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# THE TRANSFORMATION OF TRANS-SUBSTANTIVITY

CARL TOBIAS\*

Professor Linda Mullenix and Professor Gene Shreve have recently ventilated two intertwined issues at the core of modern federal civil procedure.<sup>1</sup> They questioned scholars' growing criticism of the idea that the Federal Rules of Civil Procedure are trans-substantive. Both writers also asked about the increased emphasis that commentators have accorded procedure's detrimental effects on specific rights, such as civil rights, and on particular groups or litigants, such as minorities. The preferable response to these complaints is a single word: Congress.<sup>2</sup> Because the issues that Professors Mullenix and Shreve raise are thought-provoking, however, they deserve elaboration.

Professor Shreve observed that "[i]ncreasingly, civil procedure literature stresses procedure's impact on particular sets of rights or on particular groups"<sup>3</sup> and that "much contemporary scholarship has disparaged trans-substantive approaches to identifying the function and value of civil procedure."<sup>4</sup> Professor Mullenix stated that the "accepted premise of the Federal Rules of Civil Procedure is that they are rules of general applica-

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\* Professor of Law, University of Montana. I wish to thank Peggy Sanner and Tammy Wyatt-Shaw for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. Errors that remain are mine.

1. See Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991); Gene R. Shreve, *Eighteen Feet of Clay: Thoughts on Phantom Rule 4(m)*, 67 IND. L.J. 85 (1991).

2. The response comes from one whom Professors Mullenix and Shreve simultaneously cited and perhaps indicted. See, e.g., Mullenix, *supra* note 1, at 823 (citing Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 271-72 (1989) [hereinafter Tobias, *Public Law Litigation*] for idea that civil rules detrimentally affect specific rights and particular groups); Shreve, *supra* note 1, at 92 n.36 (citing Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105 (1991) [hereinafter Tobias, *Recalibrated*] for similar proposition); Shreve, *supra* note 1, at 92 n.39 (citing Tobias, *Public Law Litigation* for idea that "much contemporary scholarship has disparaged trans-substantive approaches"). I have not criticized trans-substantive approaches to the Rules; I have simply observed that they have decreasing applicability to the Rules and that the Rules are decreasingly trans-substantive. See, e.g., Tobias, *Public Law Litigation, supra*, at 338-39. Correspondingly, I have analyzed civil rights plaintiffs through the prism of Rule 11, see, e.g., Tobias, *Recalibrated, supra*; Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988-89) [hereinafter Tobias, *Civil Rights Litigation*]; environmental plaintiffs through the prism of Rule 11, see Carl Tobias, *Environmental Litigation and Rule 11*, 33 WM. & MARY L. REV. 429 (1992) and public interest litigants through the prism of Rule 24, see, e.g., Tobias, *Public Law Litigation, supra*, at 322-29; Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415 [hereinafter Tobias, *Standing*]. I undertook this work primarily out of concern that the federal judiciary properly implement congressional intent by facilitating these litigants' vindication of congressionally prescribed substantive rights.

3. See Shreve, *supra* note 1, at 92 (citations omitted).

4. *Id.* (citations omitted). See generally Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732-40 (1975).

bility, without regard to kinds of cases or litigants; thus, they transcend particular substantive law applications,"<sup>5</sup> while she lamented that "[t]his trans-substantive theory of the federal rules has been under attack."<sup>6</sup> Professor Mullenix provided the following explanation of what she characterized as the "public interest law critique":

This perspective views litigation through a decidedly political lens that pits unempowered, resourceless individuals against big institutional litigants with vast financial resources. The public interest critique of procedural rules reflects an ideology that litigation embodies class, race, gender, and economic struggles. The basic theory of public interest partisans is that there are no such things as "facially neutral rules."<sup>7</sup>

Professor Mullenix correspondingly invoked both ideas that Professor Shreve and she broached to criticize a public interest representative's request that the Civil Rules Advisory Committee collect extensive empirical data on the effect which one rule's proposed revision would have on specific types of cases and particular litigants.<sup>8</sup>

