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"ENCROACHMENTS AND OPPRESSIONS": THE CORPORATIZATION OF PROCEDURE AND THE DECLINE OF RULE OF LAW

*J. Maria Glover**

INTRODUCTION

The civil liability system in the United States has been criticized for decades. Corporate litigants and lobbyists in particular have pushed to restrict an "explosion" of "abusive"[1] civil litigation and liability exposure. To reduce that exposure, corporate entities have engaged in attempts to curtail rules of substantive liability and have sought extensive procedural reform including heightened pleading standards, stricter summary judgment standards, heightened class-certification standards, arbitration agreements with class action waivers, and countless others. Corporate entities have pursued these procedural reforms as litigants and as lobbyists, restructuring our litigation system by appealing to both the legislative and judicial branches of government.

Despite the existence of dual-branch power over procedure, the ability of corporate entities to pursue procedural reform in almost equal measure from the judicial and legislative branches is a relatively recent historical development. For over four decades after the Federal Rules of Civil Procedure were promulgated, Congress barely dipped its toe in procedural waters even though Congress retains ultimate power over procedure.[2] Congress chose instead to defer to the expertise and institutional advantages of the judiciary in matters of litigation management.[3] Congressional deference to the judicial branch in matters procedural began to wane

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1. *See, e.g.*, Briana Lynn Rosenbaum, *The RICO Trend in Class Action Warfare*, 102 IOWA L. REV. 165, 175 (2016); *The Litigation Explosion*, ONLINE LEGAL, http://www.online-legal.biz/robert-m/the-litigation-explosion/ [https://perma.cc/24NP-PUDK] (last visited Mar. 15, 2018).

2. Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1681–82 (2004).

3. Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 443 (1958).

sometime around the 1980s[4] when Congress developed a sense that the Rules Advisory Committee was exercising its rulemaking power in ways that concealed an agenda to recalibrate substantive pronouncements of Congress and to reduce access to court for certain litigants.[5] In other words, Congress initially intervened in matters of judicial procedure to *preserve* access to justice and the rule of law.

While Congress's involvement in procedural matters has continued—indeed, increased—since that time, its agenda has changed. Lobbied by corporate entities, recent procedural reforms by Congress have tended to restrict access to justice and rule of law rather than preserve it. More than that, what began in the 1970s and 1980s as perhaps Congress's simple policing of the boundaries of judicial power has turned into an all-out power struggle: the judiciary often claims as much power as it can over procedure even when the exercise of that power impacts congressional enactments. Congress does the same even when its power grabs cut back at the judicial power and expertise regarding procedure and case management. Together, the result is that both Congress and the federal courts (particularly the U.S. Supreme Court) are reforming procedure in ways that restrict access to justice and diminish rule-of-law norms.

The big winner in this power struggle has been neither the judicial nor the legislative branch but, instead, corporate entities seeking (often successfully) to limit exposure to liability by restricting access to justice, particularly for low-income individuals, those with low-value claims, or citizens with little political power. This power struggle has provided corporate entities with two bites at the procedural apple. If corporations are the big winner in this struggle, there must be a big loser. That loser has been the rule of law. If corporations have been the ones to succeed in this struggle, there must be a failure—the failure of the judiciary to fulfill its unique role in our tripartite structure of government to preserve the rule of law.

This judicial role to preserve the rule of law goes back to the time of the framing, where the judicial branch was set apart as separate from political processes[6] that might contaminate justice, fairness, objectivity, and other rule-of-law values. While relatively little time was spent discussing the judicial branch at the Constitutional Convention of 1787, one of its principal architects—Alexander Hamilton—devoted much ink to developing its

4. *See* Burbank, *supra* note 2, at 1705–06.

5. *See id.* at 1704.

6. *See, e.g.*, William M. Treanor, *The Genius of Hamilton and the Birth of the Modern Theory of the Judiciary*, *in* CAMBRIDGE COMPANION TO THE FEDERALIST (Jack Rakove & Colleen Sheehan eds., forthcoming 2018). When speaking on the radical nature of Hamilton's ideas, one of the most prominent antifederalist opponents of Hamilton's view of the judiciary stated, "[N]othing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial." Brutus XV (Mar. 20, 1788), *reprinted in* 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 431, 434 (John P. Kaminski et al. eds., 1986). Indeed, Blackstone's *Commentaries* treated the judiciary as part of the executive branch. 1 WILLIAM BLACKSTONE, COMMENTARIES *267; *see also* FORREST MCDONALD, *NOVUS ORDO SECLORUM*: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 210 (1985) (characterizing the judiciary as "a subordinate of the executive").

contours and characteristics. Hamilton's vision for the judiciary was a radical one at the time. He, along with James Madison, ultimately rendered the radical decidedly nonradical—so much so that Hamilton's conception of the federal judiciary was embodied in Article III with little protest.[7] Chief among Hamilton's characteristics for the federal judiciary was a stalwart commitment and unique ability to preserving the rule of law.[8] This commitment to rule of law could only be realized by a structure that prevented "encroachments and oppressions" from the legislative branch.[9] Rather than serving as a bulwark against the "encroachments and oppressions" of the political branches of government,[10] the current judiciary has become enmeshed in a procedural power struggle that hinders its ability to serve this role and has even, in recent years, been complicit in the corporate takeover of procedure.[11]

This Article begins by providing a brief account of the corporatization of procedure through judicial decision-making and noting some of the detrimental effects it has had on the preservation of rule of law and access to justice. Part II goes on to explore how the judiciary does not retain full control over procedure and how corporate entities have little care for whether a procedural reform simply cuts back at litigation or goes further and cuts back at judicial power and the judicial role itself. To illustrate these points, Part II examines the most recent attempt at "procedural reform" by corporate entities—the proposed Fairness in Class Action Litigation Act (FICALA). The most dramatic procedural changes in FICALA involve multidistrict litigation (MDL). These changes would cut back significantly at judicial power and discretion as well as the role of the judiciary in preserving the rule of law. Part III explores one of the implications of having two political branches and one nonpolitical branch of government—namely, that moneyed corporate interests effectively get two bites at the procedural apple. This state of affairs raises a number of fundamental questions, including ones regarding the appropriate nature and scope of legislative and judicial power over procedure. Part III grapples with those questions.

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7. *See* Treanor, *supra* note 6, at 3.

8. *See id.*

9. THE FEDERALIST NO. 78 (Alexander Hamilton) (noting that judicial independence was critical for the judiciary to preserve the rule of law).

