JUDICIAL REJECTION OF TRANSSUBSTANTIVITY: THE FOIA EXAMPLE

Margaret B. Kwoka*

TABLE OF CONTENTS

INTRODUCTION

Professor Stephen Subrin's expansive body of scholarship concerning the history, development, and implementation of the Federal Rules of Civil Procedure has covered vast terrain.[1] From this impressive background, he and Pro-

* Assistant Professor, University of Denver Sturm College of Law. Many thanks to the participants of the symposium at Northeastern University School of Law, entitled *Through a Glass Starkly: Civil Procedure Reassessed*, for their thoughtful feedback on the ideas contained in this essay.

[1] *See, e.g.*, Phyllis Tropper Baumann, Judith Olans Brown & Stephen N. Subrin, *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211 (1992); Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399 (2011); Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27 (1994) [hereinafter Subrin, *Fudge Points*]; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) [hereinafter Subrin, *How Equity Conquered Common Law*]; Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DEN. U. L. REV. 377 (2010) [hereinafter Subrin, *The Limitations of Transsubstantive Procedure*]; Stephen N.

fessor Thomas Main just last year described how we find ourselves in a new "distinct, fourth era" of civil procedure.[2] Unlike the first three eras[3]—namely the import of the English common law/equity system,[4] the Field Code,[5] and the advent of the Federal Rules of Civil Procedure[6]—this fourth era, they opine, is difficult to define because there was no public debate, no formal adoption, and no official implementation.[7] Rather, it is characterized by "back door" efforts to cut back on substantive rights by eroding the procedures used to vindicate them.[8] They provide countless compelling examples, including the Supreme Court's ratcheting up of the pleading standard to the amorphously defined "plausibility pleading" as announced in its decisions in *Twombly* and *Iqbal*,[9] the burdening of ordinary discovery mechanisms,[10] and the increased prominence of summary judgment as a dispute resolution mechanism, particularly after the 1986 so-called summary judgment triology.[11]

Professors Subrin and Main's account of the Fourth Era is compelling not just in documenting a new paradigm of case resolution, but in critiquing the method of its adoption:

> Conspicuously absent from the history of the fourth era of procedure is the policy debate that should occur when lawmakers and the public are presented with a choice between the competing visions of the third and fourth eras. Proce-

---

Subrin, *Thoughts on Misjudging Misjudging*, 7 NEV. L.J. 513 (2007); Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79 (1997).

[2] Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1841 (2014).

[3] They admit that there is some debate about whether the prior three eras were each internally cohesive, but conclude it is appropriate to treat them as such. *Id.* at 1842 n.11.

[4] *Id.* at 1842 (noting that on top of merely the importation of English common law and equity court systems, the U.S. added a layer of federal courts to the mix).

[5] The Field Codes are so named after the New York lawyer David Dudley Field, who campaigned to reform the judicial system in the mid 1800s, leading to the merger of law and equity and the drive to simplify procedure to eliminate hyper-technicality. *See* Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 311, 316–19 (documenting Field's objectives in reforming legal process).

[6] The Federal Rules were adopted in 1938. Subrin & Main, *supra* note 2, at 1843.

[7] *Id.* at 1856–57.

[8] *Id.* at 1869 (arguing the conservative opposition to social safety net programs may have led to various strategies to dismantle them, one of which was an ultimately successful strategy to "undermine the procedural platform upon which substantive rights rely, but to [do] so through the back door—incrementally, through judicial decisions").

[9] *Id.* at 1848; *see also* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

[10] Subrin & Main, *supra* note 2, at 1849–51 (citing the narrowing of the scope of discovery, additional discovery hurdles such as conferences and initial disclosures, and the growth of judicial supervision of discovery, all of which have been adopted as supposed solutions to a problem of excessive discovery that Subrin and Main explain does not in reality exist in most cases).

[11] *Id.* at 1851 & n.70 (collecting evidence of the expanding role of summary judgment, contrary to the intent that it serve as "an exceptional remedy with a very limited role").

> dure is power, of course, so the stakes of choosing one over the other produces different winners and losers. In a debate, the trade-offs between the two visions would be explored, the empirical data gathered, and the interested constituencies consulted. Yet that debate never happened. Indeed, it is all-too-fitting that the third era itself was denied notice and the right to be heard before it was interred by judges.[12]

While the rising conservative political ideology of the federal judiciary is an easy target for blame in this regard,[13] Professors Subrin and Main also document a host of practical factors that fueled the Fourth Era, including the growth in civil caseloads and corresponding need for case management solutions.[14]

This essay explores one aspect of procedural law that might be considered a Fourth Era phenomenon: the departure from the transsubstantive design of the Federal Rules by judicial decisions that create substance-specific procedure operating in their shadow. Notably, like other Fourth Era features, these substance-specific procedural practices are generated outside the relative transparency of legislative processes or even federal civil rulemaking procedures.

Using Freedom of Information Act ("FOIA") litigation as an example of how the Federal Rules allow and even condone shadow procedure, this Article contends that while substance-specific process may be a useful reform in some instances, shadow substance-specific procedures lack legitimacy.[15] In fact, the effect of strict adherence to formal transsubstantivity combined with the judicially created shadow substance-specificity risks driving litigants from the courthouse doors to alternative dispute resolution mechanisms.[16] In this context, the irony Professors Subrin and Main describe in the failure of the Third Era to receive its own public hearing of sorts is doubly salient: this non-transparent shadow procedure affects government transparency itself by hindering the substantive rights of the public to access government information and learn what our government is up to under FOIA.[17]

This article proceeds in three parts. Part I briefly describes the origins of transsubstantive procedural design and details the mechanisms by which procedure has departed from that principle in limited ways. Part II delves deeply into the process by which courts have created substance-specific procedural rules in FOIA litigation. It argues that courts have employed a sort of common

---

[12] *Id.* at 1856–57 (footnote omitted).

[13] *Id.* at 1859, 1869–74 (documenting how the rise in conservative legal movements, including organizations such as the Federalist Society and the various conservative legal foundations fueled a political shift in the federal judiciary).

[14] *Id.* at 1860–68. The growth in federal civil cases is attributed in large part to the creation of brand-new federal statutory rights and the growth of the legal profession. *Id.* at 1859. Case management solutions took various forms, but mostly in the culture shift toward judicial intervention into case negotiations and settlement, as well as increased accountability for individual judges efficiency in moving cases through the federal system. *Id.* at 1861–63.

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

[16] *See infra* Part III.C.

[17] *See infra* Part III.B.

law approach to FOIA litigation processes, departing in significant aspects from the transsubstantive Federal Rules of Civil Procedure. Part III contends that common law substance-specific procedural rules, like the ones used in FOIA litigation, implicate important concerns regarding the legitimacy of the judiciary, the soundness of the processes, and the impetus for litigants to avoid the courthouse altogether.

I. TRANSSUBSTANTIVITY

Procedural rules are transsubstantive when they apply to all cases, regardless of the substance of the claims.[18] That is, the same set of rules will decide tort cases arising out of car accidents as will decide civil rights violations as will decide corporate contract disputes.[19] The modern student of civil procedure will practically take this principle for granted; with limited exceptions, the current procedural regime fully embraces transsubstantive procedural design.[20]

In fact, however, transsubstantivity was viewed as one of the major achievements of the Federal Rules of Civil Procedure.[21] At common law, developed in England and borrowed in the earliest American legal systems, substance and procedure were inseparable.[22] Through a system of writs, each type of action had a process for obtaining a particular type of remedy; the substantive rights and remedies available were dependent on the particular procedure.[23]

The specificity of the writs and technicalities that often thwarted otherwise meritorious claims led to the first prominent set of procedural reforms. In the

---

[18] David Marcus, *The Past, Present, and Future of Trans-substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 376 (2010) [hereinafter Marcus, *Past, Present, and Future*]. Transsubstantivity has also been used to describe a system that applies the same rules to all cases regardless of case size, rather than substantive claim. Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 1, at 378.

[19] *See* FED. R. CIV. P. 1 ("These rules govern the procedure in *all civil actions and proceedings* in the United States district courts . . . ." (emphasis added)).

[20] *See* FED. R. CIV. P. 81(a) (enumerating a limited list of types of proceedings not governed by the federal rules, such as bankruptcy, certain admiralty matters, citizenship proceedings). As discussed below, there are also departures from the transsubstantive nature of the federal rules in particular substantive statutes. *See infra* notes 37–67 and accompanying text.

[21] *See* Marcus, *Past, Present, and Future*, *supra* note 18, at 372; *see also* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975) (referring to the "ongoing trans-substantive achievement of the Federal Rules of Civil Procedure").

[22] Marcus, *Past, Present, and Future*, *supra* note 18, at 382–83.

[23] Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 1, at 379.

> The various forms of action [writs] required the pleader to make quite specific and technical allegations in his complaint that differed depending on the remedy pursued. The processes that followed as a case proceeded varied. The chosen form would determine the nature of the defendant's responsive pleading, the requirements for service of process, whether a court could enter a default judgment, the form of trial, and the means of executing judgments. General procedural rules did not exist . . . .

Marcus, *Past, Present, and Future*, *supra* note 18, at 382 (footnotes omitted).

mid-1800s, David Dudley Field, a New York lawyer, drafted a code of procedure—widely referred to as the Field Code—later adopted in large measure by most American jurisdictions.[24] The Field Code championed the notion of substance as distinct from procedure and embraced the principles of transsubstantivity.[25] Implementation of the code, however, failed to live up to its ideal as courts often imported common law concepts in interpreting the code and in any event adoption of the code remained uneven.[26] Substance specificity accordingly lived on.

The drafters of the Federal Rules were committed to various ideals for their new procedural regime. Central among them were commitments to simplicity and avoidance of the technicality of the common law system.[27] Transsubstantivity was a logical extension of this goal; having only one set of straightforward rules was at the heart of the drafters' strategy to eliminate overly technical litigation processes.[28] In fact, the deliberations of the initial Advisory Committee that drafted the Federal Rules included no debate at all about whether the same rules would apply to all types of cases.[29] Thus, like the Field Code, the Federal Rules were designed as transsubstantive, but beyond the Field Code, the Rules eliminated all vestiges of language that could be interpreted against the backdrop of common law principles.[30] Accordingly, the Federal Rules achieved transsubstantivity not only in theory, but also in practice.

