ICING THE JUDICIAL HELLHOLES: CONGRESS' ATTEMPT TO PUT OUT "FRIVOLOUS" LAWSUITS BURNS A HOLE THROUGH THE CONSTITUTION

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ABSTRACT

Tort reform is not a new topic. By simply federalizing an area of law, Congress can preempt the many variations that otherwise might exist among the states. Class actions and mass torts are but two examples of this. One bill in Congress (the Lawsuit Abuse Reduction Act) foreshadows the future of federal tort reform: imposing federal oversight on the state courts when they are hearing causes of action created by the state. By imposing Federal Rule of Civil Procedure 11 on state courts in these situations, Congress is surpassing its power under the Commerce Clause. By reverting back to the pre-1993 version of Federal Rule of Civil Procedure 11, Congress brings back the mandatory sanctions that shut the courthouse door to plaintiffs. This two-headed monster disguises itself under the guise of "attorney accountability," but it perverts the basic system of federalism that binds the very fabric of our country.

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I. Introduction

The charge of "frivolous lawsuits" is a common invective volleyed at the legal profession. Everyone has their own favorite example of how America has become such a litigious society, from suing McDonalds because their coffee was too hot or their food made people obese to suing the Weather Channel because a man relied on its forecast and died on a fishing trip.[1] These colorful anecdotes regularly make their way through the media and into the American psyche, helped by an organized public relations campaign that decries the "'litigation explosion' and greedy trial lawyers."[2] Pro-plaintiff groups then fight back with their own statistics and anecdotal evidence.[3] In addition to attacking frivolous lawsuits in the media, interest groups have lobbied Congress to stop them. One proposal,

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[1] *See* H.R. REP. No. 109-23, at 15-21 (2005) (collecting various examples of "frivolous lawsuits that have tormented innocent Americans"). However, not all of these stories are factually correct. Stephanie Mencimer, *False Alarm: How the Media Helps the Insurance Industry and the GOP Promote the Myth of America's 'Lawsuit Crisis,'* WASH. MONTHLY, Oct. 1, 2004, at 18, *available at* http://www.washingtonmonthly.com/features/2004/0410.mencimer.html. Many are simply urban legends. *Id.* (referring to Steve Brill's 1986 article in *The American Lawyer* that traced several examples of allegedly "frivolous lawsuits"). *See also* Anthony J. Sebok, *The Corrosive Effect of the Politicization of Tort Reform: What Newsweek's 'Lawsuit Hell' Didn't Tell You* (2003), http://writ.findlaw.com/sebok/20031215.html (noting that most of the statistics cited by the authors of the *Newsweek* article "have been criticized by one side or another as being biased and unreliable"). "The proliferation of dicey statistics offered by institutions with something to prove, has obscured the lack of reliable information." *Id.* Sebok suggests that "[a] fairer way to present this information would be to offer both statistics, with an explanation that they are based on self-reporting." *Id.*

[2] Mencimer, *supra* note 1, at 18 (describing the public relations "campaign [funded] by the insurance industry and other big corporations" that can be traced back to the 1950s). Organizations, such as Common Good, collect and "distribut[e] colorful litigation horror stories from around the country." *Id.*; *see* Common Good Home Page, http://cgood.org/ (last visited Feb. 4, 2006); ATRA.org, Looney Lawsuits, http://www.atra.org/display/13 (last visited Feb. 4, 2006). Common Good collects stories on other areas overburdened by lawsuits. *See* Common Good, Top Ten New School Rules, http://cgood.org/schools-newscommentary-inthenews-253.html (last visited Feb. 4, 2006). On the other side of the coin, there are organizations, such as The Committee for Justice for All and the Center for Justice & Democracy, that challenge the factual basis for the claims made by ATRA and other tort reform groups. *See* The Committee for Justice for All Home Page, http://www.saynotocaps.org (last visited Feb. 4, 2006); Center for Justice & Democracy Home Page, http://www.centerjd.org (last visited Feb. 4, 2006).

[3] Sebok, *supra* note 1. Sebok believes that "the real problem with our tort system is that it is, for most litigants, a myth: It is so expensive to litigate that few deserving victims sue, and many blameless defendants settle just so they can escape the expense and uncertainty of the civil justice system." *Id.*

which has been introduced in the House of Representatives on more than one occasion, raises serious issues about the extent of Congress' power to regulate both federal and state courts. For the federal courts, the Lawsuit Abuse Reduction Act ("LARA") presents a prudential question of whether the penalties for frivolous filings under Federal Rule of Civil Procedure 11's ("Rule 11") should be changed.[4] For the state courts, the issue is one with serious constitutional implications: whether Congress has the power to regulate the procedures used by state courts hearing claims based on state law.

Because Congress is relying on its power under the Commerce Clause to impose these changes on the state courts, one must ask whether the Commerce Clause grants Congress this power.[5] Within

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[4] This is not the first time that Congress has changed procedural rules without a recommendation from the Advisory Committee. Since the 1970s, Congress has done this several times. *See* Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1695 (2004) [hereinafter Burbank I]. While many bills that have been introduced in recent years would have changed the Federal Rules in specific substantive contexts, very few of them have been enacted. *Id.* at 1699. During the 105th Congress, forty-one were proposed and three were passed; in the 106th, thirty-three were introduced and four survived; in the 107th, six out of forty-nine passed; and in the first half of the 108th Congress, thirty-three bills were introduced and one was enacted. *Id.* at 1699-1701. See Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221 (1997) [hereinafter Burbank II] for a discussion of what it means to "implement procedural change".

[5] The Commerce Clause grants Congress an affirmative power "[t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. The courts have interpreted the Clause very broadly almost to the point of giving Congress a complete grant of power. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: POLICIES AND PRINCIPLES 194 (1997); Maryland v. Wirtz, 392 U.S. 183, 196 (1968); 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.1, at 394 (2d ed. 1992). Of all of the constitutional grants of authority to Congress, the commerce power is the most important since it is the "chief source of congressional regulatory power." LAURENCE E. TRIBE, AMERICAN CONSTITUTIONAL LAW 305-06 (2d ed. 1988); CHEMERINSKY, *supra* at 174. When broadly construed, some consider it the federal equivalent of the police power. ROTUNDA & NOWAK, *supra* at 355-56; *but see* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1987) (arguing that the current, expansive reading of the Commerce Clause is contrary to the text of the Clause itself and the structure of our constitutional government). As Professor Epstein noted two decades ago:

> The commerce power is not a comprehensive grant of federal power. It does not convert the Constitution from a system of government with enumerated federal powers into one in which the only subject matter limitations placed on Congress are those which it chooses to impose upon itself. Nor does the "necessary and proper" clause work to change this basic design; although it seeks to insure that the federal power may be exercised upon its appropriate targets, it is not designed to run roughshod over the entire scheme of enumerated powers that

this broad question, there are a host of different and complex queries. For example, where does the Commerce Clause doctrine stand after its broad reading in *Gonzales v. Raich*?[6] Must Congress be regulating an economic or commercial activity to invoke the cumulative effects doctrine, thereby permitting federal regulation of activities that substantially affect interstate commerce?[7] If so, does a

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precedes it in the Constitution.

Id.

Federal and state tort reform that limits damages for pain and suffering raises due process questions under the Fifth and Fourteenth Amendments, respectively. Anthony J. Sebok & John C. P. Goldberg, *The Coming Tort Reform Juggernaut: Are There Constitutional Limits on How Much the President and Congress Can Do in This Area?* (May 19, 2003), http://writ.news.findlaw.com/sebok/20030519.html.

[6] 125 S. Ct. 2195 (2005). After the majority decision in *Raich*, the limitations on the commerce power that the Court imposed in *United States v. Lopez* and *Morrison v. United States* are in doubt. *See* Gonzales v. Raich, 125 S. Ct. 2195, 2220-23 (2005) (O'Connor, J. dissenting). Whether *Raich* marks another shift in the Court's Commerce Clause doctrine remains to be seen. *See* Tony Mauro, *Court Watchers Assess Term's Impact on Rehnquist Legacy*, LEGAL TIMES (June 29, 2005) (noting that some court watchers saw the *Raich* and *Kelo v. City of New London* decisions as the end point to the Rehnquist Court), *available at* http://www.law.com/jsp/article.jsp?id=1119949518185. Then again, *Raich* may simply be the "'normalization' of the Rehnquist Court's Commerce Clause jurisprudence." Ernie Young, *The Normalization of the Rehnquist Court Commerce Clause Jurisprudence?* (2005), http://www.scotusblog.com/movabletype/archives/2005/06/05-week/. An obvious end to the Rehnquist Court and, by extension, to whatever ideology and/or philosophy it espoused was the investiture of John G. Roberts, Jr., as Chief Justice, the retirement of Justice Sandra Day O'Connor and the confirmation of Justice Samuel Alito. Nevertheless, after *Lopez* and *Morrison*, "it was unclear how far the Court's pro-states majority intended to take its 'Federalist revival,' and the dissenters [in those cases] refused to even engage the jurisprudence." *Id.* Now, "[t]he Court has made clear it doesn't intend to roll back federal power in any revolutionary way." *Id.* *See* George D. Brown, *Counterrevolution? – National Criminal Law After Raich*, 66 OHIO ST. L.J. 947, 948 (2005) (characterizing *Raich* as a setback for New Federalism, but not a rollback to some form of *Lopez*-Lite). Another title for this movement is "New Federalism." *Id.* at 948. Without a specific definition, there are phrases that have come to symbolize New Federalism: "the notion of spheres of state autonomy, state sovereignty, the lack of a national police power, the special state role in criminal law, the role of enumerated federal powers as a guarantee of state power, maintaining the federal balance, and dual federalism." *Id.* at 949 (describing New Federalism's principles) (footnotes omitted). Further, the supposed federalism theme of the Rehnquist Court's jurisprudence may be more appropriately termed "Symbolic Federalism" since the Court has sided with pro-federalism arguments only where a "federalism issue does not have a lot of practical importance." Orin Kerr, *The Rehnquist Court and Symbolic Federalism* (2005), http://www.scotusblog.com/movabletype/archives/2005/06/05-week/.

[7] There are three categories of regulation that the Commerce Clause grants to Congress: (1) use of the channels of interstate commerce ["category one"], (2) instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities ["category two"], and (3) those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce

lawsuit constitute an economic or commercial activity?[8] Since the

["category three"]. *See* United States v. Lopez, 514 U.S. 549, 558-59 (1995) (internal quotations and citations omitted); *Raich*, 125 S. Ct. at 2205 (reaffirming the three general categories of regulation under the commerce power); *Id.* at 2215-16 (Scalia, J., concurring) (explaining that the basis for category three regulation derives from the Necessary and Proper Clause). In *Morrison*, the Court focused on a category three regulation of a non-economic intrastate activity and relied on four factors to determine the constitutionality of a category three regulation: (1) whether the act regulates commerce or an economic enterprise; (2) whether the effect of the activity on commerce is attenuated; (3) whether the statute contains an express jurisdictional element to limit the statute's reach; and (4) whether Congress has made any findings on the relationship between the activity and interstate commerce, either in the statute or its legislative history. 529 U.S. 598, 610-12 (2000) (*citing Lopez*, 514 U.S. at 561). *Contra* Epstein, *supra* note 5, at 1454 (arguing for a narrow reading of the commerce power, where its affirmative scope is "limited to those matters that are governed by the Dormant Commerce Clause: interstate transportation, navigation and sales, and the activities closely incident to them").

[8] A threshold question is whether there is a difference between "economic" and "commercial" activity for these purposes. Notwithstanding that inquiry, there is some thought that "a lawsuit seeking money damages is certainly an economic event." Michael C. Dorf, *Does Federal Tort Reform Unduly Infringe on State Sovereignty?* (2003), http://writ.news.findlaw.com/dorf/20030430.html. However, the chain of causation that one would have to use to support the conclusion that lawsuits—whether they are economic/commercial activities or not—substantially affect interstate commerce is eerily similar to chains proposed in *Lopez*, 514 U.S. at 563-68, and *Morrison*, 529 U.S. at 612-16, both of which the Court rejected because such but-for reasoning could apply to virtually any activity without limitation. *See id.* at 616 n.6 ("but-for causal chain must have its limits in the Commerce Clause area"). Taken to its logical conclusion—and without a concept of "proximate cause"—but-for causation "would obliterate the distinction between what is national and what is local in the activities of commerce." *Id.* (*citing Lopez*, 514 U.S. at 567). *E.g.*, *Lopez*, 514 U.S. at 601 (Thomas, J., concurring) ("[e]ven though particular sections may govern only trivial activities, the statute in the aggregate regulates matters that substantially affect commerce").

LARA's supporters make arguments very similar to those advanced by the government in *Lopez* and *Morrison*, namely the high costs of frivolous litigation, *cf. Lopez*, 514 U.S. at 563-64 ("costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population"; "violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe"), and the loss of national productivity and viability, *cf. id.* at 564 ("presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being"). A la *Lopez*, the argument in support of LARA is as follows: the costs of frivolous litigation are substantial and, through the mechanism of liability insurance, those costs are spread throughout the business population. Frivolous litigation reduces the willingness of business to locate in areas within the country and the states that are perceived to be judicial hellholes and hostile to business. Further, frivolous litigation poses a substantial threat to business by threatening its economic stability and bottom-line and creating a climate of fear. A restricted, less-profitable, and paralyzed business sector, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the nation's economic well-being. *See Safeguarding Americans from a Legal Culture of Fear: Approaches to Limiting Lawsuit Abuse: Hearing Before the Comm. on the Judiciary*, 108th

Supreme Court's current definition of economics (as outlined in *Raich*) does not appear to include lawsuits,[9] the only apparent avenue

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Cong. 23-24 (2004) (statement of Karen R. Harned, Executive Director, National Federation of Independent Business Legal Foundation) [hereinafter HEARING].

To these kinds of arguments, the *Lopez* Court said that "if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, *a fortiori*, it also can regulate the educational process directly." *Lopez*, 514 U.S. at 565. The *Morrison* Court rejected similar slippery slope arguments, saying that there is a limit to the but-for causal chain:

> The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Morrison, 529 U.S. at 615. Collectively, the Court rejected the "costs of crime" and "national productivity" arguments in *Lopez* and *Morrison*, because such reasoning would allow Congress to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce" and "any activity that it found was related to the economic productivity of individual citizens." *Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 612-13. Based on *Lopez* and *Morrison*, the conclusions should be the same when analyzing Congress' bid to regulate state courts. If Congress can regulate state concerns that adversely affect the business environment, then it can also regulate those state concerns directly. At some point in time, federalism must draw the line between federal and state concerns, for "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 617-18. Arguably, state procedural rules that do not violate federal constitutional guidelines are just as local as the police power that authorizes local governments to "regulat[e] and punish[] intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce," something which "has always been the province of the States." *Id.* at 618. *Morrison* further supports a restricted view of what the regulated activity should be. Dorf, *supra*. Instead of viewing the "regulated activity [in *Morrison*] as lawsuits alleging gender-motivated violence [or substantially affecting interstate commerce]," the Court saw the appropriate level of analysis as the "real-world conduct giving rise to the lawsuit." *Id.*

[9] The Court defined "economics" as "the production, distribution, and consumption of commodities." Raich, 125 S. Ct. at 2211 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)). A "lawsuit," or a "suit," is defined as "[a]ny proceeding by a party or parties against another in a court of law." BLACK'S LAW DICTIONARY 1448 (7th ed. 1999). The Court's definition of "economics" includes only commodities, "suggest[ing] that the category of 'economic' activity excludes services entirely," which "is actually quite bizarre." Lawrence Solum, *Gonzales v. Raich, Part II: An Analysis of the Decision*, (2005), http://lsolum.blogspot.com/archives/2005_06_01_lsolum_archive.html. This definition "significantly expands the sphere of activity to which *Wickard v. Filburn* applies – as compared to the *Lopez* and *Morrison* framework." *Id.* This is a significant development. *Id.* It

for congressional regulation would be if a lawsuit constitutes commercial activity.[10] This legislation also raises the issue of the impact that a jurisdictional element, such as section 3 of LARA,[11] has on Congress' ability to regulate activity that it would not otherwise be able to reach.[12] Further, LARA's broad regulatory scheme may

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seems unlikely that services are actually excluded from Congress' grasp, but if they are, then so would the services of a lawyer in filing a civil action. *Id.*

[10] This issue presents complex questions about the importance of the commercial nature of the activity to the analysis under the Commerce Clause. The Court has intimated that category three is applicable only when Congress is exerting power "over purely *intra*state *commercial* activities that nonetheless have substantial *inter*state effects." United States v. Robertson, 514 U.S. 669, 671 (1995) (per curiam) (emphasis in original) (citing Wickard v. Filburn, 317 U.S. 111 (1942)). Compare how LARA is indirectly trying to regulate the state and federal legal systems by couching this regulation as commercial with other federal tort legislation that regulates a commercial activity with direct economic impact, such as the airline industry. Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475, 534 (2002) (noting that the latter would "fare better than legislation directed at individual activity – such as medical malpractice"). Legal activity, such as medical malpractice suits, "implicate interstate commerce based on their effects, rather than the act standing alone." Nim Razook, *A National Medical Malpractice Reform Act (And Why the Supreme Court May Prefer to Avoid It)*, 28 SETON HALL LEGIS. J. 99, 123 n.157 (2003). Medical malpractice actions might be considered economic "if people usually or typically engage in the act for economic gain." Dorf, *supra* note 8.

[11] LARA § 3 ("In any civil action in State court, the court, upon motion, shall determine within 30 days after the filing of such motion whether the action affects interstate commerce. . . . If the court determines such action affects interstate commerce, the provisions of Rule 11 of the Federal Rules of Civil Procedure shall apply to such action.").

[12] If lawsuits are not commercial activities, then Congress might still be able to regulate them on a case-by-case basis by including in the statute a jurisdictional element that limits the applicability of the federal law to those instances that substantially affect interstate commerce, instead of in all instances. That is what distinguishes the venue provision, which applies to all personal injury claims filed in state or federal court, and the Rule 11 provision, which only applies in state court proceedings that substantially affect interstate commerce. The latter would be more likely to be constitutional than the former because the inclusion of a jurisdictional element signals that Congress is aware of the limits that the Commerce Clause places on it and that it is serious about them. *E.g.*, Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 746 (1995). However, this does not resolve the threshold question of whether a jurisdictional element can save an otherwise invalid exercise of the commerce power. *See Lopez*, 514 U.S. at 549; *see also* Peter J. Henning, *Misguided Federalism*, 68 MO. L. REV. 389, 429-31 (discussing the importance of jurisdictional elements after *Lopez* and *Morrison*); Brown, *supra* note 6, at 997-1004 (discussing the impact of jurisdictional elements in federal criminal statutes passed under the commerce power after *Raich*).

In *Lopez*, the Court distinguished the statutory provision at issue, which did not contain a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce," from another statutory provision that it had upheld because that provision had an "express jurisdictional element which might limit its reach to a discrete set of firearm

impact its constitutionality.[13] Those issues are beyond the substance

possessions that additionally have an explicit connection with or effect on interstate commerce," 514 U.S. at 561, 562. *But see* United States v. Chesney, 86 F.3d 564, 579 (6th Cir. 1996) (Batchelder, J., concurring) (suggesting that "under *Lopez*, once the activity is found not be economic or commercial in nature, *Lopez* does not require that the court look into whether the statute has an express jurisdictional element or whether the activity substantially affects interstate commerce"). After *Morrison*, it would seem that the Court was condoning such legislative drafting when it said that a jurisdictional element in the Violence Against Women Act (VAWA) would "establish[] that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce." *Morrison*, 529 U.S. at 613. In *Raich*, the Court noted that this lack of a jurisdictional element was part of the reason that it struck down the provision of the Gun Free School Zone Act in *Lopez*. *Raich*, 125 S. Ct. at 2009. Since *Lopez*, lower courts have "presume[d] that the presence of a jurisdictional element invokes an 'as-applied' challenge to a facially valid statute under the channels and instrumentalities prongs" prompting the reviewing court must "determine whether the statute is valid 'as applied' to each particular case." Diane McGimsey, *The Commerce Clause and Federalism after Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675, 1719-20 (2002). For example, in prosecutions under the Hobbs Act, 18 U.S.C. § 1951(a) (2000), the lower courts have read the provision's jurisdictional element as foreclosing "any further inquiry into the effect the activity in question may have on interstate commerce." George P. Ferro, *Affecting Commerce: Post* Lopez *Review of the Hobbs Act*, 66 ALB. L. REV. 1197, 1204 (2003). *E.g.*, Michael McGrail, *The Hobbs Act after Lopez*, 41 B.C. L. REV. 949, 959-66 (2000) (collecting jurisdictional challenges to the Hobbs Act).

The problem with allowing Congress to skirt the limits of the Commerce Clause by "clever legislative craftwork" that converts a statute that regulates non-commercial activity into one which regulates commercial activity is that it opens the door to a quasi-general welfare provision by which Congress can regulate just about anything. *Chesney*, 86 F.3d at 579 (Batchelder, J., concurring). In concurring in *Chesney*, Judge Batchelder of the Sixth Circuit contended that *Lopez* did not "permit Congress [to] magically . . . produce a commercial activity (possession of a firearm 'in or affecting commerce') out of a non-commercial one (possession of a firearm) by conferring a jurisdictional credential on the non-commercial activity." *Id.* at 580. *But see* Kelly G. Black, *Removing Intrastate Lawsuits: The Affecting-Commerce Argument after United States v. Lopez*, BYU L. REV. 1103, 1130-31 (1995) (arguing that the jurisdictional element ensures the constitutionality of a federal criminal statute under the Commerce Clause).

[13] After *Lopez* and *Morrison*, the meaning of the broader scheme doctrine was unresolved. Alex Kreit, *Why Is Congress Still Regulating Noncommercial Activity?*, 28 HARV. J.L. & PUB. POL'Y 169, 170-71 (2004). *Morrison*'s four factors did not account for the possibility of such a scheme. Alex Kreit & Aaron Marcus, Raich, *Health Care, and the Commerce Clause*, 31 WM. MITCHELL L. REV. 957, 966 (2005). The *Lopez* Court did connect the broader regulatory scheme with category three's substantial effects regulations, saying that Congress could only aggregate interstate activities if the activities "arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 549. In *Raich*, the Court appeared to limit Congress' ability to regulate purely local activities through a broad regulatory scheme to those activities "that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Raich*, 125 S. Ct. at 2205.

There are several reasons why the broad regulatory scheme probably would not save LARA. First, the overriding regulatory scheme must be of an economic class

of this article.

This article concludes that by enacting LARA, Congress would improvidently change the Federal Rules of Civil Procedure and burn a hole through the two constitutional provisions that protect states from federal encroachment, Article I, Section 8 and the Tenth Amendment. LARA's passage would further damage the ideal of a federal government of limited powers, establishing a terrible precedent for future congressional encroachments on this important principle.