10. *Id.*

11. *See, e.g.*, STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT 130–81 (2017); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 377–79 (2005); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3054–56 (2015) [hereinafter Glover, *Disappearing Claims*]; J. Maria Glover, *The Supreme Court's "Non-Transsubstantive" Class Action*, 165 U. PA. L. REV. 1625, 1637 (2017) [hereinafter Glover, *"Non-Transsubstantive" Class Action*]; Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2809–11 (2015).

I. THE CORPORATIZATION OF PROCEDURE BY THE JUDICIARY

Countless scholars, myself included, have traced myriad instances in which corporate interests have achieved procedural reform through judicial avenues. Often these interests do so in ways that hinder access to justice and the effectuation of rule-of-law norms.[12] The judiciary has done so not so much through interpreting actual substantive rules governing primary conduct, though it has engaged in that practice as well,[13] but instead through less politically salient procedural decision-making.[14] At times, the very judiciary tasked with guarding the rule of law, as Hamilton envisioned, has enabled "encroachments and oppressions" upon that role. Many of these reforms are undoubtedly motivated by the judicial branch's disenchantment with civil litigation.[15]

These procedural reforms, particularly those introduced by the Supreme Court, are well known. To name a few recent ones, the Court has ratcheted up pleading requirements, thus making survival of motions to dismiss more difficult.[16] The Court has fully embraced arbitration agreements that prohibit class actions and—at least under the language of its opinion in *American*

12. *See supra* note 11 and accompanying text.

13. *See, e.g.*, Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2413–17 (2014); Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432–35 (2013); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 365–67 (2011); Glover, *"Non-Transsubstantive" Class Action*, *supra* note 11, at 1665.

14. *See* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1176–79 (2012) (discussing how procedural decisions have made certain sorts of claims more difficult to bring, thus diminishing certain regulatory regimes that rely heavily upon private enforcement); *see, e.g.*, Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1780 (2017) (holding that foreign corporations are only subject to general jurisdiction where they are "at home"); Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014) (same); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2311–12 (2013) (holding that arbitration agreements are enforceable according to their terms, regardless of whether provisions in such agreements mean that no plaintiff will able to bring a claim); *Comcast Corp.*, 133 S. Ct. at 1433–35 (narrowing the economic modeling of antitrust injury, and possibly the economic modeling of damages in class actions, at Comcast's urging); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (stating that foreign corporations are only subject to general jurisdiction where they are "at home"); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 888 (2011) (holding that U.S. courts do not have personal jurisdiction over a foreign company who does business in, distributes products in, and encourages distributors to sell in the United States, and whose products caused injury to a plaintiff in a particular state); *Wal-Mart Stores*, 564 U.S. at 365–67 (restricting Rule 23 at Wal-Mart's urging); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343–44 (2011) (permitting class action prohibitions in AT&T's particular arbitration agreement, despite the fact that such a holding would nullify most of plaintiffs' claims); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569–70 (2007) (ratcheting up pleading requirements at the urging of the corporate defendant Bell Atlantic).

15. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 367 n.299 (2013); Press Release, U.S. Supreme Court, Chief Justice's 2015 Year-End Report on the Federal Judiciary (Dec. 31, 2015), https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [https://perma.cc/TAE9-JT5K] (comparing discovery to duels).

16. J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713. 1740–41 (2012); Colin T. Reardon, Note, *Pleading in the Information Age*, 85 N.Y.U. L. REV. 2170, 2206 (2010).

Express Co. v. Italian Colors Restaurant[17]—agreements that may well go further in restricting countless other procedural mechanisms. It has narrowed courts' authority to exercise personal jurisdiction over corporate entities foreign and domestic. It has ratcheted up the commonality and predominance requirements under Rule 23 for class certification, and lower federal courts have ratcheted up requirements of ascertainability—all of which make it far more difficult to pursue claims as a class. And the list goes on.

At least two prominent scholars have argued that these and other procedural opinions evince an "anti-court Court."[18] If that is correct, then perhaps the power struggle is irrelevant; both branches are serving the same functional master—namely, to place power over rule of law and judicial procedure more firmly in the hands of the elected legislature. Respectfully, I disagree with that anticourt assessment. These are not the opinions of a judiciary eager to cede its power.[19] If anything, the Court in recent years has taken many opportunities, through procedural opinions, to maintain or increase its power.[20] These recent decisions indicate that the Court and parts of the federal judiciary are *anti-litigation*[21]—more specifically, anti-litigation vis-à-vis certain types of claims and certain types of plaintiffs[22]—and *pro-court power*. As such, in their anti-litigation opinions, the courts are sensitive not only to preserving their procedural power but also to stretching that power to or beyond its limits, rendering (often implicit) substantive judgments and substantive policy preferences.[23]

This distinction between an "anti-court Court" and an anti-litigation Court has critical implications for understanding the consequences of a procedural power struggle both for corporate entities and for the rule of law. Across the litigation landscape, the judiciary seems willing to abdicate its role in preserving the rule of law but unwilling to give away any of its power over procedure and, often by extension, its power over substantive policy preferences. This leaves an enormous window for corporations to pursue procedural reform in the judicial arena. Yet, if the corporations are unsuccessful, they are able to seek refuge from a Congress now accustomed to routine intervention into matters of judicial procedure.

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17. 133 S. Ct. 2304 (2013).

18. David Cole, *The Anti-Court Court*, N.Y. REV. BOOKS, Aug. 14, 2014 (book review), http://www.nybooks.com/articles/2014/08/14/anti-court-supreme-court/ [https://perma.cc/3JX9-PFNP].

19. *See id.* (arguing that the Roberts Court is keen to reduce the power of the federal judiciary).

20. *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); Ashcroft v. Iqbal, 556 U.S. 662 (2009); Scott v. Harris, 550 U.S. 372 (2007); Glover, *"Non-Transsubstantive" Class Action*, *supra* note 11.

21. *See generally* Daimler AG v. Bauman, 134 S. Ct. 746 (2014); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011); AT&T Mobility v. Concepcion, 563 U.S. 333 (2011); *Iqbal*, 556 U.S. 662; *Scott*, 550 U.S. 372.

22. *See* Glover, *"Non-Transsubstantive" Class Action*, *supra* note 11, at 1647–48 (noting the Court's seeming preference for suits by institutional investors who tend to be sophisticated, versus consumers who tend not to be and who tend to be parties in lawyer-driven suits); Miller, *supra* note 15, at 367.