This achievement, while celebrated by many,[31] has certainly not received universal acclaim.[32] Professor Subrin made an early case for limited substance-

---

[24] Marcus, *Past, Present, and Future*, *supra* note 18 at 388, 390. At the turn of the twentieth-century, a version of the Field Code had been adopted in twenty-five states and four territories. *Id.* at 390.

[25] *Id.* at 389–90. In particular, Field believed that transsubstantivity would promote simplicity and thus better implementation of substantive law. *Id.* at 389.

[26] *Id.* at 392–93. Many in the profession believed, for instance that "[t]he necessary link between procedural form and substantive rights . . . rendered trans-substantive procedure impossible." *Id.*

[27] Subrin, *How Equity Conquered Common Law*, *supra* note 1, at 942–43.

[28] Marcus, *Past, Present, and Future*, *supra* note 18, at 394–95.

[29] Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 1, at 383.

[30] Marcus, *Past, Present, and Future*, *supra* note 18, at 394 ("The Federal Rules left substance-specific procedure behind by closing the entry points through which the forms of action had crept back into the code reforms.").

[31] *See, e.g.*, Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-trans-substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2068–69 (1989) (arguing, in favor of transsubstantivity, that the civil rulemaking process is ill-suited to the types of political considerations inherent in any substance-specific rule and that in any case substantive-specific procedural rules are not likely to address the problems they may purport to resolve); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2238 (1989) (extolling the benefits of transsubstantivity in allowing flexibility for the creation of new substantive rights with worry that the procedural system is too rigid to accommodate them); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 779 (1993) (arguing that "a shift away from

specific rules, particularly with respect to discovery.[33] Some substantive areas, he contended, lend themselves to particular rules about the scope of core discovery, and experts and practitioners in those fields tend to know what a typical case requires.[34] He also argued that certain case types lend themselves to particularized rules concerning minimal allegations in the complaint, dependent on the amount of detail the plaintiff would be expected to know in a particular situation.[35] In fact, he declared, "[t]he price of trying to apply the same rules to all cases inevitably leads to general, vague, and flexible rules; such rules provide very little guidance for the bar or bench."[36]

To be sure, perfect adherence to transsubstantive procedure has never been truly achieved. Both Congress and state legislatures have enacted substance-specific procedural rules for certain types of litigation. For instance, Congress enacted the Prison Litigation Reform Act, which, among other things, adjusted pleading practice, processes for dismissing a complaint, and obligations of a defendant to respond.[37] Likewise, Congress heightened the pleading standard for securities litigation in the Private Securities Litigation Reform Act of 1995.[38] Sometimes Congress has acted to liberalize access to civil litigation on a substance-specific basis, too. For instance, several environmental statutes allow intervention as of right to join a government enforcement action for citizens who are subject to a so-called "diligent prosecution bar" to bringing their own suits, a broader intervention provision than the Federal Rules provide.[39]

---

trans-substantive procedure threatens to create losers of both the [claim] specific and general type").

[32] *See, e.g.*, Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 PA. L. REV. 1925, 1940 (1989) ("No one I know is suggesting a return to the forms of action or a wholesale rejection of trans-substantive procedure. Some of us, however, are suggesting that it is time both to face facts, in particular the fact that uniformity and trans-substantivity rhetoric are a sham, and to find out the facts, in particular the facts about discretionary justice."); Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem"*, 46 FLA. L. REV. 57, 78, 84 (1994) (declaring, in a section entitled "Confessions of a Recalcitrant Transubstantivist," that "[t]he creeping growth of transubstantive rules like disclosure, rules that increase the burdens on counsel and clients but are predicted not to achieve offsetting benefits, persuade me to suggest that introducing case-specific discovery guidelines may make civil discovery less complex, less erratic, and easier to administer" (footnote omitted)).

[33] Subrin, *Fudge Points*, *supra* note 1, at 28.

[34] *Id.* at 47, 48. As examples, Professor Subrin cites products liability, antitrust, securities fraud, section 1983, employment discrimination, and malpractice suits. *Id.* at 48.

[35] *Id.* at 48.

[36] *Id.* at 46.

[37] Marcus, *Past, Present, and Future*, *supra* note 18, at 405.

[38] *Id.* at 406.

[39] *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365(b)(1)(B) (2012); Clean Air Act, 42 U.S.C. § 7604(b)(1)(B) (2012); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(i) (2012); *see also* Carl Tobias, *The Transformation of Transsubstantivity*, 49 WASH. & LEE. L. REV. 1501, 1502–03 (1992) (citing these special intervention statutes as an example of the erosion of transsubstantivity). Further modification of the

State legislatures across the country have also had occasion to embrace substance-specificity. Numerous states have enacted specialized procedures for medical malpractice cases, including special filing requirements, heightened pleading standards, and evidentiary rules.[40] These legislative developments have been described as "consistent with a retreat from trans-substantivity as a foundational principle for American civil procedure."[41]

In contrast, however, Professor David Marcus has demonstrated that courts, in exercising their powers to fashion procedural rules, have been remarkably consistent in their adherence to formal transsubstantivity.[42] Notably, the civil rulemaking process has resulted in only a handful of Federal Rules that are even arguably substance-specific,[43] and local rules adopted by federal district courts likewise are overwhelmingly transsubstantive.[44] We are, it seems, a long way from abandoning the principle as a formal matter.

Although the continued dominance of formally transsubstantive rules can be established, there remains the question of whether the rules are applied in a transsubstantive manner in practice. For example, Professor Arthur Miller recently claimed that not only do *Twombly* and *Iqbal* effectuate a change to the pleading standard as enunciated in the Federal Rules, but that with them, "it is quite possible that the Court implicitly abandoned or compromised its devotion to the transsubstantive character of the Rules."[45] It may have done so, he claims, by requiring its new "plausibility" standard to be applied contextually, thereby tolerating "divergent applications" of the pleading rule.[46]

But pleading is not the only area potentially subject to substance-specific applications. One central and inherent weakness of transsubstantive rules is the vast discretion it leaves to judges to fashion a process for each individual

---

rules of intervention in the environmental context are possible. Both industry and environmental groups have voiced objections to the application of Rule 24 to environmental disputes, *see* Courtney R. McVean & Justin R. Pidot, *Environmental Settlements and Administrative Law*, 39 HARV. ENVTL. L. REV. 191, 211–13 (2015), and Congress is considering legislation that would add a provision to the Endangered Species Act that would provide affected parties a "reasonable opportunity to move to intervene" after the filing of a consent decree and further would create a "rebuttable presumption" that the interests of an "affected party . . . would not be represented adequately" by the government. S. 19, 113th Cong. § 2(1) (2013).

[40] Marcus, *Past, Present, and Future*, *supra* note 18, at 407.

[41] *Id.* at 409.

[42] *Id.* at 413.

[43] Professor Marcus reports one count of substance-specific rules within the Federal Rules of Civil Procedure as numbering "only six subsections of the more than ninety Federal Rules." *Id.* For example, Rule 5.2(c) limits remote access to electronic files in social security appeals and immigration cases, and Rule 71.1 details separate procedures for actions to condemn property. *See id.* at 413 n.262 (listing the substance-specific federal rules).

[44] *Id.* at 414 (reporting that in a survey of ten federal districts, only five percent of all local rules "could arguably be deemed substance-specific").

[45] Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 91 (2010).

[46] *Id.* at 91–92.

case.[47] Depending on how this discretion is exercised, it can itself lead to an erosion of transsubstantivity through the collective actions of judges and reliance on precedent.[48]

As Professor Subrin has demonstrated, transsubstantivity and discretion are inherently linked.[49] In perhaps his most well known work, *How Equity Conquered Common Law*, Professor Subrin chronicles the history of the Federal Rules of Civil Procedure and demonstrates that the "underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law."[50] Two of the most important ways that equity principles are enshrined in the Federal Rules are the separation between procedure and substance (and resulting transsubstantive design) and the Rules' expansive judicial discretion.[51] In fact, since cases can differ vastly from one another, a failure to afford discretion to judges could, according to Professor Marcus, "jeopardize[] the success of a trans-substantive code."[52] And other scholars agree: "Necessarily, therefore, trans-substantivism implies a certain amount of discretion."[53] The result, however, was that by design, specifics were left to judges to determine within the broad confines of the Federal Rules.[54]

Discretion, however, does not automatically lead to substance-specific processes. It could simply lead to individualized, ad hoc decision making to achieve the best justice possible in each individual case as envisioned by the drafters of the rules.[55] This type of ad hoc decision making, while it has been criticized as representing a departure from transsubstantivity,[56] does not inher-

---

[47] *See id.* at 92 ("[T]he vast reservoir of judicial discretion in the application of the Federal Rules, coupled with the restraints on appellate review imposed by the final-judgment rule, probably undermines the transsubstantivity principle." (footnote omitted)).

[48] *Id.* (noting that "[v]iewed realistically, the substance behind the catechism of transsubstantivity actually may have been discarded in all but name long before *Twombly* and *Iqbal*").

[49] Subrin, *How Equity Conquered Common Law*, *supra* note 1, at 922.

[50] *Id.*

[51] *Id.* at 923–24. Equity principles are also evidenced in the low pleading threshold, liberal joinder, expansive discovery, flexible remedies, judicial control over juries, and other aspects. *Id.*

[52] Marcus, *Past, Present, and Future*, *supra* note 18, at 396.

[53] Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1747 (1992).

[54] Subrin, *How Equity Conquered Common Law*, *supra* note 1, at 942. "The drafters of the Federal Rules recognized that the system they were creating lacked restraint." *Id.* at 975.

[55] Indeed, as Professor Subrin notes, "It was thought that there was no other way [other than discretion] to avoid problems of technicality inherent in interpreting the Field Code and the Throop Code." *Id.* at 942.