This article analyzes how LARA would change the constitutional and procedural landscapes if it were enacted. Section II highlights

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of activities. Lawsuits filed in a state court that are based on state law causes of action cannot be a part of a larger "economic 'class of activities'" for what would that larger class be? Lawsuits in general? Lawsuits, by definition, having nothing to do with the production, distribution, or consumption of commodities. They are actions or suits brought before a court, as to recover a right or redress a grievance. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), *available at* http://www.bartleby.com. Even if one assumed that the broad regulatory scheme could apply to a non-economic class of activity, this presupposes that there is such a scheme in place. There are two possible ways to analyze whether such a scheme exists. One could view LARA in isolation as a single statute that addresses frivolous lawsuits in state and federal courts, or as one piece of a larger attempt to regulate tort liability at the federal level. On its own, LARA pales in comparison to the Controlled Substances Act ("CSA"), Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-153, 21 U.S.C. § 801, *et seq.*, at issue in *Raich*, and other federal tort reform bills, such as the Class Action Fairness Act of 2005 ("CAFA"), because it addresses only one or two small issues. Even if one considered CAFA to be a "broad regulatory scheme," LARA looks less like such a scheme and more like legislation focusing on one or two small issues; on the other hand, CAFA, which provides comprehensive rules and regulations for class action lawsuits, is closer to being such a scheme. Had Congress preempted all personal injury claims, similar to what it did with class actions, then it might be said that Congress was attempting to address a nationwide problem with a broad regulatory scheme designed to contain the costs of civil litigation. At least with the CSA, the federal government has a broad regulatory scheme in place to address controlled substances on a nationwide basis. Here, Congress is selectively choosing to apply a new rule or limitation on state court proceedings, *i.e.*, Rule 11 and venue; this cannot be said to be a "broad regulatory scheme." There is no reason to believe that Congress could not pass parts of a broader regulatory scheme in a piecemeal fashion. The issue is how that scheme should be defined. As a piece of a larger attempt to regulate tort liability on the federal level, LARA should be grouped with those bills that change the procedures for hearing cases, such as class actions (CAFA) and mass torts (Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107-273, § 11020), and not those bills that address the substance of claims, such as providing immunity to a particular activity, *see, e.g.*, Henry Cohen, *Federal Tort Reform Legislation: Constitutionality and Summaries of Selected Statutes*, 19-26 (Congressional Research Service, 95-797 A, updated Feb. 23, 2003) (listing federal tort reform bills for the past one hundred years, including those that provide immunity to a particular activity), *available at* http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/95-797_A_02262003.pdf.

the perceived problem that frivolous lawsuits present and examines LARA's response.[14] This bill makes significant changes in federal and state civil practice by imposing mandatory sanctions on attorneys, clients, and law firms under Rule 11, changing venue provisions for personal injury suits, and introducing an expanded *forum non conveniens* analysis. Section III concludes that Congress does not have the authority to impose these procedural changes on the state courts.[15] For Congress to take such action would obliterate the limits that the Tenth Amendment imposes on it. Section IV analyzes the prudential reasons against changing Rule 11 and imposing that rule on state courts.[16] Section V concludes that LARA should not be enacted, and if it is, the courts should find it an unconstitutional exercise of congressional power.[17]

II. A Proposed Response to the Perceived Problem of Frivolous Lawsuits

A. *The Perceived Problem of Frivolous Lawsuits*

Deep down in the judicial hellholes[18] of America, justice allegedly comes at a price. According to one interest group's calculations, a "tort tax" of $3,380 burns a hole in everyone's wallets because of frivolous litigation and other abuses of the civil litigation system.[19] Some claim that a "legal culture of fear has come to

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[14] *See* discussion *infra* Part II.

[15] *See* discussion *infra* Part III.

[16] *See* discussion *infra* Part IV.

[17] *See* discussion *infra* Part V.

[18] The phrase "judicial hellhole" was created by the American Tort Reform Association, an interest group comprised of more than three hundred businesses, corporations, municipalities, associations, and professional firms. ATRA, About ATRA, http://www.atra.org/about/ (last visited Oct. 16, 2006). ATRA supports an aggressive civil justice reform agenda that includes health care liability reform, class action reform, promotion of jury service, abolition of the rule of joint and several liability, abolition of the collateral source rule, limits on punitive damages, limits on noneconomic damages, production liability reform, appeal bond reform, sound science in the classroom, and stopping regulation through litigation. *Id.* There are any number of tort reform organizations with similar goals and interests. The purpose of this article is not to discuss the merits of tort reform arguments in general, but only to address those issues that the legislation at hand raises.

[19] Lawsuit Abuse Reform Coalition, Why It's Needed, How It Will Help, and Why It Has Broad Support, http://www.lawsuitabusereform.org/about/whitepaper.php (last visited Feb. 4, 2006). This "tort tax" supposedly stifles economic growth because it is a cost that is "added to the price of products and services needed to cover the costs of litigation." *Id.* In the *Washington Monthly*, Stephanie Mencimer described the history of the phrase "tort tax."

permeate American society."[20] Everyone, from churches to schools, doctors to small businesses, sports to playgrounds, and even the Girl Scouts are threatened by the fear of being sued.[21] Thus, American culture and values are at stake.[22]

Frivolous lawsuits allegedly "threaten to put business owners out of business."[23] There is a common belief that business and industry are spending too much money defending against frivolous lawsuits,[24] with small businesses bearing the brunt of the attack.[25] From the perspective of a small business, there are three certainties in life: death, taxes, and frivolous lawsuits. Their problem is apparently not the large verdicts, but the small settlements.[26] Lawsuits extract psychological costs that tax and drain the owner.[27]

One premise for changing the way the tort system works is that a "lawsuit lottery" has "caus[ed] doctors to stop practicing and forc[ed] many small businesses to eliminate jobs or even shut down."[28] Tort

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> It dates back to 1988, when Manhattan Institute fellow Peter Huber coined the term in his book, *Liability*, and claimed that the tort system cost Americans $300 billion a year. Three years later, the figure made its way into a speech given by Vice President Dan Quayle, who blamed lawyers for wrecking the economy. After the speech, several researchers examined the methods Huber had used to arrive at that figure. Huber, they found, had simply made it up. As *The Economist* observed in 1992, "the $300 billion figure has no discernible connection to reality."

Mencimer, *supra* note 1.

[20] H.R. REP. No. 108-682 (2004).

[21] *Id.*

[22] *Id.*

[23] HEARING, *supra* note 8 (statement of Rep. Smith, Member, House Comm. on the Judiciary), *available at* http://commdocs.house.gov/committees/judiciary/hju94364.000/hju94364_0f.htm.

[24] Lamar Smith, *Stopping Frivolous Litigation and Protecting Small Businesses*, (14 Wash. Legal Found. Legal Opinion Letter No. 19), Sep. 3, 2004, *available at* http://www.wlf.org/upload/090304LOLSmith.pdf. Part of the problem for businesses is the increase in costs for liability insurance. Adina Genn, *Liability Insurance Costs Choke Small Businesses*, LONG ISLAND BUS. NEWS, July 16, 2004.

[25] ATRA, New Coalition Formed to Help Stop Lawsuit Abuse, http://www.atra.org/show/7900 (statement of Lisa Rickard, President, U.S. Chamber of Commerce Institute for Legal Reform) ("Small business owners are footing the bill for America's litigation explosion to the tune of $88 billion annually.").

[26] HEARING, *supra* note 8, at 26 ("[o]nce the suit is settled, the small-business owner must pay with higher business insurance premiums"); *e.g.*, Sebok, *supra* note 1 (commenting that the problem with our tort system is that it is too expensive for deserving plaintiffs to sue and it forces "many blameless defendants [to] settle just so they can escape [its] expense and uncertainty.").

[27] HEARING, *supra* note 8, at 6.

[28] *Congress Passes Lawsuit Abuse Reduction Act of 2004*, 21 MED. MALPRACTICE L. & STRATEGY 12, at 1 (2004) (quoting Rep. Randy Neugebauer (R-TX)).

reformers see this as "legal extortion," because the "threat of costly and lengthy litigation forces businesses to settle frivolous claims that could potentially put them out of business."[29] The judicial hellholes or as wealthy personal injury lawyers supposedly call them, "magic jurisdictions," promise easy jackpot justice.[30] This causes "litigation tourism," where attorneys file claims in judicial hellholes instead of where the plaintiff lives or was hurt or where the defendant resides.[31] These judicial hellholes allegedly show a consistent bias against defendants,[32] especially those located out-of-state.[33] In the aggregate,

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[29] ATRA, New Coalition Formed to Help Stop Lawsuit Abuse, *supra* note 25, (statement of Tiger Joyce, Chairman, LARC and President, ATRA) ("While it costs the plaintiff only a little more than a small filing fee to begin a lawsuit, it costs much more for a small business to defend against it."). This seems to be an attack on the modern notice pleading system, which only requires a party to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2).

[30] *Id.* (statement of Victor E. Schwartz, General Counsel, ATRA). Judicial hellholes have also been called "magnet courts." Lawsuit Abuse Reform Coalition, Why It's Needed, How It Will Help, and Why It Has Broad Support, *supra* note 19.

[31] ATRA, New Coalition Formed to Help Stop Lawsuit Abuse, *supra* note 25.

[32] Pro-plaintiff groups have charged that tort-defendants improperly remove cases from state to federal court. Trevor Morrison, *Overlooked in the Tort Reform Debate: Abusive Litigation by Defendants*, (2004) http://writ.news.findlaw.com/commentary/20040812_morrison.html. Even if removal was wrong, the burden falls on the plaintiff (or the federal court) to challenge the removal after the fact. *Id.* Where the "defendant (typically a corporation) can easily pay the bill for its side of the litigation" related to contesting the removal, "the plaintiff (often an individual with a contingency-fee attorney) may be strapped for cash." *Id.* As the costs mount, the plaintiff may "opt for settling the case for a fraction of its full value, or even to abandon the case altogether." *Id.* Evidence shows that the number of diversity tort cases did not change, even when tort filings in state court declined, and that remand rates are increasing. *Id.* From Morrison's perspective, this means that wrongful removals are increasing. *Id.* The time and cost incurred in the detour from state court to federal court and back to state court "is a deadweight loss to the judicial system." Morrison, *supra.* Congress' passage of defendant-friendly tort reform legislation will make it easier to remove cases from state to federal court, thus increasing the opportunities for such abuse. *Id.* To reduce wrongful removal, Morrison suggests imposing mandatory fee-shifting for erroneous removal by making the current version of the federal removal statute, which permits fee-shifting within the court's discretion, mandatory or instituting a presumption in favor of fee-shifting. *Id.* He also suggests "more robust sanctions to be levied against defense counsel who engage in egregiously abusive removal" by creating a "more aggressive removal-specific protocol" in the shadow of Rule 11. *Id.* One unintended effect of LARA's mandatory sanctions would be to close off this defense strategy, because when sanctions were mandatory under the 1983 Rule, wrongful removal merited the awarding of sanctions against the party who improperly removed the case. *See* Ident Corp. of Am. v. Wendt, 638 F. Supp. 116, 118 (E.D. Mo. 1986).

[33] Lawsuit Abuse Reform Coalition, Backgrounder, http://www.lawsuitabuse reform.org/about/background.php (last visited Feb. 4, 2006). These out-of-state plaintiffs are drawn to these favorable jurisdictions, but they only burden these local courts. *Id.* LARC does not explain why local courts would not be hostile to only out-

these concerns give the perception that the civil justice system is dysfunctional and in need of change. This perception, whether accurate or not, can be the impetus for reform.[34] Reducing expense

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of-state defendants and not any out-of-state party.

Congress couches its support for applying Rule 11 to state court proceedings that substantially affect interstate commerce and imposing venue restrictions on all personal injury causes of action in *The Federalist*, where James Madison wrote:

> A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former.

H.R. REP. NO. 109-23, *supra* note 1, at 30, 35 (citing THE FEDERALIST No. 42, at 267-68 (Madison) (Clinton Rossiter ed., 1961)). According to Congress, "Madison foresaw the problem in which products or services would be made to cost more to consumers in one state because other states those products or services passed through would levy duties on them," *id.* at 30, and "because other states allowed the companies that manufactured those products or supplied those services to be sued in those other states even when the facts and circumstances of the lawsuit had no connection to those states," *id.* at 35. Some states, by allowing (a) frivolous lawsuits to be brought for unlimited damages in cases involving products and services that touch their jurisdiction, or (b) lawsuits to be brought in local jurisdictions even when the facts and circumstances of the case have no connection to such local jurisdictions, "are raising the costs of providing products and services to out-of-state customers, resulting in higher prices and lost jobs across multiple states or nationwide." *Id.* at 30, 35-36. This logic fails to account for other reasons why a business may find it more expensive to provide such products and services to out-of-state customers, such as higher costs of living and higher production costs. Further, it equates civil litigation with a state-imposed levy; such a connection appears tenuous, at best. Following Congress' logic, there should a national price for every product and service, since certain products and services, including gasoline, groceries, and entertainment, cost more in some places than in others. However, this discussion of the Commerce Clause should be tempered with Alexander Hamilton's allaying of Anti-Federalist fears of a national government usurping all matters, both local and federal, under general power.

> The *administration of private justice* between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, *can never be desirable cares of a general jurisdiction.* It is therefore improbable that there should exist a disposition in the federal councils to usurp the powers with which they are connected; because the attempt to exercise those powers would be as troublesome as it would be nugatory; and the possession of them, for that reason, would contribute nothing to the dignity, to the importance, or to the splendor of the national government.

THE FEDERALIST No. 17 (A. Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). Thus, it is uncertain whether the Founding Fathers intended Congress to control state court procedures simply because they may affect the national economy.

[34] Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 675 (1997). In the past, Congress has "[e]xpress[ed] doubt that the public perception of out-of-control

and delay is a consistent theme of litigation reform.[35]

The concept of federal tort reform is not new. Congress has previously enacted reform legislation that can be grouped together by similar characteristics.[36] The current stage fails to utilize the bargained-for exchanges that typified earlier periods of reform.[37] Previously, when Congress wanted to encourage private activity, it granted potential defendants partial immunity from tort liability.[38] In exchange for the loss of some common law rights against private parties, Congress provided offsetting legal benefits.[39] Today, Congress simply curtails private rights of action without providing a direct substitute or alternative legal remedy to claimants.[40] During this latest phase of federal tort reform, Congress attempted broad liability reforms while also providing specific liability exemptions

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litigation, particularly discovery abuse, had been alleviated by the various 'tinkerings' of the rulemakers," by changing the rules itself. *Id.* at 680.

[35] *Id.* at 676. Burbank and Silberman note that this is a "common rallying cry for civil justice reform world-wide." *Id.*

[36] Perry H. Apelbaum & Samara T. Ryder, *The Third Wave of Federal Tort Reform: Protecting the Public or Pushing the Constitutional Envelope?*, 8 CORNELL J.L. & PUB. POL'Y 591 (1999) (discussing the three phases of federal tort reform).

[37] *Id.* at 592-93. Apelbaum and Ryder classify federal tort reform (statutory law or proposals that preempt state tort law) according to three phases, with legislation in each phase having a similar purpose. *Id.* Congress' first reform efforts were the Employers' Liability Acts of 1906, Pub. L. No. 59-219, 34 Stat. 232 (codified at 45 U.S.C. §§ 50-60 (1906)) (repealed 1907), and Pub. L. No. 60-100, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60 (2000)). *Id.* at 592. Within this phase, the authors also include the Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901-945 (2000), which amended Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (1969). *Id.* at 594. The purpose of these statutes was to "alter state tort law applicable to common carriers and their employees by eliminating a number of common law defenses and substituting a comparative negligence standard." *Id.* at 592. This had the effect of expanding employers' liability. *Id.*

[38] Apelbaum & Ryder, *supra* note 36, at 592.

[39] *Id.* at 592, 601. This is characterized as the second phase of federal tort reform. *Id.* at 592. Within this wave, Congress passed several acts that were challenged as unconstitutional: Federal Drivers Act, Pub. L. No. 87-258, § 1, 75 Stat. 539 (codified as amended at 28 U.S.C. § 2679 (2000)); Price-Anderson Act and its various amendments, Pub. L. No. 85-256, 71 Stat. 576 (1957), Pub. L. No. 89-645, 80 Stat. 891 (1966), Pub. L. No. 94-197, 89 Stat. 1111-1115 (1975), and Pub. L. No. 100-408, 102 Stat. 1066 (1988) (codified as amended in scattered sections of 42 U.S.C. (2000)); Swine Flu Act, Pub. L. No. 94-380, 90 Stat. 1113 (codified at 42 U.S.C. § 247b (1976) (repealed 1978); Atomic Testing Liability Act, Pub. L. No. 101-510, 104 Stat. 1837 (codified at 42 U.S.C. § 2212 (2000)); and the Federal Employees' Liability Reform and Tort Compensation Act of 1988 ("Westfall Act"), Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended at 28 U.S.C. § 2679 (2000)). Apelbaum & Ryder, *supra* note 36, at 601-12. Several others have not been challenged. *Id.* at 601 n.69 (listing other federal tort reform statutes).

[40] *Id.* at 593.

through narrowly tailored laws.[41] Whether the threat came from class action lawsuits, mass tort claims, medical malpractice, or products liability, Congress was ready with a federal response.[42] With LARA, Congress is attempting to give "frivolous" lawsuits similar treatment.

B. *One Proposed Response: LARA*

With the support of numerous interest groups,[43] including the United States Chamber of Commerce,[44] Rep. Lamar Smith (R-TX) proposed a response to this economic threat: the Lawsuit Abuse

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[41] *Id.* at 612. These include the General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552-54 (1994) (codified at 49 U.S.C. § 40101(2000)); Bill Emerson Good Samaritan Food Donation Act, Pub. L. No. 104-210, 110 Stat. 3011 (1996) (codified at 42 U.S.C. § 1791 (2000)); Volunteer Protection Act of 1997, Pub. L. No. 105-19, 111 Stat. 218 (codified at 42 U.S.C. §§ 14501-05 (2000)) (protecting volunteers for nonprofit organizations); Section 161 of the Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, 111 Stat. 2570 (codified at 49 U.S.C. § 28103 (2000)); Biomaterials Access Assurance Act of 1998, Pub. L. No. 105-230, 112 Stat. 1519 (codified at 21 U.S.C. § 1601-06 (2000)); and Y2K Act, Pub. L. No. 106-37, 113 Stat. 6601 (1999) (codified at 15 U.S.C. §§ 6601-17 (2000)). Apelbaum & Ryder, *supra* note 36, at 612-27.

[42] *Id.* at 627-34 (discussing other federal tort reform proposals, including products liability, medical malpractice, and the tobacco settlement). Whether a federal cap on medical malpractice awards would succeed in quelling the "med mal crisis" is debateable. Adam D. Glassman, *The Imposition of Federal Caps in Medical Malpractice Liability Actions: Will They Cure the Current Crisis in Health Care?*, 37 AKRON L. REV. 417 (2004). In 1994, the American Law Institute (ALI) proposed a federal response to complex litigation, primarily focusing on mass torts, but this was never enacted. Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1, 9 (1999).

[43] Interest groups have become a major player in the fight over rules of procedure. Burbank I, *supra* note 4, at 1705.

> Over the last decade, a variety of powerful "repeat players" have sought, sometimes openly, to influence "court reform" efforts. By and large, that work has been done not by letters written to the Advisory Committee on Civil Rules, but rather by lobbying efforts directed towards legislatures and the public, by well-financed media campaigns, and by support for conferences and meetings to address and describe our "litigation crisis." However appealing might be the notion that writing the Rules of Civil Procedure . . . is a "neutral" task with diverse consequences on anonymous and interchangeable civil plaintiffs and defendants, that description is no longer available. "Tort reform," among other events of the last decade, has denied us the refuge of a comforting image.

Id. (citing Judith Resnick, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2219-20 (1980)).

[44] Dan Roberts & Edward Alden, *Corporate America hopes the clearer Republican mandate will ease the passage of favourable legislation in areas such as tort reform and healthcare. But it may not be a bonanza for every sector.*, FINANCIAL TIMES, Nov. 5, 2004, at 17.

Reduction Act ("LARA").[45] The American Tort Reform Association ("ATRA"), the author of an annual study of judicial hellholes, supported LARA's passage.[46] In the words of ATRA, "[t]his common-sense legislation would help put an end to personal injury lawyers gaming the civil justice system by filing frivolous lawsuits and forum shopping. These abuses are a threat to American businesses and their employees."[47] During the 108th Congress, LARA passed the House and was referred to the Senate, where it was read twice and referred to the Judiciary Committee.[48] However, the bill died when the Senate failed to take any action on it during the term; Rep. Smith then reintroduced it into the 109th Congress, where it passed the House and was again referred to the the Senate Judiciary Committee.[49] He intends to reintroduce it every session of Congress until it becomes law.[50]

In its final, amended version, LARA has eight sections that are designed to tighten the reins on attorneys who file "frivolous" lawsuits. These sections would impose six primary changes in the current practice of two procedural areas: Rule 11 and venue. First, LARA changes the mechanics and imposition of sanctions for violations of Rule 11. Second, LARA imposes Rule 11 on state courts hearing claims that affect interstate commerce. Third, LARA codifies where a plaintiff—in either federal or state court—may file a personal injury claim. Fourth, attorneys are subject to a three-strike provision. Fifth, LARA raises a rebuttable presumption that arguing a position that has lost three consecutive prior occasions violates Rule 11.

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[45] Lawsuit Abuse Reduction Act of 2004 (LARA), H.R. 4571, 108th Cong. § 2(1)(A) (2004).

[46] ATRA, New Coalition Formed to Help Stop Lawsuit Abuse, *supra* note 25. The Lawsuit Abuse Reform Coalition (LARC) comprises more than seventy business organizations, including ATRA, the National Association of Manufacturers (NAM), the National Association of Wholesaler-Distributors (NAW), the National Federation of Independent Business (NFIB), the National Restaurant Association (NRA), and the U.S. Chamber Institute for Legal Reform (ILR). *Id.*

[47] *Id.*

[48] http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h.r.04571.

[49] *Congress Passes Lawsuit Abuse Reduction Act of 2004*, 21 MED. MALPRACTICE L. & STRATEGY 12, at 1 (2004), *supra* note 28, at 1; Mark Hansen, *Is It Frivolous to Try Again?*, 4 A.B.A.J. E-REPORT 6 (2005).

[50] David L. Hudson, Jr., *"Frivolous Suit" Bill Returns*, 5 A.B.A.J. E-REPORT 4 (2006), http://www.abanet.org/journal/ereport/j27tort.html (statement of Beth Frigola, Press Secretary, Rep. Smith); Lawsuit Abuse Reduction Act of 2005 (LARA), H.R. 420, 109th Cong. (2005). The reintroduced version of LARA did not contain the three-strike provision for attorneys contained in its predecessor. H.R. 4571, *supra* note 45. The three-strike provision made its way back into LARA as an amendment introduced during committee sessions. *See* H.R. REP. NO. 109-123, *supra* note 1, at 40. See *infra* Appendix for the complete text of the bill.

Finally, intentional destruction of documents raises the possibility of enhanced sanctions.This article will focus primarily on the first three changes.

1. Minor (But Important) Changes to Sanctions under Rule 11

LARA amends the text of Rule 11[51] to its pre-1993 version,

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[51] Presently, Rule 11 reads as follows:

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,–

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the

bringing back mandatory sanctions. It eliminates the court's discretion to impose sanctions[52] and the twenty-one day "safe harbor" provision that allows attorneys to withdraw their motions without fear of sanctions.[53] Further, LARA requires Rule 11 sanctions to "be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and to compensate the parties that were injured by such conduct."[54] Additionally, by deleting subsection (d)

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court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

FED. R. CIV. P. 11 (2004).

[52] LARA § 2(1)(A).

[53] *Id.* at § 2(1)(B).

[54] *Id.* at § 2(1)(C). "The sanction may consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney's fee." *Id.* Presently, the possibility of a party being assessed monetary damages, including the payment of attorney's fees, is limited by several discretionary layers. *See* FED. R. CIV. P. 11(c)(2). There are two general levels of discretion. First, any sanctions imposed under Rule 11 are "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." *Id.* Second, the court has the option of imposing either

of the present Rule 11,[55] these sanctions would now apply to the discovery process.[56] Furthermore, in any federal or state court proceeding that substantially affects interstate commerce, anyone who

> [I]nfluences, obstructs, or impeded, or endeavors to influence, obstruct, or impede, a pending court proceeding through the

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nonmentary or monetary sanctions on a party. *Id.* Monetary sanctions are not available after a voluntary dismissal or settlement of the offending claims. *See* FED. R. CIV. P. 11(c)(2)(B) (2005).

