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THE PAST, PRESENT, AND FUTURE
OF TRANS-SUBSTANTIVITY IN
FEDERAL CIVIL PROCEDURE

David Marcus*

INTRODUCTION

The procedural system in the federal courts before the Federal Rules of Civil Procedure of 1938 tended toward staggering complexity. Federal courts applied one set of rules in equity, while in cases at law, federal procedure had to conform “as near as may be” to the rules of the state in which the judge sat.1 A federal judge in New York, for example, would have juggled equity rules, a procedural code with 1,536 sections,2 and special “federal practice rules” for instances when the state code was inoperable or inappropriate for federal litigation.3 In comparison, the Federal Rules, at least on the surface,4 offer a procedural canvass of stunning simplicity. The procedural backbone for the largest court system in the country consists of fewer than one hundred rules currently in force.5

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1. CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 31–34 (2d ed. 1947). Clark noted that “[t]he resulting discord tended to make the practice of each federal district indigenous and unique.” Id. at 34.


4. For the argument that the surface simplicity of the Federal Rules has engendered complexity, see, for example, Stephen B. Burbank, The Complexity of Modern American Civil Litigation: Curse or Cure?, 91 JUDICATURE 163, 164 (2008).

5. In 2004, a total of 281,338 civil cases were filed in the federal courts, and in 2005 the number was 253,273. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 48 (2008). In contrast, in Fiscal Year
What Robert Cover called their “trans-substantive achievement”—the notion that the Federal Rules apply equally to all areas of substantive legal doctrine—is one of the keys to the simplicity intended by their 1938 authors. The trans-substantivity principle reduces complexity for a straightforward reason. It requires that the procedural treatment that the Federal Rules prescribe for simple contracts disputes mirrors exactly what applies in complicated employment discrimination litigation. Judges and lawyers do not need to relearn procedure every time they delve into a new field of substantive doctrine.

Trans-substantivity and the simplicity it engenders have a certain aesthetic appeal, but while perhaps appropriate in 1938, they may not suit the complexity of the twenty-first century legal world. The Federal Rules have drawn critical fire as a relic of a kinder, gentler era in American civil justice that anachronistically encumbers modern litigation. Perhaps indicative of the principle’s centrality to the Federal Rules, these general assaults routinely include an attack on trans-substantivity. The notion that the same procedural rules could and should apply regardless of the substance of the case does, at first blush, seem quaint. The 1938 authors likely did not foresee the asbestos leviathan, class actions with up to 100 million plaintiffs, or other enormously complicated fields of litigation that beg for specialized procedural treatment. Legal practice has evolved since 1938; lawyers focus their practices on increasingly minute areas of law, and


9. See Resnik, supra note 8, at 508–15 (offering a view of civil litigation in the 1930s); Stephen N. Subrin, Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limitis, 49 Ala. L. Rev. 79, 84 (1997) (finding it “unlikely in the extreme that [today] a relatively small group of lawyers, many of whom knew each other in advance, could sit in a room and create an entirely new procedure for the entire country as was the case in the 1930s”).


even supposedly generalist judges specialize. Why should a one-
size-fits-all set of procedural rules persist? If certain areas of law are
sufficiently complex to demand specialized practitioners, should they
not also require specialized, substance-specific procedures?

The pressures of complexity and specialization, among other devel-
opments, have imperiled the trans-substantivity principle as a bulwark
of federal civil procedure. For years, lower federal courts have chafed
against its constraints, trying to read substance-specific requirements
into the open texture of the Federal Rules. In the past decade, legis-
latures have enacted tailored rules for particular doctrinal areas.
Prominent commentators have floated proposals for substance-spe-
cific procedural rules.

Trans-substantivity seems poised to depart from the center of the
procedural stage. Before this exit, however, the story of where the
principle came from in the first place needs telling. Although others
have touched on various aspects, no one has yet offered a historical
treatment of trans-substantivity’s development. This Article offers a
version, and in doing so, it identifies the theoretical underpinnings
long associated with trans-substantivity that should have implications
for procedural rulemaking in the future. Why and how the principle
developed illuminates some basic foundational assumptions of Ameri-
can civil procedure. The story also reveals what changes substance-
specific procedural rules might require for the processes by which
such rules are promulgated and judicially constructed.

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(2008).
(describing efforts by lower courts to forge substance-specific pleading requirements).
15. See, e.g., Stephen B. Burbank, Of Rules and Discretion: The Supreme Court, Federal Rules
and Common Law, 63 NOTRE DAME L. REV. 693, 716–17 (1988); Stephen N. Subrin, Fudge
Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure,
16. Stephen Subrin and Robert Bone have touched on various aspects of the history of trans-
substantivity but have not addressed the subject comprehensively. See Robert G. Bone, The
Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy,
87 GEO. L.J. 887, 893–97 (1999); Stephen N. Subrin, Federal Rules, Local Rules, and State Rules:
(1989). Stephen Burbank has thoroughly addressed the substance-procedure dichotomy but has
not provided a historical treatment of the principle itself. See Stephen B. Burbank, The Rules
17. For a different description of the “foundational assumptions” of “modern American pro-
cedure,” see Stephen B. Burbank, Pleading and the Dilemmas of “General Rules”, 2009 WIS. L.
REV. 535, 536.
After an introduction to trans-substantivity in Part II, it traces the rise of the principle in American law. It begins with the substance-specific procedural system of the common law era, describes the entrenchment of trans-substantivity with the code reforms of the nineteenth century, and depicts its final triumph with the Federal Rules of 1938. A prominent theme of this history is the tight link between the emergence in legal thought of a dichotomy between substance and procedure, and a preference for trans-substantive procedural rules. Only after lawyers acquired the ability to conceive of substantive doctrine apart from procedural form could procedural reformers argue for rules to apply equally regardless of substance. One might fairly describe this substance-procedure dichotomy as the jurisprudential prerequisite for the development of trans-substantivity.

Also, procedural reformers consistently voiced a claim—the only purpose of procedure qua procedure is to facilitate the efficient resolution of cases on their substantive merits—as they argued for trans-substantive rules. To early advocates of the principle, this normative assumption was an implication of trans-substantivity, given its indifference to substantive policy. Finally, because trans-substantive rules derived their goals from the substantive law they implemented, their promulgation was value-neutral and could legitimately proceed outside the political process. Trans-substantivity accordingly played a key theoretical role in justifying the sort of court-supervised rulemaking that produced the Federal Rules of 1938.

Part IV describes the ways in which recent statutory developments have imperiled trans-substantivity as a central plank in the foundation of American civil procedure. Most prominently, legislatures have enacted mixed packages of procedural and substantive reforms, including particularized pleading rules for medical malpractice, securities, and prisoner litigation. The embrace of substance-specific procedure highlights the brittleness of trans-substantivity’s theoretical underpinnings. An insistence on a dichotomy between substance and procedure rings hollow when legislatures use procedural and substantive measures as functionally indistinguishable tools to pursue an un-divided set of policy goals. The claim that procedural rules exist simply to facilitate the resolution of cases on their substantive merits

18. See infra notes 25–47 and accompanying text.
19. See infra notes 48–192 and accompanying text.
20. See infra notes 49–63 and accompanying text.
21. See infra notes 64–126 and accompanying text.
22. See infra notes 127–192 and accompanying text.
23. See infra notes 205–233 and accompanying text.
TRANS-SUBSTANTIVITY fails when legislatures use these tools to directly implement substantive ends. The very politicized processes that generated these procedural reforms undercut any notion that procedural reform is a value-neutral pursuit.

But the decline of trans-substantivity in recent decades is not simply the story of a principle in its senescence. Even as the theoretical underpinnings of trans-substantivity weaken, institutions with rulemaking power manifest by their actions continued respect for the principle. As Part IV describes, authoritative rulemakers within the federal system—the Supreme Court, the Advisory Committee, and federal districts in their exercise of local rulemaking power—have restricted themselves to the promulgation of trans-substantive rules or the trans-substantive construction of procedural rules.24 The contrast with the legislative turn to substance-specific procedure makes the reticence of these actors all the more interesting. A message lurks in this juxtaposition: court-supervised rulemaking remains legitimate if it generates trans-substantive rules, but substance-specific rules must come from the political process. Even if it is theoretically bereft, trans-substantivity continues to function as a principle that allocates rulemaking power among various institutions.

If trans-substantivity has a future, it is as this: a principle of institutional allocation of rulemaking power. The point here is not to offer a normative defense of trans-substantivity on its own merits, but rather to find in it a legal process value that is worth defending. By operating as an institutional restraint on court-supervised rulemakers, the principle can strengthen their legitimacy to craft procedural rules. As argued in Part V, trans-substantivity is functionally useful as a tool to achieve this good result.

II. AN INTRODUCTION TO THE TRANS-SUBSTANTIVITY PRINCIPLE

Although trans-substantivity has attracted quite a lot of comment,25 it has enjoyed little systematic theoretical or historical treat-

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This Part sets up the history of trans-substantivity by describing what exactly the principle is. Particularly important to the evolution of trans-substantivity as a historical matter is the relationship between procedural reform and value choice in law. This Part lays the groundwork to support procedural reformers’ claim, as described in Part III, that trans-substantive rules are value-neutral.

A. The Contours of Trans-Substantivity

A procedural rule is trans-substantive if it applies equally to all cases regardless of substance. A substance-specific procedural rule, in contrast, requires specific processes for a particular substantive category of case. Rule 8 of the Federal Rules, which provides that “a pleading . . . must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief,” is trans-substantive. In contrast, a provision in Rule 26 that exempts “an action by the United States to collect on a student loan” from the mandatory initial disclosures requirement is substance-specific. The vast majority of the Federal Rules are trans-substantive, with a few minor exceptions.

Despite this apparent simplicity, trans-substantivity has engendered some confusion in discussions of the general principles undergirding modern federal civil procedure. First, trans-substantivity differs from uniformity—an entirely different principle for the design of procedural rules. Uniformity in procedure has several possible meanings. As a geographical matter, a procedural system is uniform when the same rules apply in all jurisdictions. Procedural rules can be uniform but substance-specific (all jurisdictions must exempt student loan cases from the mandatory initial disclosure requirement, for example) or disuniform but trans-substantive (each jurisdiction can decide...
whether to allow telephonic depositions, for example). Several commentators have suggested a causal link between the prerogative of federal districts to enact local rules—a power that fosters disuniformity, to be sure—and the erosion of trans-substantivity in the federal procedural system.\textsuperscript{31} Certainly this prerogative can contribute to a breakdown in trans-substantivity because it gives federal districts the room to promulgate substance-specific local rules if they wish.\textsuperscript{32} But as the discussion of local rules in Part IV suggests, nothing necessarily links disuniformity with substance-specificity.\textsuperscript{33}

A procedural system is also uniform when the same rules apply regardless of the size or complexity of a case. In this sense, a system would be disuniform if, for example, one set of deposition rules applied to class actions, while another applied to individual suits. This hypothetical system would nonetheless remain trans-substantive, provided that the same deposition rules applied regardless of the substance of the class action.\textsuperscript{34}

Second, the relationship between trans-substantive rules and rules that vest procedural discretion in individual judges needs clarification.\textsuperscript{35} A number of commentators, generally critical of trans-substantivity, argue that the vast discretion the Federal Rules give district judges renders the federal system only superficially trans-substantive.\textsuperscript{36} For example, a judge who thought that civil rights litigation was a waste of time could, consistent with the Federal Rules, regularly limit § 1983 plaintiffs to ten depositions but allow antitrust litigants more.\textsuperscript{37}

\textsuperscript{31} See, e.g., Jay Tidmarsh, \textit{Civil Procedure: The Last Ten Years}, 46 J. LEGAL EDUC. 503, 510 (1996) (eliding “uniformity” with “trans-substantivity” and arguing that the proliferation of local rules after the enactment of the Civil Justice Reform Act of 1990 eroded both); Tobias, supra note 25, at 1504 (arguing that “the proliferation of local rules . . . has undone trans-substantivity”).

\textsuperscript{32} See, e.g., Local Rules for the United States District Courts for the Southern and Eastern Districts of New York, Rule 33.2 (“Standard Discovery in Prisoner Pro Se Actions”); see also Subrin, supra note 16, at 2025–26 (describing non-trans-substantive local rules).

\textsuperscript{33} See infra notes 267–272 and accompanying text.

\textsuperscript{34} But see Resnik, supra note 8, at 526–27 (suggesting that the evolution of a “distinct set of rules for cases with multiple parties or complex issues” has “undermined” trans-substantivity in the Federal Rules of Civil Procedure).

\textsuperscript{35} See Stephen B. Burbank, \textit{The Costs of Complexity}, 85 MICH. L. REV. 1463, 1474 (1987) (reviewing Richard L. Marcus & Edward F. Sherman, \textit{Complex Litigation: Cases and Materials on Advanced Civil Procedure} (1985)) (“[I]t is important to distinguish between procedure that is tailored to the case, in the sense that it is ad hoc, and procedure crafted in advance for a type of case.”).

\textsuperscript{36} See, e.g., Burbank, supra note 35, at 1474; Burbank, supra note 15, at 715; Resnik, supra note 8, at 527; Tidmarsh, supra note 26, at 1747–48.

\textsuperscript{37} See FED. R. CIV. P. 30(a)(2) (requiring leave of court for a party to take more than ten depositions). Several commentators have invoked the \textit{Manual for Complex Litigation}, which
This claim, that the trans-substantivity of the federal system is illusory because of judicial discretion, sweeps a bit broadly in its criticism of the principle. Ad hoc substance-specific procedures that an individual judge might employ differ significantly from a system-wide commitment to substance-specificity, as might be expressed in a substance-specific rule that binds the hands of all judges. A civil rights plaintiff might suffer because the discretionary Federal Rules enable the judge who is assigned to her case to restrict her access to discovery. But a different civil rights plaintiff, who draws a more sympathetic judge, would benefit from the Federal Rules' open texture. In other words, nothing in the discretion that the Federal Rules provide manifests a systemic approval or disapproval of a particular substantive area of litigation. In contrast, an expressly substance-specific rule implies a blanket policy assessment as to the desirability of a particular type of litigation that all judges must respect, regardless of individual proclivity.

Third, procedural rules do not easily fit into either trans-substantive or substance-specific pigeonholes. Because procedural rules can have regular, predictable impacts that differ by substantive area of litigation, trans-substantivity and substance-specificity are ideal types at two ends of a spectrum. But this fact does not render the labels useless. Arizona law requires a plaintiff suing a "health care professional" to state in her complaint whether an expert opinion will be necessary to establish the defendant's liability. Although by its terms it would apply to a breach of contract or antitrust claim against a physician, the requirement of course would overwhelmingly impact medical malpractice cases. It has only a veneer of trans-substantivity and is substance-specific by design.