[56] Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1474 (1987) ("Many of the Federal Rules authorize essentially ad hoc decisions and therefore are transsubstantive in only the most trivial sense."); Tidmarsh, *supra* note 53 ("Paradoxically, however, the discretion to fashion case-specific rules also threatens trans-substantvism—not at the level of formal rule, but at the level of rule implementation in individual cases.").

ently lead to the application of substance-specific process.[57] It could simply lead to nonuniformity, or similar cases receiving different treatment.

On the other hand, this discretion can lead to substance-specific process when the formally transsubstantive rules are applied, through the use of discretion, consistently one way in some substantive areas, and another way in other types of cases.[58] Moreover, courts may adopt precedent-setting language in certain cases concerning the proper application of the rules to a class of cases, leading to some formalization of substance specificity.[59] As discussed below, of the various ways that substance-specific rules may arise, judicial common law rules are the hardest to identify and the most structurally problematic. The remainder of this article uses litigation under FOIA to exemplify the troubling implications.

II. SPECIAL FOIA PROCEDURES

FOIA is the public's primary vehicle for obtaining government-held information.[60] Although it does require limited affirmative disclosure or publication of government records,[61] its hallmark provision embraces a request-and-response model of making agencies more transparent, requiring the government to produce records to any person who asks,[62] subject only to nine statutorily listed exemptions.[63] If the government denies a request for information under

---

[57] Marcus, *Past, Present, and Future*, *supra* note 18, at 378.

[58] *See* David Marcus, *Trans-substantivity and the Processes of American Law*, 2013 B.Y.U. L. REV. 1191, 1204.

[59] For example, prior to the Supreme Court weighing in, courts of appeals had fashioned substance-specific pleading standards in Title VII cases in precedential opinions that were widely followed. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002).

[60] *See* 5 U.S.C. § 552(a)(4)(B) (2012). It certainly, however, is not the only mechanism. For instance, the Federal Advisory Committee Act requires certain balance and transparency on advisory committees, *see* 5 U.S.C. Appx. § 5, the Sunshine Act requires certain agency meetings to be open to the public, *see* 5 U.S.C. § 552b, and the Privacy Act requires certain personal records to be made available, *see id.* at § 552a. In addition, informal disclosure—either with official sanction such as planting information in the press, or without official sanction, i.e., leaking—plays a critical role in informing the public about the government's activities. *See generally* David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013) (describing the various ways in which allowing unauthorized information disclosures serves the government's interests, including by fostering the public's belief that it will by some means learn of any important governmental policies).

[61] 5 U.S.C. § 552(a)(1), (2).

[62] *Id.* at § 552(a)(3)(A).

[63] *Id.* at § 552(b)(1)–(9). The exemptions cover records that are properly classified for national security reasons, certain internal records, records exempt from disclosure by other statutory provisions, trade secret and confidential commercial and financial information, records that would be privileged in civil discovery, records that if released would constitute a clearly unwarranted invasion of personal privacy, certain law enforcement records, certain information about financial regulation, and certain information about wells. *Id.*

FOIA, the requester has the right, after exhausting administrative remedies, to challenge that denial by bringing a lawsuit in federal court.[64]

The same Federal Rules of Civil Procedure govern FOIA lawsuits as govern other civil suits.[65] And while FOIA litigation involves a federal agency, it is unlike litigation reviewing most other agency actions, review of which is typically deferential and is confined to the administrative record.[66] Instead, whether records are exempt from mandatory disclosure under FOIA is a question that is determined de novo by the district court on a record created in litigation.[67] Accordingly, it is much more like a host of other statutory rights that can be vindicated in a typical civil suit in federal district court.

While the same procedural rules apply as a formal matter in FOIA litigation as in other civil cases, judges have, through the exercise of discretion, consistently applied different processes in practice. That is, as detailed below, courts exercise discretion categorically and constrain themselves by applying precedent dictating the processes to be applied in FOIA cases. In effect, judges, through individual decisions, have made a system of substance-specific procedural rules for FOIA litigation.

A. Discovery Abolished

Departure from typical litigation process in FOIA cases begins with discovery. Discovery rules are an area of civil procedure often under attack, including for their one-size-fits-all approach, which leads to discovery abuses in some cases.[68] Overzealous use of discovery and the permissiveness of the dis-

---

[64] *Id.* at § 552(a)(4)(B).

[65] *See* FED. R. CIV. P. 1, 81 (describing the applicability of the rules and not listing FOIA actions as exempt from their reach).

[66] For a full discussion of the ways in which judicial review of FOIA determinations differs from typical agency litigation and instead resembles other civil litigation, see Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 196–200 (2013).

[67] 5 U.S.C. § 552(a)(4)(B) provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

[68] *See* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 553 (2010) (surveying the "escalating problems in the U.S. civil discovery system and how they can be remedied"); Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189, 191–92 (1992) (discussing potential preclusionary rather than monetary sanctions for discovery abuse); Frank H. Easterbrook, Comment, *Discovery As Abuse*, 69 B.U. L. REV. 635, 648 (1989) (arguing that discovery abuse is a serious problem worth addressing, and that it is rooted in excessive uncertainty, allocation of costs, and judicial control); Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 1, at 403 (describing a proposal for simple track litigation in federal court with reduced discovery, citing the prob-

covery rules may well create some problems that need to be addressed. In FOIA cases, however, the problem is the opposite: too little discovery. In fact, courts have all but precluded any discovery whatsoever in FOIA litigation.

An example helps illustrate the special discovery procedures dictated by the courts in FOIA cases. Antique aircraft enthusiast Greg Herrick filed a Freedom of Information Act request with the Federal Aviation Administration ("FAA") seeking construction specifications for an antique F-45 aircraft submitted for regulatory purposes by the Fairchild Engine and Airplane Corporation, maker of the F-45.[69] Herrick was himself undertaking to restore an F-45 aircraft he owned, only sixteen of which were ever built and only approximately three of which still existed.[70] When the FAA denied his request, asserting that the records were exempt from FOIA's mandatory disclosure provision because they constituted trade secrets, he exercised his right to sue, challenging the legality of the FAA's refusal to disclose the records.[71]

One aspect of the litigation that ensued is now well known to civil procedure professors and students alike. After Herrick lost his suit in the district court,[72] and his appeal to the Tenth Circuit,[73] Brent Taylor filed a FOIA request with the FAA for the very same records and likewise brought a lawsuit—this time in the D.C. District Court—when he failed to receive a response by the statutory deadline.[74] The D.C. District Court and the D.C. Circuit both concluded that Taylor's lawsuit was barred by claim preclusion, or *res judicata*, on

---

lems with excessive discovery). *But see* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994) (arguing that claims of discovery abuse are empirically unfounded and rule amendments based on the rhetoric are dangerous for the civil justice system).

[69] Herrick v. Garvey, 298 F.3d 1184, 1188 (10th Cir. 2002).

[70] Herrick v. Garvey, 200 F. Supp. 2d 1321, 1323 (D. Wyo. 2000).

[71] *Herrick*, 298 F.3d at 1188.

[72] *Herrick*, 200 F. Supp. 2d at 1322. In particular, the court found that the records included "drawings and blueprints required to manufacture the F-45—all materials clearly used in the production process for this aircraft and which are the end product of innovation and substantial effort." *Id.* at 1328. Applying a common formulation, the court declared that these materials "do come within the scope of Exemption 4" because they meet the

> definition of trade secret as secret, commercially valuable plan, formula, process, or device used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort, with a direct relationship between the trade secret and the productive process.

Id.; *see also* 5 U.S.C. § 552(b)(4) (exempting trade secrets from mandatory disclosure under FOIA).

[73] *Herrick*, 298 F.3d at 1188. The Tenth Circuit rejected Herrick's three arguments on appeal that the records were not actually owned by the corporate successor to Fairchild, that the records were not secret because FAA had been given permission to share them publicly, and that the current corporate objection to their release does not constitute a reinstatement of secret status. *Id.* at 1190.

[74] Taylor v. Sturgell, 553 U.S. 880, 887–88 (2008). A failure to receive a response within the twenty-business day deadline is deemed a constructive denial and administrative exhaustion of remedies, allowing for immediate filing of suit. 5 U.S.C. § 552(a)(6)(A), (a)(6)(C)(i).

the theory that Taylor was "virtually represented" in Herrick's lawsuit because of the two plaintiffs' prior relationship, membership in the same antique aircraft association (of which Taylor was the president), and representation by the same attorney.[75] The Supreme Court took the case, definitively barring the doctrine of virtual representation and holding a strict line on the application of *res judicata*; Taylor's lawsuit could proceed.[76]

While the Supreme Court's opinion was an important one in the area of claim preclusion, another aspect of the litigation—a discovery battle that occurred at the district court level—should also cause proceduralists to pause. Prior to the case's ascent to the high court, it had begun as typical civil litigation. Taylor filed a complaint alleging the FAA had failed to respond to his request,[77] and the parties agreed to stay the litigation while the FAA produced a response.[78] When the FAA arrived at a response denying Taylor access to the records, it then answered the complaint.[79] Taylor then served discovery requests on the FAA.[80]

It was clear from the outset that the crux of the case on the merits would turn on whether the requested records had actually been maintained as confidential, a necessary condition for a trade secret claim. In fact, a 1955 letter from Fairchild authorized the government to loan out the data to anyone for the purpose of making repairs or replacement parts without the need for prior permission, raising serious questions about the confidentiality of these records.[81] Accordingly, Taylor's discovery requests focused on gathering information about whether the records had been maintained confidentially or whether they had been previously disclosed to third parties.[82]

---

[75] Taylor v. Blakey, 490 F.3d 965, 969–71 (D.C. Cir. 2007). The D.C. Circuit declared that:

> For a party to be deemed the "virtual representative" of a party to a later suit making the same claim, the two parties must have the same interests and those interests must have been adequately represented in the first litigation. In addition, there must be a close relationship between the two, or the new party must have participated substantially in the prior litigation or engaged in tactical maneuvering to avoid the preclusive effects of the first decision.

