THE PROBLEM WITH ONE-SIZE-FITS-ALL PROCEDURE

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ABSTRACT

Commentators extol the virtues of the “transsubstantivity” norm—the idea that a single set of procedural rules should govern all civil litigation, regardless of claim type—in civil procedure. Because transsubstantive rules limit one potential dimension of complexity in civil litigation, proponents claim that the transsubstantivity norm fosters better outcomes and more equitable access to courts for every litigant, regardless of sophistication level or economic resources.

Notwithstanding well-understood theoretical weakness in the case for a substance/procedure dichotomy (upon which the transsubstantivity norm implicitly relies), there remains good reason to prefer transsubstantive rules over substance-specific rules—but not in all cases. This Article explains why.

I begin by reframing the debate over the substance/procedure dividing line in economic term, combining elements of the legal realist critique of the traditional dichotomous approach with later public-choice-influenced accounts. Lawmakers must ultimately negotiate their way to social policy. Notwithstanding post-hoc attempts to redefine outcomes, much law is thus best understood in compromise terms. To the extent lawmaking is pointed toward particular compromise-reflecting social outcomes, a realist approach suggests that those anticipated outcomes are in turn embodied in two potentially overlapping components: conduct prescriptions or proscriptions, and enforcement provisions. Taken together, the conduct and enforcement components ultimately yield a social result. If the compromise is working, that social result mirrors lawmakers’ negotiated expectations.

But the science of law is imperfect and messy, and not all lawmaking yields the intended social result. In theory, regulators can adapt or alter either the conduct or the enforcement components of law to correct social outcomes. It has long been recognized that legislatures may legitimately correct prior missteps by way of either approach with respect to both their own prior enactments and earlier common law pronouncements. It is similarly clear that the court-sponsored rulemaking process cannot interject itself directly into the conduct arena. It remains to determine whether committee rulemakers should be allowed to offer substance-specific amendments to otherwise transsubstantive rules to correct social outcomes inconsistent with lawmakers’ intent. Notwithstanding the apparent difficulties presented by the Rules Enabling Act, I believe they sometimes should.

My conclusion arguably stands in irreconcilable conflict with the transsubstantivity norm. If committee rulemakers are allowed to “peek behind the curtain” to evaluate and then give effect to the compromises inherent in lawmaking, hasn’t a democratically unaccountable body usurped the role of the legislature with respect to statutory law? And wouldn’t this sort of tinkering ultimately undermine the courts’ legitimacy even in the realm of common law decision-making? While these are legitimate concerns, the limited changes I suggest do not really pose such threats. In fact, the economic approach I suggest actually promotes the true spirit of transsubstantive procedure as Clark, Pound, and the other early twentieth-century framers of the Federal Rules of Civil Procedure envisioned it.

The Federal Rules of Civil Procedure and their state analogues are supposed to ensure that resolution of civil disputes is both efficient and just. When the Federal Rules went into effect in 1938, a transsubstantivity norm served that end admirably in the overwhelming majority of litigated cases. But over time, technological advances, the evolution of “substantive” law, and certain procedural innovations (most notably, the Rule 23(b)(3) class action) have combined to make transsubstantivity the enemy of procedural innovations (most notably, the Rule 23(b)(3) class action) have combined to make transsubstantivity the enemy of procedural goals in certain situations. Specifically, these factors have combined to create a far more economically heterogeneous civil docket, characterized by differential distribution of pretrial asymmetries—for example, litigation cost asymmetries, information asymmetries, or risk-preference asymmetries—disproportionately favoring one party over another, the “all cases are created equal” transsubstantivity norm does more harm than good.

An amalgam of legal realist considerations, economic analysis, and legal process considerations suggest the following approach: I propose allowing court-supervised committee rulemakers to opt out of the transsubstantivity norm, but if and only if: (1) the existing default enforcement regime creates a substantial risk of asymmetry-driven abuse by private litigants; (2) the risk is attributable to a discrete and manageable cluster of default enforcement provisions; and (3) rulemakers can mitigate the identified risk by adopting a conduct-specific enforcement rule without creating a significant countervailing risk of reciprocal strategic behavior. In the event that one or more of these conditions cannot be satisfied, I would require that any deviation from the transsubstantivity norm be undertaken, if at all, by the political branches.

INTRODUCTION

Rules governing the conduct of federal civil lawsuits are largely “transsubstantive,” that is, we generally take a “one-size-fits-all” approach to the rules governing the administration and management of litigated claims. But should we?
In this Article, I argue that the civil litigation system works best when transsubstantive procedural rules enjoy the status of default rules. That is, there should be merely a rebuttable presumption that procedural rules will be applied transsubstantively, rather than a hard-and-fast, absolute transsubstantivity requirement. We can and should abandon the transsubstantivity norm in the categories of cases in which its application yields results at odds with the broader aims of the Federal Rules of Civil Procedure. Moreover, it is legitimate and appropriate for the traditional committee rulemaking apparatus to initiate these departures from the transsubstantivity norm. Notwithstanding the institutional legitimacy challenges inherent in defining the dividing line between “substance” and “procedure,” this is often a job for rulemakers, not legislators.

In keeping with the implicit spirit of the Rules themselves, I take an explicitly economic approach to the problem. Building on my earlier work, I identify modern civil litigation dynamics in which the application of transsubstantive procedural rules actually fosters results inconsistent with Rule 1’s directive to ensure the “just, speedy, and inexpensive determination” of claims. Although most modern civil claims do not involve these troubling economic dynamics, those in which a party—plaintiff or defendant—can take advantage of merits-independent asymmetries to disadvantage its opponent may yield problematic results.

In these contexts, I recommend authorizing the committee rulemaking apparatus to address the problem by way of “substance-specific” rulemaking, provided the cure is better than the disease. Thus cabined, the committee rulemaking process can take advantage of its superior institutional expertise without overstepping the legitimate bounds of its authority.

This Article has five parts. In Part I, I briefly outline the concept of transsubstantivity and its historical underpinnings. Relying heavily upon the excellent work of Robert Bone, Judith Rosnik, Stephen Subrin, and David Marcus, Part I is intended to provide sufficient background for the reader to grasp the essence of the transsubstantivity problem and its origins.

Part II offers an economic account of the long-running debate about the dividing line between “substance” and “procedure.” My analysis largely embraces the legal realist critique of the distinction, albeit in explicitly economic terms. Recognizing that most lawmaking is inherently an exercise in negotiation and compromise, I argue that debates regarding procedure are perhaps better understood and resolved in the context of a “bundled” definition of lawmaking. This bundled approach recognizes that lawmaking consists of synergistic or at least interactive “conduct” and “enforcement” provisions pointed toward a particular, negotiated social result. In this framing, the Federal Rules of Civil Procedure function in most cases as enforcement-related default rules that allow lawmakers to focus on the conduct component subject to some baseline understanding of the enforcement backdrop. The goal of procedure is to minimize the social costs of litigation, and thus

With all respect to similarly inclined scholars, such a conclusion is highly dependent upon either a particularly antagonistic view toward judicial discretion within the transsubstantive paradigm, or an availability-heuristic-influenced view of the relevant civil dockets. See discussion infra Parts I, II.

3. Though I focus on the federal system and the Federal Rules of Civil Procedure, my conclusions apply generically to all U.S. jurisdictions adopting transsubstantive procedural codes as part of a system designed to produce accurate, speedy, and inexpensive litigation results.

4. The Rules are not framed in overtly economic terms, but their explicit focus on accuracy and efficiency is essentially economic in nature, insofar as it implies rejection of other, noneconomic values for procedure. See, e.g., Fed. R. Civ. P. 1; see also David Marcus, The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure, 59 DePaul L. Rev. 371, 395-99 (2010) (describing the focus of Rules proponents as accuracy- and efficiency-driven, though admittedly for partially pragmatic, political reasons, at least).


7. This is ultimately true, not only of legislative enactments, but also of common law lawmaking, at least at the level of the court of last resort. Supreme Court justices count votes too.
the validity of the transsubstantivity norm depends upon the extent to which it effectively minimizes net error costs and process costs relative to potential alternatives.

For a variety of reasons, it is appropriate to assume lawmakers implicitly adopting transsubstantive procedural default rules do so naively; that is, that they do or at the very least should adopt the default system only when they assume it will yield accurate results. It would be problematic in the extreme to assume that lawmakers are aware of and actively take advantage of merits-independent asymmetries in their negotiations. It is likely far more accurate to characterize post-hoc lawmaker opposition to economically corrective procedural reform as a post-hoc attempt to renegotiate the original deal.

Part III delivers an economic critique of transsubstantivity. Strong-form transsubstantivity arguably makes sense under only three conditions: (1) error costs are low because distribution of economically relevant incentives is relatively homogeneous across the entire civil docket; transsubstantive rules aimed at balancing those incentives do not have perverse side effects on a large volume of cases involving different incentives; (2) more controversially, under some imported normative baseline, otherwise unacceptably high error costs systematically and predictably accrue in a socially desirable fashion; or (3) the political and process costs of any potential alternative approach exceed the error and process cost benefits of that approach. I argue that none of these conditions are plausible under current circumstances.

Part IV provides a modest, legal-process-influenced proposal for reform. Viewing the transsubstantivity paradigm in default rule terms, substance-specific revision becomes desirable when the default rules create significant agency cost risks for the parties acting as lawmakers' agents to vindicate the social goals of law through civil litigation. Because traditional lawmakers are institutionally less able to anticipate, understand, and correct those agency cost problems created by transsubstantive procedure, the traditional committee rulemaking apparatus should be given the job. I would therefore allow the traditional committee rulemaking apparatus to engage in substance-specific rulemaking to correct identifiable asymmetries, provided it can do so without genuine political impact, and without creating countervailing problems.

I. TRANSSUBSTANTIvITY AND THE SUBSTANCE/PROCEDURE DICHOmOY

A. Defining Transsubstantivity

Generally speaking, U.S. civil procedure is “transsubstantive.” In a recent article, Professor David Marcus offered a description of transsubstantivity and its historical roots.\(^8\) I will not recapitulate all of Marcus’s work here, nor do I completely agree with either his interpretation of the historical record or his prescriptive conclusion that transsubstantivity continues to be the best option for federal rulemakers. But Marcus’s article is comprehensive and his definition of transsubstantivity is particularly helpful: in simplest terms, a rule is transsubstantive if “it applies equally to all cases regardless of substance” or claim type.\(^9\)

As Marcus notes, there are several traps for the unwary lurking in this seemingly straightforward definitional issue. First and foremost, “uniformity” and “transsubstantivity” are not synonymous.\(^10\) A rule is transsubstantive if it applies to all claim types; “uniformity” by contrast can refer to several different concepts. For example, geographic uniformity means that the same rules apply in all jurisdictions.\(^11\) But geographically uniform rules may be either transsubstantive or substance-specific.\(^12\) Marcus also identifies another form of uniformity: a

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8. See Marcus, supra note 4, at 376-401.
9. See id. at 376.
10. Id. at 376-77.
11. Id. at 376.
12. Marcus cites Rule 8(a)(2), which establishes a federal civil pleading standard for all cases not expressly exempted from coverage and Rule 26(a)(1)(B)(vii), which exempts federal student loan collection suits from initial disclosure requirements as examples of geographically uniform rules—applicable throughout the federal system—that are transsubstantive and substance-specific, respectively. Fed. R. Civ. P. 8(a)(2); Fed. R. Civ. P. 26(a)(1)(B)(vii); see also Marcus, supra note 4, at 376.
system is procedurally uniform when the same rules apply regardless of the size or complexity of a
case.13 A system may thus be disuniform if it applies one set of deposition rules to class actions,
and another to individual suits, but that system would still be transsubstantive if the substance of
claims within those size/complexity categories did not affect the applicable rules.14

Marcus makes two other important definitional contributions. First, he ably rebuts critics who
contend that the federal procedural system is not transsubstantive because it vests significant
discretion in judges.15 Though Marcus acknowledges that this discretion may permit a biased judge
to advance her own outcome preferences under cover of ostensibly “procedural” rulings, he rightly
distinguishes this risk from “systemic approval or disapproval of a particular substantive area of
litigation.”16 The fact that an individual judge may be able to use her procedural discretion to
advance her own substantive agenda does not eliminate the transsubstantive character of the
Federal Rules as a whole.

Second, Marcus contends that transsubstantive rules are “value-neutral” in an important
sense.17 Although he recognizes the myriad ways in which even purportedly transsubstantive rules
are inherently value laden, he finds some laudable “value-neutrality” in the fact that generically-
applicable procedural rules will not affect the primary behavior of regulated parties in the way
that substance-specific rules would.18 The across-the-board adoption of a heightened pleading
standard,19 for example, might inspire generally lower compliance with the entirety of substantive
civil law as potential defendants recognize that the bar just got higher for plaintiffs everywhere.
But that stricter standard at least arguably would not yield disproportionate, substance-specific
effects in the way that a substance-specific pleading standard would.20

B. Substance and Procedure: Historical Background

The transition from common law pleading and traditional equitable practice to code pleading to
the procedural approach embodied in the Federal Rules is well-rehearsed.21 But modern scholars
have paid relatively less attention to the evolution and development of the transsubstantivity norm
throughout that transition.