23. *See* Glover, *"Non-Transsubstantive" Class Action*, *supra* note 11, at 1637–53.

Indeed, corporations pushing procedural reform are at best indifferent as to whether they achieve their ends as litigant or lobbyist. Corporate defendants are used to getting their way with a federal judiciary hostile to litigation in general and aggregate litigation in particular.[24] Nonetheless, corporate defendants have no compunction about turning to other branches for a second bite at the procedural apple—and strategically, why should they? The results of this dual bite, however, are procedural-reform efforts that diminish judicial power over procedure and the management of courts, as well as the rule of law.[25]

The most recent procedural reform effort, FICALA, is currently pending before the Senate Judiciary Committee.[26] FICALA would achieve broad-sweeping procedural change that cuts at the core of the judicial power to manage cases and preserve the rule of law. The next Part of this Article uses FICALA to illustrate how power struggles over procedure between the judicial and legislative branches provide corporate entities vast opportunities to reduce litigation exposure and, as the judiciary becomes less "independent," have the potential to cut back at the judicial role to preserve the rule of law.

II. "ENCROACHMENTS AND OPPRESSIONS" OF JUDICIAL POWER AND THE JUDICIAL ROLE: THE EXAMPLE OF FICALA

Despite the words "class action" in FICALA's title, the class action provisions are not the big-ticket items in this bill, even if they would achieve some long-standing class action-restrictive goals of corporate entities. Instead, and particularly given that the class action is already rather enfeebled from various recent Court pronouncements, the real game in town for aggregate litigation has become the MDL. The MDL reform proposals in FICALA would have not only sweeping anti-litigation effects—effects the judiciary has in recent years been willing to effectuate—but also significant

24. *See generally* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017); *Daimler*, 134 S. Ct. 746; *Italian Colors*, 133 S. Ct. 2304; Comcast Corp. v. Behrend, 569 U.S. 27 (2013) (suggesting that damages had to be common for a class to be certified); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); *Nicastro*, 564 U.S. 873; Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 359 (2011) (ratcheting up the standard under 23(a) to one of predominance under 23(b)); *AT&T Mobility*, 563 U.S. 333; Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 559 U.S. 662 (2010); *Iqbal*, 556 U.S. at 679–80 (confirming that plausibility pleading standards apply across all federal cases); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007) (discussing settlement pressure and discovery cost).

25. Corporate entities began meaningfully looking to Congress to obtain procedural reform in the 1980s. *See, e.g.*, Private Securities Litigation Reform Act of 1995, 15 U.S.C § 78u-4 (2012) (providing a heightened pleading standard for securities fraud claims making it harder for plaintiffs to survive a motion to dismiss for such claims); Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 78bb (2012) (same); Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d) (2012) (reconfiguring the balance of state and federal jurisdiction, thereby reducing the number of classes certified and ultimately brought).

26. *See H.R. 985—Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/985/all-actions [https://perma.cc/NZV9-VYQ2] (last visited Mar. 15, 2018) (showing the most recent update of the bill on March 13, 2017, when it was referred to the Senate Committee on the Judiciary).

anticourt effects. These latter effects, which cut at the heart of judicial power, are not effects the judiciary seems particularly keen to hasten, and they are achieved through purely procedural provisions.

A. House Bill 985 Section 105(i): "Allegations Verification"

Starting with subsection (i) of section 105 of FICALA, entitled "Allegations Verification," personal injury plaintiffs would be required to submit what is known in the MDL process as a "fact sheet."[27] These fact sheets must contain support for the allegations in the plaintiffs' complaint, including injury causation, and plaintiffs must submit them within forty-five days after the action is placed with the MDL judge.[28] The provision expressly states that this deadline "shall not be extended."[29] After submission, the MDL judge must review each fact statement within ninety days and decide whether it provides sufficient evidence for plaintiff's case to proceed.[30]

This provision, written and supported by various corporate entities,[31] responds to what many attorneys in the defense bar perceive as inadequate screening of unmeritorious cases.[32] To be sure, to the extent some MDL plaintiffs are being added to plaintiff inventories with little more than a signature and with no screening,[33] there ought to be careful evaluation of MDL procedures and possible reforms.[34] The reforms proposed in section 105(i), however, are not only premature absent empirical data but would also not achieve accurate screening. Instead, they would encroach on judicial power by creating potentially insurmountable burdens for MDL

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27. H.R. 985, 115th Cong. § 105(i) (2017).

28. *Id.*

29. *Id.*

30. *Id.*

31. *See The Growth of Multidistrict Litigation: Emerging Issues and Possible Solutions*, LAW & ECON. CTR. (June 16, 2017), http://masonlec.org/events/the-growth-of-multidistrict-litigation-emerging-issues-and-possible-solutions/ [https://perma.cc/E5QL-TTLK]. At the event, it was mentioned that the law firm Skadden, Arps, Slate, Meagher & Flom LLP, which represents Johnson & Johnson in various MDL matters, helped draft this provision based on its experience on the ground with MDL litigation.

32. *See, e.g.*, *The Impact of Lawsuit Abuse on American Small Business and Job Creators: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 35–37 (2017) (statement of John H. Beisner, Partner, Skadden, Arps, Slate, Meagher & Flom LLP); *"Gateway to the West" Becomes "Gateway to the Courts" for Dubious Science and High Damage Awards*, AM. TORT REFORM FOUND. (May 23, 2016), http://www.judicialhellholes.org/2016/05/23/gateway-to-the-west-becomes-the-gateway-to-the-courts-for-dubious-science-and-high-damage-awards/ [https://perma.cc/D358-HTJ2] (arguing that jury awards to plaintiffs who claimed that Johnson & Johnson talcum powder caused cancer were unmeritorious); *Multidistrict Litigation (MDL) Conference*, FEDERALIST SOC'Y (Oct. 18, 2017), https://fedsoc.org/conferences/multidistrict-litigation-mdl-conference?#agenda-item-eliminating-meritless-claims [https://perma.cc/J8QJ-ZX3J] (discussing the "problem" of unmeritorious cases, particularly tag-along cases, in MDL).

33. *See generally* John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, 38 LITIGATION 26 (2012).

34. "[L]aw in its ordinary mode of operating offers normative guidance" to citizens and litigants. Gerald J. Postema, *Fidelity in Law's Commonwealth*, *in* PRIVATE LAW AND THE RULE OF LAW 17, 28 (Lisa M. Austin & Dennis Klimchuk eds., 2014).

judges and oppress rule-of-law norms by systematically screening out *meritorious* cases.

