Legislative Transsubstantivity

*By Jeffrey C. Dobbins**

* Associate Professor of Law, Willamette University College of Law. Thanks to the Willamette University College of Law for research support, to David Marcus, Aaron Simowitz, and the entire Willamette University College of Law faculty for their thoughtful comments and reactions. Errors of fact, logic, and omission remain my own. As this piece goes to print in the early Spring of 2020, the country and world face extreme disruption from the COVID-19 pandemic. My sincere appreciation and deepest respect go to all who are working to ease the physical, mental, and economic pain it is visiting on so many.

Table of Contents

Introduction 709
I. Transsubstantivity in Procedure 713
A. Basic Principles 713
B. Justifications for Transsubstantivity in Judicial Rulemaking 716
C. Challenges—and Some Tentative Responses—to Reliance on a Transsubstantivity Principle in Judicial Decision Making 723
II. Are Legislatures Bound by Transsubstantivity? The Literature Suggests "No" 730
III. Legislative Transsubstantivity as a Foundational Premise in Our Legal System 733
A. Presumptions Favoring General Rules and Transsubstantivity 734
B. Implicit and Explicit Acknowledgement of Transsubstantivity as a General Principle in Procedural Decision Making 738
IV. Legislative Transsubstantivity as a Systemic Virtue 741
A. Justifications for a Legislative Transsubstantivity Principle 741
B. The Application of Legislative Transsubstantivity to Legislative Action 748
C. Legislative Transsubstantivity and Due Process 750
D. Limits on Legislative Transsubstantivity 754
Conclusion 756

INTRODUCTION

At the heart of judicial procedure in the United States—and at the core of our law school courses in civil and criminal procedure—is a principle of transsubstantivity, which presumes that rules governing court procedures should apply to all kinds of cases, regardless of their substance.[1] In the civil system, this principle is embodied in the Federal Rules of Civil Procedure (Federal Rules) and the many state procedural codes that substantially track the Federal Rules.[2] Whether a case asserts a cause of action arising out of a tort, contract, or property dispute, the process required to resolve that case is the same across those substantive areas.

Over the years since the adoption of the Federal Rules, however, an increasing number of commentators have questioned whether the principle should constrain rulemakers in the drafting and modification of our rules of procedure. Some have argued that transsubstantivity artificially limits the creativity, nuance, and efficiency that could come from procedure more targeted to the needs of particular substantive areas.[3] Legislatures, at least, have taken these criticisms to heart, and have adopted over the years a number of substance-specific procedures applicable only in certain limited areas of the law (such as landlord-tenant law, family law, and med-

1 Margaret B. Kwoka, *Judicial Rejection of Transsubstantivity: The FOIA Example*, 15 NEV. L.J. 1493, 1496 (2015); David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1194 (2013) [hereinafter *Processes of American Law*] ("Trans-substantivity is one of the most fundamental principles of doctrinal design for modern civil procedure . . . ."); *see also* Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1911–12 (1989) (noting that legal education in civil procedure is directed to federal rules, thereby aiding the development of uniformity in the procedural system at the national level).

2 *See infra* Part I.A.

3 *See, e.g.*, Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377–78 (2010) [hereinafter *Limitations*] (arguing for "readjustment" to principle of transsubstantive procedure in order to address concerns about flexibility and efficiency); Stephen P. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 715–19 (1988) [hereinafter *Of Rules and Discretion*] (arguing for value of some substance-specific procedures in order to avoid impact of "falsely advertised" simplicity and predictability in current system, and to serve principles of equality); *see also infra* Part I.C, especially text accompanying notes 65–76 (articulating these criticisms in greater detail).

ical malpractice cases[4]). That said, there are a number of commentators who continue to defend the principle of transsubstantivity as applied to the rulemaking process.[5]

In the midst of the debate about the value of transsubstantivity, however, there is very little disagreement that it is courts and court-adjacent rulemakers—not legislatures—that should be constrained by its principles. With few exceptions, commentators assume that legislatures are inherently free of transsubstantive limits, and are entitled to adopt procedures targeted to particular substantive areas.[6]

As a constitutional matter, these commentators are certainly correct. And yet, as this Article explores, our judicial system is often skeptical of substance-specific procedures adopted through the legislative process. In civil, administrative, and criminal systems, for instance, courts rely on presumptions that favor "standard" procedures, and use policy-based canons of interpretation that push courts in the direction of standard judicial processes. This previously unacknowledged presumption of *legislative transsubstantivity* is the focus of this Article. Ultimately, this Article suggests that in the legislative context, the presumption of transsubstantivity should not only be acknowledged, but encouraged.

This is not to say that statutes should not be able to deviate from general procedural rules—they certainly should, and courts should willingly interpret legislation clearly imposing such substance-specific procedures in a manner consistent with legislative intent.[7] Rather, this Article points out that our system is properly laced with presumptions favoring transsubstantive procedures. The implicit skepticism with which courts evaluate legislatively-adopted

---

4 *See* David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DePaul L. Rev. 371, 407–09 (2010) [hereinafter, *Trans-Substantivity*] (discussing substance-specific procedures adopted by many states for medical malpractice cases); *see also* Kwoka, *supra* note 1, at 1498–99.

5 *See, e.g.*, Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. Pa. L. Rev. 2067, 2068 (1989) [hereinafter *An Exorcism*] (arguing that substance-specific rules have "been wisely rejected in the past and must be rejected for the present and for the future"); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. Pa. L. Rev. 2237, 2244, 2247 (1989) (concluding that critique of transsubstantive rules "seems misguided to me"; noting commitment to transsubstantive principles by well-known judges); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 Brook. L. Rev. 761, 778–79 (1993) (raising concerns about a shift away from transsubstantive procedures).

6 *See infra* Part II.A.

7 *See infra* Part IV.C.

substance-specific procedures serves many of the same basic salutary principles that transsubstantivity serves in judicial rulemaking: the principle effectively acknowledges that most legislators (like most judges) are generalists; it improves legitimacy by limiting the risk of substance-specific capture of procedure by unelected interests; and it encourages predictability, familiarity, and ease of application of legal procedures by those who operate within and are subject to them. While legislatures should be able to overcome judicially-imposed transsubstantive skepticism through clearly stated positive law, legislative transsubstantivity should be acknowledged as an important—and useful—constraint on legislative action and judicial decision making.

To develop this thesis, I begin in Part I by examining the principle of procedural transsubstantivity as it has been described and discussed in the academic literature. From its early application (and, arguably, its zenith) in the adoption of the Federal Rules of Civil Procedure, through its acknowledgement in the academic literature, to skeptical academic views of the value of the principle, the notion of transsubstantivity has been an important premise behind the evolution of legal procedure over the last century. In Part II, I examine how commentators have thought about transsubstantivity in the context of legislative enactments. Generally speaking, legislatures have been viewed as wholly unbound by transsubstantive principles; Part II discusses why this perception has held sway, and looks at what legal and policy understandings might support this view. In Part III, I discuss how, despite the lack of any articulated support for applying transsubstantivity principles to legislative enactments, courts nevertheless make decisions about legislative enactments based on what appears to be a spillover of transsubstantivity principles into certain decisions about procedure. These decisions take the form both of presumptions (such as the presumption of reviewability), as well as interpretive rules that give effect to those presumptions. As Part III discusses, these decisions are not generally rooted in any kind of explicit reliance on a principle of transsubstantivity, but they can nevertheless be explained by the carryover of transsubstantivity principles into decision making about an area of the law—legislative procedural enactments—tooward which the principle has generally been viewed as irrelevant.

Finally, in Part IV, I discuss this phenomenon, and argue that the application of transsubstantivity principles to legislative decision making should not only be acknowledged, but encouraged. Acknowledging the importance of transsubstantivity in the evaluation and application of procedural legislation is not only theoretically and normatively interesting, but it is also likely to improve judicial decision making by exposing an important premise governing those

decisions. The Article further argues, however, that the application of this kind of transsubstantive presumption in judicial rulemaking, judicial decision making, and legislative action is substantively wise. Many of the same justifications that have motivated the application of transsubstantivity in judicial rulemaking—ease of application for generalist decision makers and practitioners, for instance—also apply in the context of legislation. Of course, legislators do not risk the same lack of legitimacy in adopting substance-specific procedural legislation that courts might face were they to adopt such targeted procedures. Nevertheless, legislative legitimacy can also be undermined when special interests (and their focused knowledge about the importance of certain procedures in achieving substantive goals) influence generalist legislators to adopt legislation in which substance-specific procedures may be unnecessary, superfluous, excessively complex, or contrary to a particular legislator's substantive legislative goals.

This Article does not argue that legislatures should be barred from adopting legislation imposing substance-specific legal procedure (although some courts may view excessive legislative intrusion into procedures as impermissibly encroaching on constitutionally defined "judicial powers"). Legislators can and should be able to accomplish substantive policy goals through directly legislating substance or procedure. If they choose to go the latter route, however, it is appropriate that legislators approach such decisions with care, and that courts view apparently substance-specific legislation with a skeptical eye.

In the end, I recognize that this Article's thesis runs against a trend in the academic literature that is skeptical about the continuing utility of a strong transsubstantivity principle in even judicial rulemaking. Hopefully, however, the Article demonstrates not only that the premise already plays an important part in judicial decisions regarding legislation, but makes a case for avoiding what might be characterized as "casual" substance-specific procedural legislation in both the development of procedure as well as in the interpretation and application of it. While legislators should be free to adopt new substance-specific procedures when doing so is considered and done intentionally, an approach that views legislative enactments through a transsubstantive lens provides a check on such enactments that is not only consistent with current practice, but also is an appropriate way to maintain important values that have been associated with the principle of transsubstantivity since early in the last century.

I. Transsubstantivity in Procedure

A. Basic Principles

Transsubstantive legal procedure is procedure that applies to the management of a case regardless of the substance of that case.[8] The Federal Rules of Civil Procedure are, with few exceptions, transsubstantive, because they apply to cases regardless of the content of those cases.[9] A case alleging breach of contract will be managed in the federal system—and (with a few modifications) in most state systems[10]—identically to a case alleging negligence in tort.

8 *Trans-Substantivity*, *supra* note 4, at 376 ("A procedural rule is trans-substantive if it applies equally to all cases regardless of substance."). In his later article, *Trans-Substantivity and the Processes of American Law*, Marcus highlights some important subtle features of arguments about transsubstantivity that mark an important advance in thinking carefully about the principle. *See Processes of American Law*, *supra* note 1, at 1197–208 (noting application of principle to a wide field of "process law," as well as what he calls a "spectrum" of transsubstantivity). For purposes of this Article, however, the straightforward definition in the text will suffice.

9 *Trans-Substantivity*, *supra* note 4, at 376 (discussing transsubstantive and some of the limited substance-specific provisions of the Federal Rules).

10 Many states adopted procedural systems similar, if not nearly identical to, the Federal Rules. While some states have resisted the kind of wholesale modeling on the Federal Rules that other states have adopted, the systems are, with few exceptions, transsubstantive. *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash. L. Rev. 1367, 1369, 1377–78 (1986) (noting the "pervasive influence of the Federal Rules on at least some part of every state's civil procedure," but classifying only 23 states as having a true "federal rules replica" system); *id.* at 1369 (noting that while many systems have adopted variations on the Federal Rules or rejected their substance altogether, the judicially-driven (and, presumably, transsubstantive) rules-based nature of the Federal Rules now predominates in the U.S.); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. Pa. L. Rev. 1999, 2026–43 (1989) [hereinafter *Federal Rules, Local Rules, and State Rules*] (chronicling history of state adoption of (and refusal to adopt) Federal Rules model); *id.* at 2045 (noting that, despite variation in how willing states have been to adopt the Federal Rules, "the Federal Rules have greatly influenced state procedure, and they have certainly dominated scholarly thought and the teaching of civil procedure in law school"). In Oregon, for instance, which Oakley and Coon label a "Fact Pleading / Idiosyncratic Rules-Based Procedural System," the Oregon Rules of Civil Procedure are largely transsubstantive (though certain venue and jurisdictional rules are substance-specific). *See* Or. R. Civ. P. 1-85; *see also* Oakley & Coon, *supra*, at 1414–15. *But see* Or. R. Civ. P. 4H-4K (substance-specific provisions in Oregon rule governing personal jurisdiction).

State courts, then, have been significant advocates for transsubstantivity

While a number of articles have addressed various important aspects of the development of the transsubstantivity principle and associated jurisprudential and practical considerations,[11] perhaps the most comprehensive history of the transsubstantivity principle itself is Professor David Marcus' article, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*.[12] Professor Marcus notes that although the principle has its roots in Jeremy Bentham's work distinguishing procedural rules (or "adjective law") from substantive law,[13] the notion of transsubstantivity in the American legal system only became important with the development of code pleading in the 19th century.[14]

The substance-procedure distinction plays a critical role in the transsubstantivity principle (and, as we will see, in the undermining of its theoretical underpinnings in the years subsequent to the adoption of the Federal Rules). Bentham, who offered the "first

---

principles. As one commentator noted, state judges appear to have been largely responsible for deep-sixing proposed changes that would have removed the courts from a decision-making role in the development of Federal Rules in the mid-1980s; those state judges were "concerned about their own prerogatives" and fought to retain the model on which their own systems had been built. Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1721–22 (2004) [hereinafter *Procedure, Politics and Power*]. A fascinating proposal that would take state transsubstantive procedure to new heights can be found in Glenn S. Koppel, *Toward A New Federalism in State Civil Justice: Developing A Uniform Code of State Civil Procedure Through A Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167 (2005).

11 *See generally* Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States that Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 318 n.30 (2001) (providing a comprehensive list of academic works on the role of transsubstantivity in the federal system); *Processes of American Law*, *supra* note 1, at 1194–95 & nn.11–14 (2013) (citing articles); *see also An Exorcism*, *supra* note 5, at 2067; Hazard, *supra* note 5, at 2237.

12 *Trans-Substantivity*, *supra* note 4. This Article relies heavily on Marcus' piece for its careful and thorough explanation of the evolution and ongoing utility of the doctrine of transsubstantivity.

13 *Id.* at 384–85 ("The trans-substantivity principle lurks in Bentham's distinction between substance and procedure.").