[55] Rule 11(d) says:

> Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

FED. R. CIV. P. 11(d) (2005).

[56] LARA § 2(2). If enacted, subdivision (c) of Rule 11 would read as follows:

> (c) Sanctions.
>
> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the attorney, law firm, or parties that have violated this subdivision or are responsible for the violation, an appropriate sanction, which may include an order to the other party or parties to pay for the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper, that is the subject of the violation, including a reasonable attorney's fee.
>
> (1) How Initiated.
>
> (A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5. If warranted, the court shall award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.
>
> (B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.
>
> (2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and to compensate the parties that were injured by such conduct. The sanction may consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney's fee.
>
> (3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

FED. R. CIV. P. 11 (if H.R. 420, 109th Cong., enacted).

> intentional destruction of documents sought in, and highly relevant to, that proceeding (1) shall be punished with mandatory civil sanctions of a degree commensurate with the civil sanctions available under Rule 11 of the Federal Rules of Civil Procedure, in addition to any other civil sanctions that otherwise apply; and (2) shall be held in contempt of court and, if an attorney, referred to one or more appropriate State bar associations for disciplinary proceedings.[57]

Any attorney violating Rule 11 three or more times in one federal district court will be suspended from the practice of law in that district court for one year and for any additional period the court considers appropriate.[58] By its express language, this provision applies only to the federal courts.

Further, a rebuttable presumption of a Rule 11 violation arises "[w]henever a party attempts to litigate, in any forum, an issue that the party has already litigated and lost on the merits on [three] consecutive prior occasions."[59] This provision is silent as to the forums in which it is to apply. The absence of a jurisdictional reference to the federal district courts, unlike the three-strike provision, indicates that Congress intends this provision to apply to federal *and* state courts.

To attack the heart of the perceived problem in the judicial hellholes of the state courts,[60] section 3 of LARA makes Rule 11—with its new mandatory sanctions—applicable to "any civil action in State court" that "substantially affects interstate commerce."[61] LARA states it "shall [not] be construed to bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law."[62]

2. Mandatory—and Universal—Venue Rules

Congress has always established the framework for venue in the

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[57] LARA § 8(a).

[58] *Id.* at § 6(a). Unlike the mandatory imposition of sanctions for a Rule 11 violation, an attorney would have the right to appeal this suspension. *Id.* at § 6(b).

[59] *Id.* § 7.

[60] AMERICAN TORT REFORM ASSOCIATION, BRINGING JUSTICE TO JUDICIAL HELLHOLES 6 (2005), http://www.atra.org/reports/hellholes/2005/report.pdf.

[61] LARA § 3. The state court would be required to "determine within 30 days after the filing of such motion whether the action substantially affects interstate commerce . . . based on an assessment of the costs to the interstate economy, including the loss of jobs, were the relief requested granted." *Id.*

[62] *Id.* at § 5.

federal courts,[63] but LARA is the first attempt to legislate venue in state courts.

In contrast to LARA's Rule 11 provisions, section 4 of LARA attacks forum-shopping with a "national solution" that limits the venue in which a plaintiff may bring an action.[64] Presently, 28 U.S.C. §1391,[65] which was last rewritten in 1990 with minor changes in 1992 and 1995,[66] governs venue in the federal courts. LARA does not state whether its section four would replace § 1391 or merely supplement it. Under LARA,

> [A] personal injury claim filed in State or Federal court may be filed only in the State and, within that State, in the county (or Federal district) in which

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[63] 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE, JURISDICTION AND RELATED MATTERS § 3802 (2d ed. 1982) [hereinafter WRIGHT & MILLER].

[64] Lawsuit Abuse Reform Coalition, Why It's Needed, How It Will Help, and Why It Has Broad Support, *supra* note 19.

[65] 28 U.S.C. §1391 provides

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.
>
> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.
>
> (c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

Id.

[66] WRIGHT & MILLER, *supra* note 63, at § 38021.

> (1) the person bringing the claim . . .
> (A) resides at the time of filing; or
> (B) resided at the time of the alleged injury;
> (2) the alleged injury or circumstances giving rise to the personal injury claim allegedly occurred;
> (3) the defendant's principal place of business is located . . .[67]

LARA addresses the possibility that an injury or circumstance giving rise to a claim may occur in more than one county or federal district. In that case, "the trial court shall determine which State and county (or Federal district) is the most appropriate forum for the claim. If the court determines that another forum would be the most appropriate forum for a claim, the court shall dismiss the claim."[68] Class actions are not subject to this rule.[69]

III. Congressional Imposition of LARA's Procedural Requirements on State Courts Engulfs the Concept of Federalism

Congress has the authority to enact rules and procedures for the federal courts.[70] Leaving the prudential question of whether

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[67] LARA § 4(a). The section also incorporates a *forum non conveniens* provision that requires the trial court to dismiss the claim if it "determines that another forum would be the most appropriate forum for [the] claim . . ." *Id.* at § 4(b). Combining the two concepts is integral to the tort reform platform of "ensur[ing] that the cases are heard in a court that has a logical connection to the claim, rather than a court that will produce the highest award for the plaintiff." American Tort Reform Association, Forum and Venue Reform, http://www.atra.org/issues/index.php ?issue=7356 (last visited Feb. 4, 2006).

[68] LARA § 4(b). The statute of limitations would toll from the date the claim was filed to the date it was dismissed under § 4. *Id.*

[69] *Id.* at § 4(c)(1)(B). However, all class actions are now subject to federal regulation under the Class Action Fairness Act of 2005 [hereinafter CAFA]. *See* CAFA, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. § 1332 (2005)) (as referred to Senate Judiciary Committee after being received from the House). CAFA would create original jurisdiction in the federal district courts for certain types of class actions. CAFA § 4(a). For a discussion of CAFA's provisions, see *The Class Action Fairness Act of 2005*, S. Rep. No. 109-014 (2005) [hereinafter SENATE REPORT].

[70] This authority derives from Articles I and III of the U.S. Constitution. Article I grants Congress the authority to "constitute tribunals inferior to the Supreme Court," U.S. CONST. art. I, § 8, cl. 9, and to enact all laws "necessary and proper" to execute its constitutional powers, U.S. CONST. art. I, § 8, cl. 18. *See e.g.*, Willy v. Coastal Corp., 503 U.S. 131, 136-37 (1992); Hanna v. Plumer, 380 U.S. 460, 472 (1965); Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941); Bank of United States v. Halstead, 23 U.S. (10 Wheat.) 51, 53-65 (1825); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 21-22 (1825). Congress has delegated authority to prescribe general rules of practice and procedure to the Supreme Court through the Rules Enabling Act. *See* 28 U.S.C. § 2072(a) (2000).

Congress should amend Rule 11 until Section IV, this section will instead focus on whether Congress may impose LARA's Rule 11 and venue provisions on the state courts when those courts are not enforcing federal rights or deciding federal causes of action.[71] Accepting for argument's sake that the Commerce Clause would permit Congress to enact legislation that regulates all other lawsuits filed in state courts,[72] the article still concludes that the Tenth Amendment prevents Congress from legislating for the state courts.

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[71] *See e.g.*, Pierce County v. Guillen, 537 U.S. 129 (2003). The Supreme Court heard a similar case where, in causes of action based solely on state law, Congress was regulating the admissibility of certain transportation studies that were created by local governments to satisfy conditions imposed on their receipt of federal highway funding. *Id.* at 133. The Washington Supreme Court held that this federal statutory privilege exceeded Congress' powers under both the Commerce and Spending clauses. Pierce County v. Guillen, 31 P.3d 628, 656 (Wash. 2001). The United States Supreme Court never discussed the spending power issue because it found the statute to be a valid exercise of Congress' commerce power. *Guillen*, 537 U.S. at 147-48 n.9. The Court reasoned as follows. Since Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," this statute "can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce." *Id.* at 147. The main objection to this reasoning is that the statute—on its face—regulates state court procedure and not the channels or instrumentalities of interstate commerce. Lynn A. Baker, *Lochner's Legacy for Modern Federalism: Pierce County v. Guillen as a Case Study*, 85 B.U.L. REV. 727, 736 (2005). By distinguishing "between *what* is being regulated and what such regulation *is for*," it is clear that the statute "did not regulate instrumentalities or channels, in the sense that these are not the things upon which the statute operated." *Id.* Thus, the Court never addressed the "substantially affects" prong. The *Guillen* holding relied on an implicit assumption that *Lopez* can be read as permitting Congress to "regulate things *other than* instrumentalities or channels in order to protect instrumentalities or channels." *Id.* at 737 n.67. However, "neither *Lopez* itself nor the precedents upon which it relies . . . remotely establish that Congress is authorized under the Commerce Clause to regulate just anything for the purpose (or with the "aim") of protecting the channels or instrumentalities of interstate commerce." Mitchell N. Berman, *Guillen and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487, 1503 (2004). Where

> *Lopez* and *Morrison* establish that when Congress regulates intrastate activities with the aim or purpose of somehow affecting (as by increasing) interstate commerce, whether such activities are economic in character and whether the regulation intrudes upon traditional areas of state sovereignty are considerations of central, perhaps decisive, significance. But the apparent lesson of *Guillen* is that when Congress's regulation of intrastate activities is aimed at protecting the channels or instrumentalities of interstate commerce, those two factors are of no moment whatsoever.

Id. at 1504. This issue has no impact on LARA's constitutionality because Congress is not trying to protecting the channels or instrumentalities of interstate commerce.

[72] For purposes of this section, a civil proceeding in a state court does not include these federally-created causes of action.

Perhaps the proposition that states have the power to control their own court procedures is so fundamental to the concept of federalism, it is difficult to identify its proper legal basis.[73] The Supreme Court has recently noted, "[t]he States thus have great latitude to establish the structure and jurisdiction of their own courts."[74] Federal regulation of state civil proceedings in state courts appears to threaten state sovereignty for no other reason than "Congress does not have the power to do so."[75] This section will address this unresolved question by examining the limitations placed on Congress by the Tenth Amendment. These limits show the venue and Rule 11 provisions—with respect to the state courts—are an invalid exercise of congressional power.

A. *The Tenth Amendment Limits Valid Exercises of Congressional Power under Article I*

Our system of government operates under a system of dual sovereignty that was created by the Constitution.[76] The states have surrendered many of their powers to the federal government, but retain "a residuary and inviolable sovereignty."[77] The Tenth

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[73] *See* Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 951 (2001) [hereinafter Bellia]; Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 BYU L. REV 731, 731 (1995) ("[w]e really have no clear idea about what the power of Congress is over the jurisdiction of courts").

[74] Johnson v. Fankell, 520 U.S. 911, 919 (1997).

[75] Bellia, *supra* note 73, at 951 n.14, 973 (collecting commentary on the subject). *E.g.*, Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 294 ("but limitations enacted by Congress to govern non-federal civil proceedings in non-federal courts would be unsustainable as not being appropriately substantive under Article I or appropriately procedural under Article III"); Joan Steinman, *Reverse Removal*, 78 IOWA L. REV. 1029, 1114 (1993) ("legislature of a sovereign state is free to regulate the procedures of the state courts as it sees fit," within the limits of the Due Process Clause). For those scholars who have questioned Congress' power to regulate state court litigation of state claims, see Apelbaum & Ryder, *supra* note 36, at 656; Parmet, *supra* note 42; Margaret G. Stewart, *Federalism and Supremacy: Control of State Judicial Decision-Making*, 68 CHI.-KENT L. REV. 431 (1992).

[76] Printz v. United States, 521 U.S. 898, 918 (1997) (citing Gregory v. Ashcroft, 501 U.S. 452, 457 (1991); Tafflin v. Levitt, 493 U.S. 455, 458 (1990)).

[77] *Printz*, 521 U.S. at 918-19 (citing THE FEDERALIST No. 39, at 245 (J. Madison) (Clinton Rossiter ed., 1961)). The text of the Constitution reflects this concept of dual sovereignty. *Id.* at 919 (mentioning several examples). One of the reasons for this duality was that the "Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict." *Id.* at 919. Thus, they "rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments

Amendment explicitly preserves a state's exclusive authority over both legislative enactment and executive enforcement of the law.[78] The Supreme Court has used this amendment to scrutinize federal regulations that were otherwise proper exercises of Congress' commerce power under Article I.[79] In both *New York v. United States*[80]

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would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'" *Id.* at 919-20 (citing THE FEDERALIST No. 15, at 109 (A. Hamilton) (Clinton Rossiter ed., 1961). As a result, the Constitution grants "Congress the power to regulate individuals, not States." *Id.* at 920.

[78] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend X. For a discussion of the history of Tenth Amendment jurisprudence, and how the current constitutional interpretation of the enforcement of federalist principles has discarded the Ninth Amendment from the equation, *see* Kurt T. Lash, *James Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment*, Loyola-L.A. Legal Studies Paper No. 2005-30 (Nov. 2005), *available at* http://ssrn.com/abstract=849665.

[79] Bellia, *supra* note 73, at 970-71. Besides the examples cited by Justice Scalia in the *Printz* majority opinion, this residual state sovereignty was implied by "the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones." *Printz*, 521 U.S. at 919. The text of the Tenth Amendment expresses this implication. *Id.*

[80] 505 U.S. 144 (1992). At issue in *New York* were three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240, 99 Stat. 1842 (codified at 42 U.S.C. § 2021). The Court found two of the provisions constitutional. *New York*, 505 U.S. at 149. These two provisions gave states monetary and access incentives to encourage them to comply with their statutory obligation to provide for the disposal of waste generated within their borders. *Id.* at 152-53. It ruled that the third, the take-title provision, was unconstitutional. *Id.* at 177. The take-title provision offered the states a so-called incentive, that is, an option of taking title to and possession of the low level radioactive waste that was generated within its borders and thereby becoming liable for all the damages that waste generators would suffer because "of the states' failure to do so promptly." *Id.* at 174-75. This "incentive" was the only alternative for those states that refused the monetary and access incentives that Congress provided if a state complied with Congress' regulations by adopting the federal standards. *Id.* at 174. Thus, the states could either begrudgingly regulate the radioactive waste according to the instructions of Congress, or they could be stuck with ownership of and liability for the radioactive waste created within its borders. The Court felt that this was no choice. *Id.* at 175-77 ("No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress"). If the take-title provision was considered as a separate, freestanding option, Congress could not constitutionally impose either option on its own. *New York*, 505 U.S. at 175. Congress could not simply "transfer radioactive waste from generators to state governments," which the Court viewed as nothing more than a "congressionally compelled subsidy from state governments to radioactive waste producers." *Id.* Neither could Congress require the states to incur liability to the generators for their damages, which would akin to "Congress directing the States to assume the liabilities of certain state residents." *Id.* Both of these "options" commandeered the "state governments into the service of federal regulatory purposes." *Id.* But if a state chose not to take title of the waste and assume liability, then its only other option was to

and *Printz v. United States*,[81] the Court invalidated federal statutes that offended the principles of federalism in the Tenth Amendment, even though the statutes were constitutional under Congress' Article I powers.[82] Conceptually, the Court examines legislation under Article I and the Tenth Amendment similarly because the inquiries are "mirror images of each other."[83] As the Court explained in *New York*, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."[84] The Court no longer decides what is an "attribute of state sovereignty" as a basis for allowing a state to shield

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regulate pursuant to Congress' direction, and this would simply be Congress commanding the states to implement legislation that it enacted. *Id.* at 175-76. The Constitution does not allow Congress to do this. *Id.* at 176.

[81] 521 U.S. 898 (1997). In *Printz*, the Court was asked "whether certain interim provisions of the Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536, commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks, violate the Constitution." *Id.* at 902. The Brady Act required regulated firearms dealers to forward a Brady Form (statement from a firearms buyer that contains the buyer's name, address, and date of birth, along with a sworn statement that the buyer is not a prohibited purchaser) to the "chief law enforcement officer" (CLEO) of the buyer's residence. *Id.* at 902-04. The CLEOs must then make "reasonable efforts" within five days to determine "whether the sales reflected in the" Brady Form are lawful. *Id.* at 904. They may grant a waiver of the federally-prescribed five-day waiting period for handgun purchases if they notify the gun dealer that they have no reason to believe that the transaction would be illegal. *Id.* at 904-05. In striking down these provisions, the Court held that the Government could not support the commandeering of state executives based on historical understanding and practice, the structure of the Constitution, or the Court's jurisprudence. *Id.* at 905.

[82] Reno v. Condon, 528 U.S. 141, 149 (2000) ("In *New York* and *Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment."). The activities regulated in those cases—background checks on prospective handgun purchasers in *Printz* and the disposal of radioactive waste in *New York*—were valid as federal regulation of intrastate economic activities that substantially affected interstate commerce. Bellia, *supra* note 73, at 970. However, Congress employed an unconstitutional means for regulating those activities. *Id.* at 970-71.

[83] Bellia, *supra* note 73, at 970 n.138. *But see* Baker, *supra* note 71, at 738 (analyzing Justice Thomas' opinion in *Guillen* as implying that the Commerce Clause and Tenth Amendment inquiries are independent of each other) (citing *Guillen*, 537 U.S. at 148 n.10).

[84] *New York*, 505 U.S. at 156. In *New York*, the Court said that "[w]hether one views the take-title provision as lying outside Congress' enumerated powers or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution." *Id.* at 177.

itself from federal regulation.[85] Instead, the relevant focus is on whether Congress "is regulating individuals or the states' regulation of individuals."[86] LARA's passage would present the courts with an opportunity to wrestle with the applicability of the Tenth Amendment to the state courts and to answer the unresolved question of "whether, and the extent to which, a state has exclusive authority over judicial enforcement of the law."[87]

There are fair comparisons between LARA and the take-title provision at issue in *New York*. Like *New York*, Congress would use the state courts as the implements of its federal regulations.[88] Unlike *New York*, where Congress at least gave the states a choice between two (albeit unconstitutional) options, LARA offers the states no such choice. Without giving the states an opportunity to avoid federal regulation, Congress would force the states to apply LARA's provisions.[89] If Congress believes that tort reform—in the form of mandatory sanctions for Rule 11 violations and stricter venue requirements—is a sufficiently strong federal interest to justify congressional legislation, then it must regulate the matter directly by preempting the contrary state regulations. Congress may not stealthily conscript the state courts as its agents.[90]

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[85] To answer what was an attribute of state sovereignty, the Court relied on the nebulous concept of "traditional governmental functions," which was first proposed in *Nat'l League of Cities v. Usery*. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). The *New York* Court acknowledged the departure from this approach, which it described as follows:

> [I]n determining whether the Tenth Amendment limits the ability of Congress to subject state governments to generally applicable laws, the Court *has* in some cases stated that it will evaluate the strength of federal interests in light of the degree to which such laws would prevent the State from functioning as a sovereign; that is, the extent to which such generally applicable laws would impede a state government's responsibility to represent and be accountable to the citizens of the State.

New York, 505 U.S. at 177.

[86] Bellia, *supra* note 73, at 971 n.139.

[87] *Id.* at 971.

[88] *E.g.*, *New York*, 505 U.S. at 161 ("[t]his litigation instead concerns the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way").

[89] *E.g.*, *id.* at 162 ("While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.").

[90] *E.g.*, *id.* at 178 ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate."). While LARA does not require the state legislatures to affirmatively

With LARA, Congress is neither preempting a state tort cause of action[91] nor federalizing an area of substantive law by creating exclusive federal court jurisdiction under its enumerated powers.[92] Nor is Congress creating concurrent jurisdiction in the federal and state courts over a federal right.[93] Instead, Congress attempts to impose general procedural requirements on the state courts in their administration of justice, in both personal injury actions (through the venue requirements of section 4 of LARA) and in civil actions that affect interstate commerce (through LARA's Rule 11 provisions), neither of which form a part of any underlying federal right. The primary cost of this legislation would be borne by the states and not the federal government.[94] Nevertheless, this legislation would bring

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change their civil rules of procedure and venue requirements, it bypasses the state legislature and simply imposes Congress' will on the state courts. This is similar to the sheriff in *Printz* because LARA conscripts state officials (judges) into carrying out federal policy when the Supremacy Clause does not require it to do so.

[91] *E.g.*, Geier v. American Honda Motor Co., 529 U.S. 861, 886 (2000) (finding plaintiff's claim that her car was defective because it lacked a driver's side air bag was preempted); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 530-31 (1992) (holding that federal law preempted certain, but not all, state failure-to-warn claims arising out of the sale of cigarettes).

[92] *See* David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 589-99 (2004) (discussing the congressional power to regulate state court procedures by federal substantive rights and preemption). The Supremacy Clause permits Congress to preempt state law by occupying an entire field of regulation, such as railroad workers through the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (2000). Schwartz, *supra*, at 589-99.

[93] Congress may not supplant state procedures in the state court when that court is hearing a civil action to enforce a federal right. Howlett v. Rose, 496 U.S. 356, 369-72 (1990). However, certain state procedures are preempted if they "defeat" the assertion of federal rights. Brown v. W. Ry. of Alabama, 338 U.S. 294 (1949).

This section will not discuss the well-known exceptions to the rule that "federal law takes the state courts as it finds them." Felder v. Casey, 487 U.S. 131, 150 (1988) (citing *Brown*, 338 U.S. at 298-99). The caveat to this general rule is that it applies "only insofar as those courts employ rules that do not 'impose unnecessary burdens upon rights of recovery authorized by federal laws." *Id.* It is worth noting that LARA, like the Y2K Act, 15 U.S.C. §§ 6601-6617 (1999), before it, is the obverse of *Felder*. Bellia, *supra* note 73, at 962. While *Felder* prevented a state court from enforcing a state notice-of-claim statute in adjudicating a federal § 1983 claim, the Y2K Act—and, by comparison, LARA—"provides that state courts must enforce a federal notice-of-claim requirement and other procedures in adjudicating certain state-created claims." *Id.*

[94] H.R. REP. No. 109-123, *supra* note 1, at 28. LARA "contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) because it would preempt certain State laws governing court procedures." *Id.* The Congressional Budget Office estimated "that the cost of complying with that mandate would be minimal and well below the threshold established in that act ($62 million in 2005, adjusted annually for inflation). The bill contains no new private-sector mandates." *Id.* But it does impose new private-sector costs that will be borne by plaintiffs and defendants, as well as the state courts who have to conduct hearings

an important, unsettled issue of constitutional law to the Supreme Court: May Congress regulate the procedures by which states enforce rights of action that the states created?[95]

Adjudication of state claims by the individual states is a traditional area of state sovereignty.[96] While the federal government is not powerless to regulate areas normally left to the states,[97] state

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that they would not have otherwise had to conduct.

[95] Bellia, *supra* note 73, at 951. This is not the first time that Congress has proposed or enacted laws that regulate state court procedures. *Id.* at 950-51 (noting the Y2K Act, 15 U.S.C. §§ 6601-6617, and Universal Tobacco Settlement Act, S. 1415, 105th Cong. (1997)).

[96] *Felder*, 487 U.S. at 138 ("No one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts."). It is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion." Patterson v. New York, 432 U.S. 197, 201 (1977) (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)). A state "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[97] *See* United States v. Oregon, 366 U.S. 643 (1961). In *Oregon*, the Supreme Court upheld a federal statute that provided that "when a veteran dies without a will or legal heirs in a veterans' hospital, his personal property 'shall immediately vest in and become the property of the United States as trustee for the sole benefit of the General Post Fund' . . . . " *Id.* at 644; 38 U.S.C. § 17 (1952). "Although it is true that this is an area normally left to the States, it is not immune under the Tenth Amendment from laws passed by the Federal Government which are, as is the law here, necessary and proper to the exercise of a delegated power." *Oregon*, 366 U.S. at 649. Justice Douglas dissented, stating that "the Supremacy Clause is not without limits. For a federal law to have supremacy it must be made 'in pursuance' of the Constitution. The Court, of course, recognizes this; and it justifies this federal law governing devolution of property under the Necessary and Proper Clause of Art. I, § 8." *Id.* at 651 (Douglas, J., dissenting). He further challenged the use of the Necessary and Proper Clause, warning against its expansive construction:

> We stated that it is "not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out" the powers specifically granted. Powers not given "were reserved," as Madison said. And "no powers were given beyond those enumerated in the Constitution, and such as were fairly incident to them."