Id. at 978.

[76] *Taylor*, 553 U.S. at 904.

[77] Freedom of Information Act Complaint at 2, para. 7, Taylor v. Blakey, 490 F.3d 965 (D.C. Cir. 2007) (No. 03-00173), 2003 WL 24057317.

[78] Minute Order Granting Joint Motion to Stay, Taylor v. Blakey, 490 F.3d 965 (D.C. Cir. 2007) (No. 03-00173).

[79] Defendant's Answer, Taylor v. Blakey, 490 F.3d 965 (D.C. Cir. 2007) (No. 03-00173), 2003 WL 24057522.

[80] Plaintiff's Motion to Allow Discovery (filed Jan. 5, 2004), Taylor v. Blakey, 490 F.3d 965 (D.C. Cir. 2007) (No. 03-00173) [hereinafter *Taylor* Plaintiff's Discovery Motion].

[81] Herrick v. Garvey, 298 F.3d 1184, 1193 (10th Cir. 2002).

[82] *See* Memorandum in Support of Plaintiff's Motion to Allow Discovery, Taylor v. Blakey, 490 F.3d 965 (D.C. Cir. 2007) (No. 03-00173). For instance, the proposed interrogatories included, with the 1955 letter, "Did this letter authorize public access to and borrowing of the plans and specifications which the Federal Aviation Administration (or its predecessor agency) keeps on file that support the type certificates for certain Fairchild Aircraft, including the F-45 Aircraft?" and "If it is contended that this letter was rescinded, or withdrawn, state the date of such rescission or withdrawal, and identify the document(s) you contend

What happened next took an unusual turn. After requesting that the parties submit a status report on the case, the court announced that Taylor would need to file a motion for leave to take discovery, and that the FAA therefore need not respond to the already-served discovery requests or file a motion for a protective order with respect thereto.[83] The rationale for this order was simply that discovery is not ordinarily permitted in a FOIA case.[84]

Taylor's quest to access basic discovery tools did not encounter merely another procedural hurdle, but what would become a procedural roadblock. Taylor filed the requested motion to allow discovery, documenting the need for discovery to establish whether the records were maintained confidentially or, alternatively, how the government reclaimed confidentiality of records that were in the public domain as a result of the 1955 letter.[85] But the request for discovery was denied as premature, the court declaring that "discovery should only occur *after* the government has moved for summary judgment and submitted its supporting affidavits and memorandum of law."[86]

Taylor's discovery battle did not end there. Shortly after the initial discovery order, the Fairchild Corporation, a corporate successor to the manufacturer of the F-45, intervened as a defendant, and litigation over the claim preclusion question ensued.[87] Once the Supreme Court allowed the case to proceed, however, it was remanded to the district court and again stood in the posture of a case where nothing more than pleadings had been completed.[88] Taylor accord-

---

effect such withdrawal or rescission?" and "Does the Federal Aviation Administration maintain a record(s) of persons who have been given access to the requested information and, if so, how far back that record(s) go. State the names, addresses and dates of access." *Taylor* Plaintiff's Discovery Motion, *supra* note 80, at Exhibit Plaintiff's Interrogatories to Defendant at 3.

[83] Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion to Allow Discovery at 4, Taylor v. Blakey, 490 F.3d 965 (D.C. Cir. 2007) (No. 03-00173), 2003 WL 24057524 ("During a telephone conference with the parties and a law clerk in attendance on or about December 11, 2003, the parties were told that, in the circumstances of this case and because discovery is not ordinarily permitted in a FOIA case, plaintiff would need to file a motion seeking discovery. It was agreed that defendant need not file a motion for a protective order pertaining to discovery, because the Court had not yet ruled that plaintiff was entitled to discovery.").

[84] *Id.*

[85] *Taylor* Plaintiff's Discovery Motion, *supra* note 80.

[86] Memorandum Opinion Denying the Plaintiff's Motion for Discovery at 4, Taylor v. Blakey, 490 F.3d 965 (D.C. Cir. 2007) (No. 03-00173). The court further explained: "A rationale for waiting for the government's motion and supporting documents is that, prior to receiving these materials, the court has insufficient information to determine the applicability of the FOIA exemption at issue." *Id.* at 4–5.

[87] Motion to Intervene, Taylor v. Blakey, 490 F.3d 965 (D.C. Cir. 2007) (No. 03-00173).

[88] *See* Joint Status Report at 1, Taylor v. Blakey, 490 F.3d 965 (D.C. Cir. 2007) (No. 03-00173) (explaining that the effect of the Supreme Court's ruling was to allow the case to move forward with next steps, to wit, any possible discovery and then to summary judgment motions).

ingly renewed his motion to allow discovery.[89] He again advanced arguments about the need for discovery, this time focusing on the need to gather information that would shed light on the truth or falsity of a key affidavit, one that evidenced apparent weakness in the personal knowledge of the affiant, among other problems.[90]

Again, however, Taylor's efforts to access discovery were denied.[91] This time, the court acknowledged Taylor's concern that without discovery, he would be "unable to effectively oppose a potential motion for summary judgment," but concluded that the "appropriate mechanism for the plaintiff to seek such relief, however, is through a Rule 56(f) motion"[92] filed after the government files for summary judgment.[93] "At that point," the court declared, it would have "the opportunity to review the merits of the defendants' exemption claim and [would] be better suited to make a discovery ruling."[94] Accordingly, Taylor had no choice but to proceed to the summary judgment stage of the case having had no opportunity whatsoever to use discovery to gather evidence that may help him win his own motion or defeat that of the government.[95]

The court in Taylor's case did not invent these discovery rules out of thin air. In fact, the court's decision is in keeping with a long history of decisions enumerating special discovery processes—namely, a presumptive discovery ban—in FOIA cases. Courts have boldly declared: "[D]iscovery is an extraordinary procedure in a FOIA action;"[96] "When the courts have permitted discovery in FOIA cases, it is generally limited to the scope of the agency's search;"[97] "Discovery is generally unavailable in FOIA actions;"[98] and "FOIA actions typically do not involve discovery."[99] This per se blanket rule is some-

---

[89] Plaintiff's Motion to Allow Discovery (filed Apr. 28, 2009), Taylor v. Blakey, 490 F.3d 965 (D.C. Cir. 2007) (No. 03-00173).

[90] *Id.* at 4–5. In particular, this motion detailed that the affiant, the Executive Vice President, General Counsel and Corporate Security of the Fairchild Corporation, had twice sought to evade service of a subpoena for a deposition in the previous Herrick case, and that, based on the circumstances, it was unlikely he had personal knowledge about the records in question and that his characterization of the records was conflicted in some aspects with the FAA's characterization. *Id.*

[91] Taylor v. Babbitt, 673 F. Supp. 2d 20 (D.D.C. 2009).

[92] *Id.* Rule 56(f) has been recodified at FED. R. CIV. P. 56(d), and provides that:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.

[93] *Taylor*, 673 F. Supp. at 23.

[94] *Id.*

[95] *See id.*

[96] Thomas v. Dep't of Health and Human Servs., Food and Drug Admin., 587 F. Supp. 2d 114, 115 n.2 (D.D.C. 2008).

[97] El Badrawi v. Dep't of Homeland Sec., 583 F. Supp. 2d 285, 301 (D Conn. 2008).

[98] Wheeler v. CIA, 271 F. Supp. 2d 132, 139 (D.D.C. 2003).

[99] People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 308 (D.D.C. 2007).

times explained as emanating from a presumption that agencies tell the truth: "Affidavits submitted by an agency are 'accorded a presumption of good faith,' accordingly, discovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions are adequate on their face."[100] That is, except in extraordinary circumstances, no testing of the veracity of agency affidavits in FOIA cases is allowed.

Typically, in other civil litigation, courts are extremely hesitant to grant motions for summary judgment before a party has had an adequate opportunity to take discovery.[101] In fact, one treatise describes how courts "have wisely hesitated to grant a motion for summary judgment before the nonmovant has had an adequate opportunity to complete discovery concerning the matters raised in the summary judgment motion."[102] The rules even provide the presumptive deadline for filing such a motion as thirty days after discovery has ended, and list the types of evidence that may be used to support the motion as precisely the types of evidence gleaned in discovery: depositions, documents, electronically stored information, admissions, and interrogatory answers, among others.[103] Accordingly, for proceduralists, it goes nearly without saying that summary judgment is designed to resolve cases in which there are no genuine issues of material fact based upon the evidence obtained during discovery.

Thus, perhaps even more bizarre than FOIA decisions that declare a ban on discovery is another common refrain, echoed in the *Taylor* case, which declares that in FOIA cases discovery is not permitted until *after* summary judgment motions have been made and denied. As the Eleventh Circuit declared: "The plaintiff's early attempt in litigation . . . to take discovery depositions is inappropriate until the government has first had a chance to provide the court with the information necessary to make a decision on the applicable exemptions."[104] In one typical D.C. District Court decision, the court oddly asserted that whether a FOIA case "warrants discovery is a question of fact that can only be determined after the defendants file their dispositive motion and accompanying affidavits."[105] Thus, the rules of discovery are held to operate differently in

---

[100] Carney v. U.S. Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994) (citation omitted) (quoting Safecard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991)).

[101] *See* EDWARD J. BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 7.7 (2014) ("Indeed, some decisions unequivocally assert that an award of summary judgment is premature if the nonmovant has not had a chance to commence discovery.").

[102] *Id.*; *see also* Subrin & Main, *supra* note 2, at 1844 (describing that the rules, by design, gave judges "the authority to enter a summary judgment after the discovery of relevant facts and before a trial only in very limited circumstances").

[103] FED. R. CIV. P. 56(b), (c)(1).

[104] Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993).

