b) (2012).

139. See Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.); Edward A. Purcell Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1891–93 (2008) (describing proponents and backers of the modern “tort reform” movement).

140. See Burbank & Farhang, *supra* note 79, at 1563 n.48 (“CAFA significantly increased the number of state law class actions that were governed by a trans-substantive and ever-more-conservative federal class action jurisprudence.”).

141. Marcus, *supra* note 136, at 1254–56.

and if state courts truly have a local “bias” against out of state defendants (a central justification for diversity jurisdiction).¹⁴² The resulting statute presumably represented a compromise, precisely balancing these interests and values in the interest of achieving some type of reform. Reading potentially non-existent process-values—like a general congressional interest in the federalization of class actions—into CAFA is an unsatisfactory way to conduct procedural design.

In their study of litigation reform measures, Burbank and Farhang found four additional limited-scope reform bills that passed. Three of these bills limited fee awards to disabled students or their families suing schools, including one that “limited fee recovery by (or imposed some fee liability on) plaintiffs’ counsel for frivolous or unreasonable litigation behavior.”¹⁴³ The fourth bill regulated the attorney’s fees allowed in cases related to antitrust violations when antitrust violators report their own cartel activity to the Justice Department and cooperate in its ensuing investigation.¹⁴⁴

IV. LEGISLATIVE ATTEMPTS AT PROCEDURAL REFORM IN THE 115TH CONGRESS

The conservative political party—a party that began with control of both houses of Congress and the White House—has been upfront about its agenda to reduce perceived costs to the economy caused by litigation. In this vein, members of the 115th Congress had introduced a large number of measures targeting various aspects of litigation.¹⁴⁵ Together these measures propose sweeping reforms that would impact many aspects of the judicial process and court access. These proposed reforms—in combination with reforms already implemented by Congress and the courts—would have deep and long-lasting effects on substantive and social policy.

Most of these provisions clearly and plainly target an underlying substantive policy at issue by proposing litigation reform in a specific area. So, for example, in one bill, Congress proposed changes to the statute of limitations for essentially all medical malpractice actions. Some target no specific substantive policy, and instead propose trans-substantive reforms that would apply in a vast number of cases. An example of this is the LARA, a repeat of previous Rule 11 reform that would mandate sanctions for all Rule 11 violations and remove the safe harbor in all civil actions. Despite their seeming neutrality, however, trans-substantive bills have their own “policy” purposes.

142. *Id.* at 1261–63.

143. Burbank & Farhang, *supra* note 79, at 1564.

144. *Id.*

145. Republicans lost control of the House with the midterm election of November 2018. For more on the potential impacts of the election on the prospects for reform, see *infra* notes 245–247 and accompanying text.

Although the precise intent of each piece of legislation will be explored below, the stated intent behind a significant portion of this legislation is the same as much of the litigation reform measures introduced throughout the last three decades: to lessen the costs and burdens associated with litigation by ensuring the procedures associated with litigation are clear, efficient, and targeted to stated goals. In short, the 115th Congress intended to further a policy of decreasing the cost of litigation.

A. Trans-substantive Bills re Litigation Reform

As in the past, the 115th Congress continued in its attempt to affect major change to the federal litigation landscape through trans-substantive procedural reform. For example, the following three measures are trans-substantive in that they affect all (or most) litigation that comes before the courts, regardless of the type of litigation involved. These measures uniquely attract the focus of both civilian interest groups and experts and players in the procedural world, including the Judicial Conference, and academics alike. The stated intent behind all of these bills is regulating plaintiff attorney compensation, limiting the type and scope of class certification, and preventing frivolous litigation.¹⁴⁶

The Fairness in Class Action Litigation Act of 2017 (FICALA) was introduced to broadly target many aspects of litigation, including: general compensation, certification and representation related issues for class actions, and issues arising out of multidistrict litigation.¹⁴⁷ The U.S. Chamber of Commerce has argued that this legislation “would help bring equity back into the judicial system by discouraging fraud and abuse in a wide variety of civil cases.”¹⁴⁸ Aspects of the bill, such

146. *See, e.g.*, Letter from ACA Int'l et al. to Members of the U.S. House of Reps. (Mar. 8, 2017), http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Coalition_Letter_FICALA_to_House.pdf [<https://perma.unl.edu/H7DN-UTNP>] (evincing a letter signed by fourteen such organizations, including the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform, focusing on the portions of the bill that would regulate attorney compensation and “type and scope of injury” requirements); Letter from Aric Newhouse, Senior Vice President of Policy & Gov't Relations of the Nat'l Ass'n of Mfrs. to U.S. House of Reps. (Mar. 9, 2017), [http://www.nam.org/Advocacy/Key-Manufacturing-Votes/115th-Congress/House/NAM-Key-Vote-Letter-in-Support-of-the-Fairness-in-Class-Action-Litigation-Act—HR-985-\(House\)](http://www.nam.org/Advocacy/Key-Manufacturing-Votes/115th-Congress/House/NAM-Key-Vote-Letter-in-Support-of-the-Fairness-in-Class-Action-Litigation-Act—HR-985-(House)) [<https://perma.unl.edu/9D7Q-4ANP>] (citing also the injury in fact and asbestos transparency requirements of the bill as being key).

147. Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. (2017) (as passed by the House on Mar. 9, 2017).

148. Letter from Jack Howard, Senior Vice President of Cong. and Pub. Affairs with the U.S. Chamber of Commerce & Lisa A. Rickard, President of the U.S. Chamber Inst. for Legal Reform to Members of the U.S. House of Reps. (Mar. 8, 2017), https://www.uschamber.com/sites/default/files/170308_kv_hr985_fairnessinclass

as the same “type and scope of injury” requirements¹⁴⁹ and class certification requirements,¹⁵⁰ had been proposed previously in the 2016 congressional sessions. The 2016 bill passed the House,¹⁵¹ however, with unfriendly political parties in the Senate and White House, these bills had little chance of success.¹⁵²

The Innocent Party Protection Act, passed by the House in March 2017, amends the removal statute, 28 U.S.C. § 1446, and would prevent some plaintiffs from being able to sue in local state courts “where the trial bar has a significant home field advantage against out-of-state businesses.”¹⁵³ Supporters suggest that the bill is intended to address concerns that businesses are often targeted by parties seeking to fraudulently join defendants to defeat diversity jurisdiction.¹⁵⁴ Opponents argue that the bill would overturn a century of accepted practices in the courts in order to allow corporate defendants to move cases properly brought in state courts to a more favorable federal forum.¹⁵⁵ As one group argues, business defendants “prefer to litigate in federal court, which usually results in less diverse jurors, more expensive pro-

actionlitigationandfurtheringasbestosclaimtransparencyact_house.pdf [https://perma.unl.edu/BM2W-S59A].

149. H.R. 985; Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016, H.R. 1927, 114th Cong. (2016).
150. H.R. 1927.
151. *Id.*
152. The Office of Management and Budget issued a statement opposing the bill and stating that President Obama’s senior advisors would suggest he veto the bill, should it have crossed his desk. *See* H.R. REP. NO. 115-25, at 47 (2017) (report from the Committee on the Judiciary on the Fairness in Class Action Litigation Act of 2017), <https://www.congress.gov/115/crpt/hrpt25/CRPT-115hrpt25.pdf> [https://perma.unl.edu/H5YS-F426].
153. Letter from Neil L. Bradley, Senior Vice President & Chief Policy Officer of Gov’t Affairs of the Chamber of Commerce of the U.S., to Hon. Robert W. Goodlatte, Chairman of the Comm. on the Judiciary of the U.S. House of Representatives and Hon. John Conyers, Ranking Member on the Comm. on the Judiciary of the U.S. House of Representatives (Feb. 1, 2017), https://www.uschamber.com/sites/default/files/documents/files/170201_hr725_innocentpartyprotectionact_goodlatte_conyers.pdf [https://perma.unl.edu/GNG9-URYN].
154. *See* Newhouse, *supra* note 146.
155. Letter from Alliance for Justice et al., to Robert W. Goodlatte, Chairman of the Comm. on the Judiciary of the U.S. House of Representatives and Hon. John Conyers, Ranking Member on the Comm. on the Judiciary of the U.S. House of Representatives (Feb. 1, 2017), <https://www.nclc.org/images/pdf/legislation/letter-oppose-attack-civil-justice.pdf> [https://perma.unl.edu/YNQ7-A3DS] (letter signed by 53 parties); *see also* Press Release, Ctr. for Democracy & Justice, Statement on Mar. 2017 Passage of Three House Anti-Civil Justice Bills (Mar. 10, 2014), <https://www.centerjd.org/content/statement-march-2017-passage-three-house-anti-civil-justice-bills> [https://perma.unl.edu/GG63-MTZZ] (characterizing H.R. 725 as “corporate forum-shopping location”).

ceedings, longer wait times for trials, and stricter limits on discovery.”¹⁵⁶

Finally, the LARA focused on Rule 11(c) of the FRCP. Akin to the Rules prior to 1993, this reform would make court-issued sanctions mandatory, rather than permissible, and remove the “safe harbor” provisions that currently require a party seeking sanctions to first give notice to the opposing party and an opportunity to fix the violation in question. Essentially, this bill would expand the sanctions powers granted in securities cases through the PSLRA to all civil cases in federal courts. According to its drafters, the purpose of the bill is to limit fraudulent lawsuits and protect small businesses from the cost of either defending against or settling fraudulent lawsuits.¹⁵⁷ But of greatest concern to opponents of the bill is the fact that mandatory sanctions are inconsistent with fundamental judicial goals: *access to justice, efficiency, and reduction of waste in the judicial system*. Opponents of LARA fear that the reform would chill meritorious litigation¹⁵⁸ as empirical evidence supports the view that mandatory or overly severe sanction schemes deter parties from bringing otherwise legitimate lawsuits.¹⁵⁹

Professor Edward Cavanagh has recently written that there is little evidence to support the notion that mandatory sanctions would deter baseless lawsuits and points to evidence to the contrary.¹⁶⁰ As Professor Cavanagh explains, “The House Bill would raise—and not address—the very same problems that led the Supreme Court to eliminate mandatory sanctions through the 1993 Amendments to Rule 11” such as undermining incentives for parties to work cooperatively and collegially, re-introducing a strategic “profit-motive” into Rule 11 motions by shifting the focus from deterrence to compensation, and chilling meritorious litigation.¹⁶¹

156. Alliance for Justice et al., *supra* note 155; *see also* Ctr. for Democracy & Justice, *supra* note 155 (characterizing H.R. 725 as “corporate forum-shopping legislation”).