Id. at 653 (citations omitted). Douglas' concerns reappeared over forty years later in *Raich*. For an illustration of the differing opinions on the role of the Necessary and Proper Clause of Justices Scalia, O'Connor, and Thomas. *Raich*, 125 S.Ct. at 2215-20 (Scalia, J., concurring), 1220-29 (O'Connor, J., dissenting), and 2229-39 (Thomas, J., dissenting). *See also* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 185 (2003) (providing a discussion of the historical—and competing—understandings of the "necessary" and "proper" parts of the Clause from Chief Justice Marshall to James Madison, and concluding that the meaning that one attributes to those terms impacts how one views the nature and scope of judicial review). That does not mean to say that Justice Douglas would have disagreed with the majority in *Raich*. He noted that the "Tenth Amendment does not, of course, dilute any power delegated to the national government . . . . But when the Federal

court procedures should be treated differently. Over twenty years ago, "[t]he Court reaffirmed the 'general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts,' but also emphasized that a local practice cannot be employed to defeat a federal right."[98] When state courts adjudicate federal claims over which they have jurisdiction, they must apply federal procedural rules that are "part and parcel" of a federal claim.[99] In that circumstance, the strong presumption that federal procedures should be used when a state court is hearing a federal cause of action should prevail.

[I]t is arguable that the burden imposed on the state court to employ federal procedures should not be as unrelenting when the federal issue arises in the course of the adjudication of a state cause of action. In such cases, the state possesses a competing and countervailing interest in achieving enforcement of its own substantive policies through use of its own procedures. To be sure, in light of the principle of federal dominance, where Congress expressly directs state courts to adhere to federal procedures where issues of federal law arise or where use of state procedures could seriously disrupt proper enforcement of substantive federal law, federal procedures should necessarily prevail. However, absent one or both of these circumstances, it would seem reasonable to allow a state court to employ its own procedures in the adjudication of its own causes of action.[100]

With LARA, Congress is not creating concurrent jurisdiction in state and federal courts over issues of federal law. Rather, it prescribes procedures for how state courts hear state causes of action. Nor do the state procedures that Congress wants to change disrupt the enforcement of a substantive federal law or an underlying federal right.[101] Therefore, it is more than reasonable, and constitutionally

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Government enters a field as historically local as the administration of decedents' estates, some *clear relation of the asserted power to one of the delegated powers* should be shown." *Oregon*, 366 U.S. at 654 (Douglas, J., dissenting) (emphasis added). However, he stated that there are times when "the exercise of a delegated power reaches deep into local problems," such as using "the commerce power to extend to home-grown and home-used wheat, because total control was essential for effective control of the interstate wheat market." *Id.* (citing *Wickard*, 317 U.S. at 111).

[98] Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 107 (1998) (quoting *Felder*, 487 U.S. at 138).

[99] Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952).

[100] Redish & Sklaver, *supra* note 98, at 105 n.180.

[101] There are times when state courts must follow federal procedures in enforcing federal claims, and the rationale for federal regulation of state court procedure in

commanded, to allow states to use their own procedures to decide their own causes of action.[102]

Justice O'Connor explained what impact the source of the right, either state or federal, has on the determination of which rules of procedure apply when a court hears that right: "It is settled that a state court must honor federally created rights and that it may not unreasonably undermine them by invoking contrary local procedure . . . But absent specific direction from Congress the state courts have always been permitted to apply their own reasonable procedures in enforcing federal rights."[103] Such a conclusion is firmly rooted in the basic values of federalism that underpin the concept of dual sovereignty.

LARA defies the values of federalism.[104] It does not promote political accountability, or self-determination,[105] because public disapproval of LARA, if any, will be directed at state officials, who are powerless to change the federal law that imposed these changes.[106]

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federal cases is quite clear: "that federal procedures may constitute part of a federal substantive right and that certain state procedures may impermissibly burden a federal substantive right." Bellia, *supra* note 73, at 962.

[102] *Id.* at 989 ("If Congress has no authority to prescribe general procedures for states to follow in adjudicating federal claims (viz., procedures not part of the substance of any particular federal claim), a fortiori Congress has no authority to prescribe procedures for states to follow in adjudicating state law claims.").

[103] Southland Corp. v. Keating, 465 U.S. 1, 31 (1984) (O'Connor, J., dissenting).

[104] *See* Bellia, *supra* note 73, at 997-1001 (discussing and critiquing the values traditionally offered in favor of federalism with respect to federal control of state court regulations); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1074-81 (1995) (discussing the traditional values of federalism); George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332, 339-43 (1994) (discussing the normative values of subsidiarity).

[105] Bermann, *supra* note 104, at 340 ("Individuals are generally thought to have a greater opportunity to shape the rules governing their personal and business affairs when those rules are made at levels of government at which they are more effectively represented.").

[106] Bellia, *supra* note 73, at 997. One of the reasons the Court in *New York* rejected the concept of legislative commandeering was that "if the decision turns out to be detrimental or unpopular . . . it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *New York*, 505 U.S. at 168-69. Bellia discusses the situation where "a state creates a right of action enforceable through attendant part and parcel procedures, and Congress changes only the attendant procedures." Bellia, *supra* note 73, at 997. Bellia contends that "neither government will be accountable for the resulting right of action because neither government created it." *Id.* at 997-98. With respect to the Y2K Act, which increased the level of proof necessary to recover punitive damages, Bellia asks, "[w]hich government should unhappy customers blame because it now is more difficult to recover punitive damages in Y2K actions? The state is not to blame,

Nor does it enable people to personally participate in the democratic process at the local level.[107] While federalism promotes policy diversification and decentralization,[108] as well as flexibility,[109] LARA restricts these values by imposing a "one-size-fits-all" rule that all jurisdictions must follow.

B. *Procedural v. Substantive Dichotomy*

The question of Congress' power over state courts hearing state-created causes of action is unanswered in the courts. The Supremacy Clause requires state judges to hear federal causes of action within their jurisdiction,[110] because the "supreme Law of the Land" must be

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for the state has assigned the plaintiff an easier burden of proof. Congress is not to blame, for the state could have eased the required elements for recovery." *Id.* LARA does not go as far as the Y2K Act, but it does change the rules for where a civil action may be filed and the standard for the filing of certain other actions. Outside of the legal community, these may be less-noticed changes, neutralizing the political accountability argument against LARA.

[107] Bellia, *supra* note 73, at 998. Depending on the rules already in place in a state, LARA may have varying degrees of impact. For example, if a state has a version of Rule 11 that is not based on the standards in Rule 11, then the effect will be greater or lesser, depending on whether the state standard was more or less stringent than the federal standard. *See* Bermann, *supra* note 104, at 342 (subsidiarity tends to preserve the formal, internal allocations of power within the component states).

[108] Bellia, *supra* note 73, at 999; Bermann, *supra* note 104, at 341-42 (subsidiarity fosters diversity within the larger polity, and this is conducive to social, cultural and political experimentation). State court procedures should be protected because these procedures allow a state to maintain a policy in the first place. Bellia, *supra* note 73, at 999-1000. Since a state's procedural laws are generally adapted to enforce the substantive rights that the state has created, if Congress changes these procedures, then "a state may find that it does not in fact maintain a policy that it thought it maintained because a procedural rule that formed part of the substance of the right is no more." *Id.* at 1000. Whatever the reasons Congress may have for preempting substantive state law, those reasons are not so apparent when Congress is preempting state procedures, and this makes the consequences of such a substantive policy not at all apparent. *Id.* While "stealth preemption" may not end local experiments for the benefit of the national interest, it does "silently contaminate[]" them. *Id.*

[109] Bermann, *supra* note 104, at 341 ([S]ubsidiarity "enable[s] the community to respond appropriately to the changes of circumstances that occur within it from time to time. By enhancing the law's responsiveness to the population it serves, subsidiarity affords a flexibility that advances democracy at the same time as it produces good government.").

[110] Testa v. Katt, 330 U.S. 386 (1947). *Cf.* Redish & Sklaver, *supra* note 98, at 72 ("[A] fact that has often gone unnoticed, however, is that the Court in *Testa* never actually grounded such a congressional power within the terms of a specific constitutional grant of authority. Rather, it merely assumed the existence of such a power, and proceeded to focus exclusively on the nature of a state court's constitutional obligation once Congress chooses to exercise its unexplained

enforceable in every state.[111] But LARA does not create a federal right or cause of action that the state courts must recognize; rather, it "dictate[s] directly to state courts how they must decide cases."[112] "A state court is not 'to be treated as a Federal court deriving its authority not from the State creating it, but from the United States.'"[113] Deciding where a case may be heard and how frivolous filings by litigants should be sanctioned are clearly procedural issues that the states should have the power to decide:

> [W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion."[114]

With LARA, Congress is trying to supervise state tort law. If permitted to do so, then Congress would abandon the concept of dual sovereignty.[115]

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power.").

[111] *New York*, 505 U.S. at 178.

[112] Brief for the Association of Trial Lawyers of America as Amicus Curiae Supporting Respondents, Pierce County v. Guillen, 537 U.S. 129, at *10 (2003) (No. 01-1229), 2002 WL 1929521.

[113] *Id.* (citing *Howlett*, 496 U.S. at 370 n.17). "'[B]ottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'" *Id.* (citing Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)). A similar argument was made against CAFA. *See* SENATE REPORT, *supra* note 69, at 92-94. The Court has noted that the judicial respect for federalism "is at its apex when we confront a claim that Federal law requires a State to undertake something as fundamental as restructuring the operation of its courts" and "it is a matter for each State to decide how to structure its judicial system." Johnson v. Fankell, 520 U.S. 911, 922 (1997).

[114] Patterson v. New York, 432 U.S. 197, 201 (1977) (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)).

[115] *E.g.*, Maryland v. Wirtz, 392 U.S. 183, 204 (1968) (Douglas, J., dissenting) (noting that the "exercise of the commerce power may also destroy state sovereignty"). In *Wirtz*, the majority of the Court permitted the federal government to enforce the 1966 amendments to the Fair Labor Standards Act against the states under the "enterprise concept" of the Commerce Clause. *Id.* at 188-93. In response, Justice Douglas wrote:

> If constitutional principles of federalism raise no limits to the commerce power where regulation of state activities are concerned, could Congress compel the States to build superhighways crisscrossing their territory in order to accommodate interstate vehicles, to provide inns and eating places for interstate travelers, to quadruple their police forces in order to prevent commerce-crippling riots, etc.? Could the Congress virtually draw up each State's budge to avoid "disruptive effect[s] . . . on commercial intercourse[?]
>
> If all this can be done, then the National Government could

New York and *Printz* provide some indication that the Supreme Court can be sympathetic to states' rights. In both, the Rehnquist Court held that Congress could not commandeer state legislatures[116] or state executives[117] to implement federal law or regulations. Yet, state courts are treated differently than state executives and legislatures.[118] Because the Supremacy Clause provides Congress with an inroad requiring state judges to enforce federal law, the call for the Court to "complete the trilogy" of state protection from federal commandeering[119] (at least with respect to federal rights) will probably go unfulfilled. However, the Supremacy Clause does not provide the same power door for Congress to commandeer the state courts.

The Court recently sidestepped this issue in *Jinks v. Richland County, South Carolina.*[120] In that case, Richland County argued that the tolling provision of the supplemental jurisdiction statute, 28 U.S.C. § 1367(d),[121] was an unconstitutional exercise of Congress'

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devour the essentials of state sovereignty though that sovereignty is attested by the Tenth Amendment.

Id. at 204-05 (Douglas, J., dissenting). *Cf.* State of New York v. United States, 326 U.S. 572, 596 (1946) (Douglas, J., dissenting) ("[T]he major objection to the suggested test is that it disregards the Tenth Amendment, places the sovereign States on the same plane as private citizens, and makes the sovereign States pay the federal government for the privilege of exercising the powers of sovereignty guaranteed them by the Constitution."). After *New York v. United States*, 505 U.S. 144 (1992), Justice Douglas' concern that Congress could draw up each state's budget has been quelled.

[116] New York v. United States, 505 U.S. 144 (1992).

[117] Printz v. United States, 521 U.S. 898 (1997).

[118] Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 879 n.283 (2004).

[119] Brief for the Association of Trial Lawyers of America as Amicus Curiae Supporting Respondents, Pierce County v. Guillen, 537 U.S. 129, at *5-6 (2003) (No. 01-1229), 2002 WL 1929521. *E.g.*, Caminker, *supra* note 104, at 1026 (discussing Congress' power to regulate state courts in federal cases); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988) (same); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2007-32 (1993).

[120] 538 U.S. 456, 464-65 (2003).

[121] Section 1367 allows a federal district court with original jurisdiction over a civil cause of action to determine "whether it may exercise supplemental jurisdiction over other claims that do not independently come within its jurisdiction, but that form part of the same Article III 'case or controversy.'" *Jinks*, 538 U.S. at 458; 28 U.S.C. § 1367(a) (2000). Sections 1367(b) and (c) "describe situations in which a federal court may or must decline to exercise supplemental jurisdiction." *Jinks*, 538 U.S. at 459. If a claim that is asserted under § 1367(a) is dismissed for one of these reasons, the plaintiff must refile the claim in state court. *Id.* "To prevent the [state statute of] limitations period on such supplemental claims from expiring while the plaintiff was

enumerated powers.[122] The federal district court declined to exercise jurisdiction of the Jinks' wrongful death and survival claim, so the Jinks filed those claims in state court within the time period allowed under § 1367(d).[123] A state court jury returned an $80,000 verdict against the defendant County's detention center on the wrongful-death claim.[124] The South Carolina Supreme Court reversed this verdict because § 1367(d) unconstitutionally changed the state's statute of limitations for claims brought in state court against a state's political subdivisions.[125] On appeal, the United States Supreme Court rejected the County's contention that the tolling provision was facially invalid.[126] Instead, they held that the tolling was necessary and proper for carrying out Congress' power over the federal courts and for ensuring that those courts may fairly and efficiently exercise that power.[127] The tolling provision provided the appropriate connection between these twin charges, and this connection was not "so attenuated as to undermine the enumeration of powers set forth in Article I, § 8."[128]

The Court's discussion under the "proper" prong of the "necessary and proper clause" inquiry is relevant to LARA's constitutionality. The state in *Jinks* argued that § 1367(d) was not a proper exercise of congressional power because it violated the principles of state sovereignty that the Court had discussed in

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fruitlessly pursuing them in federal court, § 1367(d) provides a tolling rule that must be applied by state courts." *Id.*

[122] *Id.* at 461. The basis for § 1367 relies on Congress' powers under Article I, § 8, cl. 9 ("To constitute Tribunals inferior to the Supreme Court"), and the "judicial power of the United States" under Article III, § 1.

[123] *Id.* at 460.

[124] *Id.*

[125] *Jinks*, 538 U.S. at 460. This, the South Carolina Supreme Court held, "'interfer[ed] with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit.'" *Id.* (*quoting* Jinks v. Richland County, 349 S.C. 298, 304 (2002)).

[126] *Id.* at 461.

[127] *Id.* at 462 (citations omitted) (quoting U.S. CONST., Art. I, § 8, cl. 9, and Art. III, § 1). As to the necessity of § 1367(d), the Court said that it was "'conducive to the due administration of justice' in federal court, and is 'plainly adapted' to that end." *Id.* (quoting McCulloch v. Maryland, 4 Wheat. 316, 414-15 (1819)). There was no suggestion by either side that § 1367(d) was enacted "as a 'pretext' for 'the accomplishment of objects not entrusted to the [federal] government.'" *Id.* at 464. There is a strong argument that LARA was enacted as a pretext for the accomplishment of federalizing state tort law through state civil procedure, an object not entrusted to the federal government.

[128] *Jinks*, 538 U.S. at 462, 464 (citing *Lopez*, 514 U.S. at 567-68; *Morrison*, 529 U.S. at 615).

Printz.[129] By changing the state's statute of limitations period, the supplemental jurisdiction statute's tolling provision regulated a state court procedure.[130] The County contended this was unconstitutional.[131] The Court sustained the tolling provision, but emphasized that it was not holding "that Congress has unlimited power to regulate practice and procedure in state courts."[132] It did this by assuming that in determining the propriety of a federal law, it could distinguish "between federal laws that regulate state-court 'procedure' and laws that change the 'substance' of state-law rights of action."[133] Even if the County's assertion was an accurate statement of constitutional doctrine, state statutes of limitations such as the one that barred the Jinks' state law claims, were not procedural.[134] Thus, such time limitations were not immune to valid congressional regulation.[135] Because a clear line between substance and procedure cannot be drawn,[136] the meaning of these terms is "'largely determined by the purposes for which the dichotomy is drawn.'"[137] State statute of limitations periods may be both procedural, as for Full Faith and Credit purposes,[138] as well as substantive, as for *Erie* purposes.[139] Although a close call, the Court held the tolling provision in the supplemental jurisdiction statute to be substantive.[140] Therefore, Congress validly regulated the substance of a state-law claim and not the procedures that the state court used to hear those claims.

In contrast, neither of LARA's state law provisions changes whether a state court can hear a particular claim. LARA simply mandates how those courts hear the claim. The constitutionality of these provisions boils down to whether they are regulating the substance or the procedure of the state law claims.[141]

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[129] *Id.* at 464.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 465.

[133] *Id.* at 464.

[134] *Jinks*, 538 U.S. at 464-65.

[135] *Id.*

[136] *See* Bellia, *supra* note 73, at 988 (noting that "what a court does can be viewed on a continuum – from substance to procedure to remedy to execution").

[137] *Jinks*, 538 U.S. at 465 (quoting Sun Oil Co. v. Wortman, 486 U.S. 717, 726 (1988)).

[138] *Id.* (citing *Wortman*, 486 U.S. at 726).

[139] *Id.* (citing Guaranty Trust Co. v. York, 326 U.S. 99, 109-112 (1945)).

[140] *Id.* (citing Stewart v. Kahn, 11 Wall. 493, 506-07 (1871)).

[141] Prof. Burbank's authoritative discussion of the Rules Enabling Act of 1934 also notes that at that time, there was no definitive explanation for the difference

The Supreme Court has given little prospective guidance to courts needing to interpret the Congressional mandate creating this substantive-procedural dichotomy. It has held that substantive law binds state courts under the Supremacy Clause and preempts contrary state law.[142] In *Southland Corp. v. Keating*, Justice Sandra Day O'Connor suggested that the commerce power on which LARA is based does not allow Congress to enact "free-standing rules of procedure for the states."[143] In *Jinks*, the Court provided one benchmark in this analysis by concluding that the tolling of a state's statute of limitations is substantive.[144]

Predicting whether LARA's Rule 11 or venue provisions are constitutional depends on whether they are found to be substantive or procedural.[145] Neither provision is similar to the Federal

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between procedure and substantive rights. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1021-31 (1980). A 1926 Senate Report "refers to the matters excluded from the rulemaking power as 'substantial,' an adjective that does not advance the inquiry." *Id.* at 1121. It did provide standards for a classification scheme. *Id.* For example, "the rulemaking power does not extent [sic] to 'matters involving substantive legal and remedial rights affected by the considerations of public policy.'" *Id.* This would include limitations and abatement of actions and provisional remedies "because the decision when to bar or abate a claim limits whatever rights have been conferred on the claimant by the substantive law." *Id.* By imposing sanctions on a plaintiff or her attorney, Rule 11 acts in much the same way because it increases the cost of litigating a substantive right. Further, the heart of a Rule 11 motion goes to the core of the substance of the claim. *Cf., id.* at 1122 (citing S. REP. No. 1174, 69th Cong., 1st Sess., at 10 (1926) ("'the matter is all of a substantive character and defines *or limits* certain civil rights . . . using that term in its broad sense'")) (emphasis added).

[142] Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding that section two of the Federal Arbitration Act (FAA) is substantive law). Justice O'Connor dissented because she believed that the FAA established a rule of procedure. *Id.* at 25 (O'Connor, J., dissenting). A full discussion of *Southland* is beyond the scope of this article.

[143] Bellia, *supra* note 73, at 968. In Justice O'Connor's view Congress "believed that the FAA established nothing more than a rule of procedure," that "rule [was] therefore applicable only in the federal courts." *Southland*, 465 U.S. at 26 (O'Connor, J., dissenting). Bellia notes that the "therefore" supports the assertion that "the commerce power does not include the power to establish free-standing rules of procedure for the states." Bellia, *supra*, at 968.

[144] *Jinks*, 538 U.S. at 465.

[145] Bellia, *supra* note 73, at 988 (noting that "what a court does can be viewed on a continuum – from substance to procedure to remedy to execution"). Bellia demonstrates this continuum using the statute at issue in *Testa*, which provided to a buyer a right of action against a seller who sold goods at a price above a prescribed ceiling. *Id.* How judgments are executed falls under on the "procedure" end of the spectrum, which makes it the exclusive prerogative of the states to control. *Id.* at 989.

While doubting that "perfect definitions" would ever be written, the Ohio Supreme Court has tried to define these terms: "However, the authorities agree that, in general terms, substantive law is that which creates duties, rights, and obligations,

Arbitration Act (FAA), as discussed in *Southland.* Unlike the FAA, LARA does not displace the conflicting state law or the state law that inhibits the statute's "proarbitration policy."[146] Compared to a tolling provision, such as § 1367(d), LARA's Rule 11 provision is procedural because it has little to do with the substance of the claim being presented. The problem with this comparison is that the heart of a Rule 11 motion ultimately goes to the substance of whether there was a basis for filing the claim.[147]

When compared to a statute of limitations provision, such as that of South Carolina in *Jinks,* the Rule 11 provision on its face, seems more procedural than substantive. Further, the venue provision is clearly procedural because it merely states where a claim is to be filed, which does not go to the substance of the claim itself. According to tort reform advocates, like ATRA, the "substance" of the claim really depends on where the claim is being filed, despite the obvious differences among states' substantive laws. Even so, it is doubtful that the Court would say that this provision changes the

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while procedural or remedial law prescribes methods of enforcement of rights or obtaining redress." State ex rel. Holdridge v. Industrial Commission, 11 Ohio St.2d 175, 178 (1967).

[146] Schwartz, *supra* note 92, at 546.

[147] *E.g.*, FED. R. CIV. P. 11(b) (2005). When presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, a party certifies to the best of its knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Id.

Technically, Rule 11 must be procedural because the Rules Enabling Act prevents the Supreme Court from promulgating "substantive" rather than "procedural" rules. Rules Enabling Act of June 19, 1934, Pub. L. No. 73-415 § 1, 48 Stat. 1064, 1064 (codified at 28 U.S.C. § 2071 (2000)) ("[T]he Supreme Court of the United States shall have the power to prescribe, by general rules . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."). *See* Burbank, *supra* note 141.

elements or substance of a claim. If Congress cannot prescribe general procedures that do not unnecessarily burden the right of recovery for federal claims heard in state courts, then Congress does not have the power to prescribe those same procedures that a state court must use when it hears state-law claims.[148] Thus, because it infringes upon the sovereignty of the states, guaranteed by the Tenth Amendment,[149] LARA "is inconsistent with the federal structure of our Government established by the Constitution."[150]

IV. LARA Is the Wrong Fire Extinguisher to put out the Judicial Hellholes

Setting aside the constitutional questions previously discussed, this section focuses on the prudential question of whether Congress should make these proposed changes to Rule 11. First, the current version of Rule 11 is the appropriate vehicle for sanctioning attorney conduct. Second, Congress should not bypass deliberative rulemaking process for an unproven, quick-fix to a complex problem. Third, there are alternative ways to improve attorney performance that do not necessitate obliterating constitutional doctrines and the basic principles of federalism.