As to the former—the encroachment of judicial power and discretion—there is ample reason to believe that judges cannot read and analyze for sufficiency hundreds, maybe thousands,[35] of facts sheets within ninety days of submission. Given these time constraints, this provision could well be the death knell for MDL. Judges in the MDL are *volunteers* who take on the important work of MDL *on top of* their regular caseload. This provision would likely put an end to that volunteerism.

As to the latter—oppressing access to justice and rule of law—this provision is at best indifferent to the scores of *meritorious* cases that would be screened out by a provision both so broad and so rigid. To illustrate, imagine a fictional plaintiff, Mr. Jones.[36] Mr. Jones received an injection of Heparin, a blood thinner. So far as we know, Heparin is generally safe. Some people, however, received Heparin injections pulled from one of many batches manufactured in China, which contained a dangerous contaminant—so dangerous, in fact, that this contaminant has caused 149 deaths in U.S. patients in 2007 and 2008.[37]

How is Mr. Jones (or his estate) supposed to craft a section 105(i) fact statement in forty-five days? Mr. Jones needs discovery on any number of issues: Where were the tainted batches distributed? What facilities actually received and used the tainted batches? What batch did *his* injection come from? Where was his batch manufactured? Where was his batch screened? And so on. Mr. Jones does not have access to that information; the defendant does. And Mr. Jones cannot expect to get discovery in the first forty-five days.

Mr. Jones, then, is out of luck. He could have all the law and facts in the world on his side. Yet in the face of section 105(i), he loses. He will not be the only one. Whether it is bad-batch cases, sample cases, or any number of other scenarios, section 105(i) is a death knell for countless meritorious claims across the swath of the litigation landscape. Quite a swipe to the rule of law.

It need not be so. To the extent reform is needed in this area, it might call for heightened use of existing screening mechanisms or heightened screening

35. The most extreme example is a set of MDL cases devoted to claims alleging injuries from pelvic mesh manufactured by Johnson & Johnson (J&J) and its subsidiaries. All claims against seven different defendants have been consolidated before Judge Joseph Goodwin in the Southern District of West Virginia, and there have been over 80,000 claims filed. *See, e.g.*, Amanda Robert, *Pelvic Mesh MDL "Most Complicated in History," Plaintiff Attorney Says*, LEGAL NEWSLINE (Nov. 24, 2015), https://legalnewsline.com/stories/510649797-pelvic-mesh-mdl-most-complicated-mdl-in-history-plaintiff-attorney-says [https://perma.cc/B2P6-PPTC].

36. This fictional plaintiff is based on plaintiffs that were involved in real cases involving contaminated batches of the drug Heparin. *See, e.g.*, Estate of Johansen v. Baxter, No. 09 L 11175, 2011 WL 2976812 (Ill. Cir. Ct. June 9, 2011) (awarding $625,000 to plaintiffs' estate after Steven Johansen died as a result of receiving contaminated Heparin from the defendant).

37. Zachary Brennan, *Congressmen Slam FDA's Handling of Investigation into Tainted Chinese Heparin*, REG. AFF. PROFESSIONALS SOC'Y (Mar. 30, 2016), https://www.raps.org/regulatory-focus™/news-articles/2016/3/congressmen-slam-fda's-handling-of-investigation-into-tainted-chinese-heparin [https://perma.cc/J2K7-HNPT].

by the *transferor* court. Reform might well involve fact sheets, but submission and review ought not be encumbered by such obviously anti-litigation, anticourt time limits. Nor should they be saddled with anti-rule-of-law requirements of proving a key element like causation at the outset of a case. Such reforms, or others like them, would strive to be *consistent, not at odds*, with the purposes of the MDL statute, the judicial power to manage its cases, and the judicial role vis-à-vis rule of law. The problem with corporate access to the legislature in procedural reform, however, is precisely what one sees in this and other provisions of FICALA: a total (maybe even willful) insensitivity to the judiciary's independent power to manage its courts and cases and to the critical role of the judiciary in preserving the rule of law.

B. House Bill 985 Section 105(k): Required Appeals from Nonfinal Orders

Section 105(k),[38] which provides that MDL judges *must* permit appeals from any order that "may materially advance the ultimate termination of one or more civil actions in the proceedings,"[39] is also anticourt and anti-rule of law. This provision is a not so thinly veiled request by corporate entities for Congress to lick particular litigation wounds[40] with seemingly little concern for its effect on long-standing judicial precedent, power, and discretion in the process. While corporate defendants and the U.S. Chamber of Commerce have insisted—orally—that section 105(k) is only intended to apply to "certain types" of orders, there is no language in the bill to that effect.[41] Whatever the so-called intended scope of the language, given the current deregulatory inclinations of Congress, corporate entities have little incentive to narrow this provision. This provision spares these entities the difficult practice of making their products safer,[42] or of seeking *substantive* products-

38. Given the limitations of this short piece, I omit from discussion section 105(j) of House Bill 985, though it warrants brief mention. Section 105(j) prohibits the judge to whom the Judicial Panel on Multidistrict Litigation assigns actions from "conduct[ing] a trial . . . transferred to or directly filed in the proceedings unless all parties to that civil action consent." H.R. 985, 115th Cong. § 105(j) (2017). This provision may well not do much work in the wake of the Supreme Court's clear opinion in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), but in any case, the gambit of this provision was to restrict access to trials in what defendants view as and the American Tort Reform Association refers to as "Judicial Hellholes."

39. H.R. 985, 115th Cong. § 105(i).

40. Indeed, and particularly given the statements of J&J's attorneys that Congress wrote the provisions of House Bill 985 "based on their experience" on the ground in MDL litigation, this provision seems a rather direct response to J&J's dissatisfaction with Judge Ed Kinkeade's denial of J&J's motions to exclude some of plaintiffs' experts and denial of motions for new trial in the *In re Depuy Orthopaedics, Inc. Pinnacle Hip Implant Products Liability Litigation*, No. 3:11-MD-2244-K, 2017 WL 4122625 (N.D. Tex. Sept. 18, 2017).

41. *Multidistrict Litigation (MDL) Conference Livestream*, FEDERALIST SOC'Y (Oct. 18, 2017), https://fedsoc.org/commentary/blog-posts/multidistrict-litigation-mdl-conference [https://perma.cc/H2S9-D8K4].