157. *See* H.R. REP. NO. 115-16, at 4–7 (2017) (noting that the changes to Rule 11 would result in compensation for and deterrence of wrongfully filed suits and citing evidence that a 55% majority of judges believe this to be the purpose of Rule 11).

158. *See generally* Edward Cavanagh, *Mandating Rule 11 Sanctions? Here We Go Again*, 74 WASH. & LEE L. REV. ONLINE 31, 42 (2017).

159. Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study*, 75 MARQ. L. REV. 313, 336–37 (1992); *see also* Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 952–53 (1992) (finding that the mere threat of sanctions had as great an impact on litigation decisions as the actual imposition of sanctions); H.R. REP. NO. 115-16, at 28–30 (citing studies showing that the pre-1993 rule had a particularly adverse effect on civil rights cases).

160. *See* Cavanagh, *supra* note 158, at 39 n.39.

161. *Id.* at 41.

Not only are critics concerned with impacts on an individual's substantive rights, but opponents of these bills have also expressed concern that the introduction of these trans-substantive bills in Congress circumvents current accepted traditions of changing judicial procedure.¹⁶² These bills have attracted attention and comment from procedural scholars, the American Bar Association (ABA), and the current chairs of the Standing Committee and the Advisory Committee. The ABA points out that the Advisory Committee can and has thoroughly and thoughtfully considered the issue of sanctions under Rule 11 and worries that congressional procedural actions, such as these, will not include the same level of transparency and public discussion regarding the need for Rule modification.¹⁶³

B. Bills Targeting Litigation Under Specific Statutes or Substantive Areas of Litigation

In addition to the trans-substantive bills above, Congress also considered a number of other procedural bills that effect change on the system of litigation and thus, the underlying rights that system enforces. Like the trans-substantive procedural bills, the goal of many of these bills is to limit litigation costs, including by reducing the economic incentives to bring lawsuits in particularly costly areas of litigation like accessibility lawsuits, financial class action, and environmental litigation.¹⁶⁴ However, unlike the trans-substantive bills, these bills are more limited in scope, including by targeting only a specific area of the law or litigation for change. The effect of the procedural changes in these bills is often non-transparent, both to the public and to systemic procedural scholars, and thus, garners less attention than either substantive reform or trans-substantive procedural reform.

1. The Protecting Access to Care Act of 2017 (H.R. 1215)

The Protecting Access to Care Act includes both substantive provisions altering the law of health care tort law and efforts to reduce opportunities and incentives to file medical malpractice and defective products lawsuits through procedural reform. The more publicly dis-

162. Letter from Thomas M. Susman, Dir. of the Governmental Affairs Office of the Am. Bar Ass'n to Representatives (Mar. 6, 2017), <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Class%20Action%20Letter%202017.authcheckdam.pdf> [<https://perma.unl.edu/FBR5-7UCC>].

163. See Letter from Thomas M. Susman, Dir. of the Governmental Affairs Office of the Am. Bar Ass'n to Hon. Robert W. Goodlatte, Chairman of the Comm. on the Judiciary of the U.S. House of Representatives and Hon. John Conyers, Ranking Member on the Comm. on the Judiciary of the U.S. House of Representatives (Feb. 1, 2017), https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2017feb1_lara_1.authcheckdam.pdf [<https://perma.unl.edu/L46R-5HBZ>].

164. See Burbank & Farhang, *supra* note 79, at 1562–67.

cussed portion of this Act would impose a \$250,000 cap on noneconomic damages¹⁶⁵ for lawsuits related to medical care provided by, or in any way subsidized by, the federal government. But this Act also imposes a federally mandated statute of limitations on all medical malpractice claims, regardless of what an individual's state statute of limitation provides for Health Care.¹⁶⁶ The result of this is to essentially federalize a state issue: the amount of time people have to file state law malpractice claims.¹⁶⁷ It also prohibits plaintiffs from using as evidence in court a doctor's apology and mandates that expert witnesses be from the state in which the case was being heard or a contiguous state.

The potential for success in the Senate is unclear, with some surprising opponents suggesting that the federalization of a clear state issue makes this bill more difficult for conservative members like Representative John Duncan from Tennessee to accept.¹⁶⁸ Supporters claim optimism, however, highlighting the fact that the bill is more narrowly targeted than previous attempts at national medical malpractice reform.¹⁶⁹ Whether this bill will be perceived as more limited remains to be seen. A previous version of this bill, the HEALTH Act of 2002, contains much of the same language as H.R. 1215, including the \$250,000 cap on damages and the imposition of a three-year statute of limitations. The primary difference is the scope of potentially affected

165. Protecting Access to Care Act, H.R. 1215, 115th Cong. (2017) (including among other things, damages for physical and emotional pain, suffering, physical impairment, and mental anguish, as defined under the Act).

166. *Id.*

167. For an example of a longer state statute of limitations that would be overridden by the Act, see VA. CODE ANN. § 8.01-243(C)(3) (2016) (allowing the statute of limitations to be tolled for negligent failure to diagnose cancer but not to exceed ten years).

168. Joyce Frieden, *House Passes Restrictions on Some Malpractice Awards*, MEDPAGE TODAY (June 28, 2017), <https://www.medpagetoday.com/practicemanagement/medicolegal/66341> [<https://perma.unl.edu/5TN8-KDL9>]; see also Andis Robeznick, *Senators May Stall Medical Liability-Reform Legislation*, AMA WIRE (July 12, 2017), <https://wire.ama-assn.org/practice-management/senators-may-stall-medical-liability-reform-legislation> (statement by consumers Union expressing concern that the bill would prevent many patients from being able to bring suit, thus protecting medical providers from liability); H.R. 4600, 107th Cong., (2017) (explaining the dissenting view that expressed the same concern). For an excellent discussion of the issue of federalism in the context of health care, see Abbe R. Gluck, Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689 (2018).

169. Press Release, PIAA, Medical Liability Reform Legislation Passes U.S. House Judiciary Committee (Mar. 1, 2017), https://www.mplassociation.org/docs/News_Releases/2017_Press_Release_HR1215.pdf [<https://perma.unl.edu/3TS5-L5K2>] (“Unlike previous federal bills, however, the bill is focused solely on healthcare professionals and entities, includes detailed flexibility for states for all its reforms, and is linked with the expenditure of federal dollars, to address states’ rights concerns.”).

lawsuits. The proposed 2002 Act would have applied to any health care lawsuit “concerning the provision of health care goods or services affecting interstate commerce,” while H.R. 1215 applies to any suit involving federal health care or funds.¹⁷⁰

2. *Back the Blue Act of 2017 (H.R. 2437)*

The “Back the Blue Act of 2017” raises the bar for lawsuits against police officers. Already, to sue a police officer, individuals must overcome the difficult hurdle of qualified immunity, requiring plaintiffs to prove both that their rights were violated and that a reasonable officer should have known that the actions were unconstitutional. Even then, it is rare to hold an officer personally liable under current law, as juries tend to dislike finding officers liable, and municipal policies often indemnify officers from liability.¹⁷¹ The new bill would raise the stakes even higher, making it next to impossible to find an officer liable, in part by creating a modified affirmative defense for the officer. An officer defendant who is able to show that the plaintiff “more likely than not” committed a felony or crime of violence in the course of the unconstitutional conduct will be liable only for out-of-pocket expenses. Furthermore, upon such proof, the plaintiff would be barred from recovering attorneys’ fees.

Others have written eloquently on the impact of such proposed legislation from a policy angle—specifically, on the suitability of raising the burden of proof in police misconduct cases as it relates to issues of accountability, victims’ rights, correctional misconduct, professional protection, and civil rights.¹⁷² The focus here is instead on the use of procedure—both an affirmative defense resulting in a loss of vital damage recoveries and the bar of attorneys’ fees—to implement substantive reform. Organizations like the Human Rights Watch and the National Police Accountability Project have warned that provisions like these limit potential plaintiffs’ interest in suing, and ability to sue, by increasing the risk that it will be more expensive to sue.¹⁷³

170. *Compare* Protecting Access to Care Act, H.R. 1215, 115th Cong. § 7 (2017), *with* Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2002, H.R. 4600, 107th Cong. § 9 (2002).

171. Radley Balko, *A New GOP Bill Would Make It Virtually Impossible to Sue the Police*, WASH. POST (May 24, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/05/24/a-new-gop-bill-would-make-it-virtually-impossible-to-sue-the-police/?utm_term=.d0adaec2a1cf [<https://perma.unl.edu/RP5Y-XN69>].

172. *See US: Congress Should Reject ‘Back the Blue Act’*, HUM. RTS. WATCH (May 23, 2017), <https://www.hrw.org/news/2017/05/23/us-congress-should-reject-back-blue-act> [<https://perma.unl.edu/F8QP-EB7T>].

173. *Id.*; *NSAP Comments on Back the Blue Act of 2017*, S. 1134 and H.R. 2347, NAT’L POLICE ACCOUNTABILITY PROJECT, <https://www.nlg-npap.org/advocacy/npap-comments-back-blue-act-2017-s-1134-and-hr-2437> [<https://perma.unl.edu/H4JZ-PRB7>].