A. *The See-Saw History of Rule 11*

Before discussing the prudential reasons for opposing LARA's changes to Rule 11, it is important to recognize how the 1993 amendments, which LARA's sponsors apparently find so repulsive, addressed the widely recognized problems that the 1983 amendments created.

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[148] Bellia, *supra* note 73, at 989.

[149] U.S. CONST. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This is the reason that the Conference of Chief Justices strongly opposes LARA, section four in particular, and any federal legislation that would "dramatically change the traditional state role in determining ethics, jurisdiction and venue rules in state litigation." Conference of Chief Justices, Resolution 26: In Opposition to the Usurpation of State Court Authority as Guaranteed by the United States Constitution (Jan. 26, 2005), *available at* http://ccj.ncsc.dni.us/IndependenceofStateJudicialSystems/OpposeFederalUsurpationStateCourtAuthority.pdf.

[150] *New York*, 505 U.S. at 177 ("[w]hether one views the take-title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.").

1. The 1983 Rule 11 Had Too Many Problems to Succeed

Like a see-saw, Rule 11 has had its ups and downs. Mandatory sanctions were introduced to put the bite back into a long-forgotten rule, and then they were removed because the bite cut too deep. Now, Congress wants to bring back the bite.

Despite numerous warnings about the potential costs, the Advisory Committee implemented mandatory sanctions for Rule 11 violations in 1983, all while "in a virtual empirical vacuum."[151] The two goals for the 1983 amendments were to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses."[152] The amended rule authorized monetary sanctions against lawyers and their clients and made sanctions mandatory for violations of Rule 11 or Rule 26 because "there were too many civil proceedings and too much motion practice in federal courts and that this costly excess was the result of neglect, indifference, or misuse of procedure by counsel."[153]

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[151] Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 844 (1993). The Advisory Committee proceeded upon experience "in practice" for the conclusion that Rule 11 was not effective in deterring abuses. FED. R. CIV. P., Advisory Committee Notes to Rule 11, 97 F.R.D. 165, 198 (1983). The Committee deleted the "provision in the original rule for striking pleadings and motions as sham and false" because that provision had "rarely been utilized, and decisions thereunder [had] tended to confuse the issue of attorney honesty with the merits of the action." *Id.* at 199. The 1983 amendments also deleted the "reference to the inclusion of scandalous or indecent matter," as it was deemed unnecessary due to Rule 12(f). *Id.*

[152] *Id.* at 198; Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 203 (1988). The basis for these amendments was the "equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation." FED. R. CIV. P., Advisory Committee Notes to Rule 11, 97 F.R.D. 165, 199 (1983). On the other hand, the Federal Judicial Center proposed additional purposes for the rule: "to penalize the violator, to compensate the offended party, and to deter others from engaging in similarly abusive conduct." Vairo, *supra*, at 203 (citing S. Kassin, *An Empirical Study of Rule 11 Sanctions* 29 (Fed. Judicial Center 1985); Lieb v. Topstone Indus., Inc., 788 F.2d 151, 158 (3d Cir. 1986)). Uncertainty as to which of these purposes was the primary one led to inconsistent results. *Id.* The Advisory Committee also noted "considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions." FED. R. CIV. P., Advisory Committee Notes to Rule 11, 97 F.R.D. 165, 198 (1983).

[153] Paul D. Carrington & Andrew Wasson, *A Reflection on Rulemaking: The Rule 11 Experience*, 37 LOY. L.A. L. REV. 563, 564 (2004) (citing Melissa L. Nelken, *Sanctions*

The Advisory Committee focused on the individual lawyer's responsibility in filing pleadings, motions, and other papers instead of simply rethinking the pleading rules.[154]

A chorus of complaints was raised against the 1983 changes, with the primary concerns that the new Rule 11:

> (1) gave rise to a new industry of Rule 11 motion practice adding to cost and delay; (2) stimulated incivility between lawyers; (3) was aimed at plaintiff's counsel, leaving defense counsel unrestrained in the assertion of unfounded denials; and, (4) encouraged judges to indulge their occasional personal animus toward individual lawyers, sometimes by belated sua sponte rulings coming after a dispute that seemed to have been resolved.[155]

Perhaps encouraged by an article written by district judge William W. Schwarzer that "lauded the Rule 11 modification and requested that federal courts enforce it rigorously,"[156] many judges strictly enforced it.[157] As a result, these changes "spawned satellite litigation on such issues as whether, when, and what sanctions were warranted."[158]

Parties "overused and abused" the Rule 11 changes by focusing on the potential for compensation that the rule afforded to parties, and not its objective of deterring frivolous filings.[159] The combined activity of counsel, litigants, and the courts "was responsible for considerable unnecessary and expensive litigation that was unrelated

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Under Amended Federal Rule 11 – Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 74 GEO. L.J. 1313, 1316 (1986)). As Carrington and Wasson note, "[w]hether there was or is in fact such a problem remains uncertain." *Id.*

[154] Burbank & Silberman, *supra* note 34, at 678.

[155] Carrington & Wasson, *supra* note 153, at 566 (citing Georgene M. Vairo, *Rule 11: Where Are We and Where Are We Going*, 60 FORDHAM L. REV. 475 (1991)). Initial commentary on the changes was somewhat favorable, as the reporter for the Advisory Committee had overall praise for them in his report for the Federal Judicial Center. Margaret L. Sanner & Carl Tobias, *Rule 11 and Rule Revision*, 37 LOY. L.A. L. REV. 573, 578 (2004) (citing ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY (1984)).

[156] Sanner & Tobias, *supra* note 155, at 578 (citing William W. Schwarzer, *Sanctions Under the New Federal Rule 11 – A Closer Look*, 104 F.R.D. 181 (1984)).

[157] *Id.*

[158] Burbank & Silberman, *supra* note 34, at 678-79; Vairo, *supra* note 152, at 195, 199 (commenting that "many have said that Rule 11 has replaced civil RICO actions as the cottage industry of the litigation bar"). Before 1983, there were few reported Rule 11 decisions. *Id.* at 199. However, between August 1, 1983 and December 15, 1987 there were 688 reported Rule 11 decisions from the district and circuit courts. *Id.*

[159] Sanner & Tobias, *supra* note 155, at 573.

to the substantive merits of dispute."[160] Litigation strategy decisions became more difficult because of inconsistent interpretation of the rule among the circuits compounded by "the discretion of individual judges in defining the standard."[161] Satellite litigation, or litigation over which type of sanction to impose increased,[162] and the Secretary to the U.S. Judicial Conference said abuse of the 1983 rule led to a "cottage industry . . . that churned tremendously wasteful satellite litigation that had everything to do with strategic gamesmanship and little to do with underlying claims."[163] There were over 3,000 reported decisions on Rule 11 in the eight years following the 1983 changes.[164] Ironically, Judge Schwarzer, who previously encouraged his fellow jurists to rigorously enforce Rule 11 back in 1984, wrote another article four years later expressing his concern over satellite litigation and the use of the Rule for reimbursement of a party's attorney's fees.[165]

The Advisory Committee assured civil rights plaintiffs that they would not be targeted and that the 1983 amendments were "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."[166] The Chair of the Advisory Committee

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[160] *Id.* Sanner & Tobias further note that "[t]he overuse, abuse and judicial application of the 1983 change had detrimental consequences for individuals and groups with relatively little time, money or power, such as those who pursue civil rights actions." *Id.*

[161] Burbank & Silberman, *supra* note 34, at 679.

[162] Sanner & Tobias, *supra* note 155, at 576. Nelken contended that "judges significantly and incorrectly overemphasized the 1983 revision's compensatory goal and notion of attorney-fee shifting as an appropriate sanction." *Id.* at 578 (citing Nelken, *supra* note 153).

[163] Mary P. Gallagher, *Bill Ramping Up Rule 11 Sanctions Passed by House, Pending in Senate*, N.J. L.J., Oct. 11, 2004, (statement of L. Ralph Mecham, U.S. Judicial Conference Secretary). The advocacy group American Association of People with Disabilities opposes LARA because of the chilling effect on persons with legitimate claims. American Ass'n of People with Disabilities, Protect Victims of Discrimination: Oppose H.R. 4571 and H.R. 3369, Sept. 13, 2004, http://www.aapd-dc.org/policies/victimsofdiscr.html. "[E]ven civil rights plaintiffs who pursue their legitimate claims with the heightened risk of severe sanctions, may give up at the hands of litigious defendants who employ a rope-a-dope technique simply to hear out their opponents." *Id.*

[164] Burbank & Silberman, *supra* note 34, at 679 (citing Kritzer, Marshall, & Kahn Zemans, *Rule 11: Moving Beyond the Cosmic Anecdote*, 75 JUDICATURE 269 (1992)).

[165] Sanner & Tobias, *supra* note 155, at 578-79 (citing William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988)).

[166] FED. R. CIV. P., Advisory Committee Notes to Rule 11, 97 F.R.D. 165, 199 (1983). The note also instructed judges not to use the "wisdom of hindsight" in a Rule 11 inquiry, but instead "test[ing] the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." *Id.* While sanctions were mandatory under the 1983 amendments, the

assured the bar that "the advisory committee did not intend to dampen the enthusiasm or the adversarial spirit of lawyers."[167] For example, lawyers making good faith arguments to change existing law would not be subject to Rule 11 sanctions, but "a lawyer simply fail[ing] to research the law or ignor[ing] the existing law in making legal arguments" would be, meaning a "lawyer must know the existing law to seek to change it in good faith."[168] When courts soundly rejected a legal position in suit after suit, "the propriety of sanctions [became] more difficult to decide. While sanctions may be warranted to shield defendants from a barrage of suits, the development of the law is threatened if Rule 11 is read 'to penalize litigants because they choose to fight uphill battles.'"[169] Without making any judgment as to the merits of a particular claim, any changes in Rule 11 should not impede the development of the law.

Despite the non-binding assurances of the Advisory Committee, the 1983 changes succeeded in causing lawyers to stop and think, not just before filing long shot claims, but also before they filed claims or defenses that they felt were meritorious.[170] The American Judicature Society found that 19.3% of practicing lawyers said that, in the previous year, Rule 11 deterred them from filing such claims.[171] One commentator characterized this version of the rule as an "irresponsible experiment with court access [that] was in place for ten years."[172] Rule 11 disproportionately impacted all plaintiffs,[173] but

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Advisory Committee noted that the court "retain[ed] the necessary flexibility to deal appropriately with violations of the rule. It ha[d] discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted." *Id.* at 200.

[167] Nelken, *supra* note 153, at 1339 (statement of Mansfield, J.) (citing Miller & Culp, *Litigation Costs, Delay Prompted the New Rules of Civil Procedure*, NAT'L L.J., Nov. 28, 1983, at 34, col. 3).

[168] Nelken, *supra* note 153, at 1342.

[169] *Id.* at 1342 (quoting Fleming Sales Co. v. Bailey, 611 F. Supp. 507, 519 (N.D. Ill. 1985)).

[170] Charles Yablon, *Hindsight, Regret, and Safe Harbors in Rule 11 Litigation*, 37 LOY. L.A. L. REV. 599, 619 (2004).

[171] *Id.* at 619 n.83 (citing Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U.L. REV. 943, 961-62 (1992)).

[172] Burbank, *supra* note 151, at 844.

[173] Vairo, *supra* note 152, at 200 (noting that the reported cases suggest that amended Rule 11 (1983-88 version) is being used disproportionately against plaintiffs). While plaintiffs were the target of a sanctions motion in 536 of the 680 cases reported from circuit and district courts between August 1, 1983 and December 15, 1987 in which sanctions were requested, they were also sanctioned at a higher rate than defendants. *Id.* Rule 11 violations were found in 57.8% of the 680 times that sanctions were requested. *Id.* at 199. The plaintiff was the violator in 46.9% of those cases, while the defendant was the violator in 10.9% of the cases. *Id.* at 200. The "fact that the plaintiff [was] the target of the sanctions motion in 536 of the 680

it hit civil rights plaintiffs particularly hard.[174] A frequent commentator on Rule 11 opined in 1991 that Linda Brown[175] and Alan Bakke,[176] who both challenged established Supreme Court precedent and presented novel claims, would have to "'think twice before proceeding'" or "forgo [sic] litigation entirely even though important rights may [have been] at stake."[177] One of the NAACP's lead attorneys who argued for Ms. Brown said, "I have no doubt that the Supreme Court's opportunity to pronounce separate schools inherently unequal would have been delayed for a decade had my colleagues and I been required, upon pain of potential sanctions, to plead our legal theory explicitly from the start."[178]

Since civil rights plaintiffs and attorneys had comparatively few resources, they were risk averse, and "judicial implementation of the 1983 version had chilling effects on" them.[179] It was alleged that between 1983 and 1988, no other classification of civil litigants had more Rule 11 motions filed and sanctions imposed against them than civil rights and employment discrimination plaintiffs.[180] This

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cases (78.8%) in which sanctions were requested" explains this difference. *Id.* However, plaintiffs were hurt more by Rule 11 than defendants because they are sanctioned at a higher rate than defendants. *Id.* (noting that plaintiffs were sanctioned in 59.6% of the cases in which they are the target and defendants are sanctioned in 51.4% of the cases in which they are the target).

[174] *See e.g.*, Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988). In the Third Circuit, "civil rights plaintiffs and/or their lawyers were sanctioned at a rate (47.1%) far higher than plaintiffs as a whole (15.9%) and higher still than plaintiffs in non-civil rights cases (8.45%). The same was true of counseled civil rights plaintiffs." *See also* Stephen B. Burbank, *The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11: An Update*, 19 SETON HALL L. REV. 511, 522 (1989). "Plaintiffs (and/or their counsel) were the targets of approximately two-thirds of the Rule 11 motions in our sanction survey, and they were sanctioned at a rate (15.9%) higher than the rate for defendants (9.1%). Moreover, plaintiffs were the object of 77.8% of all sanctions imposed, on motion and *sua sponte*, in the survey period." *Id.* at 521. The advocacy group American Association of People with Disabilities opposes LARA because of the chilling effect on persons with legitimate claims. American Ass'n of People with Disabilities, Protect Victims of Discrimination: Oppose H.R. 4571 and H.R. 3369, *supra* note 163. "[E]ven civil rights plaintiffs who pursue their legitimate claims with the heightened risk of severe sanctions, may give up at the hands of litigious defendants who employ a rope-a-dope technique simply to hear out their opponents." *Id.*

[175] Linda Brown of *Brown v. Board of Education*, 347 U.S. 483 (1954).

[176] Alan Bakke of *University of California Regents v. Bakke, 438 U.S. 265* (1978).

[177] Georgene M. Vairo, *The New Rule 11: Past As Prologue*, 28 LOY. L.A. L. REV. 39, 41 (1994) (citing Vairo, *supra* note 155, at 475-76).

[178] Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2192-93 (1989).

[179] Sanner & Tobias, *supra* note 155, at 576.

[180] *Id.* (citing Nelken, *supra* note 153, at 1327, 1340; Vairo, *supra* note 152, at 200-01). Between July 1, 1983 and June 30, 1985, there were 40,772 claims filed in the

influence was termed the *in terrorem* or chilling effect, where "lawyers might use the threat of severe sanctions under Rule 11 to deter the filing of potentially meritorious claims, particularly in, but not limited to, the civil rights area."[181] The statistics apparently justified these

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federal courts nationwide. Nelken, *supra*, at 1327 n.92 (citing DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT table 19 (1985)). "Although civil rights cases accounted for only 7.6% of the civil filings between 1983 and 1985, 22.3% of the Rule 11 cases involve civil rights claims." *Id.* Vairo provided an in-depth empirical study in 1987 that confirmed this disproportionate impact on civil rights plaintiffs:

> Civil rights and employment discrimination cases are the subject of 28.1% of the Rule 11 cases (191 of the 680 requests). Plaintiffs are the target of the sanction request in 165 of these cases, 86.4%, which is somewhat higher than average (78.8%). Plaintiffs are sanctioned in 71.5% of the cases in which they are the target, a figure that is a full 17.3% higher than the average for plaintiffs in all other cases (54.2%). Defendants are targeted in 13.6% of the cases, and sanctioned in 50% of these cases, but this represents only 6.8% of all civil rights and employment discrimination Rule 11 cases.
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> . . .
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> Taking civil rights and employment discrimination cases out of consideration, it appears that plaintiffs and defendants are being sanctioned at relatively equal rates, plaintiffs in 54.2% of the cases in which they are targeted, and defendants in 51.9%.

Vairo, *supra* note 152, at 200-01 (footnotes omitted).

[181] Yablon, *supra* note 170, at 602. Professor Yablon further described the *in terrorem* effect as follows:

> before 1993, the danger of Rule 11 sanctions was so serious and severe that opposing lawyers could deter even potentially meritorious claims by threatening the lawyers who brought them with Rule 11 sanctions in the event that they lost. This threat of not just losing, but of then being sanctioned under Rule 11, with potentially severe financial consequences, was sufficiently great that it could cause lawyers to drop their claims or settle for nominal amounts.

Id. at 602-03.

Vairo notes that there were two other areas of Rule 11 activity that contrast the civil rights area and Rule 11 cases in general: securities fraud/RICO cases and antitrust and other trade regulation cases. Vairo, *supra* note 152, at 201. In the former, plaintiffs were targeted 84.3% of the time, but they were sanctioned in only 45.5% of the cases. *Id.* (noting that these plaintiffs were the target of Rule 11 sanctions at a higher rate than average, and almost as high as plaintiffs in civil rights cases, but were sanctioned at a much lower rate than plaintiffs in general). To explain why the sanctions rate was so low, Vairo contended that, unlike the civil rights categories, where most of the sanctions "are awarded because the plaintiff's legal theory has been held to be frivolous," in "the securities/RICO/trade regulation areas, the basis for a sanction is more likely to be a failure to engage in a reasonable inquiry as to the factual basis for the claims." *Id.* at 202. In the contract and other commercial dispute cases, the plaintiff was targeted 58.3% of the time, while the defendant was targeted 41.7% of the time. *Id.* Unlike all of the other areas, however, the defendant was sanctioned at a higher rate than the plaintiff, 55.6% to 52.4%. *Id.*

fears.[182]

Whether or not the 1983 changes deterred frivolous claims and motions and whether there were real net cost-savings to the courts or parties is debatable.[183] The only certainty was that Rule 11 was a tinderbox of controversy.[184] When the Advisory Committee proposed changes to Rule 11 in the late 1980's and early 1990's, they followed a "special procedure" to accommodate all interests, as it "had received various requests, formal and informal, for further amendment or abrogation of Rule 11."[185] The committee also took note of the published studies that analyzed the rule in great detail.[186] The committee began their work without an identified agenda, not knowing whether to propose any change at all, because "[t]here was no consensus about whether-or how-the rule should be amended."[187]

2. 1993 Amendments to Rule 11 Addressed the Problems Created by the 1983 Version

After receiving many comments and deliberating for two years, the Advisory Committee spent another two years deliberating on changes to Rule 11.[188] The committee noted that some of the criticisms of the 1983 changes were "frequently exaggerated or premised on faulty assumptions," but they "were not without some merit."[189] It reaffirmed the basic goal of the 1983 amendments,

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[182] *Id.* at 200.

[183] Carrington & Wasson, *supra* note 153, at 567 (citing AMERICAN JUDICATURE SOCIETY, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, 75-76, 95-96 (Stephen B. Burbank ed., 1989)). These are two separate questions. Even if the changes in 1983 deterred frivolous claims and motions, parties and the courts may not have realized any savings as a result of those changes. As discussed elsewhere, satellite litigation over allegedly frivolous filings increased after 1983, and, in the end, the overall costs may have been a wash for all involved.

[184] The "bitter debate over the 1983 amendments to Rule 11 raised the question whether its perceived consequences—satellite litigation, a chill on legitimate lawyer creativity, and an increase in adversarial posturing—outweighed its benefits." Burbank & Silberman, *supra* note 34, at 679-80.

[185] Attachment B to Letter from Hon. Sam C. Pointer, Jr. to Hon. Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure Chairman, Advisory Committee on Civil Rights 2-5 (May 1, 1992) [hereinafter LETTER], *reprinted in* 146 F.R.D. 519, 522 (1993).

[186] *Id.*

[187] *Id.*

[188] Carrington & Wasson, *supra* note 153, at 567.

[189] LETTER, *supra* note 185, at 523. According to the ATRA, the Judicial Conference made its recommendations despite the results of a survey of federal judges that had three contrary conclusions: (1) 95% of judges believed that the 1983

finding deterrence to be "proper and legitimate" and insisting that "litigants 'stop-and-think' before filing pleadings, motions, and other papers should . . . be retained."[190] Nevertheless, the committee presented five reasons for making changes to Rule 11:

> (1) Rule 11, in conjunction with other rules, has tended to impact plaintiffs more frequently and severely than defendants; (2) it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party's belief about the facts can be supported with evidence; (3) it has too rarely been enforced through nonmonetary sanctions, with cost-shifting having become the normative sanction; (4) it provides little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law; and (5) it sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel.[191]

They were also concerned that "although the great majority of Rule 11 motions have not been granted, the time spent by litigants and the courts in dealing with such motions has not been insignificant."[192]

The proposed amendments were drafted "with the objective of increasing the fairness and effectiveness of the rule as a means to deter presentation and maintenance of frivolous positions, while also reducing the frequency of Rule 11 motions."[193] They "sought to reduce expense and delay through open-textured rules that gave judges broad discretion to control the pre-trial stage of litigation as well as authority to impose sanctions for perceived misuse of the generous pleading and discovery procedures in civil litigation."[194] The compromise solution was the safe harbor provision of Rule 11(c)(1)(A),[195] which permits a party to withdraw or correct an

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version of Federal Rule 11 did not impede the development of the law; (2) 80% saw the 1983 version as having an overall positive effect and should not be changed; and (3) 75% said that the 1983 version's benefits of deterring frivolous lawsuits and compensating victims of those claims justified the use of judicial time. Lawsuit Abuse Reform Coalition, Why It's Needed, How It Will Help, and Why It Has Broad Support, *supra* note 19.

[190] LETTER, *supra* note 185, at 523.

[191] Carrington & Wasson, *supra* note 153, at 568 (citing LETTER, *supra* note 185, at 523).

[192] LETTER, *supra* note 185, at 523.

[193] *Id.*

[194] Burbank & Silberman, *supra* note 34, at 679 (noting that critics believed that these changes sacrificed other values, such as uniformity and predictability).

[195] Carrington & Wasson, *supra* note 153, at 567; FED. R. CIV. P. 11(c)(1)(A).

allegation or contention within 21 days of the filing without fear of sanctions being sought by the other party.[196] Thus, a "party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation."[197] The court retained the power to act on its own initiative.[198]

The 1993 changes raised the standard for violating Rule 11 by preventing the "hindsight effect" from influencing a judge's decision on a Rule 11 motion.[199] The hindsight effect occurs when a judge decides a Rule 11 motion not at the beginning of the case or immediately after the document is filed with the court, but after the case has been resolved and the judge has been made aware of the facts and the outcome of the case. The decrease in "questionable Rule 11 motions is, to a considerable degree, a reflection and result of" the change in timing for the filing of a Rule 11 motion.[200] In addition, courts have held that "the safe harbor provisions effectively prohibit Rule 11 motions made after the end of the case."[201] LARA eliminates the safe harbor that gives the plaintiff's lawyer a "free pass" to "simply change the words of the pleading, [and] file it again."[202] Hopefully, this change would not simultaneously re-inject hindsight into the mix. If it did, then the *in terrorem* effect would also be re-introduced. To prevent LARA from squelching potentially meritorious claims, judges should be prohibited from using the benefit of hindsight when imposing Rule 11 sanctions.