The 1983 amendments to Rule 11 fall closer to, but still apart from, the trans-substantivity end of the spectrum. Among other things, the

suggests procedural strategies for the management of particular types of complex cases, in order to illustrate how the open texture of the Federal Rules enables individual judges to approach cases in substance-specific ways. See, e.g., Resnik, supra note 8, at 527; Tobias, supra note 25, at 1505 (arguing that the Manual for Complex Litigation "is a monument to non-trans-substantivity").

38. As far as the Manual for Complex Litigation is concerned, the existence of trans-substantive rules of course does not mean that certain types of cases will present recurring procedural challenges or that these challenges will differ by substantive category. It is one thing to have useful advice spelled out in advance for how to handle these challenges; it would be another thing altogether if the Manual were binding and thereby required judges to handle antitrust or securities class actions in particular ways in all instances.


amended Rule 11 required a plaintiff's lawyer to certify that allegations in a complaint are "well grounded in fact" and did not permit a good faith defense to the threat of sanctions.\footnote{Fed. R. Civ. P. 11 (Advisory Committee's Note to 1983 amendments).} While nominally trans-substantive, this rule change had a particularly dramatic impact in Title VII and other civil rights cases.\footnote{See generally Phyllis Tropper Baumann et al., Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases, 33 B.C. L. Rev. 211, 289–96 (1992) (describing the impact of the 1983 version of Rule 11 on Title VII cases); Mark Spiegel, The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules, 32 Conn. L. Rev. 155 (1999) (arguing that the 1983 and 1993 versions of Rule 11 had a disproportionate impact in civil rights cases); Carl Tobias, Rule 11 and Civil Rights Litigation, 37 Buff. L. Rev. 485, 489–508 (1989) (noting the adverse effect of the 1983 Rule 11 amendments on civil rights plaintiffs).} A number of recurring features of this type of litigation—the fact that evidence of discrimination is often in the defendant's control, for example, and the well-known financial straits of civil rights practitioners\footnote{See Baumann et al., supra note 42, at 289–90.}—made this so. But in contrast to the Arizona pleading requirement, this substance-specific effect did not motivate the design of the nominally trans-substantive rule. Part V discusses the implications of this difference.

**B. Value-Neutrality and Trans-Substantivity**

A particularly important, if controvertible, feature of trans-substantive rules is their neutrality with respect to substantive policy. Rules designed to apply equally across doctrinal categories require a level of abstraction that prevent them from explicitly expressing or manifesting a judgment as to the value of one area or another of substantive law. To the pioneers of the principle, as explained in Part III, this result meant that trans-substantive rules were value-neutral.

This perception of value-neutrality depends on an understanding that restricts value to policy choices made in substantive law. This notion of value of course is quite restrictive. A choice of one trans-substantive procedural rule over another, even if made for reasons totally disconnected from any particular substantive policy preference, can significantly impact the enjoyment of rights and the discharge of duties.\footnote{See, e.g., Stephen N. Subrin, The New Era in American Civil Procedure, 67 A.B.A. J. 1648, 1651 (1981).} A rulemaker might prefer a heightened pleading standard over a minimal one if she believes that efficiency, defined as optimal system-wide costs of litigation, should temper easy access to courts. The choice would help determine who can try to vindicate their claims and under what conditions, and thus have a significant impact on public policy. By a more expansive notion of value, this preference is
quite value-laden. Indeed, the claim that procedural rules should serve all doctrinal categories equally itself involves a value choice because it implies a commitment to the idea that all substantive areas merit the same amount and type of procedural implementation.45

At the least, however, trans-substantive procedural rules can claim a type of value-neutrality that substance-specific rules lack. Alas, it becomes necessary here to provide some definitional distinction between substance and procedure. It is impossible to do so in a way that will prove remotely satisfying to the legions of lawyers, judges, and scholars who have grappled with this issue, so the distinction here is offered tentatively for the sake of the argument that follows. A law is procedural if in design and effect it regulates the efficiency or accuracy of litigation. To borrow a famous and venerable definition, a law is substantive if in design and effect it “characteristically and reasonably affect[s] people’s conduct at the stage of primary private activity.”46

If value is defined as a choice of substantive policy, a law is value-neutral if it does not directly regulate conduct “at the stage of primary private activity.” By providing particularized procedural requirements for different areas of substantive law, substance-specific rules directly contribute to the achievement of particular regulatory goals for individuals’ primary activity. The preference or burden they foist upon a particular area of substantive policy thus precludes value-neutrality. The generality of trans-substantive rules, however, does not permit such a direct connection between process and substantive end. By this admittedly restrictive but (one hopes) analytically useful understanding of value, trans-substantive rules are indeed value-neutral.47

III. THE RISE OF TRANS-SUBSTANTIVE CIVIL PROCEDURE

This Part tells the story of trans-substantivity’s rise, starting with common law pleading, proceeding through the code reforms of the nineteenth century, and ending with the Federal Rules of 1938. Three themes emerge. First, the principle developed in lockstep with the emergence of a dichotomy between substantive and procedural law. This connection is logical. Trans-substantivity by definition requires

45. Cf. Bone, supra note 26, at 1163 (arguing that the only way to evaluate the “social benefit of procedure” is to assess the value of the substantive interests the procedure addresses).


47. For other discussions of value-neutrality in federal procedure, see Carrington, supra note 25, at 2074–79; Marcus, supra note 25, at 773–74, 781, 784.
some analytical separation between substance and procedure. Procedural rules can only apply across doctrinal categories if these categories exist in some manner or another. Also, procedural rules must stand apart from these doctrinal categories in order for the same rules to function regardless of substantive setting. The substance-procedure dichotomy could fairly be described as trans-substantivity’s jurisprudential prerequisite.

Second, the major proponents of trans-substantivity shared a consistent normative assumption for the proper purpose of procedural rules: they have no independent goals of their own and instead exist to provide for the efficient resolution of cases on their substantive merits. Procedure, in other words, is only a means to an end, a machine of sorts, and its goals in terms of public policy are entirely derivative of choices made in substantive law. The concurrent development of trans-substantivity with this assumption suggests that these proponents believed that the assumption was an implication of the principle, and that the principle required the assumption.

These two themes of trans-substantivity’s rise—its jurisprudential prerequisite and the normative assumption that accompanies it—dovetail to help explain a third theme: the understanding of procedural reform as value-neutral and the implications of this value-neutrality for court-supervised rulemaking. The substance-procedure dichotomy enabled a distinction between procedural rulemaking and substantive legislation. The claim that procedural rules derived their goals entirely from substantive law strengthened the perception of procedural reform as a value-neutral enterprise. Crucially, for the history of American civil procedure, procedural rulemaking for early twentieth-century reformers could legitimately proceed outside the political process because the promulgation of trans-substantive rules involved no choice of substantive policy.

A. Common Law: Substance-Specific Procedure

Every history of American civil procedure shares the same beginning: the system of common law pleading first developed in England after the Norman invasion, and it was then transported across the Atlantic as a backbone of early American law. Procedural reformers shared an understanding of efficiency that was much more rudimentary than what a modern lawyer who is familiar with basic economic theory might read into the term. For them, procedural rules were efficient when they worked quickly and inexpensively. See Bone, supra note 16, at 895 & n.37.

their implementation through a system of writs gave common law pleading its foundation. Starting in the thirteenth century, a prospective litigant had to petition the Crown's chancellor for a writ, an order directing the defendant to appear and giving the royal court jurisdiction. Various forms of action—assumpsit, detinue, trover, trespass, and a host of others—eventually coalesced out of the issuance of similar writs under similar factual circumstances. What modern lawyers would regard as a set of substance-specific procedural rules evolved. The various forms of action required the pleader to make quite specific and technical allegations in his complaint that differed depending on the remedy pursued. The processes that followed as a case proceeded varied. The chosen form would determine the nature of the defendant's responsive pleading, the requirements for service of process, whether a court could enter a default judgment, the form of trial, and the means of executing judgments. General procedural rules did not exist, but to quote one seminal history of English law, "[O]ne could discourse at great length about the mode in which an action of this or that sort was to be pursued and defended."

This connection between procedure and substance reflected the state of the common law's theoretical sophistication. Late nineteenth-century lawyers denigrated the forms of action and the writ system of pleading, which evolved haphazardly and without any overarching

50. See Clark, supra note 1, at 14. See generally L.B. Curzon, English Legal History 73–82 (2d ed. 1979) (describing the forms of action at common law pleading); Charles A. Keigwin, Cases in Common Law Pleading 1–13 (1924) (same); Robert Wyness Millar, Civil Procedure of the Trial Court in Historical Perspective 17 (1952) (same).
51. Clark, supra note 1, at 14.
52. Id. at 14–15.
55. See Maitland, supra note 53, at 6; see also J.H. Baker, An Introduction to English Legal History 52 (2d ed. 1979) ("Procedures and methods of trial available in an action commenced by one kind of writ were not necessarily available in another."); George van Santvoord, A Treatise on the Principles of Pleading in Civil Actions Under the New York Code of Procedure 9 (1873) (observing that each form of action had "rules peculiar to itself").
58. Pollock & Maitland, supra note 57, at 562.
theoretical design, as a testament to a theoretically immature legal system with no real structure. This observation, although perhaps exaggerated by the hyper-rationality of nineteenth-century legal science, has some truth. Doctrinal categories such as tort or contract did not appear in the common law until the late eighteenth century at the earliest. Before that time, lawyers did not think of substantive rights per se, but rather conceived of them procedurally in terms of writs to procure a particular remedy. Only in the nineteenth century did substantive doctrinal categories and a robust jurisprudential distinction between procedural rules and substantive rights and duties emerge. Before then, the forms of action provided the common law with its organizational structure. Trans-substantive procedural rules must be disconnected from substantive law to apply across doctrinal categories. Thus, their entanglement in the common law meant that, as a jurisprudential matter, a trans-substantivity principle could not fit within common law pleading.

B. The Rise of Trans-Substantivity

1. Jurisprudential Beginnings

The classification of the common law in Blackstone's Commentaries in the late eighteenth century, and the early nineteenth-century stirrings of legal science with all its categorizing tendencies, laid the groundwork for a substance-procedure dichotomy and thus trans-substantivity's jurisprudential prerequisite. The entanglement of sub-

59. See Pollock & Maitland, supra note 57, at 568; Pomeroy, supra note 54, § 26, at 24; Charles E. Clark, Trial of Actions Under the Code, 11 CORNELL L.Q. 482, 483 (1926); Book Review, 5 AM. L. REV. 359, 359 (1871) (reviewing John Townshend, The Code of Procedure of the State of New York, As Amended to 1870 (1871)) (noting that the forms of action "owe[d] their origin to ... purely historical causes" and were not "based upon a comprehensive survey of the field of rights and duties").

60. See Pomeroy, supra note 54, § 26, at 24.

61. See, e.g., J.H. Baker, An Introduction to English Legal History 49 (2d ed. 1979); Edgar Hammond, A Concise Legal History 1 (1921); Hepburn, supra note 54, § 21, at 21–22; Millar, supra note 50, at 3–4; Pomeroy, supra note 54, § 24, at 21; Harold Potter, An Introduction to the History of English Law 82 (1923).


64. Charles Clark noted the significance of Blackstone in this regard by declaring in his Handbook of Code Pleading that Blackstone "apotheosized" English common law. Clark, supra
stance with procedure, however, persisted well into the 1800s. The newly emerging American treatise literature of the time illustrates this transitional state of affairs. Joseph Chitty organized his 1826 contracts treatise without recourse to the forms of action, and James Gould published a treatise on pleading in 1832 that approached the subject as its own discipline. On the other hand, Nathan Dane's eight volume *General Abridgement and Digest of American Law*, published from 1823 to 1829, used the forms of action as a structural guide to the common law.

The jurisprudential boundary between substance and procedure owes its first analytically precise articulation to Jeremy Bentham, the progenitor of the term "procedure" itself. Bentham stressed the purpose each plays in the maximization of utility as he distinguished between the two. Substantive law included all doctrine that regulated rights and duties, with its end being "the maximization of the happiness of the greatest number of the members of the community in question." Bentham defined "procedure" or "adjective law" as "the course taken for the execution of the laws, . . . for the accomplishment of the will declared, or supposed to be declared, by them in each instance."

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65. See Simpson, supra note 63, 668–70.
71. Bentham, supra note 70, at 5.
Procedure did not directly contribute to overall happiness because, by definition, it simply provided the avenue for the implementation of the substantive law. But by ensuring "the maximization of the execution and effect given to the substantive branch of the law," it could do so indirectly. Hence, the "primary," albeit entirely derivative, goal of procedural rules: "the execution of the commands issued, the fulfillment of the predictions delivered, of the engagements taken, by the system of substantive law." This meant, in William Twining's summary, "[R]ectitude of decision, that is the correct application of substantive law to reliably determined facts." Bentham recognized that "in the pursuit" of this primary goal, "a variety of inconveniences are apt to occur." Litigation can prove expensive and burdensome and thereby detract from overall happiness. Hence, as a "collateral" or "subordinate" goal, procedural rules should try to "minimiz[e] the evil, the hardship, in various possible shapes necessary to the accomplishment of the main specified end."

Put together, the purpose of procedure is simple: efficiently facilitate the resolution of cases on their substantive merits. Thus, procedure is only "a means to an end." Any treatment of procedural rules that afforded them some other purpose was illegitimate because it interfered with the maximization of happiness through the substantive law.