Numerous developments, for which Congress has been primarily responsible, respond to the questions that Professors Mullenix and Shreve have aired. Several institutions, principally Congress, pursuant to different sources of authority, have undermined the trans-substantive vision that most drafters of the original Federal Rules apparently held in 1938.<sup>9</sup>

Congress has enacted many substantive statutes dubbed "social legislation,"<sup>10</sup> such as environmental measures, that erode trans-substantivity through their distinctive purposes and procedures. For example, if a plaintiff is attempting to vindicate a substantive purpose of civil rights legislation, such as reducing racial discrimination, a court should facilitate the plaintiff's vindication of that purpose. In this way, effectuation of the substantive congressional mandate can undermine trans-substantivity.<sup>11</sup> All of these enactments also expressly afford procedural benefits to parties who vindicate the measures' purposes. For instance, a number of environmental statutes

5. Mullenix, *supra* note 1, at 829 n.176.

6. *Id.*

7. *Id.* at 823.

8. *See id.* (citing Letter from Professor Laura Macklin, Associate Director, Institute for Public Representation, Georgetown University Law Center, to Professor Paul Carrington, Advisory Comm. Reporter (Mar. 20, 1990)).

9. *See Cover, supra* note 4, at 718 (discussing drafters' trans-substantive vision); *accord* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 944 (1987).

10. *See, e.g.,* Consumer Product Safety Act, 15 U.S.C. §§ 2051-2083 (1988); National Environmental Policy Act of 1969 §§ 2, 101-105, 42 U.S.C. §§ 4321, 4331-4335 (1988); *see also* William Lilley III & James C. Miller III, *The New "Social Regulation,"* 47 PUB. INTEREST 49 (1977) (discussing social legislation).

11. *See* Tobias, *Standing, supra* note 2, at 459-60; *see also* Cover, *supra* note 4.

explicitly prescribe intervention of right,<sup>12</sup> which can erode the trans-substantive nature of the provision made for intervention of right in Federal Rule 24(a)(2).<sup>13</sup>

Since 1938, numerous additions to Title 28 of the United States Code, including aspects of the recent "judicial improvements" legislation enacted in 1988 and 1990, have had or could have similar effects.<sup>14</sup> One component of the 1990 statute, the Civil Justice Reform Act, requires each federal district to develop a civil justice expense and delay reduction plan and codifies the idea that experimentation is intrinsically valuable, thereby promising to undercut trans-substantivity.<sup>15</sup> This measure and the plans that a number of early implementation districts have now adopted pursuant to the measure prescribe systematic, differential procedural treatment in terms, for instance, of a particular lawsuit's complexity or its subject matter.<sup>16</sup>

Congress, when passing the Civil Justice Reform Act, may have contemplated that district courts would promulgate local rules that conflict with the Federal Rules.<sup>17</sup> The civil justice plan for the Eastern District of Texas proclaims that "to the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling."<sup>18</sup> Moreover, approximately twenty Early Implementation District Courts have prescribed procedures governing mandatory prediscovery disclosure that are inconsistent with current Federal Rules and resemble proposals to revise the Rules that are so controversial that they may not be adopted.<sup>19</sup> This

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12. See, e.g., Clean Air Act, 42 U.S.C. § 7604(b)(1)(B) (Supp. II 1990); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(i) (1988).

13. See Tobias, *Standing*, *supra* note 2, at 459-60; see also *infra* note 36 and accompanying text. The drafters may have contemplated that trans-substantivity would be eroded, because Rule 24(a)(1) expressly provides for statutory intervention of right. A recent piece of social legislation that prescribes dissimilar procedures for different types of cases is the Civil Rights Act of 1991. See Civil Rights Act of 1991, PUB. L. No. 102-166, 105 Stat. 1071 (1991); see generally Carl Tobias, *Civil Rights Procedural Problems*, 70 WASH. U.L.Q. 801 (1992).

14. See Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642 (1988); Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089; see also *infra* notes 15-17 and accompanying text.