14 *Id.* at 383–87, 389 ("Trans-substantivity thus appears as a central feature in what became known by the late 1800s as the "American system" of procedure.").
Professor Subrin suggests that the term "trans-substantive" itself was probably first used by Professor Robert Cover. *See Limitations*, *supra* note 3, at 377 n.1 (citing Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975)). Professor Subrin also notes that usage varies between "trans-substantive" and "transsubstantive." *See id.* Like him, I have chosen the latter, non-hyphenated version.

analytically precise articulation" of the boundary,[15] distinguished substantive law, which defined rights and duties of individuals, from "adjective law" that was intended solely to define how to enforce that substantive law.[16] The distinction necessarily presumed that procedural law was value-neutral, and to the degree that "procedure" had the effect of imposing substantive policy changes, it took itself out of the realm of procedure. Laws enacting substance-specific procedure necessarily suggested that they were focused not on the value-neutrality of "adjective law," but rather on the policy effects of a particular change—a topic best left to legislators, rather than judges.[17]

With a jurisprudential line in place that permitted reformers to distinguish between "value neutral" procedure and "substantive" law, a variety of 19th century efforts to codify and unify legal practice, most notably in the Field Code, amounted to the first round of efforts to move in the direction of a uniform and transsubstantive procedural system, and away from the complex processes that dominated the common law writ system and its adjacent procedures.[18] Although continued adherence to common law forms of pleading lingered throughout the country,[19] the push for a federal system of procedure—along with the power to generate that system through a court-adjacent rulemaking process—ultimately resulted in the "final triumph" of transsubstantivity: the adoption of the Federal Rules of Civil Procedure in 1938.[20]

15 *Trans-Substantivity*, *supra* note 4, at 384.

16 *Id.*

17 *Id.* at 384–86; *see also* D. Michael Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions"*, 30 UCLA L. Rev. 189, 191–92 (1982) (describing Bentham's distinction between substance and procedure).

18 *See generally Trans-Substantivity*, *supra* note 4, at 381–83, 386–92; *see also* Stephen R. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 931–75 (1987) [hereinafter *How Equity Conquered Common Law*] (chronicling the evolution of the American system from common law pleading to the equity-dominated system embedded in the Federal Rules). As Subrin notes, however, the Field Code rejected judicial discretion, and "leaned as much, or more, toward the view of common law procedure, as to equity." *How Equity Conquered Common Law*, *supra*, at 939. Notably, that emphasis reflected a belief on the part of Field and like-minded reformers that legislatures, rather than judges, should be primarily responsible for the development of legal procedures. *See Trans-Substantivity*, *supra* note 4, at 390, 395; *see also* Roscoe Pound, *Procedure Under Rules of Court in New Jersey*, 66 Harv. L. Rev. 28, 31–32 (1952) (discussing move away from Field Code's legislative control over procedure and the resulting complexity).

19 *Trans-Substantivity*, *supra* note 4, at 392–94.

20 *Id.* at 392, 394–99.

The rise of the Federal Rules was reinforced by principles of transsubstantivity. When discussing the value of procedural reform, advocates presumed that a single federal system would naturally be simple, systemic, and free of reference to substantive areas of the law.[21] Existing federal practice under the Conformity Act of 1872 had proven difficult for practitioners, and reform advocates argued for simplicity in legal process not only because of the intrinsic value of a simplified system, but because it would also reduce the degree to which procedural tactics, rather than substantive merit, would dictate the outcome of cases.[22] This emphasis on the value-neutral characteristic of transsubstantive procedural reform helped to drive the enactment of the Rules Enabling Act and adoption of the Federal Rules. By reinforcing the "technocratic" and "expert" nature of the court-adjacent process that was proposed for development of the Federal Rules, reformers (led by Charles Clark) argued for keeping procedural reform out of the hands of legislative control that had "led to 'indifference and political manipulation,' and … hobbled the ability of procedural reform to keep pace with constantly evolving litigation needs."[23] The doctrines of procedural value-neutrality, transsubstantivity, and the appropriate role of court-adjacent rulemakers in generating procedural reform reinforced each other in the 1930s, and ultimately persuaded Congress to adopt the Rules Enabling Act in 1934.[24] The Federal Rules of Civil Procedure—the model for transsubstantive American civil legal process—followed just four years later.[25]

B. Justifications for Transsubstantivity in Judicial Rulemaking

The history of transsubstantive procedure therefore encompasses several arguments that its defenders have relied upon to justify its continued place in legal procedure in the United States. First, transsubstantivity helps to ensure that courts and court-adjacent rulemaking operate within their (value-neutral, procedural) core area of expertise and authority, and stay away from value-laden substantive law. Second, transsubstantivity is consistent with the notion of uniform procedure and treating "like cases alike"—a fundamental principle of procedural justice. Third, because the notion of uniformity is inherently part of transsubstantive procedures, a

21 *See How Equity Conquered Common Law*, *supra* note 18, at 957–59.

22 *See, e.g.*, *id.* at 959–60.

23 *Trans-Substantivity*, *supra* note 4, at 395–96.

24 *Id.* at 396; *see* Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (current version at 28 U.S.C. § 2072 (2018)).

25 *See Supreme Court Adopts Rules for Civil Procedure in Federal District Courts*, 24 A.B.A. J. 97, 99 (1938).

range of universal values associated with uniformity have been used to defend transsubstantivity as well. With uniformity and simplicity come practical considerations that are used to reinforce the value that transsubstantivity brings to the procedural system.

Institutional Arguments. The institutional argument supporting the value of transsubstantivity in our procedural system turns primarily on the notion that transsubstantive rules, unlike substance-specific procedural rules, are "value-neutral."[26] To the degree that courts, rather than legislatures, are responsible for developing procedural systems, then, the rules themselves must necessarily be transsubstantive given that courts do not have the institutional authority necessary to justify developing their own value-laden principles. "[F]or 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."[27]

This argument for transsubstantivity depends significantly, of course, on the structure of the rulemaking process. While the history of procedural reform in the United States means that transsubstantive rules are viewed as a natural product of the court-adjacent rulemaking system, it does not necessarily mean that transsubstantive rules can *only* be generated from processes that are centered in the judicial branch.[28] In other words, the important role of transsubstantivity flows from the understanding that rulemaking is best left in the hands of the courts. That institutional understanding necessarily requires that any rules that *are* developed should be transsubstantive.

If the premise is undermined—i.e., to the degree that legislative control over rulemaking is (re)asserted[29]—this institutional argument falls away as a justification for the adoption of transsubstantive rules. If we are interested, as this Article is, in justifications for applying transsubstantivity to legislative rulemaking, we need to

26 *See Trans-Substantivity*, *supra* note 4, at 397–99 (discussing importance of principles of value-neutrality in the adoption of transsubstantive rules).

27 *Id.* at 381.

28 Marcus's article on transsubstantivity persuasively concludes that even if transsubstantivity is not a systemic good in itself—i.e., even if there are substance-specific rules that might do better to improve procedural justice than transsubstantive rules—transsubstantivity nevertheless amounts to a "principle of institutional allocation of rulemaking power" that defines and limits the scope of court-supervised rulemakers and thereby "strengthen[s] their legitimacy to craft procedural rules." *Id.* at 375.

29 Some commentators have challenged the assertion of legislative control over judicial procedures. *See, e.g.*, Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 379 (1992).

look to intrinsic arguments for the value of transsubstantive rules.

Transsubstantivity as Procedure. In the absence of judicial rulemaking, institutional arguments about the need for transsubstantive rules do not necessarily hold sway. But even if legislatures were generating procedural rules, transsubstantivity could be viewed as a manifestation of the evenhandedness and impartiality that are fundamental characteristics of "ideal" legal procedure.[30] Impartial and evenhanded procedure has as a fundamental characteristic the premise that "like cases are treated alike."[31] While cases in different areas of substantive law are arguably "unalike," they are only substantively unalike, and therefore can be reasonably subject to different substantive rules. To the degree that parties asserting different substantive legal rights are seeking to vindicate legal interests, however, it is harder to make the case for why a lawsuit in a medical malpractice case should be managed in a procedurally different way from a lawsuit alleging breach of contract, or how a case alleging violations of a particular state consumer protection law should be handled any differently from a property line dispute between neighbors. To the degree that transsubstantive procedure manages to treat *all* cases alike, it accomplishes at least some of the goals of evenhandedness and impartiality.[32] To be sure, transsubstantive rules may generate different outcomes when courts apply transsubstantive discretionary powers to different facts. Reliance on discretion as a transsubstantive principle can therefore challenge the fundamental values of transsubstantivity.[33] In the end, however, transsubstantive

30 *See* Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. Pa. L. Rev. 1839, 1880 (2014) (setting forth the authors' vision of the inherent value of procedure).

31 *Cf. Federal Rules, Local Rules, and State Rules*, *supra* note 10, at 2001 (noting "final uniformity question: how can procedure most effectively aid the predictable application of substantive law and thus help to achieve uniformity of result in similar cases?"); *An Exorcism*, *supra* note 5, at 2074–75 (discussing the importance of procedural neutrality to the validity of legal system).

32 *See* Stephen N. Subrin, *Reflections on the Twin Dreams of Simplified Procedure and Useful Empiricism*, 35 W. St. U. L. Rev. 173, 188 (2007) [hereinafter *Simplified Procedure*] ("We have rules, substantive and procedural, in the attempt to reduce arbitrariness."). Whether our transsubstantive system achieves the goal of reducing arbitrariness is a matter of dispute. *See infra* Part I.C.

33 *See infra* Part I.C (discussing lack of uniformity as a result of the application of transsubstantive principles of discretion); *Trans-Substantivity*, *supra* note 4, at 377; *see also* Robert S. Summers, *Evaluating and Improving Legal Processes A Plea for Process Values*, 60 Cornell L. Rev. 1, 25 (1974) (noting risk to "procedural legality" of leaving too much discretion to decision makers).

In his criticisms of the transsubstantivity principle, Professor Stephen Burbank has noted this natural drift toward the use of discretion in a transsubstantive system. *Of Rules and Discretion*, *supra* note 3, at 715 ("It is not surprising that,

procedures, rather than substance-specific ones, do a better job of advancing the goals of a legal justice system that seeks to treat like cases alike.[34]

Transsubstantive procedures also provide, at least on their face, for procedural rationality. By treating all cases similarly (at least in form), transsubstantive procedures give "[t]hose who participate in, or are affected by" the legal process "a better chance of knowing 'what is going on'—of knowing what is happening to them and why."[35] While it is certainly possible that a given transsubstantive procedure might not be the "best" such process (because it might be inefficient, or even lead to incorrect results), at the very least, the consistency of procedure between substantive areas of the law helps to advance systemic goals by enhancing the perception of fairness, consistency, and legitimacy.[36] This kind of consistent treatment of similar cases helps to promote public confidence in the legal system as a whole.

The Theoretical and Practical Value of Simplicity and Uniformity. Transsubstantive rules are not necessarily uniform rules, and uniform rules are not necessarily transsubstantive.[37] Nevertheless, Clark and other advocates for the development of a transsubstantive federal procedural system rested much of their argument for such a system on the importance of simplicity and predictability. As Professor Subrin puts it, in Clark's view, "procedural technicality stands in the way of reaching the merits, and of applying substantive law."[38] Given that the entire purpose of procedure had traditionally[39]

---

with some notable exceptions, the trend of modern procedural law has been away from rules that make policy choices towards those that confer on trial courts a substantial amount of normative discretion. For once one has settled upon trans-substantive rules as the best way of achieving uniformity, simplicity and predictability, and once one acknowledges the impact of procedure on the substantive law, concerns about either the legitimacy of the enterprise or its efficacy push in that direction.").

34 *See Processes of American Law*, *supra* note 1, at 1220–21 ("The refusal to discriminate among different antecedent regimes means that regimes' beneficiaries get treated as objects of equal concern by the processes of American law.").

35 Summers, *supra* note 33, at 26–27.

36 *Cf. Simplified Procedure*, *supra* note 32, at 186 ("It seems to me that the closest we can come to measuring 'justice' in a given procedural system is the extent to which relevant participants and society perceive the system and its results as fair and legitimate.").

37 *See Trans-Substantivity*, *supra* note 4, at 376–77 (noting how uniformity differs from transsubstantivity).

38 *How Equity Conquered Common Law*, *supra* note 18, at 962.

39 "Traditionally" means "since the development of a jurisprudential view about the line between substance and procedure." *See supra* notes 13–17 and

been viewed as "staying out of the way" of the goals of substantive law, reformers necessarily believed that procedural reform had to be transsubstantive. The alternative—substance-specific procedure—would necessarily embed value judgments in the very procedures that were supposed to be value-neutral.[40] Regardless of how rules are generated, then, for them to be appropriately deemed "procedural," they have to be transsubstantive.

Under this view, transsubstantivity is a necessary path by which procedural reformers can avoid the costs of complexity. When a single procedure can be used to evaluate and vindicate legal rights across a broad spectrum of substantive areas of the law, that procedure is not only appropriately "simple," but it is consistent with the whole idea of procedure *qua* procedure. A "simple" procedure, in essence, is inherently transsubstantive. Although this vision of transsubstantive simplicity is necessarily tainted by the reliance on judicial discretion that develops to permit efficient application of the rules in such straightforward systems,[41] a transsubstantive system is, at least on its face,[42] simpler and easier to understand than one that uses different procedures for different substantive areas of the law.[43]

---

accompanying text (discussing importance of substance-procedure distinction to development of transsubstantivity principles).

40 *See Trans-Substantivity*, *supra* note 4, at 418 ("[S]ubstance-specific procedures . . . encroach on legislative terrain."); *see also id.* at 419 ("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."); *An Exorcism*, *supra* note 11, at 2085 (noting how the flexibility of transsubstantive rules limits political interest in those rules and is linked to the "objective of political neutrality in rulemaking").

41 *See Trans-Substantivity*, *supra* note 4, at 377–78; *see also* Main, *supra* note 11, at, 379–80 (noting the important difference between a procedural system that is uniform in "form" and one that is uniform in practice).