42. *See, e.g.*, Charmaine Lloyd v. Johnson & Johnson (*In re* Johnson & Johnson Talcum Powder Cases), No. BC628228, 2017 WL 4780572, at *1 (Cal. App. Dep't Super. Ct. Oct. 20, 2017) (discussing a product known by J&J to be carcinogenic but sold anyway); Ebaugh v.

liability legislation from Congress. Instead, it provides a quick and nonsalient political solution: grind MDL to a halt through unlimited appeal under a hopelessly vague standard of whether, in any given case, an order "materially advance[s] the ultimate termination of . . . the proceedings."[43]

To be clear, it is not the case that corporate entities have no avenues for discretionary appeal in the courts. Nor is it true that those entities are failing to avail themselves of these existing mechanisms. Instead, because district courts are not granting requests for appeal as often as corporate entities might like, those entities look to Congress to encroach upon that discretion.

Section 105(k) places into stark relief the power struggle between Congress and the judiciary over procedure and case management. The recently reiterated view of the Court—the same anti-litigation Court referenced earlier—is that appeals from nonfinal judgments ought to be very rare.[44] It is for very good reasons that even an anti-litigation court would resist attempts to flout the final judgment rule. Without it, cases get unduly delayed, generate unwarranted costs, and get caught in a game of ping-pong between the district courts and the courts of appeals.[45] A legislative encroachment upon the judiciary's discretion over nonmandatory appeals would pit this Congress not only against the current Court but against the Committee on Rules on Practice and Procedure (comprised of then-Judge Gorsuch), which rejected an almost-identical reform provision just last year.[46] This Congress would also place itself at odds with the Rules Advisory Committee to the Federal Rules of Civil Procedure in 2016, which rejected a provision almost identical to section 105(k) that was proposed as an amendment to Rule 23.[47]

If granted, this request would not simply have anticourt effects, but it would also have anti-rule-of-law effects. Section 105(k) invites abuse by *both* sides—it is not as if defendants would be the only parties filing motions for appeal when dissatisfied with a ruling. The natural and normatively undesirable effects of a provision subject to two-sided abuse are relatively obvious: it grinds litigation to a halt, mires proceedings in endless appeals, and potentially discourages MDLs altogether, either because litigants avoid them or judges stop volunteering to preside over them. These effects seem to be the strategic gambit of FICALA's proponents.[48]

Ethicon, No. 130700866, 2017 WL 4181739, at *1 (Pa. Ct. Com. Pl. Aug. 7, 2017) (discussing a product known by J&J to cause perforation of pelvic organs but sold anyway).

43. H.R. 985 § 105 (k)(1).

44. *See, e.g.*, Microsoft v. Baker, 137 S. Ct. 1702, 1707 (2017).

45. *Id.*

46. Letter from Comm. on Rules of Practice & Procedure, to Judge Bob Goodlatte (Feb. 14, 2017).

47. Section 105(k) also pits this Congress against a Congress that preceded it. Because of concerns about undue delay, unwarranted costs, and prolific satellite litigation, the 109th Congress rejected a provision almost identical to section 105(k) when it passed the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

48. MDL judges already can certify orders for interlocutory appeals; if parties fail to obtain such an order, that party may seek a writ of mandamus.

C. House Bill 985 Section 105(l): "Ensuring Proper Recovery for Plaintiffs"

On any number of fronts—including the preservation of rule of law and access to justice—the title of this provision, "Ensuring Proper Recovery for Plaintiffs," portends a needed reform goal. Section 105(l) seeks to achieve this aim by providing that plaintiffs must receive 80 percent of the proceeds from any recovery obtained via settlement or judgment.[49] That leaves 20 percent for plaintiffs' attorneys.

How we actually achieve proper recovery for plaintiffs in mass litigation is a complex question and the answer goes beyond the scope of this short Article.[50] However, the answer, in its simplest form, is two-fold: (1) align attorneys' incentives to recover with plaintiffs' incentives and (2) align the total amount of plaintiffs' attorney fees with plaintiffs' actual recovery. In short, create a structure whereby attorneys' zealous representation of clients' interests also serves the attorneys' pecuniary interests. Section 105(l) does neither.

Instead, section 105(l) imposes a price regulation that blatantly interferes with the free market for legal services and goes far toward ensuring that plaintiffs will *not* obtain a proper recovery. This is an ironic ask by corporate entities who have argued vociferously for the last decade that neither the Court nor Congress should interfere with the free market for procedural provisions in arbitration contracts. How quickly the champions of the free market embrace "big government" paternalism when it reduces their exposure to liability! Rather than displaying a theoretical coherence among policy and procedural reform proposals,[51] then, corporate entities seek to obtain some of the very gains Hamilton feared: encroachment upon judicial independence and the rule of law.

While 80 percent may *sound* like a good deal for plaintiffs, more is not always more. Plaintiffs will have tremendous difficulty finding qualified counsel to represent them under this below-market fee structure. Diminishing the amount of potential recovery well below market value makes taking on MDL cases much riskier for attorneys. When one subtracts the amount a given attorney must pay to lead attorneys in an MDL in the form of common-benefit fees,[52] and the attorney's own investment in the case (which often includes footing the bill for expensive experts), a 20 percent cut is often not going to be high enough to justify an attorney's investment.

The consequences of section 105(l) for plaintiff recovery and rule-of-law norms are not difficult to predict. First, many attorneys simply will not take cases, no matter how meritorious. Second, even if an attorney does take on

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49. H.R. 985, 115th Cong. § 105(l)(b) (2017).

50. For a discussion regarding plaintiffs' remedies in MDL, see generally Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017).

51. *See, e.g.*, J. Maria Glover, *A Regulatory Theory of Legal Claims*, 70 VAND. L. REV. 221, 244 (2017) (demonstrating the theoretical incoherence among free-market views regarding claim alienation within both the plaintiffs' and defense bar).

52. *See generally* William B. Rubenstein, *On What a "Common Benefit Fee" Is, Is Not, and Should Be*, CLASS ACTION ATT'Y FEE DIG., March 2009, at 87, 87.

some cases, that attorney now has the following predictable but highly undesirable incentive: package as many plaintiffs together as possible, as quickly as possible, for a settlement that reflects litigation risk rather than case merits. Despite this subsection's title—which suggests that its contents serve the interests of plaintiffs and the rule of law—it actually seems to serve defendants' interests in eliminating litigation or, at the very least, achieving finality inexpensively. Yet nothing about the status quo or in the empirical evidence[53] demonstrates that this sort of price regulation is required to recalibrate some injustice defendants are suffering.[54]

Moreover, like section 105(k), section 105(l) highlights the negative effects of a procedural power struggle between the judiciary and Congress. Judges typically exercise control over fee awards in light of the various exigencies of the cases. Under this provision, judges are given no room to help craft an admittedly needed solution regarding plaintiff recovery, despite their having vastly superior expertise and discretionary ability.