The trans-substantivity principle lurks in Bentham's distinction between substance and procedure. By definition, procedural rules lack any doctrinal vestments and are thus substance-neutral. This, Bentham believed, is how it should be. Substance-specific procedural rules engender complexity, which would only give judges and lawyers an excuse to enrich themselves needlessly at the expense of overall utility. Bentham offered an anthropology of sorts of dispute resolution, and he believed that something akin to the formless process by which families solved problems worked most efficiently and accurately. Litigation should be modeled on this simple process. Properly conceived, Bentham maintained, "The means for coming at the

72. JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 477 (1827).
74. BENTHAM, supra note 70, at 6.
75. Id. at 8.
76. BENTHAM, supra note 72, at 477.
77. See TWINING, supra note 73, at 91.
78. See JEREMY BENTHAM, SCOTCH REFORM, in 5 THE WORKS OF JEREMY BENTHAM 1, 3, 5–6 (John Bowring ed., 1843) (1808).
truth, as to matters of fact, are the same in all cases: the means for obtaining and exercising the powers necessary to the giving execution and effect to the ordinances of substantive law, are the same in all cases.\textsuperscript{780}

Bentham's definitions of substance and procedure syncs with the sharp distinction that he drew between legislative and judicial functions. "[N]othing," he argued, "can be of greater importance than that the provinces of the Judge and the Legislature should be kept distinct."\textsuperscript{781} For several reasons, including fear of upsetting settled expectations as to rights and duties, he argues that judges should not make substantive law, but rather implement legislative will strictly and adhere to stare decisis rigidly.\textsuperscript{82} In contrast, Bentham advocated open-ended procedural rules—to be applied with ample discretion by the judge on a case-by-case basis—as best suited for the efficient implementation of substantive doctrine.\textsuperscript{83} The entirely derivative purpose that he assigned procedural rules gives normative support to this distinction. Judges could control procedure because its application did not entail the choice to privilege any particular rights or duties but merely involved the implementation of legislative will. Procedure, in this sense, was value-neutral.\textsuperscript{84}

2. The Development of Trans-Substantivity in the United States

After Bentham, the story continues in the United States. By the middle of the nineteenth century, the vanguard of American civil procedure had become nominally trans-substantive. The same three themes that resonated in Bentham's thought—the substance-procedure dichotomy, the normative assumption about the purpose of procedure, and procedure's value-neutrality—accompanied the principle's American emergence.

\textsuperscript{80} BENTHAM, supra note 70, at 15. Although Bentham allowed that there might be some substance-specific procedural rules, he insisted that the great weight of adjective law should be the same regardless of the substantive law at issue. See Gerald J. Postema, The Principle of Utility and the Law of Procedure: Bentham's Theory of Adjudication, 11 GA. L. REV. 1393, 1401 (1977).

\textsuperscript{81} POSTEMA, supra note 79, at 197.

\textsuperscript{82} See id. at 198–201, 209.


Progress began with the first American legal code—Edward Livingston's code of procedure of 1805.\textsuperscript{85} Significantly influenced by Bentham,\textsuperscript{86} Livingston eschewed the common law forms of action and the procedural complexities they fostered for a simplified procedure. To plead a claim, his code required plaintiffs in all cases to simply "state the names of the parties, their places of residence, and the cause of action, with the necessary circumstances of places and dates."\textsuperscript{87} As Livingston wrote to Bentham, he intended his code to "reject[] . . . the common law procedure in civil suits" and offer in its stead a "simple system" that a student could master in a day of study.\textsuperscript{88}

The fact that Louisiana, of all American jurisdictions, was the first to adopt a trans-substantive procedural code itself illustrates the principle's jurisprudential dependence on the substance-procedure dichotomy. Louisiana was not a common law jurisdiction and thus did not inherit a system of law structured around procedural form.\textsuperscript{89} Moreover, substance disentangled itself from procedure much earlier in civilian systems.\textsuperscript{90}

Much to the frustration of some lawyers of the time,\textsuperscript{91} common law pleading persisted elsewhere in the United States in the first half of


\textsuperscript{86} See Francis R. Aumann, The Changing American Legal System: Some Selected Phases 123 (1940); Peter J. King, Utilitarian Jurisprudence in America: The Influence of Bentham and Austin on American Legal Thought in the Nineteenth Century 270–95 (1986).

\textsuperscript{87} Henry G. McMahon, The Case Against Fact Pleading in Louisiana, 13 LA. L. REV. 369, 377 (1953) (quoting Acts of the Territory of Orleans, ch. 26, § 1 (1805)).

\textsuperscript{88} Letter from Edward Livingston to Jeremy Bentham (July 1, 1830), in 11 The Works of Jeremy Bentham 52 (John Bowring ed., 1843); cf. John H. Wigmore, Louisiana: The Story of Its Legal System, 1 S.L.Q. 1, 10 (1916) (observing that Livingston shared Bentham's "contempt for the rubbish and the useless fictions that disfigured . . . the common law of England and the United States").

\textsuperscript{89} Louisiana law in 1805 was largely Spanish in origin. See King, supra note 86, at 270. In 1808, it adopted a civil code modeled on the Code Napoleon. See John H. Tucker, Source Books of Louisiana Law, 6 TUL. L. REV. 280, 283 (1932).

\textsuperscript{90} See R.C. Van Caenegem, European Law in the Past and Future 48–49 (2002).

\textsuperscript{91} See, e.g., State of New York, First Report of the Commissioners on Practice and Pleadings 139 (1848) ("No new action has been devised within the last three hundred years; and the courts of law of republican New-York, in the nineteenth century, are administering justice, in the forms of the courts of monarchical England, in the sixteenth."); David Dudley Field, Third Report of the Practice Commission (Jan 30, 1849), in 1 Speeches, Arguments, and Miscellaneous Papers of David Dudley Field 285, 287 (A.P. Sprague ed., 1884) ("Our society had outgrown the solemn forms which, conceived in remote ages, belonged to monarchical institutions."); see also Stephen N. Subrin, David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision, 6 LAW & HIST. REV. 311, 322 (1988) (describing antebellum New York lawyers' frustration with pre-code procedure).
the nineteenth century. The forms of action, many of which had coalesced in a fourteenth-century, feudal, agrarian society, proved ill-suited for the rapidly developing legal needs of an increasingly industrialized American economy. The deficiencies of common law pleading in this respect coincided with, and likely contributed to, the emergence of a substance-procedure dichotomy. Driven by a need to reconceptualize the common law for a nineteenth-century world and encouraged by scientific theories of the day, lawyers began to classify law into its familiar doctrinal categories. At the same time, the organizational structure that the forms of action provided the common law began to prove unnecessary, enabling the separation of substance from procedure.

These developments reached their zenith with the New York Code of Procedure, authored in significant measure by David Dudley Field and adopted in 1848. Influenced by Livingston’s code, the Field Code has justly earned significant comment as a fountainhead of modern American civil procedure. In addition to the abolition of the distinction between law and equity, its key reforms included an end to the forms of action. Rather than selecting a particular writ based on the remedy sought, a plaintiff merely had to state all facts constituting a “cause of action” in order to successfully plead his claim. Also, the Field Code established a single mode of procedure for all cases.


96. For a comprehensive history of the Field Code, see generally Subrin, supra note 91.

97. See, e.g., David Dudley Field, What Shall Be Done with the Practice of the Courts?, reprinted in 1 Speeches, Arguments, and Miscellaneous Papers of David Dudley Field, supra note 91, at 226, 242; Arphaxed Loomis, Historic Sketch of the New York System of Law Reform in Practice and Pleadings 15 (1879) (observing that the New York Commissioners reviewed Livingston’s code as an example when drafting the New York code).


99. Clark, supra note 1, at 22-23; Millar, supra note 50, at 53-54.
Trans-substantivity thus appears as a central feature in what became known by the late 1800s as the "American system" of procedure.100

Field embraced trans-substantivity as a foundational principle for procedure.101 In an 1847 polemic on procedural reform, he lamented "the net of forms" that had "entangled" justice.102 Doing better meant starting over. Field recommended that lawyers "go back to first principles, break up the present system, and reconstruct a simple and natural scheme of legal procedure."103 A fundamental tenet of this new scheme, he insisted, must be "nothing less than a uniform course of proceeding, in all cases."104 Field defined "uniform course" as

a general conformity in the different cases, so that, while the particular circumstances of each may receive such remedy as they require, the outline of the proceedings in all may be the same, and a knowledge of the course pursued in one may serve as a guide in the others.105

Field made the same normative assumption for procedural rules as Bentham did—that their purpose was the efficient implementation of the substantive law. He related this purpose to trans-substantivity. Substance-specific rules created complexity, which interfered with this implementation.106 Field also had the jurisprudential sophistication to conceptualize a substance-procedure dichotomy, as evidenced by his advocacy for a substantive civil code apart from his procedural one. But Field’s 1847 polemic suggests that the dichotomy had not yet become accepted wisdom. His desire for a procedural code needed the political support of the New York bar. Field realized, however, that the lawyers he had to win over might object to a simplified procedural


101. See Daun van ee, David Dudley Field and the Reconstruction of the Law 33 (1986) (referring to a "single method of proceeding" as "the essence" of Field’s proposals); see also Letter from David Dudley Field to Cephas Brainerd et al. (Feb. 20, 1878), in The Latest Edition of the New York Code of Civil Procedure: Correspondence Between Cephas Brainerd and Others and David Dudley Field 28 (1878) (denouncing a proposed change to the New York Code of Procedure because of its substance-specificity).

102. David Dudley Field, What Shall Be Done with the Practice of the Courts? (1847), reprinted in 1 Speeches, Arguments, and Miscellaneous Papers of David Dudley Field, supra note 91, at 226, 228 [hereinafter Field, Practice of the Courts]; see also David Dudley Field, Law Reform in the United States and Its Influence Abroad, 25 Am. L. Rev. 515, 519 (1891) (denouncing the "grotesque forms of action").

103. Field, Practice of the Courts, supra note 102, at 226, 229.

104. Id.

105. Id. at 230.

106. See id. at 235; cf. Subrin, supra note 91, at 318 (noting Field’s frustration with the technicalities of common law pleading and the way they interfered with litigation).
code on grounds that “the learning of the profession”—the substance of the law itself—“[is] bound up with the system of common-law pleading.” As a response, Field staunchly asserted the independence of substantive law from procedure:

To assert that the great body of the law, civil and criminal—the law which defines rights and punishes crimes; the law which regulates the proprietorship, the enjoyment, and the transmission of property in all its forms; which explains the nature and the obligations of contracts through all their changes . . . to assert that this vast body of law requires the aid of that small portion which regulates the written statement of the parties in the courts of common law, is to assert a monstrous paradox, fitter for ridicule than for argument.

Field also insisted that his proposed procedural system would “not affect, in the slightest degree, the substantial rights of any party.” In other words, procedural reform, pursued the way Field envisioned it, would be value-neutral with respect to substantive policy.

In one respect, Field differed from the other key figures in the development of trans-substantivity and what it meant for procedural rulemaking. Like Bentham, Field advocated for a strict separation between the judicial and legislative functions. Unlike Bentham, however, who believed judicial discretion appropriate in the procedural realm, Field wanted to constrain judges with legislatively fixed procedural rules that eliminated such discretion. He would thus protect against judicial adventurism in lawmaking. In other words, to protect the legislative prerogative from judicial encroachment, Field denied judges control even over the rules that governed court processes.

Field’s influence on American civil procedure in the second half of the nineteenth century was enormous. By 1900, twenty-five states and four territories had enacted a version of his code reforms, spreading trans-substantivity across the American legal landscape. Commentaries from the era reflect the tight link between the principle’s entrenchment and a well-established substance-procedure dichotomy.

107. Field, Practice of the Courts, supra note 102, at 226, 249.
108. Id.
109. Id. at 251.
111. See Subrin, supra note 91, at 323.
112. See Clark, supra note 1, at 24. The four territories were Arizona (1912 statehood), Alaska (1959 statehood), Oklahoma (1907 statehood), and New Mexico (1912 statehood).
113. Late nineteenth-century commentators invoked the substance-procedure dichotomy as a starting point for a discussion of procedure. See, e.g., Edwin E. Bryant, The Law of Plead-
John Norton Pomeroy, an important supporter of the code reforms,114 explicitly discussed the rise of trans-substantivity—a “single, harmonious, identical system” of procedure115—as a result of jurisprudential maturation.116 In earlier times, because “judges [did not] view the law as a body of general rules based upon great principles of right and justice,”117 procedural form provided the common law with its organizational structure.118 According to Pomeroy, as nineteenth-century lawyers “mould[ed] separate and important portions of the [common law] into a logical, scientific, and homogenous form,”119 the forms of action lost their structural importance,120 and their continued use could only interfere with the implementation of the substantive law. By abolishing the forms of action and substituting in their stead a “single judicial instrument for the prosecution of all remedial rights,” the American system of code pleading would better enable the legal system to perform this function.121

Lawyers continued to make the same normative assumption as to the derivative purpose of procedural rules that Bentham and Field voiced—the settlement of “controversies . . . quickly, inexpensively, and as nearly right as possible.”122 Also, procedural reform did not alter substantive rights123 and could thus claim the mantle of value-neutrality. The state of affairs for procedural reform at the end of the nineteenth century thus reflects the entrenchment of trans-substantivity. By 1900, the lack of procedural uniformity across American jurisdictions124 and creeping particularism and complexity within code

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114. For Pomeroy on the code reforms, see POMEROY, supra note 54, § 32, at 31. For a discussion of Pomeroy's importance as a proceduralist in general, see Robert G. Bone, Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules, 89 COLUM. L. REV. 1, 27 (1989).

115. POMEROY, supra note 54, § 34, at 32.

116. See, e.g., id. § 7, at 7.

117. Id. § 24, at 21.

118. See id. § 25, at 23 (“The division into legal and equitable relief, and the common-law forms of action, presented a theoretical and a practical classification of remedies and remedial rights, which was universally accepted as not only proper, but as the only one possible under the circumstances.”).

119. Id. § 24, at 22.

120. Id. § 37, at 37; see also Johnson, supra note 100, at 380 (observing that the abolition of the forms left underlying rights unchanged).

121. POMEROY, supra note 54, § 33, at 32; see also id. § 37, at 37.

122. Fred A. Maynard, Reform in Legal Procedure, 2 MICH. L.J. 75, 75 (1893).

123. See POMEROY, supra note 54, § 37, at 37.

124. As early as the 1870s, advocates proposed a national code of civil procedure. See, e.g., M.M. Cohn, A Uniform Code of Procedure, 7 CENT. L.J. 322, 324 (1878); Address of Mr. Justice Miller, 18 ALB. L.J. 405, 412 (1878); William Reynolds, A National Code of Procedure, 21 AM. L.
jurisdictions\textsuperscript{125} drew the focus of reformers. Substance-specificity entered into the conversation only implicitly, as part of debates over the persistence in some jurisdictions of common law pleading and the continued resistance to code reforms.\textsuperscript{126}

C. The Federal Rules of 1938: Trans-Substantivity, Court-Supervised Rulemaking, and Institutional Legitimacy

Although innovative in many respects, the Federal Rules of 1938 did nothing particularly novel with respect to the development of trans-substantivity.\textsuperscript{127} Rather, they represent the principle's final triumph, as they expunged remnants of a common law mentality that had survived the code reforms. As far as trans-substantivity is concerned, the Federal Rules are significant for that reason alone. Also important to the trans-substantivity story is their source. The Federal Rules emerged from a court-supervised rulemaking process to which the themes of the principle’s rise, and thus the trans-substantivity principle itself, lent institutional legitimacy.