15. See 28 U.S.C. §§ 471-472 (Supp. II 1990); see generally Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. (forthcoming Feb. 1993).

16. See 28 U.S.C. § 473(a)(1) (Supp. II 1990); see, e.g., U.S. DIST. COURT FOR THE S. DIST. OF ILL., CIVIL JUSTICE DELAY AND EXPENSE REDUCTION PLAN 4-6 (1991); U.S. DIST. COURT FOR THE DIST. OF MONTANA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 34 (1991) [hereinafter MONTANA DISTRICT COURT PLAN]; see also SENATE COMM. ON JUDICIARY, JUDICIAL IMPROVEMENTS ACT OF 1990, S. REP. NO. 416, 101st Cong., 2d Sess. 23 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6826-27.

17. See 28 U.S.C. § 473(b)(6) (Supp. II 1990); see also S. REP. NO. 416, *supra* note 16, at 14-32, reprinted in 1990 U.S.C.C.A.N. at 6816-35. But see Lauren K. Robel, *Fractured Procedure* (unpublished manuscript, on file with author).

18. U.S. DIST. COURT FOR THE E. DIST. OF TEX., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 9 (1991); see generally Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 51-52 (1992).

19. See, e.g., U.S. DIST. AND BANKRUPTCY COURT FOR THE DIST. OF IDAHO, THE CIVIL

development could well undermine that trans-substantivity which the Federal Rules presently retain.<sup>20</sup>

Correspondingly, the Civil Rules Advisory Committee, in recently formulating proposals to amend three provisions of the Federal Rules, explicitly recognized that districts might make exceptions to the federal provisions by local rule.<sup>21</sup> The Advisory Committee also suggested that the Supreme Court and Congress revise Rule 83(b) to permit districts to adopt experimental local rules that conflict with the Federal Rules.<sup>22</sup>

Congressional acquiescence in the Supreme Court's promulgation of the 1983 amendment to Rule 16, which expressly recommends that judges tailor various dissimilar procedures to specific lawsuits, additionally undercuts the Rules' trans-substantive nature.<sup>23</sup> For example, although the Advisory Committee Note which accompanies the revision proclaims that the "most significant change in Rule 16 is the mandatory scheduling order," the Note explicitly encourages district judges to "exempt certain categories of cases in which the burdens of scheduling orders exceed the administrative efficiencies that would be gained."<sup>24</sup>

The federal judiciary, for its part, has contributed substantially to the dismantling of trans-substantivity. All of the federal districts are responsible for the proliferation of local rules that has undone trans-substantivity.<sup>25</sup>

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JUSTICE REFORM ACT OF 1990 EXPENSE AND DELAY REDUCTION PLAN 10 (1991); MONTANA DISTRICT COURT PLAN, *supra* note 16, at 18; U.S. DIST. COURT E. DIST. OF N.Y., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 4 (1991); *see also* JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS 16, 26 (1992); *see generally* Randall Samborn, *U.S. Civil Procedure Revisited*, NAT'L L.J., May 4, 1992, at 1.

20. *See* Stephen N. Subrin, *Federal Rules, Local Rules and State Rules: Uniformity, Divergence and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2018-26, 2041-43 (1989); *cf. infra* notes 33-35 and accompanying text (observing that Federal Rules presently retain little trans-substantivity); *see also infra* note 25 and accompanying text.

21. *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Proposed Amendments to the Federal Rules of Civil Procedure*, 26(a)(2)(C), 26(b)(2), 54(d)(2)(D), *reprinted in* 137 F.R.D. 53, 89, 91-92, 137 (1991).

22. *See id.* at 53, 153. The Standing Committee did not send forward the proposal that would have permitted local rules to conflict with the Federal Rules. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS (1992). It apparently deferred to civil justice reform efforts that effectively permit districts to adopt similar experimental rules.

23. *See* FED. R. CIV. P. 16; *see also* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 484, 527 (1986); *see generally* Tobias, *Public Law Litigation*, *supra* note 2, at 292 n.148.