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[196] FED. R. CIV. P. 11(c)(1)(A) (prohibiting a motion for sanctions from being filed unless, "within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected").

[197] FED. R. CIV. P. 11 advisory committee's note on 1993 amendments.

[198] *Id.*; FED. R. CIV. P. 11(c)(1)(B).

[199] Yablon, *supra* note 170, at 604. The commentary makes clear that "a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention)." FED. R. CIV. P. 11 advisory committee's note to 1993 amendments.

[200] Yablon, *supra* note 170, at 605. To avoid conflicts of interest or to "reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation," the court may delay its ruling on the Rule 11 motion. FED. R. CIV. P. 11 advisory committee's note to 1993 amendments.

[201] Yablon, *supra* note 170, at 611 (citing Barber v. Miller, 146 F.3d 707, 710-11 (9th Cir. 1998); Ridder v. City of Springfield, 109 F.3d 288, 295 (6th Cir. 1997)).

[202] Lawsuit Abuse Reform Coalition, Why It's Needed, How It Will Help, and Why It Has Broad Support, *supra* note 19.

B. *Prudential Concerns Militate Against LARA*

"When the rulemakers are indifferent to empirical study and appear to ignore criticisms of their published proposals or attribute them to the rank self-interest of their critics, those critics quite naturally take their complaints to Congress."[203] There are several policy reasons for why Congress should not modify Rule 11. First, Congress would deprive interested parties of a full and robust discussion of the issue. By declaring its response superior to all others, Congress forecloses any other proposed solutions. Second, the 1993 amendments do not need to be changed because they found the appropriate compromise between the weaknesses of the original Rule 11 and the oppressiveness of the 1983 version. Neither the bench nor the bar has complained about the present version of Rule 11 to the Administrative Office of the U.S. Courts.[204] Nor does LARA address a new problem, and its "solution" would not appreciably improve the situation. Instead, LARA would eliminate the changes that were made to address the demonstrated problems with the 1983 modifications, namely the mandatory sanctions. In essence, reverting to the days of pre-1993 Rule 11 helps no one. It is for these reasons that the Judicial Conference and the Conference of Chief Justices oppose LARA.[205]

1. Congress Is Bypassing the Constructive Process of Delegated Rulemaking

LARA "is the latest chapter in the seesaw history of Rule 11."[206] The Supreme Court and Congress did not arbitrarily enact the 1983 amendments; rather, they were the result of a deliberative process of inquiry and discussion. The task of formulating an appropriate response to the problems with the original rule was given to the Advisory Committee on Civil Rights of the Judicial Conference of the United States.[207] Despite knowing very little about the mechanics of

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[203] Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 515-16 (1996).

[204] Gallagher, *supra* note 163 (statement of John Rabiej, head of the Rules Committee Support Office at the Administrative Office of the U.S. Courts). According to Mr. Rabiej, "the current rule is a balanced approach." *Id.*

[205] *See* Letter from Leonidas Ralph Meachum to Rep. Sensenbrenner (May 17, 2005) and Resolution 26, *reprinted in* H.R. Rep. 109-123, *supra* note 1, at 75-78.

[206] Gallagher, *supra* note 163.

[207] Carrington & Wasson, *supra* note 153, at 565 (citing 131 F.R.D. 335, 338-41 (1990)).

Rule 11, the Advisory Committee made recommendations and then forwarded them to the Standing Committee on Rules.[208] Upon the Standing Committee's approval, the proposals were sent to the Judicial Conference, which approved the rule.[209] The Supreme Court then received the rule and adopted it in accordance with the Rules Enabling Act.[210] The same process was followed in 1993,[211] although, at that time, Congress tried to prevent the changes to the rule from taking effect.[212] Unlike the present package of proposed changes, "serious, methodologically sound, empirical work" supported the 1993 amendments to Rule 11.[213]

One practical benefit to the rulemaking process is the inclusion of the Advisory Committee's notes to each rule. By disregarding the judiciary's deliberate input, LARA would amend Rule 11 without providing any practical guidance to practitioners or to the courts. Without these notes, the courts will encounter the same problems that plagued the 1983 version, in which they were on their own to

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[208] *Id.* This does not mean that the 1983 amendments were made on the basis of an informed judgment about how Rule 11 actually worked in the court system. Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927 (1989).

> The Advisory Committee knew little about experience under the original Rule, knew little about the perceived problems that stimulated the efforts leading to the two packages of Rules amendments in 1980 and 1983, knew little about the jurisprudence of sanctions, and knew little about the benefits and costs of sanctions as a case management device.

Id.

[209] Carrington & Wasson, *supra* note 153, at 565-66.

[210] *Id.* at 566; 28 U.S.C. §§ 2071-2074 (2000). Congress has given the Supreme Court the authority "to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals. 28 U.S.C. § 2072(a) (2000). While Congress could have stopped the rule from taking effect, it did not do so.

[211] Sanner & Tobias, *supra* note 155, at 574 (noting that the 1993 process was an "unusually expeditious attempt to rectify or temper the difficulties created by the 1983 modification"). For a discussion of the details involved with the 1993 Rule Amendment Process, see *id.* at 580-88.

[212] *Id.* at 588 n.75 (citing H.R. 2814, 103d Cong. (1993); Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171, 188 (1994)). *See* Burbank, *supra* note 208, at 1948 n.119 (discussing the legislative attempt to delay the effective date of the 1983 amendments).

[213] Burbank & Silberman, *supra* note 34, at 702 (noting that the Advisory Committee refused to delay discovery reform until the results of experimentation under the Civil Justice Reform Act of 1990 had been collected and evaluated). Unlike Congress' passage of CAFA, the Advisory Committee in 1993 "took back proposed amendments to Rule 23 (class actions) so that it could consult more broadly among the practicing bar and the academy and have sufficient time for empirical study." *Id.* at 702-03.

interpret the rule, leading to further inconsistency, uncertainty, and circuit conflict.[214] Consequently, practitioners will be unsure how the courts will apply the rule. When there are already concerns about the chilling effect of mandatory sanctions, uncertainty over the courts' application of the rule will further discourage potentially meritorious litigation.

Reflecting upon the federal rule revision process, two commentators suggested two significant lessons can be learned from the 1983 and 1993 revisions.[215] First, any changes to the rules must be made on the basis of solid, empirical data "gathered, analyzed and synthesized by experts."[216] Using anecdotal information as the foundation for a major change "can have unintended and often detrimental consequences for judges, lawyers and parties as well as the rule revision process."[217] Second, revising significant parts of the rules too frequently makes practice more difficult for attorneys and "undermines respect for the amendment process."[218] Not only do the judges have "difficulty interpreting and applying" the revisions, "lawyers and parties must spend time and money finding, understanding and satisfying these changes."[219] By enacting LARA, Congress would disregard both.

The American Bar Association, along with a host of other interest groups, opposes LARA, primarily because it is an "end run around the Rules Enabling Act, under which the Supreme Court makes court rules, subject to congressional review."[220] Here, Congress does not need to step in and fix a rulemaking process that

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[214] Vairo, *supra* note 152, at 203.

[215] Sanner & Tobias, *supra* note 155, at 588-92.

[216] *Id.* at 588 (citing Burbank, *supra* note 208, at 1927-28; Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 813-20 (1991)).

[217] *Id.*

[218] *Id.* at 589. One of the reasons the ABA does not support Congress' bypassing of the Judicial Conference is because "each rule forms just one part of a complicated, interlocking whole, rendering due deliberation and public comment essential to avoid unintended consequences." Letter from Michael S. Greco, ABA President, at 1-2 (Oct. 10, 2005), http://www.abanet.org/poladv/letters/109th/judiciary/lara101005.pdf.

[219] Sanner & Tobias, *supra* note 155, at 589.

[220] Gallagher, *supra* note 163; David L. Hudson, Jr., *"Frivolous Suit" Bill Returns*, *supra* note 50; Rhonda McMillion, *Standing Pat on Rule 11*, 91 A.B.A.J. 62 (July 2005). While it did not question Congress' power to amend Federal Rule 11, the ABA "question[ed] the wisdom of circumventing" of bypassing the established process and called LARA "an unwise retreat from the balanced and inclusive process established by Congress when it adopted the Rules Enabling Act." Letter from Michael S. Greco, *supra* note 218, at 1-2..

has broken down. To the contrary, the Judicial Conference just concluded a deliberate process of debate and commentary on changes to the federal rules of criminal and civil procedure, evidence, and bankruptcy.[221] Some of the proposals represent significant changes in the discovery process, including electronic discovery, but they do not address Rule 11.[222] If the rulemaking process addresses the most pressing issues, then in the eyes of the judiciary, Rule 11 is currently not one of them. Obviously, the movement for change is not coming from within the legal profession.

Congress has begun to re-exert its power in the rulemaking arena in an attempt to regain some of what it lost following the judiciary's "power grab" in this area.[223] "[U]nable to resist running

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[221] The preliminary draft was released for public comment in August 2004. *Comments Sought on Electronic Discovery, Other Proposed Changes to Federal Rules*, 73 U.S.L.W. (BNA) 2138, Sept. 14, 2004. After approval by the Supreme Court, the amendments will be sent to Congress and, if they do not object, will take effect on December 1, 2006. *New E-Discovery Rule Amendments Proposed*, 36 THE THIRD BRANCH 7 (July 2004), http://www.uscourts.gov/ttb/july04ttb/ediscovery/index.html. Two of the practical reasons for this process is that the "rules of evidence and procedure are inherently a matter of intimate concern to the judiciary, which must apply them on a daily basis" and "the Judicial Conference is in a unique position to draft rules with care in a setting isolated from pressures that may interfere with painstaking consideration and due deliberation." Letter from Michael S. Greco, *supra* note 218, at 2.

[222] New E-Discovery Rule Amendments Proposed, *supra* note 221.

[223] Burbank, *supra* note 174, at 513-14. Congress intended there to be more significant limitations on rulemaking than the Supreme Court has acknowledged. Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions about Power*, 11 HOFSTRA L. REV. 997, 1007 (1983).

> Briefly, Congress' concerns seem to have been rulemaking in areas where choices would have a predictable and identifiable impact on rights claimed under the substantive law or on interests claimed under the Constitution, and rulemaking in areas where choices would *create* rights substantially similar to rights under the substantive law in their effect on persons or property.

Id. (emphasis in original).

Prof. Burbank has proposed three reasons for Congress' re-emergence from the shadows. First, federal lawmakers believed that "the rulemakers were cavalier about the Enabling Act's limitations on their power, promoting changes under the banner of procedure that would have consequential effects on articulated congressional policy, including particularly policy concerning access to court." Burbank I, *supra* note 4, at 1704. Second, lawyers "came to believe that the rulemakers (who had come to be dominated by judges) were not listening, and they turned to Congress for relief from proposals to which they objected." *Id.* Third, "lobbying by lawyers and others led members of Congress to perceive that some issues of court practice and procedure either could be used to generate political support among certain interest groups or in any event might require attention in order to preserve such support." *Id.* at 1705. Members of Congress came "to view rules of procedure as a magnet, if not for constituent interests, then for special interests." Burbank II, *supra* note 4, at 228.

with the political football of civil justice reform,"[224] Congress passed a wake-up call—the Civil Justice Reform Act of 1990[225]—and a fire alarm—the Private Securities Litigation Reform Act of 1995[226]—that should have signaled to the legal profession and the rulemakers that Congress is ready, willing, and able to make changes if the legal profession will not.[227] This concern about who has the power and the will to exert it fails to place appropriate emphasis on pursuing "a shared vision, one that is informed by the fruits of empirical inquiry or an appropriate surrogate, disciplined by awareness of that which is politically feasible and crafted with technical expertise."[228] When there is only external pressure to change, the better approach may be the cooperative model of rulemaking, in which responsibility for reforming the civil justice system is reallocated.[229] Because "well-

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[224] Burbank, *supra* note 174, at 516.

[225] 28 U.S.C. §§ 471-482. The CJRA required each federal district court to implement a civil justice expense and delay reduction plan that was to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes." 28 U.S.C. § 471 (2000). A frequent commentator on rulemaking has noted that the CJRA succeeded in decreasing expense and delay in civil litigation. Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547, 548 (1998).

[226] Pub. L. No. 104-67, 109 Stat. 737 (codified at 15 U.S.C. § 77) (1995). According to the Conference Report, the PLSA

> seeks to protect investors, issuers, and all who are associated with our capital markets from abusive securities litigation. This legislation implements needed procedural protections to discourage frivolous litigation. It protects outside directors, and others who may be sued for non-knowing securities law violations, from liability for damage actually caused by others. It reforms discovery rules to minimize costs incurred during the pendency of a motion to dismiss or a motion for summary judgment. It protects investors who join class actions against lawyer-driven lawsuits by giving control of the litigation to lead plaintiffs with substantial holdings of the securities of the issuer. It gives victims of abusive securities lawsuits the opportunity to recover their attorneys' fees at the conclusion of an action. And it establishes a safe harbor for forward looking statements, to encourage issuers to disseminate relevant information to the market without fear of open-ended liability.

H.R. REP. No. 104-369, at 32 (1995). For Congress' explanation of the various provisions in the PLSA, see *id.* at 31-49.

[227] Burbank, *supra* note 174, at 516. "[B]y failing to seek empirical evidence on the operation of the Rules or proposed amendments, the rulemakers have both put their workproduct at risk of legislative override and encouraged Congress to initiate its own half-baked reforms." Burbank, *supra* note 151, at 841-42.

[228] Burbank & Silberman, *supra* note 34, at 703. It is not fair to "pursu[e] sanction theories in the absence of facts, particularly theories that are in tension, if not direct conflict, with basic premises of our legal system and with the articulated premises of Rule 11." Burbank, *supra* note 208, at 1962.

[229] Burbank & Silberman, *supra* note 34, at 703-04. Under this model, the judiciary would reassert itself as the primary rulemaker, but there would be

intended initiatives," such as mandatory sanctions under Rule 11, "can have unintended consequences," it is important that any changes to the civil justice system be based on more than the "practical experience of the bench and bar" and litigants.[230] This shared vision is necessary to achieve effective legal reform because unilateral action, as in LARA, cannot make the needed changes in both procedure and substance.[231] The problem of frivolous lawsuits—both real and perceived—requires more than just the changing of one procedural rule.

Objecting to LARA simply because it bypasses the "established" channel of rulemaking for the federal courts will not defeat it. Furthermore, it will lead to additional adverse public perception of the judiciary as self-absorbed in maintaining its own power.[232] Congress holds the ultimate power to legislate the rules for United States courts,[233] albeit a power that it has chosen to delegate to the judiciary through the Rules Enabling Act. However, anytime the Federal Rules are the subject of change outside the Enabling Act Process, such as through direct statutory amendments (*e.g.*, LARA), "the judiciary has a legitimate interest in focusing attention on the

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"mechanisms requiring that the branches cooperate, with the judiciary taking the lead, in the formulation and promulgation of reforms that would necessarily and obviously affect substantive rights." *Id.* This model would also stress research on the civil justice system while tightening the ability of local district courts to experiment with their own procedural rules. *Id.* at 704. *But see id.*, at 694 ("because fee-shifting can consequentially affect substantive social policy decisions even when masquerading as a sanction, it is a matter for Congress"). *See also* Burbank II, *supra* note 4, at 247-50 (proposing a commission on the model of the National Commission on Judicial Discipline and Removal to determine "whether there is agreement about the existence and nature of" problems in the civil justice system and, if so, to recommend "solutions, which might include wholly new permanent structures").

[230] Burbank & Silberman, *supra* note 34, at 677. The "lack of reliable and systematic empirical data makes it difficult to assess how serious or how extensive the problems [with frivolous litigation and Rule 11, in particular,] are." *Id.* at 676-77.

[231] *Id.* at 703.

[232] Burbank I, *supra* note 4, at 1733. Invoking "'The Enabling Act Process' as an objection to statutory substance-specific procedure may reinforce the view that the judiciary cares more for its power and supposed prerogatives than it does for the public interest." *Id.* Further, this appeal risks the perception "that the appeal is a cover for substantive disagreement." *Id.* at 1738. The Judicial Conference has a longstanding policy of opposing direct amendment of the Federal rules by legislation. Letter from Leonidas Ralph Meachum, Secretary, United States Judicial Conference, to Chairman F. James Sensenbrenner (July 9, 2004), quoted in H.R. REP. 109-123, *supra* note 1, at 42.

[233] U.S. CONST. art. I, § 8, cl. 9; U.S. CONST. art. III, § 1, cl.1; U.S. CONST. art. III, § 2, cl.2.

Enabling Act Process."[234] "[T]he judiciary's legitimate interests lie rather in timely and sincere consultation on the questions whether the existing trans-substantive rules are in fact not appropriate and, if so, what alternatives would be best."[235] Congress should make certain that there is a compelling reason to depart from the Enabling Act Process, which they have not done with LARA.[236] Instead, there is a policy disagreement between the legislature and the judiciary over the best way to curtail a perceived problem with frivolous lawsuits. There is an underlying factual debate over the actual pervasiveness of frivolous lawsuits. Rule 11 was changed in 1983 without an empirical justification and then was altered again because the 1983 amendments were perceived to have created all of the problems that the bar had predicted but that the rulemakers had ignored.[237] This lesson from recent history should counsel against a shotgun approach to again changing one of the most powerful and threatening procedures in the Civil Rules arsenal.[238]

2. Current Rule 11 Is Working

a. Regressing to Pre-1993 Rule 11 Is Unnecessary

Even before the 1993 amendments took effect, there was concern that Rule 11 would open the floodgates to frivolous claims

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[234] Burbank I, *supra* note 4, at 1737. "Like a certain four letter word, 'The Enabling Act Process' loses *its* power when invoked too often." *Id.* at 1739 (emphasis added).

[235] *Id.* at 1738.

[236] *Id.* at 1737 (mentioning a genuine need for speedy adoption, inadvertent omission from proposed Rules that are about to become effective, or the desire to place law properly made by Congress as opposed to the rulemakers in the proper context). Congress has said that the "threat of frivolous lawsuits that affect all aspects of American society" is a pressing problem, requiring it to take direct action. H.R. REP. 109-123, *supra* note 1, at 42. Without engaging in a discussion of the subject, it is worth noting that Prof. Burbank suggests that the rulemakers "should remind Congress that following the normal process, if possible, is important not just to improve the quality of the product (including the coherence of the Federal Rules as a whole), and not just to show respect for the federal judiciary as an institution." Burbank I, *supra* note 4, at 1738.

[237] *Id.* at 1704.

[238] "If positive legislative action were thought required or desirable, it would be appropriate for Congress to signal its interest in receiving a proposed Federal Rule from the judiciary, as it would be to proceed directly to legislation if the signal were ignored (which is highly unlikely)." *Id.* at 1738 n.269. The federal judiciary and the federal bar should take LARA as a Congressional invitation to make its own changes to Federal Rule 11 or to demonstrate, with sufficient factual basis, why the current version of the Rule should not be changed.

and motions. This began with Justice Scalia's famous dissent from the Supreme Court's transmittal of the proposed rule to the Congress.[239] Justice Scalia said that "[t]he proposed revision would render the Rule toothless, by allowing judges to dispense with sanction, by disfavoring compensation for litigation expenses, and by providing a 21-day 'safe harbor' within which, if the party accused of a frivolous filing withdraws the filing, he is entitled to escape with no sanction at all."[240] The Advisory Committee did agree that the safe harbor provision would "reduce the number of Rule 11 motions and the severity of some sanctions," but "to the extent these changes may be viewed as 'weakening' the rule," the Advisory Committee felt that this effect was desirable.[241] While Justice Scalia clearly viewed the strict, punitive nature of the 1983 Rule 11 as one of the keys to its success, the Advisory Committee felt it went too far in de-emphasizing its original deterrent purpose.[242] Since the 1983 version was unable to achieve the desired outcome, the Judicial Conference returned to the concept of judicial discretion as the "preferred method to achieve the underlying goal of limiting frivolous litigation."[243] Foreshadowing the present, Congress reacted by attempting to "abolish the safe harbor provisions and essentially restore Rule 11 to its pre-1993 form."[244]

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[239] FEDERAL RULES OF CIVIL PROCEDURE, *reprinted in*, 146 F.R.D. 401, 507 (1993) (Scalia, J., dissenting). Justice Thomas concurred in Justice Scalia's dissent, and Justice Souter only joined the dissent with respect to the elimination of Rule 11 sanctions from the discovery process (*i.e.*, Rule 11(d)). *Id.*

[240] *Id.* at 507-08. LARA's supporters consider this a game of "heads I win and tails you lose" because "unscrupulous plaintiffs' attorneys . . . can bring a frivolous claim and hope that they could succeed in getting an unjust settlement. But if a Rule 11 motion was brought against the personal injury lawyer, he or she has 21 days to withdraw the lawsuit without the imposition of any sanction." Lawsuit Abuse Reform Coalition, Backgrounder, *supra* note 33.

[241] LETTER, *supra* note 185, at 523.

[242] FED. R. CIV. P. 11 Advisory committee's note ("the purpose of Rule 11 sanctions is to deter rather than to compensate").

[243] Judith A. McMorrow, *The(F)utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 45 (2005) (citing Maureen Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 SMU L. REV. 493, 507 (1997)). LARA's supporters do not like judicial discretion. With respect to the 1993 amendments that removed the mandatory sanctions, LARC says that these amendments "allowed judges to ignore or forget sanctions." Lawsuit Abuse Reform Coalition, Backgrounder, *supra* note 33. Judicial discretion, then, allowed "irresponsible personal injury lawyers" to "game the legal system" because "[t]hey knew that it would be unlikely that they would have to pay for bringing frivolous claims." *Id.*

[244] Yablon, *supra* note 170, at 611 (*citing* Common Sense Legal Reforms Act (CSLRA) of 1995, H.R. 10, 104th Cong. § 205 (1995)). The House of Representatives did not pass the CSLRA.

The 1993 amendments have reduced sanctions litigation brought under Rule 11.[245] This may have occurred because the 1983 version of the rule was neither simple nor predictable, thereby leading to over-deterrence.[246] "[T]here were 1,000 reported cases a year" concerning "Rule 11 sanctions during the 1980s."[247] A March 1995 article in the A.B.A. *Journal* cited research that there were 34% fewer Rule 11 motions filed in the first year after the 1993 amendments took effect.[248] In the words of one attorney, the changes made people "more temperate and less compelled to attack other lawyers,"[249] and a U.S. District Court Judge remarked that "more lawyers are minding their manners. In the past, Rule 11 hearings often erupted into name-calling and shouting matches between opposing counsel."[250] They both attributed this result to the safe-harbor provisions.[251] The article quoted one senior district judge saying he wanted the old rule back because the 1993 changes offered lawyers who get caught an out "when filing frivolous pleadings."[252] The Advisory Committee's goal of "reduc[ing] the number of motions for sanctions presented to the court" was achieved by the changes.[253] This merely begs the question of whether that goal is desirable.

Rule 11 is not completely toothless because the court retains significant power to issue show cause orders on its own initiative, compelling the party to "show cause why it has not violated" Rule 11.[254] Once a court issues an order to show cause, a party no longer has a "safe harbor" to avoid sanctions by withdrawing or correcting the pleading.[255] As the commentary to the rule recognizes, "[s]uch corrective action, however, should be taken into account in deciding what—if any—sanction to impose if, after consideration of the

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[245] *Id.* at 615.

[246] Burbank, *supra* note 208, at 1941.

[247] Gallagher, *supra* note 163 (statement of John Rabiej, head of the Rules Committee Support Office at the Administrative Office of the U.S. Courts).