42 As Professor Janice Toran discussed in her article *'Tis a Gift to be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 377 (1990), simplicity has an aesthetic value that influences procedural reform. "[T]o the extent that the Code and Federal Rules reformers appreciated certain stylistic qualities in procedure, their attitudes were aesthetic. This does not mean that their perceptions were limited to, or by, aesthetic sensibilities; it does suggest that aesthetic considerations exerted an influence on reforms." *Id.*

43 Improving simplicity in order to aid understanding and application was a significant goal of the 1938 adoption of the Federal Rules. *See, e.g.*, Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of A Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 80 (1997) (noting that the failed effort to develop uniform procedures, and that the resulting fact that "lawyers had difficulty knowing what procedure would apply in any given federal district court[,]" prompted the development of the Federal

The value of simplicity in a procedural system is effectively a story about the value of uniformity in that same system; it is hard for a "simple" procedural system to be nonuniform. Commentators have noted the many arguments favoring a uniform procedural system.[44] Professor Thomas Main's piece on uniformity in rulemaking begins with a description of the many ways in which that aspect of procedural rules—and particularly transsubstantive rules—has been lauded:

> So deeply is the idea of uniformity embedded in American legal thought that many proceduralists find it difficult or unnecessary to explain why uniformity is thought to be good. Whether because of the lure of simplicity, the appearance of neutrality, the likeness to science, the feel of efficiency, the imprimatur of professionalism or some combination of these, the norm of procedural uniformity enjoys virtually universal approval.[45]

As I discuss further below, difficult questions have been posed about the degree to which, in practice, uniform and simple procedural systems are actually uniform or simple.[46] Even when professional practice and judicial discretion leads to "as applied" complexities in the system, however, a common, transsubstantive procedural system generates important values. First, a uniform and transsubstantive system creates a common language for discussion about legal procedure. This common language permits the training of law students and provides a useful starting point for generalist judges and attorneys in the application of common rules to procedural problems. Second, that common language generates at least some systemic pressure for common interpretation. While a "foolish

---

Rules, which were intended to be "one simple, flexible procedure to apply to all cases (trans-substantive uniformity)"); *see also* Alan B. Morrison, *The Necessity of Tradeoffs in A Properly Functioning Civil Procedure System*, 90 OR. L. REV. 993, 996 (2012) ("[I]t is simpler to have a single set of procedural rules for all areas of the law. . . .").

44 *See, e.g.*, *Federal Rules, Local Rules, and State Rules*, *supra* note 10, at 2001 (discussing importance of procedural uniformity to development of Enabling Act and the Federal Rules); Main, *supra* note 11, at 317 (2001) ("[C]ommentators very seldom take issue with the normative value of procedural uniformity.").

45 Main, *supra* note 11, at 311–12; *see also id.* at 312–14 (discussing the importance of uniformity as a driving force in the development of both the Field Code and the Federal Rules).

46 *See infra* Part I.C.2.

consistency is the hobgoblin of little minds,"[47] a multiplicity of substance-specific procedures will necessarily undermine the image, if not the substance, of uniformity and consistency that is so valuable to the procedural realm.

Common language and consistency are particularly valuable in a system in which the primary practitioners—the judges who apply the procedural rules and (to a lesser degree) attorneys—are generalists. This is not to say that judges do not develop "expertise" in a particular area; they certainly can and do.[48] Rather, I mean that the bulk of elected and appointed judges in the U.S. legal system preside over courts with jurisdictional responsibility over a broad range of substantive topics. While particular judges may well develop expertise within a particular area of the law—becoming known, for instance, as a judge with a particular interest in insurance law—most trial court and appellate court judges in the state and federal systems are likely to be called upon to decide cases from a broad range of substantive areas. In such a system, having a multiplicity of procedural systems—not to mention different language and relevant rules regarding those systems—costs participants time and energy, undermines consistency, and ultimately threatens a return to the complexity that spurred the rise of procedural reform in the first instance.[49]

Transsubstantivity, on the other hand, can ease at least some of that complexity. As early advocates of a transsubstantive system argued, in such a system "judges and lawyers do not need to relearn procedure every time they delve into a new field of substantive doctrine."[50] While the evolution of a transsubstantive system—and the role of discretion within it—necessarily means that uniformity is more of an ideal than a description, the goal of uniformity is still an

47 Ralph Waldo Emerson, *Self Reliance*, Essays: First Series (1841), https://emersoncentral.com/texts/essays-first-series/self-reliance/ ("A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.").

48 On this point, *see generally* Edward K. Cheng, *The Myth of the Generalist Judge*, 61 Stan. L. Rev. 519 (2008).

49 *See* Main, *supra* note 11, at 312–13; *Processes of American Law*, *supra* note 1, at 1221 ("[T]rans-substantive doctrine can lower the barriers to entry for areas of practice. General rules mean fewer advantages for legal specialists. Transsubstantivity thus helps to enable generalist lawyers to practice in a wider array of contexts."). *But see* Stephen B. Burbank, *The Complexity of Modern American Civil Litigation: Curse or Cure?*, 91 Judicature 163, 164 (2008) (arguing that the "simple" Federal Rules have themselves resulted in complexity).

50 *Trans-Substantivity*, *supra* note 4, at 372.

important value served by transsubstantivity.[51]

C. Challenges—and Some Tentative Responses—to Reliance on a Transsubstantivity Principle in Judicial Decision Making

Affirmative arguments for the value of transsubstantivity run quickly up against some challenges that, over time, have evolved into significant criticisms of the doctrine. I address three of the most significant below, and offer some initial thoughts about their application to the issues addressed in this Article.

Challenge 1: The institutional validity of judicially-generated transsubstantive rules depends on a false distinction between substance and procedure.

As Professor Marcus and others have noted, around the time that the adoption of the Federal Rules marked the apex of transsubstantivity as a driving principle in our legal system, the "jurisprudential prerequisite" of the doctrine "began to weaken."[52] The primary issue is the uncertain line between substance and procedure.[53] A system that is rooted in the ability to distinguish between "value-neutral" procedure and "value-driving" substance is bound to have difficulties once one recognizes that it is difficult not only to distinguish between substance and procedure, but that even "procedural" rules have substantive content.[54] For instance, the different standards for pleadings—and the degree of specificity required of those seeking relief—inherently embed a substantive value judgment about the degree to which the procedural system should encourage parties to seek redress for legal injuries even in circumstances where facts are unclear.[55] As Professor Stephen Burbank has argued, the permeable line between substance and procedure and the systemic complexities that flow from that permeability have driven reform strategies like judicial management and alternative dispute resolution ("ADR")—strategies that amount to "steps in the flight from law."[56] He argues that one way to avoid this flight would be to abandon transsubstan-

---

51 *See An Exorcism*, *supra* note 11, at 2082–85 (arguing for the value—and theoretical validity—of flexibility in a transsubstantive procedural system).

52 *Trans-Substantivity*, *supra* note 4, at 399.

53 *Id.* at 399–400 (describing concerns, articulated at the time of the development of the Federal Rules of Civil Procedure, about the difficulty of defining a clear procedure-substance line).

54 *See id.*

55 *See, e.g.*, Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002) (noting substantive impact of different standards for the application of Fed. R. Civ. P. 8 pleading rules).

56 *Of Rules and Discretion*, *supra* note 3, at 716.

tive rules in favor of codifying substance-specific "guidance" that currently pervades our system.[57]

This Article does not seek to rehash the jurisprudential dispute over whether it is possible to distinguish "substance" from "procedure" in a logically rigorous manner. I recognize that the line between substance and procedure can be difficult to draw, and that even rules and statutes that are universally recognized as "procedural" will have substantive policy effects that generally would be viewed as improper subjects for judicial control. That said, both observers and critics of the transsubstantivity doctrine recognize that it served an important role in the development of the Federal Rules, and that the doctrine (not to mention the substance-procedure dichotomy) retains an important role in how most parties operate in today's legal system.[58]

While it may be difficult to draw a logically coherent line defining what counts as "procedure" that is appropriately within judicial control,[59] there can be little doubt that both judges and legislators (not to mention the systems that define the processes by which courts and court-adjacent parties establish "procedural" rules) have an understanding about the kinds of activities that fall on one side of the divide or the other, rather than into the foggy boundary layer that the academic literature identifies between substance and procedure.[60] To be sure, the clarity that the drafters of the Federal Rules brought to their adoption of the rules has been undermined

57 *Id.* at 716–17 ("If we should have standing orders for RICO cases, why should we not have uniform rules that govern such cases, and those like them, in the respects in which they are deemed atypical, either because of their procedural requirements or the requirements of the substantive law? If civil rights cases really do require special pleading rules, perhaps they also require other special rules that accommodate their distinctive attributes. If we should have an unofficial Manual For Complex Litigation, why should we not think about a separate set of procedural rules for complex cases, as well as a system for identifying such cases?" (cleaned up)).

58 *See, e.g.*, *Trans-Substantivity*, *supra* note 4, at 403 (noting that court-supervised rulemakers "continue to respect and in some instances vigorously reassert the trans-substantivity limit on their power").

59 *See* Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1473 (1987) ("The reminder that there is no bright line between procedure and substantive law has been a refuge of procedural reformers for fifty years.").

60 This is not a theoretically rigorous position, of course, and can generate entirely justifiable criticisms. As Clark and others concluded, however, "the labels 'substance' and 'procedure' [have] a 'common core of meaning' that [makes] them pragmatically useful." *Trans-Substantivity*, *supra* note 4, at 400 (citations omitted).

in recent years.[61] Nevertheless, even though the core understanding about the substance-procedure distinction may fail at the margins, the line is still a well-embedded understanding in our legal system.[62] But as Professor Marcus notes, "[b]ecause 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. . . ."[63] In this respect, the points at the end of the spectrum, at least, give rise to a "theoretically suspect but practically meaningful trans-substantivity principle"[64] that affects not only how courts think about their own place in the rulemaking system but—as this Article argues—also how they think about the role of legislatures in that same system.

Challenge 2: The systemic benefits of transsubstantive rules depend on an impossible-to-achieve uniformity in the legal system.

Beyond the difficulty of characterizing rules as "procedural" or substantive, commentators have offered a further challenge to continued reliance on a transsubstantivity principle in the federal courts by noting that uniformity promised by transsubstantivity—and the associated benefits of that uniformity—has been impossible to achieve in fact, and is "the antithesis of trans-substantive unifor-

61 *Id.* at 402–03 (citations omitted).

62 While the transsubstantive understanding reached its zenith with the adoption of the Federal Rules of Civil Procedure, it may have been the subsequent decades in which the principle grew its deep roots into our legal system. Despite serious questions being posed about the jurisprudential basis for transsubstantivity, "[f]or almost forty years [between the mid-1930s and mid-1970s], Congress was content to leave procedural lawmaking to the federal courts and to the institutional judiciary whose independence Congress itself had fostered, including in rulemaking." *Procedure, Politics and Power*, *supra* note 10, at 1703. It was during this time that supporters championed the value of the rules and the transsubstantivity principles they so tangibly represented, and deeply embedded the principle of transsubstantivity into our national legal culture. *Id.* at 1709–10.

At the same time, of course, political pressures mounted on the procedural system that arose with the adoption of the Federal Rules and the following state-level adoption of similar transsubstantive rule systems. These political challenges, as well as a variety of other systemic changes, led not only to the increasing trend of legislative adoption of substance-specific procedures, but also to what Professors Subrin and Main call the "Fourth Era of Civil Procedure"—one in which procedure and motion practice, rather than trial and factfinding, dominate the resolution of cases. *See* Subrin & Main, *supra* note 30, at 1880.

63 *Trans-Substantivity*, *supra* note 4, at 375.

64 *Id.* at 416.

mity."[65]

The sweeping nature of transsubstantive rules means that they are hard to apply without necessarily allowing judges significant discretionary power. Indeed, in advocating for the development of the Federal Rules, Charles Clark favored broad trial court discretion with regard to pleading standards and other rules.[66] Eventually, however, Clark "abandoned this view as well, decrying 'the perils of attempted rule-making by individual judges' as needing to be corrected by uniform Federal Rules."[67]

Clark's concern about local (and individual) variation from otherwise uniform national rules presaged the argument, offered by some critics of transsubstantivity in the federal system, that benefits claimed for the uniformity and simplicity of a transsubstantive system are largely unavailable where significant disuniformity still exists. As Professor Steve Subrin has pointed out, for instance, given the variation between state and federal courts, between different federal district courts, and between different judges, there is no real way to achieve uniformity in civil procedure in the United States. Furthermore, he argues, any uniform system will fail to adequately address varying procedural needs that arise from inherent variation in cases, which means that discretion or local variation will necessarily undermine the transsubstantive nature of the procedural system. At the same time, however, the system and its participants demand rules for many of the same reasons that transsubstantivity was such a significant theme in the development of the Federal Rules in the first instance. The only way to achieve some balance of uniformity and case-based precision in a rules-focused environment, he suggests, is to adopt non-transsubstantive rules.[68] Noting substantial local variation in how cases are treated, Carl Tobias joins in on this argument, suggesting that "trans-substantivity should now go 'gentle into that good night.'"[69]

It is worth noting, perhaps, that many of those who argue

---

65 *Federal Rules, Local Rules, and State Rules*, *supra* note 10, 2026.

66 *See* Peter Julian, *Charles E. Clark and Simple Pleading: Against A "Formalism of Generality,"* 104 Nw. U. L. Rev. 1179, 1203–04 (2010).

67 *Id.*

68 *Federal Rules, Local Rules, and State Rules*, *supra* note 10, at 2041–43; *see also* Burbank, *supra* note 59, at 1474 ("Many of the Federal Rules authorize essentially ad hoc decisions and therefore are trans-substantive in only the most trivial sense. The trend may be toward rules conferring greater discretion on the trial judge."); *Of Rules and Discretion*, *supra* note 3, at 715 ("More important, the banner of simplicity and predictability under which [transsubstantive rules] fly is by now false advertising.").

69 Carl Tobias, *The Transformation of Trans-Substantivity*, 49 Wash. & Lee L. Rev. 1501, 1508 (1992).

that uniformity is not only non-existent but also unreachable point to examples that I (and, I think, Professor Marcus) would label as instances of "non-uniformity," but not of non-transsubstantivity. While different procedural approaches in various federal district courts create a lack of uniformity in the federal system (as does the lack of consistency between states, or between state and federal courts), that lack of uniformity is not itself an indicator of an abandonment of transsubstantivity. Only when those local rules apply differently to cases dealing with different substantive areas would they in fact be non-transsubstantive—and, generally speaking, most federal local rules do not address particular *substantive* areas of the law, but rather, particular *kinds* of cases based on characteristics extrinsic to the causes of action alleged in them. There are exceptions: to the degree that civil rights cases require a heightened pleading standard, for instance, the courts have interpreted Fed. R. Civ. P. 8 in a substance-specific manner. But a decision to apply different rules to all *pro se* cases, for instance, is not, in itself non-transsubstantive—though it *is* non-uniform. While a lack of uniformity can undermine some of the most significant values of transsubstantivity, such a lack of uniformity does not suggest that the principle of transsubstantivity itself, or the values it was intended to achieve, have been altogether abandoned.[70]

Furthermore, this challenge to the value of transsubstantivity is ultimately rooted in current practices—practices that can be interpreted differently depending on one's tolerance for (or insistence upon) uniformity. For all the variation in existing systems, "the current procedural regime fully embraces transsubstantive procedural design."[71] Furthermore, while there may currently be a trend toward the adoption of non-uniform rules,[72] that trend could change.