Interestingly, one potential starting point for such a solution, which expressly harnesses judicial expertise to carry out, is found in the class action portion of FICALA. Section 103(a) provides that "any attorneys' fee award to class counsel that is attributed to the monetary recovery shall be limited to a reasonable percentage of any payments directly distributed to and received by class members."[55] This explicitly aligns attorneys' fees with *actual* plaintiff recovery, yet it leaves in place judicial discretion to award a *reasonable* percentage of that recovery to the attorneys. Section 105(l) does not attempt such a structure and instead attempts to eliminate access to justice and hinder the preservation of rule of law altogether.

None of the foregoing is to say that MDL is perfect or that corporate litigants and lobbyists lack legitimate complaints. Nor is it necessarily to fault any entity, corporate or otherwise, for taking strategic advantage where they can or to offer predictions regarding FICALA's fate.[56] This discussion is offered, instead, both to situate FICALA within a long line of corporate-led procedural-reform efforts and to illustrate the existence and consequences of a procedural power struggle between the judiciary and Congress. This

53. *See generally* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (showing empirically that defendants are not being cheated in the mass litigation settlement process).

54. If anything, MDL is beneficial to defendants: if a defendant wins a motion to dismiss, a large evidentiary motion, or a motion for summary judgment, the defendant wins across a broad swath of cases—not just a single action. Further, defendants can resolve thousands of claims in one fell swoop.

55. H.R. 985, 115th Cong. § 103(a) (2017). Indeed, this notion is precisely what scholars, judges, and lawyers of all stripes agreed to in the American Law Institute's *Principles of the Law of Aggregate Litigation* section 3.13(a): "Attorneys' fees in class actions, whether by litigated judgment or by settlement, should be based on both the actual value of the judgment or settlement to the class . . . ." PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13(a) (AM. LAW INST. 2010).

56. Serious reform debates continue, whatever FICALA's ultimate fate. *See, e.g.*, Symposium, *Civil Litigation Reform in the Trump Era*, 87 FORDHAM L. REV. (forthcoming 2018) (featuring a panel on MDL reforms); *Multidistrict Litigation (MDL) Conference Livestream*, *supra* note 41 (discussing MDL problems, reform efforts, and ideas for reform).

power struggle has led to reform efforts that tend to be rather insensitive to encroachments upon judicial discretion, access to justice, or the preservation of rule of law; indeed, they are often specifically aimed at achieving such encroachments. This state of affairs has a number of implications and raises a number of important questions about procedural theory, democratic legitimacy, misalignment of resources in litigation, and a host of others. Part III of this Article begins this inquiry by exploring questions involving the scope of judicial and congressional power over procedure, with special attention to each branch's distinct role.

III. SEPARATION-OF-POWERS IMPLICATIONS OF THE CORPORATIZATION OF PROCEDURE

The power struggle between the judiciary and Congress over matters of procedure, illustrated above by FICALA, has led to the increased politicization of procedure *in both branches*.[57] Further, it may well explain the judiciary's recent tendency toward favoring corporate litigants in its procedural decisions.[58] After all, if moneyed corporate interests can obtain congressional intervention in procedural matters in ways that are indifferent to effects on judicial power, the judiciary has a greater incentive to hold onto that power by preventing such matters from ever getting to Congress, perhaps even by ceding as far as they are willing to grant corporate anti-litigation and anti-rule-of-law requests.

Underlying this asserted connection between rule of law and procedure are two related premises. First, as many scholars have recognized, private law and the rule of law are inextricably interconnected; indeed, sometimes more so than public law and rule of law, which constitute the traditional doctrinal frame.[59] Second, and less discussed in rule-of-law literature, is the integral role of procedure—the mechanisms of private enforcement—to the preservation of the rule of law.[60] Procedure has long been the battleground for corporate litigants and lobbyists,[61] which reveals that this connection is well understood by those who seek to limit their exposure to liability. That

57. *See generally* 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 (1989).

58. *See, e.g.*, Glover, *supra* note 14, at 1146 (describing the Court's deregulatory procedural decisions); Glover, *"Non-Transsubstantive" Class Action*, *supra* note 11, at 1627 (analyzing the Supreme Court's "anti-class action" jurisprudence and finding that its decisions are more a reflection of implicit substantive choices).

59. *See generally* William Lucy, *The Rule of Law and Private Law*, *in* PRIVATE LAW AND THE RULE OF LAW, *supra* note 34, at 41; Postema, *supra* note 34, at 17; Henry E. Smith, *Property, Equity, and the Rule of Law*, *in* PRIVATE LAW AND THE RULE OF LAW, *supra* note 34, at 224; Benjamin C. Zipursky, *Torts and the Rule of Law*, *in* PRIVATE LAW AND THE RULE OF LAW, *supra* note 34, at 139.

60. For an exploration of the connection between procedure and rule of law and related ideas of substantive justice, see generally BURBANK & FARHANG, *supra* note 11; SEAN FARHANG, THE LITIGATION STATE (2010); Glover, *supra* note 14; Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004).

61. *See, e.g.*, Burbank, *supra* note 2, at 1739; *see also supra* note 25 and accompanying text.

connection is readily observed in recent procedural opinions—opinions that, beneath the surface, represent a judiciary stretching the limits of its procedural powers to achieve more "substantive" aims under the less-salient veil of procedure.[62] These two premises, the foundations of which have been detailed in the prior work of others and myself, reveal that the entities—be they plaintiffs, corporations, judges, or members of Congress—that have control over judicial procedure also have great control over the preservation, or nonpreservation, of the rule of law.