[248] Laura Duncan, *Sanctions Litigation Declining: Decrease Attributed to 1-Year-Old Safe-Harbor Amendments to Rule 11*, 81 A.B.A.J. 12 (Mar. 1995).

[249] *Id.* (statement of John P. Frank).

[250] *Id.* (statement of U.S. District Judge Suzanne Conlon, Northern District of Illinois). One of the reasons the Judicial Conference opposes LARA is that it "would exacerbate tensions between lawyers." Gallagher, *supra* note 163.

[251] *Id.*

[252] See Duncan, *supra* note 248, at 12 (statement of Senior U.S. District Judge Milton Shadur, Northern District of Illinois).

[253] FED. R. CIV. P. 11 Advisory Committee's note.

[254] FED. R. CIV. P. 11(c)(1)(B).

[255] FED. R. CIV. P. 11 Advisory Committee's note.

litigant's response, the court concludes that a violation has occurred."[256] An important feature of Rule 11 that insulates parties from the wrath and potential favoritism of the court is the unavailability of attorney fees if the sanctions are imposed pursuant to a court's order to show cause.[257] LARA eliminates this provision from Rule 11,[258] opening an additional avenue under which a party may be sanctioned and renewing the chilling effect. Given the option between current Rule 11 and Rule 11 post-LARA, 87% of 271 federal judges surveyed preferred the current version.[259]

LARA emphasizes the compensatory purpose at the expense of the deterrent purpose.[260] This only encourages parties to revert to the pre-1993 version of Rule 11 when they had an incentive to seek recovery of their costs as often as possible and to ask for as much as possible.[261] One commentator's research suggests that "when the federal district courts decide to impose Rule 11 sanctions, it is not uncommon for them to award *all* litigation costs, including attorneys' fees, as the 'appropriate' Rule 11 sanction."[262] This result turns the traditional American rule of "pay your own way" on its head. One can only imagine what would happen if the availability of Rule 11

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[256] *Id.*

[257] FED. R. CIV. P. 11(c)(2); Danielle Kie Hart, *And the Chill Goes On—Federal Civil Rights Plaintiffs Beware: Rule 11 Vis-Á-Vis 28 U.S.C. § 1927 and the Court's Inherent Power*, 37 LOY. L.A. L. REV. 645, 658 (2004).

[258] LARA § 2(1)(C).

[259] David Rauma & Thomas E. Willging, *Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure* 14 (2005), http://www.uscourts.gov/rules/newrules10.html. Of the 123 judges commissioned before January 1, 1992 (before Rule 11 was changed in 1993), eighty-three percent (83%) favored the current version of the rule, while ninety-one percent (91%) of the 148 judges commissioned after January 1, 1992 did the same. *Id.* Overall, only 4% of all the judges surveyed favored the proposed legislation. *Id.* Congress challenged this study by questioning whether any of the survey respondents had any significant experience with the pre-1993 version of the rule. H.R. Rep. 109-23, *supra* note 1, at 43-45. It also dismissed the judiciary's concerns with *ad hominem* attacks on the judges because they "themselves do not suffer in any direct way the costs of frivolous, abusive lawsuits." *Id.* at 44. Judges would be "unlikely to view frivolous litigation as a problem because such cases rarely reach the bench." *Id.* In fact, according to Congress, the "current situation favors judges, not small businesses who are harmed by the litigation." *Id.*

[260] LARA § 2(1)(C).

[261] On the contrary, the Seventh Circuit viewed an "[a]ward of fees under Rule 11 [to be] more like a sanction for contempt of court than like a disposition on the merits or even an award of costs." Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073, 1079 (7th Cir. 1987).

[262] Kie Hart, *supra* note 257, at 673 (emphasis added). According to the sanctions of Rule 11, a party is only entitled to "reasonable attorneys' fees and other expenses incurred as a *direct result* of the violation." FED. R. CIV. P. 11(c)(2) (emphasis added).

sanctions was increased. With an all-or-nothing approach to get as much of one's costs paid for by the other party, Rule 11 litigation would also increase. The supposed geniality that the 1993 amendments returned to the courtroom would be lost as parties searched their opponent's work for any reason to request sanctions. The end result would be increased litigation costs for everyone, defeating the stated purpose of LARA.

As Professor Yablon has noted, there is no exact way to determine whether the 1993 changes to Rule 11 have reduced frivolous filings, whether the *in terrorem* threat of pre-1993 Rule 11 was real, or whether the 1993 changes reduced this threat because they require a determination as to what constitutes a "frivolous" filing, and how many of those filings were withdrawn before any Rule 11 motions were filed.[263] Therefore, the best judgment about these changes is based on the available analysis and commentary. There apparently is a consensus that the number of Rule 11 motions has been reduced, and the American Bar Association rates the current Rule 11 as an "effective means of discouraging dilatory motions practice and frivolous claims and defenses."[264] While a minority of federal district judges would prefer to see Rule 11 modified to increase its deterrent effect,[265] the overwhelming majority believe that the rule should not be modified.[266] Given the concern for extraneous litigation and incivility that the 1983 modifications created, the 1993 amendments were a giant step in the right direction. Lawyers should be encouraged "to bring matters to the attention of the court informally."[267] Since Rule 11 does not aid the litigation and simply angers people, attorneys use other ways to advance their causes.[268]

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[263] Yablon, *supra* note 170, at 619-20. As Yablon demonstrates in his article, there is no good search query that yields the appropriate results, nor is there any statistical evidence on this matter compiled by the courts.

[264] Letter from Michael S. Greco, *supra* note 218, at 2; Gallagher, *supra* note 163. The former President of the Association of the Federal Bar of New Jersey said he has seen fewer Rule 11 motions. *Id.* "Sanctions for frivolous filings are the rare exception in New Jersey." *Id.* (quoting William Maderer).

[265] Rauma & Willging, *supra* note 259, at 14 (noting that 13% of 270 federal district court judges surveyed in 2005 preferred to see Rule 11 modified).

[266] Rauma & Willging, note 259, at 14. (noting that 81% of 270 surveyed in 2005 preferred the status quo).

[267] Gallagher, *supra* note 163 (statement of William Maderer). This appears to be the practice in the New Jersey federal courts. *Id.*

[268] *Id.* (statement of Dennis Gleason, chair of the Federal Practice and Procedure Section of the New Jersey State Bar Ass'n); David L. Hudson, Jr., *"Frivolous Suit" Bill Returns*, *supra* note 50 (in which Chris Mather, Director of Communications of the Association of Trial Lawyers of America stated, "legislation is duplicative and unnecessary as there already exist numerous ways for judges to throw out meritless

LARA eliminates this civil, professional process and replaces it with mandatory sanctions, and this would not promote civility.

A recent Third Circuit case demonstrates that district judges are willing to use Rule 11 to sanction attorneys. However, the case also supports the proposition that sanctions do not actually deter attorneys from filing frivolous pleadings and claims. District court judges sanctioned H. Francis deLone, Jr. three times for filing complaints based on legal theories that had been rejected by the Court of Appeals—in cases that he had himself argued.[269] Under LARA § 6, Mr. deLone would be automatically suspended from practice in that district court for at least one year. deLone's case received nationwide attention in a weekly ABA e-Journal Report; but it is not often that one hears of such situations. A three-strike provision would rarely come into play, but its existence may still chill certain plaintiffs and their attorneys from bringing claims to court.[270] In Mr. deLone's case, even discretionary sanctions were insufficient to deter him from filing unsupportable claims, and it is unlikely that required mandatory sanctions would make the outcome any different. In any event, the three-strike provision may be throwing the baby out with the bathwater, as Congress is trying to legislate every possibility, instead of allowing judges to use their discretion to achieve the same result.

b. LARA Does Not Protect Civil Rights Plaintiffs

It is unclear whether the specific deterrents facing civil rights plaintiffs under the 1983 version of Rule 11 were eliminated with the 1993 amendments,[271] and there remains some concern that Rule 11

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litigation").

[269] Shannon P. Duffy, *Lawyer Sanctioned – Again – for Losing*, THE LEGAL INTELLIGENCER, Aug. 17, 2005.

[270] One of the ABA's concerns is that civil rights and environmental plaintiffs would be the most likely target of this provision. Letter from Michael S. Greco, *supra* note 218, at 2. The three-strikes provision "is even more damaging when taken in combination with efforts to require mandatory sanctions for Rule 11 violations, which cannot be appealed until after a judgment is rendered in a case." *Id.*

[271] Carrington & Wasson, *supra* note 153, at 571 (citing Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155 (1999)). *E.g.*, Burbank, *supra* note 208, at 1947-48 ("Theory is an irresponsible basis for lawmaking about something as important as access to court, and it is especially irresponsible when the lawmaking involves judicial amendment of a Rule that, in part because of access concerns, only barely escaped the bright light of the democratic process.").

continues to deter plaintiffs from filing civil rights claims.[272] The Judicial Conference opposes LARA because it believes the changes to Rule 11 would "deter withdrawal of meritless claims" by lawyers who "might [see withdrawal] as an admission of error that justifies sanctions."[273] In addition, the increased threat of sanctions would "create possible conflicts between lawyers eager to duck sanctions and clients who want to pursue claims."[274] Perhaps the most threatening aspect of the proposed changes is the lack of a right to appeal a Rule 11 sanction.[275]

The now-open courthouse doors would again be shut to individuals who lacked "either adequate resources or ability to tolerate (let alone diversify) risk to bring a lawsuit."[276] Judges used the mandatory sanctions under the 1983 version of Rule 11 to undermine the "American Rule" of litigation finance, whereby each side bears its own attorneys' fees.[277] The Seventh Circuit saw the 1983 Rule as a "fee-shifting statute."[278] Going back to the mandatory sanctions of 1983, which were rejected less than a decade after they were instituted, revives this unfortunate possibility once again. LARA's mandatory sanctions shift some of the cost of litigation back to the plaintiffs, especially the risk-averse,[279] reflecting the perception

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[272] Carrington & Wasson, note *153*, at *Id.* (citing 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, 117 (2002)).

[273] Gallagher, *supra* note 163.

[274] *Id.* Congress has responded that "it is entirely appropriate that an attorney advise withdrawing claims a client wants to make *when those claims are frivolous.*" H.R. REP. NO. 109-23, *supra* note 1, at 41 (emphasis in original).

[275] *Id.* at 113.

[276] Burbank & Silberman, *supra* note 34, at 692.

[277] *Id.* at 691, 693. "[S]ome judges are using Rule 11 to shift the expenses they deem 'unjustified,' caused by papers they deem 'frivolous,' to the lawyer or litigant they deem responsible for the filing of the paper." Burbank, *supra* note 208, at 1932. In addition to the "conflict between or among circuits on practically every important question of interpretation and policy under the Rule" that results, other consequences include

> (1) an incursion into the American Rule on attorney's fees as deep as the notion of frivolity is subjective, (2) a view of sanctioning procedure that at times seems to impute greater rights to one who makes a Rule 11 motion than to one against whom such a motion is made, (3) a narrowing of the normative discretion that the Rule unquestionably confers on trial judges to select an appropriate sanction, and (4) a narrowing of the allocative discretion that an appellate court truly concerned about the costs of satellite litigation happily would leave with trial judges.

Id. at 1930, 1932.

[278] Hays v. Sony Corp., 847 F.2d 412, 419 (7th Cir. 1988).

[279] Burbank, *supra* note 208, at 1947.

of "would-be reformers who are concerned that the bad is driving out the good – that our court dockets are congested with frivolous cases, forcing meritorious cases to the back of the queue to languish or settle for inadequate amounts – [and who] have seen in litigation finance a potential solution."[280] Despite litigation finance being a complex social problem,[281] LARA tries to fit a band-aid on a bullet wound.[282]

In addition to civil rights groups, advocates for minorities, workers, persons with disabilities, and consumers are concerned.[283] LARA § 5, which says that the Act should not be construed to "to bar or impede the assertion or development of new claims or remedies,"[284] does not appease them.[285]

One commentator believes that the 1993 amendments have led to an increase in the chilling factor for civil rights plaintiffs.[286] Because Rule 11 sanctions are harder to get, federal district courts and attorneys resort to alternative sanctioning tools, i.e. 28 U.S.C. § 1927[287] and the court's inherent power to sanction,[288] in order to

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[280] Burbank & Silberman, *supra* note 34, at 692.

[281] *Id.* at 693.

[282] *Cf.* Burbank, *supra* note 151, at 842 (proposing a moratorium on procedural law reform "until such time as we know what we are doing").

[283] Gallagher, *supra* note 163. The advocacy group American Association of People with Disabilities opposes LARA because of the chilling effect on persons with legitimate claims. American Association of People with Disabilities, Protect Victims of Discrimination: Oppose H.R. 4571 and H.R. 3369, *supra* note 163. "[E]ven civil rights plaintiffs who pursue their legitimate claims with the heightened risk of severe sanctions, may give up at the hands of litigious defendants who employ a rope-a-dope technique simply to hear out their opponents." *Id.*

[284] LARA § 5.

[285] Gallagher, *supra* note 163.

[286] Kie Hart, *supra* note 257, at 648.

[287] This section has existed since 1813, and was amended in 1980 to specifically provide for attorneys' fees. *Id.* at 651. This is a penal statute that does not limit itself to an individual's pleadings, written motions, and other papers, like Rule 11, but looks at their course of conduct. Kie Hart, *supra* note 257, at 652. It provides,

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (2000).

[288] In *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991), the Supreme Court held that

> [A] federal court [is not] forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute [*i.e.*, 1927] or the Rules [of Civil Procedure] . . . . If in the informed discretion of the [district] court, neither the statute nor the Rules are up to the task, the court may

sidestep Rule 11's obstacles.[289] Both powers are broader than a judge's power under Rule 11.[290] Since the 1993 amendment added the safe harbor provision, the use of Rule 11 declined and parties more frequently invoked 28 U.S.C. § 1927 and the court's inherent power.[291] Ironically, the safe-harbor provision causes this sidestepping.[292]

Using sanctions other than Rule 11 to penalize plaintiffs reveals two problems. First, it means that the 1993 amendments did not accomplish their goal of ending the chilling effect.[293] Second, "if Rule 11's procedural requirements are being sidestepped . . ., then the chilling effects that prompted the Advisory Committee to amend Rule 11 in 1993 are arguably spreading to include these alternative bases of sanctions."[294] The end result is a "zero sum sanctions game."[295] While this game may adversely affect all litigants and parties, it has been argued that this effect has a greater impact on civil rights plaintiffs and their attorneys.[296] Similar to the *in terrorem* effect associated with the 1983 version of Rule 11, sidestepping chills

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safely rely on its inherent power.

Kie Hart, *supra* note 257, at 680 (bracketed material in quotation).

[289] *Id.* at 671. According to Kie Hart, sidestepping occurs when:

> (1) the same litigation misconduct is being used as the factual basis for all three sanctions provisions; (2) Rule 11's procedural requirements have not been satisfied, *and* (a) Rule 11 sanctions are threatened anyway, possibly in conjunction with a threat of alternative bases of sanctions, and/or (b) *because* Rule 11 is not satisfied, sanctions are only sought pursuant to 28 U.S.C. § 1927 and the court's inherent power.

Id. at 670 (footnotes omitted) (emphasis in original).

[290] *Id.* at 653, 655.

[291] *Id.* at 662.

[292] Kie Hart suggests that sidestepping Rule 11 "suggests that the safe harbor provision . . . is not being well-received by the federal bench and bar. If this suggestion turns out to be correct . . . this would only provide additional incentive [for the federal bench and bar] to circumvent it." *Id.* at 670. It also means that the 1993 amendments have been rendered meaningless. Kie Hart, *supra* note 257, at 670.

[293] *Id.* at 671.

[294] *Id.*

[295] *Id.*

> That is, a federal litigant or her attorney may no longer be sanctioned under Rule 11 because the 1993 amendments make it harder for courts to award Rule 11 sanctions. But that very litigant or her attorney may end up being sanctioned under either 28 U.S.C. § 1927 or the court's inherent power, *because the 1993 amendments make it harder for courts to impose Rule 11 sanctions.* In either case, however, sanctions are still threatened and they may still be imposed.

Id. at 671-72 (emphasis in original).

[296] *Id.* at 672.

civil rights plaintiffs because it opens additional avenues for sanctioning, even if Rule 11 does not apply.

This information might suggest that LARA would not necessarily resurrect the chilling effect because the chilling effect was never really eliminated. While this may be true, LARA intentionally increases the availability of Rule 11 sanctions, thereby increasing the obvious chilling effect of Rule 11, in addition to the remaining threats of alternative sanctions. Of the three sanctioning tools, Rule 11 is logically the first one that a party would encounter. By opening the floodgates of Rule 11 to more collateral litigation, civil rights plaintiffs are confronted with a hostile environment from the start, even before getting to § 1927 or the court's inherent power. LARA pours salt on an open wound, despite its insistence that it not be used to limit the "assertion or development of new [civil rights] claims or remedies."[297] Despite that language, it does not change the other two sanctioning tools. If there are alternative methods for sanctioning attorneys for filing frivolous claims and motions, and these avenues are being used more frequently, then LARA's changes to strengthen Rule 11 would be unnecessary. While these changes would eliminate some of the sidestepping, they would probably also result in a zero sum by decreasing the necessity for and use of § 1927 claims and increasing the number of Rule 11 motions. Therefore, LARA may increase the potential for sanctions and a chilling effect by broadening Rule 11's scope and not limiting the alternative avenues for sanctions.

c. LARA Brings Back a Cottage Industry . . . and Adds Another

Not only will LARA bring back the "cottage industry" that arose from the 1983 modifications,[298] but it will give rise to another, even more expensive, time-consuming, and unproductive scenario: interstate commerce hearings in the state courts.[299] The types of challenges to federal statutes under the Commerce Clause that the federal courts now hear, i.e. *Lopez*, *Morrison*, and *Raich*,[300] would occur on a more regular basis in the state trial courts anytime a party

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[297] LARA § 5.

[298] See *supra* notes 159-199 and accompanying text.

[299] "Interstate commerce hearings" refers to hearings where judges decide if the case substantially affects interstate commerce, using the criteria outlined in LARA § 3.

[300] As these three cases demonstrate, the fringes of Congress' power under the Commerce Clause are widely debated despite, or in response to, what the Supreme Court says—and does not say—in its decisions.

wanted Rule 11 to apply to that state proceeding.[301] Given the time, money, and effort that was spent arguing *Lopez*, *Morrison*, and *Raich*, LARA would make litigation more expensive for everyone, including the businesses for whom its proponents are trying to reduce litigation expenses.[302] The problems that LARA will create in the federal system will be magnified and multiplied in the state court systems because each state has its own set of rules of professional conduct.[303]

Besides the above-mentioned difficulty associated with interstate commerce hearings, LARA will increase the amount of litigation in the federal courts. Every time a state court holds a hearing to determine whether the civil action affects interstate commerce, a losing party will appeal that determination to the state appeals court, and then, possibly, to the state's highest court. Since consistency is important as to what does and what does not affect interstate commerce, it would be desirable for the federal courts to hear these state court decisions. Without a uniformity "enforcer," each state could develop its own case law interpreting the Commerce Clause. Unfortunately, the only federal court that can hear a direct appeal from a state court decision is the U.S. Supreme Court.[304] It is not

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[301] While the previously discussed statistics demonstrate a reduction in Rule 11 motions and sanctions, a return to pre-1993 practice and the new possibility for tougher sanctions in state court would more than likely prompt a surge in Rule 11 practice if LARA is enacted. See text *infra* and accompanying footnotes 248-59.

[302] Presumably, the businesses would seek to have Federal Rule 11 apply in a state court proceeding, so the businesses would bear the burden of proving that the civil action substantially affected interstate commerce. Meeting their burden would require some expense, possibly including hiring experts in the field.

[303] The federal court system presents a unique problem that is not applicable to the state court systems. While the federal courts are governed by a uniform set of rules of civil and criminal procedure and evidence, there is "[n]o single set of rules [that] govern attorney conduct (*i.e.*, ethics)." McMorrow, *supra* note 243, at 6.

[304] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). 28 U.S.C. § 1257 is the present source of statutory certiorari from a state court:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a) (2000). Under this statute, the Supreme Court would have jurisdiction to hear these appeals because Congress' authority to apply federal law in state courts under the Commerce Clause would be brought into question. Congress could grant the federal courts jurisdiction to hear appeals on this matter from the state high courts. Presumably, it would not be a final appealable order when a state judge decides that the state case substantially affects interstate commerce and that

difficult to imagine the Supreme Court having to hear several interstate commerce/Rule 11 cases every year to correct state court decisions for the sake of maintaining uniformity of Commerce Clause jurisprudence.[305]

It may be understandable why tort reformers would want to limit the discretion and power of state courts. These are, presumably, the "judicial hellholes" where judges and juries favor the injured plaintiffs at the expense of the innocent defendants, usually corporations, all under the presumably lax state rules of procedure.[306] So, the answer is to force state judges to apply the stricter federal law, and then, theoretically, justice will be restored. In principle, this top-down regulation has its merits, but this argument has an inherent flaw. The first step in the process resides back in the "judicial hellholes" and with the state judges, for they are the ones that determine whether the state civil action before them substantially affects interstate commerce. If state judges are unable to correctly apply their own state law in the first place, then what makes these same judges competent to "correctly" interpret and apply federal constitutional law?[307] Further, it is plausible that state judges may be jealous of their power, and, therefore, may be more deferential to a plaintiff in such a hearing. Ironically, the tort reformers' "solution" to frivolous lawsuits rests on the backs of the courts that they are deriding as incompetent.[308]

One unintended byproduct could be the development of a single theory for what affects interstate commerce. As *Raich*[309] demonstrates, there is no "absolute" rule on this matter. Perhaps the Court would establish such a rule and end the matter. In this respect,

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Federal Rule 11 would apply in the matter. A losing party would have to appeal the decision through the state courts—receiving a decision from the state's highest court—before appealing that decision to the federal courts, whether district or circuit.

[305] Alternatively, the Court could not hear these cases and allow inconsistency to reign.

[306] *See* American Tort Reform Association, *supra* note 19. By less-strict, I mean that the state rules do not impose mandatory sanctions for violations of their equivalent of Rule 11, like Federal Rule 11 would do if LARA was enacted.

[307] I use the term "correctly" from the tort reformers' perspective, meaning that the civil action *does* substantially affect interstate commerce and Federal Rule 11 applies. Of course, this is not a correct; or even safe, assumption. This assumption presumes that all civil actions will substantially affect interstate commerce, and, as discussed elsewhere in this article, that—even in its most general form—is not a foregone conclusion.

[308] This is one of the reasons for tort reform's success in passing federal class action reform. *See* SENATE REPORT, *supra* note 69.

[309] Gonzalez v. Raich, 125 S. Ct. 2195 (2005).

there is no fear that Rule 11 would become the next AEDPA or ERISA.[310]

Perhaps the most important reason to keep the safe harbor provision in Rule 11 is judicial economy.[311] It saves "federal judges from having to waste valuable time addressing unmeritorious claims and defenses . . ., either through the actual granting of Rule 11 motions or by way of rulings on dispositive motions."[312] Additional paperwork and filing is avoided, all of which would delay the merits of the case from being heard[313] and increase the financial burdens on the already cash-strapped state and federal court systems. These are "undeniable benefits to judicial administration . . ., which alone are sufficient to rebut any argument for its elimination."[314] Further, the Rule "induc[es], if not compel[s], opposing lawyers to communicate with each other," which "reflects a widely held view that much costly and time-consuming litigation activity could be avoided if lawyers talked to each other before they acted."[315] LARA encourages the opposite result, and, as the evidence from pre-1993 Rule 11 suggests, creates more problems than solutions.