70 *See, e.g.*, *id.* at 1504–05. Tobias argues that the "federal judiciary, for its part, has contributed substantially to the dismantling of trans-substantivity." While Tobias does note some true non-transsubstantive local variations (on, for instance, the application of Fed. R. Civ. P 8 to civil rights cases), most of his examples of variability in how local rules and the Manual for Complex Litigation manage certain cases are nevertheless still transsubstantive.
On the distinction between transsubstantivity and uniformity, see *Trans-Substantivity*, *supra* note 4, at 376–77. Professor Marcus also suggests that substance-specific variability based on how judges exercise discretion should not be properly characterized as a systemic indictment of the principle of transsubstantivity, since "nothing in the discretion that the Federal Rules provide manifests a systemic approval or disapproval of a particular substantive area of litigation." *Id.* at 378.

71 Kwoka, *supra* note 1, at 1496.

72 *See Trans-substantivity*, *supra* note 4, at 373 ("Trans-substantivity seems poised to depart from the center of the procedural stage."); *see also* Stephen R.

Although the current lack of uniformity certainly undermines the value of a transsubstantive system, more uniformity—generated in part by a recommitment to (or re-recognition of) transsubstantivity—could help restore some of that value. Professors Subrin and Burbank would likely argue that this is a fool's errand because the presence of discretion and disuniformity is inherent in the system. In the end, though, the vast majority of the disuniform rules to which these critics point are themselves transsubstantive at heart. Their disuniformity therefore does not undermine a claim that transsubstantivity remains an important driving factor in the current system; moreover, it does not mean that a wholesale abandonment of it would improve the system overall. Finally, even with a lack of uniformity in the present system, the argument remains that the principle of transsubstantivity continues to influence judicial review of legislative action in our current legal system.[73]

Challenge 3: A strong transsubstantivity principle prevents the adoption of efficient and valuable substance-specific procedures, and (to the degree that transsubstantivity is embedded in a value-laden system that primarily serves a particular set of policy outcomes) can be wielded against rational substance-specific procedural changes.

The practical consequence of the above challenges to the value of transsubstantivity is that its supposed benefits are ultimately small when compared to the potential costs associated with the system's rejection of substance-specific procedure. As Professor Robert Cover noted in what is recognized as an important early discussion (and critique) of transsubstantivity:

> [O]ur primary set of norms for optimal procedure, the procedure available in our courts of general jurisdiction, is assumed to be largely invariant with substance. It is by no means intuitively apparent that the procedural needs of a complex antitrust action, a simple automobile negligence case, a hard-fought school integration suit, and an environmental class action to restrain the building of a pipeline are sufficiently identical to be usefully encompassed in a single set of rules which makes virtually no distinctions among such cases in terms of available process. My

Burbank, *The Transformation of American Civil Procedure: The Example of Rule* 11, 137 U. Pa. L. Rev. 1925 (1989) (pointing out the decline of transsubstantivity and uniformity in the federal system).

73 *See infra* Part III.

> point is not that the Federal Rules are not workable over such a broad range. But it may be worth asking in what sense that codification works well because of its trans-substantive aspiration, and in what sense it works in spite of it.[74]

The systemic pressure against efficient substance-specific procedure is, in the mind of many critics of transsubstantivity, one of the more important reasons to abandon any strong application of that principle in the judicial rulemaking process.[75] Nearly every substantial critic of transsubstantivity argues that the doctrine should abandon its traditional aversion to substance-specific rulemaking (as well as the now-undermined trope that "procedure is value neutral and carries no substantive impact") and permit not only disuniformity, but the development of substance-specific procedural reforms.[76] Only in this way, they suggest, can clear substance-specific improvements in procedural efficiency be accomplished.

In the end, however, this criticism is only applicable if the transsubstantivity norm is so strong that it prohibits the adoption of efficient and appropriate substance-specific rules in all instances—not just by courts, but by legislative actors as well. As I discuss further in Part III, my proposal does not go nearly so far as that. If anything, by explicitly acknowledging that legislatures can (in appropriate circumstances) adopt substance-specific procedural reform, my proposal could enhance the adoption of well-considered substance-specific procedural changes.

Before explaining how the application of transsubstantivity to legislative behavior might work, however, Part II briefly discusses the degree to which transsubstantivity is largely absent from discussions about legislative rulemaking. If anything, commentators have assumed that legislatures are entirely free to adopt substance-specific rules, free from any transsubstantive constraints.

---

74 Cover, *supra* note 14, at, 732–33.

75 *See, e.g.*, *Processes of American Law*, *supra* note 1, at 1194 (citing Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 45–46 (1994)). Though not as critical of the transsubstantivity principle as others, Suzette Malveaux also points out that "trans-substantivity creates certain inefficiencies." *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 460 (2014).

76 *See, e.g.*, Malveaux, *supra* note 75; *Limitations*, *supra* note 3, at 404–05 ("[S]ubstance-specific protocols may be in order for some types of litigation that have been excluded from the simple track.").

II. Are Legislatures Bound by Transsubstantivity? The Literature Suggests "No"

Transsubstantivity evolved out of a distinction between procedure and substance—a distinction that was paralleled by the development of a doctrine that assigned primary responsibility for rulemaking to courts and their affiliated rulemaking committees. Given the sharp contrast between judicially-driven procedures and legislatively-driven substance, there has been very little discussion about the degree to which legislatures might themselves be bound by transsubstantivity principles.

At first glance, this makes both historical and jurisprudential sense. Much of the driving force behind procedural reform in the 19th and early 20th centuries was a perceived distinction between substance and procedure. To free procedure from the value-laden content of substantive law, it needed to be focused on implementing that substantive law, which left "value neutral" procedure in the hands of judges, rather than legislatures. Because the principle of transsubstantivity was developed with the intent of "de-politicising" the development of procedure,[77] it is no surprise that inherently political legislative enactments should be viewed as substance-specific—i.e., as having characteristics at the antipode of those representing judicial procedural transsubstantivity. Because "judicial" procedure is apolitical and transsubstantive, legislative enactments are political and inherently substance-specific.

Given the strong rhetoric used to defend the role for courts in the rulemaking process (and the long fight to establish that right in the federal system), the primary fight about the legislative role in rulemaking has been about whether legislatures have a place in rulemaking at all, not what the content of that legislative rulemaking should look like.[78] As advocates for a court-adjacent rulemaking system reluctantly conceded the right of legislatures to participate in the rulemaking process (at least in systems without a constitutional delegation of rulemaking powers to the courts[79]), commentators have rarely questioned the ability of legislatures to enact *any* form of procedural reform—whether transsubstantive or substance-specific.

In the end, then, even the strongest proponents of transsubstantivity have focused their attention on a claim that the principle

77 *See, e.g.*, *supra* Part I.A.

78 *See, e.g.*, Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 Mercer L. Rev. 733, 755 (1995) [hereinafter *Judicial Power*]; Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 Minn. L. Rev. 1283, 1316–22 (1993) [hereinafter *Unconstitutional Rulemaking*] (discussing such an argument as applied to a federal statute).

79 *See, e.g.*, *infra* note 153.

should bind courts and court-adjacent rulemakers, but they rarely argue for the application for such a principle to legislative actors. Thus, in his comprehensive review of the history of transsubstantivity in the federal process, Professor Marcus found a take-away message: that while "court-supervised rulemaking remains legitimate if it generates trans-substantive rules, … substance-specific rules must come from the political process."[80] Similarly, Professor Carrington acknowledged that Congress may need to enact substance-specific legislation in appropriate circumstances, but did not identify any systemic barrier to such legislative behavior.[81]

The lack of any significant argument against substance-specific legislative procedures is a little surprising; as discussed in Part I.B *supra*, arguments for transsubstantivity are not rooted exclusively in a presumption that the judiciary should have control over rulemaking. While that institutional control has long been a part of the argument for the importance of transsubstantivity, it is not the only argument, and one might expect that the values of transsubstantivity would carry over into discussions about the (in)appropriateness of substance-specific legislative action. As a practical matter, though, this has not been the case.

The tendency to accept the validity of substance-specific procedural reform is consistent with practice, though. Generally speaking, there is little motivation for legislatures to focus (except in unusual circumstances) on transsubstantive procedural change.[82] Instead, to the degree that any party seeks out procedural changes that are particular to their interest areas, accompanying procedural changes are likely to be substance-specific as well. Not only are such limited proposals for procedural change less likely to challenge other entrenched interests (and thereby to engender opposition to proposed legislation), but there are no clear advocates for transsubstantive procedural change except when either the judiciary or the bar perceive a need for such a change. The example of class action reform demonstrates this effect; Professor John Leubsdorf noted in 1997 that:

> [t]he congressional origin of most class action changes links with their substantive impetus. Procedural rulemakers have continued to write general, transsubstantive rules. Because so many groups have con-

80 *Trans-Substantivity*, *supra* note 4, at 375.

81 *An Exorcism*, *supra* note 5, at 2086. *But see id.* (noting that substance-specific procedures should be enacted only with care in order to avoid interest group capture, error, or systemic costs to the value of transsubstantivity).

82 *See infra* note 127 & accompanying text.

> flicting interests in class action rules, no consensus supporting significant class action changes of trans-substantive impact has arisen. Interest groups seeking narrower changes have found Congress a more receptive audience whether the changes they sought were substantive, procedural, or both.[83]

The lack of any mention of a legislative transsubstantivity principle is therefore consistent with the focus of the creation and criticism of the transsubstantivity principle in judicial rulemaking. As a theory that has developed (in the federal system, at least) simultaneously with the argument for court-adjacent rulemaking, both supporters and critics of the doctrine have focused on its role within the judicial system, not the legislative process.

There are other reasons why one might formally reject a principle of legislative transsubstantivity, though. First, as applied to judicial rulemaking, transsubstantivity is premised on a concern that any substance-specific procedural reform would be illegitimate. As entities that are not nearly as responsive to the public as legislators, courts are able to adopt rules only because those rules are transsubstantive on their face. If a court were to adopt substance-specific procedural reform, that court would face certain criticism for making what would be viewed as a value-laden and inherently political decision without the kind of legitimacy provided by the responsiveness that representative bodies provide to their constituents.[84]

As elected representatives, however, legislators do not face the same concerns about democratic legitimacy as do appointed judges. Legislators are expected to enact substantive laws based on political determinations and policy judgments, and are returned to

---

83 John Leubsdorf, *Class Actions at the Cloverleaf*, 39 Ariz. L. Rev. 453, 455 (1997).

84 Arguably, if this institutional legitimacy argument held sway, one might expect to see more substance-specific rules generated by courts in states where judges are elected. A study to see if that is the case might generate useful data, but to my knowledge, it is not. Courts seem to focus on transsubstantive changes not because (or at least not exclusively because) of concern about a lack of legitimacy, but because of separation of powers concerns. Courts enacting substance-specific rules are still engaging in value-laden decisions. Even if those decisions are backed by elected judges, policy-driven substance-specific decisions seem beyond the scope of appropriate judicial behavior. *See generally Processes of American Law*, *supra* note 1, at 1229 ("Trans-substantivity constrains a judge's policymaking flexibility and thus protects against encroachments on legislative terrain. It denies judges the authority to discriminate among substantive regimes and thus to make arguably political choices better left to coordinate branches.").

office (or not) based on how well those decisions reflect the needs of their constituencies, so allowing substance-specific procedure to be adopted by legislatures does not seem to be a particularly remarkable proposition.

Second, legislatures (particularly in the states) are not generally bound by many substantive constraints. Other than constitutional limits governing the roots of legislative power that are set out in some states and the federal system,[85] most legislative bodies have a relatively broad scope of legislative authority. While procedural change is, by definition, premised on the notion that substantive values are not embedded in those changes, the validity of that premise is at its weakest with respect to substance-specific procedural reform. While we might justifiably hesitate to allow courts to seize for themselves the ability to legislate (even "procedurally") within a particular substantive area, there is little such concern when it comes to similar action by a legislature. After all, not only are most judges elected, rather than appointed, but it is legislatures, not courts, that are tasked with legislative authority.[86]

In the end, then, it should not be particularly surprising that we have not typically recognized legislative actors as being constrained by principles of legislative transsubstantivity. As discussed in the next section, though, the fact that we do not recognize such constraints does not mean that they do not exist.

III. Legislative Transsubstantivity as a Foundational Premise in Our Legal System

Before diving wholly into an examination of the role of how transsubstantivity principles drive judicial decision making, I should offer this initial observation: It is without dispute that legislatures have adopted a sweeping range of substance-specific procedures

85 *See infra* note 153.

86 "Judges trespass on legislative terrain, so the argument goes, when they develop particularized processes to advance ends that they, not legislatures, select. Critics complain that judges use subterfuge to boot, as they cloak what often amounts to a change to the antecedent regime in the guise of process law. In some instances, this criticism might reflect a narrow understanding of legitimate judicial power. But some particularly aggressive deployments of process law must exceed the bounds of judicial authority." *Processes of American Law*, *supra* note 1, at 1228–29 (2013). The National Center for State Courts maintains a useful data set discussing the various methods of selection and retention of state judges. *See Methods of Judicial Selection*, NAT'L CTR. FOR ST. CTS., http://judicialselection.us/judicial_selection/methods/selection_of_judges.cfm (last visited Feb. 16, 2020).

over the last 40 years.[87] The broadest possible interpretation of the thesis of this Article runs against those important and tangible examples of how legislatures have, in some ways, abandoned any transsubstantivity principle that might have governed their substantive enactments. As discussed further below, however, I am not trying to argue for the broadest possible application of this notion of legislative transsubstantivity. Rather, my point is twofold: 1) There remains, in close cases, a set of decision rules that is motivated by a deep adherence to transsubstantivity, and that leads courts to reject a substance-specific reading of particular legislation where it is not dictated by the plain language of the statute; and 2) That the decision rules motivated by the principle of transsubstantivity, even as applied to legislative enactments, should be encouraged, for such a principle (as applied by the courts, and as part of legislative decision making) pushes legislatures to be clear in their adoption of substance-specific rules, and helps to preserve many of the same benefits of transsubstantivity that drive its continued influence in the legal system.