Before the eighteenth century, procedure at common law was remarkably substance-specific, in
large part because the substantive law itself had no coherent theoretical design.22 As a result, the
imported common law backbone of the American legal system was writ-specific and thus
procedurally byzantine.23

But commitments to transsubstantivity could not have developed without the predicate
conceptual disengagement of substance and procedure. Under the common law, each individual

13. See Marcus, supra note 4, at 377.
14. Id. Though Marcus is technically correct, a disuniform system of the sort he suggests may be only nominally
transsubstantive to the extent that different levels of case size or complexity are predictably associated with different types
of claims. A disuniform system applying separate deposition rules for class actions effectively repudiates the transsubstantivity
norm insofar as medical malpractice tort claims are concerned, since malpractice claims rarely if ever qualify for class treatment.
15. See id. at 378.
16. See id.
17. See id. at 380. I adopt a structurally similar argument in my own analysis. See discussion infra Part II.
18. See Marcus, supra note 4, at 380.
19. See Ashcroft v. Iqbal, 556 U.S. 662 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), which together
impose a “plausibility” requirement upon federal civil pleadings.
pleading standard for securities litigation).
Efficacy, 87 Geo. L.J. 887 (1999); Judith Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U. Chi. L. Rev. 494 (1986);
22. See Marcus, supra note 4, at 381-83; see also Subrin, supra note 21, at 914-18.
23. See Marcus, supra note 4, at 381-83 and sources cited therein; see also Subrin, supra note 21, at 926-29.
writ encompassed “a wide range of procedural, remedial, and evidentiary incidents”; Professor Subrin points to the publication of Blackstone’s Commentaries (which conceptually separated rights, wrongs, and methods of enforcement) as a key development in the American evolution toward separated spheres of “substance” and “procedure.”

The transsubstantivity movement arguably arose not long after Blackstone published his seminal treatises. In many ways, modern commitments to transsubstantive procedure trace their roots to Jeremy Bentham and the reforms he spearheaded in nineteenth century English legal practice. Bentham explicitly identified “adjective law” as a category separate from substantive law; adjective law was to be directed toward “the maximization of the execution and effect given to the substantive branch of the law.” In addition to his focus on accuracy of result, Bentham also promoted efficiency as a subordinate value. Because Bentham’s “adjective law” was pointed at accuracy and efficiency, its ideal form was necessarily transsubstantive; Bentham’s focus upon “maximization of happiness through the substantive law” precluded any substantive role for procedure itself. His sharp substance/procedure dichotomy was bookended by his similarly sharp distinction between legislative and judicial functions.

The idea of transsubstantive procedure began to make serious inroads in U.S. procedure with the rise of formalized legal codes in the nineteenth century. For example, the crisp demarcation between substance and procedure was a hallmark of early efforts to reform common law practice as well; David Dudley Field emphasized “nothing less than a uniform course of proceeding, in all cases” in his New York Code of Procedure that became the model for widespread reform throughout the United States in the latter half of the nineteenth century. As with Bentham before him and the Federal Rules architects after him, Field assumed that procedural rules were intended to ensure the efficient and accurate enforcement of substantive law. It was to this end that he employed his complexity-reducing transsubstantive approach.

The transsubstantivity principle’s “final triumph” came with the adoption of the Federal Rules of Civil Procedure in 1938. The framers of the Rules were deeply concerned about the lawyers of their day “mak[ing] the rules an end in themselves and not the means to an end,” and they

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25. See Marcus, supra note 4, at 380-86.
28. Marcus, supra note 4, at 385.
29. See id. \1\2
30. Id.
31. Id. at 386.
32. See id. at 386-92.
34. Marcus, supra note 4, at 389.
35. See id. This theme was a near-universal constant among reformers until the rise of legal realism. See, e.g., John Norton Pomeroy, Remedies and Remedial Rights by the Civil Action, According to the Reformed American Procedure §37, at 37 (1876); Fred A. Maynard, Reform in Legal Procedure, 2 Mich. L. J. 75, 75 (1893); Edmund M. Morgan, Judicial Regulation of Court Procedure, 2 Minn. L. Rev. 81, 83 (1918); see also Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, reprinted in Report of the Twenty-Ninth Annual Meeting of the American Bar Association 395, 405 (1906) (bemoaning the fact that common law pleading made litigation an “adversarial sport” and not a mechanism for resolution of cases on the merits).
36. See Marcus, supra note 4, at 392.
37. See Charles E. Clark, The Code Cause of Action, 33 Yale L.J. 817, 819 (1924). The “rules as end” phenomenon was just an earlier version of the cost-imposition games with which this Article is concerned; more able and knowledgeable lawyers were able to obtain favorable results for their clients by taking advantage of the pretrial cost disparities engendered by that knowledge gap.
rejected formalistic, substance-specific procedural requirements in favor of court-made transsubstantive rules that would apply to all federal civil cases.\(^\text{38}\)

Throughout the early twentieth century, proponents of procedural reform generally embraced a transsubstantivity norm and typically supported their position with Benthamite arguments regarding accuracy and efficiency.\(^\text{39}\) Rules pioneer Charles Clark proclaimed that procedural rules exist only “to aid in the efficient application of the substantive law,”\(^\text{40}\) and Harvard Law’s Edmond Morgan went even further, defining procedure as pointed toward only one goal: “the attainment of a just and speedy decision upon the merits, according to the principles of substantive law, at the lowest practicable cost . . . .”\(^\text{41}\) Those pronouncements accorded well with the Langdellian positivism of the late nineteenth century, when “law as science” was still a reputable opinion to hold.\(^\text{42}\)

But even as these commentators wrote, the once sharp distinction between “substance” and “procedure” had begun to blur.\(^\text{43}\) Depression-Era legal realists increasingly challenged the notion that substance and procedure could be separated, just as they challenged the “black-robed infallibility” of the all-too-human judges tasked with employing procedure to effectuate substantive goals.\(^\text{44}\)

The essence of the realist attack on the substance/procedure dichotomy is perhaps best expressed by Thurman Arnold, a realist sympathizer who criticized the dichotomy as the byproduct of an indefensible “attitude” about the sanctity of law.\(^\text{45}\) In Arnold’s characterization, that attitude deified substantive law as “sacred” and unchangeable, relegating procedural law to a flexible, results-oriented “practical” role.\(^\text{46}\) But Arnold questioned the attitude, noting that either of the two ostensibly distinct categories could be employed to solve a particular legal problem.\(^\text{47}\) He thus described substantive law as “canonized procedure,” and procedural law as “unfrocked substantive law.”\(^\text{48}\)

It is somewhat unclear how the architects of the Federal Rules themselves understood the problem. Although Charles Clark acknowledged, “the line between [substance and procedure] is shadowy at best,” he seemed simultaneously to embrace the notion that procedure is “normatively distinct from and subordinate to substantive law.”\(^\text{49}\) In 1922, Edson Sunderland described the distinction between the two as follows:

> Now the law consists of two distinct and almost independent sets of rules or principles, one making up the field of so-called substantive law, the other the field of procedure. The

\(^{38}\) See Marcus, supra note 4 at 394-95. Marcus notes that the Rules’ transsubstantive approach is in part grounded in legitimacy concerns, and in part.

\(^{39}\) See id. at 396-97.

\(^{40}\) Charles E. Clark, History, Systems and Functions of Pleading, 11 Va. L. Rev. 517, 519 (1925) [hereinafter Clark, History]; see also Charles E. Clark, Handbook of the Law of Code Pleading, 26-29 (2d ed. 1947) [hereinafter CLARK, CODE PLEADING].

\(^{41}\) See Morgan, supra note 35, at 83.


\(^{43}\) See Marcus, supra note 4, at 399; see also GRANT GILMORE, THE AGES OF AMERICAN LAW 77-86 (1977); LAURA KALMAN, LEGAL REALISM AT YALE 1927-1960 115-44 (1986); Resnik, supra note 21, at 502-506.


\(^{45}\) See Thurman Arnold, The Rôle of Substantive Law and Procedure in the Legal Process, 45 Harv. L. Rev. 617, 643, 645 (1932); Marcus, supra note 4, at 401.

\(^{46}\) See Arnold, supra note 45, at 643.

\(^{47}\) Id.

\(^{48}\) See id. at 645.

\(^{49}\) See Clark, History, supra note 40, at 519. Cf. Bone, supra note 21, at 894-96.
first group is primary and constitutes an essential part of the structure of society; the second is secondary and derivative, and merely serves to make the first operative. The first group is relatively fixed, and only changes with the slow evolution of social relations; the second is relatively flexible, having no universal quality, but being the mere manifestations of opportunist ingenuity. To radically revise the first would mean a social revolution, but the second could be totally reorganized at a moment’s notice without causing a tremor in the social structure.⁵⁰

Sunderland went on to play a key role in the drafting and promulgation of the Federal Rules, and his sensibility pervades the entire project. Robert Bone explains the mentality of the day:

This view of procedural rulemaking as an exercise in instrumental rationality divorced from substantive value may seem alien to many proceduralists today, accustomed as we are to focusing on the substantive effects of procedural rules. The distinction made sense to early twentieth-century reformers partly because they never seriously questioned the basic features of adversarial adjudication . . . .⁵¹

Although substantial variation in the various Rules architects’ viewpoints makes generalization a risky proposition,⁵² the following summary might come close:

- Rules framers generally acknowledged that procedural rules affected outcomes, and thus had an impact upon “substance,” or at least upon substantive values.
- Notwithstanding this understanding, the framers of the Rules genuinely believed in process values, and found instrumental utility in maintaining the distinction between procedural law and substantive law.
- They ultimately saw the primary goal of procedural law in essentially Benthamite terms, promoting transsubstantive rules for efficiency reasons.
- Accordingly, in their view, the primary purpose of a transsubstantive procedural regime is to streamline litigation; they continued to rely upon the adversarial process to generate “correct” results in litigated cases.
- Effective proceduralists were thus best thought of as a species of “engineers,” capable of designing procedural systems that generate efficient outcomes.

Although this conception of the procedure/substance dichotomy remained ascendant for a generation and more after the Federal Rules of Civil Procedure went into effect, the paradigm eventually began to break down.⁵³ By the 1970s, our uneasy but consistent faith in the instrumental value of the substance/procedure divide had eroded into skepticism if not outright agnosticism.⁵⁴

C. An Economically Shaky Foundation

Notwithstanding its weak theoretical underpinnings and the skepticism of the 1970s, transsubstantive procedure continues to enjoy a surprising level of conceptual support among

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⁵⁰ Edson R. Sunderland, An Inquiry Concerning the Functions of Procedure in Legal Education, 21 Mich. L. Rev. 372, 381-82 (1922). Sunderland’s argument is simultaneously incorrect and prophetic. Though he wrongly concludes that there is a relatively clear divide between “substance” and “procedure,” he was prescient with respect to his assertion that “procedural” revolution could take place without causing social unrest. Activists from all points on the political spectrum have smuggled effectively “substantive” reforms into law by way of ostensibly “procedural” changes; it seems clear that the hue and cry from such maneuvers has been far less than one would have expected from frontal assaults on the “substantive” law.

⁵¹ See Bone, supra note 21, at 897.

⁵² See Resnik, supra note 21, at 498-507.

⁵³ See Bone, supra note 21, at 900-07.

⁵⁴ See id. (describing the forces that ultimately undermined the substance/procedure dichotomy).
modern commentators. I will not attempt to explain contemporary enthusiasm for transsubstantivity; I suspect the story is complex. Rather, I instead focus my attention on the awful economic algebra of transsubstantive procedure: because litigants respond to incentives, even truly “procedural” transsubstantive rules may have substance-specific effects. Moreover, if the economic incentives inherent in civil litigation are heterogeneously distributed, those substance-specific effects sometimes cannot be ameliorated without causing other problems elsewhere.

For example, Rule 30(a)(2) of the Federal Rules of Civil Procedure generally limits each party to ten oral depositions without obtaining agreement of the other party or leave of court. For most federal civil claim types, transsubstantive application of this rule likely will have no disturbing effects. Many types of cases will not reasonably require more than ten depositions on either side, and other cases will require a roughly equivalent number of depositions greater than ten, on both sides, thus creating an incentive for the parties to reach an independent agreement with respect to the number of allowed depositions.

But claim types for which the typical defendant—relative to the plaintiff—possesses massively more information spread among many different employees present a very different dynamic. In those cases, the plaintiff may face a significant informational deficit; this asymmetry may in turn force the plaintiff to seek leave of court to obtain more than ten depositions of the defendants’ personnel, incurring some additional costs to do so. And because the defendant will face no similar incentive, the plaintiff will bear those costs disproportionately. Thus in cost terms, the transsubstantive impact of Rule 30(a)(2) may well vary depending upon the type of case. A diversity-jurisdiction auto accident tort claim or a massive inter-company intellectual property dispute may not provide opportunities for the parties to employ the cost imposition strategies that the “ten depositions” default rule implies—neither of those claim types is likely to involve extensive information asymmetries in either direction; but a consumer class action antitrust claim may. In this way a transsubstantivity norm may naturally stand in tension with the very principles it was intended to promote.