By injecting Rule 11 into the state court system,[316] LARA increases the chilling effect beyond the federal courts. It also reduces the states' ability to experiment with procedures that they feel best address their local problems.[317] In addition, the cost to all parties would skyrocket.[318] For the marginal benefit that LARA may realistically achieve, this cost is too burdensome, especially when there are alternative means to reach the same, if not a better, result.

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[310] *E.g.*, Matthew G. Vansuch, *Not Just Old Wine in New Bottles:* Kentucky Ass'n of Health Plans, Inc. v. Miller *Bottles a New Test for State Regulation of Insurance*, 38 AKRON L. REV. 253, 253 n.3 (2005) (quoting former Chief Justice Rehnquist as saying that "[t]he thing that stands out about [ERISA cases] is that they're dreary," and the only reason to grant review to them was "duty, not choice"). Between the 2001 and 2002 terms, the Court heard four cases involving benefits, and all four were ERISA cases. *Id.* at n.5.

[311] *See* Lonnie T. Brown, *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L.J. 1555, 1582 (2001).

[312] *Id.*

[313] *Id.* at 1582 n.103.

[314] *Id.* at 1583.

[315] *Id.* at 1578 n.84 (quoting William W. Schwarzer, *Rule 11: Entering a New Era*, 28 LOY. L.A. L. REV. 7, 20 (1994)).

[316] LARA § 3.

[317] Again, these are state courts hearing state, not federal, causes of action.

[318] *See* text *infra* and accompanying footnote 302. It is ironic that the incidental costs of satellite litigation were significant enough to justify the 1993 amendments to Federal Rule 11. *See* LETTER, *supra* note 185, at 523 ("the time spent by litigants and the courts in dealing with such motions has not been insignificant").

C. *Instead of Changing Rule 11, Enhance the Ethical Duty to Report*

Instead of punishing clients or deterring claims that are potentially meritorious by tightening Rule 11 standards and restricting potential venues for injured parties, parties should increase the use of existing attorney discipline systems to crack down on "frivolous" claims. The present system for professional responsibility is adequate to address the situation, but it is not sufficiently used by opposing counsel,[319] which may itself be a violation of the ethical rules.

1. Mandatory Reporting

Rule 8.3(a) of the Model Rules of Professional Conduct ("Model Rules") imposes a mandatory reporting requirement on all attorneys: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."[320] Its predecessor, Disciplinary Rule 1-103(a) of the Model Code of Professional Responsibility ("Model Code"), imposed an even more stringent requirement: "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."[321] With respect to frivolous filings, Model Rule 3.1(a) specifically addresses this problem: "A lawyer shall not bring or

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[319] *See e.g.*, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 12.10.1, at 683 (1986) ("[p]robably no other professional requirement is as widely ignored by lawyers subject to it"). *But see* Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 272 (2003) (providing evidence that lawyers take their reporting responsibilities seriously).

[320] MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2004) [hereinafter MODEL RULES].

[321] MODEL CODE OF PROF'L RESPONSIBILITY DR 1-103(a) (1980) [hereinafter MODEL CODE]. DR 1-102 addressed attorney misconduct, stating:

> (A) –A lawyer shall not:
> (1) –Violate a Disciplinary Rule.
> (2) –Circumvent a Disciplinary Rule through actions of another.
> (3) –Engage in illegal conduct involving moral turpitude.
> (4)–Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
> (5) –Engage in conduct that is prejudicial to the administration of justice.
> (6) –Engage in any other conduct that adversely reflects on his fitness to practice law.

MODEL CODE DR 1-102.

defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[322] The Model Code has a similar provision, which spells out in more detail a lawyer's ethical responsibilities when representing a client.[323]

For the most part, Model Rule 3.1 and Rule 11 overlap.[324] The only difference is that Model Rule 3.1 does not have a safe harbor provision allowing the attorney to avoid professional misconduct by withdrawing the filing.[325] A violation of Rule 11 will "almost certainly" be a violation of Model Rule 3.1 and several other rules, regardless of whether the court imposes Rule 11 sanctions.[326] Model Rule 8.3(a) imposes an affirmative duty on lawyers to report known misconduct to the bar.[327]

Specifically, at the moment when an attorney determines that there has been a violation of Rule 11 and decides to prepare and serve the requisite "notice" motion on opposing counsel, that lawyer will also necessarily have determined that there was a violation of Model Rule 3.1, among others, as well. Moreover, it goes without saying that such a determination meets the "knowledge" requirement of Model Rule 8.3(a) no matter what level of knowledge is deemed

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[322] MODEL RULES R. 3.1(a).

[323] MODEL CODE DR 7-102. This rule states:

> (A) In his representation of a client, a lawyer shall not:
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> (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
>
> (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
>
> (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
>
> (4) Knowingly use perjured testimony or false evidence.
>
> (5) Knowingly make a false statement of law or fact.
>
> (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
>
> (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
>
> (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

Id.

[324] Brown, *supra* note 311, at 1588-89.

[325] *Id.* at 1592.

[326] *Id.* at 1604 (noting Model Rules 3.2, 3.4(c), and 8.4(d)).

[327] MODEL RULES R. 8.3(a).

appropriate. Thus, the duty to report is activated.[328]

Yet, the safe harbor of Rule 11 creates a "protective zone of silence"[329] around these frivolous filers, as very few attorneys report these violations to the bar.[330]

There is a perception that using Model Rule 3.1 in this situation would be overkill or duplicative when the court has already sanctioned the lawyer for his or her behavior.[331] But the counterargument is stronger: "a separate ethical rule regarding frivolous filings, such as Model Rule 3.1, can 'prevent repeat offenders from escaping notice, and build confidence in the legal system as a whole.'"[332]

2. Do the Current Rules Work to Deter Frivolous Filings?

There is no consensus about whether the current mandatory reporting requirements work as they are intended.[333] In the context of a perceived societal problem that attorneys file frivolous lawsuits, the justifications for mandatory reporting of such filings provide a narrow, directed response that would go a long way to countering public perception.[334] One justification for mandatory reporting in general is that "[t]he integrity of the [legal] profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules [or Rules of Professional Conduct] is brought to the attention of the proper officials."[335] Reporting punishes past abusers, deters potential abusers, and cultivates public confidence in the legal

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[328] Brown, *supra* note 311, at 1604-05 (footnotes omitted).

[329] *Id.* at 1604.

[330] *Id.* at 1592-93. *E.g.*, Greenbaum, *supra* note 319, at 271-75 (discussing the conflicting evidence of reporting).

[331] Brown, *supra* note 292, at 1593. In addition to the "perception that there are other procedural rules (*e.g.*, Rule 11) that adequately address such conduct, it is also possible that the standard of proof required to establish a violation of Model Rule 3.1 is considered too exacting to justify the necessary effort." *Id.* at 1593-94 (footnotes omitted).

[332] *Id.* (quoting GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROF'L CONDUCT § 27.12, at 25-27 (3d ed., 2001)).

[333] *See generally* Greenbaum, *supra* note 319 (discussing a whole host of issues raised by the current mandatory reporting requirements). In short, the empirical evidence is minute, and the conclusions that can be drawn from this lack of information are speculative. *Id.* at 271-75, 285.

[334] *Cf.* Burbank & Silberman, *supra* note 34, at 675 (noting that public perception of dysfunction is a necessary condition for change).

[335] MODEL CODE EC 1-4.

profession.[336] Mandatory reporting was prompted by the failure of previous rules, which only required voluntary reporting.[337] Therefore, if the public now believes that frivolous lawsuits are becoming the norm, then it is not entirely unreasonable for the public to view the legal profession as part of the problem. Since the Bar has purportedly done nothing to combat this problem, then the legislature should step in. Public interest groups are able to garner public support for outside regulation of the profession, with LARA's proposed "stiffened" penalties for attorneys who file frivolous lawsuits as just one example.[338] Even if mandatory reporting of frivolous filings is primarily a public relations device, it is still an important response to the exhausting attack on the legal profession as being unresponsive to a perceived problem affecting those outside the profession.[339]

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[336] Greenbaum, *supra* note 319, at 264; Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 999 (proffering these three justifications for mandatory reporting).

[337] Greenbaum, *supra* note 319, at 265; *e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1279 (1973) (providing initial reasons for adding the mandatory reporting requirement to the ABA models); ABA Ctr. for Prof'l Responsibility, Ethics 2000 Commission, Model 8.3 – Reporter's Explanation of Changes (Feb. 2002 Report), http://www.abanet.org/cpr/e2k-rule83rem.htm (defending the continued inclusion of mandatory reporting requirement). State disciplinary officials view the mandatory reporting requirement as "a valuable part of the process." *Id.*

[338] Perhaps the best evidence of this public opinion is that both party candidates in the 2004 presidential election supported some form of "tort reform." Democrats John Kerry, a former district attorney in Massachusetts, and John Edwards, a former litigator from North Carolina, supported a "three-strike" proposal similar to one that was dropped from LARA between the 107th and 108th Congresses, but returned to the bill during committee sessions. *See* H.R. REP. No. 109-23, *supra* note 1, at 40. *See also* Anthony J. Sebok, *Issues of Civil Justice and Tort Reform: What Role Will They Play in the Democratic Primaries?*, FindLaw's Writ, Jan. 26, 2004, ttp://writ.news.findlaw.com/sebok/20040126.html (discussing the positions of the primary candidates for the Democratic nomination for president). For a point-counterpoint discussion on the merits of tort reform, with particular focus on the 2004 Election, see Point of Law, Featured Discussion: Election 2004, http://www.pointoflaw.com/feature/election2004.php.

[339] *E.g.*, Gerald E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 538 (1986) (noting the criticism of the duty to report as rhetoric "aimed as much at persuading the public to let the bar remain a self-policing entity as it is at encouraging the bar to effectively police itself"); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 234-35 (1993) (commenting that some ethics rules are primarily public relations devices). *Cf.* Greenbaum, *supra* note 319, 276 n.87 (noting the suggestion that window-dressing rules should be deleted because they mislead the public); Jeffrey N. Pennell, *Ethics, Professionalism, and Malpractice Issues in Estate Planning*, C920 ALI-ABA 65, 185 (1994); E. Wayne Thode, *The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession*, 1976 UTAH L. REV. 95, 100 (1976).

3. Is there a Compromise between Rule 11 and Legal Ethics?

The important question is how legal ethics can be utilized in connection with Rule 11 and Model Rule 3.1.[340] There are two possible approaches. One proposal is to change the Model Rules completely and create a nationwide "alleged offender" database where an opposing party enters the offending party's name for each offense.[341] If a lawyer's name appeared in the database more than three times in a four-year period, a "red flag" next to his or her name would trigger an investigation by the appropriate disciplinary authorities.[342] Beyond the many technical obstacles to such a proposal, it is unlikely that the legal profession would institute such a major overhaul of the present system.

Another proposal is to make the litigation ethics rules, specifically Model Rule 3.1, the standard for attorneys under Rule 11. This would be accomplished by integrating the legal ethics rules into Rule 11 and then having the courts enforce these ethical guidelines through Rule 11.[343] It is argued that the courts are hypocritical for not enforcing the "ethical obligations of its officers—those attorneys of record in cases before them."[344] By letting attorneys get away with things, such as frivolous filings, the courts do "far more damage to the image of the legal profession than possibly anything else."[345] There is no reason for a double standard inside the courtroom and outside of it. This latter proposal would crack down on frivolous filing. In fact, this proposal would probably accomplish this task better than LARA's piecemeal approach to solving frivolous litigation because it puts the onus on the legal professionals without unduly burdening potential plaintiffs. Either way, the legal profession should take the initiative in cracking down on frivolous lawsuits, which it has not done, or face outside regulation.

One compromise solution is a dual system that incorporates the judges into the reporting scheme. Currently, judges have an

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[340] For a discussion of the issues raised by multiple state ethical codes and how they are applied in federal court, see Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 FORDHAM URB. L.J. 969 (1992).

[341] Brown, *supra* note 311, at 1606-13.

[342] *Id.* at 1611.

[343] Richard C. Johnson, *Integrating Legal Ethics & Professional Responsibility with Federal Rule of Civil Procedure 11*, 37 LOY. L.A. L. REV. 819, 832 (2004).

[344] *Id.* at 922.

[345] *Id.*

obligation similar to that of attorneys to report violations of the rules of professional conduct.[346] Instead of placing attorneys in the unenviable position of reporting their fellow barristers, the burden can be placed on the judge who decides that Rule 11 has been violated. LARA takes one positive step in this direction by requiring judges to refer to appropriate state disciplinary officials those attorneys who destroy documents, thereby obstructing a pending court proceeding.[347] For other violations of Model Rule 3.1 that a judge may not find to violate Rule 11, attorneys should have the obligation to report these violations under the ethics rules. This would allow attorneys to attack those practices that the public and the profession find the most objectionable.

Mandatory reporting of violations of the current Rule 11 provides an incentive for attorneys to think before they file. It may not solve the problem of attorney misconduct in general,[348] but it would help to address the sullied public image of the profession as ambulance chasers and snake-oil salespeople who abuse the system for personal gain at the expense of their clients.[349] One of the concerns with the current mandatory reporting regime is that there are too many ambiguities in the reporting rules themselves and the

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[346] MODEL CODE OF JUDICIAL CONDUCT § 3(D) (2000) [hereinafter JUDICIAL CODE]. This canon, in relation to attorneys, states:

> (2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

Id.

[347] LARA § 8(a)(2).

[348] Greenbaum, *supra* note 319, at 267-68 (questioning whether the public is even aware of the mandatory reporting requirement). As Greenbaum notes, if the public is aware of this requirement, "a cynical public may well believe that it is a duty often ignored and seldom enforced," and that this belief "would contribute even more to the decline in public support of the profession." *Id.* at 268. Mandatory reporting is a double-edged sword. As more reports of misconduct and disciplinary action arise under a more effective reporting scheme, "the public may begin to respect lawyers as self-policing but disrespect lawyers more as misconduct appears more widespread than formerly appreciated." *Id.*

[349] Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A.J., Sept. 1993, at 60, 64 (improving disciplinary enforcement is one factor that might help improve the legal profession's image). *E.g.*, Bill Rankin, *Georgia State Poll Down on Lawyers*, ATLANTA CONST., Sept. 3, 1995, at 1F (citing the lack of honesty, filing suits which abuse the tort system, and excessive billing as some of the reasons for public dissatisfaction with lawyers).

rules in general.[350] In the present version of the Model Rules of Professional Responsibility, there are considerable areas of uncertainty left open for question.[351] Requiring attorneys to report violations of Rule 11 is not ambiguous, since the court that imposes such sanctions dispels any uncertainty as to when the other attorney's duty arises. In this respect, mandatory reporting for Rule 11 would be a bright-line situation, but all the other areas of professional responsibility would remain as they currently are . . . ambiguities and all.

V. Conclusion

It is questionable whether Congress has the authority to usurp the states' authority to enact rules of civil procedure that state courts must use for hearing causes of action that arise under state law, and it is even more questionable whether LARA would achieve its intended results of decreasing the filing of frivolous lawsuits. This legislation reopens cans of worms that were closed up over a decade ago for the short-sighted purpose of exacting compensation from and inflicting punishment on opposing parties. Instead of reducing litigation costs, LARA's proposed changes will exacerbate them indefinitely, as Congress imposes more regulations on the federal (and possibly the state) courts.[352] On the other hand, LARA may end up having no discernible impact. Nevertheless, in the process, Congress will have burned a gaping hole in the Constitution, which the courts must correct if the political process does not. Regardless, the states and not Congress should put out their judicial hellholes. Therefore,

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[350] Greenbaum, *supra* note 319, at 281.

[351] Lynch, *supra* note 339, at 545. While some ambiguity is necessary in rules by design, "the Model Rule seems to have more than its share of ambiguities, ones that some states have sought to clarify in their own adaptations of the Model Rule." Greenbaum, *supra* note 319, at 281 n.117 (citing Cynthia L. Gendry, *Comment, Ethics – An Attorney's Duty to Report the Professional Misconduct of Co-Workers*, 18 S. ILL. U. L.J. 603, 609 (1994) ("[c]ritics describe the rule as either too subjective or too ambiguous")); *e.g.*, McMorrow, *supra* note 243, at 5 (noting that "[a]ll rules carry with them the inherent ambiguity of language"). Both the rules and the comments are ambiguous. *Id.* at 282 (mentioning the term "substantial" in the phrase "substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects" as ambiguous). The Rule is also ambiguous in its omissions. *Id.* (referring to the Rule's silence on how soon reports must be made after the duty to report arises).

[352] The prospects for more statutory-driven changes in the Federal Rules seems inevitable, "with the discovery of the power of procedure by interest groups and Congress alike." Burbank I, *supra* note 4, at 1737. This should necessitate closer and more frequent cooperation with Congress. *Id.*

LARA should not be enacted, and if it is, the courts should strike it down as unconstitutional.

APPENDIX

109th CONGRESS
1st Session

H. R. 420

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

January 26, 2005

Mr. SMITH of Texas (for himself, Mr. DELAY, Mr. CHABOT, Mr. PAUL, Mr. GREEN of Wisconsin, Mr. HERGER, Mr. KELLER, Mr. KING of Iowa, Mr. SHAYS, Mr. CANNON, Mr. BRADY of Texas, Mr. NORWOOD, Mr. NEUGEBAUER, Mr. CHOCOLA, Mr. MILLER of Florida, Mr. FEENEY, Mr. FORBES, Mr. GARY G. MILLER of California, Mr. CULBERSON, Mr. GARRETT of New Jersey, Mr. LEACH, Mr. KLINE, Mr. GALLEGLY, Mr. OTTER, Mr. JONES of North Carolina, Mr. KENNEDY of Minnesota, Mrs. MYRICK, Mr. MCCAUL of Texas, Mr. BOOZMAN, Mr. FRANKS of Arizona, Mr. SENSENBRENNER, Mr. GOODLATTE, Mr. FERGUSON, Mr. WILSON of South Carolina, Mr. BRADLEY of New Hampshire, Mr. CALVERT, Mr. FORTUNATO, Mr. KIRK, and Mrs. JO ANN DAVIS of Virginia) introduced the following bill; which was referred to the Committee on the Judiciary

June 14, 2005

Additional sponsors: Mr. SOUDER, Mr. CONAWAY, Mr. ROHRABACHER, Mr. LEWIS of Kentucky, Mr. COX, Mr. SIMPSON, Mr. BARTLETT of Maryland, Mr. GUTKNECHT, Mr. NEY, Mr. MCHENRY, Mrs. CUBIN, Ms. GINNY BROWN-WAITE of Florida, Mr. ROGERS of Michigan, Mr. HENSARLING, Mr. AKIN, Mr. STEARNS, Mr. INGLIS of South Carolina, Mr. BACHUS, and Mr. PUTNAM

June 14, 2005

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed.

A BILL

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Lawsuit Abuse Reduction Act of 2005'.

SEC. 2. ATTORNEY ACCOUNTABILITY.

Rule 11 of the Federal Rules of Civil Procedure is amended—

(1) in subdivision (c)—

(A) by amending the first sentence to read as follows: 'If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the attorney, law firm, or parties that have violated this subdivision or are responsible for the violation, an appropriate sanction, which may include an order to the other party or parties to pay for the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper, that is the subject of the violation, including a reasonable attorney's fee.';

(B) in paragraph (1)(A)—

(i) by striking 'Rule 5' and all that follows through 'corrected.' and inserting 'Rule 5.'; and

(ii) by striking 'the court may award' and inserting 'the court shall award'; and

(C) in paragraph (2), by striking 'shall be limited to what is sufficient' and all that follows through the end of the paragraph (including subparagraphs (A) and (B)) and inserting 'shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and to compensate the parties that were injured by such conduct. The sanction may consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney's fee.'; and

(2) by striking subdivision (d).

SEC. 3. APPLICABILITY OF RULE 11 TO STATE CASES AFFECTING INTERSTATE COMMERCE.

In any civil action in State court, the court, upon motion, shall determine within 30 days after the filing of such motion whether the action affects interstate commerce. Such court shall make such determination based on an assessment of the costs to the interstate economy, including the loss of jobs, were the relief

requested granted. If the court determines such action affects interstate commerce, the provisions of Rule 11 of the Federal Rules of Civil Procedure shall apply to such action.

SEC. 4. PREVENTION OF FORUM-SHOPPING.

(a) In General- Subject to subsection (b), a personal injury claim filed in State or Federal court may be filed only in the State and, within that State, in the county (or Federal district) in which—

(1) the person bringing the claim, including an estate in the case of a decedent and a parent or guardian in the case of a minor or incompetent—

(A) resides at the time of filing; or

(B) resided at the time of the alleged injury; or

(2) the alleged injury or circumstances giving rise to the personal injury claim allegedly occurred; or

(3) the defendant's principal place of business is located.

(b) Determination of Most Appropriate Forum- If a person alleges that the injury or circumstances giving rise to the personal injury claim occurred in more than one county (or Federal district), the trial court shall determine which State and county (or Federal district) is the most appropriate forum for the claim. If the court determines that another forum would be the most appropriate forum for a claim, the court shall dismiss the claim. Any otherwise applicable statute of limitations shall be tolled beginning on the date the claim was filed and ending on the date the claim is dismissed under this subsection.

(c) Definitions- In this section:

(1) The term 'personal injury claim'—

(A) means a civil action brought under State law by any person to recover for a person's personal injury, illness, disease, death, mental or emotional injury, risk of disease, or other injury, or the costs of medical monitoring or surveillance (to the extent such claims are recognized under State law), including any derivative action brought on behalf of any person on whose injury or risk of injury the action is based by any representative party, including a spouse, parent, child, or other relative of such person, a guardian, or an estate; and

(B) does not include a claim brought as a class action.

(2) The term 'person' means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, but not any governmental entity.

(3) The term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, and any other territory or possession of the United States.

(d) Applicability- This section applies to any personal injury claim filed in Federal or State court on or after the date of the enactment of this Act.

SEC. 5. RULE OF CONSTRUCTION.

Nothing in section 3 or in the amendments made by section 2 shall be construed to bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law.

SEC. 6. THREE-STRIKE RULE FOR SUSPENDING ATTORNEYS WHO COMMIT MULTIPLE RULE 11 VIOLATIONS.

(a) Mandatory Suspension- Whenever a Federal district court determines that an attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall determine the number of times that the attorney has violated that rule in that Federal district court during that attorney's career. If the court determines that the number is 3 or more, the Federal district court—

(1) shall suspend that attorney from the practice of law in that Federal district court for 1 year; and

(2) may suspend that attorney from the practice of law in that Federal district court for any additional period that the court considers appropriate.

(b) Appeal; Stay- An attorney has the right to appeal a suspension under subsection (a). While such an appeal is pending, the suspension shall be stayed.

(c) Reinstatement- To be reinstated to the practice of law in a Federal district court after completion of a suspension under subsection (a), the attorney must first petition the court for reinstatement under such procedures and conditions as the court may prescribe.

SEC. 7. PRESUMPTION OF RULE 11 VIOLATION FOR REPEATEDLY RELITIGATING SAME ISSUE.

Whenever a party attempts to litigate, in any forum, an issue that the party has already litigated and lost on the merits on 3 consecutive prior occasions, there shall be a rebuttable presumption that the attempt is in violation of Rule 11 of the Federal Rules of Civil Procedure.

SEC. 8. ENHANCED SANCTIONS FOR DOCUMENT DESTRUCTION.

(a) In General- Whoever influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, a pending court proceeding through the intentional destruction of documents sought in, and highly relevant to, that proceeding—

(1) shall be punished with mandatory civil sanctions of a degree commensurate with the civil sanctions available under Rule 11 of the Federal Rules of Civil Procedure, in addition to any other civil sanctions that otherwise apply; and

(2) shall be held in contempt of court and, if an attorney, referred to one or more appropriate State bar associations for

disciplinary proceedings.
(b) Applicability- This section applies to any court proceeding in any Federal or State court that substantially affects interstate commerce.