A. Presumptions Favoring General Rules and Transsubstantivity

The first and most significant role that transsubstantivity has in the evaluation of legislative enactments is in the imposition of certain decision rules governing how our courts think of procedure when they are interpreting and applying legislation. While a wholly neutral perspective on how substantive legislation interacts with legal procedure might simply call for courts to make decisions based on their best interpretation of legislative intent, judicial decision making is not so neutral. As discussed further below, when considering legislation, courts apply presumptions and decision rules that can best be thought of as embodying transsubstantive principles. In this way, courts at least implicitly impose on legislative behavior a transsubstantivity norm.

Consider, for example, the Supreme Court's direction that federal courts "should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns."[88] While this guidance amounts to a run-of-the-mill application of judicial transsubstantivity principles when it comes to the application of standard rules of civil procedure, the Courts have tended to apply this principle even when substance-specific statutes might suggest the contrary. As Professor Marcus notes, for instance, "[t]he

87 *See, e.g.*, *Trans-Substantivity*, *supra* note 4, at 402–09 (discussing some of this substance-specific legislation).

88 Jones v. Bock, 549 U.S. 199, 212 (2007).

pleading requirements in [prison litigation, securities litigation, and medical malpractice litigation] have substantive goals and are not in any sense value-neutral."[89] Courts seeking to implement legislative intent in these areas might be expected to broadly interpret statutory signals in a manner that adopts substance-specific procedures even in unclear cases. And yet, they do not. In these cases, at least, transsubstantivity appears to hold sway.

Consider, for instance, Congress' 1995 adoption of the Prisoner Litigation Reform Act (PLRA), which codified a strong skepticism about the value of prisoner litigation. In *Jones v. Bock*, the Sixth Circuit concluded that the PLRA's scheme, which required institutional exhaustion before a prisoner could file a federal suit against prison officials regarding the terms of a prisoner's incarceration, also required prisoners to plead the facts regarding that exhaustion in their complaint.[90] As the Supreme Court put it on review, the appellate court believed that the PLRA's substance-specific scheme could not "function effectively" absent the additional pleading requirement.[91] On review, however, the Supreme Court rejected that substance-specific interpretation of the statute, and cautioned the federal courts to resist the urge to adopt substance-specific procedural requirements in the absence of statutory language to the contrary.[92]

In that case, there was no language in the PLRA that was directly relevant to the new substance-specific rule imposed by the Circuit Court, so one might argue that this is not a true application of transsubstantivity principles to the legislative process. One might make similar arguments about other circumstances in which the Supreme Court rejected heightened pleading requirements despite legislative history suggesting that Congress would have been amenable to such heightened standards.[93] But even where there was such language, the courts have retained a transsubstantive approach. Thus, for instance, provisions of the PLRA allow defendants to avoid

89 *Trans-Substantivity*, *supra* note 4, at 415.

90 Bock, 549 U.S. at 202–03.

91 *See id.* at 213.

92 *Id.* at 212 ("In a series of recent cases, we have explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns."); *id.* at 213–17 (applying that principle to this case and rejecting the lower court's substance-specific interpretation of Rule 8).

93 *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) (rejecting higher standards in Title VII cases); Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993) (rejecting heightened pleading standards in §1983 case); *see also* Johnson v. City of Shelby, 574 U.S. 10 (2014) (rejecting heightened pleading standard insisting on accurate citation to 42 U.S.C. §1983 to avoid motion to dismiss).

answering a complaint, and provide that the court can only order a responsive pleading if "the plaintiff has a reasonable opportunity to prevail on the merits."[94] Courts recognized that this standard was not specifically defined by Congress,[95] and some commentators argued that this provision imposed on plaintiffs a higher pleading standard in prisoner litigation cases than was required under Fed. R. Civ. P. 8.[96] Rather than adopt that argument, however, courts chose to reject a substance-specific interpretation of the rules, and to instead rely on the existing transsubstantive Rule 8 standards.[97]

As an example that not all presumptions can avoid defeat by clear legislative language, Professor Marcus offers another example in which Congress adopted what it explicitly intended to be heightened pleading standards in complaints that fall within the provisions of the Private Securities Litigation Reform Act (PSLRA).[98] In the case of the PSLRA, Congress insisted that plaintiffs making certain allegations regarding scienter must lay out "with particularity" the facts supporting those allegations.[99] The clear statutory language, especially in its explicit borrowing of the heightened pleading standard found in Fed. R. Civ. P. 9(b), has been interpreted by courts consistent with that (latter) Rule.[100] While Congress' desire to adopt substance-specific procedure won out over the application of Rule 8, then, the courts effectively imposed as transsubstantive a rule as possible (i.e., by making reference to Rule 9), given the clear statutory language.

Court insistence on applying principles of transsubstantivity to legislative behavior can also come in the form of presumptions favoring general procedural rights. Consider, for instance, case law favoring the availability of review in the administrative context. Although the federal Administrative Procedure Act ("APA")[101] falls outside the scope of the system of civil procedure discussed thus far,

94 42 U.S.C. § 1997e(g)(2) (2018).
95 *See, e.g.*, Aaron v. Dyer, 2016 WL 1698399, at *1 (E.D. Mich. Apr. 28, 2016).
96 *See, e.g.*, Eugene J. Kuzinski, Note, *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).
97 *See, e.g.*, Zirko v. Ghosh, 2012 WL 5995737, at *5, *13 (N.D. Ill. Nov. 30, 2012) (applying "plausibility" standard to prisoner complaint).
98 *Trans-Substantivity*, *supra* note 4, at 406–07 (discussing Pub. L. No. 104-67, 109 Stat. 737 (1995)).
99 15 U.S.C. § 78u-4(b)(1)(B), (b)(2) (2018).
100 *See, e.g.*, Novak v. Kasaks, 216 F.3d 300, 309–11 (2d Cir. 2000) (concluding that Congress intended to adopt scienter pleading standard previously articulated by that court in Acito v. IMCERA Grp., Inc., 47 F.3d 47, 52 (2d Cir. 1995)).
101 5 U.S.C. §§ 551-706 (2018).

it nevertheless defines what amounts to a transsubstantive process for managing legal disputes within the administrative system. Given that, decisions that insist on applying default rules derived from the APA are decisions that effectively impose transsubstantivity principles. By insisting that Congress must clearly articulate any intent to abandon those transsubstantive processes, the court imposes a principle of legislative transsubstantivity. Thus, in *Bowen v. Michigan Academy of Family Physicians*, the Court applied a presumption of reviewability to allow a challenge to a regulation governing Medicare Part B reimbursements, and it did so despite statutory provisions that seemed to limit review to Part A reimbursements.[102] The Court started from, and ultimately relied on

> the strong presumption that Congress intends judicial review of administrative action. From the beginning "our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.[103]

Other examples of similar transsubstantive presumptions exist. There are, for instance, presumptions against the imposition of retroactive legal obligations[104] and presumptions that Congress has not intended to repeal the writ of habeas corpus.[105] While all these cases are rooted in presumptions and rules of interpretation that appear to have little to do with principles of transsubstantivity,[106] those pre-

102 Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 668–70 (1986). As Marcus notes in *Processes of American Law*, administrative procedure is as "transsubstantive" as judicial civil procedure, and there are important overlaps in how the principle applies (and is developed) in these fields. *Processes of American Law*, *supra* note 1, at 1207–15. Because administrative agencies and processes are not subject to direct judicial creation and control in the same way as our common-law-derived courts, it should not be surprising that principles of legislative transsubstantivity would have an important role in administrative processes. That said, courts still have an important voice in the law of administrative process, and a tendency toward transubstantivity by judges will naturally carry over into the realm of administrative procedure as well. *See id.* at 1217–18 (noting judicial influence over administrative processes).

103 Bowen, 476 U.S. at 670.

104 *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

105 *See* Hamdan v. Rumsfeld, 548 U.S. 557, 572–80 (2006); INS v. St. Cyr, 533 U.S. 289, 298–302 (2001).

106 In *Jones*, for instance, the Supreme Court's rejection of the substance-specific interpretation of the PLRA by the Sixth Circuit is arguably rooted in

sumptions also align with an underlying premise: The proposition that established transsubstantive processes should be applied to litigants unless there is clear statutory language to the contrary. Rather than impose substance-specific interpretations of a particular procedure, courts—in these cases and others—are effectively imposing a legislative transsubstantivity principle in evaluating how to best synthesize substantive goals and established procedures.[107]

B. Implicit and Explicit Acknowledgement of Transsubstantivity as a General Principle in Procedural Decision Making

In some ways, it should not be surprising that courts apply a transsubstantivity principle in their decisions. Despite some recent theoretical challenges, a transsubstantive perspective has dominated procedural thinking in both state and federal courts for at least the last 80 years. Both critics of and advocates for the continued role of transsubstantivity in our system recognize that the principle continues to have a significant place in judicial thinking.

As Professor Marcus noted in 2010, "[r]ather 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."[108] While Professor Marcus' comment focuses on the role of transsubstantivity in the context of rulemaking, rather than decision making in particular cases, it is not too far of a stretch to apply it to the latter

---

standard rules of statutory interpretation. *See* 549 U.S. at 212–16. Similarly, the habeas corpus cases are also governed on their face by constitutionally-driven presumptions about the need for habeas availability, rather than by transsubstantivity principles. A similar point might be made about other presumptions that reject substance-specific procedural variation in the absence of clear statements mandating that specific change. In the end, however, a common theme to these presumptions is that they are also consistent with an underlying principle of legislative transsubstantivity.

107 For an argument suggesting another application of a transsubstantivity principle, see Vicki C. Jackson, *Printz and Testa: The Infrastructure of Federal Supremacy*, 32 Ind. L. Rev. 111, 118 (1998) ("[W]ith respect to federal statutory rights, it is not at all clear that one should presume that Congress intended, by permitting or requiring state court adjudication, to override state procedures or to invite the federal courts to do so by adoption of such a presumption. One might assume, consistent with the Court's clear statement rules in other areas, that, unless Congress makes its contrary intention clear (in the language of the statute or from its central purposes), when Congress authorizes resort to the state courts, it assumes state court procedures will control.").

108 *Trans-Substantivity*, *supra* note 4, at 403–04.

context. After all, the statement explicitly acknowledges that courts have the ability to adopt substance-specific "rule constructions," but (as least in Marcus' assessment) do not.[109] Second, the statement acknowledges the importance to judicial decision making of the trans-substantivity standard. In the end, the "pattern of legislative and judicial rulemaking since the mid-1990s reflects the same institutional allocation of rulemaking power that had evolved by the 1930s,"[110] and "[e]ven as the theoretical underpinnings of trans-substantivity weaken, institutions with rulemaking power manifest by their actions continued respect for the principle."[111] Others make similar observations, noting that "the current procedural regime fully embraces transsubstantive procedural design."[112] Given the dominance of this thinking, it should come as no surprise that transsubstantive principles affect how courts decide cases, and that they insist on clear legislative statements before committing to non-transsubstantive readings of legislative enactments.

There is one other indictor that suggests that a transsubstantivity principle already governs legislative behavior to some degree. Consider this: If legislatures were *not* bound by a notion that (a) courts should be the ones primarily responsible for developing procedure, and (b) that such procedure should be primarily transsubstantive, it would be very likely that our legal system would be characterized by legislatively-driven, substance-specific procedures that largely abrogate transsubstantive principles. As discussed elsewhere in this Article, transsubstantive values are unlikely to receive strong support from active participants in the legislative process. Generalist legislators care too little about the diffuse costs imposed on a transsubstantive system by substance-specific procedural legislation, and there is little incentive for outside defenders of transsubstantivity to step in to argue about its value. As a result, a legislative system unburdened by a principle of legislative transsubstantivity might be expected to engender the very kind of complexity that drove the movement to transsubstantive procedure in the first instance.[113] The

109 *See Trans-Substantivity*, *supra* note 4, at 414, 415 (noting that federal courts could, but generally have not, adopted substance-specific local rules, and that "like the Supreme Court, the behavior of these courts-supervised rulemakers signals that the principle retains some strength as an institutional limit").

110 *Trans-Substantivity*, *supra* note 4, at 403–04.

111 *Id.* at 375.

112 Kwoka, *supra* note 1, at 1496.

113 "Late nineteenth century lawyers denigrated the forms of action and the writ system of pleading, which evolved haphazardly and without any overarching theoretical design, as a testament to a theoretically immature legal system with no real structure." *Trans-Substantivity*, *supra* note 4, at 382–83.

reformers who advocated for the development of the Federal Rules believed that "[l]egislatures. . . had a tendency to burden a simple code with detailed amendments that turned it into a 'voluminous, intricate and inelastic system of civil practice.'"[114] Similarly, an early pre-Federal Rules ABA report noted of the multiplicity of rules that governed federal court practice under the Conformity Act of 1872 that "[t]o the average lawyer it is Sanskrit; to the experienced federal practitioner it is monopoly; to the author of text books on federal practice it is a golden harvest."[115]

Today's legal system, however, looks very different than this uncabined world under which substance-specific principles would sway in our legislatures. This suggests that, despite the agglomeration of substance-specific procedures onto our legal system over the last forty years, principles of transsubstantivity still play an important, if not dominant, role in legislative involvement in legal procedure. This state of affairs suggests that some systemic pressure already pushes legislatures toward transsubstantivity. If legislatures were entirely unbound by transsubstantive principles, we should have expected to see a proliferation of substance-specific procedures, and an undermining of our transsubstantive system, even more significant than what we have seen in the last half-century.

What may be most surprising about legislative transsubstantivity is that courts apply the principle without acknowledging it, and certainly without questioning whether it is an appropriate approach when evaluating the impact of substance-specific legislative decisions on preexisting legal processes. Part of that failure may arise from the fact that the transsubstantivity principle is usually only considered explicitly relevant as part of rulemaking processes, rather than as part of judicial decision making in particular cases.[116] As the above discussion notes, however, and as I further argue

114 *Trans-Substantivity*, *supra* note 4, at 396 (citing George W. Wickersham, Editorial Comment, *The New York Practice Act*, 29 Yale L.J. 904, 904 (1920)).

115 *Report of the Committee on Uniform Judicial Procedure*, 46 A.B.A. Rep. 461, 466 (1921) (cited in Stephen P. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 Notre Dame L. Rev. 693, 693 n.1 (1988)). Under the Conformity Act of 1872, Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197, federal courts were required to follow the legal procedure of states in which they sat.