Notwithstanding the possibility of substance-specific effects, transsubstantive rules may still be justified if the incentive structures associated with different types of litigation are sufficiently similar to justify transsubstantivity on an aggregated cost-benefit basis. In the Rule 30(a)(2) context, it seems likely that the benefits of transsubstantive procedure outweigh the costs. Though some potential economic disparity may result from transsubstantive application of the rule, it is likely not particularly costly for a plaintiff to seek leave of court in that situation, and a defendant’s decision to oppose that plaintiff’s motion will not be an easy one, given the potential spillover effects associated with taking an unreasonable position with the court.

Thus, the disparate substance-specific effects of Rule 30(a)(2) probably do not justify abandoning the transsubstantivity norm to tailor different deposition rules for different types of claims. But the economics of other rules may imply more significant effects. Proponents of traditional transsubstantivity rarely if ever even consider the possibility that homogeneous transsubstantive rules must be applied in a decidedly heterogeneous litigation environment. Because that heterogeneity in turn creates strategic incentives for parties that vary by claim type,

55. [String cite.]
56. This is not a wholly new observation. See, e.g., id. at 900-02. My contribution is to model transsubstantive procedure in economic terms, hopefully adding a bit of coherence to the analysis and a potential way out for those tempted to succumb to nihilism.
57. If this assumption does not hold, transsubstantivity can only be justified by reference to normative criteria external, and likely antithetical, to the accuracy-and-efficiency baseline of the Federal Rules. To the extent proponents of transsubstantivity base their support on such criteria, the time has come to call a spade a spade.
58. See Resnik, supra note 21, at 508-11 (discussing the cases most likely at the forefront of the Rules architects’ minds in the 1930s); see also infra Part III.
it is appropriate to search out the costs and benefits of transsubstantivity measured against the real world litigation that procedure regulates.

II. Reframing the Substance-Procedure Dichotomy in Economic Terms

I have written elsewhere that “[p]rocedure is substance.” Nonetheless, the idea of a substance-procedure dichotomy remains conceptually important, not least because it continues to animate so many procedural conversations. Consider the intuitions of Rules-Era procedural scholars like Charles Clark and Edson Sunderland. Each expressly acknowledges the weak theoretical underpinnings of the distinction between substance and procedure. But each nonetheless embraces the distinction and, by implication, each embraces a largely transsubstantive approach, if for instrumental rather than theoretical reasons.

I agree that there is substantial instrumental value in transsubstantive procedure despite its theoretical and practical shortcomings. But the critique of the substance-procedure distinction resonates as well; there is little question that procedure can be used to accomplish lawmakers’ social goals, or abused to frustrate them.

To gain better purchase on this problem, I employ an economic mode of analysis in which the social results of lawmaking are a product of two disaggregated components: conduct provisions enacted by lawmakers and an enforcement regime that dictates or at least influences the effects of the conduct provisions. Even the most ardent republican theorist would acknowledge that the process of making law is ultimately a process of negotiation and compromise. This is no less true of the deliberation necessary to allow a state Supreme Court to generate a majority opinion in the common law context than it is of a legislature’s deliberations both internally and with the executive. To the extent lawmakers depend on the civil litigation system to give effect to their desires, they effectively appoint as their agents the parties litigating individual cases. I therefore contend that the proper role of transsubstantive procedure is that of default rules that can and should be adjusted where necessary to ameliorate agency cost risks.

A. The Bundled Character of Lawmaking Compromise

The social results of lawmaking are a function of two essential components: (1) conduct provisions that direct primary behavior of those covered by the law and (2) enforcement provisions that ultimately provide the incentive structure for primary conduct on the margin. Standing alone, a conduct provision is at best aspirational; in all likelihood, it is not even that. While the “conduct/enforcement bundle” framework I adopt may be semantically unfamiliar to or uncomfortable for some, it should nonetheless be intuitively attractive to most readers. For example, a legal prohibition on the possession of small amounts of marijuana, standing alone, may affect primary behavior of a few potential users who are idiosyncratically risk averse or adopt idiosyncratic moral codes. But the great bulk of that conduct provision’s social effect will depend upon the enforcement structure behind it. If the government devotes massive resources to drug enforcement efforts and imposes draconian punishments upon violators, that will have a radically different effect upon primary behavior than a relatively laissez-faire enforcement scheme.

59. See Stancil, Close Enough, supra note 5, at 71.
61 See Part ___, infra.
62. At its most abstract, the enforcement component will consist of public enforcement provisions (criminal sanctions, government-initiated civil proceedings, regulatory enforcement, etc.) and private civil actions. This Article addresses primarily the “private right of action” component (with some possible implications for civil government enforcement).
64. Similarly, I've been waiting my whole life for someone to tell me what the real speed limit is. See DAVE BARRY, Slow Down and Die, in DAVE BARRY’S GREATEST HITS 211 (1988).
The same is true for civil law. For example, federal employment discrimination law consists of both conduct prohibitions (e.g., against racial discrimination in employment) \(^{65}\) and an enforcement superstructure put in place to effectuate the law’s purposes. The enforcement component of federal employment discrimination law in turn consists of a (very limited) direct federal enforcement apparatus\(^{66}\) and a parallel private enforcement regime.

All else equal, the more robust the private enforcement regime, the greater the effect on primary conduct.\(^{67}\) If a racially prejudiced employer contemplates engaging in discrimination nominally prohibited by the law, she will care not only that the behavior is prohibited but also about how likely it is that she will be caught and punished. She will also care about the likely extent of that punishment. The weaker the private enforcement regime, the less likely she is to be deterred by the formal legal prohibition, and vice-versa.

A naïve observer might argue that lawmakers’ conduct provisions represent the entirety of the compromise inherent in virtually all regulatory activity. In this worldview, a statute that prohibits jaywalking/racial discrimination is really intended to (or at least aspires to) eliminate all jaywalking/racial discrimination.

This argument is unconvincing for at least two reasons. First, it conveniently ignores both the cost of regulation and the resource constraints facing regulators. For example, a law that is genuinely intended to eliminate all jaywalking (or even all racial discrimination) would be prohibitively expensive to implement, and the resource allocations required would undermine countless other regulatory aims.

Second, the argument ignores the fact that important values sometimes compete and conflict. Even assuming we had the money to do so, we might nonetheless be unwilling to wholly eradicate jaywalking (or even racial discrimination) because the accomplishment of those goals might come at too great a cost to individual liberty, privacy, or other important values. Taken together, these realities strongly suggest that negotiated lawmaking compromises involve some expectation as to enforcement levels as well. In other words, lawmakers negotiate over conduct provisions, but they do so knowing that it is the *entire complementary bundle*—conduct and enforcement provisions together—that determines the ultimate social result.

Interesting things happen when we combine these insights with an understanding that law contemplating civil enforcement is effectively a series of compromises negotiated against the backdrop of a set of transsubstantive default enforcement rules. First, the importance of the default rules backdrop becomes clear. Transsubstantive procedural default rules have significant implications for the level of enforcement (and thus the level of compliance and ultimate social result) lawmakers can anticipate when considering various approaches to the substantive problem under consideration. Furthermore, this approach highlights the artificial distinction between “substance” and “procedure”; all else equal,\(^{68}\) lawmakers can achieve their social ends by way of adjustments to either the conduct prescriptions and proscriptions of “substantive” law or by adjustments to the procedural regime under which the relevant substantive rights are to be enforced. This in turn implies that a “default rule” understanding of transsubstantivity norm is closer to correct (normatively, rather than descriptively) and that stronger forms of the transsubstantivity norm are defensible only if certain implausible conditions are satisfied.

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\(^{67}\) I bracket for the moment any discussion of the normative component of this statement, but one implication of my cost disparity analysis is that an aggressive enforcement regime can sometimes have too much of an impact on primary behavior. See discussion infra Part II.B.2.D.

\(^{68}\) Which it almost certainly will not be. See discussion infra Part IV.
B. Transsubstantive Procedure as Default Rule Regime

At some level, it is therefore rational and reasonable to think of lawmakers’ intent in more instrumental terms than is typical in most debate. One hopes, of course, that lawmakers’ pronouncements are intended to have certain real-world effects. But notwithstanding the temptations of post hoc rationalization, it should be similarly recognized that lawmakers rarely, if ever, truly intend for the social results of their work to be absolute. Members of the 88th Congress certainly aspired to diminish racial discrimination with the passage of the Civil Rights Act of 1964. But it is quite a leap from that substantial aspiration to the conclusion that Congress intended the Act to eliminate all racial discrimination in the covered contexts. Instead, like all law, that Act represented a compromise with an intended social result that, while laudably ambitious, likely still fell far short of any utopian ideal.

This economically influenced understanding of “law as compromise” is critical to making any real progress on the problems inherent in transsubstantive procedure. The reasoning is straightforward, and flows inexorably from the nearly universal modern understanding that “procedural” rules can and do have substantive effects. Given that understanding, lawmakers’ negotiations over law and social policy take on a slightly different cast.

It may be better to think of legislators or Supreme Court justices not as lawmakers, but rather as contracting parties. Like contracting parties, these actors generally produce something of social value only when they reach an agreement that reflects compromise on the various parties’ aims and desires. More important for our purposes, lawmakers and traditional contracting parties both typically must reach their agreements against the backdrop of a set of default rules. In the case of commercial contracts, we rely on the default rules supplied by the Uniform Commercial Code or state common law to lower the parties’ transaction costs. Contract default rules fill in holes that the parties would otherwise have to fill in themselves. They also provide a level of certainty, predictability, and determinism that could otherwise be too costly for the parties to obtain on a contract-by-contract basis. Finally, because they are default rules, they serve as something of a signal to the parties, highlighting areas in which the parties’ own needs and expectations might require express deviation from the norm in their contract documents.

Transsubstantive procedural rules serve a similar function in the lawmaking context. That is, lawmakers considering policy changes that will implicate the civil justice system do not legislate on a blank canvas. Rather, they regulate against a backdrop of default “procedural” rules that will ultimately govern civil litigation enforcement of the “substantive” legal rights and obligations over which they are negotiating. In the federal system, the Federal Rules of Civil Procedure and provisions of Title 18 of the U.S. Code form the bulk of that backdrop.

As with default rules in the contract context, these “procedural” default rules generally lower transaction costs for lawmakers’ negotiation over regulation aimed at a perceived social ill. Like contract default rules, transsubstantive rules of procedure usually increase certainty and predictability by providing a common and generally well-understood enforcement foundation atop which substantive regulatory regimes may be constructed.

Moreover, transsubstantive procedural default rules can radically reduce the transaction costs that would otherwise mount exponentially in a “bespoke” procedural regime. And the existence of procedural default rules also offers lawmakers the same salient advantage for which contract drafters should be thankful: a codified body of default enforcement provisions helps careful lawmakers identify contexts where the default regime may not serve regulatory ends.

Lawmakers differ from commercial contract parties in one key way, however: the effectiveness of the civil litigation component of the enforcement regime depends upon the incentives and


70. Note the use of “usually” and “generally” as qualifiers.
actions of the litigating parties. In other words, lawmakers effectively appoint \textit{litigants}—plaintiffs and defendants alike—as their agents tasked with optimizing the civil-litigation-driven component of the overall regulatory program. This in turn implies that transsubstantive procedure is beneficial only when the rules in effect give the litigating parties the correct incentives. A “default rules” approach strikes the appropriate balance.

To be clear, reconceptualizing transsubstantive procedure as a set of default enforcement provisions is not simply a semantic exercise. First, a “default rule” understanding of civil procedure simply offers a better fit with the observed data. Though critics who claim that transsubstantive procedure is utterly chimerical are significantly off base, it is nonetheless clear that lawmakers have rejected transsubstantive rules in favor of substance-specific enforcement provisions numerous times over the first 75 years of the Federal Rules. Moreover, reflexive proponents of transsubstantive procedure effectively argue that “efficiency” equals “transsubstantivity,” without acknowledging several highly contestable moves necessary to complete the equation. Those moves become obvious once we reframe our understanding of transsubstantive procedure as a default rule regime rather than some sort of independent good.

\textbf{C. Bundled Law and the Economics of Procedure}

The goal of procedure should be to give effect to the compromises lawmakers make when they set social policy. Put a different way, the goal of any procedural regime should be to maximize aggregate social welfare by (1) minimizing error costs and (2) minimizing process costs in the administration of the civil justice system.\footnote{I am making an explicitly normative claim here; moreover, it’s an admittedly contestable claim. But the civil procedure literature would be well-served by commentators’ increased commitment to express disclosure of their normative baselines regarding the true purposes of procedural law. As things currently stand, too many academics writing in this area engage in baseline smuggling, with the smuggled baselines in question often originating from empirically untested \textit{a priori} beliefs regarding primary conduct rather than the institutional concerns that should animate procedural scholarship.} Though non-economists might shudder at this choice of nomenclature, the general sentiment of this statement should resonate with anyone who supports the core goal of Rule 1: “just, speedy, and inexpensive” resolution of civil claims.\footnote{For most values of “just,” at least. See \textit{Fed. R. Civ. P. 1. See also Bone, Procedure Theory, supra note ___ at 329-32} (identifying complexities).} To the extent procedural rules instead increase those costs without an offsetting improvement in accuracy of result, reform should be on the table.