This idea of increased risk and corresponding effect on access to courts is a long-standing concern in the legal community, particularly when it comes to the fee-shifting devices exhibited in this bill.¹⁷⁴

3. *Good Samaritan Health Professionals Act (H.R. 1876)*

H.R. 1676 was introduced in the House on April 4, 2017 by Representative Marsha Blackburn (R-TN). It passed out of the House Energy & Commerce Health Subcommittee in January 2018. With enumerated exceptions for criminal liability, as well as gross negligence, reckless misconduct and intoxication, the Good Samaritan Health Professionals Act bars liability for acts or omissions of volunteer health care professionals acting during a disaster, in good faith, and in the capacity of a volunteer.¹⁷⁵ Although individuals volunteering for certain non-profit or governmental organizations are afforded some civil liability protection under the Volunteer Protection Act (VPA) of 1997, healthcare providers not affiliated with such organizations who volunteer on their own accord are not protected by the VPA. This would extend that protection and, thus, limit the availability of lawsuits. In a letter of support, the American Hospital Association stated that the bill “is a positive step toward removing an impediment for physicians and other clinicians . . . by extending liability protections to health care professionals crossing state lines.”¹⁷⁶

4. *Volunteer Organization Protection Act*

The Volunteer Organization Protection Act, introduced by Representative Steve Chabot (R-OH), would also extend VPA protection to the nonprofit organizations themselves, unless the organization can be shown to be directly or vicariously liable for the individual,¹⁷⁷ or “the organization itself has expressly authorized the specific conduct constituting the act or omission.”¹⁷⁸ The Act provides further protection to the organizations, including immunizing certain organizations

174. See, e.g., Thomas D. Rowe Jr., *Indemnity or Compensation? The Contract with America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative*, 37 WASHBURN L.J. 317 (1998). As of printing, the bill appears stalled, although the House has broken off and passed a portion in the “Protect and Serve Act of 2018.” S. 2794 115th Cong. (2018). This Act would make it a federal crime, punishable by up to ten years in prison, for “knowingly caus[ing] serious bodily injury to a law enforcement officer, or attempts to do so.” *Id.*

175. Good Samaritan Health Professionals Act, H.R. 1876, 115th Cong. (2017) (previously H.R. 1822, 115th Cong. (2017)).

176. Letter from Thomas P. Nickels, Exec. Vice President of the Am. Hosp. Ass’n, to Hon. Marsha Blackburn of the U.S. House of Representatives (May 17, 2017), <https://www.aha.org/system/files/advocacy-issues/letter/2017/170517-let-nickels-blackburn-support-good-samaritan-act.pdf> [<https://perma.unl.edu/M4TK-N8VV>].

177. Volunteer Organization Protection Act, H.R. 2432, 115th Cong. (2017).

178. *Id.*

acting under governmental authority¹⁷⁹ and limiting the availability of punitive damages.¹⁸⁰ Representative Chabot issued a press release on the day he introduced the bill that stated, “By limiting potential legal liability for non-profit organizations, this legislation will help to create an environment that supports and encourages volunteer service.”¹⁸¹

This bill was introduced in the House on May 16, 2017¹⁸² and referred to the Subcommittee on the Constitution and Civil Justice on June 7, 2017.¹⁸³ No action has been taken on the bill since then.¹⁸⁴

5. CFPB Rule H.J. Res. 111

On July 19, 2017,¹⁸⁵ the Bureau of Consumer Financial Protection issued a rule that would ban certain consumer financial products and services that included arbitration arrangements from barring class action suits related to those products and services.¹⁸⁶ The rule also regulated arbitration agreements and required that records of arbitration be submitted to the Bureau.¹⁸⁷ Although this rule affects only the financial services sector, this sector is large, affecting all services overseen by the Consumer Financial Protection Bureau, including the consumer financial markets that “involve lending money, storing money and moving or exchanging money.”¹⁸⁸

On July 20, 2017, Representative Keith Rothfus (R-PA) introduced a joint resolution disapproving of the rule. The Resolution passed by the Senate on October 24, 2017, and then became law on November 1, 2017. As such, the CFPB rule no longer has “force or effect.”¹⁸⁹ The Resolution undoubtedly has an effect on a large number of consumer protection class actions. However, in the context of litigation reform in

179. *Id.*

180. *Id.*

181. Press Release, Steve Chabot, Congressman, U.S. House of Representatives, Chabot Introduces Legislation to Protect Local Non-Profit Organizations (May 16, 2017), <https://chabot.house.gov/news/documentsingle.aspx?DocumentID=39874> [<https://perma.unl.edu/C9WF-SGXS>].

182. *H.R. 1876 - Good Samaritan Health Professionals Act of 2017, All Actions H.R. 1876 - 115th Congress (2017-2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/1876/all-actions> [<https://perma.unl.edu/ZNL6-BL3A>].

183. *Id.*

184. *Id.*

185. Arbitration Agreements, 82 Fed. Reg. 33,210 (Sept. 19, 2017) (codified at 12 C.F.R. pt. 1040).

186. *Id.*

187. *Id.*

188. Kristine L. Roberts, *CFPB Allies and Opponents Clash Over Arbitration Proposal*, 23 No. 2 WESTLAW J. DERIVATIVES 1 (2016) (quoting CFPB notice).

189. *Final Rule, Arbitration Agreements*, CONSUMER FIN. PROTECTION BUREAU, <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/arbitration-agreements/> [<https://perma.unl.edu/BU9L-Q5MZ>].

general, it is targeted in scope. It is limited to a specific industry, consumer finance and banking, and part of a focused debate about how to most effectively regulate financial institutions to ensure that consumers are protected from abusive practices, while at the same time allowing free market principles to thrive.

It is perhaps the Resolution's home in the debate that ensured that specific advocacy groups were informed and ready to mobilize, both for and against this rule. Consumer watchdog and financial reform groups like the National Consumer Law Center, Public Citizen, Allied Progress, and Americans for Financial Reform, lobbied hard in favor of the CFPB rule, including by running ads in states targeting key Senator votes.¹⁹⁰ In opposition to this bill, the National Consumer Law Center issued a letter, signed by 423 professors, to Senator Mike Crapo and Senator Sherrrod Brown, urging them to oppose the bill.¹⁹¹ Public attention became even more pronounced when a video of a person dressed as the Monopoly Man attending a Senate Banking Hearing related to the Equifax data breach went viral.¹⁹² But trade groups like the American Bankers Association, the American Financial Services Association, and the U.S. Chamber of Commerce also threw their weight behind the rule change. These organizations engaged in a heavy lobbying effort that included press statements denouncing the CFPB Rule as a "prime example" of agency over-regulation¹⁹³ and litigation seeking to bar enforcement of the rule.¹⁹⁴ Ultimately, these efforts paid off.

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190. *Multi-State Ads Launched: Equifax Scandal Highlights Need to Protect CFPB's Arbitration Rule*, ALLIED PROGRESS (Sept. 14, 2017), <https://alliedprogress.org/news/multi-state-ads-launched-equifax-scandal-highlights-need-stop-repeal-cfpbs-arbitration-rule/> [https://perma.unl.edu/R2ML-WN9P]; Mega Leonhardt, *Lawmakers Just Made It Nearly Impossible for You to Sue Companies Like Equifax and Wells Fargo*, TIME: MONEY (Oct. 25, 2017), <http://time.com/money/4996613/senate-kills-cfpb-arbitration-rules/> [https://perma.unl.edu/6EBW-BLTZ]; see also Letter from the Nat'l Consumer Law Ctr. to Monica Jackson, Officer of the Exec. Sec'y, Consumer Fin. Prot. Bureau (July 12, 2017), <https://www.nclc.org/images/pdf/arbitration/071217-coalition-letter-final-cfpb-arb-rule.pdf> [https://perma.unl.edu/6YPE-PYEW] (signed by 310 consumer, civil rights, labor, community, and non-profit organizations).
191. Letter from the Nat'l Consumer Law Ctr. to Sen. Mike Crapo, Chairman, & Sen. Cherrrod Brown, Ranking Member, Senate Comm. on Banking, Hous., & Urban Affairs (Sept. 25, 2017), https://www.nclc.org/images/pdf/banking_and_payment_systems/letter-congress-400prof.pdf [https://perma.unl.edu/XK4S-Y864].
192. Jennifer Calfas, *We Spoke to the 'Monopoly Man' Who Photobombed the Senate Equifax Hearing*, TIME: MONEY (Oct. 4, 2017), <http://time.com/money/4969855/monopoly-man-equifax-hearing/> [https://perma.unl.edu/8DHY-F7LG].
193. *U.S. Chamber: CFPB Arbitration Rule Is Prime Example of Agency Gone Rogue*, U.S. CHAMBER COM. (July 10, 2017), <https://www.uschamber.com/press-release/us-chamber-cfpb-arbitration-rule-prime-example-agency-gone-rogue> [https://perma.unl.edu/93CZ-A97B].
194. Mark J. Levin & Alan S. Kaplinsky, *Finance Industry Files Lawsuit to Overturn CFPB Arbitration Rule* (Sept. 29, 2017), <https://www.consumerfinancemonitor>

6. *ADA Education and Reform Act (H.R. 620)*

Introduced to the House on January 24, 2017, the ADA Education and Reform Act would effectively graft a “safe harbor” provision into the ADA. Under current law, if an individual with a disability encounters a barrier to access, she may go straight to court to file a lawsuit challenging that access. The ADA Education and Reform Act would instead bar a civil action against a defendant for the defendant’s failure to address an architectural barrier unless the person looking to bring suit has given specific notice of the barrier¹⁹⁵ and allowed 60 days for written plans to remove the barrier.¹⁹⁶ If plans are developed, the person must wait another 60 days to allow the business to start removal of the barrier.¹⁹⁷ Only after this four month window can suit be brought. The bill also includes provisions defining adequate notice under the statute and encouraging the development of alternative dispute resolution plans to address barrier issues.¹⁹⁸ The bill passed the House on February 15, 2017.¹⁹⁹

Opponents of the bill worry that H.R. 620’s notice and cure provisions will shift the burden of “enforcing compliance with a federal civil rights statute from the alleged wrongdoer onto the discrimination victim.”²⁰⁰ Instead of affirmatively complying with the ADA’s requirement that people with disabilities have access, the bill creates an incentive for businesses to wait and see, only taking steps when challenged. The strict notice and cure provisions may also act to bar or delay meritorious claims.²⁰¹

7. *Environmental Litigation Legislation*

Republicans have introduced a number of measures related to the environment and litigation under the ESA. Just two examples can be found in H.R. 3131 and H.R. 2936. The Endangered Species Litigation Reasonableness Act (H.R. 3131) would cap the award of attorney fees

.com/2017/09/29/finance-industry-files-lawsuit-to-overturn-cfpb-arbitration-rule/ (reporting the filing of the lawsuit in *Chamber of Commerce of the United States of America v. Consumer Financial Protection Bureau*, No. 3:2017cv02670 (N.D. Tex. Sept. 29, 2017)).

195. ADA Education and Reform Act, H.R. 620, 115th Cong. (2017).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* Passage in the Senate is uncertain, as Senator Tammy Duckworth announced in March 2018 that she had worked to gather enough votes to filibuster the bill. Letter from Tammy Duckworth, U.S. Sen. to Hon. Mitch McConnell, Majority Leader, U.S. Senate (Mar. 28, 2018), <https://www.duckworth.senate.gov/imo/media/doc/18.03.28%20-%20Joint%20Letter%20to%20Majority%20Leader%20Opposing%20H.R.%20620.pdf> [https://perma.unl.edu/W8RR-XSMW].