[105] Murphy v. FBI, 490 F. Supp. 1134, 1136 (D.D.C. 1980); *see also* Krieger v. Fadely, 199 F.R.D. 10, 14 (D.D.C. 2001) (explaining that discovery in FOIA cases should "ordinarily occur after the government moves for summary judgment"); *cf.* Judicial Watch, Inc. v. U.S. Dep't of Justice, 185 F. Supp. 2d 54, 65 (D.D.C. 2002) (ruling that rather than allow the

FOIA cases than in other civil litigation, and judges expressly rely on their discretion to fashion these substance-specific rules.[106]

That is not to say that discovery in FOIA cases is never allowed, but that unlike other cases, plaintiffs must make motions and convince a court—usually having to demonstrate egregious misconduct by the government—before they are granted the right to use discovery tools. For instance, in *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Veterans Affairs*, the D.C. District Court allowed limited discovery in circumstances where the agency's own declarations suggested it had destroyed relevant records, the agency subsequently admitted some statements in its own declarations were false, and the agency withheld relevant information from the plaintiffs as a result of litigation tactics.[107] In other cases where discovery was allowed, the record already contained strong indications of agency bad faith or the agency failed to produce facially adequate affidavits.[108] The high hurdles for the exceptions prove the general rule, however, that discovery is almost never allowed in a FOIA case, despite its formal availability under the rules.

Not only do courts uniformly come down against discovery in FOIA cases, these special procedural standards have been codified in precedential opinions of circuit courts. Very early in FOIA's history, in *Goland v. CIA*, the D.C. Circuit ruled that where the plaintiff had made no showing of bad faith and the agency affidavit was facially adequate, the district court did not err in denying the plaintiff the opportunity for discovery.[109] The District Court for the District of Columbia, bound by D.C. Circuit precedent, hears a vastly disproportionate number of FOIA cases, amounting to nearly 40 percent of all such cases nationwide.[110] In fact, *Goland* has been cited for its discovery ruling nearly a hundred times.[111] Other circuits have followed suit. The Second Circuit, citing *Goland*, has held that "discovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the

---

FOIA plaintiff discovery after the denial of a summary judgment motion, "when an agency's affidavits or declarations are deficient regarding the adequacy of its search, as they are here, the courts generally will request that the agency supplement its supporting declarations").

[106] For example, in Taylor, the court in denying discovery cited *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980) for the proposition that "courts have ample authority to set limitations to protect agencies from oppressive discovery." Taylor v. Babbitt, 673 F. Supp. 2d 20, 23 (D.D.C. 2009).

[107] Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't Veterans Affairs, 828 F. Supp. 2d 325 (D.D.C. 2011).

[108] *See, e.g.*, Landmark Legal Foundation v. EPA, 959 F. Supp. 2d 175, 184 (D.D.C. 2013) (citing a failure to search relevant records and evidence the agency purposefully attempted to "skirt disclosure under the FOIA"); Long v. U.S. Dep't of Justice, 10 F. Supp. 2d 205, 210 (N.D.N.Y. 1998) (granting discovery because the affidavits did not reasonably describe the search).

[109] Goland v. CIA, 607 F.2d 339, 355 (D.C. Cir. 1978).

[110] Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217, 261 (2011).

[111] *Goland*, 607 F.2d at 339 at West Headnotes 9, 11.

agency's submissions are adequate on their face."[112] The Ninth Circuit has declared that while normally discovery is available to any party, in FOIA cases "courts may allow the government to move for summary judgment before the plaintiff conducts discovery."[113] The Eleventh Circuit has stated that FOIA plaintiffs' attempts to take discovery are "inappropriate until the government has first had a chance to provide the court with the information necessary to make a decision on the applicable exemptions."[114] These precedent-setting rulings do not merely apply the individualized exercise of discretion to particular FOIA cases, but instead announce deviations from the Federal Rules that apply in a single substantive area.

B. Trials Denied

Substance specificity in FOIA procedure does not end with discovery, but also permeates the method of arriving at ultimate decisions in FOIA cases through unique applications of summary judgment. The formal summary judgment standard prescribes, of course, that judgment should only to be entered when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[115] Facts are material if they might affect the outcome of the case,[116] and disputes as to those facts are genuine if a reasonable fact finder could find in favor of either party.[117] Any genuine disputes of material fact would preclude judgment being entered for either party and would require, instead, a trial.

To be sure, the charge has been made as a general matter that summary judgment is too often used to resolve fact disputes that could affect the outcome, and that the power of summary judgment may be invading the province of the trier of fact.[118] These critiques of the use of summary judgment generally

---

[112] Carney v. U.S. Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994).
[113] Lane v. Dep't of Interior, 523 F.3d 1128, 1134 (9th Cir. 2008).
[114] Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993).
[115] FED. R. CIV. P. 56(a).
[116] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 252 (1986).
[117] *Id.* at 247–48, 252 (requiring more than the "mere existence of a scintilla of evidence" on both sides).
[118] *See, e.g.*, Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 203 (1993) (contending that summary judgment is being inappropriately used to resolve questions of fact in civil rights cases to the detriment of plaintiffs); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 982 (2003) (expressing "concern that courts have extended the use of summary judgment and the motion to dismiss to resolve disputes that are better left to trial and the jury"); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 190 (1988) (arguing that the 1986 so-called summary judgment trilogy inappropriately increases the power of the judge over the jury); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1945 (1998) ("In sixty years summary judgment has grown from a wobbly infant to an

to resolve civil lawsuits are important to potential reforms to our procedural system as a whole.[119]

As to FOIA cases, however, the problem of courts resolving material fact disputes on summary judgment motions has reached a different level, both in degree and in kind. First, as a matter of degree, empirical evidence suggests that FOIA cases go to trial significantly less frequently than other civil cases.[120] In FOIA litigation, over a thirty-year period, only 0.71 percent of all cases were resolved by trial.[121] By contrast, as to other civil cases over the same time period, trials resolved 3.44 percent of lawsuits.[122] In fact, not only are the numbers low, they have been falling precipitously; it is fair to say that in the last ten years, there have been essentially no FOIA trials.[123] In place of trials, the numbers also strongly suggest that the cases that otherwise would go to trial are overwhelmingly being resolved by summary judgment.[124]

Second, the absence of FOIA trials is not surprising in light of the special procedural rules courts have adopted for using summary judgment in FOIA cases. Courts are quick to explain that summary judgment is not simply one way of deciding FOIA cases, but rather is the preferred or presumptively appropriate way to decide them. They describe the use of summary judgment in FOIA cases by saying: "FOIA cases are generally and most appropriately resolved on motions for summary judgment;"[125] "Summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved;"[126] "FOIA actions

---

aggressive gatekeeper to access to trial—by jury or otherwise"). It has even been argued that summary judgment is a wholly unconstitutional violation of the Seventh Amendment right to trial by jury. Suja A. Thomas, Essay, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007).

[119] *See, e.g.*, Subrin & Main, *supra* note 2, at 1852–53 (describing how a shift in summary judgment practice that increases its prevalence over trials is an element of a new era of civil procedure that should be judged as a whole).

[120] Kwoka, *supra* note 110, at 260.

[121] *Id.*

[122] *Id.*

[123] *Id.* at 257–58 & n.222. There is one notable exception, which is a FOIA case concerning trade secret information in which the business submitter intervened as a defendant and the case was resolved via a true bench trial. *See* In Def. of Animals v. U.S. Dep't of Agric., 656 F. Supp. 2d 68, 70 (D.D.C. 2009).

[124] Kwoka, *supra* note 110, at 260. Among other civil cases, resolution by motion occurred 12.08 percent of the time, while in FOIA cases, motions resolutions accounted for 38.09 percent of all cases. *Id.* While the motions resolutions numbers reported include more than merely summary judgment motions because of the data collection methods by the Federal Judicial Center, for FOIA cases summary judgment almost certainly dominates because agencies must submit affidavits to support claims of exemption and are unable to move for a judgment on the pleadings or to dismiss. *See* Vaughn v. Rosen, 484 F.2d 820, 826–28 (D.C. Cir. 1973) (explaining the requirements for an affidavit submitted by the agency in a FOIA case).

[125] Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency, 811 F. Supp. 2d 713, 732 (S.D.N.Y. 2011).

[126] L.A. Times Commc'ns, LLC v. Dep't of the Army, 442 F. Supp. 2d 880, 893 (C.D. Cal. 2006).

are typically and appropriately resolved on summary judgment;"[127] and "Summary judgment is the preferred procedural vehicle for resolving FOIA disputes."[128]

The implication of resolving nearly all FOIA cases on summary judgment motions is that any factual disputes that do exist and that would or could affect the outcome of the case will be resolved on summary judgment motions, not through the full trial process involving live witness testimony, cross examination, and oral arguments.[129] While courts seem to think that this result is appropriate because FOIA cases hardly ever involve factual disputes,[130] the reality is that whether exemptions apply to certain records often involves a factual inquiry.[131] For example, whether records were prepared to aid in making a decision or to defend a decision already made might not be apparent from the face of the record, but may make all the difference as to whether records fall under the deliberative process privilege.[132] Or, as in Taylor's case, whether records have been disclosed previously may wholly change the outcome on a claim of commercial confidentiality.[133]

As with discovery rules, in fashioning special summary judgment rules for FOIA cases, courts are not merely applying the summary judgment standard on an individual basis and tending to find that it resolves most cases. Rather, district courts are following circuit precedent directing them to use summary judgment to resolve essentially all FOIA disputes, regardless of their nature. For example, the Eleventh Circuit minced no words in declaring that, "[g]enerally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified."[134] The D.C. Circuit (again, perhaps the most influential court in the area of FOIA law) has explained that "we have created exceptions to the normal summary judgment review processes applicable to litigation under [FOIA]," and that at the summary

---

[127] Landmark Legal Foundation v. EPA, 959 F. Supp. 2d 175, 180 (D.D.C. 2013).

[128] Adamowicz v. IRS, 552 F. Supp. 2d 355, 360 (S.D.N.Y. 2008).

[129] I have explained elsewhere the probable detriment to FOIA plaintiffs that results from this lack of procedural opportunities. Kwoka, *supra* note 110, at 264–76.