\textbf{1. Minimizing Error Costs}

In the context of civil dispute resolution, error costs accrue when litigation results in the wrong winner.\footnote{Because civil litigation involves not only the binary win/lose outcome but also potentially differing quanta of costs, error costs also arise when someone pays too much or receives too little compared against some measure of abstract ideal justice.} In Rule 1 terms, error costs are associated with outcomes that are not “just,” where “justice” is typically defined as the result that would obtain when the operative law is correctly applied to the relevant facts.\footnote{There are, of course, other potential definitions of justice, including several for which minimizing error costs is likely not on the agenda. Such definitions conflict with the ethos of the Federal Rules and the stated justifications for a transsubstantive procedural system. At the very least, framing the debate over transsubstantivity in economic terms will necessarily force those embracing more controversial and normatively loaded definitions of “justice” to acknowledge preferences at odds with the overarching principles motivating the Federal Rules. \textit{See also Bone, Procedure Theory, supra note ___ at 329-32.}}

The broad category of error costs can be further broken down into two discrete subcategories, what social scientists call “Type I” and “Type II” errors. In layman’s terms, a Type I error is a “false positive.” In the civil litigation context, we would classify a Type I error as any situation in which a defendant either loses when he shouldn’t, or pays more to the plaintiff than is just. By contrast, a Type II error is a “false negative.” We would generally apply the “Type II error” label in cases in...
which a plaintiff with a legally meritorious claim is either entirely unsuccessful in obtaining relief or obtains less relief than the facts and law would objectively justify.

Procedural systems inevitably produce both types of errors. As an example, enforcement provisions (trans substantive or otherwise) that significantly curtail plaintiffs’ access to courts will likely generate substantial Type II errors—some of the claims left unfiled under such a system almost certainly would have been meritorious. Other enforcement provisions might produce Type I error costs; for example, provisions that allow categories of plaintiffs to employ one-way cost imposition strategies might yield substantial cost-of-defense settlements for even objectively frivolous claims.76

All else equal, a procedural system is proportionally more just the lower the aggregate error costs associated with its use. This is not to say that error cost minimization is free from normative concerns. A system that seeks to minimize error costs faces at least two challenges. First, it must decide whether “some error costs are more equal than others;” in other words, whether there is any distributive component to the calculus that favors, say, plaintiffs over defendants because plaintiffs generally have fewer resources. If we so decide, we might say that for any given absolute level of error costs, we prefer that defendants bear a proportionally greater percentage of those costs. Second, error cost minimization is subject to a potentially confounding problem: we often can lower error costs only by increasing process costs. The goal of the procedural system should generally be to minimize total social costs; as a result, certain potential improvements on the error costs front might be off the table because of their negative process cost effects.

2. Minimizing Process Costs

For our purposes, process costs are simply the internal costs of administering the civil justice system. Among other things, process costs would include: litigation costs to the parties (time, attorneys’ fees, etc.) and the administrative costs of the court system itself. Although litigating lawyers might disagree out of naked self-interest, an ideal procedural system would minimize process costs for any given aggregate level of “justice.” Again, all else equal, it would be better for the litigation process to take less time and cost less money, since those expenditures are largely deadweight losses to society. Put differently, if we know a particular dispute outcome is a given, essentially everyone but the lawyers would prefer to reach that result without hiring attorneys and going to court, since the costs associated with the litigation process in that case would benefit only the lawyers.77

3. An Optimization Problem

It is all well and good to talk about minimizing error costs and process costs as a design goal, but the devil is in the details. Because error costs and process costs are sometimes negatively correlated (i.e., sometimes we can obtain lower error costs only by increasing process costs), it is not necessarily easy to optimize the system, even with broad agreement as to underlying goals. Still, a “cost minimization” paradigm does offer a way forward for those concerned about the “just, speedy, and inexpensive” resolution of civil disputes. One possible answer lies in a revised approach to the trans substantiveity norm.

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77. Leaving aside the possible incremental societal benefits of litigation, it is possible that, in the aggregate, even costly litigation has some societal benefits (e.g., promoting legitimacy of the courts and the government generally, generating “law” for society as a whole in the form of common law precedent, etc.). That said, the social benefits attributable to any one case, viewed ex ante, are negligible.
4. Transsubstantivity and Minimizing Costs

Reframed in economic terms, traditional arguments in favor of strong-form transsubstantivity play on both process cost and error cost themes. Process cost arguments are probably dominant, as proponents of transsubstantivity generally ground their defense in claims that transsubstantive procedure significantly simplifies and streamlines the litigation process, thus making it significantly more efficient by offering a single set of well-understood rules for all types of litigation. That said, arguments in favor of transsubstantivity can also be based in part upon error cost concerns. Rules architects were concerned that what they saw as a Byzantine and unnecessarily complex procedural environment at the turn of the twentieth century was limiting meaningful access to the courts. When a plaintiff chooses not to file her claim because the substance-specific procedural rules are too expensive to master, Type II error costs rise. And when a defendant rolls over rather than litigating because the sheer complexity of the system increases the cost of defense beyond his ability to pay, Type I error rears its ugly head.

III. AN ECONOMIC CRITIQUE OF STRONG-FORM TRANSSUBSTANTIVITY

Regardless of the semantics, proponents of transsubstantive procedure typically make essentially economic arguments that transsubstantive procedure minimizes process costs and error costs. But any serious defense of strong-form transsubstantivity ultimately requires proof of at least one of three propositions: (1) the run of actual and potential civil claims and defenses is sufficiently homogeneous that a strongly transsubstantive procedural regime produces efficiency, clarity, and access benefits that outweigh the error costs associated with comparatively rare outlier cases; (2) otherwise unacceptable error costs are a feature, not a bug; that is, that while a heterogeneous claim mix might generate error costs that outweigh the process benefits of a transsubstantive regime, those error costs are likely to accrue predictably in a direction that we actually think socially desirable for some external reason; or (3) the political economy of any plausible substance-specific approach is sufficiently suspect that the likely process costs and error costs from the new norm would outweigh the social costs inherent in the present system.

A. Are Civil Dockets Economically Homogeneous?

Continued adherence to a strong-form transsubstantivity norm might be economically justified if court dockets are relatively homogeneous along economically important dimensions. In particular, a docket consisting of cases with relatively similar relative cost, information, and risk preference profiles should respond well to a transsubstantive procedural regime, because transsubstantive rules can be crafted with a relatively uniform set of case dynamics in mind.

There is a credible argument that Rules drafters faced, or at least believed they faced, such relative homogeneity as they worked to develop the Rules in the 1930s. But however homogeneous the federal civil docket of 1938, the modern federal docket is radically less so. Substantial economic heterogeneity between claim types is now the order of the day, and a transsubstantive procedural regime designed with the economic dynamics of some 1938 “paradigm case” in mind can have disastrous effects upon the substantial subset of modern cases that do not fit the model.

1. Cost and Information, and Risk Preference Distribution

For a transsubstantive regime to be successful, the vast majority of cases must have relatively similar pretrial cost, information, and risk preference profiles. When pretrial costs, information, and/or risk preferences are not uniformly distributed, a transsubstantive procedural regime creates opportunities for litigants to leverage asymmetries to their advantage without regard for the merits of the claims or defenses at issue in the case.

78. Marcus, supra note 4, at 372, 394.
79. See Resnik, supra note 21, at 508-11.
To be clear, this critique of the transsubstantivity norm depends primarily upon the distribution of different cost/information/risk preference profiles across the run of civil litigation, and not upon the shape of these profiles. Admittedly, I focus substantial attention on the potentially perverse effects of cost, information, and risk preference asymmetries between plaintiffs and defendants upon civil litigation outcomes. Standing alone, those asymmetries and their effects on litigant behavior might justify changes to existing rules, but they do not necessarily justify abandoning the transsubstantivity norm. If a particular asymmetry is affecting virtually all cases, a transsubstantive amendment to the civil rules may well be in order to fix the problem. Transsubstantive procedure instead falters when some types of cases predictably face different cost/information/risk preference profiles than others; it is only then that the “one size fits all” approach isn’t up to the task.

I therefore focus on asymmetries not because those asymmetries themselves undermine the transsubstantivity norm, but because the architects of the modern transsubstantive approach reasonably and understandably assumed (perhaps subconsciously) that relative parity in costs, information, and risk preference characterized the civil litigation of their time. 80 It is understandable that a set of transsubstantive rules designed with the belief that most cases are economically similar struggles to promote justice in the far more (economically) heterogeneous modern environment.

In an earlier work essentially assuming the continued application of a transsubstantive approach to procedure, I proposed a single deviation from the norm to address problems arising from pretrial cost disparities in certain types of cases.81 Specifically, I argued for a heightened default pleading standard in a category of cases characterized by significant cost asymmetries favoring plaintiffs.82 Noting that such dynamics encouraged frivolous litigation and cost-of-defense settlements unconnected to the merits, I suggested “balancing the pleading equation” to encourage merits-driven outcomes.83 At the same time, I recognized that cases characterized by plaintiff-favoring pretrial cost asymmetry often involve significant defendant-favoring information asymmetry.84 I therefore recommended allowing such plaintiffs to “buy” the traditional relaxed pleading standard by purchasing a bond that would be awarded to the defendant only upon a finding that the claim was frivolous.85

My recommendation in Balancing the Pleading Equation is an example of the type of substance-specific rulemaking I propose below in Part IV. But the mere existence of cases fitting the cost disparity profile I identified is not in itself sufficient to justify abandoning the transsubstantivity norm. While the dynamics I identified might call for a rule change to address the problem, that rule change should still apply transsubstantively if all of the cases on the docket fit essentially the same cost/information profile. Transsubstantivity itself is implicated only if the pretrial cost and information profiles in the civil justice system are heterogeneously distributed.

Consider again the pleading standard example. If rulemakers (or the Supreme Court, as in Twombly86 and Iqbal87) adopt a heightened pleading standard on a fully transsubstantive basis, that standard may do more harm than good, even if it represents an appropriate response to some

80 See Part ___, infra. We cannot prove the Rules framers’ subjective states of mind either empirically or by reference to the historical record. They simply did not talk about these things. But as I demonstrate below, we can gain significant insight from an examination of the civil dockets of the time. This paper makes a very tentative, largely anecdotal start on that project; the literature would benefit substantially from a more thoroughgoing examination of the civil litigation backdrop against which the Federal Rules architects operated.
81. See generally Stancil, Balancing, supra note 5. 
82. Id. at 146-49. 
83. Id. 
84. Id. at 146. 
85. Id. at 149-51. 
subset of cases.\textsuperscript{88} For cases that do not involve significant cost asymmetries (a large but not overwhelming percentage of litigated claims, I have argued),\textsuperscript{90} the transsubstantive heightened pleading standard primarily raises Type II error costs. At least some plaintiffs who have no incentive or ability to abuse the system through excess cost imposition will nonetheless either decide not to file meritorious claims or will see these claims dismissed at the pleading stage because they cannot satisfy the heightened standard.

2. Then: Cost and Information Distribution in Civil Litigation

Thus a transsubstantivity norm implicitly depends upon homogeneous distribution of pretrial costs and information. And at the dawn of the Rules Era, that is exactly what Rules framers saw—economically relatively homogeneous cost profiles and information distribution.\textsuperscript{90} In fact, when the Rules went into effect, virtually all routinely litigated civil claims would have been characterized by relative parity\textsuperscript{91} in pretrial costs, and in consistent, generally predictable informational environments.

In one sense, there was no “paradigm federal case” in 1938.\textsuperscript{92} Roughly contemporaneous studies of the federal dockets instead demonstrate that federal civil proceedings at the time involved a wide range of causes of action.\textsuperscript{93} The United States was itself a party in a large percentage of these cases,\textsuperscript{94} but private litigation was a significant component of the federal civil docket as well.\textsuperscript{95}

a. Pretrial Cost Distribution at the Dawn of the Rules Era

But the nominal claim-type variety in the 1930s federal docket does not equate to significant variety in litigation cost and information profiles. Rather, at the time the Rules were adopted, virtually every relevant federal case (and most state cases) would have been characterized by relative cost parity, at least compared to the benchmark that I have elsewhere suggested justifies intervention of some sort.\textsuperscript{96} This is in part because of the nature of the claims actually litigated in federal court at that time.\textsuperscript{97} Virtually none of the traditional common law causes of action (the backbone of the federal diversity docket) involved significant pretrial cost disparity between plaintiffs and defendants.\textsuperscript{98} In addition, there were far fewer statutory causes of action available to

\textsuperscript{88} It is likely that the Twombly/Iqbal standard is not such a response, even for the set of cases motivating the decision.

\textsuperscript{90} Note that this is not the same thing as uniform distribution of those characteristics among plaintiffs and defendants. Transsubstantive procedure can deal with asymmetries; it cannot deal with disuniformly distributed asymmetries.

\textsuperscript{91} As I tentatively define the term. See Stancil, Balancing, supra note 5, at 120-21, 160-63 (emphasizing in the context of an argument for selectively stricter pleading standards that cost disparity must be calculated using both internal and external cost functions and arguing that the triggering disparity should be sufficiently large to assuage an implementing court’s error and transaction cost concerns).