116 The term itself is almost entirely absent from case law. A search for "transsubstantive or trans-substantive or 'trans substantive'" among all federal and state case law in Westlaw reveals a total of 20 cases, many of which simply quote from a District Court case that uses the term to reference how rulemaking should be transsubstantive. *See* Tyco Fire Products LP v. Victaulic Co., 777 F. Supp. 2d 893, 904 (E.D. Pa. 2011) ("Using local patent rules to alter a defendant's pleading obligations, while perhaps practical given the

below in Part IV, courts should not only acknowledge the relevance of a legislative transsubstantivity principle, but they should embrace it. Furthermore, this skepticism should encourage legislators to apply a similar principle to their own process, and limit the adoption of substance-specific procedures to circumstances where the consequences of such procedures can be clearly understood, and their terms clearly stated, at the time of enactment.

IV. Legislative Transsubstantivity as a Systemic Virtue

A. *Justifications for a Legislative Transsubstantivity Principle*

Criticisms of transsubstantivity have, to some degree, undermined the premise of value-neutral procedure that helped to justify the deep embedding of judicially-driven transsubstantivity into the legal system. That said, there are other justifications for transsubstantive rules than a legitimacy borne out of an imperfect vision of value-neutrality, and I discuss several of these below. This is not to say that substance-specific procedures might not be more efficient in particular circumstances, but rather that a system of transsubstantive rules has value that goes well beyond the sum of its parts. Thus, even if arguments about legitimacy and “proper” decision makers do not justify the application of legislative transsubstantivity principles, the basic values of simplicity associated with transsubstantive systems can still provide utility to the legal system as a whole.[117] As a result, there are good reasons to not merely acknowledge, but to support, the application of a transsubstantivity principle to legislative action.

First, and most significantly, most of the concerns about the costs of complexity in our procedural system hold just as true for legislative rulemaking as they do for judicially-driven rulemaking. As an initial matter, complexity requires levels of specialization among practitioners and judges if they hope to appropriately function within each substance-specific area of the law. This takes time and effort to do perfectly—time and effort that might be better spent resolving the substance of particular cases. Furthermore, it is time and effort that may well not be available at all, which increases the

very unique nature of federal patent litigation, offends the trans-substantive character of federal procedure.”).

117 This is not to dismiss the legitimate criticism that a transsubstantive system is not necessarily uniform. *See supra* Part I.C.2 (noting criticisms to that effect). It is, however, necessarily more uniform than a system that operates with the types of disuniformity that persist in our system today *as well as* substance-specific procedures.

likelihood of error and associated inefficiencies.[118] One of the motivations for the Field Code's development in the mid-1800s was avoidance of unnecessary complexity; according to Professor Marcus, in Field's view, "[s]ubstance-specific rules created complexity, which interfered with [the efficient] implementation [of the substantive law]."[119]

Professor Burbank has examined the problems of complexity in the context of federal limitations law—i.e., the question of what statute of limitations governs federal causes of action when the relevant federal statute creating that cause of action does not otherwise clearly provide for a federal statute of limitations.[120] In evaluating this question, a federal court practitioner or judge is called (under current case law) to determine "what the most closely analogous state law is" and to apply that statute of limitations. As Professor Burbank notes, however, this is a complicated and time-consuming task that is, like most complex systems, prone to error.[121] We would expect similar costs—though with perhaps slightly less uncertainty—from systems in which substance-specific procedures were dominant (regardless of their source).

The costs associated with complexity are not borne solely by the legal system, however. They are also borne by legislators. Consider, for instance, the point made by early reformers about how trans-substantive procedure can promote efficiency in a system of generalists.[122] While today's legal system—and the actors within it—are necessarily more specialized than was true years ago, most top-level state and federal judges are still generalists in the sense that they preside over courts with jurisdiction over cases from a broad range of substantive areas of the law.[123] Similarly, many attorneys enter the legal profession trained and, initially, working as generalists.[124]

118 *Cf. Legal Malpractice Attorney Offers Insight*, L. Prac. Today (Feb. 14, 2019), https://www.lawpracticetoday.org/article/legal-malpractice-attorney-offers-insight/ (interviewing William Gwire, a legal malpractice attorney of 30 years, citing oversight, inexperience, and poor evaluation as primary reasons for malpractice claims, and further noting that "[A]n adjunct to these three reasons is that the law has simply become extraordinarily complex.").

119 *Trans-Substantivity*, *supra* note 4, at 389.

120 *Of Rules and Discretion*, *supra* note 3.

121 *Id.* at 694–96.

122 *See supra* text accompanying note 49.

123 *See supra* text accompanying notes 47–48.

124 *See, e.g.*, NALP Found. & Am. Bar Found., After the JD: First Results of a National Study of Legal Careers 34 (2004), http://www.americanbarfoundation.org/uploads/cms/documents/ajd1_final_report_for_distribution.pdf (noting that in early years of their careers, majority of lawyers report working on "[nine or more] different matters," with the likelihood

This argument, however, carries over into the legislative context as well. Like judges and attorneys, most legislators are generalists[125] who must spend time and effort in order to adequately understand the areas in which they seek to legislate.[126] Whether in judging or in assessing the value and effect of legislation, complexity decreases efficiency, makes decisions more complicated, and requires additional effort to achieve the same results as a more straightforward system. For legislators, the failure to understand the impact of unique procedures on substantive areas of the law can undermine their ability to

---

of specialization increasing as the size of the firm increased). Subsequent studies of the same cohort concluded that the proportion of attorneys who specialize in particular areas of the law increased later in their careers, though a significant part still could be characterized as generalists. *See* NALP FOUND. & AM. BAR FOUND., AFTER THE JD III: THIRD RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 36 (2014), http://www.americanbarfoundation.org/uploads/cms/documents/ajd3report_final_for_distribution.pdf (percent of survey self-identifying as "specialist" increased from 39% to 66% over ten years, though percentage spending more than 50% of their time in a given area of the law decreased from 82% to 75% over the same period).

125 *See* Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1227 (2001) (describing "the position of elected nonfederal policy generalists—that is, politicians with nonspecialized jurisdiction like mayors, governors, state legislators, city councilors, and county commissioners"); *id.* at 1238 (arguing for the value of "democratically elected 'generalist' politicians"); *id.* at 1240 ("generalists tend to provide a political culture, a 'style' of governing, that is fundamentally different from and, in its place, better than, the bureaucratic style").

Like judges, legislators can also specialize in particular policy areas. *See, e.g.*, Keith E. Hamm et al., *Committee Specialization in U.S. State Legislatures During the 20th Century: Do Legislatures Tap the Talents of Their Members?*, 11 ST. POL. & POL'Y Q. 299 (2011) (discussing degree to which legislatures tap expertise of individual members in making committee assignments; noting that "the wisdom and expertise needs of collective decision making—that is, specialization—on very complex topics by legislative generalists [is] the raison d'être for a committee system"). Also like judges, however, legislators have the ability—and responsibility—to take action in the full range of substantive areas subject to their oversight.

126 The cost of this effort is likely to be particularly large for legislators in states with "part time" legislatures, since they are often otherwise employed full time and have less time to devote to separate efforts to investigate (let alone to properly assess) the significance of substance-specific procedural changes. In many cases, part-time legislatures also have fewer staff members upon which to depend to conduct such analysis. For a listing of where states fall on the full-time vs. part-time legislature spectrum, see NAT'L CONF. ST. LEGISLATURES, *Full- and Part-Time Legislatures*, http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx (last visited July 9, 2019).

achieve policy goals. Similarly, a lack of familiarity with existing systems that comes with complexity can result in needless duplication of otherwise acceptable existing procedures in the status quo. These suboptimal legislative outcomes will likely undermine the ability of legislators to achieve both their policy goals and their reelection, making a presumption in favor of transsubstantivity preferable to the ad hoc development of substance-specific procedures.

The risks posed by a proliferation of substance-specific procedural legislation is exacerbated to a substantial degree by the "value-neutral" presumption that (rightly or wrongly) drives the premise of judicial transsubstantivity. To the degree that legislators view procedure as value-neutral, they are tempted to ignore (or at least fail to try to understand) the policy effects of substance-specific procedural changes. As one reformer noted in the 1930s, "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 rarely enable legislators to act."[127] Because systemic procedural values rarely serve as the motivating factor in legislation, legislators are almost guaranteed, in adopting substance-specific rules, to give little weight to any systemic costs of substance-specific procedures.

Complexity also generates opportunity for rent-seeking behavior at a scope and level that is not generally available in a system

127 *Trans-Substantivity*, *supra* note 4, at 398–99 (quoting Edson R. Sunderland, *The Regulation of Procedure by Rules Originating in the Judicial Council*, 10 Ind. L.J. 202, 204 (1935)); *see also Processes of American Law*, *supra* note 1, at 1224–26; Briana Lynn Rosenbaum, *The Legislative Role in Procedural Rulemaking Through Incremental Reform*, 97 Neb. L. Rev. 762, 810 (2019) ("[S]ocial and policy change through procedural litigation reform is less likely to receive public notice."); Pound, *supra* note 18, at 31–32:

> Sir Courtenay Ilbert said that Parliament was not interested in lawyer's law. It would not keep its hands off, but it had no real interest and was only moved to act on this or that detail as pressed to do without any systematic plan. This is even more true in America today. Today a legislature must deal in a limited time with a large volume of proposals for legislation. Also popularly elected lawmakers nominated by direct primary have more interest in measures attracting public notice than in dry minutiae of legal procedure. Political questions, appropriations, economic questions, the machinery of government, provision for administration and police, social security and welfare, and humanitarian projects must have the right of way. Only matters of procedure urged in the interest of some group with political backing or some member with a particular case in mind and much influence in the house or senate is likely to get a hearing.

where a large number of individuals are all equally familiar with a common procedural regime.[128] As Professor Marcus notes, Jeremy Bentham, an early proponent of a transsubstantivity principle, argued that "[s]ubstance-specific procedural rules engender complexity, which … only give judges and lawyers an excuse to enrich themselves needlessly at the expense of overall utility."[129] When "niche" procedures develop, it creates an opportunity for specialists to take advantage of the transaction costs associated with learning new procedures, and to extract additional benefits from the system that they might not be able to extract if procedures were generally known to most participants in the legal system. While new substantive areas of the law also require investments of time to learn, a system that utilizes a transsubstantive procedure at least allows those efforts to be limited to substantive law, rather than requiring effort to learn new procedures as well.

A similar risk of rent-seeking can be expected in legislative activity that functions outside of a presumption favoring procedural transsubstantivity.[130] In the legislative process, special interest groups seek opportunities to maximize their interests,[131]

---

128 This is not to say that transsubstantive procedural systems somehow avoid the problem presented when relatively narrow-minded interests are able to change the nature of the underlying system. *See* Brooke Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2016) (describing, and pointing out problems with, control over Federal Rule reform by "one percent" of uniquely affected rulemakers).

129 *Trans-Substantivity*, *supra* note 4, at 385 (citing Jeremy Bentham, *Scotch Reform*, *in* 5 THE WORKS OF JEREMY BENTHAM 1, 3, 5–6 (John Bowring ed., 1843) (1808)).

130 Concern about the ability of legislatures to adequately manage procedure was part of the motivation for Charles Clark's desire to drive the development of the Federal Rules through expert court-based rulemaking, rather than legislative processes. *See Trans-Substantivity*, *supra* note 4, at 395 (Clark believed that "legislative control over procedure had led to 'indifference and political manipulation'").

131 *See, e.g.*, Franklin G. Mixon & M. Troy Gibson, *The Retention of State Level Concealed Handgun Laws: Empirical Evidence from Interest Group and Legislative Models*, 107 PUB. CHOICE 3 (2001) ("The interest group theory of government is based upon the assumption that all legislation has the intended goal of benefitting some particular group, and that the benefits will flow to well organized, politically powerful interest groups from either relatively less powerful groups, or unorganized individuals."); Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUDIES 131, 142 (1996) ("Under the economic theory of interest groups, legislators may pass inefficient laws that benefit small but concentrated interest groups that can organize relatively cheaply at the expense of larger but more dispersed groups that have higher organization costs.").

and generalist legislators are not well-positioned to independently develop the legal or policy-based knowledge necessary to challenge interest group efforts to maximize those opportunities; rather, they rely on interest groups to supply that information.[132] The point is not so much that interest groups are deceiving legislators; the literature suggests little evidence for such efforts.[133] Rather, it is entirely possible (particularly when it comes to procedural mechanisms for *achieving* policy goals) that a significant part of the policy effect associated with a particular legislative substance-specific procedural change may be hidden, rather than apparent on the face of the legislation. In any event, the net result is that legislatively-driven substance-specific procedural reform may result in, at best, the inefficient embellishment of a preexisting transsubstantive system and, at worst, the imposition of unanticipated costs.[134]

---

132 *See* Koppel, *supra* note 10, at 1205 ("Too often, the vacuum left by the absence of empirical data [regarding procedural reform] is partly filled by political influence of the plaintiff's or defense bar on policymakers, leaving unrepresented the interests of potential litigants who lack direct access to the rulemaking process."); Pound, *supra* note 18, at 32 ("Only matters of procedure urged in the interest of some group with political backing or some member with a particular case in mind and much influence in the house or senate is likely to get a hearing."); Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 Stan. L. Rev. 247, 286 (1996) ("Legislators are generalists, not specialists, and they have many issues to address. They lack expertise in particular areas. They are also subject to intense political pressures that can favor "lowest common denominator" solutions.").
A variety of theories about special interest groups and lobbyists take different perspectives on the precise model that should be thought of as motivating lobbyists. *See, e.g.*, Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 Am. Pol. Sci. Rev., No. 1 at 69, 70–73 (2006) (arguing for a "lobbying as subsidy" model, but articulating other models). In the end, though, these various theories recognize that legislators are, broadly speaking, more "generalist" than "specialist," that this asymmetry in knowledge, in combination with complexity, means that legislators are generally at the whim of special interest groups in making decisions about the likely value and effects of proposed legislation. *See id.* at 73 (establishing assumption that "[r]elative to legislators, lobbyists are specialists"; "Whereas most legislators simultaneously care about multiple issues, a lobbyist focuses on relatively few. The lobbyist thus has greater issue-relevant experience, expertise, and time to invest in assisting legislators."); *see also id.* at 74 ("Acquiring and assimilating … information poses a budgetary problem for the legislative enterprise. Fortunately for legislators, lobbyists are specialists…. They analyze, synthesize, and summarize-in a politically user-friendly form, information to promote the policy goals that their group and the legislator share.").

133 *Id.* at 75 n.9.