24. "Logical candidates [for exemption from Rule 16's mandatory scheduling] . . . include social security disability matters, habeas corpus petitions, forfeitures, and reviews of certain administrative actions." FED. R. CIV. P. 16 advisory comm. note, *reprinted in* 97 F.R.D. 165, 207 (1983); *see also* David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1985 (1989).

25. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PROCEDURE (1989); Subrin, *supra* note 20, at 2018-26, 2041-43; *see also* Tobias, *Public Law Litigation*, *supra* note 2, at 292 n.148.

Concomitant experimentation, pursuant to those local rules or to express or inherent judicial authority, with a plethora of techniques, such as summary jury trials and differential discovery by case type, has eroded trans-substantivity.<sup>26</sup> The second edition of the Manual for Complex Litigation, which specifically suggests that judges tailor numerous particular procedures to individual complicated lawsuits, is a monument to non-trans-substantivity.<sup>27</sup>

Judicial interpretation of several federal rules has had analogous impacts. The quintessential example is the requirement that civil rights plaintiffs plead with specificity under Rule 8. All of the circuits now demand particularized pleading,<sup>28</sup> even though little judicial authority or empirical data support this requirement.<sup>29</sup> The imposition of elevated pleading in civil rights cases epitomizes the very ideas—creating different procedural requirements by kinds of lawsuits and types of litigants, thus reducing Rule 8's trans-substantive character—that Professors Mullenix and Shreve address.<sup>30</sup>

26. See Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984) (discussing summary jury trials); Subrin, *supra* note 20, at 2025-26, 2041-42 (discussing differential discovery); see also Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case From Filing to Disposition*, 69 CAL. L. REV. 770, 779-89 (1981) (discussing techniques employed in experimentation).

27. See, e.g., MANUAL FOR COMPLEX LITIGATION, SECOND §§ 33.1-.6, at 284-342 (1985) (suggesting procedures to be applied in efficiently managing six major categories of complex cases); see also Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2175-76 (1989); see generally Resnik, *supra* note 23, at 526-27.

28. See *Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985); *Hobson v. Wilson*, 737 F.2d 1, 30 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). The Supreme Court may soon resolve the issue of elevated pleading in civil rights cases. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054 (5th Cir.), *cert. granted*, 112 S. Ct. 2989 (1992).

29. The courts may lack sufficient authority to demand particularized pleading. The Advisory Committee specifically prescribed elevated pleading only in Rule 9 covering fraud, rejected stringent requirements when initially drafting Rule 8, and has not modified these determinations while preserving liberal pleading meant to serve limited purposes. See *Elliott*, 751 F.2d at 1482 (Higginbotham, J., concurring); C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677, 692 (1984). The weak empirical basis for imposing stricter pleading requirements in civil rights actions is that they are more frivolous than other actions. See, e.g., *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 925, 927 (3d Cir. 1976) (Gibbons, J., dissenting); Wingate, *supra*, at 688.

30. See *supra* notes 3-8 and accompanying text. The Supreme Court recently articulated a more flexible standard for judicial modification under Rule 60(b) of consent decrees entered in public law cases. See *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992); see also Tobias, *Public Law Litigation*, *supra* note 2, at 301-19, 322-31 (analyzing differential application of additional rules in ways that frequently disadvantage public interest litigants). Ironically, numerous courts have created a "public rights exception" to compulsory party joinder under Rule 19 that provides public interest litigants a forum in which to vindicate public rights, and this exception also erodes trans-substantivity. See, e.g.; *Conner v. Burford*, 848 F.2d 1441, 1459-61 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989); *Jeffries v. Georgia Residential Fin. Auth.*, 678 F.2d 919, 929 (11th Cir. 1982); see generally Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745 (1987).