1. The Federal Rules and the Final Triumph of Trans-Substantivity

Vestiges of the forms of action lingered in turn-of-the-century pleading, even in jurisdictions that had adopted a version of the Field Code,\textsuperscript{128} in part due to the intransigence of lawyers who saw something jurisprudentially fundamental in them.\textsuperscript{129} The necessary link between procedural form and substantive rights, one lawyer argued in

\textsuperscript{125} See, e.g., J. Newton Fiero, Should the Code of Civil Procedure Be Revised, Condensed and Simplified, 2 Am. Law. 479, 480 (1894).

\textsuperscript{126} See, e.g., Asa Iglehart, Suggestions upon Code Revisions and Code Procedure, 8 Cent. L.J. 411, 411 (1879).

\textsuperscript{127} Cf. Summary of Proceedings of the First Meeting of the Advisory Committee on Rules, Held in the Federal Building at Chicago, Thursday, June 20, 1935, at 6 (discussing the meaning of the term "general rules" in the Rules Enabling Act, 28 U.S.C. § 2072, but making no mention of trans-substantivity); Burbank, supra note 25, at 1934–35; Burbank, supra note 15, at 713 n.140 (noting that the 1938 authors of the Federal Rules "assumed" that they would pursue trans-substantive rules).

\textsuperscript{128} See Henry John Stephen, Principles of Pleading in Civil Actions § 10, at 15 (2d ed. 1901) ("The dependence of code pleading upon the principles of the common-law system is no longer a disputed or debatable point in American jurisprudence.").

\textsuperscript{129} See, e.g., Charles A. Keigwin, Cases in Code Pleading 23–24, 221 (1926); Simeon Nash, Pleading and Practice Under the Civil Code 3 (3d ed. 1864); Modern Reform in Pleading, 1 Am. L. Rev. 631, 634 (1867).
1912, rendered trans-substantive procedure impossible. Others agreed, for example, that while the code reforms abolished the requirement that plaintiffs lard their complaints with technical language, the common law forms of action determined what facts a plaintiff had to allege in order to state a "cause of action." Lawyers thus continued to pay scrupulous regard for the form that pleadings took, "mak[ing] the rules an end in themselves and not the means to an end," as Charles Clark lamented, even after the evolution of substantive doctrinal categories rendered them structurally irrelevant.

This attitude retarded the implementation of trans-substantivity. The Field Code, for example, authorized the joinder of all causes of action in a single suit that arose from the same "transaction." Determined to preserve the spirit of common law pleading, New York courts construed the term "transaction" to allow joinder only of those causes of action that could have been joined at common law. The earlier system made joinder dependent on the forms of action, so this interpretation of the Field Code read the forms back into its terms of the code. Joinder rules were thus substance-specific. The doctrinal label that the substantive law assigned to the plaintiff's claim controlled the procedural avenues that were open to her.

A reluctance to acknowledge the substance-procedure dichotomy accompanied the persistence of this common law mentality. The forms of action filled some casebooks on pleading and practice of the early twentieth century, manifesting the belief, as one of the casebook editors put it, that "a common law foundation" must precede any study of "modern pleading devices." Proponents of this procedural pedagogy invoked the benefits that the study of the forms of action

would offer a student's education in substantive law. The common law mentality's survival also meant that, for some commentators, procedural rules served purposes other than the efficient implementation of the substantive law. In his famous 1906 address on defects in American law, Roscoe Pound complained that common law pleading fostered the attitude that the purpose of procedure was to make litigation an adversarial sport and not a mechanism for resolution of cases on the merits.

Procedural reformers spent great energy during the first three decades of the twentieth century trying to rid procedural rules once and for all of the last remnants of common law pleading. The Federal Rules represent the culmination of these efforts. Their doctrinal history is well known, but the success that the 1938 authors had in eliminating common law pleading and entrenching trans-substantivity deserves further comment. The Federal Rules left substance-specific procedure behind by closing the entry points through which the forms of action had crept back into the code reforms. The authors eschewed the term "cause of action" in Rule 8 in part to discourage courts from turning to the common law forms in order to determine what a plaintiff must allege to adequately state a claim. Rule 18, which governs joinder of claims, avoids both "cause of action" and "transaction," enabling joinder without any restriction based on the doctrinal categories from which the claims come. At a more basic level, the 1938 authors, following Bentham's lead, committed themselves to simple rules that were designed to vest ample discretion in trial judges.

138. See Roy W. McDonald, The Procedure Curriculum in a Period of Reform, 9 Am. L. Sch. Rev. 1053, 1055 (1941). But see Charles E. Clark, Book Review, 47 Harv. L. Rev. 148, 148 (1933) (reviewing James P. McBaine, Cases on Civil Procedure (1933)) (complaining that this attitude leads to instruction in the common law forms of action, which "is the worst possible approach to modern pleading conceptions").


140. Clark, for example, repeatedly expressed frustration at the persistence of a common law mentality into the twentieth century. See, e.g., Charles E. Clark, The Cause of Action, 82 U. Pa. L. Rev. 354, 355 (1934); Charles E. Clark, Editorial Comment, Ancient Writs and Modern Causes of Action, 34 Yale L.J. 879, 884 (1925).


144. See, e.g., Charles E. Clark, Pre-Trial Orders and Pre-Trial As a Part of Trial, 23 F.R.D. 506, 506 (1959).
The generality that this design required led logically to trans-substantive rules.\textsuperscript{145}

2. Trans-Substantivity and Institutional Legitimacy

A committee of experts, working under the supervision of the Supreme Court, drafted the Federal Rules. Charles Clark, the committee’s reporter and the most significant influence on its final product,\textsuperscript{146} identified expert rulemaking under court supervision, as opposed to procedural reform through statutory enactment, as the most important procedural milestone that the Federal Rules marked.\textsuperscript{147} He believed that legislative control over procedure had led to “indifference and political manipulation,” and that it had hobbled the ability of procedural reform to keep pace with constantly evolving litigation needs.\textsuperscript{148} For Clark and others, court-supervised rulemaking, meaning committees of experts working under the aegis of a high court,\textsuperscript{149} was the preferred mode for reform going forward.\textsuperscript{150}

Indeed, the lawyers interested in procedural reform advocated for the return of procedural rulemaking power to the judiciary, a power these lawyers believed was inherently judicial.\textsuperscript{151} The pendulum had swung back from Field’s insistence on procedure as a set of legislative commands and his distrust of judicial control over procedural reins.

\textsuperscript{145} Cf. Tidmarsh, \textit{supra} note 26, at 1747 (arguing that trans-substantivity is consistent with general, open-textured rules).
\textsuperscript{146} See Bone, \textit{supra} note 114, at 80; Subrin, \textit{supra} note 141, at 961.
\textsuperscript{149} See Clark, \textit{supra} note 3, at 446.
Legislatures, reformers typically believed, had a tendency to burden a simple code with detailed amendments that turned it into a "voluminous, intricate and inelastic system of civil practice," as George Wickersham put it.\textsuperscript{152} Moreover, the desire to bind judicial hands jeopardized the success of a trans-substantive code. "No two contested suits are precisely alike," Edgar Tolman noted, and generally applicable procedural rules must vest judges with the flexibility to apply them in a manner sensitive to case-specific context.\textsuperscript{153} But statutory rules would compel judges to bend to legislative "command" and prevent this sort of case-specific application, rendering generally applicable rules inoperable.\textsuperscript{154}

The jurisprudential prerequisite of trans-substantivity and the normative assumption that accompanied its rise helped to legitimate the allocation of rulemaking power to the judiciary. They reinforced the notion of procedural reform as value-neutral, and hence, the reforms were appropriately pursued outside the political process. The substance-procedure dichotomy had become an article of faith for many lawyers by 1938.\textsuperscript{155} The Rules Enabling Act of 1934, by which Congress delegated rulemaking power to the Supreme Court, codified the dichotomy with the requirement that any rules enacted pursuant to its terms not "abridge, enlarge or modify any substantive right."\textsuperscript{156} Prominent reformers similarly agreed on the purpose of procedural rules, sharing the normative assumption Bentham and Field made. Clark, for example, insisted that procedural rules exist "to aid in the efficient application of the substantive law,"\textsuperscript{157} and that any other purpose would inappropriately treat the rules as ends and not means. Edmond Morgan defined "the sole object of any procedural system" as "the attainment of a just and speedy decision upon the merits, accord-

\textsuperscript{152} Wickersham, supra note 2, at 904; see also Address of Chief Justice Hughes, 21 A.B.A. J. 340, 341 (1935) (lamenting that "the simple form of unified procedure originally adopted came to be overlaid with procedural monstrosities due to legislative tinkering and elaboration").

\textsuperscript{153} Tolman, supra note 150, at 6.

\textsuperscript{154} Id.

\textsuperscript{155} See, e.g., Wash. S. Nav. Co. v. Balt. & Phila. Steamboat Co., 263 U.S. 629, 635 (1924); Edson R. Sunderland, An Inquiry Concerning the Functions of Procedure in Legal Education, 21 Mich. L. Rev. 372, 382 (1923); see also Subrin, supra note 44, at 1650–51 (observing that the authors of the 1938 Federal Rules, along with other procedural reformers, accepted a dichotomy between substance and procedure).


\textsuperscript{157} Charles E. Clark, History, Systems and Functions of Pleading, 11 Va. L. Rev. 517, 519 (1925); see also Clark, supra note 1, at 28 (noting that the purpose of procedural rules is to assist in the "working out of justice through the rules of substantive law").
ing to the principles of substantive law, at the lowest practicable cost."  

Others made similar claims.  

Statements like these reflected the perception of value-neutrality in procedure. The discourse lawyers of the day used to diagnose procedural ills in advance of the Federal Rules exemplifies this perceived value-neutrality. Existing code and common law systems suffered from "delay," "expense," and "uncertainty," problems that, regardless of substantive policy preference, all could agree needed eradication. Edson Sunderland likened successful procedural reform to "a new method of treating cancer"; without question, "every intelligent doctor in the world would almost immediately know about it and attempt to take advantage of it." Clark, a more sophisticated theorist than most reformers, did identify "values" in procedural rules, but he described them in neutral terms of accuracy and efficiency. Reformers couched some of their arguments for court-supervised rulemaking in similarly neutral ways, comparing the speed and expertise of courts to the gridlock and inexperience of legislatures. In an age still beholden to tenets from nineteenth-century legal science, the value-neutrality of procedure meant that its rules could be "reform[ed]," while substantive law could only be "restate[d]."

158. Edmund M. Morgan, Judicial Regulation of Court Procedure, 2 MINN. L. REV. 81, 83 (1918).

159. See, e.g., Edwin M. Borchard, Judicial Relief for Peril and Insecurity, 45 HARV. L. REV. 793, 800-01 (1932) ("Procedure became recognized in all modern systems as a method provided by the state for the assurance, guaranty, and vindication of substantive rights . . . ."); Laurance M. Hyde, From Common Law Rules to Rules of Court, 22 WASH. U. L.Q. 187, 204 (1937); Roscoe Pound, Some Principles of Procedural Reform, 4 ILL. L. REV. 388, 394 (1910) ("[T]he end of legal procedure is to bring about results in accord with the substantive law . . . ."); Adolph J. Rodenbeck, Principles of a Modern Procedure, 2 J. AM. JUDICATURE SOC'Y 100, 103-04 (1918) (arguing that "the substantive rights of the parties should be the primary consideration" for procedural rules); Austin W. Scott, The Progress of the Law, 1918-1919, 33 HARV. L. REV. 236, 236 (1919).

160. E.g., Edgar Bronson Tolman, Historical Beginnings of Procedural Reform Movement in This Country—Principles to Be Observed in Making Rules, 22 A.B.A. J. 783, 786 (1936); see also Nagler v. Admiral Corp., 248 F.2d 319, 324 (2d Cir. 1957) (recollecting that the intended purpose of the 1938 Federal Rules was to end delay and mistakes in adjudication); Robert G. Bone, Making Effective Rules: The Need for Procedure Theory, 61 OKLA. L. REV. 319, 324 (2008) (describing early twentieth-century reformers' belief that procedural reform "was mainly a technical exercise in perfecting administrative machinery," and that "[t]he values relevant to this task were not substantive in nature" but rather "practical values of sound administrative design").


This supposed value-neutrality enabled the distinction between rulemaking and legislation.\textsuperscript{165} Pound argued, for example, that "it ought to be easy to make changes of detail in procedure" because "rights are well defined by substantive law."\textsuperscript{166} If procedural rules had no purpose of their own but existed merely to serve the substantive law, then their creation and alteration were value-neutral. They could thus properly come within the province of unelected experts operating outside the political branches.\textsuperscript{167} In a section stressing the distinction between substance and procedure, a 1926 Senate Report on an early version of what would become the Rules Enabling Act provided that lawyers and judges "unanimously agreed," "with an absence of all partisan spirit," on the wisdom of court-supervised rulemaking.\textsuperscript{168} In short, trans-substantivity strengthened the institutional legitimacy of the court-supervised rulemaking process that produced the Federal Rules.\textsuperscript{169} So long as court-supervised rulemakers stayed within the bounds of trans-substantivity, they could appropriately generate procedural rules.\textsuperscript{170}

Reformers stressed this value-neutrality in order to win political support for the ultimately successful effort to vest court-supervised rulemakers with the power to craft rules for federal litigation.\textsuperscript{171} Clark referred to procedural rulemaking in value-neutral terms in order to deny that a court-supervised process suffered from a democratic deficit.\textsuperscript{172} Sunderland insisted that procedural reform does not attract the attention of legislators because "the only impulse toward procedural reform arises from the general desire of the public to get a better administration of justice," and such value-neutral motivations


\textsuperscript{166} Pound, supra note 151, at 167.

\textsuperscript{167} See Bone, supra note 16, at 894-97.


\textsuperscript{169} See Subrin, supra note 141, at 960.

\textsuperscript{170} For a more recent assertion of this link between trans-substantivity and the apolitical nature of procedural rules, see Carrington, supra note 25, at 2085.

\textsuperscript{171} See Subrin, supra note 16, at 2006.

\textsuperscript{172} See Charles E. Clark, Two Decades of the Federal Civil Rules, 58 Colum. L. Rev. 435, 444 n.45 (1958) ("Rule-making is a matter for research, study, and judicious analysis and critiques, not one for the public platform.").
rarely motivate legislators to act. Objectors to early versions of the Rules Enabling Act feared that a rulemaking body operating outside congressional control would stray into matters of substantive policy or encroach on legislative prerogative in other ways. A contributor to what became the Rules Enabling Act included its “substantive rights” restriction in part to assuage those who were apprehensive of usurpative courts that rulemakers would not exceed their institutional authority. The 1926 Senate Report dwelled on this restriction at length to rebut criticism of court-supervised rulemaking.

