

Trans-Substantivity Beyond Procedure

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David Marcus, [*Trans-Substantivity and the Processes of American Law*](#), 2013 **B.Y.U. L. Rev.** 1191.

Whether the Federal Rules of Civil Procedure should be trans-substantive (as they ostensibly are) has been hotly debated since the Rules' inception. One wonders, after three-quarters of a century, if another article examining this central tenet of the American civil litigation system can make a unique contribution to the literature. David Marcus's recent article, *Trans-Substantivity and the Processes of American Law*, demonstrates that the answer is "yes." Building on his excellent 2010 article, [*The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*](#), Marcus challenges proceduralists to broaden their examination of trans-substantivity beyond the confines of civil procedure law.

This article examines the principle of trans-substantivity in the context of what Marcus calls "process law" —which includes not only procedural law, but administrative and interpretive law as well. Marcus uses the Supreme Court's 2009 decision in [*Ricci v. DeStefano*](#) to illustrate how the Court may draw upon federal civil procedure, federal administrative law, and statutory interpretation doctrine in a single case. He draws upon this example to encourage scholars not to cabin their understanding of the pros and cons of trans-substantivity to a single species of process law. The interrelationship and overlap of these doctrines are significant.

Drawing on history, Marcus explains some of the forces that prompted trans-substantivity in the various types of process law. As it turns out, procedural and administrative doctrine share parallel histories that help to explain the development and endurance of trans-substantivity for both. As the American legal system grew in complexity, the need for litigation and public administration regulation norms increased. Trans-substantivity firmly took root in the 1930s, post-New-Deal, and became even more entrenched following World War II.

Situating trans-substantivity in this broader context, Marcus defends the principle's longevity and future maintenance. His defense grows out of a comparative analysis of institutional competence. In the context of court-made process, trans-substantivity is the norm. Marcus argues that this is appropriate in light of the judicial branch's institutional deficiencies in three areas: legitimacy, competency, and effectiveness (coordination). Trans-substantivity addresses these deficiencies so that courts can appropriately create and administer process law. He defends this normative principle, relying on a number of compelling values. For example, trans-substantivity requires that a certain generality be applied to all cases. This reduces the effect of potential political influence and bias, and enhances access for generalist lawyers.

Marcus does not deify trans-substantivity, however. To his credit, he recognizes that trans-substantivity can be over-inclusive. Admittedly, some rules are nominally trans-substantive, yet their routine application generates different outcomes for different substantive areas of law. The disparate impact of summary judgment procedure on employment discrimination cases is a good example. He also grants that "substance-specific doctrines may ... respond to dysfunctions from which legal processes involving particular antecedent regimes tend to suffer." (P. 1221)

But Marcus cautions decision-makers who consider deviating from the trans-substantivity norm to

undertake a contextualized analysis of the costs and benefits. Building on his analysis of trans-substantivity within “process law,” he offers a method for evaluating when a particular doctrine should adhere to the principle and when it should be exempt. With this broader lens through which to examine trans-substantivity, he creates a general metric for evaluating the legitimacy of judge-created substance-specific process law.

When considering the propriety of court-created substance-specific procedural doctrine, Marcus emphasizes the goals of fidelity and institutional efficacy—although he recognizes other important goals of process law, such as fairness. (P. 1242) Marcus contends these goals help courts overcome legitimacy, competency and coordination limitations. With respect to fidelity, Marcus makes a distinction between judges who depart from the trans-substantive norm to better realize the policy objectives of an antecedent regime and those who depart from the norm to interfere with those objectives. He argues that substance-specific rules motivated by the former rather than the latter are more justifiable. As to institutional efficacy, Marcus contends that process law may depart from the trans-substantive norm to address limitations or flaws in the institutions involved in legal processes. This includes attempts to address inefficiencies, poorly reasoned deliberations, and comparative institutional incompetence, among others. Marcus adeptly grapples with these values of fidelity and institutional efficacy—individually and in combination—to justify departures from the trans-substantive norm.

Marcus’s work continues to offer clarity and context to the examination of trans-substantivity. He challenges proceduralists to stretch our understanding of this enduring principle and the circumstances in which departures are warranted. This article makes an important and thoughtful contribution to the literature.

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