[130] *See, e.g.*, Shannahan v. IRS, 637 F. Supp. 2d 902, 912 (W.D. Wash. 2009) ("The usual summary judgment standard does not extend to FOIA cases because the facts are rarely in dispute and courts generally need not resolve whether there is a genuine issue of material fact.").

[131] For a full accounting of the most common types of factual inquiries in FOIA cases, see Kwoka, *supra* note 110, at 227–44.

[132] Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 867 (D.C. Cir. 1980) (requiring that records be both "predecisional" and "deliberative" to be exempt on the basis of the deliberative process privilege); *see also* 5 U.S.C. § 552(b)(5) (2012) (exempting from FOIA's mandatory disclosure provisions any records that would ordinarily be privileged from discovery in civil litigation against the agency).

[133] *See* Herrick v. Garvey, 298 F.3d 1184, 1193 (10th Cir. 2002) ("In response the government argues that only actual public disclosure of the documents would eliminate their 'secret' nature.").

[134] Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993).

judgment stage, "[w]hen the district court reviews an agency's [affidavit] to verify the validity of each claimed exemption, its determination resembles a fact-finding process."[135]

Perhaps even more strikingly, however, is that five circuits have rejected in the FOIA context the otherwise applicable de novo standard of appellate review for district court's summary judgment orders; instead, they acknowledge the fact-finding inherent in the district courts' summary judgment decisions by reviewing them for clear error.[136] In essence, courts have, through precedential decisions, effectively revised the Federal Rule governing summary judgment in the FOIA context to allow district courts to resolve factual disputes presented in summary judgment motions.

The anomalies of summary judgment procedures in FOIA cases do not end there. Take, for example, the case of Eduardo Benavides. Benavides, a federal prisoner, filed FOIA requests with the Bureau of Prisons ("BOP") for recordings of telephone conversations between himself and his attorney that occurred while he was incarcerated.[137] BOP denied his request, claiming, among other things, that the records fell within FOIA's law enforcement exemption to mandatory disclosure, and he filed a lawsuit challenging that claim.[138] The government promptly moved for summary judgment,[139] and Benavides cross-moved for summary judgment in his favor.[140]

A central dispute in the case was the application of the law enforcement exemption.[141] In FOIA litigation, the burden is on the government to show that an exemption applies.[142] As to a law enforcement exemption claim, one essen-

---

[135] Summers v. Dep't of Justice, 140 F.3d 1077, 1080 (D.C. Cir. 1998).

[136] The Third, Fourth, Ninth, and Eleventh articulate the standard of review for summary judgment decisions in FOIA cases as applying a de novo standard to legal conclusions and clear error to factual findings. McDonnell v. United States, 4 F.3d 1227, 1242 (3d Cir. 1993); Hunton & Williams v. U.S. Dep't of Justice, 590 F.3d 272, 275–76 (4th Cir. 2010); Lane v. Dep't of the Interior, 523 F.3d 1128, 1135 (9th Cir. 2008); News-Press v. U.S. Dep't of Homeland Sec., 489 F.3d 1173, 1189 (11th Cir. 2007). The Seventh Circuit articulates its standard of review as first determining if there is an adequate factual basis for the district court's decision and then reviewing the decision as a whole for clear error. Enviro Tech Int'l, Inc. v. EPA, 371 F.3d 370, 373–74 (7th Cir. 2004).

[137] Benavides v. Bureau of Prisons, 774 F. Supp. 2d 141, 143 (D.D.C. 2011).

[138] 5 U.S.C. § 552(b)(7) (2012). Specifically, BOP invoked exemption 7(C), which covers records that are compiled for law enforcement purposes and the release of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Defendant's Memorandum of Points and Authorities in Support of the Motion for Summary Judgment at 10, *Benavides*, 774 F. Supp. 2d 141 (No. 09-2026) [hereinafter *Benavides* Summary Judgment Memo]. The personal privacy concerns the BOP invoked were those of Benavides's attorney, the other party on the telephone calls. *Id.* at 12.

[139] *Benavides* Summary Judgment Memo, *supra* note 138.

[140] Plaintiff's Memorandum of Points and Authorities in Support of His Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment, *Benavides*, 774 F. Supp. 2d 141 (No. 09-2026).

[141] *See id.* at 5–10.

[142] 5 U.S.C. § 552(a)(4).

tial element is a demonstration that records are compiled "for law enforcement purposes,"[143] which requires the government to "identify a particular individual or incident as the object of the investigation and specify the connection of the individual or incident to a potential violation of law or security risk."[144] To meet its burden to demonstrate that there is no genuine issue of material fact that the records in question were compiled for law enforcement purposes, BOP submitted an affidavit that averred, in relevant part, that BOP has various enforcement powers and is "tasked with the law enforcement mission of protecting inmates, staff, and the community."[145] It further averred that recordings of telephone conversations are made "for the purpose of monitoring inmate telephone activity and conducting investigations regarding violations of illegal activites or suspected illegal activities being conducted, coordinated or directed from within a BOP facility."[146] However, as the district court later found, the affidavit "neither identifie[d] a particular individual or incident subject to an investigation nor connect[ed] a particular individual or incident to a potential violation of law."[147] That is, the court concluded that the government offered no evidence whatsoever that could allow a reasonable fact-finder to find in its favor on an essential element of its claim.

Were the case decided according to typical Rule 56 standards, the failure of the party with the burden of proof to produce any evidence on an essential element of a claim at the summary judgment stage would be fatal, resulting in judgment entered for the opposing party.[148] Rather than grant Benavides's motion, however, the court denied both parties' motions for summary judgment as to the law enforcement exemption claim, specifying that only the BOP's motion was denied without prejudice to refile.[149] That is, the party who bore the burden of proof and failed to produce any evidence to meet that burden received more favorable treatment by being allowed to rewrite its affidavits and try for summary judgment again. In essence, if the government fails to come up with sufficient evidence on its first try in a FOIA case, it will be allowed what I have termed elsewhere a "do-over."[150]

Admittedly, the precedential appellate case law on this question is somewhat more mixed than is the case with other special FOIA procedures. At one

---

[143] 5 U.S.C. § 552(b)(7).

[144] Benavides v. Bureau of Prisons, 774 F. Supp. 2d 141, 145 (D.D.C. 2011) (quoting Davin v. U.S. Dep't of Justice, 60 F.3d 1043, 1056 (3d Cir. 1995)).

[145] Declaration of Larry Collins, Attachment to Defendant's Memorandum of Points and Authorities in Support of the Motion for Summary Judgment, at para. 17, *Benavides*, 774 F. Supp. 2d 141 (No. 09-2026).

[146] *Id.* at para. 15.

[147] *Benavides*, 774 F. Supp. 2d at 147.

[148] *See* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

[149] *Benavides*, 774 F. Supp. 2d at 147.

[150] Kwoka, *supra* note 66, at 231–33.

point, the D.C. Circuit went out of its way to affirm the decision of the district court to order immediate release of records as to which the government had produced an inadequate affidavit supporting exemption, rather than allowing the government a second try.[151] At best, however, the circuits have given highly mixed signals. The D.C. Circuit has also held that "in camera review may be particularly appropriate when . . . the agency affidavits are insufficiently detailed," suggesting that entry of judgment against the government is hardly the first recourse in such a situation.[152] The First Circuit has admitted having "cautioned against ordering immediate disclosure of documents based on an agency's admittedly flawed affidavit," but has also, in another case, upheld the denial of a second chance to the agency.[153] In another circumstance, the Third Circuit has squarely held that it is error not to consider revised affidavits when the initial ones fail.[154] While the circuit courts may be sending somewhat mixed signals, the intonation of the decisions suggests that the safest recourse is to permit the government another chance, and the district courts are consistently allowing do-overs in FOIA cases.[155]

Taken together, summary judgment procedures in FOIA cases depart drastically from summary judgment in other substantive areas of the law. District courts follow circuit precedent requiring the presumptive use of summary judgment—not the presumptive use of trial—to resolve all FOIA disputes. Moreover, courts routinely condone and encourage district courts to allow the government, the party with the burden of proof, multiple attempts at producing sufficient evidence to survive, or even win, a summary judgment motion. Summary judgment has thus become a substance-specific practice for FOIA litigation.

III. COSTS TO THE JUDICIARY

As the previous part demonstrated, courts have created through a common law type process a special set of procedures used to decide cases brought under FOIA. These processes deviate not only from the processes used in other cases, but from the codified Federal Rules of Civil Procedure themselves. Debates over the merits of substance-specificity have abounded in the literature.[156] And certainly, some substance-specific procedural rules may be sound policy in particular instances.[157]

---

[151] Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 861 (D.C. Cir. 1980).

[152] Quiñon v. FBI, 86 F.3d 1222, 1228 (D.C. Cir. 1996).

[153] State of Maine v. U.S. Dep't of Interior, 298 F.3d 60, 73 (1st Cir. 2002) (discussing Irons v. Bell, 596 F.2d 468 (1st Cir. 1979)).

[154] Coastal States Gas Corp v. Dep't of Energy, 644 F.2d 969, 980 (3d Cir. 1981).

[155] Kwoka, *supra* note 66, at 233 & n.307.

[156] For examples of arguments against substance-specificity, see note 32 (citing sources).

[157] *See, e.g.*, Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 831–32 (1986) ("I hope that my analysis of problems created by the application of trans-substantive preclusion

FOIA litigation may even be ripe for substance-specific processes (albeit, likely not those described above).[158] That said, because of the way that these procedural rules for FOIA have been created—eschewing the legislative or rulemaking process—they create significant costs, which can be grouped into three categories. First, the creation of substance-specific rules in this fashion undermines the legitimacy of the judiciary. Second, the process used results in rules themselves that are substantively flawed and fail to advance Congress's goals in enacting FOIA. And third, the perception on both sides—from the judiciary and the litigants—that the litigation process is not working to resolve FOIA disputes has led to the beginning stages of a movement to relocate FOIA dispute resolution to alternative non-judicial venues. All three of these downsides implicate institutional concerns of the third branch.