200. 164 CONG. REC. H1191 (daily ed. Feb. 15, 2018) (statement of Ms. Jackson Lee).

201. *Id.*

in ESA citizen suits, and would restrict awards to “prevailing parties,” rather than “all parties.”²⁰² The Resilient Federal Forest Act of 2017 (H.R. 2936), would give the agency the discretion to send disputes regarding forest management actions to binding arbitration, thus eliminating access to independent courts and potential judicial oversight of agency decision-making.²⁰³ It would also eliminate recovery of costs and attorneys’ fees in such actions.²⁰⁴

8. *Congressional Article I Powers Strengthening Act of 2017, Sunshine Regulations and Regulatory Decrees and Settlements (H.R. 469)*

Under current law, if a plaintiff sues a government agency, the parties can either go to trial or they can “negotiate a consent decree or settlement agreement.”²⁰⁵ H.R. 469²⁰⁶ changes that process so that the agency would be required to publish proposed consent decrees and settlement agreements in the Federal Register for public comment sixty days prior to filing with the court and to respond to all public comments.²⁰⁷ The stated purpose of this bill is to prevent what is seen as collusive practices where “friendly” attorneys sue the government in order to force agency action without going through the usual agency procedures.²⁰⁸

V. OBSERVATIONS – THE NATURE AND EFFICACY OF INCREMENTAL LEGISLATIVE PROCEDURAL REFORM

The above survey of incremental legislative forays into litigation reform provides a better understanding of the nature and efficacy of such reform. This history leads to insights regarding the role Congress has played in the rulemaking process. Structurally, the above history indicates: (1) Congress is not afraid to exercise its power to issue rules of procedure, and it does so regularly, (2) Congress has exercised this

202. Endangered Species Litigation Reasonableness Act, H.R. 3131, 115th Cong. (2017); *see* 28 U.S.C. § 2412 (2018).

203. Resilient Federal Forest Act of 2017, H.R. 2936, 115th Cong. (2017).

204. *Id.*

205. CONG. BUDGET OFFICE, COST ESTIMATE, H.R. 469, SUNSHINE FOR REGULATIONS AND REGULATORY DECREES AND SETTLEMENTS ACT OF 2017, at 1 (2017).

206. There are substantially similar provisions in two Senate bills. S. 1756, 115th Cong. (2017) (introduced by Sen. Sullivan (R-AK)); S. 237, 115th Cong. (2017) (introduced by Sen. Grassley (R-IA)).

207. H.R. 469, 115th Cong. § 103 (2017).

208. H.R. REP. NO. 115-347 (2017). *But see id.* (dissenting view) (“By facilitating dilatory conduct by anti-regulatory forces, using vague language in key provisions, and imposing numerous and burdensome procedural requirements on agencies and courts . . . H.R. 469’s cumulative effect will be to discourage the use of consent decrees and settlement agreements.”).

power through both “major” and more targeted, incremental reforms, and (3) the targeted nature of incremental reform appears to increase the potential for ideological alignment and prospects for passage.

The history also leads to questions about the values that congressional procedural rulemaking promotes. The history indicates that incremental legislative reform is often targeted to, and motivated by, altering remedies in a particular substantive area, non-transparent, and unmoored from adjudication and practice-based normative values. This is in direct contrast with the court-centered rulemaking process authorized in and adopted after the REA. The below analysis explores these points by drawing on the history identified above. It draws in particular on two areas of congressional action: Rule 11 and ADA notification reform.

A. Congress as a Major Player

The first question to ask is what Congress is doing in this area. As seen above, Congress regularly acts to issue rules of procedure. It regulates in the form of both major and targeted incremental measures. It also regulates through acquiescence to Judicial Conference Amendments and, indirectly, by failing to correct change. In addition, the targeted nature of incremental reform appears to increase the potential for ideological alignment and prospects for passage.

First, Congress is unafraid to regulate in the field of procedure and does so regularly and directly. Since the 1990s, conservative forces in Congress have followed a consistent and persistent agenda of proposing litigation reform bills. They have done so both to further cost-asymmetry agendas (that is, to reduce the cost of apparently meritless litigation) and to further specific substantive goals. That holds true with the 115th Congress. Litigation reform is not just a bread-and-butter conservative ideological issue but a key part of Speaker Paul Ryan’s “A Better Way” reform agenda.²⁰⁹ That agenda identifies lawsuits as a major drain on America’s economy and proposes bills to “stop baseless lawsuits,” “prevent trial lawyers from gaming the system,” and cracking down on practices favoring settlement.²¹⁰

Rule 11 Reform provides a useful example. As the Rules Enabling Act process dictates, Congress has the final word on any Rule 11 amendments that are proposed. The Advisory Committee has affirmatively acted, and Congress has endorsed, Rule 11 changes on two occasions, first when it accepted the Advisory Committee’s mandatory sanctions amendment in 1983 and second when it accepted the

209. *A Better Way to Fix Health Care*, BETTER WAY, https://abetterway.speaker.gov/_assets/pdf/ABetterWay-Economy-Snapshot.pdf [https://perma.unl.edu/FV5X-BAS7].

210. *Id.*

changes in 1993 that, among other things, made sanctions discretionary and created the safe harbor requirement.²¹¹ Both of these changes occurred in a very public, indeed controversial manner.²¹² These debates were also informed. The 1993 version came about when the Committee, acting under the 1988 REA notice and comment procedures, called for written comments on Rule 11, sought out empirical research, and considered public, scholarly, and legal opinion in its ultimate proposal.²¹³ These records are available to the public, including to congressional members wishing to inform themselves of the impact of the proposed trans-substantive rules.

It is possible to argue that congressional “acquiescence” does not equate to action. The LARA bill itself suggests as much, in that it seems to suggest that Congress is attempting to fix a problem that the Judicial Conference created. The apparent evils brought on by the 1993 Amendment serves as one of the primary motivating factors for the 2017 LARA bill. Justice Antonin Scalia claimed the 1993 revision “would eliminate a significant and necessary deterrent to frivolous litigation,”²¹⁴ and LARA proponents argue that is exactly what has occurred.²¹⁵ The LARA bill is designed to remedy that flaw. However, while the Advisory Committee drafted and proposed the 1993 Amendment, Congress cannot disclaim responsibility for it. It is ultimately *Congress* that is responsible for approving them and allowing them to become law. Congress approved both.²¹⁶

The above history also shows that Congress regularly acts to amend procedural rules in more targeted ways. These measures are often linked to a specific area of substantive law, and together make seemingly “incremental” changes to both the procedural landscape and the substantive scheme. An example from the Rule 11 context is the successful PSLRA, which, when passed, amended the Rule 11 sanctions process but only in the context of securities litigation.²¹⁷ An-

211. Tobias, *supra* note 114, at 543–45.

212. The 1983 Amendment has been described as “the most controversial modification in the Federal Rules’ history.” *Id.* at 543.

213. Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1, 12 (2012) (describing the evidence supporting the 1993 amendments).

214. Tobias, *supra* note 114, at 544.

215. See H.R. REP. NO. 115-16, at 3–5 (2017).

216. See Burbank & Farhang, *supra* note 79, at 1589 (describing the Democratic efforts to block the 1983 amendment to Rule 11 that failed in the Republican-controlled House). I acknowledge that I am reading in a legislative intention by the failure to reject a rule amendment, which arguably is hard to discern from a failure to reject. Nevertheless, considering Congress’s ultimate responsibility in the rulemaking process, this aspect of procedural rulemaking should be included.

217. Avery, *supra* note 119, at 335–36, 355 (citing 141 CONG. REC. H15215 (daily ed. Dec. 20, 1995)).

other example is H.R. 620, which would add a notice and waiting period before a disabled person can file an ADA claim. H.R. 620 is just the latest iteration of many previous versions of ADA notification bills introduced in Congress. Some previous versions had proposed outright changes in the substantive law itself, including a proposal to criminalize unsupported settlement demand letters.²¹⁸ Such substantive aspects of the bills have, perhaps not surprisingly, received the most pushback, and the latest iteration proposes various “procedural” remedies “around the edges.” But these changes are far from trivial. Procedurally, this bill affects the standing of claimants, in that it changes the very right of the person to sue, it acts as a tolling statute, in that it delays the process for filing, and it effectively heightens the pleading and proof requirements by adding pre-claim burdens on plaintiffs, with the stated purpose of avoiding abusive use of the ADA by unscrupulous attorneys. And these are only the procedural effects. As noted above, substantively, the bill may effectively shift the burden of compliance from alleged wrongdoers onto persons with disabilities.

Other examples of targeted procedural reform include the 1996 LSC bill that placed restrictions on the use of LSC funds in certain kinds of cases, including class actions, and cases brought on behalf of prisoners, most immigrants, and persons challenging segregation of schools.²¹⁹ This move effectively re-directed organizations away from enforcing particular rights, like providing remedies for large-scale Title VII violations, without providing alternative enforcement mechanisms or changing the underlying rights regimes. Another example is in class action reform. Although Congress has not amended Rule 23 itself, it has changed class action practice for particular types of cases. For example, in the PSLRA, Congress enacted heightened class certification standards and requirements for court approval and appointment of lead plaintiffs in securities class actions, and in 1996, Congress prohibited class action lawsuits by immigrants challenging the validity of the immigration system or determining an individual’s immigration status.²²⁰

In addition to this positive ratification as a form of legislative action, Congress’s failure to respond to perceived problems in the area of attorney discipline and conduct can also be seen as indirect legislative “action.” In their empirical study of litigation reform efforts in Con-

218. ADA Education and Reform Act of 2015, H.R. 3765, 114th Cong. (2015) (making it unlawful, subject to a fine, for a person “to send or otherwise transmit a demand letter or other form of pre-suit notification alleging a violation of section 302 or 303 of the Americans with Disabilities Act” except under specific circumstances).

219. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321–53.

220. See Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208 § 306(a)(2), § 242(d)(2), 110 Stat. 3009-610 (1996).

gress, Burbank and Farhang identified fourteen legislative proposals that had been introduced to bolster sanctions under Rule 11. “A substantial majority” of these bills were specifically targeted at reversing the 1993 amendments to Rule 11,²²¹ just as LARA is today. While these previous efforts have largely failed, Congress did have some success at more targeted efforts at rolling back the 1993 Amendments. An example is the Rule 11 reform enacted as part of the PLSRA in 1995. As noted, that provision rolled back some of the key amendments to Rule 11 implemented just two years before by the Advisory Committee, but it did so only for securities cases. It did this by primarily making sanctions mandatory and requiring court review of Rule 11 compliance (i.e. without a “safe harbor”).