134 *See* Mullenix, *Judicial Power*, *supra* note 78, at 755. Paul Carrington noted that Congress effectively acknowledged this risk when it vested responsibility for

Even more importantly, it is unlikely that special interest groups or supportive lobbyists—all of whom are already steeped in the particulars of a given substance-specific legislative proposal—are thinking carefully about the costs of abandoning principles of trans-substantivity. The risks and costs associated with increased complexity—including the confusion, barriers to entry, risk of error, and potential for unanticipated effects that come with such changes—are an indirect consequence of a particular substance-specific proposal, and few interest groups are likely to lobby against a particular substance-specific proposal simply in order to defend the sweeping values represented by maintaining transsubstantivity principles in the legal system.[135]

On the other hand, if courts impose a principle of legislative transsubstantivity at the back end of the legislative process, such involvement would provide a mechanism for allowing interests that favor transsubstantivity to be represented (albeit belatedly) in the legislative process.[136] Given that courts and attorneys are the ones

federal rulemaking "under the institution it perceived to be least responsive to interest group politics." *An Exorcism*, *supra* note 5, at 2075–76.

135 While some substance-specific procedural legislation generates vigorous legislative fights, other substance-specific procedural reform may not. Substance-specific changes that are intended to address a new area of the law, or make minor modifications to existing substantive law, may well have concentrated benefits but (at least with respect to its impact on the overall transsubstantive system) diffuse costs. As a result, that kind of substance-specific procedural change is a classic type of "client politics" law that, while easily enactable, can also be "normatively bad" because of the lack of incentives to oppose it. *See* Coleman, *supra* note 128, at 1058–60 (discussing James Q. Wilson's typology of law making and regulation). As Professor Coleman explains:

> Civil procedure is important to those that are paying attention, but it does not garner attention to the degree that many substantive legal developments do. Indeed, it is an area that, while not completely veiled, is less prominently considered by the public. In this way, procedure is much like Wilson's client politics laws. It is "less conspicuous" than other legal topics; those who stand to gain the most are behind, and receive the concentrated benefits of, many procedural developments, while the rest of the civil litigation system and its players are together bearing the diffuse costs.

Id. at 1060.

136 This is not to say that courts are currently irrelevant players in the legislative process. As Professor Marcus notes, "[t]he lobbying arm of the federal judiciary—the supposed beneficiary of the procedural reform [offered by the PLRA]—offered mild opposition to the statute." *Trans-Substantivity*, *supra* note 4, at 404–05 (citing REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 64–65 (1995) (report of September

who are most likely to directly experience the adverse effects of complexity and interference with transsubstantive principles, courts are in a uniquely good position to assess the costs and benefits of procedure. Legislators, by contrast, are in a relatively poor position to make accurate assessments of those costs and benefits. The relative institutional competence of courts on this question offers another reason why a principle of legislative transsubstantivity should apply to judicial decision making.

In his defense of transsubstantivity in 1987, Professor Carrington hinted at the value that a premise of legislative transsubstantivity might bring. While noting that occasional substance-specific legislation might be appropriate, Carrington also wrote that there are "reasons for Congress to proceed cautiously" in adopting such substance-specific procedural reform:

> First, it is difficult to foresee the secondary institutional consequences or the consequences for groups not represented at a legislative hearing of a special procedural arrangement. Second, Congress faces the risk that such an arrangement may in time create complexity that transforms the process into one preoccupied with procedural miscue rather than enforcement of the substantive laws that Congress has written. Finally, there is a longer-term risk that not only Congress but even the judges will lose their feel for the values of procedural justice that are the core of the present rules.[137]

B. The Application of Legislative Transsubstantivity to Legislative Action

Given the arguments for legislative transsubstantivity, how much work should the doctrine do in our legal and political processes? The weak version of the argument for legislative transsubstantivity is that courts should simply continue doing what they are doing now—they should review ambiguous legislation and close calls

---

1995 meeting)). Similarly, Professor Burbank documents the effort that the federal judiciary, at least, expends to monitor proposed federal legislation that might impact procedure. *Procedure, Politics and Power*, *supra* note 10, at 1701–02; *see also* John Burritt McArthur, *Inter-Branch Politics and the Judicial Resistance to Federal Civil Justice Reform*, 33 U.S.F. L. Rev. 551, 594 (1999) (documenting the judicial system's opposition to the Civil Justice Reform Act).

137 *An Exorcism*, *supra* note 11, at 2086. This is as close an acknowledgement of a legislative transsubstantivity principle as I have come across in the academic literature.

regarding whether to apply substance-specific procedures with an eye toward favoring transsubstantive procedures instead. Arguably, this judicial skepticism about substance-specific procedure is merely another form of judicial transsubstantivity—and effectively just an application of the institutional allocation of power argument that Marcus advocates.[138] At the same time, however, any case involving the application of transsubstantive procedural rules will necessarily arise out of a substance-specific context. Where statutes are at issue, an argument might be made (as in the PLRA cases) that the statutory scheme demands adoption of a substance-specific interpretation of an otherwise transsubstantive rule. Resisting such a call might be viewed as an application of judicial transsubstantivity principles, but it also might be characterized as an application of what I call "legislative transsubstantivity." If courts were to recognize this presumption when making these decisions and acknowledge its importance, they might be able to not only be clearer and more efficient in their decision making, but also help call attention to the principle of transsubstantivity that underlies those decisions so that it can be more directly addressed by advocates, judges, and commentators.

A more vigorous argument might be made, however, for the extension of this kind of transsubstantive principle into the action of legislatures *ab initio*. First, this may naturally happen as a result of the mild form of legislative transsubstantivity described in the last paragraph: Legislators considering the adoption of substance-specific procedures would need to take into account a judicial "clear statement" rule that preferred the retention of transsubstantive procedures. This is a natural carryover that would flow from the application of a judicial presumption favoring legislative transsubstantivity, and does not in itself suggest an obligation on the part of legislative actors to adopt (or retain) transsubstantive legal processes.

An even more robust version of this argument would argue for a legislative norm that would—even in the absence of judicial interpretation—push legislators away from substance-specific procedure and toward transsubstantivity. At first glance, the argument for such a norm might seem absurd—and certainly not representative of current practice. After all, despite the long-standing vocal support for transsubstantive procedure, legislatures have also long been

138 In the conclusion to his 2010 article, Professor Marcus points out that "[t]he trans-substantivity principle would also operate to constrain judicial construction of nominally trans-substantive rules." *Trans-Substantivity*, *supra* note 4, at 423. Professor Marcus suggests that regardless of the validity of transsubstantivity as a normative model, it is a useful tool for helping court-adjacent rulemakers to stay in their "constitutional lane," so to speak, by avoiding any temptation to adopt substance-specific rules. *See id.* at 416–421.

actively adopting substance-specific procedures in areas of (for instance) medical malpractice, landlord-tenant law, and family law.[139] At the same time, however, the idea that legislatures might conform to a norm that permits judicial control over procedure should not be that unusual. Congress has occasionally characterized the "'true balance' between courts and Congress in procedural rulemaking as one in which the judiciary has a cooperative if not primary role to play, indicat[ing] at the very least that Congress adopted the Rules Enabling Act with the perceived need to respect the judiciary's autonomy in mind." [140] A norm of legislative transsubstantivity would help to reinforce the independent role of the courts within our constitutional system. To the degree that the legislature adopts a norm that restrains itself from imposing substance-specific procedures on our legal system, it (in Geyh's words) "underscores the important role that Congress plays in defining the contours of judicial independence."[141]

C. Legislative Transsubstantivity and Due Process

Although it may seem radical to impose a transsubstantivity principle on legislative behavior, the imposition that I suggest is not likely to seriously interfere with a determined legislative effort to adopt new substance-specific procedures. Many of the substance-specific procedures adopted over the course of the last several decades, including the PLRA, PSLRA, procedures specific to medical malpractice cases in the states, etc., are all examples of cases in which the heart of the proposed substance-specific changes would likely survive even a "clear statement" rule. Legislatures desiring other changes could impose on them sufficiently well-written statutes, and so, while the rhetorical attention to transsubstantivity that I advocate here would still provide some benefits, such attention to transsubstantivity would ultimately do little to interfere with legislatively-driven, substance-specific, procedural reform. As discussed below, such an outcome is to be expected in a system that allocates rulemaking authority to both courts and legislators.

There is, however, one additional circumstance in which courts might choose to impose an even more rigorous test on substance-specific legislative enactments—a test that might actually limit the ability of a legislature to adopt substance-specific changes

139 *See, e.g.*, sources cited *supra* note 4 (setting forth sources discussing recent examples of such substance-specific legislation).

140 Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 Ind. L.J. 153, 207 (2003).

141 *Id.* at 165.

or, at least, limit the legislative ability to do so for poorly-justified reasons. In particular, in circumstances where a party is able to marshal a Due Process or Equal Protection based challenge to the adoption of a substance-specific procedural change, a very strong version of the legislative transsubstantivity principle could lead courts to impose relatively high burdens on legislative enactments that adopt sweeping legislative changes to transsubstantive rules. This test might manifest itself in the judicial process as an intermediate scrutiny test (or, at the very least, as heightened rational basis review).[142] Such a test might be justified based on the targeted and disparate impact that innovative substance-specific procedures might have on particular parties.

At least one prior case suggests the validity of this kind of heightened review. At issue was the Price-Anderson Nuclear Liability Act.[143] In *Duke Power v. Carolina Environmental Study Group, Inc.*,[144] the environmental plaintiffs argued for an intermediate standard of review in their Due Process challenge to the Price-Anderson Nuclear Liability Act's liability limitations, which imposed a wide range of substance-specific procedures on the prosecution and management of claims related to nuclear power plant disasters, and included a significant financial cap on the recovery of damages arising out of such a nuclear incident (with only general promises of Congression-

142 In some ways, this obligation might be seen as a soft version of the obligation that federal courts impose on Congress in examining whether abrogation of state sovereign immunity under the Fourteenth Amendment is adequately backed by legislative findings. *See* City of Boerne v. Flores, 521 U.S. 507, 530–32 (1997) (concluding that Congressional findings did not adequately support proposition that generally applicable state and local laws "passed because of religious bigotry," and therefore that Religious Freedom Restoration Act's remedial scheme was not "congruent" and "proportional" to a set of constitutional violations under the Fourteenth Amendment). This is not to say that such findings should be overwhelmingly difficult to articulate; the test I advocate is not necessarily as strong as, say, "hard look" arbitrary and capricious review under the Federal Administrative Procedure Act—but simply that legislatures should articulate not only the substantive policy justification for adoption of the new process, but also factual findings supporting the conclusion that those policies will, in fact, be resolved by the substance-specific procedure at issue.

143 *See* Jeffrey C. Dobbins, *Promise, Peril, and Procedure: The Price-Anderson Nuclear Liability Act*, 70 Hastings L.J. 331 (2019) (discussing unusual procedural innovations in the Price-Anderson Act, enacted initially in the late 1950s to cap liability for civilian nuclear power facilities in order to promote the development of a civilian nuclear power industry).

144 438 U.S. 59, 83 (1978).

al redress in the event that the cap was exceeded).[145] In *Duke Power*, the Court rejected the challenge, finding that the Act was "a classic example of an economic regulation," and entitled to a presumption of constitutional validity.[146]

Notably, however, the Court did not explicitly reject the plaintiffs' argument that they were entitled to a higher standard of review. Rather, the Court seemed to suggest that Congress was obligated to at least articulate reasons why proposed procedural changes were "a fair and reasonable substitute for" legal relief available under the status quo.[147] Whether this test is considered a rational basis analysis or something more significant, a rigorous interpretation of that obligation could force legislatures to give some careful thought to why particular procedural innovations are necessary, and to articulate those changes in the form of legislative findings. As with other forms of heightened-yet-not-extraordinary scrutiny, this test may not ultimately be particularly difficult for legislatures to pass, but it would at least impose on legislative actors an obligation to take some care before adopting significant substance-specific procedural reform.[148]

Although some might suggest that this kind of scrutiny is unusual, it imposes on legislatures an obligation that is symmetric to Marcus' suggestion that courts adopting a nominally transsubstantive (but actually substance-specific) rule would lose any presump-

145 *See generally* Dobbins, *supra* note 143. The Court's decision in *Duke Power* was reached before many of the most significant procedural innovations had been added to the Act through amendments adopted in 1988. Under one of those provisions, for instance, Nuclear Regulatory Commission determinations regarding the existence of an "extraordinary nuclear occurrence" that triggers many of the most significant procedural innovations of the Act are unreviewable. *Id.* at 355–56 (discussing non-reviewability provisions of 42 U.S.C. § 2014(j)).

146 438 U.S. at 83.

147 *Id.* at 91. The Court indicated that this showing had been accomplished in the case of the Price-Anderson Act, but in so doing, suggested that such a showing was at least sufficient to meet constitutional dictates; there is a good argument that in a system of heightened scrutiny, such a showing is *necessary* to meet those dictates as well.

148 *See also supra* text accompanying notes 135–38. Parties seeking to challenge such reform would, of course, need to identify the underlying Due Process property right being lost. *Cf.* Duke Power, 438 U.S. at 94 (Stewart, J. concurring) (noting the obligation to identify which property rights have been deprived, and questioning whether the alleged deprivation in that case—"a state created right to recover full compensation for tort injuries"—was in fact a deprivation under the facts of that case). This limitation would constrain the number of cases in which this kind of strong legislative transsubstantivity argument would have merit.

tion of validity if the rule had a "particularly marked impact" on a given substantive area of the law.[149] The flip side of this argument is that while legislatures have the ability to enact legislation that has a "particularly marked impact" on a given area of law, the legislature should be required to clearly articulate, and set out findings regarding, that impact. Absent some kind of fact-based conclusion that the justifications for the changes are rooted in factually-grounded findings, skepticism regarding the rationality of procedural innovation would be warranted.

Ultimately, intensive review of legislative rationales can help to maintain the constitutional barrier between the exercise of the judicial and legislative branches.[150] This barrier is, of course, quite vague and permeable: it is difficult to define the line between substance and procedure; even "procedural" enactments have substantive effects; and most substantive effects can be achieved through means that are either procedural or substantive. In the end, however, the judicial preference for transsubstantive procedure helps to properly define not only the institutional role of the judiciary vis-à-vis the legislative branch, but it helps to reinforce the judiciary's role in procedure (an area in which it has significant expertise, and in which legislators are often relatively inexperienced).