This, however, was not always the case. Elected branches of government have not always been as indifferent to—or in some cases, fervently devoted to—the diminishment of judicial power or the judicial role to preserve rule of law. Today, however, the national discourse, not to mention our Twitter feeds, are filled with attacks on intertwined notions of rule of law and judicial independence. These attacks, while far less eloquent than those leveled against Hamilton's conception of the judiciary at the time of the Constitution's framing, are nonetheless far more persistent, more salacious, and—given that many of these assaults can emanate from the President of the United States—perhaps far more concerning.[63] And these largely unprecedented[64] attacks on the rule of law from the President exist alongside a deregulatory Congress whose legislation and rhetoric has heightened what

62. *See* Burbank, *supra* note 2, at 1739–40 (noting that courts risk Congress's ire when their procedural power is exercised in ways that attempt to conceal substantive ends). *See generally* Glover, *Disappearing Claims*, *supra* note 11; Glover, *"Non-Transsubstantive" Class Action*, *supra* note 11.

63. *See, e.g.*, Matt Apuzzo et al., *Trump Told Russians That Firing 'Nut Job' Comey Eased Pressure from Investigation*, N.Y. TIMES (May 19, 2017), https://www.nytimes.com/2017/05/19/us/politics/trump-russia-comey.html [https://perma.ccQHP7-BD7U]; Jeremy Diamond, *Trump 'Disappointed' in Sessions, Won't Say If He Wants Him out*, CNN (July 25, 2017, 5:03 PM), http://www.cnn.com/2017/07/25/politics/trump-press-conference/index.html [https://perma.cc/3Y2D-QQQE] (expressing anger that Attorney General Sessions recused himself from the Russia investigation). Some of the most publicly salient attacks on the judiciary and the rule of law have emerged from the tweets of Donald Trump. For example, after a federal judge struck down Trump's immigration ban as unconstitutional, Trump threatened the judge via tweet: "Just cannot believe a judge would put our country in such peril. If something happens[,] blame him and court system. People pouring in. Bad!" Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 5, 2017, 3:39 PM), https://twitter.com/realdonaldtrump/status/828342202174668800 [https://perma.cc/PJG8-KEVD]. Trump also referred to this same judge as a "so-called judge" whose decision was "ridiculous and [would] be overturned!" Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 8:12 AM), https://twitter.com/realDonaldTrump/status/827867311054974976 [https://perma.cc/3YVR-2F2Z]. Trump has also questioned the impartiality of a Mexican American judge in litigation related to Trump University, on the ground that the judge is Mexican American. Donald J. Trump (@realDonaldTrump), TWITTER (May 30, 2016, 2:45 PM), https://twitter.com/realDonaldTrump/status/737399475509985280 [https://perma.cc/9M4U-RDQ9] (calling Judge Gonzalo Curiel "very unfair" and "[t]otally biased").

64. There is at least one notable historical precedent: President Jackson refused to abide by Justice John Marshall's order not to displace the Cherokee Indians; Jackson sent them out anyway and famously proclaimed, "Marshall has made his decision; now let him enforce it." Jeffrey Rosen, *Not Even Andrew Jackson Went as Far as Trump in Attacking the Courts*, ATLANTIC (Feb. 9, 2017), https://www.theatlantic.com/politics/archive/2017/02/a-historical-precedent-for-trumps-attack-on-judges/516144/ [https://perma.cc/AJ2Q-9ZKL]. President Jackson's executively ordered mass exodus is now known as the Trail of Tears and remains one of the most shameful events in our nation's history.

was already a growing level of "encroachment and oppression" of the judicial role to preserve the rule of law. Though many factors affect the judiciary's ability to preserve the rule of law, it seems that our current political climate combined with our structure for procedural reform—whereby corporate entities have multiple channels through which they can effectuate anti-rule-of-law procedural measures—ought to be more thoroughly considered and theorized. While this Article cannot do that task justice, it can offer some preliminary thoughts.

Keeping intact the current understanding of judicial power over procedure—in other words, keeping constant the notion that the judiciary has delegated supervisory power over procedure, subject to the limitations in the Rules Enabling Act[65]—there nonetheless exist structural separation-of-powers and federalism constraints that could better align procedural reform and procedural power with the role of the judiciary to preserve the rule of law. Both the Enabling Act, which purports to operationalize judicial power over procedure, and the related *Erie* doctrine, which purports to set up constitutional limits on federal court lawmaking power, draw separation-of-powers lines that, if properly understood, might provide guidance as to when and whether either the legislative or the judicial branch is most appropriately involved with a particular procedural reform. These limitations ought to be guided by the institutional characteristics and roles of the legislature on the one hand and the judiciary on the other.

In diversity cases, federal courts are required by the *Erie* doctrine to steer clear of interference with state substantive lawmaking prerogatives. In federal question cases, federal courts have more breathing room vis-à-vis interpretation of substantive law but must adhere to the separation-of-powers limitations in the Rules Enabling Act, which precludes them from encroaching on Congress's lawmaking power. Moreover, as a matter of democratic legitimacy and structural constitutionalism, major changes in substantive law are better left to the more transparent and democratic processes that characterize the legislative branch.[66] Thus, as I have detailed in prior work, federal courts may apply different procedural rules in different substantive contexts *only if* those differences stem from the dictates of the underlying substantive law.[67] Otherwise, the judiciary would run afoul of legislative power. I term this theory of judicial procedural power the "principle of procedural symmetry," and I offered it in prior work as a challenge to the transsubstantivity principle that has long been used to operationalize the Rules Enabling Act.[68] This principle helps capture the dual power of the judiciary and Congress over both procedure and substantive lawmaking (at least in federal question cases) and could help police the line between the two branches in matters of procedural reform.

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65. *See* Glover, *"Non-Transsubstantive" Class Action*, *supra* note 11, at 1628–29.

66. Burbank, *supra* note 2, at 1679.

67. *See* Glover, *"Non-Transsubstantive" Class Action*, *supra* note 11, at 1660.

68. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is.").

To illustrate the purchase these principles could have with regard to preserving the rule of law, consider the following procedural-reform power struggles. First, one of the more heated debates during the passage of the PSLRA was whether Congress was intruding upon the judiciary's power over procedure (not to mention its expertise).[69] Under both the symmetry principle and institutional constraints on the judiciary, this debate was misplaced. The PSLRA ultimately created a substance-specific procedural regime for securities fraud, something arguably beyond the scope of the judicial power over procedure under the symmetry principle, and certainly beyond its institutional role to preserve, not recalibrate, the rule of law. Indeed, a heightened pleading rule just for securities laws must emanate from the substantive law of securities itself, at least absent a substantive judicial interpretation of section 10(b)(5) of the Securities Act of 1933 that would dictate a different application of Rule 8 of the Federal Rules of Civil Procedure. In short, such a proclamation of the substantive contours of securities laws needed to emanate from Congress. The PSLRA may well have impacted the ease with which private litigants could bring securities claims, but the enlargement or retrenchment of substantive rights is most properly within the ambit of the legislative branch; the judiciary can only "preserve" the rule of law vis-à-vis the laws it is given to enforce.