Although Congress has been otherwise unsuccessful in its repeated attempts at Rule 11 amendment, it would be wrong to ignore Congress’s attempts at reform in an analysis of the legislative role in litigation reform. The repeated attempts tell us something about the legislature’s perception of its role in the rulemaking process. Congress clearly sees itself as an active player in procedural and litigation reform lawmaking. This is despite the conventional wisdom relegating the legislative branch to a delegative role. The lack of success, seen in prior context, also tells us something about prospects for future legislative reform. It tells us that substantial players in the judicial reform space—including lobbyists, defense interest groups, the media, legislators, and members of the judiciary—see sanctions as a “ripe” and necessary area for reform. Also, the repeated legislative narrative of a need for action (whether that be to deter frivolous litigation, or to curb attorney abuses) slowly changes from an unsubstantiated claim to accepted fact underlying reform. We see this through much of the frivolous litigation reform of the 1980s and still today.

These observations show that a courts-only focus on procedural reform in procedural design scholarship is, at best, incomplete. Such a narrative of the development of procedural law doesn’t take into account the full scope of litigation reform measures that Congress has enacted. By focusing only on major legislative procedural revisions like CAFA or the PSRLA, however, and making only passing references to “limited” attempts at more targeted reform in Congress, we also miss the more incremental change that has occurred to the adjudicatory system as a result of congressional action.

B. The Characteristics of Congressional Incremental Procedural Reform

That Congress is actively involved in procedural reform, including targeted, incremental reform, doesn’t end the inquiry. The second in-

221. Burbank & Farhang, *supra* note 79, at 1563.

quiry is to determine the nature and efficacy of incremental legislative litigation reform. In other words, what characteristics does this type of reform have and does this reform align with articulated procedural reform values? Incremental legislative procedure is often targeted to, and motivated by, altering remedies in a particular substantive area, non-transparent, and unmoored from adjudication and practice-based normative values. This is in direct contrast with the court-centered rule making process authorized in and adopted after the REA.

1. *Substantive*

First, when Congress chooses procedural methods of reform, it is often motivated by specific substantive and remedial goals. While this seems like a subversive thing to claim, Congress is anything but quiet about its intent. So, in statements praising the passage of H.R. 1215, the medical malpractice bill, Congressman Doug Lamborn (R-CO-05), emphasized that, as a result of the legislation, “damages will be capped,” and healthcare costs “for Americans” would be lowered by lowering the costs of lawsuits to doctors.²²² And Congressman Kevin Cramer (R-ND-01) explained that he wanted to do away with lawsuits “that cause doctors to practice defensive medicine.”²²³ Similarly, Congresspersons lauding the passage of the ADA notification bill in the House explained that they intended to “alleviate the financial burden small businesses are facing as a result of ADA lawsuits”²²⁴ and ensure that businesses need not “pay expensive legal fees for unintended, vague, or technical violations.”²²⁵

These statements show that lawmakers contemplate shifts in underlying rights, remedies, and or legal obligations, not just procedural tinkering to fix “loopholes,” as is often suggested.²²⁶ But if that is the intent, why doesn’t Congress simply regulate the substance directly

222. *Lamborn Praises Tort Reform*, U.S. CONGRESSMAN DOUG LAMBORN (June 28, 2017), <https://lamborn.house.gov/news/documentsingle.aspx?DocumentID=2033> [<https://perma.unl.edu/RN9B-XFGD>].

223. *Cramer: House Passes Bill to Reform Medical Litigation Laws*, KEVIN CRAMER U.S. CONGRESSMAN OF N.D. (June 28, 2017), <https://cramer.house.gov/media-center/press-releases/cramer-house-passes-bill-to-reform-medical-litigation-laws> [<https://perma.unl.edu/2QF5-Y7R5>].

224. *Rep. Calvert Votes for Bill to Ensure the ADA Is Focused on Access for the Disabled, Not Abusive Lawsuits*, CONGRESSMAN KEN CALVERT (Feb. 15, 2018), <https://calvert.house.gov/media/press-releases/rep-calvert-votes-bill-ensure-ada-focused-access-disabled-not-abusive-lawsuits> [<https://perma.unl.edu/9WHA-YKHM>].

225. *LaMalfa Votes to Reform ADA, End “Drive-By” Lawsuits*, CONGRESSMAN DOUG LAMALFA (Feb. 15, 2018), <https://lamalfa.house.gov/media-center/press-releases/lamalfa-votes-to-reform-ada-end-drive-by-lawsuits> [<https://perma.unl.edu/BBH9-42Q2>].

226. *See Grothman Supports Needed ADA Reform*, GLENN GROTHMAN U.S. REPRESENTATIVE (Feb. 15, 2018), <https://grothman.house.gov/news/documentsingle.aspx?DocumentID=551> [<https://perma.unl.edu/2H97-WJ28>].

then? Institutional theorists explain that when there are high political barriers to major policy revision, lawmakers (and decision-makers) instead choose to modify policy through incremental change. This kind of change is described as “entail[ing] an irregular series of small steps that do not overturn the status quo and create a new one . . . but rather modify policy or add new layers to the existing policy sporadically over a long period of time.”²²⁷ The primary cause of changes like these “is not large-scale legislative reform, but a set of decentralized and semiautonomous processes of alteration within existing policy bounds.”²²⁸ When change occurs incrementally, “the link between legislative action (or inaction) and outcomes remains complex and opaque,” so that the precise legislative strategy is “often lost completely on voters.”²²⁹ One institutional scholar uses efforts to reform Social Security in the 1990s as an example. Rather than change the program itself, which had become politically popular and which would be difficult with a Democratic President in the White House, Republicans in the 1990s instead “retooled their strategy to encourage private retirement savings through ever more flexible and individualized means.”²³⁰ Thus, Jacob Hacker observes, conservatives effected change in welfare policy by getting Americans used to private accounts, diverting attention and, eventually, infrastructure resources away from the core public program.²³¹

Thus, the most likely reason the 115th Congress (and previous Congresses since 2000) have largely avoided attempts to amend the ADA through, say, tackling ADA’s specific compliance requirements, is that such a “substantive” reform is both far less likely to pass and a political ticking time bomb. The same outcome desired from the procedural notification amendment (lessening the cost compliance burden on businesses), would be fairly difficult to accomplish directly by withdrawing or amending underlying substantive rights. At present, disabled Americans have existing rights to enter places of business that comply with specific ADA regulations in order to ensure access. And once people have certain rights, they do not appreciate them being taken away. Nor do Republicans wish to push legislation that would anger their political base by, for example, reinforcing and regulating compliance obligations. So, for example, a bill introduced by Congressman A. Donald McEachin (D-VA-04) in April 2018 that would double the tax credit that small businesses receive for complying with the

227. Etta Bick, *Institutional Layering, Displacement, and Policy Change: The Evolution of Civic Service in Israel*, 31 PUB. POL’Y AND ADMIN. 342, 344 (2016).

228. Hacker, *supra* note 1, at 244.

229. JACOB S. HACKER, PAUL PIERSON & KATHLEEN THELEN, *DRIFT AND CONVERSION: HIDDEN FACES OF INSTITUTIONAL CHANGE* 28 (2013).

230. Hacker, *supra* note 1, at 256.

231. *Id.*

ADA has gone nowhere in the House, despite enjoying widespread democratic support.²³²

Incremental procedural reform presents a safer option. Accordingly, Republicans enact substantive reform masked as procedural rule-change. Despite the label, procedural reform has significant effects on the enforcement of the rights underlying the statute. As the dissenting Representatives explained in opposing the ADA notification bill, “H.R. 620’s notice and cure provisions will have the effect of inappropriately shifting the burden of enforcing compliance with a federal civil rights statute from the alleged wrongdoer onto the discrimination victim.”²³³

And make no mistake, these substantive effects are intended. The record is rife with evidence that, in the procedural reform context, not only are legislators utilizing this same method, but they are doing so deliberately. Again, H.R. 620 provides an example. As noted, Congress has attempted to pass a pre-suit notification bill before. The harshest version of these iterations was H.R. 3765, introduced in the 114th Congress (2015–2016) by Representative Ted Poe, when the Republicans controlled the House but not the Senate or the White House. The bill is largely the same as H.R. 620, with one key difference: H.R. 3765 included a provision making it unlawful to issue “a demand letter or other form of pre-suit notification alleging a violation of section 302 or 303 of the Americans with Disabilities Act of 1990” without first meeting several onerous requirements, including detailing how the person was actually denied access.²³⁴ Violation would result in a fine. Unlike H.R. 620, the 2016 version would have overtly changed the substantive law by creating criminal liability for disabled persons if they aren’t sufficiently specific. After significant opposition, this section was removed in the markup session in the House Judiciary Committee.

This above history also shows that the combination of procedural and substance-targeting character of incremental legislative reform has effects on the potential success of passage. It does so in many ways, including by aligning ideologies and removing vetoes against passage. Initially, the fact that ideology has a role to play in procedural development seems antithetical to procedural scholars, as we usually consider procedure “neutral.” However, if this history shows anything, it is that the politics of procedure are anything but neutral. By ideology here, I mean both the traditional notion of partisan politics documented by others and more minute considerations of dogma or

232. *H.R. 5536 – Disabled Access Credit Expansion Act*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/5536/cosponsors> [<https://perma.unl.edu/33AC-YBXU>].

233. 164 CONG. REC. H1191 (daily ed. Feb. 15, 2018).

234. ADA Education and Reform Act of 2015, H.R. 3765, 114th Cong. (2015) § 3.

philosophy. Both play important roles in understanding the success of legislative procedural reform.