Indeed, for a considerable period, commentators have been exploring the decline of trans-substantivity. Many writers have credited Professor Robert Cover with the first major critique of trans-substantivity in 1975.<sup>31</sup> A quarter century ago, Professor Benjamin Kaplan, upon his retirement as Advisory Committee Reporter, specifically proposed that the Committee empirically study the advisability of altering the Rules' trans-substantive nature.<sup>32</sup> There has been much subsequent work on trans-substantivity and its erosion.<sup>33</sup> Illustrative are Professor Judith Resnik's 1986 observations that the "premise of trans-substantive rules has been silently undermined—de jure and de facto" and that the "trans-substantive premise of the Rules has proved unworkable"<sup>34</sup> and Professor Stephen Burbank's 1987 declaration that "many of the Federal Rules authorize essentially ad hoc decisions and therefore are trans-substantive in only the most trivial sense."<sup>35</sup>

Congress has some, albeit indirect, responsibility for increased scholarly interest in, and criticism of, procedure's adverse impact on specific sets of rights or on particular groups, which is the second idea that Professors Mullenix and Shreve raised. Congress clearly intended in much of the legislation mentioned above to bestow substantive rights and interests on specific groups or their members, such as women who allegedly were victims of discrimination. Congress also contemplated that the individuals would frequently litigate in groups, either because they experience injury as a group<sup>36</sup> or because litigation costs require them to

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, 2067-69 (1989); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244 (1989); see also Cover, *supra* note 4.

32. See Letter to Dean Acheson, Chairman, Advisory Comm. on the Civil Rules, from Benjamin Kaplan, Reporter, Advisory Comm. on the Civil Rules (Mar. 2, 1967), in Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, app. at 1964 (1989); see also Benjamin Kaplan, *Comment on Carrington*, 137 U. PA. L. REV. 2125, 2126 (1989).

33. See, e.g., Carrington, *supra* note 31; Hazard, *supra* note 31. There are fifty-three law review pieces that mention trans-substantivity. Search of LEXIS, Lawrev library, Allrev file (Oct. 16, 1992).

34. Resnik, *supra* note 23, at 526, 547.

35. Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1474 (1987) (book review). The recent work of Professors Mullenix and Shreve testifies to lively, ongoing debate over trans-substantivity in the academy which apparently has not been replicated in the federal courts. The judiciary has contributed substantially to the decline of trans-substantivity. See, e.g., *supra* notes 27-31 and accompanying text. It apparently has done so rather unself-consciously, however. Indeed, there are no federal cases in which the term trans-substantivity appears. Search of LEXIS, Genfed library, Courts file (Oct. 16, 1992).

36. The classic study of sexual harassment as injury that women experience as a group is CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979). Cf. KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988) (expressing similar ideas regarding minorities as group); see generally STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987).

pool resources.<sup>37</sup> Congress correspondingly meant for the federal judiciary to facilitate these individuals' and groups' vindication of their rights and interests through litigation. An important way that Congress manifested this intent was to afford the potential litigants certain procedural advantages, such as reducing requirements for them to secure standing and to recover attorneys' fees.<sup>38</sup> Considerable academic scrutiny of procedure's effects on particular rights or specific groups grew out of concern that the federal judiciary properly implement this congressional intent.<sup>39</sup> Indeed, insofar as perpetuation of a trans-substantive theory of the Rules has restricted the vindication of underlying substantive rights, trans-substantivity may have become the enemy of substance.<sup>40</sup>

Another source of this growing scholarly interest in these procedural impacts has been increasing academic work in substantive areas, such as feminist legal thought and critical race theory.<sup>41</sup> Some of that research has focused on the intersection of substantive law with specific groups of individuals, characterizing such phenomena as sexual harassment, wife battering, and pornography as discrimination on the basis of gender.<sup>42</sup> These writers naturally analyzed whether, and if so how, civil procedure facilitated

37. Fee shifting statutes demonstrate Congressional recognition that litigation costs require groups to pool their resources. See *infra* note 38 and accompanying text; see also Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291 (1990); see generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); BURTON A. WEISBROD ET AL., *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* (1978).