In contrast, broad, transsubstantive enactments like the Civil Justice Reform Act of 1990 (CJRA) have rightly been criticized as encroachments upon the province and expertise of the judiciary and the rulemaking process.[70] The same sorts of criticisms can be leveled against FICALA. Here, instead of tackling the substantive issue of products-liability law, Congress seeks to fight that war through reform to the MDL procedures as a whole. Moreover, unlike the PSLRA, which generated robust lobbying from both sides of the securities bar,[71] broad-sweeping procedural reform like the CJRA and the FICALA tends not to mobilize the concomitantly diffuse swath of litigants who might one day be affected by it.[72] Instead, these reforms would truly intrude or encroach upon the supervisory power of the judiciary to craft and enforce procedures to manage the courts and would oppress the judiciary's ability to fulfill its role in preserving the rule of law.[73]

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69. *See, e.g.*, Burbank, *supra* note 2, at 1708–12.

70. *See, e.g.*, Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 379 (1992) (arguing that the CJRA "has effected a revolutionary redistribution of the procedural rulemaking power from the federal judicial branch to the legislative branch").

71. *See* John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 BUS. LAW. 335, 338 (1996) (noting that the debate for reform in private securities litigation was "propelled primarily by those whose interests [were] most directly affected, with the accounting firms and the issuer community on one side and the plaintiffs' bar on the other").

72. *See generally* Glover, *Disappearing Claims*, *supra* note 11.

73. And just as critics of the CJRA warned, the legislative process lacks the rigorous empirical work needed for broad-sweeping reform—a fact on blatant display in the House report on FICALA, which does not cite a single empirical study. *See* H.R. REP. NO. 115-25 (2017).

The limitation with the separation of powers on the relative powers of Congress and the judiciary over procedure—operationalized in large part by the procedural symmetry principle—provides guidance for the judiciary as well. Consider the sweeping procedural reform achieved by corporate litigants in the class-arbitration cases. While most of the arbitration cases did not directly implicate the Rules Enabling Act or the *Erie* doctrine, concerns about separation of powers were present.[74] In the arbitration cases, the Court was asked to interpret a federal *procedural* statute, the Federal Arbitration Act (FAA), and apply it in different substantive contexts (for instance, consumer fraud and federal antitrust law). To the extent the Court's interpretation of a procedural statute[75] conflicted with the dictates of an existing and duly enacted substantive statute, it is a long-standing canon of construction that the (relatively) substantive federal statute must prevail over the (relatively) procedural one. This canon of construction exists harmoniously with the principle of procedural symmetry: variances in application of procedural rules in different substantive contexts are permissible so long as the dictates arise from substantive law; variances in the application of substantive law across procedural contexts are not.

The Court, however, in a formalistic power grab, ignored these separation-of-powers concerns altogether—a move it has made in contexts beyond arbitration.[76] Whether the currently anti-litigation Congress would have agreed with the Court's ultimate results in these cases is of little importance. What matters, instead, is that in its arbitration cases, the Court recalibrated the remedial scheme for the swath of federal substantive statutes *without* any congressional input on any of those statutes, much less the particular ones at issue in the cases the Court considered.[77] Instead of staying within the confines of preserving the rule of law, the Court recalibrated that law—a role more appropriately undertaken by a democratically accountable legislature.

The foregoing is sufficient only to offer the following modest conclusion: any approach to procedural reform ought to take into account the separation-of-powers limitations and institutional-role differences briefly discussed here. Instead of a dual-branch procedural reform buffet for corporate entities, procedural reform should stem *either* from the dictates of substantive law *or* from the relatively depoliticized Rules Advisory Committee process and

74. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2313 (2013) (Kagan, J., dissenting) (stating that the Court's imposition of procedural bars to stating claims betrays federal statutes like the antitrust laws).

75. Here, "procedural" is relative to other legislative enactments governing primary conduct. *See id.* at 2318–19.

76. *See, e.g.*, Comcast Corp. v. Behrend, 569 U.S. 27 (2013); Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

77. For instance, the Court *could* have reached a narrower holding in *Italian Colors* on the ground that it need not reach the separation-of-powers question because Congress, in enacting the Sherman Act, considered and rejected a class action provision. Though the issue was briefed, *see, e.g.*, Brief of the American Antitrust Institute as Amici Curiae Supporting Respondents at 17–18, *Italian Colors*, 133 S. Ct. 2304 (No. 12-133), the Court did not consider it, instead issuing a sweeping holding that would affect all federal statutes, *Italian Colors*, 133 S. Ct. at 2311–12 n.4 (mentioning the Sherman Act only in a footnote in reference to Justice Kagan's dissenting opinion).

appropriately constrained procedural decision-making by courts. Such a change, though seemingly modest, could begin restoring Hamilton's intended role for the judiciary to preserve the rule of law and to reduce the "encroachments and oppressions" on that role he so feared.

CONCLUSION

Much additional work is needed on this topic, as well as on various other matters of procedural power.[78] It is also true that there are many reasons beyond mere power struggles that explain the corporatization of procedure: the increased politicization of judicial appointments; the anti-litigation stance of the Court filled with many of those more "politicized" appointees;[79] the long-standing perception of a litigation explosion in the United States;[80] an increasingly far-right and deregulatory Congress and executive; and a lack of campaign-finance reform, among others. All of these considerations should give us pause in believing that there is, in fact, a nonpoliticized branch with which we can entrust matters of "procedure." They further demonstrate that there is no single solution.

That the problem of procedural regulation is complex, however, cannot justify too much pause. The rule of law is not only caught in a procedural power struggle that often results in its diminishment—including by the branch entrusted with its preservation—but it is also under direct attack from elected members of federal and state governments. As a result, separation-of-powers considerations may have never mattered more. In matters of procedure and in matters of governance, there has perhaps never been a greater need for restraint and respect.

78. For instance, there is the lingering question of the judiciary's "inherent" power over procedure. *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 24 (1985).

79. *See, e.g.*, BURBANK & FARHANG, *supra* note 11, at 244; LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE (2014).

80. *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 596 (2007) (Stevens, J., dissenting) (expressing the Supreme Court's belief that district judges were not skilled at controlling discovery costs).