A. Loss of Legitimacy

So-called "neutrality" of procedural rules has been lauded as a virtue to be embraced.[159] The word neutrality, however, must be carefully defined in this context. Neutrality as to substantive outcomes, such that the procedural rules are not favoring one side or the other of particular substantive disputes, while never perfect, is typically the type of neutrality sought with respect to process.[160] Procedural rules surely embody other types of value judgments—about the value of certain process to truth seeking, justice, efficiency, acceptability, etc.—but not the same sorts of value judgments policymakers engage in when determining substantive rights and remedies.[161]

The reform movement resulting in the Federal Rules embraced the idea that neutrality was a central goal. For instance, rulemaking authority was placed principally with the Supreme Court, an institution seen as least susceptible to political pressure.[162] In addition, the Rules Enabling Act dictated neutral-

---

rules will contribute to the reconsideration of some of the basic [transsubstantivity] assumptions of modern procedural systems."); Subrin, *Fudge Points*, *supra* note 1, at 28 (making a case for "selective substance-specific procedure," particularly with regards to discovery).

[158] I have described the costs of the current version of specialized procedures in FOIA elsewhere. *See* Margaret B. Kwoka, *Deference*, Chenery, *and FOIA*, 73 MD. L. REV. 1060 (2014) (documenting a litigation paradox wherein deference, including through special processes, is given agency decisions, but agencies are not constrained by another key administrative law principle, the *Chenery* principle, requiring them to defend their actions on the rationale stated at the time the decision was made); Kwoka, *supra* note 66, at 200 (explaining how these and other specialized procedures contribute to deference to government claims of secrecy and undermine transparency laws).

[159] *See* Carrington, *supra* note 31, at 2074.

[160] *See id.* ("Neutrality with respect to the interests of particular groups of disputants is an obvious objective, indeed perhaps a paramount value, of any enterprise engaged in dispute resolution.").

[161] *See* Marcus, *Past, Present, and Future*, *supra* note 18, at 380 ("If value is defined as a choice of substantive policy, a law is value-neutral if it does not directly regulate conduct 'at the stage of primary private activity.").

[162] Carrington, *supra* note 31, at 2075.

ity, mandating that the rules not "abridge, enlarge or modify any substantive right."[163] And, importantly, the Rules were expressly designed to be transsubstantive, applying equally to "all civil actions and proceedings in the United States district courts."[164]

Transsubstantivity itself is a principle of neutrality that deserves special attention. When one rule must govern all cases, the likelihood that a particular substantive goal motivates the design of the rule is diminished; after all, if a rulemaker disfavors a particular type of claim, making a rule that would hinder its advancement would also hinder the advancement of all other types of claims, including the ones that the rulemaker may favor.[165] As Professor Subrin has declared, "we now know that once one starts debating which procedures are best for which types of cases, it becomes obvious that political decisions are being made."[166]

The fact that substance-specific rules may reflect underlying policy choices does not necessarily make such rules inadvisable, but it does have important implications about who should have the power to engage in that type of rulemaking and how those rules should be made.[167] Even advocates for substance specificity admit that assigning responsibility for "meshing procedure and substance" to a particular actor is difficult.[168]

Professor Marcus has persuasively demonstrated that "trans-substantivity strengthened the case for the neutrality of procedural reform, and thus the legitimacy of doctrinal development outside political arenas."[169] That is, confining courts to transsubstantive rulemaking guards against abuse of the rulemaking power they have been granted, because a transsubstantive rule is less likely to be motivated by particular political goals.[170] As Professor Marcus succinctly says, typically, "substance-specific rules must come from the political process," because courts can legitimately generate only transsubstantive rules.[171] Thus, even the Supreme Court-supervised federal rulemaking process would suffer a legitimacy deficit if it ventured far into the territory of substance specificity.[172]

---

[163] 28 U.S.C. § 2072(b) (2012).

[164] FED. R. CIV. P. 1.

[165] *See* Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 1, at 384.

[166] *Id.*

[167] *Id.* (noting that the initial civil rules Advisory Committee "certainly did not want to raise congressional ire by overtly stepping into substantive areas of law—this was the province of elected officials").

[168] Subrin, *Fudge Points*, *supra* note 1, at 54 ("There is the remaining issue of under whose auspices such a meshing of process and substance should take place. This is my place for fudging.").

[169] Marcus, *Trans-substantivity and the Processes of American Law*, *supra* note 58, at 1210–11.

[170] *See id.*

[171] Marcus, *Past, Present, and Future*, *supra* note 18, at 416.

[172] Marcus, *Trans-substantivity and the Processes of American Law*, *supra* note 58, at 1220, 1229. Marcus also dubs trans-substantivity a sort of "second best" by constraining process law where circumstances prevent the law maker from making legitimate choices. *Id.* at 1236.

Individual courts engaging in a sort of common law process for creating substance-specific rules, as is the case in FOIA litigation, stand on even worse footing. Even though there is unquestionably federal power to make federal procedural rules, that responsibility primarily lies with Congress, except when Congress chooses to delegate it to the judiciary.[173] And federal courts are, of course, not empowered as a general matter to engage in making common law.[174] Substance-specific procedural rules walk a fine line, and may often cross that fine line, into substantive law making. This is particularly true where the substance-specific rules made through a common law process conflict with the federal rules Congress has adopted through the rulemaking process.[175]

Other common law departures from the federal rules have been similarly criticized as lacking legitimacy. For example, even prior to *Twombly* and *Iqbal*, courts regularly imposed a sort of heightened pleading standard in civil rights cases, despite the fact that under the Federal Rules, notice pleading applies across substantive areas.[176] In another instance, courts routinely refused to certify class action lawsuits brought under the Truth in Lending Act even though they met the Rule 23 standards for certification, effectively writing an "exception" into the rule.[177] In each instance, these departures provoked criticism of the courts for overstepping their role.

The concern about judge-made, substance-specific procedure is not merely theoretical: social science literature demonstrates that the public's perception of the legitimacy of legal actors hinges largely on whether the process is apparently fair.[178] In determining if a process appears fair, litigants and the public hold as a central factor the evident neutrality of the decision maker.[179] Whatever the merits of substance-specific process in some areas—or even in FOIA litigation

---

[173] *See* Hanna v. Plumer, 380 U.S. 460, 472 (1965) ("For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts."). There certainly remains some federal common law making power with respect to procedure as to which Congress's ability to override is a matter of some debate. *See* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 833–34 (2008). Here, however, substance-specific procedural rules not only flirt with the substance/procedure divide, but also collide with mandates in the duly enacted federal rules. And in any event, Congress currently exercises vast control over federal court procedure. *Id.* at 887.

[174] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law.").

[175] *See* Barrett, *supra* note 173, at 887 (noting agreement that Congress has used the rulemaking power to largely control the procedures of the federal courts).

[176] *See generally* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002) (discussing how federal courts have welcomed heightened pleading standards in certain situations).

[177] Marcus, *Trans-substantivity and the Processes of American Law*, *supra* note 58, at 1244–45.

[178] For a discussion of how the social science literature on procedural justice applies to FOIA litigation, see Margaret B. Kwoka, *Leaking and Legitimacy*, 48 U.C. DAVIS L. REV. 1387, 1419–34 (2015).

[179] *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 137–38 (2006).

specifically—courts lack the authority to create that set of rules on their own through a common law type process. Departing from the transsubstantive rules in certain classes of cases opens courts up to attack because it implicates underlying value judgments about the substance of the laws themselves, and, consequently, engages in policy decisions that should be reserved for the political branches.

B. Ineffective Procedural Rules Embraced

Beyond the legitimacy problems courts may face by making substance-specific procedural rules through a common law process, such a process-making method is also more likely to result in substantively undesirable rules. Courts in individual cases may not be able to take into account the full range of information necessary to make good substance-specific rules, and are ill equipped to make final policy decisions.[180] FOIA litigation provides a good example: while courts have correctly identified oddities in FOIA cases that may warrant substance-specific rules, they have crafted rules that hinder, rather than advance, Congress's objectives in passing FOIA.[181]

The nature of the decision-making exercise in which courts engage impedes good substance-specific procedural rules from emerging. In individual cases, courts are presented only with a single circumstance and record concerning that particular dispute.[182] They are not presented with the kind of overall data or range of issues that might arise in that type of litigation more generally, the sort of information that would be considered in the rulemaking process or in Congress.[183]

For instance, some courts have justified limiting discovery in FOIA cases on the basis that "the underlying case revolves around the propriety of reveal-

---

[180] Even the Supreme Court, to whom Congress delegated rulemaking power in the Rules Enabling Act, implicitly acknowledged its limitations when, acting unilaterally, it created an Advisory Committee tasked with actually writing the rules. *See* David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 931 (describing the origins of the rulemaking process). The Committee decided to seek public input as part of the process. *Id.*

[181] *See* Kwoka, *supra* note 66, at 221–35.

[182] Relatedly, Nancy Leong has demonstrated that courts' rulings are distorted when they face issues in only one context, rather than seeing a broad range of contexts for the issue to arise. *See* Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 406 (2012). And Suja Thomas has documented how courts ruling on atypical cases are prone to making bad law. Suja A. Thomas, *How Atypical, Hard Cases Make Bad Law (See, e.g., The Lack of Judicial Restraint in* Wal-Mart, Twombly, *and* Ricci*)*, 48 WAKE FOREST L. REV. 989, 992 (2013). These are further examples of how courts' narrow views when deciding an individual case can stymie good decision making at the macro level.