The role of ideology is reflected in the Rule 11 reform efforts of Congress. Congressional attempts to enact trans-substantive Rule 11 reform have been stymied up until now. However, it is also important to note the context of these failures. Two attempted reforms introduced as part of the Contract with America in the 1990s—one which passed, and one which didn't—provide illustration. These bills occurred at a time of renewed Republican presence in Congress: despite the fact that a Democrat, President Clinton, sat in the White House, in 1995, Republicans gained control of both houses of Congress for the first time since 1954. Just as we see with the 2017 Republican party, the party reacted by introducing a profusion of litigation reform measures. One of these, the ultimately successful PSLRA, was limited in scope, targeting only one type of litigation. It passed, despite President Clinton's veto. In vetoing the bill, the President specifically noted his objection to the sanctions provision, arguing that it would have the effect of treating plaintiffs and defendants differently, and it would come "too close to a 'loser pays' standard."²³⁵ Congress overrode the veto.²³⁶ However, that same year, Congress also introduced the Attorney Accountability Act of 1995 (AAA),²³⁷ which included trans-substantive amendments to Rule 11 similar to the modern LARA. Like LARA, it would have made sanctions under Rule 11 mandatory and removed the safe harbor for all cases in civil litigation.²³⁸ The AAA was passed by the House but not the Senate.²³⁹

Why the difference in treatment between LARA's sanction provisions and the AAA? Contemporary observers have posited a few reasons. First, the AAA was hindered by political accountability concerns—specifically, fears that the measure would be perceived as rights-retrenching and would result in political backlash. Measures increasing the possibility of paying an opposing party's attorneys' fees are often seen as contravening a basic principle of American jurisprudence: the American rule fostering self-funding of litigation expenses.²⁴⁰ Across-the-board "loser-pays" provisions might ultimately affect the ability of individual plaintiffs to bring (and afford to bring) litigation enforcing a broad swath of statutes, including civil rights and environmental statutes. Carl Tobias, in commenting on the proposed AAA, reflected that:

235. Avery, *supra* note 119, at 360 (citing 141 CONG. REC. H15215 (daily ed. Dec. 20, 1995)).

236. *Id.* at 353.

237. Tobias, *supra* note 114, at 553.

238. *Id.*

239. *Id.*

240. *Id.* at 556.

This provision might limit access in cases which are close, complex, difficult or costly to prove, or in which possible plaintiffs have little power or money because the exposure to liability for opponents' attorneys' fees will chill potential litigants' enthusiasm for filing or vigorously pursuing litigation. Parties that may function as private attorneys-general in enforcing products safety, consumer or natural resources protection statutes or policies may be particularly vulnerable to the impacts reviewed in this paragraph.²⁴¹

Although the sanctions in the PLSRA presumably have the same, or similar, political accountability concerns, contemporary observers saw the PLSRA as a strategic "retreat" from broad legislative proposals to an ultimately successful limited-scope bill.²⁴² Republicans may have introduced in the House a "legislative juggernaut" as part of the Contract with America in order to push through sweeping reforms,²⁴³ but the political reality noted above prevented such an outcome. Accordingly, the bills that ultimately achieved success—like the PLRA and the PSLRA—were more limited, targeted to specific kinds of litigation seen as particularly problematic.²⁴⁴

The targeted, limited scope of the PLRA and the PSLRA enabled buy-in from otherwise hesitant political actors. Unlike the AAA and other Contract with America bills, which were denounced by all members of the Democratic Party, the PSLRA enjoyed some bi-partisan support. In fact, its passage is credited, in part, to the support and lobbying efforts of Democrats like Congressman Christopher Dodd and Diane Feinstein, who supported the regulation based on concerns over pressures on the financial and tech industries in their home states.²⁴⁵ Thus, the targeted approach at rule reform succeeded, even over President Clinton's veto, as legislators who would normally be expected to vote to prevent reform based on normative procedural principles, supported legislation based on substance-specific concerns.

In today's Congress, we see similar targeted efforts at litigation reform. There are reasons to suggest that, for reasons similar to above, litigation reform bills may have some measure of success. Until January 2019, the 115th Congress controlled both Houses and the Presidency. This, in theory, reduced the number of actors and institutions who could act as vetogates in the process of approval for revision. Accordingly, prospects for bill passage go up. This is exhibited by the passage of CAFA, a bill that had twice-before been considered and failed but ultimately passed after the mid-term elections in 2004

241. *Id.*

242. Rowe, *supra* note 174, at section II.D.

243. Letter from Dick Armev and John Boehner to Republican Members of Congress (Dec. 26, 1994), in MAJOR GARRETT, *THE ENDURING REVOLUTION: HOW THE CONTRACT WITH AMERICA CONTINUES TO SHAPE THE NATION* (2005) ("By creating a legislative juggernaut, we make it more likely that *all* items of the Contract get passed – like the old adage that a rising tide lifts all ships." (emphasis added)).

244. Rowe, *supra* note 174.

245. PATRICK DILLON & CARL M. CANNON, *CIRCLE OF GREED* 230–31 (2010).

raised the number of Republicans in the House above a potential filibuster by Democrats and veto-proof from the Republican President.²⁴⁶ It can also be seen in the success of controversial CFPB arbitration rule.

Despite having this control, the 115th Congress was not known for its bill-passage productivity. Various partisan factions within the Republican Party have famously acted as de facto vetogates over efforts to overhaul social policy, pass immigration reform, and fund the government. Furthermore, the Republican majority in the Senate is slim and the Republicans lost control of the House after the November 2018 election. However, we should not assume from this that procedural reform is unlikely to happen (and thus disregard it).

As the past history shows, Congress is capable of even trans-substantive litigation reform even in a politically polarized government. Thus, in 1990, Congress passed the CJRA, which, in part, promotes ADR as an alternative to civil litigation, with bipartisan support (necessary with two Democratic houses of Congress and a Republican President). Furthermore, Congress has proven quite adept at litigation reform that is targeted, limited in scope, and/or “buried” in other measures. The H.R. 620 enjoyed bipartisan support, including among a large number of California Democrats, Rep. Jackie Speier (D-CA) from San Francisco. Despite being a champion of civil rights legislation, Speier and other Democrats likely supported this bill in part because the targeted procedural nature of H.R. 620 appeared to align with reform that California has previously enacted with regard to its own disability statute.²⁴⁷ In 2016, California enacted its own notice provision that gave small businesses four months to fix disability access issues in order to avoid California’s minimum civil liability of \$4,000 for each violation.²⁴⁸ Proposing a similar “type” of a procedural fix at the federal level may seem like a natural leap.

The review of modern litigation reform measures above contains numerous examples at such targeted, limited in scope procedural reform, including the Protecting Access to Care Act of 2017 and the Congressional Article I Powers Strengthening Act of 2017 (H.R. 469). Both of these target only specific aspects of litigation—medical malpractice cases and lawsuits against the government. Accordingly, it will be easier for proponents to mobilize around common ideological interests, for

246. See STASZAK, *supra* note 43, at 108–09 (describing history of CAFA and legislative attempts at passage).

247. Jeff Horseman, *Would a Proposed Law Gut the Americans with Disabilities Act?*, PRESS-ENTERPRISE (Mar. 9, 2018), <https://www.pe.com/2018/03/09/would-a-proposed-law-gut-the-americans-with-disabilities-act/> [https://perma.unl.edu/PP52-MCCF].

248. Richard K. De Atley, *Legislation: Disability Access Fix-It Bill Now Law*, PRESS-ENTERPRISE (May 10, 2016), <https://www.pe.com/2016/05/10/legislation-disability-access-fix-it-bill-now-law/> [https://perma.unl.edu/NQ7V-QSDY].

example, an interest in decreasing the cost of health care or the cost of government. This may be so, even after the Democratic party takes over the House in January 2019. Thus, the prospects for passage of procedural bills increase.

2. *Not Transparent*

In addition to aligning ideological interests, there is perhaps another reason why targeted, or more limited, procedural bills have enjoyed so many past successes. The very “procedural” nature of the reform, combined with the incremental impact on substantive law, helps to make these changes less transparent. By less transparent, I mean less transparent in three ways: substantive intent and effects of the change are unclear, there is a less open and apparent procedural reform process, and the wider impact on the judicial adjudicatory process is not clear.²⁴⁹

First, procedural legislative reform, and its corresponding effects on substantive rights, succeeds, in part, due to an information-deficit on the part of the public. When lawmakers attempt to change the substance of law or policy directly—for example, by proposing to eliminate a government entitlement, or by enacting a new criminal penalty for certain behavior, it is easier for the public to see how it might affect them. When vested interests are in danger, existing interest groups mobilize to protect institutional arrangements, privileges, statuses, and rights.²⁵⁰ Conversely, social and policy change through procedural litigation reform is less likely to receive public notice.²⁵¹ This is especially so if the proposed procedural changes are buried in a larger substantive reform package.

Largely as a result of these vested interests, debate and dialogue often occurs in conjunction with substantive policy reform. This dialogue can be formal, through the legislative process, such as in hearings or on the congressional floor, or it can be more tangential to the legislative process, informal, such as through the media or town-halls. Either way, greater transparency in the deliberative process, including an articulation of the justifications and ramifications of the pending change is key for good democratic governance. Indeed, legal and

249. See Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2086 (1989) (“It is difficult to foresee the secondary institutional consequences or the consequences for groups not represented at a legislative hearing of a special procedural arrangement.”).

250. HACKER, PIERSON & THELEN, *supra* note 229, at 23; BICK, *supra* note 227, at 344.

251. STASZAK, *supra* note 43, at 4–5; BURBANK & FARHANG, *supra* note 30, at 299.

political theorists maintain that transparency ensures that Congress “arriv[es] at views that represent collective, informed consent.”²⁵²

The recent debate about health care reform provides an excellent example. Many Republicans ran their electoral campaigns with slogans pledging to repeal the Affordable Health Care Act (ACA).²⁵³ Under the Obama Administration, the House “voted more than 60 times to repeal or alter” the law.²⁵⁴ However, that was mere window dressing because any legislation passed by the House, even in the unlikely prospect that the Senate concurred, faced a sure Obama veto. At the same time, thousands of people were enrolling in health care under Affordable Health Care Act plans across the country, including in Medicaid.²⁵⁵ Although the exact impact of the ACA is impossible to measure, it is at least clear that for a large portion of society, it expanded rights to health care previously unavailable to them.