3. Doubts at the Moment of Triumph

The story of trans-substantivity’s rise ends here, with the successful promulgation of the 1938 Federal Rules through a value-neutral, court-supervised rulemaking process. But the story has an important coda. Somewhat paradoxically, just as the Federal Rules anchored the trans-substantivity principle as a foundational plank for American civil procedure, its jurisprudential prerequisite began to weaken. Doubts concerning the robustness of the substance-procedure dichotomy had begun to fester by the 1930s. Consistent with their distrust of abstract legal conceptions, the legal realists insisted that the boundary between substance and procedure did not exist in any hard-and-fast way. For Clark, “the line between them is shadowy at best.”

174. Cf. Charles E. Clark & Charles Alan Wright, The Judicial Council and the Rule-Making Power—A Dissent and a Protest, 1 Syracuse L. Rev. 346, 364 (1950) (claiming that “good reasons” exist to limit rulemaking authority “strictly . . . to matters of procedure and practice”); Silas A. Harris, The Rule-Making Power, in A.B.A. Special Comm. on Improving the Admin. of Justice, Judicial Administration Monographs 1, 14–15 (1942) (expressing concern over the proper allocation of rulemaking power between court and legislature); William M. Trumbull, Judicial Responsibility for Regulating Practice and Procedure in Illinois, 47 Nw. U. L. Rev. 443, 451 (1952) (arguing against broad rulemaking power on grounds that it would infringe on legislative prerogative); Thomas J. Walsh, Reform of Federal Procedure, 6 Tenn. L. Rev. 32, 52 (1927) (arguing against the delegation of rulemaking power to courts on grounds that it belongs in the legislature); Sam Bass Warner, The Role of Courts and Judicial Councils in Procedural Reform, 85 U. Pa. L. Rev. 441, 447 (1937) (observing that “[s]ome of the problems of procedural reform touch too closely the liberties of citizens to be decided in a democracy by any body not subject to the popular will”).
175. For a thorough treatment of the issue from this time, see Edgar H. Ailes, Substance and Procedure in the Conflict of Laws, 39 Mich. L. Rev. 392 (1941).
176. Clark, supra note 157, at 519.
178.见Austin W. Scott, Actions at Law in the Federal Courts, 38 Harv. L. Rev. 1, 3 (1924) (arguing for court-supervised rulemaking but noting that it must be circumscribed by a “substantive rights” limit).
while Walter Wheeler Cook claimed that a "twilight zone" separated the two.\textsuperscript{179}

Mirroring this theoretical disquiet, the 1938 authors struggled to get a handle on the Rules Enabling Act’s “substantive rights” restriction.\textsuperscript{180} Sunderland acknowledged that the “categories” of both “pleading, practice, and procedure” and also “substantive rights” “have acquired no settled meeting.”\textsuperscript{181} As the committee began its work, Edgar Tolman wrote to then Yale professor Ernest Lorenzen to ask for “a formula or test” to draw “a satisfactory distinction between procedure and substantive law.”\textsuperscript{182} Lorenzen responded that “no definite line can be drawn” and that any such distinction would “be necessarily an arbitrary one.”\textsuperscript{183} Perhaps influenced by Lorenzen’s letter, in 1937, Tolman would confess that “[t]he distinction between law as a rule of human conduct and the law of practice and procedure is not always easy to draw.”\textsuperscript{184}

Clark did not despair, however, that the substance-procedure dichotomy was so theoretically bereft as to jeopardize court-supervised rulemaking. He agreed with Walter Cook’s claim that the labels “substance” and “procedure” had a “common core of meaning” that made them pragmatically useful.\textsuperscript{185} So long as the purpose for the classification was explained, a lawyer could meaningfully classify something as either substantive or procedural.\textsuperscript{186} Sunderland concurred.\textsuperscript{187} The 1938 authors appear to have simply put nagging doubts to one side,

\textsuperscript{179} Walter Wheeler Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 YALE L.J. 333, 334 (1933). For other realists, see Ailes, supra note 177, at 393–94 (quoting Ernest Lorenzen); Karl N. Llewellyn, A Realistic Jurisprudence—The Next Step, 30 COLUM. L. REV. 431, 448 (1930). An even more radical denial of any difference came earlier, from the English evidence scholar Charles Frederic Chamberlayne. See 1 CHARLES FREDERIC CHAMBERLAYNE, A TREATISE ON THE MODERN LAW OF EVIDENCE § 171, at 217 (1911) (“The distinction between substantive and procedural law is artificial and illusory. In essence, there is none.”).

\textsuperscript{180} See generally Burbank, supra note 16, at 1134 n.530, 1132–37.


\textsuperscript{184} Edgar Bronson Tolman, Address Before the Law Club (Nov. 6, 1936), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURE, 1935–1988, at 6, microformed on CIS No. CI-929 (Cong. Info. Serv.).

\textsuperscript{185} Cook, supra note 179, at 339; see also Clark, supra note 162, at 1234.

\textsuperscript{186} The burden of proof for contributory negligence might be classified as substantive in some instances and procedural in others, but the distinction is still useful once the purpose for the classification is illuminated. See Cook, supra note 179, at 345.

\textsuperscript{187} See Sunderland, supra note 181, at 406.
perhaps so as not to let the Rules Enabling Act stand in the way of their achievement. By 1938, William Mitchell, the chair of the Advisory Committee, would report publicly, and inaccurately, that he and his colleagues “found very little difficulty” respecting the Rules Enabling Act’s “substantive rights” restriction.188

One theorist of the 1930s pressed the attack on the dichotomy’s theoretical integrity more completely, and for reasons discussed in Part IV, his view has arguably proven more prescient. To Thurman Arnold, a realist sympathizer,189 the dichotomy expressed an “attitude” about the sanctity of law. Substantive law was “sacred” and unchangeable, while procedural law was “practical” and could be reworked to achieve desired results.190 But while different in name, the two were functionally indistinct as tools for dealing with a particular legal problem. As Arnold wryly explained, “[s]ubstantive law is canonized procedure,” while “[p]rocedure is unfrocked substantive law.”191 If thwarted by a supposedly unchangeable substantive law doctrine, a judge aiming for a particular result could restate the problem as a procedural one and thereby expand his discretion, and thus power, to reach the desired answer.192

IV. TRANS-SUBSTANTIVITY IN THE PRESENT

From the debut of the Federal Rules until the 1970s or so, an odd jurisprudential equilibrium remained in place. Clark’s and Cook’s take on the shadowy divide between substance and procedure prevailed as accepted wisdom.193 But the substance-procedure dichot-


191. Arnold, supra note 164, at 645.

192. See id.; see also Charles M. Yablon, Justifying the Judge’s Hunch: An Essay on Discretion, 41 HASTINGS L.J. 231, 244–46 (1990) (describing Arnold’s argument).


Matters of “substance” and matters of “procedure” are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, “substance” and “procedure” are the same key-words to very different problems. Neither “substance” nor “procedure” represents the same invariants. Each implies different variables depending upon the particular problem for which it is used.

Id. For a non-academic perspective from the time, see Thomas H. S. Curd, Substance and Procedure in Rule Making, 51 W. VA. L.Q. 34 (1948).
omy continued to live in the minds of lawyers. Procedure retained a value-neutral veneer, consistent with the assumption that it merely served policy choices reflected in substantive law. The Judicial Code of 1948, for example, which included important changes to federal jurisdictional and venue law, passed both houses of Congress unanimously. Although formally a statute, it came into being through nearly the same apolitical, court-supervised process that generated the Federal Rules.

For a number of reasons, the landscape began to shift in the 1970s. Class action commentary from the time, addressing in particular the 1966 amendments to Rule 23, offers a flavor of the skepticism about the supposed boundary between substance and procedure and the latter's value-neutrality. Attorneys objected to the tendency of courts to shape substantive doctrine, to fit better the new requirements for class certification under Rule 23(b)(3), as an impermissible circumvention of the Rules Enabling Act's "substantive rights" limitation. The power of class actions to extend remedies otherwise unavailable to small-value claimants also attracted criticism. The aggregation made possible by the 1966 amendments


199. See, e.g., Simon, supra note 197, at 383–86.

200. See Landers, supra note 197, at 860.
fanned fears that defendants would settle claims with little substantive merit, in effect if not in form, thereby transforming the substantive strength of a plaintiff's alleged rights. These and other concerns motivated Congress in 1979 to try, albeit unsuccessfully, to enact a legislative amendment to Rule 23 that would have required courts to assess the substantive strength of plaintiffs' claims before granting class certification.

Since the 1970s, in several heavily litigated fields, the breakdown in the substance-procedure dichotomy has manifested itself in the emergence of substance-specific rules. After decades of acquiescence to the federal rulemaking process as the primary engine for procedural change, Congress dramatically jumped into the fray with substance-specific procedural measures that were designed to explicitly achieve ends of substantive policy. For some, these developments threaten the continued viability of the trans-substantivity principle as a foundational plank for American civil procedure.

But the story of trans-substantivity at the dawn of the twenty-first century is not so straightforward. Rather than follow the legislative lead and promulgate or approve substance-specific rules or substance-specific rule constructions, court-supervised rulemakers within the federal system continue to respect and in some instances vigorously reassert the trans-substantivity limit on their power. Far from a departure from past practice, the pattern of legislative and judicial rulemak-
ing since the mid-1990s reflects the same institutional allocation of rulemaking power that had evolved by the 1930s.

A. The Uncertain Legislative Fate of Trans-Substantivity

In securities, prisoner, and medical malpractice litigation, Congress and state legislatures have enacted substance-specific procedural reforms to accomplish particular goals of substantive policy. These statutes show the prescience in Thurman Arnold's doubts about the substance-procedure dichotomy. Both categories can yield legal tools that are designed to achieve the same policy outcome, and they thus are functionally indistinguishable. These legislative forays highlight the theoretical incoherence of the substance-procedure dichotomy.

In the mid-1990s, Congress enacted several major pieces of legislation addressing pleading standards. It passed the Prison Litigation Reform Act (PLRA) in response to two perceived problems: an avalanche of prisoner lawsuits ostensibly swamping the federal courts and prison micromanagement by federal judges. The former was arguably a procedural one because it involved judicial caseloads and thus the efficiency of the federal courts. But the selection of prison lawsuits as the vehicle to address these problems necessarily required a determination as to the substantive value of this litigation as a policy matter. Moreover, a procedural purpose may have only partially motivated Congress to act. Whether dockets were swamped and whether this swamp needed draining were debatable questions in light of the fact that the rate of prisoner filings had actually fallen fairly significantly in the fifteen years before the PLRA's enactment.

205. In addition to the statutes discussed here, Congress has kicked around several other substance-specific pleading requirements. Had President Clinton not vetoed it, the Common Sense Product Liability and Legal Reform Act of 1996 would have imposed a particular sanctions regime in place of what Rule 11 provides for product liability claims. See H.R. 956, 104th Cong. (1996); see also Jeffrey A. Parness & Amy Leonetti, Expert Opinion Pleading: Any Merit to Special Certificates of Merit?, 1997 B.Y.U. L. REV. 537, 545-49. Procedural concerns—for example that Rule 11 had inadequately assisted in the resolution of product liability cases on their substantive merits—did not motivate the bill. Rather, the hope was that the pleading reform would help lessen the deleterious economic impact of product liability litigation. See, e.g., H.R. REP. No. 104-63, pt. 1, at 8-12 (1995). Congress also enacted a heightened pleading provision for claims arising out of the so-called Y2K problem. See Fairman, supra note 13, at 612-17.


bying arm of the federal judiciary—the supposed beneficiary of the procedural reform—offered mild opposition to the statute.\textsuperscript{209} In all likelihood, entreaties from state attorneys general for relief from the expense and burden of prisoner litigation defense—a policy goal different from the efficient resolution of cases on their merits—played a larger role in motivating Congress to restrict prisoner access to courts.\textsuperscript{210}

The PLRA did not prescribe heightened pleading requirements, but it included changes to other aspects of pleading practice that departed significantly from trans-substantive requirements in the Federal Rules. Prisoners, for example, must exhaust available administrative remedies before filing suit;\textsuperscript{211} indigent inmates must pay filing fees;\textsuperscript{212} and district courts must screen complaints before they are served on defendants and dismiss a complaint \textit{sua sponte} if it is “frivolous, malicious, or fails to state a claim upon which relief may be granted; or . . . seeks monetary relief from a defendant who is immune from such relief.”\textsuperscript{213} Unlike Rule 12, which requires an answer or pre-answer motion from the defendant as a matter of course,\textsuperscript{214} the PLRA excuses a named defendant from answering under some circumstances, and the court can order a responsive pleading only if “the plaintiff has a reasonable opportunity to prevail on the merits.”\textsuperscript{215}

\textsuperscript{213} \textit{Id.} § 1915A(b)(1)–(2).
\textsuperscript{214} See Fed. R. Civ. P. 12(a)(1).
\textsuperscript{215} 42 U.S.C. § 1997e(g)(2). Soon after the PLRA’s enactment, some thought that this provision amounted to a new, heightened pleading requirement for plaintiffs. \textit{See}, e.g., Eugene J. Kuzinski, Note, \textit{The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995}, 29 Rutgers L.J. 361, 381 & n.116 (1998). Courts, however, have interpreted this language to mean that if the prisoner’s complaint would survive a motion to dismiss under standard pleading rules, then the courts can order the defendant to answer the complaint. \textit{See}, e.g., Proctor \textit{v. Vadlamudi}, 992 F. Supp. 156, 158 (N.D.N.Y. 1998).
Congress lumped these nominally procedural reforms together with nominally substantive ones. Some—a restriction on judicial power to issue prospective injunctive relief and a time limit placed on prospective injunctions, for example—target the purported problem of judicial activism in the area of prison condition oversight. Others—including a prohibition on claims for mental or emotional injuries without proof of accompanying physical injury, limits on attorneys' fees, and the requirement that any damages award go to an outstanding restitution order—complement the pleading reforms that target allegedly excessive inmate litigation. In short, a set of mostly substantive policy goals moved Congress to act, and it responded with a mix of substantive and procedural reforms that, as far as achieving these goals are concerned, are functionally indistinguishable. Emerging from this legislative milieu, the PLRA's pleading requirements, although they affect the efficiency and accuracy of the conduct of prison litigation, also have a substantive effect by design.