Professor Burbank suggests that "Congress holds the cards—that it has virtually plenary power over federal procedure."[151] This is likely true for most state legislatures as well, at least to the degree that state courts have not attempted to exercise a separation-of-powers based constitutional argument to defend procedure (i.e., "the judicial power") from legislative control. It may be that this fundamental truth means that there is little to be done against concerted legislative efforts to impose substance-specific procedure on our legal system. At the same time, however, encouraging courts to apply principles of transsubstantivity to legislative enactments would help to defend transsubstantive values—which both critics and supporters acknowledge—against at least the casual complexification of procedure that can result when legislators are able to adopt sweep-

149 *See Trans-Substantivity*, *supra* note 4, at 423.

150 Professor Marcus concludes that transsubstantivity is effectively a fence that the courts use as a marker to identify the kinds of procedural decisions that courts can appropriately make under our constitutional system. *Trans-substantivity*, *supra* note 4, at 416 (noting that, ultimately, transsubstantivity may be viewed as "a theoretically problematic but functionally useful principle for the allocation of rulemaking power among various institutions"). That fence has two sides, however, and my proposal suggests that transsubstantivity principles may well have a place on *both* sides.

151 *Procedure, Politics and Power: The Role of Congress*, *supra* note 3, at 1706.

ing substance-specific laws without any systemic pushback at all.[152]

D. Limits on Legislative Transsubstantivity

Although I have made the case here for recognizing, and even extending, the principle of legislative transsubstantivity, it is important to recognize that such an approach would not ultimately prevent legislatures from adopting substance-specific procedures.

First, of course, it would make little sense to try and impose a rule barring legislatures from enacting substance-specific procedures. As an initial matter, it would be difficult to argue for any kind of judicial authority to impose such limits.[153] Second, the permea-

---

152 The tendency of legislatures to "burden a simple code with detailed amendments" and "procedural monstrosities due to legislative tinkering and elaboration" was a common theme for reformers advocating for the adoption of the Rules Enabling Act. *Trans-Substantivity*, *supra* note 4, at 396 n.152 (internal citations omitted).

153 Some courts and commentators have articulated constitutional separation-of-powers limits on the ability of legislatures to interfere with judicial process. Relying on a judicial construction of the "judicial power" (and, in some cases, explicit grants of rulemaking authority to the judicial branch), such constitutional limits have primarily been wielded against direct legislative interference in judicial decision making. Congress cannot, for instance, direct the outcome of a pending dispute without changing the law underlying that dispute. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995); Robertson v. Seattle Audubon Soc., 503 U.S. 429, 440–41 (1992). It is not difficult, however, to imagine courts taking such an argument further, claiming that more traditional forms of "process" (such as pretrial operations, and perhaps even rules regarding reviewability) are within the scope of the judicial power rather than subject to plenary legislative control. *See, e.g.*, *Unconstitutional Rulemaking*, *supra* note 78, at 1316–22 (discussing such an argument as applied to a federal statute); Thomas O. Main, *Reconsidering Procedural Conformity Statutes*, 35 W. St. U.L. Rev. 75, 83–85 (2007).

Such an approach would be a plausible foundation upon which to build a constitutionalized legislative transsubstantivity principle, since it would leave rulemaking to courts, and institutional legitimacy arguments would (barring innovation) then drive courts to transsubstantive, rather than substance-specific, rules. One significant defender of a strong version of judicial rulemaking prerogative as a version of a constitutional argument is Professor Linda Mullenix, who has written that:

> [a] judiciary that cannot create its own procedural rules is not an independent judiciary. Moreover, a judiciary that constitutionally and statutorily is entitled to create its own procedural rules, but must perform that function under a constant cloud of congressional meddling and supercession, is truly a subservient, non-independent branch.

Judicial Power, *supra* note 78, at 734. That said, Professor Mullenix does not advocate for exclusive judicial control over procedure, but a less-than-

bility of the barrier between substance and procedure would make it difficult to decide where courts would draw such lines. Finally, and perhaps most importantly, that same permeability means that legislatures barred from achieving particular policy goals through substance-specific procedural enactments can achieve them more directly through substantive enactments adopting and modifying causes of action, establishing standards particular to such causes of action, or through explicit caps or damages rules that impose policy limits on the exercise of particular legal rights.[154]

Second, none of the proposals I offer would ultimately impose an impassable barrier to political actors who are convinced of the need for substance-specific legislation. Judicial skepticism in circumstances where substance-specific statutes are unclear can be overcome with clear statutory language. Legislative skepticism about the need for substance-specific legislation can of course be trumped by sufficiently persuasive factual and political arguments. And even the most significant hurdle—the proposed "heightened scrutiny" in due process cases alleging that a substance-specific procedure has deprived a plaintiff of a property right—can be overcome with sufficiently well-reasoned and supported legislative findings.

Finally, I recognize that implementing these principles of legislative transsubstantivity in the judicial and legislative systems will require some of the same difficult assessments that have long plagued this area of the law, such as the question of when a particular substance-specific legislative enactment is "procedural" and deserving of judicial skepticism, rather than "substantive" and within the core of legislative responsibilities. Much ink has been spilled on these questions, and I will not resolve them here. But those questions are likely to survive even in the absence of the proposals I offer in this Article, and are therefore not an impediment to implement-

exclusive, not wholly dominant role for legislatures in procedural rulemaking. *Id.* at 745.

154 As Professor Marcus notes:

> [R]ecent 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 undivided set of policy goals.

Trans-Substantivity, supra note 4, at 374.

ing these proposals.

Conclusion

I recognize that in an era where many have disclaimed any real reliance on traditional notions of transsubstantivity, there is some irony in the suggestions this Article offers. After all, much of the resistance to the wholesale implementation of a transsubstantivity principle in the early 1900s was the result of a lingering resistance of those who believed in the value—and necessity—of traditional forms of the cause of action. As Marcus notes, for instance, many textbooks in the early decades of the 1900s continued to teach the common law pleading system and perpetuate the "common law mentality."[155] Reformers spent much of those years on "closing the entry points through which the forms of action had crept back into the code reforms."[156] The system's lingering attachment to an abandoned philosophy, despite clearly-articulated reasons to abandon common law pleading, delayed adoption of the Rules Enabling Act and the Federal Rules for years.[157]

Critics of transsubstantivity might similarly argue that any reinforcement of transsubstantivity principles like that argued for in this Article similarly threatens to interfere with the efficient abandonment of an "old fashioned" view about the importance of transsubstantivity in our current legal system.[158] That argument may have particular force to the degree that this Article advocates not only for merely acknowledging, but actually expanding, the role of a legislative transsubstantivity principle.

The irony is noted, but in the end, I believe that legislative transsubstantivity has an appropriate place in our legal system. First, of course, the arguments set out above make a case for the value of transsubstantivity as applied in the legislative context. Second, while legitimate concerns might be raised if such a principle were deemed to bar legislatures from enacting *any* substance-specific pro-

155 *Id.* at 393–94.
156 *Id.* at 394.
157 *Id.* at 391–93.
158 That said, even transsubstantivity's critics acknowledge that "[n]o one I know is suggesting a return to the forms of action or a wholesale rejection of trans-substantive procedure. Some of us, however, are suggesting that it is time both to face facts, in particular the fact that uniformity and trans-substantivity rhetoric are a sham, and to find out the facts, in particular the facts about discretionary justice." *Procedure, Politics, and Power*, *supra* note 10, at 1712 n.162.

cedures, this Article does not suggest such an absolutist approach.[159] Rather, the arguments set out in this Article simply make it harder for such substance-specific procedures to be adopted casually in the first instance, and provide a principled mechanism for a skeptical analysis of the meaning and application of arguably (but not clearly) substance-specific procedures. Legislatures that are adequately convinced of the need for such procedures can adopt statutes using plain language to which courts should ultimately adhere. Even in the rare cases when substantial legislative innovation gives rise to *Duke Power*-like due process challenges, clearly stated legislative findings should be enough to permit such innovative processes to survive judicial scrutiny.

Third, I would suggest that when it comes to the implementation of legal policy and reform, simpler is better—or, at least, that simplicity carries with it a systemic value that is too easily lost in arguments about the newest and most impressive substance-specific procedure targeted to a particular narrow area of the law. Some of the most compelling rationales for applying transsubstantivity principles arise out of the costs of complexity in the legal system. These costs can only be avoided through a careful assessment of the systemic costs imposed by a proliferation of substance-specific procedures complicating an already complex system. While there may well be particular procedures that can improve efficiency in a particular substance-specific area when viewed narrowly, the adoption of such substance-specific procedures only rarely involves a careful consideration of the costs that such principles impose on the system writ large—the cost imposed on generalist judges, lawyers, legislators, and even individual parties who will necessarily be required to learn about and implement substance-specific procedures.

I acknowledge the value that appropriate substance-specific procedures can create in terms of improving efficiency in particular areas of the law, and therefore the costs that a strong transsubstantivity principle might impose on the judicial or legislative development of procedure. This potential lost value that might result from imposing an excessively strict transsubstantivity principle on the development of procedure justifies the criticisms that have been levied against an overarching "super" transsubstantivity of the kind that idealistic early supporters of the Federal Rules might have champi-

159 I accept the proposition that "[i]f lawmakers cannot depart from the trans-substantive norm to address … dysfunctions [in transsubstantive procedure], they must either let these dysfunctions fester, or they must remedy them with an over-inclusive trans-substantive response that applies unnecessarily to processes involving other antecedent regimes." *Processes of American Law*, *supra* note 11, at 1221.

oned.

This does not mean, however, that we should altogether abandon principles of transsubstantivity.[160] As discussed above, the presumption is already embedded into a variety of judicial decision rules. In theory, at least, a transsubstantive system is less complicated, easier to understand, and simpler to explain for everyone in the legal system than a system that looks to different procedural rules depending on what substantive right is being enforced. While it is worth acknowledging the flaws in the existing system, as well as the degree to which the system already deviates from the Platonic model of a uniform set of transsubstantive procedural rules, that model continues to have significant force in the legal community, in the political branches that help to define the legal system being disputed and applied, and in the mind of the public that interacts with that legal system.

Starting with transsubstantivity as a baseline principle, then, seems not unreasonable. After all, even under the enhanced version of the presumption argued for in this Article, legislatures should be fully able to lay out clear statements that support the application of substance-specific procedures when justified by policy goals. By encouraging judges, lawyers, and legislators to think more carefully about the justifications for substance-specific procedures, the enhanced presumption favoring transsubstantivity will help to avoid the risk of "casual" substance-specific procedural reform—that is, the adoption of procedural reform without the kind of careful drafting of positive law (and supporting findings) that might accompany a system in which legislative substance-specific procedural changes were subject to no oversight at all.[161]

In this emphasis on the obligation of legislatures to think carefully about the consequences of procedural reform, this Article's call to acknowledge and implement skeptical review of substance-specific legislation overlaps with the remedy proffered by

160 Nor, as a practical matter, do the most vocal critics of transsubstantivity. *See id.* at 1221–22; *see also Limitations*, *supra* note 3, at 404 (explaining how, even under a proposed "simple track" procedure for certain cases in the federal system, "[t]ranssubstantivity remains the underlying norm.").

161 As I have argued in prior articles, legislative changes to systems of appellate review have generally done a poor job of anticipating the significance of those changes to principles of precedent and standards of review. *See, e.g.*, Jeffrey C. Dobbins, *Changing Standards of Review*, 48 Loy. U. Chi. L.J. 205 (2016); Jeffrey C. Dobbins, *New Evidence on Appeal*, 96 Minn. L. Rev. 2016 (2012). It is not too much to expect that legislatures think about (and clearly articulate an intended resolution of) these issues before adopting new procedures. Imposing such an obligation on legislatures would do much to avoid unnecessary litigation and judicial confusion.

some critics of the transsubstantive premise. As Professor Burbank noted in his argument for an abandonment of transsubstantivity in favor of more substance-specific procedures:

> An objection to a strategy of reform of this sort not likely to be stated, but very powerful, is the objection that it would require procedural reformers to become conversant with the substantive law, or at least to work with those who are so conversant. It would thus have obvious and potentially far-reaching professional and political implications, threatening myths of expertise on the one hand and of legitimacy on the other. Effective procedural reform will not come from a small group of 'experts,' nor will it come from the Supreme Court alone. We need partnerships in determining how the field should be carved up for study, in studying it, and in implementing proposed reforms. Existing projects furnish possible models for the work, and we need to think about other models. We also need to show more respect, if not for Congress, then for democratic ideals that we elsewhere profess.[162]

Under both Professor Burbank's suggestion and the one in this Article,[163] any effort to initiate procedural reform would need to be preceded by careful and effective consideration of the interaction between procedure and substance. If the last several decades of civil procedure have taught us anything, it is that the empirical consequences of procedural reform are important to know, yet complicated and difficult to predict in advance (not to mention difficult to

162 *Of Rules and Discretion*, *supra* note 3, at 718 (cleaned up).

163 Professor Subrin offers a similar suggestion for targeted substance-specific procedural reform (or, at least, substance-specific procedural guidance), suggesting that in appropriate circumstances such changes might be considered by groups appointed by the Rules Advisory Committee to evaluate the goals and likely impacts of such changes. *See Limitations*, *supra* note 3, at 405.

Notably, both Subrin and Burbank's suggestions for reform seem to focus on the role of careful planning and research for court-adjacent substance-specific rulemaking. This makes sense, of course, since the principles of transsubstantivity have in the past been almost exclusively applied to that court-adjacent process. The proposals in this Article might be viewed as proposing something of a mirror image of those suggestions for the adoption of substance-specific procedural reform, but in the legislative process, rather than in the judicial process.

measure after they are implemented).[164] While both transsubstantive and substance-specific procedural experimentation should be encouraged—improvements can always be made, and they likely will need to be made as the nature of litigation in our legal system changes over time—that experimentation can be effective and advance systemic goals only after careful consideration and evaluation of the consequences of the proposed changes. In my view, an important way to encourage such careful consideration of the consequences of procedural reform is by acknowledging and encouraging judicial pushback against substance-specific procedural change in the legislative process. For that reason, perhaps most of all, the courts—and legislators seeking to implement procedural change—should embrace and be guided by a principle of legislative transsubstantivity.

164 For important discussions—and examples—of the need for such empirical work, see, *e.g.*, *Simplified Procedure*, *supra* note 32, at 173; Koppel, *supra* note 10, at 1205; Burbank, *supra* note 72, at 1963; Maurice Rosenburg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. Pa. L. Rev. 2197, 2198 (1989) ("[T]there is a disappointing paucity of reliable data on how the Rules have worked.").