38. The Clean Water Act and the Clean Air Act provide potential litigants standing through citizen suit provisions and attorneys' fees if they prevail. See 33 U.S.C. § 1365 (1988); 42 U.S.C. § 7604 (Supp. II 1990). Last Term, the Supreme Court restrictively interpreted a citizen suit provision in the Endangered Species Act and fee-shifting provisions in the Solid Waste Disposal Act and the Clean Water Act. See *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992); *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992).

39. See, e.g., Cover, *supra* note 4; Tobias, *Civil Rights Litigation*, *supra* note 2; Wingate, *supra* note 29; Erik K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990).

40. Professor Cover seemed to suggest a tension between trans-substantivity and substance. See Cover, *supra* note 4, at 718-22, 738-40. But cf. Hazard, *supra* note 31, at 2246-47 (arguing that Federal Rules are employed in "social justice" litigation precisely because they are cast in general terms).

41. See, e.g., Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990) (feminist legal thought); Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222 (1991) (critical race theory); Patricia J. Williams, *The Obliging Shell: An Informal Essay on Formal Equality Theory*, 87 MICH. L. REV. 2128 (1989) (both).

42. See, e.g., MACKINNON, *supra* note 36 (sexual harassment); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) (wife battering, sexual harassment, and pornography); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) (same); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from The Women's Movement*, 61 N.Y.U. L. REV. 589, 642-48 (1986) (wife battering and sexual harassment).



or hindered individuals' or groups' vindication of their underlying substantive rights.<sup>43</sup>

For many years, scholars have been evaluating procedure's impact on particular rights or specific groups, just as they have been exploring the decline of trans-substantivity. For instance, Professor Kaplan stated soon after the 1966 revision of Rule 23 that it was intended to promote more vigorous use of the class action mechanism as a device for vindicating the rights of substantial numbers of people who could not otherwise litigate individually.<sup>44</sup> Professor Cover concomitantly employed cases involving slavery to illustrate how procedure might be used to facilitate the vindication of substantive human rights.<sup>45</sup>

The civil procedure that federal courts in fact apply is rapidly undermining the theory that the Federal Rules are trans-substantive. The theory and practice of legal scholarship are having similar effects, while they increasingly discredit the related idea that procedure can be applied without fully considering its substantive impacts on particular rights or specific groups. The federal judiciary and scholars must recognize that the trans-substantive center will not hold, primarily because Congress has so declared and because courts have substantially eroded trans-substantivity. It is entirely too late to transfigure trans-substantivity, much less remain transfixed by it,<sup>46</sup> and trans-substantivity should now go "gentle into that good night."<sup>47</sup> The preferable approach is to transcend trans-substantivity, to acknowledge candidly its limitations, and to recognize and meet forthrightly the compelling challenge of formulating procedures that will efficaciously treat civil litigation in the twenty-first century. Most important, the procedural mechanisms developed and applied must facilitate litigants' vindication of substance, thereby effectuating congressional intent and freeing substance from the shackles of procedure.

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43. See, e.g., MACKINNON, *supra* note 36, at 57-99, 158-74; Schneider, *supra* note 42, at 642-48; Yamamoto, *supra* note 39, at 359-81.

44. See Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COMMERCIAL L. REV. 497, 497 (1968); see also FED. R. CIV. P. 23 advisory committee's note, reprinted in 39 F.R.D. 98, 102 (1966); Kaplan, *supra* note 32, at 2126-27; *supra* note 39; see generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

45. See Cover, *supra* note 4, at 722-32.

46. Cf. Carrington, *supra* note 31, at 2067-68 (observing that Professor Cover's vision that Federal Rules of Civil Procedure might usefully forsake trans-substantive nature to serve substantive rights more efficaciously has never been "trans-substantiated" as draft of procedural rules to be considered as alternative to "trans-substantive" rules).

47. DYLAN THOMAS, *Do Not Go Gentle into that Good Night*, in THE POEMS OF DYLAN THOMAS 213 (Daniel Jones ed., New Directions Publishing Corp. 1971) (1952). Cf. Burbank, *supra* note 35, at 1479 ("[t]oday, we should not be talking about the decline of adjudicatory procedure, except perhaps as one would at a wake").