Congress singled out securities litigation for special procedural treatment with the Private Securities Litigation Reform Act of 1995 (PSLRA). According to the Senate Report on the statute, Congress intended it "to lower the cost of raising capital by combating" certain perceived "abuses" in securities class action litigation. The report elaborated three "purposes" that mix substantive policy goals with procedural concerns: "to encourage the voluntary disclosure of information by issuers," "to empower investors so that they, not their lawyers, control securities litigation," and "to encourage plaintiffs' lawyers to pursue valid claims for securities fraud and to encourage defendants to fight abusive claims." Like the PLRA, the PSLRA contains a mixture of nominally substantive and procedural reforms. Examples of the former include limits on joint and several liability for violation of securities laws, the insulation of certain issuer statements from liability, and the elimination of securities fraud as a predicate offense for civil RICO claims. Among the latter, two pleading requirements depart from the trans-

217. Id. § 3626(b)(1)(A).
219. Id. § 3006A.
223. Id. at 5–6.
substantivity principle. Plaintiffs who allege upon information and belief must state "with particularity all facts on which that belief is formed"; and for scienter allegations, plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind." Again, like the PLRA, the PSLRA treats nominally substantive and procedural reforms as functionally indistinct tools used to achieve a single set of substantive policy goals.

Perhaps most significantly as a practical matter, given the volume of cases implicated, dozens of state legislatures have departed from the trans-substantivity principle and enacted special pleading requirements for medical malpractice cases. These range from detailed fact pleading requirements, pre-filing notice requirements, and most commonly, provisions that require a plaintiff to file an expert physician's affidavit or certificate of merit that attests to the merit of the plaintiff's claims, either with the complaint or soon thereafter.

225. 15 U.S.C. § 78u-4(b)(1)(B), (b)(2) (2006). The statute also requires plaintiffs to "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading," Id. § 78u-4(b)(1)(B). This requirement basically parallels the heightened pleading requirement in Rule 9 for fraud claims more generally. See Fed. R. Civ. P. 9(b).


227. See Ala. Code § 6-5-551 (2008) (requiring plaintiffs suing health care providers to provide "a detailed specification and factual description of each act and omission alleged by plaintiff to render the health care provider liable").


Legislatures often passed these substance-specific procedural rules as parts of comprehensive medical malpractice reform packages alongside numerous substantive doctrinal changes.\textsuperscript{230} As with Congress, these legislatures used nominally procedural and substantive tools alike to achieve the same set of policy goals, such as access to physician care and lower liability insurance premiums.\textsuperscript{231} The \textit{Erie} analysis that federal courts have used, mostly in order to find litigants in diversity cases bound by these pleading requirements,\textsuperscript{232} would have given

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\item Va. Code Ann. § 8.01-20.1 (2007) (certificate of merit with complaint);
\item Wash. Rev. Code Ann. § 7.70.150 (2007) (certificate of merit with complaint);
\item Miss. Code Ann. § 11-1-58 (2002) (requiring attorney to execute certificate and attach it to a complaint stating that the attorney consulted with an expert before filing);
\item N.C. Gen. Stat. § 1A-1, Rule 9(j)(1)-(3) (2008) (requiring that a complaint specifically state that the plaintiff consulted with an expert);
\item Okla. Stat. tit. 63, § 1-1708.1E, invalidated by Zeier v. Zimmer, Inc., 152 P.3d 861, 874-75 (Okla. 2006) (requiring that an expert affidavit be attached to a complaint);
\end{enumerate}
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Thurman Arnold great pleasure because it underscores the emptiness of the terms "substance" and "procedure." Applying a truncated and arguably crude version of the *Erie* doctrine, some courts have reasoned that these nominally procedural requirements for filing suit must apply in federal court because they are really "substantive."233

These legislative developments strike at the jurisprudential prerequisite for and normative assumption of trans-substantivity. Congress and state legislatures matched special pleading requirements with a myriad of substantive reforms, all directed toward the same set of ends. If they are defined functionally, the reform packages demonstrate that the terms substance and procedure, and thus their dichotomy, are theoretically incoherent. As far as ends are concerned, a host of substantive purposes—the encouragement of the capital markets, for example, or increased physician access—explode the normative assumption consistently held by procedural reformers from Bentham to Clark: the assumption that the purpose of procedural rules *qua* procedural rules is to facilitate the efficient resolution of cases on their substantive merits. This new legal landscape for procedure, to say nothing of the highly politically charged processes from which these pleading reforms emerged, precludes any claim that procedural reform is by definition a value-neutral enterprise.

**B. Trans-Substantivity in the Judiciary Since the Early 1990s**

These legislative forays into rulemaking are certainly consistent with a retreat from trans-substantivity as a foundational principle for American civil procedure. But when compared to the quite different pattern of behavior engaged in by court-supervised rulemakers over

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the same time period, these substance-specific reforms actually reaffirm the institutional allocation of rulemaking power that early twentieth-century reformers achieved with the assistance of the trans-substantivity principle.

1. The Supreme Court and the Construction of the Federal Rules

In a series of recent decisions on pleading standards, the Supreme Court has expressed a commitment to the substance-procedure dichotomy by refusing to accept the judicial revision of procedural rules to meet perceived substantive needs. The trans-substantivity principle plays a starring role.

By the 1980s, courts in a number of circuits had departed from Rule 8's minimal pleading standard and crafted substance-specific requirements for complaints in various doctrinal areas. Litigation under 42 U.S.C. § 1983 figured prominently in this evolution. Official immunity doctrine serves a particular substantive policy goal, striking the right balance between individual redress and deterrence of misconduct on one hand, and the need to make possible the vigorous discharge of public duties on the other. Starting in the 1960s, some courts determined that Rule 8's minimal pleading threshold frustrated the latter half of the balance. Sinking officials into the muck of discovery, for example, would detract from the discharge of their important public duties. Particularized, heightened pleading requirements developed as a response and required plaintiffs to surmount a higher barrier to discovery and thereby achieve the goal of protecting officials.

On three occasions, the Supreme Court has rebuffed such constructions of Rule 8, denying that procedural requirements in the Federal Rules can change based on concerns of substantive policy. In

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238. See, e.g., Elliott v. Perez, 751 F.2d 1472, 1476-79 (5th Cir. 1985).

239. Id. at 1479.
Leatherman v. Tarrant County, the Supreme Court rejected a heightened pleading standard for claims of municipal liability under 42 U.S.C. § 1983. To buttress official immunity doctrine, the Fifth Circuit had required that plaintiffs plead with particularity facts showing why defendants cannot successfully invoke an immunity defense. Although it sympathized with the problems that civil rights litigation created for government officials, the Court denied that such concerns could justify a departure from trans-substantivity and Rule 8’s minimal standard. A court could not legitimately craft substance-specific pleading requirements through common law adjudication.

The Court reacted similarly in Swierkiewicz v. Sorema N.A. to lower court efforts to raise pleading standards for Title VII allegations. It did not allow lower courts to require particularized allegations of fact for employment discrimination claims, rejecting the contention that a higher pleading threshold would protect against unwarranted suits by disgruntled employees. Finally, in its 2007 Jones v. Bock decision, the Court on similar grounds rejected a specific pleading rule for prison litigation claims.

This emphasis on a single pleading standard regardless of substance suggests an abiding fealty to the trans-substantivity principle. Put simply, the same pleading rules should apply uniformly unless the Federal Rules expressly provide otherwise. Decided accordingly, the Rule 8 cases are at least indicative of, if not expressly committed to, the same institutional allocation of rulemaking power that procedural reformers pioneered in the early twentieth century. As the Court insisted in Jones, “[C]ourts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns.”

240. See, e.g., id.


242. See Leatherman, 507 U.S. at 168; see also Hill v. McDonough, 547 U.S. 573, 582 (2006) (“Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts.”).


244. Id. at 515.


246. See Leatherman, 507 U.S. at 168.

247. Jones, 549 U.S. at 212. For speculation as to why the Court qualified this statement with “generally,” see Burbank, supra note 17, at 549 n.70.

message about the legitimacy of court-forged procedural rules emerges from these decisions: trans-substantive rules are properly within the judicial province, while substance-specific ones should not emerge from case-by-case adjudication.

In one sense, the message from the Court’s two most recent pleading cases—Bell Atlantic v. Twombly\textsuperscript{249} and Ashcroft v. Iqbal\textsuperscript{250}—reaffirms this commitment to trans-substantivity. The Court in Twombly, an antitrust conspiracy case, jettisoned a fifty-year-old minimal pleading threshold.\textsuperscript{251} In its stead, the Court provided that “[f]actual allegations must be enough to raise a right to relief above the speculative level,”\textsuperscript{252} and that Rule 8 requires complaints to contain “allegations plausibly suggesting (not merely consistent with)” liability.\textsuperscript{253} Although the Court gave no explicit indication that it intended to restrict this new construction of Rule 8 to antitrust claims, the opinion is opaque, and in its wake the question as to whether the plausibility standard applied only to antitrust claims arose.\textsuperscript{254} Two years later, the Court revisited Rule 8 in Iqbal and confirmed Twombly’s trans-substantive application, noting that an antitrust limitation would be “incompatible with the Federal Rules of Civil Procedure.”\textsuperscript{255}

In another sense, the Twombly-Iqbal story with respect to trans-substantivity is more complicated. Although nominally trans-substantive, both decisions bespeak hostility to the underlying substantive claims. Moreover, and perhaps more problematically, the pleading standard adopted in Twombly and clarified in Iqbal may well license lower courts to forge the sort of substance-specific applications that the other three pleading decisions rejected and otherwise preclude. Part V discusses this issue.\textsuperscript{256} For the time being, the Rule 8 line of decisions expresses a larger message about the continued viability of trans-substantivity, the relevance of the substance-procedure dichotomy for the construction of procedural rules, the need for indifference to substantive value in rule application, and the institutional limits on and legitimacy of court-supervised rulemaking.

The Rule 8 cases are only several of the Court’s many forays into civil procedure over the last four decades, so the preceding discussion

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\item[252.] Twombly, 550 U.S. at 555.
\item[253.] See, e.g., id. at 557.
\item[254.] See, e.g., A. Benjamin Spencer, Plausibility Pleading, 49 B.C. L. Rev. 431, 457–60 (2008) (addressing this issue).
\item[255.] Iqbal, 129 S. Ct. at 1953.
\item[256.] See infra notes 301–308 and accompanying text.
\end{enumerate}
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is a preliminary attempt to distill a larger message about trans-substantivity. Another indicator arguably seconds the message identified in this caselaw. From 1938 until 1973, the Court addressed only five times, and in somewhat cursory fashion, the Rules Enabling Act's "substantive rights" restriction. It adopted a test—a proposed rule passes statutory muster if it "really regulates procedure"—that vested procedural rulemakers with an expansive license to craft rules with significant substantive effects. A reluctance to police the substance-procedure boundary more vigilantly might suggest judicial indifference to it. If so, however, the Court's much more frequent engagement with the restriction since 1973—more than a dozen decisions, with increasingly stronger language, albeit in dicta, as to the limited power of court-supervised rulemakers—perhaps underlines a particular concern for the legitimacy of court-crafted procedural rules and their substantive ramifications.

2. Trans-Substantivity and the Rule-Making Process

The various bodies that participate in the process for the promulgation of the Federal Rules have similarly remained committed to the trans-substantivity principle since the early 1990s. Although trans-substantivity can be in the eye of the beholder, by one count only six subsections of the more than ninety Federal Rules currently in force are substance-specific. Since 1992, the Advisory Committee has considered a number of substance-specific rule changes and recommended for adoption only a single arguably substance-specific one, namely, a service of process requirement for Bivens actions. On the
subject of pleading, the Advisory Committee has frequently at least discussed substance-specific amendments to Rule 8.264 But it has repeatedly declined to take action on such proposals, several times stressing the need to keep procedure separate from substance.265 Also, a recognition that "seemingly procedural pleading rules are surreptitiously motivated by distaste for the substantive rights or defenses subjected to higher standards"—a lack of value-neutrality and blindness to the substance-procedure dichotomy—has deterred the adoption of "claim-specific pleading rules."266

Each federal district also has authoritative rulemaking powers to craft local rules "not inconsistent with" the Federal Rules.267 Commentators have invoked this aspect of federal practice to insist that federal procedure is hardly uniform or trans-substantive.268 Certainly federal districts have enacted a number of substance-specific local rules.269 The Middle District of Florida, for example, uses substance as one factor to determine which track a case will follow for case management purposes,270 and the Western District of Pennsylvania has a pleading rule for pro se prisoner civil rights cases.271 But rather than confirm the illusion of trans-substantivity in federal civil procedure, local rules should convey the opposite message. A survey of ten federal districts shows that only about five percent of all local rules could arguably be deemed substance-specific.272


265. See, e.g., REPORT, ADVISORY COMMITTEE ON CIVIL RULES, WASHINGTON, D.C., Nov. 8–9, 2007, at 269; REPORT, CIVIL RULES ADVISORY COMMITTEE, Dec. 12, 2006, at 18.

266. Minutes, Civil Rules Advisory Committee, May 22–23, 2006, at 38; see also Minutes, Civil Rules Advisory Committee, Oct. 27–28, 2005, at 30 (observing that the adoption of substance-specific pleading rules "has manifest substantive overtones and might augment concerns that heightened pleading requirements spring from distaste for some varieties of legal rights"); Minutes, Civil Rules Advisory Committee, Oct. 21–23, 1993, at 8 (noting that "the real risk that imposing specific pleading requirements for specific legal theories will be seen as a substantive decision that these theories are disfavored").

267. FED. R. CIV. P. 83.


269. See, e.g., Subrin, supra note 16, at 2025.

270. See M.D. FLA. R. 3.05.


272. See infra Appendix.
Readily available records of deliberations of local rulemaking committees generally do not exist, and the Advisory Committee has rarely invoked trans-substantivity by name as a restriction on its rulemaking power. But like the Supreme Court, the behavior of these court-supervised rulemakers signals that the principle retains some strength as an institutional limit. Even as legislatures, by their actions, have undermined the theoretical support for the substance-procedure dichotomy and the assumption of value-neutrality in procedural reform, these bodies hew to the trans-substantivity principle as they craft and construct procedural rules.

V. THE FUTURE OF TRANS-SUBSTANTIVITY

Trans-substantivity in the early twenty-first century is a paradox of sorts. It lacks a solid theoretical foundation. The principle depends on the substance-procedure dichotomy as its jurisprudential prerequisite. But to jurisprudences like Thurman Arnold, the dichotomy eroded long ago. Perhaps more significantly, the politics of rulemaking since the 1970s has, in practical terms, dissolved a definable boundary in practice between substance and procedure. Also, the normative assumption long made as to the purpose of procedural rules, another theoretical underpinning, cannot survive unchallenged. Trans-substantive rules do not privilege any area of law, reflecting the notion, as lawyers like Charles Clark and Roscoe Pound advocated, that procedural rules should have no purpose but to implement policy choices made in the substantive law efficiently. Although trans-substantivity can be consistent with other procedural purposes, this one reflects an attitude that is central to the rise of court-supervised rulemaking. If value choice is equated with the choice of a particular goal of substantive policy, procedural rules, properly conceived, are value-neutral and appropriately generated outside the political process. But the securities, prison, and medical malpractice litigation examples preclude any claim that procedural rules necessarily must serve the purpose that reformers identified for them. The pleading requirements in these fields have substantive goals and are not in any sense value-neutral.