After President Trump’s election, when the path opened up for actual repeal of the ACA, Republicans tried again, attempting a full repeal of ACA. But it did not fare well. Massive public mobilization occurred in opposition, including issue-based lobbying groups, formal political organizations, and grassroots citizen-groups.²⁵⁶ As a result, there was a significant amount of public and media attention on almost every aspect of the proposed bill. The opposition occurred, despite the fact that Congress famously held few hearings, had little

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252. Maya Sen, *Courting Deliberation: An Essay on Deliberative Democracy in the American Judicial System*, 27 NOTRE DAME J.L. ETHICS & PUB. POL’Y 303, 331 (2013) (quoting JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY & PUBLIC CONSULTATION* 34 (2009)); see generally Douglas Kriner, *Can Enhanced Oversight Repair “The Broken Branch”?*, 88 B.U. L. REV. 765 (2009) (conducting an empirical study of congressional oversight of the War in Iraq to draw conclusions regarding legislative failures in deliberation, oversight, and delegation).
253. Jessica Frenkel, *With Great Power Comes No Responsibility: The Tragedy and the Irony of ERISA Preemption*, 88 U. COLO. L. REV. 1169, 1221 (2017) (citing Richard Cowan & Susan Cornwell, *House Votes to Begin Repealing Obamacare*, REUTERS (Jan. 13, 2017), <http://www.reuters.com/article/us-usa-obamacare-idUSKBN14X1SK> [<https://perma.unl.edu/H6WN-H9ZJ>]); see also Erin C. Fuse Brown, *Consumer Financial Protection in Health Care*, 95 WASH. U. L. REV. 127, 131 (2017) (explaining that the future of coverage under the Affordable Care Act is uncertain since the election of Donald Trump as President).
254. Frenkel, *supra* note 253, at 1221.
255. Cowan & Cornwell, *supra* note 253; see also *Impacts of the Affordable Care Act’s Medicaid Expansion on Insurance Coverage and Access to Care*, ASPE ISSUE BRIEF (June 20, 2016), <https://aspe.hhs.gov/system/files/pdf/205141/medicaidexpansion.pdf> [<https://perma.unl.edu/AJ8D-KEAH>] (“Medicaid expansion has increased access to primary care, expanded use of prescription medications, and increased rates of diagnosis of chronic conditions for new enrollees.”).
256. James A. Morone & David Blumenthal, Abstract, *The Arc of History Bends Toward Coverage: Health Policy at a Crossroads*, 37 ADVANCING HEALTH EQUITY (Mar. 1, 2018), <https://www.healthaffairs.org/doi/10.1377/hlthaff.2017.1312> [<https://perma.unl.edu/83UX-VM6U>].

open debate on the proposal and disclosed the bill only hours before the House's vote.

Ultimately, Congress could not pass the measure. But this did not, and has not, stopped Congress from enacting incremental reform that may have the effect of repealing the ACA. Congress and the President have been working in tandem to undermine the ACA through a number of incremental reforms, including eliminating the individual mandate as part of the tax overhaul passed in December 2017, limiting support for open enrollment, and allowing small businesses to buy health insurance together.²⁵⁷ Also, as noted, Congress is considering limitations to medical malpractice lawsuits, motivated in part by an interest in lowering insurance premiums and the cost of medical care.²⁵⁸ Although the long-term benefits of these measures on the economy and health care choices are much debated, all agree that these changes will have effects on health care coverage, availability, and cost.²⁵⁹ Despite this, there has been much less public debate and discussion on most of these actions and proposals. Certainly, none of the uproar accompanying the proposed ACA repeal has occurred regarding medical malpractice reform.

One reason may be the perceived neutrality of procedural rules. The procedural nature of the incremental reforms discussed here makes it harder for the public to understand their effects, makes them appear politically “neutral,” and makes them appear to be, by default, efficiency measures, rather than measures targeting individual rights.

257. Timothy Stoltzfus Jost, *Navigating a Post-AHCA Landscape*, HEALTH AFFAIRS (May 2017), <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2017.0372> [<https://perma.unl.edu/CDL4-AKRG>]; Tami Luhby, *8 Ways Trump Hurt Obamacare This Year*, CNN MONEY (Jan. 20, 2018), <https://money.cnn.com/2018/01/20/news/economy/obamacare-trump-year-one/index.html> [<https://perma.unl.edu/K3JM-LTHE>]; Robert Pear, *Trump Proposes New Health Plan Options for Small Businesses*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/us/politics/trump-association-health-plans-obamacare.html> [<https://perma.unl.edu/82CG-4ZHT>].

258. See CONG. BUDGET OFF., COST ESTIMATE H.R. 1215 PROTECTING ACCESS TO CARE ACT OF 2017 (2017), <https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/hr1215.pdf> [<https://perma.unl.edu/6PNK-WBYJ>] (projecting reduction in costs in “federal health programs and . . . private health insurance” as a result of PACA as a result of lowered premiums for medical liability insurance and reduction of use of unnecessary medical procedures due to “less pressure from potential malpractice suits”). Despite this claim, there is significant debate in the health law community about the effectiveness of damages caps and other malpractice reforms on the cost of insurance and the health care system. Billy Corriher, *The Other Terrible Health Care Bill Pending in Congress*, CTR. FOR AM. PROGRESS (July 20, 2017), <https://www.americanprogress.org/issues/courts/reports/2017/07/20/436343/terrible-health-care-bill-pending-congress/> [<https://perma.unl.edu/427U-EGXJ>] (citing studies).

259. Timothy Stoltzfus Jost, *Active December Caps Historic Year for Reform*, (Jan. 16, 2018), <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2018.0005> [<https://perma.unl.edu/LPN5-F4V9>].

Procedural rules and regulations—say, for example, rules that govern in which venue a lawsuit must be filed—are perceived as lacking bias toward any side.²⁶⁰ One of the ways that the Federal Rules accomplish the goal of neutrality is through its trans-substantive design. The Rules apply in all cases, regardless of who the parties are and what type of case it is. There are many understood reasons for this approach to rulemaking, but one of them is the perceived neutrality. A related theory suggests that, due to their neutrality, procedural laws built onto existing policy regimes are seen as less politicized.²⁶¹

Either way, due to this perceived neutrality, members of the public are often unable to assess the significance of specific and technical procedural rules.²⁶² This is so, even if those rules have the effect of limiting substantive rights and putting up barriers to vindication of rights.²⁶³ As we proceduralists inherently know, procedure can never be separated from substance and changes in procedure substantively affect behavior.²⁶⁴ Thus, the process of defining procedural rules is “inherently political, for the definitions normally favor one side or the other.”²⁶⁵

Public policy theorists help explain the disconnect between incremental procedural reform and public attention by focusing on modes of reform, the actors contemplating reform, and the political structures within which they operate.²⁶⁶ When major policy occurs at critical junctures, existing special issues groups mobilize to bring public attention to the affected social or public issue.²⁶⁷ When our lawmakers state a substantive policy and promise to act on its merits—we listen. By contrast, incremental change—like much of the pending procedural reform is harder to see.²⁶⁸ Unfortunately, it is often hard to see the vast importance of a number of changes to the method of bringing a lawsuit because they are often masked as mere procedures.

260. Burbank & Farhang, *supra* note 30, at 299 (“When the Court is engaged in apparently procedural and legalistic decision making, the public perceives it as more objective, neutral, and legitimate.”). *But see* Baumann, *supra* note 67, at 296.

261. Ethan J. Leib & James J. Brudney, *Legislative Underwrites*, 103 VA. L. REV. 1487, 1517 (2017).

262. HACKER, PIERSON & THELEN, *supra* note 229, at 30 (“Similarly, conversion strategies that operate through influence over the enforcement or interpretation of specific rules or policies are often lost completely on voters with their notoriously short attention spans and limited appetite and aptitude for technical and legal detail.”).

263. Baumann, *supra* note 67, at 296.

264. *Id.*

265. *Id.*

266. STASZAK, *supra* note 43, at 216–17; HACKER, *supra* note 1, at 256–58.

267. HACKER, PIERSON & THELEN, *supra* note 229, at 28–29.

268. *Id.*

There is an important observation to be made here regarding the hidden prospects for risk privatization embedded in much of the litigation reform legislation before Congress. A number of these proposals would have the effect of passing a greater amount of the costs and risks of enforcement of public policies—like preventing employment discrimination, protecting wildlife, and ensuring the safety of products—to private actors. For example, the Fairness in Class Action Litigation Act of 2017 contains a proposal to limit the attorneys’ fees in class actions to a reasonable percentage of the amount actually distributed to the class. This provision would, if enacted, effectively prevent *cy pres* payments in class action cases. *Cy pres* in the class action context is a process conceived through the judicial common law, that allows distribution of proceeds to the “next best” class of consumers” when distribution would be otherwise impossible. The policy is that this type of “indirect” distribution is preferable in order to achieve punitive, deterrent, and social policy gains, rather than let the defendant off scot-free.²⁶⁹

Without *cy pres* awards and the ability to include them in the attorney fee calculation, some kinds of lawsuits challenging wrongdoing simply will not be economically feasible and thus will not be brought. An example routinely cited is the case of the taxi company that overcharged its customers, but the customers, naturally, couldn’t be identified. Unless the government is willing to step in to compensate individuals and punish wrongdoers in contexts like these, withdrawing *cy pres* has the effect of shifting the cost of this enforcement on individuals. Here, it is the plaintiffs’ attorneys who have to take on the enormous cost (and risk) of bringing a lawsuit for a social good. Alternatively, a provision like this will have the effect of discouraging lawsuits altogether. In which case, the effect is to privatize the risk of social harm (i.e. overcharging)—we individuals will have to accept the possibility of overcharging as a cost of living in society. These might be acceptable normative choices for a procedural rule, but these choices must be considered, and they must be taken into account when choosing the proper method of regulation.

Some scholars have suggested that procedural limitations on substantive rights succeed because many have accepted the view that litigation and regulation themselves are bad things.²⁷⁰ In part, this is driven by the anti-litigation and anti-regulation narratives that have taken root in the general consciousness. Litigation and regulation are

269. For discussions of the economics of class actions, including their deterrence and other social values, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 349–50 (2d ed. 1973); Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 *EMORY L.J.* 399 (2014).