\textsuperscript{93} See Annual Report, supra note 92 (reproduced infra as Appendix A); Business of the Federal Courts, supra note 92, at 59.

\textsuperscript{94} Although the cost-mismatch dynamic arguably comes into play occasionally in cases involving the United States as a party, I generally bracket those cases on the assumption that the United States’ incentive structure when it litigates is not motivated by simple economic desires to profit-maximize.

\textsuperscript{95} See Annual Report, supra note 92.

\textsuperscript{96} See Stancil, Balancing, supra note 5, at 132-33.

\textsuperscript{97} See Resnik, supra note 21, at 514 (suggesting that many claims were left unlitigated because many plaintiffs lacked the resources to pursue them, and modern correctives were not yet in place).

\textsuperscript{98} See, e.g., Stancil, Balancing, supra note 5, at 127 (summarizing data on pretrial costs in tort litigation).
private plaintiffs at the time, and many of those that were technically available were not financially practicable because plaintiffs were unable to aggregate small claims effectively.  

Antitrust law provides an example of the latter phenomenon. When Congress enacted the Sherman Act in 1890, it did not contemplate private enforcement; rather, the Attorney General directly enforced the law. In 1903, the newly created Department of Justice Antitrust Division took over public enforcement of the law. Private plaintiffs first obtained the parallel right to pursue antitrust claims with the passage of the Clayton Act in 1914, which authorized treble damages suits by “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.”

But the character of private antitrust suits in the years leading up to the adoption of the Rules was quite a bit different than the character of private antitrust suits today. Before 1938 (and, indeed, before 1966), the typical private antitrust claim pitted one business against another.

Although these sorts of suits may have involved some disparity in business size between plaintiffs and defendants—given the nature of antitrust claims, it is plausible that private antitrust plaintiffs of the time tended systematically to be smaller than antitrust defendants—it is unlikely that these size disparities occasioned much in the way of pretrial cost disparities. These cases typically involved a claim of illegal behavior directed at a competitor; as such, they would necessarily have involved searching into the transactions between the two companies and/or their customers or suppliers; thus, the plaintiff’s ability to impose costs on the defendant likely would have been matched by the defendant’s ability to do likewise.

Consumers with small individual claims against a price fixing cartel had the nominal right to sue under the Clayton Act in 1938 (“any person . . .”), but they had no true functional opportunity to do so. The massive costs of suit dwarfed their paltry potential individual recoveries.

The antitrust story is hardly unique to the time; the federal dockets in the early years of the Federal Rules consisted largely of economically similar disputes, regardless of their substantive law contexts.

99. See Resnik, supra note 21, at 514.
101. See id.
102. See 15 U.S.C. § 15 (2012). As an aside, it is plausible to characterize the passage of the “private right of action” portions of the Clayton Act as an “enforcement tweak” intended to move the law toward the negotiated social outcome the Sherman Act represented.
103. Although the analysis is admittedly a bit rough-and-ready, quick examination of reported antitrust cases decided before 1938 bears this out. I performed a Westlaw search in the “ALLFEDS” database looking for all pre-1938 cases containing the words “Sherman Act,” “antitrust,” or “anti-trust,” but not containing “United,” “federal,” “people,” or “State” in the case title. Of the first twenty-five results returned, six cases involved actual antitrust claims; all involved a business entity suing another business entity for allegedly anticompetitive behavior. The captions of those six cases give a sense of the paradigmatic antitrust claim of the times. See generally Terminal Warehouse Co. v. Pa. R.R. Co., 297 U.S. 500 (1936); Radio Corp. of Am. v. Raytheon Mfg. Co., 296 U.S. 459 (1935); Ind. Farmer’s Guide Publ’g Co. v. Prairie Farmer Publ’g Co., 293 U.S. 268 (1934); Levering & Garrigues Co. v. Morrin, 289 U.S. 103 (1933) (antitrust suit by business against labor union and labor union president); Cent. Transfer Co. v. Terminal R.R. Ass’n of St. Louis, 288 U.S. 469 (1933); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931).
104. See, e.g., Ind. Farmer’s Guide Publ’g Co., 293 U.S. at 272-74 (plaintiff farmer’s guide publisher alleging that a cooperative of other publishers conspired to drive plaintiff out of business by attempting to monopolize the sale of commercial advertising to farm-related businesses).
105. In the case of antitrust specifically, another dynamic is in play: changes in the substantive law over time. Through the 1960s, antitrust law was relatively friendly to claims made by one competitor against another. See, e.g., Klor’s, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). But by the late 1970s, the tables had turned, and the law clearly favored claims by injured consumers over competitor suits. See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (establishing “antitrust injury” requirement such that antitrust plaintiffs must prove “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful”); see also Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223-25 (1993) (imposing a “recoupment” requirement upon predatory pricing claims in a competitor suit alleging predatory pricing by rival cigarette manufacturer). This increasing hostility to competitor suits, while arguably positive for the overall direction of antitrust law, put additional pressure on rules of procedure by favoring consumer suits in which problematic cost disparity is substantially more likely. But see Illionois Brick ___ U.S. ___ (197_).
b. Information Distribution at the Dawn of the Rules Era

Federal civil litigation at the dawn of the Rules Era typically involved a relatively small universe of relevant factual information. Moreover, in a world without Westlaw, Google, and Wikipedia, search costs for relevant legal information (i.e., which procedural or substantive law governed a given claim) were quite high. Those high search costs fed into the framers' perception that transsubstantive rules would lower process costs associated with civil litigation. Data storage at the time was entirely hard copy, and even the production and duplication of hard-copy information was severely limited by available technology. This in turn meant that the vast majority of litigated claims, including those that today involve massive pretrial cost disparity, simply could not generate hugely disproportionate discovery bills—a primary source of pretrial cost disparity. Importantly, the “data” explosion of the last forty years has not had uniformly distributed effects. Many civil cases continue to be “low data,” involving relatively limited information. The uneven distribution of the effects of the Information Age data revolution weakens the transsubstantivity norm, not the fact that there is simply more information available. A plaintiff or defendant bent on conducting impositional discovery in 1938 might have been able to force her adversary to search its own haystacks for needles, but they generally would have been pretty small haystacks.

3. Now: Cost and Information in Modern Civil Litigation

By contrast, the modern civil litigation environment is characterized by dynamics that inevitably lead to significant heterogeneously distributed pretrial cost disparity across the federal docket. Moreover, though information costs are still high for the uninitiated, ready access to information in this digital age has, on the margins at least, reduced the need for transsubstantive procedure.

a. New Causes of Action

Since the adoption of the Federal Rules in 1938, lawmakers have added countless new private rights of action to the law. At the federal level, the most notable developments are probably the

106. I say “typically.” There were, of course, exceptions—including antitrust. But those exceptions likely constituted too small a fraction of the federal docket to negate the value of transsubstantive procedure generally.

107. Even the punch cards used for data storage (only by governments and the very largest corporations) at the time were technically hard copy.

108. Chester Carlson invented electrostatic photcopying in 1938, but the first automated photocopier did not appear until 1960. Document duplication techniques that were available (e.g., photostatic copying, carbon-paper copying, typographic transcription) were labor-intensive, expensive, and relatively low-quality. See David Owen, Making Copies, SMITHSONIAN MAG. (Aug. 2004), http://www.smithsonianmag.com/history/making-copies-2242822/?no-ist.

109. Although not as important to the ultimate analysis as cost parity/disparity distribution, it is also worth noting that the civil litigation environment before the adoption of the Federal Rules was characterized by “search costs” substantially higher than those present today. Before the arrival of the Information Age, it was simply more difficult to obtain and analyze relevant information; reformers thus recognized that byzantine complexity was one of the primary weaknesses of the common law regime. See, e.g., FIELD, supra note 33, at 230 (proposing “general conformity in the different cases, so that, while the particular circumstances of each may receive such remedy as they require, the outline of the proceedings in all may be the same, and a knowledge of the course pursued in one may serve as a guide in the others.”). And reformers were critical of common law procedure’s tendency to make litigation “an adversarial sport and not a mechanism for resolution of cases on the merits.” Marcus, supra note 4, at 394; see also POUND, supra note 35, at 405.

It would have been almost impossibly difficult for a layperson to navigate the intricacies of common law or even code pleading; in a very real way, lawyers in the pre-transsubstantivity era commanded high fees as much for their procedural expertise as for their substantive legal acumen. Moreover, it would have been almost impossibly expensive for a layperson to acquire the knowledge necessary to navigate a common law system; the expense associated with this knowledge acquisition is another argument in favor of a transsubstantive approach.

110. Another argument in favor of abandoning strong form transsubstantivity for a default rule approach: dynamism. It is possible that evolving technology will again shift information and cost dynamics heterogeneously across claim types. For example algorithmic search technology may bring some claim types closer to “cost parity” while having little effect on others. Rulemaker flexibility is key to keeping pace with these sorts of changes.
dramatic expansion of civil rights-related claims and a revolutionary turn toward private enforcement of environmental claims. At the state level, the development of strict liability in tort stands out. Moreover, these new causes of action tended to involve transactions disproportionately focused upon the actions and/or motivations of the defendant. As explicit tools of social policy, new causes of action have typically been significantly less focused on the actions of plaintiffs than the paradigm case envisioned by early proponents of transsubstantivity.

For example, the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race. As interpreted by the Supreme Court, Title VII plaintiffs can prove illegal discrimination not only by direct evidence of discrimination but also by indirect evidence of disparate treatment. Under the Supreme Court’s approach to indirect evidence discrimination claims, any plaintiff that demonstrates a prima facie case of discrimination will ultimately have to prove that the legitimate justification proffered by the defendant is pretextual. Pretrial cost burdens are likely to fall more heavily on defendants in such situations, because the plaintiff can force the defendant to search for evidence of pretext in the defendant’s own files under the prevailing liberal discovery rules; the defendant’s reciprocal ability to impose costs upon the plaintiff will be limited by comparison.

Similarly, in “citizen suit” environmental litigation, individual plaintiffs act essentially as private attorneys general; the only inquiry in such cases is whether the defendant violated the environmental law in question; the plaintiffs’ activities are completely irrelevant. The same is true to a lesser extent in strict liability cases. Although the plaintiff must demonstrate injury and will likely retain experts to testify on the issue of defect, the bulk of pretrial proceedings will focus upon information uniquely within the defendant’s possession, custody, or control—design specifications and history, safety evaluations, etc. To the extent new causes of action create a cost dynamic favoring plaintiffs over defendants, they may well call for a new approach to transsubstantivity.

b. Claim Aggregation

A bigger story in modern litigation is the law’s relatively recent embrace of devices that mitigate a different type of cost disparity problem in certain types of litigation. Specifically, claim-aggregating devices like Rule 23(b)(3) allow the owners of small claims to band together, thus making it economically feasible for small-claim plaintiffs to pursue legal remedies against defendants whose misdeeds might otherwise go unpunished because the cost of pursuing such claims would be far too high for any single plaintiff.

113. If not necessarily inappropriately.
116. By demonstrating membership in a protected class, application for job opening, rejection for the position, and that the position remained open thereafter. Id. at 802
117. See id. at 804-05.
118. This article is primarily concerned with private defendants because the paradigm private case seems most likely to produce troubling cost dynamics. Thus, the “citizen suit” environmental litigation in question would typically involve only private defendants. This is not to say that government litigants are irrelevant to my analysis, they just deserve their own analysis. In addition, this should not be read to suggest that citizen suit environmental litigation needs its own enforcement regime. There are too many variables at play to allow such a conclusion after only a cursory analysis.
119. FED. R. CIV. P. 23(b)(3).
Return again to the history of antitrust law enforcement. Once the Federal Rules were amended to allow small-claim class actions in 1966, consumer suits became a viable alternative. Without the ability to aggregate claims, an individual purchaser of price-fixed goods would not likely find suit attractive; she would likely pay many times more in fees and time expended than her expected recovery could possibly justify. But once her claim can be aggregated with other similar claims under Rule 23(b)(3), her suit becomes viable. And indeed, modern antitrust litigation reflects this change. The same is true for other types of claims as well; for example, many shareholder securities fraud claims only became viable with the adoption of Rule 23(b)(3).

c. More Data

For claim types characterized by significant information disparities, the arrival of the digital age has exacerbated the problem a thousand-fold (or more). While the ready availability of terabyte-level storage has undoubtedly provided a prospective plaintiff with myriad additional avenues to pursue in her search for proof of wrongdoing, it has also increased the costs she can impose on the defendant by several orders of magnitude. Moreover, for several post-1938 claim types, growth in the quantum of potentially relevant and discoverable information has not been symmetrical between plaintiffs and defendants. For example, the typical class action securities litigation plaintiff will still possess relatively little discoverable information, as will her class action antitrust counterpart. Even a Title VII plaintiff—whose Facebook posts and email accounts likely will be scrutinized closely by the defendant—likely has not seen her relevant digital file room expand in proportion to her defendant employer’s.