Even as theoretical support for the principle has weakened, however, the pattern of institutional behavior with respect to procedural rulemaking continues to reflect the implications of trans-substantivity,

273. But see Minutes, Advisory Committee on Civil Rules, Feb. 16-17, 1995 (considering an amendment to Rule 23 and noting that "[r]evision should be trans-substantive, not only for mass torts").

274. See generally Michael Bayles, Principles for Legal Procedure, 5 LAW & PHIL. 33 (1986).
as understood by early twentieth-century reformers, for the allocation of rulemaking power. Congress and state legislatures have embraced substance-specific procedural rules as tools functionally indistinct from substantive legal changes in order to achieve particular goals of public policy. Court-supervised rulemakers by and large have refused to follow suit. Perhaps a claim about the institutional limits of court-supervised rulemaking lies in this divide. Procedural rules can be substance-specific for the achievement of substantive policy goals, but only the political process can make them so.

What, then, should courts and legislatures make of the theoretically suspect but practically meaningful trans-substantivity principle going forward? Clark faced this paradox long ago. He argued vigorously for court-supervised rulemaking as a value-free and thus legitimate exercise. Yet, as a leading legal realist, he had to acknowledge that nothing really distinguished substance from procedure, a prerequisite for the claim that rulemaking differed in some intrinsic way from legislation. For Clark, however, this paradox did not require a choice between willful blindness to theoretical sophistication or the abandonment of expert, apolitical rulemaking. He believed that even if the dichotomy could not be located with "pin-point precision," the boundary between substance and procedure "is one of policy expressing an ideal for a proper division of power and responsibility" for rulemaking.

The future of trans-substantivity may be this: a theoretically problematic but functionally useful principle for the allocation of rulemaking power among various institutions. It works straightforwardly. A court-supervised process can legitimately generate trans-substantive rules, that is, rules not designed to achieve any particular goals of substantive policy. Any substance-specific rules must come from the political process. A preliminary defense of trans-substantivity as a mechanism for dividing rulemaking power between courts and legislatures follows, as well as some thoughts for how this principle might work in practice.

At the outset, it is important to clarify that the argument for trans-substantivity as a principle of allocation is not a defense of trans-substantivity per se. The principle may well create costs that substance-specific rules could avoid. These might include, among others, the economic inefficiencies generated when trans-substantive discovery rules apply to cases whose informational needs do not warrant the

275. See supra note 172 and accompanying text.
276. Clark & Wright, supra note 174, at 364.
expansiveness that the discovery rules permit.\textsuperscript{277} The normative value of trans-substantivity on its own merits is a difficult question and not one answered here. What is at issue is not whether the principle itself is desirable but rather, as a matter of legal process, who should have the power to depart from a trans-substantivity default in rulemaking. The normative assumption lurking in this question is not so much that trans-substantivity itself is valuable but that the allocation of rulemaking power that it encourages leads to a desirable result.

\textit{A. The Rationale for Trans-Substantivity as a Principle of Institutional Allocation}

The argument for trans-substantivity as a mechanism for the allocation of rulemaking power raises two chief questions. First, why should trans-substantivity limit the prerogative of court-supervised rulemakers? Second, how meaningful is a trans-substantivity limit when the practical distinction between substance and procedure does not obtain?

The history of the principle suggests a ready answer to why trans-substantivity should act as an institutional limit: it helps legitimate court-supervised rulemaking. This response presumes that court-supervised rulemaking is worth legitimating, an assumption beyond the scope of this Article but probably one that is generally undisputed.\textsuperscript{278}

How does a trans-substantivity limit on rulemaking reach this desirable result? One response lies with the Rules Enabling Act’s “substantive rights” restriction. Although nominally procedural, a rule enacted to further a goal of substantive policy would arguably run afoul of the statute and be illegitimate for that reason. But the “substantive rights” restriction, at least according to the prevailing interpretation, is a somewhat weak limit on the power of court-supervised rulemakers.\textsuperscript{279} Statutory invalidity is one, although not conclusive, argument for the illegitimacy of court-crafted, substance-specific rules.

Beyond statutory text, a trans-substantive limit strengthens the legitimacy of court-supervised rulemaking by restricting this process to a core judicial function. Judicial control over some modicum of procedural rulemaking has a centuries-old pedigree in Anglo-American law.\textsuperscript{280} A certain kind of rulemaking, then, fits comfortably within the

\begin{footnotes}
\item [\textsuperscript{277}] See Subrin, supra note 15, at 45–46.
\item [\textsuperscript{278}] See, e.g., Jack H. Friedenthal, \textit{The Rulemaking Power of the Supreme Court: A Contemporary Crisis}, 27 \textit{Stan. L. Rev.} 673, 674 (1975) (“The results of the Supreme Court’s rule-making power have been spectacular.”).
\item [\textsuperscript{279}] See Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5–6 (1987).
\item [\textsuperscript{280}] See, e.g., Pound, supra note 151, at 171.
\end{footnotes}
ambit of traditional judicial powers. On the flip side, substance-specific procedural rules, insofar as they further a goal of substantive policy, encroach on legislative terrain.

Of course, courts, through common law adjudication, pursue substantive policy goals—attempts to regulate the primary activity of individuals—all the time. Nothing in the judicial role per se prohibits unelected judges from pursuing substantive ends. But a difference exists in the modes by which judges make substantive law. A restriction on prospective rulemaking that prohibits reforms designed for particular substantive goals fits common beliefs about appropriate judicial roles. A court that decides a torts case exercises a central judicial function, even if in the process it entrenches particular substantive values in precedent. The requirement that a court entrench substantive policy only piecemeal as it decides particular cases or controversies “limit[s] the business” of the judiciary “to questions . . . in a form historically viewed as capable of resolution through the judicial process.” In contrast, a court that promulgates a black-letter-rule of tort law, untethered from the facts of any case, would stray considerably from any recognizable judicial function and trespass markedly onto legislative terrain. Few would doubt the democratic illegitimacy of the second scenario, even if in practical effect it would differ little from the first. Because a substantive policy goal would motivate a substance-specific procedural rule, it would smack of the second scenario and suffer a legitimacy deficit for the same reason. Moreover, constitutional and statutory limits on court-supervised rulemaking powers in the federal system may render the positive promulgation of certain rules unlawful, even if courts could adopt them through the exercise of federal common law rulemaking powers.

Implicit in the concern for legislative prerogative, as it was for the procedural reformers of the early twentieth century, is the notion that in order to be legitimate, court-supervised rulemaking must be value-

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281. See Bone, supra note 16, at 949.
283. Arthur Vanderbilt, a prominent proceduralist of the early twentieth century and the chief justice of the New Jersey Supreme Court, commented on this issue as follows:
Substantive law includes much more than legislation, it comprehends also the rights and duties which have come down to us through the common law. . . . [T]he rule-making power as to practice and procedure must not invade the field of the substantive law as such. While the courts necessarily make new substantive law through the decision of specific cases coming before them, they are not to make substantive law wholesale through the exercise of the rule-making power.
neutral. The trans-substantivity principle ensures at least a type of value-neutrality because it denies rulemakers the power to pursue directly substantive policy ends through procedural rules.

This type of value-neutrality is just that—a type. Value, of course, is not limited to substantive law. Any proposed procedural rule requires a value choice. A trans-substantive minimal pleading standard would facilitate access to courts, but it might allow baseless cases to proceed to discovery and impose unfair costs on defendants. A trans-substantive heightened pleading standard might check against these costs but interfere with court access. Quite a lot in terms of public policy rides on the choice between the two. More generally, the normative assumption of Bentham and Field, namely, that the primary goal of procedural rules is the resolution of cases on their substantive merits, is just that—normative. An equally trans-substantive purpose, but one that would lead to quite different real-world results, is to ensure that the benefits of litigation exceed their costs. The choice between the two has major policy implications in terms of the ability of parties to vindicate rights and the costs that they and their adversaries must bear for this vindication. This sort of choice is not value-neutral, yet the trans-substantivity principle would allow a court-supervised process to make it. Why is this choice legitimate, while the choice of a substance-specific procedural rule is not?

The type of value-neutrality that trans-substantivity requires is admittedly limited, but it nonetheless fosters legitimacy through judicial restraint for a couple of reasons. First, some version of interest representation legitimates the political process. Legislators can make value choices for law because they represent everyone else in some manner or another. The trans-substantivity principle would not guarantee the equal representation of everyone's interests at the rulemaking table. But in one sense, it would at least inhibit a conflict of interest between rulemakers and some politically vulnerable group from manifesting itself in a proposed rule, and it would accordingly provide the rulemaking process with a sort of legitimacy. The requirement that procedural rules apply equally across doctrinal categories makes it quite difficult for rulemakers to single out a vulnerable group deliberately to bear a particular procedural burden. In contrast, rulemakers who are free to craft substance-specific rules might foist one on a group with whom it has a conflict of interest.

Second, trans-substantivity might inculcate a norm of procedural minimalism that would lead court-supervised rulemakers to avoid significant changes in procedural rules. At its heart, the principle's message is this: significant value choice in procedure belongs in the
legislative arena. Even if the letter of the principle does not preclude the selection of a heightened trans-substantive pleading standard over a minimal one, rulemakers sensitive to the message of trans-substantivity might avoid any major changes to the rules for which they bear responsibility. Arguably, the fate of the 1983 amendments to Rule 11 bears witness to this norm at work. Once its ramifications in terms of its impact on civil rights litigation manifested themselves, the Advisory Committee revised the rule and thereby weakened the blow.

Finally, as a functional matter, assuming that a court-supervised rulemaking process proceeds legitimately only when it avoids substantive value choices, the trans-substantivity principle is likely to strengthen this legitimacy better than alternatives. An erstwhile Reporter to the federal Civil Rules Committee suggested a “decibel” test as the mechanism for institutional allocation. If public clamor over a proposed rule change reached a certain decibel level, this test would remove the rule from the court-supervised process responsible for the creation of the Federal Rules and require that Congress enact it.\footnote{See Mullenix, supra note 25, at 836 (discussing the Reporter’s proposal).} This test is inoperable. No means for measuring the decibel level exists, and the cutoff that sends the rule to Congress goes unspecified. Moreover, as Linda Mullenix notes, because of the breakdown in the substance-procedure dichotomy and the substantive effects of the procedural rules it unveils, interest groups will ensure that the requisite deafening roar meets every proposed rule reform.\footnote{Id. at 837.} The trans-substantivity principle, in contrast, lends itself to easy application.

The second question asks how robustly trans-substantivity can serve as an institutional limit, given that the substance-procedure dichotomy has proven illusory. The principle promises legitimacy because it prevents court-supervised rulemakers from using their power to directly achieve substantive ends. But if the breakdown of the substance-procedure dichotomy unveils the substantive effects of all procedural rules, then how can courts legitimately proceed with any rulemaking without breaching the trans-substantivity limit? If incidental substantive effects of nominally trans-substantive rules matter, then the trans-substantivity limit precludes any court-supervised rulemaking.

A difference exists, however, between nominally trans-substantive procedural rules with substantive effects and expressly substance-specific procedure. This difference explains, at least by the Supreme Court’s measure, the lawfulness of the Federal Rules under the Rules
Enabling Act’s “substantive rights” limitation. The difference is not merely formal but suggests a meaningful limit on the exercise of rulemaking power. A trans-substantivity limit better prevents rulemakers operating outside the political process from crafting rules to implement their own substantive preferences. A rulemaker might worry about patient access to healthcare and thus desire to shield physicians from medical malpractice suits. Under the trans-substantivity limit, if she wanted to use a heightened pleading standard for this purpose, she would have to accept a raised barrier in all types of cases. In other words, she could not restrict the effects of her heightened pleading standard to the medical malpractice setting and would have to accept frustrated litigation elsewhere, perhaps in doctrinal areas she favors. An inability to keep the costs of her proposal internalized to the area that she wants to reform might dissuade her from acting. Even if she is willing to use a blunt trans-substantive tool to achieve a particular end, her colleagues on the rulemaking body might prove reluctant to promulgate such a broadly sweeping reform if they could not cabin its effects.

Additionally, the justificatory rhetoric for trans-substantive rules differs from substance-specific procedure. The illusory boundary between substance and procedure aside, rulemakers can explain the need for a generic heightened pleading standard without reference to any choice of substantive policy. A medical malpractice pleading standard, in contrast, would require some explanation for why lawsuits against doctors differ as a policy matter from all other doctrinal areas. This justification and the substantive value choice it represents would much more nakedly usurp legislative prerogative than a choice expressed in traditionally procedural terms like “efficiency” or “accuracy.”

B. Trans-Substantivity As a Principle of Institutional Allocation in Practice

1. Trans-Substantivity and Rule Promulgation

At a basic but important level, the trans-substantivity principle would work fairly straightforwardly in practice. Any procedural rule expressly phrased with reference to a particular doctrinal field would have to come from a legislature and not through a court-supervised rulemaking process. This limit decently fits the pattern of rulemaking

activity engaged in by the Advisory Committee, but it is by no means an obvious implication of the principle. In its Rule 8 decisions, the Court suggested that the process for the promulgation of the Federal Rules could legitimately generate substance-specific pleading standards in employment discrimination and other civil rights litigation, although the Court itself could not do so. A proposed rule such as "claims in § 1983 litigation must be supported by particularized allegations of fact," however, would clearly run afoul of the trans-substantivity limit. Because particular desired policy outcomes would motivate a proposal like this one, trans-substantivity as a principle of institutional allocation would require that Congress promulgate it.

The principle's application gets more complicated when procedural rules do not neatly fit into either a trans-substantive or substance-specific pigeonhole. As discussed in Part II, a spectrum, not a black-and-white boundary, separates trans-substantivity from substance-specificity. A nominally trans-substantive rule with a regular and predictably differential impact on certain types of litigation presents more of a challenge. What does the trans-substantivity principle make of the Arizona medical professional pleading requirement mentioned in Part II, or the amendments to Rule 11 adopted in 1983?