[183] This type of information would help a decision maker ascertain what are known as legislative facts or "*generalized* statements about the world that help the court decide questions of law and policy." Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1265 (2012).

ing certain documents."[184] This rationale seems to assume that the only possible relevant discovery would be the documents themselves, a request for which would be an inappropriate end run around the merits of the dispute. Certainly, in some cases plaintiffs have made such inappropriate requests.[185] Those instances may, however, be coloring courts' views of the appropriateness of discovery in all cases. Many FOIA disputes will center on issues that are not apparent in the content of the requested records,[186] and discovery as to those issues may be entirely appropriate, as was the case in *Taylor*.[187]

In addition, courts may draw incorrect conclusions from their observations, not having the full policy vetting that goes with legislative rulemaking and public participation. In the FOIA context, courts have frequently noted that the "lack of knowledge by the party seeing [sic] disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution."[188] That is certainly true, and yet, this fact led the D.C. Circuit not to seek the most disclosure possible from the government (for instance, by permitting discovery), but rather by essentially substituting the normal discovery obligations with a requirement that the government produce a single affidavit known as a *Vaughn* index that lists the withheld records and brief justifications for the corresponding claims of exemptions.[189] Judge Bazelon dissented, stating: "Without discovery, a party to litigation may not have access to facts necessary to oppose a motion for summary judgment. This problem is especially acute for plaintiffs in FOIA cases."[190] That is, the judges on the D.C. Circuit recognized an oddity in FOIA cases—an inherent information imbalance between the parties—but could not agree as to what procedures would best remedy the problem, a quintessential policy decision.

Other courts have made assumptions about the nature of FOIA disputes that contribute to the overuse of summary judgment and which also do not hold up to scrutiny. These courts often assert that FOIA cases involve pure questions of law, because once the documents are identified, the only dispute is about the applicability of the statutory exemptions to disclosure.[191] In reality, however,

---

184 Lane v. Dep't of Interior, 523 F.3d 1128, 1134 (9th Cir. 2008).

185 Kwoka, *supra* note 66, at 226 & n.259 (listing cases).

186 *See* Kwoka, *supra* note 110, at 234–44.

187 *See supra* notes 74–106 and accompanying text.

188 Vaughn v. Rosen, 484 F.2d 820, 824 (D.C. Cir. 1973).

189 *Id.* at 827–28; *see also* Goland v. CIA, 607 F.2d 339, 352–55 (D.C. Cir. 1978) (stating that if Vaughn index requirements are met, the district court "has discretion to forgo discovery and award summary judgment on the basis of affidavits" and announcing a requirement that a plaintiff demonstrate agency bad faith before discovery may be had).

190 *Goland*, 607 F.2d at 357 (Bazelon, J., dissenting).

191 *See, e.g.*, Trentadue v. Integrity Comm., 501 F.3d 1215, 1226 (10th Cir. 2007) ("Whether a FOIA exemption justifies withholding a record is a question of law that we review de novo."); Am. Mgmt. Servs., LLC v. Dep't of the Army, 842 F. Supp. 2d 859, 866 (E.D. Va. 2012) ("In general, FOIA disputes are, and should be, resolved by way of summary judgment. This is so because FOIA cases generally involve disputes not about triable issues of

fact disputes permeate claims of exemption. For instance, the law enforcement exemption depends on an agency's claim about the reason why the record was created—something that may not be apparent from the document itself.[192] The same inquiry—why the record was made—is similarly relevant for the deliberative process privilege.[193] And like in Taylor's case, the trade secrets exemption may turn on who has already seen the records, another dispute of fact.[194] In fact, fact disputes can be at the heart of all of the most frequently claimed exemptions to disclosure.[195]

Charles Clark, the "architect" of the Federal Rules of Civil Procedure, asserted that procedure should be the "handmaid and not the mistress" to justice, that is, that procedure should serve the ends of the substantive law and nothing more.[196] Professor Marcus posits that there are specific instances in which courts may create substance-specific procedures, including when the circumstances suggest the institutional limitations of courts are mitigated or where other actors are even more limited in their competency.[197] An example of the former would be when courts are attempting to achieve the policy objectives of the substantive law more accurately by creating a substance-specific procedure.[198] This type of substance-specific procedure obtains its legitimacy from the underlying legislative decision regarding the substantive area of law.[199]

Professor Marcus admits, however, that what advances Congress's underlying objectives may be in the eye of the beholder,[200] and FOIA's substance-specific procedures, even if well-intentioned, seem to fall far short. Denying FOIA plaintiffs access to discovery, subjecting their factual disputes to resolution at summary judgment, and giving the government multiple bites of the apple all tilt the playing field in favor of the government.[201] This result seems to fly in the face of Congress's underlying policy goals of strong, de novo judicial review to achieve maximum government transparency under FOIA.[202]

---

fact, but rather how the law is to be applied to the documents withheld; as a result, once the documents at issue have been properly identified, typically only questions of law remain.").

[192] *See* Pratt v. Webster, 673 F.2d 408, 418 (D.C. Cir. 1982) (describing how in an agency that has some law enforcement functions and some non-law enforcement functions, "a court must scrutinize with some skepticism the particular purpose claimed for disputed documents redacted under FOIA Exemption 7").

[193] *See* Access Reports v. Dept. of Justice, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (engaging in a detailed analysis of the purpose of the disputed record, and finding that the memo was sought "in part as ammunition for the expected fray, in part as advice on whether and when to duck").

[194] *See supra* notes 80–82 and accompanying text.

[195] Kwoka, *supra* note 110, at 234–44.

[196] Subrin, *How Equity Conquered Common Law*, *supra* note 1, at 961–62.

[197] Marcus, *Trans-substantivity and the Processes of American Law*, *supra* note 58, at 1237.

[198] *Id.* at 1237, 1243.

[199] *Id.* at 1244.

[200] *Id.*

[201] Kwoka, *supra* note 66, at 235.

[202] *Id.*

That court-made, substance-specific procedure in the context of FOIA results in counterproductive rules may be somewhat a matter of chance. It is always possible courts will devise rules that in fact advance laudable objectives. But the judiciary's lack of legislative-type information and competency at making policy choices suggests that it is unlikely to consistently create desirable rules. These institutional limitations council strongly against substance specificity in rules fashioned by individual judges.

C. Bypassing the Courts

A final concern resulting from the tension between the Federal Rules and common-law-made, substance-specific procedures is the possibility that the system will appear so broken to litigants that judicial remedies will no longer be desirable.[203] As has been discussed, courts feel that FOIA litigation under the Federal Rules is akin to forcing a square peg into a round hole, and have fashioned their own procedures.[204] Those procedures, in turn, have left litigants without effective remedies, and the situation seems untenable from all angles.[205] As a result, a trend is emerging toward removing cases from the court system in favor of alternative dispute resolution mechanisms.

Formal reform efforts have often focused on shunting cases into alternative dispute resolution mechanisms.[206] Professor Subrin posits that such a move should be no surprise in light of the equity-based Federal Rules, which themselves embody such broad discretion that formal litigation fails to provide predictable results.[207] As Professor Subrin has said, ADR processes bring attention to the fact that certain types of cases may warrant different types of process.[208] Another scholar dubbed this trend a "flight from law."[209]

There has been considerable push to move FOIA dispute resolution to some sort of ADR mechanism. In 2007, Congress passed the OPEN Government Act, which established the Office of Government Information Services ("OGIS"), housed at the National Archives and Records Administration.[210] OGIS is designed to serve as a sort of FOIA ombudsman and provides voluntary mediation services for requesters and agencies in disputes.[211]

---

[203] *See supra* Part III.A (discussing legitimacy concerns).

[204] *See supra* Part III.B. (discussing the failure of the court-created substance-specific procedures in FOIA litigation).

[205] *See supra* Part III.B.

[206] Subrin, *How Equity Conquered Common Law*, *supra* note 1, at 911–12.

[207] *Id.* at 988–89.

[208] *Id.* at 991.

[209] Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 716 (1988).

[210] Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. 110-175, § 10, 121 Stat. 2524, 2529 (2007).

[211] *Id.* In full, it provides: "The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and

Separately, the Administrative Conference of the United States, an independent research agency designed to improve administrative processes, recently took up the issue of ADR for FOIA disputes, strongly recommending more use of the OGIS mechanism and consideration of ADR in place of litigation.[212] Other academic proposals have gone further and suggested binding arbitration mechanisms for FOIA in lieu of litigation.[213]

While ADR may be a perfectly fine option for some disputes, it should not be the option of last resort simply because litigation is failing to meet its objectives. Strict adherence to formally transsubstantive rules may push courts to make their own substance specificity, but they are unlikely to make the most effective policy choices. The end consequence may be an undesirable one: the wholesale removal of classes of litigation from the court system.

CONCLUSION

"Procedure is power, of course, so the stakes of choosing one over the other produces different winners and losers."[214] The choice of winners and losers is all the more direct when crafting substance-specific rules. When we adhere too strictly to the principle of transsubstantivity, judges "chafe[] against its constraints."[215] This tension has played out in FOIA litigation, resulting in a set of substance-specific procedures crafted in a process akin to creating common law.[216] Not only does this type of substance specificity threaten to undermine the legitimacy of the judiciary, but it is unlikely to produce the best policy choices and may drive litigants from the courthouse to alternative dispute resolution mechanisms.[217] While FOIA litigation represents a small sample of the federal docket, the example it provides illustrates the dangers of overadherence to transsubstantive design as a formal matter, and sheds light on the problems with empowering judges to take substance specificity into their own hands.

---

administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute." *Id.*

[212] MARK H. GRUNEWALD, REDUCING FOIA LITIGATION THROUGH TARGETED ADR STRATEGIES 2 (2014), *available at* https://www.acus.gov/sites/default/files/documents/Grunewald%20Draft%20FOIA%20Report.pdf. Specifically "the study concludes that the most important targeting should be directed toward the dispute resolution mechanism itself . . . . The study makes a series of recommendations to foster the development and dispute resolution centrality of OGIS—the targeting choice made in the first instance by Congress." *Id.*

[213] *See* Michael Bekesha, *James Madison Would Not Litigant FOIA Disputes: Fixing FOIA Through ADR*, ADMIN. & REG. L. NEWS, Fall 2009, at 10, 10.

[214] Subrin & Main, *supra* note 2, at 1856.

[215] Marcus, *Past, Present, and Future*, *supra* note 18, at 373.

[216] *See supra* Part II.

[217] *See supra* Part III.