Taken together, unanticipated changes in the distribution of cost asymmetries in the civil litigation environment since 1938 severely undermined the strongest argument in favor of transsubstantive procedure. The strength of this critique is only amplified when we consider similar changes in the distribution of informational and risk preference asymmetries in the modern civil docket.

d. Heterogeneously Distributed Information Asymmetries

The foregoing discussion of heterogeneously distributed cost asymmetries often implies a mirror-image change in the distribution of information asymmetries. Changes in the litigation environment since 1938 have produced substantially greater variance in pretrial cost asymmetries that disproportionately disadvantage defendants in many types of cases. Those same changes have also increased variance in the distribution of informationally asymmetric cases, largely in ways that disadvantage plaintiffs.

As discussed above, the rise of statutory state-of-mind requirements strict liability in tort causes of action, and “private attorneys general” suits have together created a class of justiciable rights largely disconnected from the individual plaintiff’s own actions. In the Rules architects’


121. Fee-shifting statutes do not wholly solve the problem, if for no other reason than they routinely award a “reasonable” attorney’s fee. Reasonableness is typically measured against the recovery obtained, and in the absence of particularly strong social policies and statutory enforcement norms, a risk-averse attorney would be unlikely to take a five-dollar case in the hope of earning a multi-million dollar fee.

122. In stark contrast to the reported cases from before 1938, see supra note 103, an identical Westlaw search without the date limitation suggests that consumer class actions are the order of the day in modern antitrust litigation. Of the first twenty-five hits from the search (all opinions from 2011), eight cases involved actual antitrust claims. Of those eight, six were class actions, and five were traditional consumer class actions. [Update and cite returned cases.]

123. It is at least plausible that for a few types of modern claims, increases in cost asymmetry variance are attributable to new cost asymmetries favoring defendants. For example, the proliferation of professional malpractice claims may well mean that relative to 1938, there are also more cost-asymmetric cases in which the defendant enjoys the advantage.

124. See discussion infra Part III.A.2.a.
paradigm cases,\textsuperscript{125} claim-relevant information was likely relatively evenly distributed among the parties. In the modern environment, those paradigm cases now coexist with a set of new or evolved claim types in which relevant information resides primarily with one party. I assume as I must the primacy of substantive lawmakers’ preferences regarding the suite of legal rights and obligations society wishes to enforce. Given that assumption, it is unjust in Rule 1 terms to apply transsubstantive rules that are perfectly well-suited for the informationally-symmetric 1938 paradigm case (still present in large quantities on civil dockets) when those same transsubstantive rules make it significantly more difficult for parties facing an informationally-asymmetric modern claim to vindicate the rights assigned to them by substantive lawmakers.

I will not fully recapitulate my cost asymmetry arguments here; it is obvious that the same types of dynamics exist with respect to information in, say, a racial discrimination or design defect case. If those cases were all there was on the docket, transsubstantivity would still make sense. But here, too, the variance story carries the day. In the face of wildly disparate patterns of information distribution among modern civil litigation, transsubstantivity stops making sense on traditional grounds.

4. Risk Preference Distribution

A transsubstantive approach also makes sense only to the extent that the distribution of parties’ risk profiles is essentially uniform across all claim types. Risk consists of two components: degree of risk and risk preference.\textsuperscript{126} Both may be asymmetrically and heterogeneously distributed. For example, a consumer class action plaintiff likely faces a relatively low degree of risk relative to the bet-the-company risk faced by the defendant she has sued. But a plaintiff in a garden-variety commercial dispute may face a degree of risk roughly equivalent to or even greater than that of her adversary.

The same variance is likely present with respect to risk preference as well. The class action plaintiffs’ attorneys who are the driving force behind most of the consumer class action docket may be risk neutral or even risk seeking. An individual plaintiff involved in even relatively low stakes litigation may have quite a different risk preference profile. And the same variance is likely present across the range of civil defendants as well.\textsuperscript{127}

Similarly, risk preferences may be asymmetrically distributed across claim types. Litigation in which liability insurance coverage plays a significant role will often involve relative risk-neutral defendants, since the insurance companies’ entire business model is predicated upon risk neutrality. Self-insured defendants may well be more risk averse, especially as the stakes increase. We might expect to see the same variance among plaintiffs as well. Plaintiffs with few resources and significant injuries may be risk-averse, while plaintiffs who are simply “rolling the dice” without much personal stake in the game may be risk-neutral or even risk-seeking.

Because both components of risk are likely asymmetrically distributed across the range of potential civil disputes, transsubstantivity is sensible only if party responses to the civil rules are effectively risk-independent. This almost certainly is not the case. A risk-averse plaintiff (or defendant) will have different reactions to civil rules than her risk-neutral or risk-seeking risk.

\textsuperscript{125} See Resnik, supra note 21, at 508-09 (noting that “paradigm cases” included private monetary disputes as well as equity cases and labor injunctions and receiverships).


\textsuperscript{127} Substance-specific rulemaking is only appropriate to correct risk profile heterogeneity to the extent that heterogeneity is predictable and systemic with reference to claim types. I am not arguing for a bespoke procedural regime that attempts to delve into the minds of individual litigants on a case-by-case basis to ascertain risk tolerance and preference. Some variance from litigant to litigant within claim types is inevitable. It is also simply not amenable to procedural correction, no matter what its distortive effects on litigation outcomes may be.
analogue. If nothing else, risk preference will affect the ex ante expectations of litigating parties—risk-averse litigants will downgrade the expected value of any action and upgrade the expected costs, and risk-seeking litigants will do the opposite. Although risk asymmetry problems occasioned by transsubstantive procedure may be somewhat more difficult to address by way of substance-specific deviation from the transsubstantive default rules, the heterogeneous distribution of risk profiles further undermines any commitment to the transsubstantivity norm.\textsuperscript{128}

The “then and now” narrative I have offered to explain cost distribution and information distribution may not hold with respect to the risk profile distribution story, or at least not in the same way. Economic incentives influencing litigant behavior with respect to cost and information likely would have been a part of the Rules architects’ background experience, if only at an informal and intuitive level. In other words, it probably makes sense to assume that the Rules architects were thinking about cost and information problems when they put the Federal Rules together, even if they never would have used those terms or invoked microeconomic theory to justify their approach.

Risk profile distribution is different. It seems unlikely that Clark, Sunderland and Pound would have thought much at all about differential degrees of risk involved in civil litigation, except at the most basic level (e.g., considerations regarding the extent to which existing Byzantine procedural regimes might have been used by high-resource litigants to disadvantage less wealthy litigants can be recast in “degree of risk” terms). And it seems almost unthinkable that the Rules architects would have considered differential risk preferences among the various classes of litigants and attorneys involved in civil litigation.

That said, there is still some reason to believe that there is a “then and now” component to the risk profile story as well. The evolutionary changes to the civil litigation docket I discuss above likely did scramble the distribution of risk profiles also; moreover, that scrambling likely changed that distribution from “mostly homogeneous” to “demonstrably heterogeneous.” The rise of statutory causes of action that place plaintiffs at little or no personal risk (e.g., environmental citizen suits) and the creation of the small claims class action almost certainly introduced greater variance into the risk profiles of litigating parties and their attorneys. So too with the rise of different methods of litigation finance, attorneys fees statutes,\textsuperscript{129} and the like. Thus, even though it seems unlikely that Rules architects explicitly considered risk profiles in 1938 to the same extent

\textsuperscript{128} See id. The story of cost and information asymmetry distribution since the effective date of the Rules is one of increased asymmetry and increased variance. It is less clear that the distribution of risk profiles has changed as dramatically since 1938. While a narrative supporting increased variance exists, it is equally possible that we have had substantial variance the whole time, and that the Rules architects simply did not consider it in their deliberations. See generally Resnik, supra note 21.

\textsuperscript{129} Attorney’s fees statutes raise interesting questions in the context of this Article. Congress can and does use attorney’s fees provisions to tip the scale when it concludes that the default enforcement regime (American Rule) does not generate sufficient enforcement. But this in turn raises at least three additional important questions mostly beyond the scope of this Article. First, as an empirical matter, do attorney’s fees statutes work and under what conditions? See, e.g., Evans v. Jeff D; Buckhannon Board (majority and dissenting opinions expressing equally uninformed but stridently divergent views on the effectiveness of attorney’s fees statutes under different conditions); see also [literature on American and English Rules noting the quality/quantity effects of each]. Second, should the courts be allowed to imply attorney’s fees provisions or depart from the plain language of existing attorney’s fees statutes to further “correct” perceived imbalances? (See, e.g., [cases in which Supreme Court interprets 42 U.S.C. § 1988 as a one-way statute favoring plaintiffs]. Finally, can/should committee rulemakers diverge from the American Rule on a substance-specific basis—should attorney’s fees be in the toolkit, given the recommendations I make? Regardless of the theoretical answer to that question, the practical answer is almost certainly “no.” It is hard to envision even the most articulate and thoughtful committee rulemakers successfully defending a decision to shift from the American Rule to the English Rule, much less vice-versa.
they likely considered cost and information issues, there is reason to believe that risk profiles are subject to both greater variance and more heterogeneous distribution today than they were at the dawn of the Rules era.

B. A Thumb on the Scale?

Even if high system-wide variance in cost asymmetry, information asymmetry, and risk/risk preference asymmetry profiles suggest that the error costs associated with transsubstantive procedure are likely too high, one might still be able to justify strong-form transsubstantivity by reference to some imported normative baseline. Under this approach, transsubstantivity would be justified despite its error costs because groups disfavored under some exogenous moral theory will incur those error costs predictably and systematically. In other words, one might defend transsubstantive procedure not because it has acceptably low net error costs, but because high error costs are a feature, not a bug.

One hears echoes of this view in much civil procedure scholarship, but few commentators openly embrace such an approach. For example, much of the hue and cry over heightened pleading standards after Twombly and Iqbal implicitly depended upon the baseline belief that continued transsubstantive application of the far more liberal Conley “no set of facts” standard was appropriate because the transsubstantivity-induced error costs of that particular rule fell mostly or exclusively on defendants. This view is dependent upon one or both of two embedded exogenous normative propositions: (1) that, as a class, civil litigation defendants are generally culpable (either with respect to the types of claims the heightened pleading standard tended to filter out, or with respect to their general moral character) and/or (2) that redistribution of resources from the wealthy to the poor (or from the relatively more wealthy to the relatively less wealthy) is justified regardless of legal culpability and regardless of context.

Without commenting on the normative validity of either of those propositions, there are several reasons not to endorse strong-form transsubstantivity on the grounds that it puts a thumb on the “right” side of the scale. First and foremost, the variance present in the system strongly suggests that the error costs associated with transsubstantive procedure as a whole do not have a predictable normative valence. A given single rule might predictably work reasonably well for most cases but tip the scales in favor of plaintiffs in others, but a fully transsubstantive regime is likely to have negative effects on defendants in some cases and plaintiffs in others.

Second, even if transsubstantive procedure predictably puts the thumb on the “right” side of the scale (on either a rule-by-rule basis or in the aggregate), this justification either implicitly assumes that deliberate indulgence of that sort of bias has no long-term effects on the legitimacy of the courts or simply does not care if the norm undermines court legitimacy or not. I cannot embrace either assumption. Admittedly, legitimacy effects are damnably difficult to measure. But a properly modest approach to the practical limits inherent in applying normative theory to the real world recognizes that all sides in current highly salient debates regarding judicial legitimacy are concerned that the system is nearing a breaking point. Justifying transsubstantive procedure on the grounds that “law is politics” hardly seems the correct course of action in the current highly polarized environment.

C. Compared to What: Is Transsubstantivity the Best of Our Bad Options?

Finally, continued commitment to strong-form transsubstantive procedure might be justified despite its inherent error costs if the next best substance-specific alternative engenders higher net social costs than even the current flawed system. Among the three possible conditions supporting

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130. For some values of “right.”

131. See, e.g., Bone, supra note 21, at 890 (discussing the importance of institutional legitimacy in rulemaking and civil dispute resolution processes).
retention of a strong-form transsubstantivity norm, this “compared to what” argument has by far the greatest force.

In fact, I implicitly accept this argument to a certain degree in my own proposal when I recast transsubstantivity as a default rule approach rather than abandon it altogether. This is in large part because a default rule regime does lower process costs relative to a bespoke procedural environment; moreover, consistent default rules likely lower error costs, insofar as extensive substance-specific complexity implies some higher level of adjudicatory errors by reason of that complexity alone. Thus, my implicit acceptance of this argument dictates that certain potential alternatives—for example, custom procedural rules for every aspect of every different type of claim—be taken off the table entirely.

It remains to be determined whether some superior compromise approach exists, or whether the costs inherent in even the best possible deviation from the transsubstantivity norm are simply too high. This in turn requires a brief analysis of the types of new or additional costs we might expect to see as we move away from the norm.

The most obvious problem with more specialized procedure is increased process costs; any alternative approach must not pursue error cost reduction beyond the point where process cost increases offset decreases in adjudicatory errors. Second, an alternative regime must not itself increase error costs. This implies that those performing substance-specific adjustments must have sufficient information and expertise to do the job well; they must also be able to solve problems using the traditional rulemaking toolkit. Finally, a substance-specific alternative must also do the job without incurring systemic legitimacy costs inherent in certain potential approaches. More concretely, an alternative to transsubstantive rulemaking must avoid straying into “substantive” lawmaking, confining its efforts to efficient error cost reductions that do not raise serious first order social policy concerns. 132 My proposal successfully walks this tightrope.