270. Lahav, *supra* note 24, at 1700 (citing Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 *STAN. L. REV.* 1255, 1296 (2005)).

both perceived to be by their nature costly for external parties trying to navigate within the systems and for the systems themselves. Furthermore, there is a common perception that both of these systems are subject to manipulation and misuse by bad actors, often due to identified conflict and accountability problems (both within the government and by the external actors seeking relief).²⁷¹

Proponents of incremental litigation reform can and do capitalize on these narratives as a means of gaining support. This has been so, even when the proposed reform would have effects on popular underlying social and civil rights programs. For example, the House Committee Report supporting H.R. 620, the ADA notification bill, cites abuse of the ADA statute and unscrupulous lawyers as a reason for the need for the legislation.²⁷² Essentially, this is an attempt to capitalize on the much-used frivolous litigation narrative. However, many question this narrative as groundless.²⁷³ Indeed, the evidence cited by the Report to support this narrative includes familiar flaws. It cites discrete occasions of clear attorney misconduct, such as so-called serial filers, and then cherry-picks statistics to imply that such misconduct is not only prevalent but the reason why ADA compliance is so expensive. The Report's own cited statistics don't even support such a premise.²⁷⁴ The Report cites a defense-friendly law firm's PACER study for the proposition that "there was a 37% increase from 2015 with 6,601 of ADA Title III lawsuits being filed in federal court."²⁷⁵ However, the Report also fails to mention that the same study also found that only thirteen lawyers were so-called serial-filers, having filed more than 100 lawsuits that year.²⁷⁶

3. *Rulemaking Unmoored from Adjudication and from Practice-based Normative Values*

As noted above, Robert Bone has argued that procedural rulemaking should be justified both by tying to actual practice and to the broader practice-based normative values. There is great wisdom in this, as without such ties, procedural rules may be misapplied, including failures to gain the intended results. This is because the use of

271. For an excellent articulation of this issue on the agency side, see MARC ALLEN EISNER, *REGULATORY POLITICS IN AN AGE OF POLARIZATION AND DRIFT: BEYOND DEREGULATION* (2017).

272. H.R. REP. NO. 115-539 (2017).

273. See Briana Lynn Rosenbaum, *The RICO Trend in Class Action Warfare*, 102 IOWA L. REV. 165 (2016).

274. H.R. REP. NO. 115-539 (2017).

275. *Id.*

276. Minh N. Vu, Kristina M. Launey & Susan Ryan, *ADA Title III Lawsuits Increase by 37 Percent in 2016*, SEYFARTH SHAW (Jan. 23, 2017), <https://www.adatitleiii.com/2017/01/ada-title-iii-lawsuits-increase-by-37-percent-in-2016/> [https://perma.unl.edu/HX7Y-Z2XV].

procedure to obtain a particular result requires study of the efficacy and value of the procedural tools.²⁷⁷ Have such tools been used before? What have the results been? What are the lawmakers attempting to accomplish with these tools? Are these tools the best method for garnering these results? These kinds of questions often go unanswered with incremental procedural reform.

For example, the incremental procedural reform discussed above is often accompanied by little discussion of procedural alternatives. The ADA notification bill, H.R. 620, includes a pre-suit notification requirement. As noted above, the procedural tool affects the standing of claimants, acts as a tolling statute, and heightens the pleading and proof requirements by adding pre-claim burdens on plaintiffs. However, conspicuously missing from the statements of those supporting this bill is consideration of more targeted alternatives to the proposed procedural reform.²⁷⁸ Disability rights advocates have argued that the real issue with the rising number of accessibility lawsuits, if there is a rising number, is the lack of compliance.²⁷⁹ Whether this is an issue of too many regulations, the complexity of regulations, the cost of regulations, or the lack of regulatory oversight is not for me to determine.²⁸⁰ But what is clear is that, by design, enforcement of compliance of the ADA falls primarily on private parties, and this was by design. If this legislation makes it harder to complain, then enforcement goes down.

Importantly, there is only a bare discussion in the legislative history regarding how the procedural fix—pre-suit notification barring suit—will support the stated goals (increased compliance and reducing compliance costs). Supporters suggested that there would be an increase in compliance because businesses would fear the threat of lawsuit after getting a letter. But this assertion is both unsupported and confusing, considering the fact that non-complying businesses are

277. See Bone, *supra* note 3; Erickson, *supra* note 3, at 64 (exploring procedural tools that Congress can consider when considering cost asymmetries and meritless litigation, grounded in normative procedural principles).

278. Sections 2 and 5 of the bill develop education materials on compliance and promote mediation of claims. However, these Departments already do both of these things, and a failure to allocate funding in support undermines any suggestion of real intended reform.

279. See, e.g., Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 6 (2006) ("[T]he litigation conduct that courts, members of the U.S. Congress, and business groups have labeled 'abusive' grows out of the statute's remedial limitations.").

280. See *id.* at 7–9 (detailing reasons why businesses do not voluntarily comply with the ADA); Kim Sauder, *The Real Problem with "Drive-By Lawsuits"*, CRIPPLED-SCHOLAR BLOG (Dec. 5, 2016), <https://crippledscholar.com/2016/12/05/the-real-problem-with-drive-by-lawsuits/> [<https://perma.unl.edu/UGP8-FHW4>] ("There is no active monitoring of ADA compliance," writes Sauder, a disability studies scholar. Because there is "no independent body doing regular inspections and meting out fines for noncompliance," enforcement of ADA rights "is often primarily done through complaints.").

already aware of the fact that they can be sued, at any time. The only change the bill would bring for businesses is the ability to learn that someone is aware of their particular violation before the lawsuit. As one disability-rights scholar has explained, the effect of such a pre-suit notice requirement may “improve access in the short run by making facilities accessible in instances where lawsuits had been threatened,” but it would also “impede access in the long run by further diminishing the incentives for plaintiffs’ lawyers to enforce the ADA’s accessibility requirements.”²⁸¹

The choice of a pre-lawsuit notification procedure raises questions about the role of the courts, agencies, and private actors in the enforcement of rights, and the proper method of enforcement of those rights. Congress could have proposed different mechanisms for addressing the perceived problems—frivolous litigation and costly compliance—addressed by H.R. 620. For example, it could have more precisely addressed the apparent problem of repeat filers with professional conduct rule reform. It could have addressed the cost-of-compliance issue by increasing assistance with voluntary compliance, for example through education, literature, and compliance training²⁸² or by reviewing and changing the compliance requirements themselves. Or it could choose some combination of these reforms, while also addressing the systemic compliance problem with regulatory monitoring programs. However, as noted above, these types of “substantive changes” are less likely choices by legislative actors.

Lawmakers considering incremental procedural reform also rarely consider impacts on other areas of procedural practice. These measures see procedural changes in targeted substantive areas in isolation and usually consider them as such. An example of an exception to this is Contract with America in the 1990s, which specifically identified ten pieces of legislation—including trans-substantive and targeted bills—that Republicans would bring to the floor to accomplish its litigation reform agenda (including the CSLRA, which included the PSLRA and the AAA). Because these measures were listed in the “Contract,” the public and media began to keep score on their success, perhaps making these changes even more visible than they would be otherwise. It was also perhaps easier to analyze these measures together to see the overall effort being made at reform of the litigation system and its potential effect.

281. *Cf.* Bagenstos, *supra* note 279, at 25.

282. Section 2 of the proposed bill requires that the Disability Rights Section of the Department of Justice consult with “property owners and representatives of the disability rights community” to develop an education program for State and local governments “on effective and efficient strategies for promoting access to public accommodations for persons with a disability.” H.R. 620, 115th Cong. § 2 (2018). However, this section also explicitly comes with no additional funding.

In contrast, Ryan's "A Better Way" lists litigation reform as a generic goal.²⁸³ If measures like the medical malpractice and ADA notification bills are part of this effort, they are not explicitly tied to any specific Republican plan. Just the opposite, they appear as stand-alone measures. For example, the environmental bills are proposed as part of the package of five bills related to environmental reform in general, with litigation being one aspect of it. While litigation costs and the rising remedial rights of plaintiffs may be driving the decisions to introduce these reform measures, addressing these issues in sometimes inconsistent one-off provisions will make any ultimate reform measure both more complex and ripe for misapplication.

Perhaps one of the reasons why Congress fails to see either procedural alternatives or the problems with the effectiveness of the procedures chosen is that the process is not designed to ensure that fully representative voices are heard. By fully representative voices, I mean voices in the adjudicatory process. It is often assumed that because Congress is the more democratic branch, it is the more open, accessible procedural rulemaking process. However, when the proposed reform is a targeted procedural one, even the most thorough congressional process, one that includes hearings with testimony, debate, and constituent and interest group participation, will lack voices fully attuned to the full effects of the proposal on the adjudicatory system in light of other procedures.

VI. CONCLUSION

Viewing congressional action (and inaction) on litigation reform with an institutional incremental lens gives reason to doubt that Congress as a body should be relegated to a minor role in the litigation and procedural reform process. Over the last three decades, Congress has implemented reforms touching on almost every aspect of litigation in federal courts: from securities, to antitrust, to prison litigation, to class actions, to multidistrict litigation. It has enacted major reforms, like when it created the multidistrict litigation process in 1976, and incremental reforms, like its targeted changes to sanctions and fee-shifting statutes that affect incentives to sue in specific areas of litigation. Legislative successes have shaped the procedure in federal courts in fundamental, and often non-transparent, ways.

The history also suggests that we should rethink our approach to studying legislative treatment of litigation reform. By concentrating primarily on either identifiably "procedural" reforms or on major reforms that include procedural components, procedural and litigation reform research can be both too insular and targeted at the same time. Instead, we should also take a broader look at the full scope of mea-

283. *A Better Way to Fix Health Care*, *supra* note 209.

sure Congress proposes (and has proposed) targeting seemingly disparate aspects of the litigation system but nevertheless having procedural components or impacts. At the least, congressional procedural reforms should be considered as seriously as we consider proposed amendments to the FRCP.

This study reveals weaknesses about incremental reforms at the legislative level, including the lack of transparency, debate, and understanding that surrounds them. There is a potential for risk privatization and other incidental effects, such as on court access that can result from even targeted litigation reform. I do not believe that this means that Congress is an inappropriate body to enact procedural legislation. However, further study of the legislative rulemaking process is advisable. One fix could be to loop the Advisory Committee, the Judicial Conference, and generalized attorney interest groups like the ABA into the process on all arguably procedural reforms. In providing such input, these actors could be better suited to describing how a proposed change will affect the rights and practices of all of the stakeholders—not just in the particular kinds of cases being considered, but in related litigation and in the adjudicatory system as a whole. Lawmakers must consider all the purposes and effects of litigation when legislating in this area. Although efficient conflict-resolution is an important and laudable goal, it cannot be the only driver of reform. Policymakers must also consider the effect that changes to litigation have on the protection and regulation of behavior and social benefits. They should consider whether the rules being considered (and their effects) reflect the values of any interconnected individual substantive rights and the system itself.²⁸⁴

The aim of this Article is not to comment on the ultimate goals of the legislature when passing procedural legislation. Instead, it is to ensure that those considering procedural reform (and those analyzing it) are aware of the numerous institutional effects of their choices.

284. Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377 (2010).