For these sorts of nominally trans-substantive rules, the principle might require a two-step test to determine where on the spectrum the rule fits. First would be an assessment of the rulemaker's motive. If rulemakers can plausibly explain their motives in trans-substantive terms—that is, in the traditional procedural terms of accuracy and efficiency—the rule they generate enjoys a presumption of legitimacy. The 1983 amendments to Rule 11 pass this test; the Advisory Committee notes explaining them make no reference whatsoever to substance. In contrast, the language used by the Arizona state legislature to justify the Arizona medical professional pleading requirement concerned medical malpractice litigation. It is doubtful that a rulemaker, if she wanted to adopt this requirement for the federal system, could explain it differently. As such, it fails the first step of the test, and it could not come from a court-supervised rulemaking process.


289. See supra notes 39–42 and accompanying text.

290. FED. R. CIV. P. 11 (Advisory Committee Notes to 1983 Amendments).

291. See Cooper, supra note 40, at 20.
The second step might consider the real-world effects of a nominally trans-substantive rule that an assessment of rulemaker motive makes presumptively valid. Any such rule that has a particularly marked impact on one category of claims or defenses would lose its presumption of trans-substantivity, and a court-supervised rulemaker would have to abstain from its promulgation. The 1983 amendments to Rule 11 might have failed this step. Their disproportionate impact on civil rights plaintiffs had such a specific and marked substantive effect that only those blind to empirical realities could defend the rule as genuinely trans-substantive. Of course, most procedural rules affect different substantive areas differently, so a test that rejected any proposed rule with any disproportionate impact at all would be inoperable. Hence the presumption of legitimacy is rebutted only if the impact is particularly marked. Obviously, this standard would require judgment calls by rulemakers, but shadowy, ill-defined parameters for rulemaking are nothing new for the federal rulemaking process. It would have the salutary effect of encouraging empirical research into procedure and possibly local, district-level experimentation with proposed rule changes before their final promulgation.

2. Trans-Substantivity and Rule Construction

The trans-substantivity principle would also operate to constrain judicial construction of nominally trans-substantive rules. The Court in its Rule 8 decisions did not react to the terms of the rule itself but rather rejected entrenched, substance-specific applications of Rule 8 by lower courts in particular doctrinal areas. Likewise, the principle would counsel courts against these sorts of constructions.

Beyond pleadings, an example of a substance-specific construction that runs afoul of trans-substantivity is the maturity concept and its application in mass tort class actions through Rule 23.293 According to this concept, a mass tort is immature so long as plaintiffs have inferior access to evidence and the legal basis for the tort is not yet established. It matures as plaintiffs begin to win individual cases, demonstrating the evidentiary and legal plausibility of the claims.294

Some of those who find merit in the concept advocate a maturity limit on class certification in mass tort cases. Before the tort matures, the argument goes, class certification is improper because, if granted,

292. The Rules Enabling Act's "substantive rights" limitation, as construed by the Supreme Court, is a good example. See supra notes 257–259 and accompanying text.


294. Id.
it would exert a distorting effect on the parties' settlement incentives. Defendants should have little incentive to settle immature torts, as they do not yet have a solid foundation in the applicable substantive law. But certification threatens defendants with a risk, however marginal, of a debilitating judgment on a massive scale. The threat of an unlikely but devastatingly large verdict pressures defendants into settlements that are unwarranted by the substantive strength of the plaintiffs' claims. In its most prominent judicial applications to date, the maturity concept has led to findings under Rule 23(b)(3) that class actions are not superior to individual cases for the prosecution of claims. As one court declared in a case involving a "novel" theory of liability, why should companies "be forced by fear of the risk of bankruptcy to settle even if they have no legal liability," as they would if the class was certified before a requisite number of individual trials could go forward and "reflect a consensus, or at least a pooling of judgment," as to the strength of the plaintiffs' claims?

In theory, the maturity concept could work in any class action. Almost without exception, however, courts have only invoked it in mass tort class actions. In other words, the maturity concept operates as a regular, substance-specific application of Rule 23(b)(3). In several important instances, the concept operated to cloak judicial hostility to the substantive strength of the plaintiffs' theories of liability. It thus can readily amount to an evaluation of a claim's substantive value—a substantive policy, value-laden determination—in procedural guise. The trans-substantivity principle would counsel against such judicial adventurism without prior congressional approval.

Finally, the trans-substantivity principle militates against upper court constructions of trans-substantive rules that would predictably lead to substance-specific procedure in lower courts. The models in

296. See, e.g., Castano v. Am. Tobacco Co., 84 F.3d 734, 746–49 (5th Cir. 1996); In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299–1300 (7th Cir. 1995).
297. Rhone-Poulenc, 51 F.3d at 1296.
298. Id. at 1299–1300.
300. See, e.g., Castano, 84 F.3d at 747–48; Rhone-Poulenc, 51 F.3d at 1298.
this regard are *Twombly* and *Iqbal*. For fifty years before 2007, the Supreme Court consistently hewed to a bright-line rule for pleading: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."\(^{301}\) *Twombly* discarded this approach for its flexible "plausibility" standard.\(^{302}\) Consideration of the costs, particularly those relating to discovery, that a minimal pleading threshold generates in a complex antitrust case motivated the Court’s decision to jettison *Conley*’s more lax standard.\(^{303}\) *Iqbal* not only reaffirms the plausibility standard, it also confirms that an evaluation of the likely costs of litigation are relevant to what pleading threshold a plaintiff must meet.\(^{304}\)

Precisely what the *Twombly* pleading standard requires stirred debate and probably remains uncertain after *Iqbal*.\(^{305}\) One interpretation takes the Court’s expressed concern for the costs of litigation as a guide, leading to a “sliding-scale” standard for pleading: as the anticipated costs of litigation, however defined, rise, the plaintiffs’ obligation to include more particularized obligations does as well.\(^{306}\)

In theory, this “sliding-scale” standard is trans-substantive. Significant costs, regardless of the case’s doctrinal basis, will necessitate a higher pleading threshold. But because presumed costs might often depend on the doctrinal category a case fits into, *Twombly* and *Iqbal* might also engender consistently substance-specific lower court applications. Courts faced with cases against state officials, for example, recite by rote certain costs—"the diversion of official energy from pressing public issues," "the deterrence of able citizens from acceptance of public office," and "the danger that fear of being sued will dampen the ardor of all but the most resolute . . . in the unflinching discharge of their duties"\(^{307}\)—that they have repeatedly invoked as justification for particularized allegations in complaints.\(^{308}\) In other words, courts weigh their perception as to the substantive value of

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\(^{303}\) Id. at 558.


\(^{305}\) See Limestone Dev. Corp. v. Village of Lemont, 520 F.3d 797, 803–04 (7th Cir. 2008); Minutes, Civil Rules Advisory Committee, Nov. 8–9, 2007, at 32 (noting that “strong support” exists in the lower courts for the proposition that, after *Twombly*, “[g]reater pleading detail is required in cases that threaten to impose massive pretrial and trial burdens”).


\(^{307}\) Fairman, supra note 13, at 583–90; see also Amnesty Int’l, USA v. Battle, 559 F.3d 1170, 1177 (11th Cir. 2009) (reaffirming a heightened pleading standard in certain § 1983 cases).
§ 1983 litigation as they calibrate procedural requirements. If Twombly and Iqbal license courts to do so, and if § 1983 cases consistently involve the same presumed costs, then courts might routinely and regularly apply the new standard in order to require particularized allegations in civil rights cases. This nominally trans-substantive standard will metamorphose in application into a number of substance-specific procedural rules that differ from doctrinal category to doctrinal category.

VI. Conclusion

The Supreme Court's recent decision to jettison a fifty-year-old interpretation of Rule 8 and the rejuvenation of pleading litigation that the 1938 authors intended "to wither and die" show at a minimum that nothing is sacred in American civil procedure. The uncertain future of trans-substantivity, a "foundational assumption" of the 1938 rules, is further evidence of this fact. Although central to the design of American procedural systems since the early nineteenth century, the principle has taken a licking in recent years and potentially fatal cracks appear in its theoretical foundation. Nonetheless, trans-substantivity remains robust, if not as a jurisprudential matter, then as a practical matter, as the actions of rulemakers in the federal system demonstrate. The principle plays, and should continue to play, an important role as a mechanism for the allocation of rulemaking power. If it does, it will strengthen the legitimacy of court-supervised rulemaking going forward.

309. Marcus, supra note 235, at 1749.
310. Burbank, supra note 17, at 536.
Counting rules alone is an inexact science, and determining which rules are substance-specific and which are not adds a further element of arbitrariness to the exercise. I have tried to be over inclusive in my count of substance-specific rules. I have included, for example, DUCivR 16-2(c) from the District of Utah, which exempts cases involving incarcerated parties from an arbitration program. The rule is nominally trans-substantive, but it overwhelmingly would apply in prisoner civil rights cases. I have excluded bankruptcy, admiralty, and habeas corpus rules, as these areas of law have traditionally been covered by their own procedural rules. Substance-specificity in these areas does not suggest a tendency toward or away from trans-substantivity.

Others undertaking a similar exercise doubtlessly would arrive at slightly different figures, so I offer this data as illustrative and disclaim any suggestion that they are exact. But a slight difference in the total of substance-specific rules for a federal district would not take away from my argument that federal districts have remained quite consistent to the trans-substantive ideal in their local rulemaking.

### Table 1

<table>
<thead>
<tr>
<th>Federal District</th>
<th>Total Local Rules</th>
<th>Total Substance-Specific Local Rules</th>
<th>Percentage of Substance-Specific Local Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>N.D. Cal.</td>
<td>122</td>
<td>7</td>
<td>5.7%</td>
</tr>
<tr>
<td>D. Utah</td>
<td>77</td>
<td>3</td>
<td>3.9%</td>
</tr>
<tr>
<td>N.D. Ill.</td>
<td>144</td>
<td>7</td>
<td>4.9%</td>
</tr>
<tr>
<td>N.D. Tex.</td>
<td>78</td>
<td>3</td>
<td>3.8%</td>
</tr>
<tr>
<td>D. Mass.</td>
<td>62</td>
<td>2</td>
<td>3.2%</td>
</tr>
<tr>
<td>D. Alaska</td>
<td>77</td>
<td>4</td>
<td>5.2%</td>
</tr>
<tr>
<td>D.S.D.</td>
<td>42</td>
<td>1</td>
<td>2.4%</td>
</tr>
<tr>
<td>M.D. Fla.</td>
<td>65(^{311})</td>
<td>5</td>
<td>7.7%</td>
</tr>
<tr>
<td>E.D. Va.</td>
<td>28</td>
<td>3</td>
<td>10.7%</td>
</tr>
<tr>
<td>W.D. Pa.</td>
<td>69</td>
<td>7</td>
<td>10.1%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>Average 5.8%</strong></td>
</tr>
</tbody>
</table>

\(^{311}\) This figure does not include the district’s local admiralty rules.
## Table 2
**Substance-Specific Local Rules by District**

<table>
<thead>
<tr>
<th>Federal District</th>
<th>Substance-Specific Local Rules</th>
</tr>
</thead>
</table>
| N.D. Cal.        | - Rule 3-4(a)(4) (specifying particular requirements for entitling complaint in immigration cases, Privacy Act cases, or APA cases)  
                     - Rule 3-7 (providing filing requirements for securities cases)  
                     - Rule 16-5 (specifying timeline for cases reviewing administrative record)  
                     - Rule 16-6 (specifying particular rules for U.S. debt collection cases)  
                     - Rules 23-1 and 23-2 (providing class action requirements for securities cases)  
                     - Rule 58-1 (providing entry of judgment requirements for securities cases) |
| D. Utah          | - Rule DUCivR 5-3 (filing and in forma pauperis requirements for civil rights actions)  
                     - Rule DUCivR 16-1(a)(1)(A) (exempting certain categories of cases from scheduling conference and scheduling order requirements)  
                     - Rule DUCivR 16-2(c) (exempting cases involving incarcerated parties from ADR program) |
| N.D. Ill.        | - LR3.4 (filing requirements for cases brought under patent and trademark laws)  
                     - LR5.7(b) (filing requirements for False Claims Act cases)  
                     - LR8.1 (filing requirements for Social Security Act cases)  
                     - LR16.1 (exempting certain categories of cases from Rule 16 pretrial procedures)  
                     - LR16.3 (providing for voluntary mediation program for Lanham Act cases)  
                     - LR54.4 (providing for specific procedures for entering judgment in foreclosure cases)  
                     - LR81.1 (providing filing requirements for § 1983 cases brought by persons in custody) |
| N.D. Tex.        | - LR 5.3 (filing requirements for prisoner civil rights cases)  
                     - LR 9.1 (various requirements for social security and black lung cases)  
                     - LR 16.1 (providing exemptions for categories of cases from scheduling and planning requirements of Fed. R. Civ. P. 16(b)) |
| D. Mass.         | - Rule 16.2 (providing exemptions for categories of cases from scheduling and planning requirements of Fed. R. Civ. P. 16(b))  
                     - Rule 35.1 (providing particular requirements for disclosure of medical information in personal injury cases) |
| D. Alaska | Rule 9.1 (providing filing requirements for Social Security Act cases)  
|           | Rule 16.1 (providing exemptions for categories of cases from scheduling and planning requirements of Fed. R. Civ. P. 16(b))  
|           | Rule 16.3 (providing various requirements for appeals from administrative agencies)  
|           | Rule 81.2 (providing hearing requirements for naturalization petitions) |
| D.S.D.   | LR 16.1 (providing exemptions for categories of cases from scheduling and planning requirements of Fed. R. Civ. P. 16(b)) |
| M.D. Fla. | Rule 1.03(e) (providing filing requirements for prisoner cases)  
|           | Rule 1.05(e) (providing filing requirements for prisoner cases)  
|           | Rule 3.05 (assigning cases to various tracks based on substantive category)  
|           | Rule 8.02 (exempting cases based on constitutional rights from arbitration referral)  
|           | Rule 9.03 (providing categories of cases subject to mediation) |
| E.D. Va. | Local Civil Rule 4(C) (providing filing requirements for prisoner cases)  
|           | Local Civil Rule 16(A) (providing exemptions for categories of cases from scheduling and planning requirements of Fed. R. Civ. P. 16(b))  
|           | Local Civil Rule 71A (providing specific requirements for land condemnation actions) |
| W.D. Pa. | LR 9.2 (providing filing requirements for prisoner cases)  
|           | LR 9.3 (providing appellate procedural rules for prisoner cases)  
|           | LR 16.1.2 (allowing court to require filing of case statement for RICO cases)  
|           | LR 16.1.3 (providing for various tracks depending in part on substantive category of case)  
|           | LR 35.1 (providing for impartial medical exam for cases where medical condition in controversy)  
|           | LR 71A.1 (providing filing requirements for land condemnation actions)  
|           | LR 72.1.4 (providing specific powers to magistrate judges for cases challenging conditions of confinement) |