IV. TOWARD A DEFAULT RULE APPROACH TO SUBSTANCE-SPECIFIC RULEMAKING

To justify committee rulemaking departures from the transsubstantivity norm the net benefits must outweigh the costs. Given both the challenges associated with measuring costs and benefits in this context and the separation of powers concerns lurking around every corner, one thing becomes clear: modesty is the best policy.

I thus do not recommend radical departures from an approach that, despite its theoretical and practical problems, has served us reasonably well in many contexts for over seventy-five years. Instead, I suggest embracing a new understanding of transsubstantivity, one in which the transsubstantive procedural regime functions as a default rule regime. The presumptive application of transsubstantive rules would be subject to substance-specific committee rulemaking departures if and only if such departures correct identifiable agency-cost-inducing asymmetries without creating countervailing problems.

A. The Default Rule Presumption

My starting point is a strong but not irrebuttable presumption in favor of transsubstantive rules of procedure. In other words, transsubstantive rules would act as and would serve much the same function as default rules in other areas of law. In my framework, the default rule presumption applies regardless of the institutional context; lawmakers as well as rulemakers should be loath to impose idiosyncratic, conduct-specific enforcement provisions without good reason. In particular,

132. As discussed below, it is likely inevitable that substance-specific deviations from transsubstantive default rules will raise second-order social policy concerns because some political constituencies will be happy with the social order resulting from the distortions occasioned by transsubstantive application of existing procedural rules. While these potential concerns have real implications for the political feasibility of my proposal, they are not in themselves legitimate. As I discuss below, it is reasonable to assume that lawmakers’ compromises include some consideration of the effects of civil litigation upon the ultimate social result. But it is not reasonable to assume generalist lawmakers can identify and incorporate distortions in the incentives engendered by the application of default rules in every context. It is both descriptively and normatively better to assume that lawmakers expect litigants to act as faithful (if adversarial) agents in litigating civil claims. See discussion infra Part IV.
lawmakers should be concerned about their institutional ability to “do good procedure,” while rulemakers should exercise caution given the higher risk of making substantive law when diverging from the transsubstantive norm.

1. Keeping Politics In Its Place

   a. Let the Politicians Politick

   For committee rulemakers, this presumption functions to protect lawmakers’ general primacy in matters relating to the regulation of primary behavior. Or, put another way, committee rulemakers should generally avoid substance-specific rulemaking because it often presents a risk that the rulemakers will cross the line into general policymaking with redistributive effects that cannot be justified by appeal to Rule 1. Because our tripartite system of government generally assigns the general policymaking responsibility to the executive and legislative branches, the default approach should be to let the politicians politick.

   b. Politicians Playing at Procedure?

   Few would today dispute that legislatures can create private enforcement regimes specific to particular statutes. Thus, if a universally applicable presumption in favor of transsubstantive procedural default rules applies to the legislature as well, it applies for other reasons.

   In addition to systemic cost and efficiency-related concerns applicable to any potential promulgator of enforcement rules, there are institutional-competency-related reasons for the legislature to restrain itself from routine creation of substance-specific enforcement provisions. Congress and its state counterparts are generalists, and their areas of expertise lie primarily in crafting “the content of self-applying regulatory arrangements” and “innovations in techniques of control . . . .” Legislators are considerably less experienced when it comes to fine-tuning enforcement regimes for their “self-applying regulatory arrangements” to obtain optimal compliance.

   Thus, a legal process justification for legislative restraint suggests itself. In the classic Hart & Sacks formulation, institutional competence is of primary importance: “What is each of these institutions good for? How can it be made to do its job best? How does, and how should, its working dovetail with the working of the others?”

   And there should be little question that the legislature is not particularly good, especially ex ante, at anticipating the ways in which substance-specific enforcement provisions will affect social results. Many legislators and legislative staffers hold law degrees, of course. But relatively few of the truly relevant legislative actors have significant experience operating in the crucible of the courts. Fewer still have real experience relevant to any particular substance-specific problem. Thus, although the legislature has the authority to reject transsubstantivity, it should think twice before exercising that power.

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133. See Marcus, supra note 4, at 374.
135. See discussion infra Part IV.A.3.
136. See Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 165 (1994) (emphasis added). When Hart & Sacks discuss “innovations in techniques of control” they are not talking about specialized enforcement procedures applicable to private court claims. Rather they are discussing the application of new regulatory techniques to solve primary behavior problems. See generally id. at 844-953.
137. See id. at 158.
B. The Role of Rulemaking: A Modest Proposal

Committee rulemaking should typically be transsubstantive both because transsubstantivity limits improper incursions into the political realm and because a simplified, transsubstantive enforcement framework generally lowers process costs as transsubstantivity proponents suggest. Committee rulemaking should deviate from that norm if and only if (1) the application of the norm works at cross-purposes with the accuracy goals of civil procedure by creating asymmetry-driven agency cost problems with litigants and (2) a substance-specific deviation can correct that error without occasioning additional costs in the opposite direction.

Assuming rulemakers can satisfy both criteria, the committee rulemaking process is institutionally superior to legislative solutions for at least two reasons. First, these matters are peculiarly within the expertise of committee rulemakers. This in turn implies both a better fit and lower costs in the promulgation of substance-specific enforcement provisions, relative to the legislature. Second, compared to the legislative process, the committee rulemaking process is generally lower-cost, even exclusive of expertise, because until Supreme Court review, the committee rulemaking process is more or less entirely concerned with rulemaking. Without the myriad demands for time and attention facing Congress, rulemakers likely will be better able to identify and respond to cost disparity problems than legislators.

1. The Limits of the Default Rule Analogy: Institutional Competence and Litigants as Agents

Reconceptualizing transsubstantive procedure in “contract default rule” terms is, on the whole, a rather effective analogy. It generally comports well with observed experience and helps clarify both the sources of value inherent in a transsubstantivity norm and the limits on that value. But the analogy is not perfect. Negotiating lawmakers differ from parties negotiating commercial contracts in two important ways, and both have implications for the manner in which we should approach potential deviations from transsubstantive default rules.

a. The Limits of Lawmakers’ Institutional Competence.

In the commercial context, we generally assume that the contracting parties themselves (or their lawyers) know the most about both their mutual business goals and the impact of the existing set of contract default rules on the likely outcome of their deal. Accordingly, we generally think that the contracting parties are best suited to negotiate and agree to deviations from those rules. They know their businesses, and they presumably know as well as anyone how application of a default rule might negatively impact the value of their transaction.

The same cannot be said for lawmakers enacting policies against the backdrop of transsubstantive civil enforcement default rules. Generalist legislators, for example, are likely to have a basic understanding of the civil litigation system, but they are neither close enough to the process nor expert enough to predict ex ante whether a particular regulatory program will engender perverse effects if the default rules apply trans substantively. The same is likely true for common law courts of last resort, if to a slightly lesser extent. Neither the U.S. Supreme Court nor most state supreme courts contain a critical mass of long-serving trial judges deeply familiar with current trial-level litigation dynamics. They will likely be somewhat more familiar with the ins

and outs of trial-level litigation practice than legislators, but that may be damning with faint praise.

Given this, should we nonetheless assume that lawmakers know, understand, and incorporate the distortive effects of transsubstantive procedure when they are negotiating over the conduct components of new regulation? The answer is “no” for at least two reasons. The first is obvious: they almost certainly lack the institutional ability to do the work necessary to incorporate those effects into their deals. It is hard enough for true experts to predict those sorts of effects ex ante; there is absolutely no reason to think that legislatures or common law courts of last resort can do better; rather, they would likely do far worse.

Second, even if we assume that lawmakers can perform such calculations, we should not encourage them to do so. The legitimacy of the court system would be diminished substantially if we were to adopt a version of lawmakers’ intent that deliberately encompassed distortionary error costs of skewed civil litigation into their negotiating calculus. Again assuming wildly unrealistic levels of understanding and awareness among lawmakers, it is normatively unattractive to allow them to accomplish their goals by knowingly exploiting error costs in the litigation system. Instead, it would be normatively preferable to force lawmakers to achieve their desired results by strengthening or weakening conduct provisions.

All in all, this implies that the lawmakers tasked with regulating primary behavior are probably not the people best positioned to either identify flaws in the default rule regime or correct those flaws in most cases.

b. Litigants as Agents

Lawmakers also differ from commercial actors in that lawmakers are inherently dependent upon unaffiliated third parties to effectuate their desires. Commercial actors face agency costs, of course, but those costs are typically internal to the organization—an employee might fail to act as expected, for example. By contrast, lawmakers typically depend upon either executive branch enforcers (agency personnel, prosecutors, etc.) or upon private parties to give social effect to their pronouncements. Because this Article focuses upon civil procedure, I will leave aside government enforcement agency costs for now, focusing instead on the implied agent-principal relationship between lawmakers and the private parties litigating civil claims.139

Courts have expressly recognized that private plaintiffs often act as “private attorneys general”; this is nothing more than an express acknowledgment that lawmakers often depend upon private litigation to make good on their expectations. It is thus only a small leap to think of plaintiffs as lawmakers’ agents, especially in the statutory context. But the reality is a bit more complex. Since virtually all law is compromise, it is far more accurate to think of all parties as agents of lawmakers, with the contours and outcomes of those agency relationships defined by the ritualized combat of the adversary process rather than explicit instructions to the participants.

This approach has some interesting implications for transsubstantivity. Followed to its logical end, lawmakers’ reliance upon the civil litigation system to accomplish regulatory goals implies that the procedural regime has a social policy obligation to minimize agency costs. Put another way, we effectively must assume that the civil litigation component of a regulatory scheme is working as intended only when the parties’ incentives point consistently in a single direction: efficient litigation on the merits.

Thus, if a transsubstantive default rule discourages plaintiffs with meritorious claims from filing in the first place, the lawmakers’ intent is frustrated. This is, I suspect, a relatively

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139. The government sometimes engages in civil litigation, of course. Although some of my analysis applies equally to government plaintiffs and defendants, sometimes the dynamics involved in government litigation might differ substantially from those in private litigation over the same subject matter. This further supports the idea that transsubstantive procedure is of only limited value.
noncontroversial assertion. Potentially more controversial is the notion that lawmakers’ intent is equally frustrated when a transsubstantive default rule encourages a non-culpable defendant to settle on a cost-of-defense basis. Given that lawmakers should and likely do expect civil enforcement to work without economic distortions, each outcome should be interpreted as deviating from lawmakers’ negotiated expectations.

Absent potentially ill-advised direct intervention in the procedural realm, substantive lawmakers have no control over their private-litigant-agents. Plaintiffs and defendants cannot be given new instructions—they are advancing broader social goals only as a byproduct of their own self-interested litigation activity. Moreover, it is difficult and costly to correct litigants’ incentives with additional “substantive” law. Worse, they cannot be “fired,” short of eliminating or at least dramatically restricting civil enforcement. Because it is enormously costly to substitute additional public enforcement for private litigation, lawmakers have few good options when it comes to fixing skewed incentives.

2. Protecting the Baseline

Transsubstantivity generally promotes the low-cost, efficient resolution of claims by ensuring that lawyers and litigants do not have to learn discrete sets of rules for different types of litigation. Having a single, generally applicable set of rules both reduces the investments participants must make in acquiring information and reduces the number of socially costly mistakes resulting from greater complexity. But efficiency is only part of the story; the efficiency-related benefits of a transsubstantive approach to procedure may sometimes be outweighed by the accuracy costs imposed by the approach.141

Thus, in order to justify committee rulemaking departures from the transsubstantivity norm, it is a necessary but not a sufficient condition that the application of transsubstantive rules creates a real, systemic risk of inaccurate, unjust results that are unrelated to the merits of litigated claims. More concretely, non-transsubstantive rulemaking requires either (1) the existence of systemic, significant interparty disparity in pretrial costs which encourages opportunistic filings by plaintiffs without meritorious claims or (2) a disparity in the other direction that dissuades plaintiffs from filing valid claims.

3. Avoiding Countervailing Costs

A substance-specific committee rulemaking response would only be acceptable if it addresses the accuracy baseline problem without swinging the pendulum across the accuracy baseline in the other direction.143 This will often be hard to accomplish. Returning to the Rule 23 example, elimination of the small-claim class action would address the accuracy baseline problem by eliminating class action plaintiffs’ attorneys’ ability to leverage their cost advantages. Without the

140. See discussion supra Part II. Substance-specific legislative deviation from procedural default rules is a reality, and it is not always a bad thing. Nonetheless, institutional competence concerns suggest that substantive lawmakers should usually resist the temptation to deviate.

141. See supra notes Error! Bookmark not defined.-Error! Bookmark not defined. and accompanying text.

142. Consider whether the condition should actually require that the accuracy costs outweigh the efficiency benefits. The nature of the tweaks in play suggests not, since (1) the great bulk of procedural rules will remain transsubstantive; and (2) the very nature of the rules likely to be in play is such that the efficiency benefits there are largely illusory (e.g., summary judgment, discovery, and pleading, where litigants will have to do significant independent research to determine how the ostensibly transsubstantive rule applies in specific contexts).

143. Query whether we would accept non-transsubstantive rulemaking that does shift the pendulum to the other side, but at a net distance closer to the accuracy equilibrium point than before. I tentatively think not, because the relevant dynamics only exist in the context of plaintiff cost advantages over defendants, and essentially by definition, the tie goes to the remedial purpose of the law/statute in question (i.e., to the plaintiffs). But it’s not an economic argument; it’s a “limits of knowledge” problem. We probably cannot calibrate any of this effectively enough to know that we’ve generated a net improvement when we push the ball over the line in the opposite direction. Thus, we should focus on solutions that don’t push the ball over, only up to.
Rule 23(b)(3) class action, defendants would be able to impose relatively significant costs upon plaintiffs in an important way. Although the nominal pretrial cost disparity between the plaintiff and defendant would still be enormous and would still favor the plaintiff, the typical defendant could impose enough costs upon the typical plaintiff to swallow up any potential benefit of a frivolous suit.\footnote{144}

But elimination of the Rule 23(b)(3) class action would obviously come with significant countervailing costs.\footnote{145} Moreover, if rulemakers did the deed, these costs would push the pendulum too far in the opposite direction; elimination of the Rule 23(b)(3) class action would tend to lead to less accurate results by discouraging the filing of small-but-valid claims. If we are to allow non-transsubstantive rulemaking, it must correct the pretrial cost-disparity-induced accuracy problem without creating other countervailing problems.\footnote{146}

As in my earlier work on pleading standards,\footnote{147} I do not here offer either a laundry list of specific claim types for which pretrial cost disparity is sufficient to trigger a right to consider substance-specific rulemaking responses. Nor do I offer any general guidance on the quantum of pretrial cost disparity necessary to trigger that right, save that it should be substantial. I leave it to later work to consider those admittedly difficult line-drawing problems.

But a few additional clarifying thoughts are in order. First and foremost, the test I propose does \textit{not} merely boil down to “small claims class actions are bad.” Small-claims class actions do tend to create, along with their obvious social benefits, problematic pretrial cost disparities of the sort I find troubling, but there are other types of claims in which this dynamic may exist. Small claims class actions may offer the most salient and most extreme examples, but they are not the only examples.

Moreover, deviations from the economic, incentive-driven baseline–accurate determination of claims on the merits–are the \textit{only} deviations I can correct under my analysis, and then only to the extent they \textit{can} be corrected without going too far in the opposite direction. Consider, for example a situation in which committee rulemakers obtain indisputable empirical proof that illegal employment discrimination is still rampant in the workforce and that relaxing the pleading standard or allowing pre-suit discovery for such claims would ameliorate the problem. They still could not consider a substance-specific amendment under my framework, unless they could also show inaccurate outcomes; that is, that actual or potential employment discrimination plaintiffs are systematically not obtaining accurate results or are being denied meaningful access to the civil justice system by operation of basic cost economics. And substance-specific action could only be justified if the solution did not swing too far by producing countervailing excess costs for defendants.

\section*{C. Applying the Test}

\subsection*{1. Balancing the Pleading Equation Revisited}

Assuming we can identify categories of agreed-upon claim types that predictably yield problematic economic dynamics, the question remains what to do with them. In earlier work, I engaged one of the moving parts in this story, offering a potential solution to the problem grounded

\footnotetext[144]{Explain the economics of this argument further? Some readers may not find it intuitive.}
\footnotetext[145]{See supra notes 119-122 and accompanying text.}
\footnotetext[146]{For those in search of an example of problematic committee rulemaking, consider Rule 9(b). The adoption of Rule 9(b)’s enhanced, substance-specific “particularity” pleading standard for allegations of “fraud or mistake” likely does not satisfy either prong of my proposed test. See \textit{Fed. R. Civ. P.} 9(b). Viewed as charitably as possible, the Rule reflects a policy judgment by Rules drafters that public policy favored a stricter pleading standard for those types of claims. This is a political judgment, and the fact that Congress allowed the Federal Rules to become law without objection does not inoculate the Rule from a charge of impermissible political impact. \textit{See generally} Stancil, \textit{Balancing, supra} note 5; Jack B. Weinstein, \textit{The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie}, 54 \textit{Brook. L. Rev.} 1 (1988).}
\footnotetext[147]{See Stancil, \textit{Balancing, supra} note 5.}
in an adjustment to the federal civil pleading standard.\textsuperscript{148} A quick comparison of my proposed solution with the Supreme Court's \textit{Twombly} and \textit{Iqbal} opinions addressing the same issue demonstrates the differences between my calibrated approach and the Court's less defensible value-judgment-laden interpretation of Rule 8(a)(2).

In \textit{Twombly} and \textit{Iqbal}, the Court embraced an ostensibly one-size-fits-all interpretation of the federal civil pleading standard, holding that \textit{all} federal civil claims must be “plausible” such that the “non-conclusory” factual allegations they contain, if proven, would tend to make the existence of legally-cognizable wrongdoing “plausible.”\textsuperscript{149} Regardless of the ambiguous effects of the \textit{Twiqbal} interpretation of Rule 8(a)(2), the Court overstepped its authority in issuing this interpretation. Specifically, by adopting a transsubstantive rule tightening the federal pleading standard, the Court undeniably reached a normative political conclusion that there are too many frivolous lawsuits. Moreover, by adopting the stricter pleading standard, it necessarily, if implicitly, embraced a normative judgment that the plaintiff-favoring cost disparity problems inherent in certain claim types cause greater social harm than the defendant-favoring information disparity problems inherent in those same case types. This is a political judgment, and it is difficult to justify the redistributive effect of the Court’s actions—toward defendants and away from plaintiffs—on any plausible theory of Court power.\textsuperscript{150} The same would have been true if committee rulemakers had been the source of the \textit{Twiqbal} rule.\textsuperscript{151}

The fact that \textit{Twiqbal} applies transsubstantively and thus is ostensibly “value-neutral” (as David Marcus defines the term) is of little help.\textsuperscript{152} \textit{Twiqbal}'s transsubstantivity is largely illusory. The vast majority of litigated claims involve deep inquiry into one or more fact-laden transactions between plaintiff and defendant; a “plausibility pleading” standard will rarely be difficult to satisfy for those claims. In fact, traditional notice pleading will almost certainly suffice to meet the purportedly higher standard. \textit{Twiqbal}'s bite is instead felt precisely in the cases where both plaintiffs’ informational vulnerabilities and defendants’ pretrial cost vulnerabilities are most in play. Thus, \textit{Twiqbal} necessarily represents the Court’s value judgment that pretrial cost vulnerabilities are a greater concern.

By contrast, my proposed solution to the pleading problem attempts to move the Rule 1 needle to “neutral” without passing judgment on the relative merits of conservative or liberal arguments about frivolous claims or clandestine misbehavior.\textsuperscript{153} Instead of endorsing an across-the-board, one-size-fits-all pleading standard \textit{a la Twiqbal}, I recommended a two-tiered approach applicable only to high-risk claims. In essence, my solution would put in place a stricter pleading standard for high-risk claims, but the plaintiff could opt out of the strict standard in favor of traditional notice pleading by posting a bond roughly equivalent to the cost disparity at issue. The Plaintiff would forfeit this bond if the court found the claim genuinely frivolous but would retain the bond in all other cases.

There are several theoretical and practical challenges associated with implementation of my solution to the pleading problem, but I need not discuss them further here. My purpose in discussing this earlier work is not to identify a perfect solution to the cost disparity problem, nor do I necessarily think pleading-standard-oriented fixes are particularly attractive solutions for all variants of the cost disparity problem. Rather, I discuss the earlier work simply to illustrate how committee rulemakers might go about adopting a non-transsubstantive solution if they \textit{did} choose...
the pleading standard as the most tractable moving part. The next section briefly addresses how we might go about choosing where and how to act.

2. Identifying the Moving Parts

The pretrial cost disparity problem is a function of several distinct and unique features of American-style civil litigation. Specifically, U.S. civil litigation is characterized by an adversarial approach with limited judicial involvement; U.S. litigation also features generally liberal notice pleading (even after Twiqbal), a largely ineffectual sanctions regime, and incredibly liberal discovery rules (likely the primary source of pretrial litigation costs).\footnote{154} In addition, American litigants typically pay their own legal fees regardless of outcome.\footnote{155} Finally, summary judgment, while not technically disfavored, still remains available only after the non-moving party has had “adequate time for discovery.”\footnote{156} Taken together, these features generate most of the pretrial cost disparity problems. They are thus also the basic moving parts available to rulemakers looking to correct Rule 1 imbalances.

Assume that committee rulemakers have passed the first portion of my test and can appropriately consider a substance-specific response to a particular cost disparity problem. As a general rule, the best course of action is for rulemakers then to consider adjusting the moving part or parts that (1) can best solve the problem with (2) the least collateral damage and (3) the least political opposition. Thus, the appropriate moving part(s) may differ from context to context, depending on the lay of the land.

For some claim types, mandated limitations on pretrial discovery coupled with mandatory active court supervision may be the best option.\footnote{157} This may be especially appropriate for claim types in which the universe of information relevant to one or more key elements of the claim would be small and concentrated in only a handful of sources. Certain types of securities fraud claims, for example, might fit the bill. In those cases, the key question is often whether the defendant \textit{knowingly} misrepresented the state of the company to shareholders; courts likely are capable of managing a focused discovery process for such claims that would substantially decrease pretrial cost disparity while still allowing plaintiffs access to relevant information.\footnote{158}

By contrast, the federal civil pleading standard may be the best target for fixing the cost imbalance inherent in certain types of consumer antitrust claims. Mandating active judicial supervision and restrictive, issue-specific discovery would likely be less than helpful, because the primary issue in such cases is usually the existence of a conspiracy. Because conspiracies can be (and often must be) proved inferentially, it is less likely that even a diligent and knowledgeable judge would be able to contain costs (and thus contain cost disparities) sufficient to mitigate cost disparity concerns.

For still other claim types, it might be best to adjust the Rule 11 sanctions regime, provided the adjustments can be made without over-detering socially beneficial litigation. Courts are understandably reluctant to impose sanctions sufficient “to deter repetition of the conduct or comparable conduct by others similarly situated,”\footnote{159} at least in part because the economic logic would require enormous, politically unpalatable sanctions awards to effectively deter high-expected-value frivolous claims. But a stronger, better-designed sanctions regime, limited in its...
application to lower-expected-value-type claims, might be able to thread the needle in ways that any potential transsubstantive sanctions framework simply could not.

In more general terms, there would appear to be more “balancing” potential and fewer spillover problems with rulemaking that lowers the relevant cost disparity by getting judges more directly involved with problematic claim types. It may be difficult, for example, for a rules amendment to even out the cost dynamics in a medical malpractice claim, but the presence of a defendant-favoring cost dynamic may offer sufficient justification for rulemakers to require a more active judiciary in such cases. This might not affect the plaintiff’s incentives to sue in cases involving huge pretrial cost disparities, but on the margins, it would help to know that the court is required to manage the case actively. If nothing else, this would reduce the opportunity for defendants to engage in cost-imposition sub-games that might turn an otherwise economically viable claim into an abandoned claim.

This is not intended to be a thorough discussion of the ways in which rulemakers can or should adjust the various moving parts of the litigation system to solve substance-specific cost disparity problems. Such a project lies well beyond the scope of this Article. Instead, I offer these preliminary thoughts as a sketch of the ways in which rulemakers might think about these problems.

CONCLUSION

Whatever the theoretical vices of the transsubstantivity norm, it has enormous practical virtues. But the simpler, more efficient litigation system engendered by a transsubstantive approach and the institutional-legitimacy-enhancing effect of a blanket rule against substance-specific rulemaking are sometimes insufficient to justify the approach in light of its costs.

In this Article, I have demonstrated an undesirable implication of transsubstantive procedure: applying the same rules to every claim type sometimes leads to a set of perverse economic incentives at odds with the Federal Rules’ goal of accurate resolution of all claims. For claim types involving significant interparty pretrial cost disparity, transsubstantive rules are as much bane as benefit, since they give plaintiffs powerful tools they can use either to ferret out hidden wrongdoing or to extort an unjust settlement.

By allowing committee rulemakers to address the pretrial cost disparity dynamic on a substance-specific basis, we allow a superior institutional actor to exploit the advantages of greater expertise and lower costs in solving the problem. At the same time, however, substance-specific deviations from the transsubstantive default regime carry substantial risks; accordingly, committee rulemakers should only be allowed to promulgate substance-specific rules if the cost dynamic presents real problems and they can do so without straying across the line dividing the procedural from the political.

Future work should explore the practical challenges associated with my approach; they are, admittedly and unfortunately, substantial. But “substantial” is not the same as “insurmountable,” and the benefits of reframing our analysis of procedure in this way are significant even if there are ultimately few opportunities to deploy my approach. By thinking of the substance-procedure dichotomy in conduct/enforcement terms and by explicitly considering institutional competence in our consideration of solutions to the problem, we draw closer to a realistic understanding of both the tensions inherent in our real-world civil litigation system and how to solve them.