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Geoffrey Hazard

University of Pennsylvania Law School, ghazard@law.upenn.edu

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V. THE FEDERAL RULES FIFTY YEARS LATER

DISCOVERY VICES AND TRANS-SUBSTANTIVE VIRTUES IN THE FEDERAL RULES OF CIVIL PROCEDURE

GEOFFREY C. HAZARD, JR.†

INTRODUCTION

The Federal Rules of Civil Procedure, whatever criticisms we might have of their details, have been a major triumph of law reform. They have served for fifty years substantially intact, a statement that can be made of few other pieces of major legislation in our era. They have been adopted in a majority of the states¹ and have been a principal source of borrowing in states with strong traditions of autonomy in matters of procedural law, notably California, Illinois, and New York.² Moreover, within almost every state, a procedure based on the Federal Rules governs most types of civil litigation. Taking account of their use in state courts, Federal Rules provisions thus apply to virtually every type of contested civil case involving interests of substantial financial or social significance.³ Indeed, the comprehensive scope of the Federal Rules is now the basis of complaints against them.

I wish to address two basic criticisms of the Federal Rules. One criticism emanates primarily from the corporate and business sector and concerns the broad scope of discovery under the Federal Rules. The criticism is that Federal Rules discovery permits excessive intrusion

† Sterling Professor of Law, Yale University.

¹ See Oakley & Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1377-78 (1986). Of course, many states have modified various specific provisions in the course of adopting the Federal Rules. See *id.* On the whole, however, a state that "adopts" the Federal Rules does so by taking them substantially intact.

² The area of procedure most strongly influenced by the Federal Rules has been discovery. While New York still retains some discovery restrictions deriving from its autonomous procedural tradition, the New York discovery rules of today are much more like the Federal Rules as promulgated in 1938 than the New York discovery rules as they stood in that year.

³ This generalization excludes the procedures governing such matters as small claims, domestic relations, and bankruptcy.

into confidential deliberations in the management of organizations. The other criticism comes from legal academia and concerns the "trans-substantive" scope of the Federal Rules. Both criticisms are objections to what might be called "procedural imperialism" in the Federal Rules. The objection to discovery is that the Rules authorize parties to reach too deep. The trans-substantive objection is that the Rules reach too far.

I shall suggest that the objection to the depth of discovery may have more weight than it has been accorded in most discourse on the Federal Rules and that the trans-substantive objection has much less weight than it has been accorded. I also shall suggest that if the Rules are tailored along lines suggested by the objection to their broad trans-substantive scope, the revisions are likely to result in limiting the depth of discovery into confidential organizational matters. If so, a drive to tailor the Federal Rules to specific subtypes of litigation may result in some peculiar political alliances. I think there is little risk of this. Neither scholars nor responsible partisans in political arenas have come forward with concrete proposals for amendment of the Rules except in matters of detail. If that is not evidence of success in law reform, there is no such thing.

I. THE DISCLOSURE ETHOS OF THE FEDERAL RULES

In large perspective, the Federal Rules made three basic changes. The first was simplified pleading. Pleadings are allowed to assert legal grievances, and legal defenses as well, in general terms.⁴ The second basic change was redesign of the rules governing joinder of parties and claims. Under the Federal Rules, joinder of parties and claims is based on the contours of the out-of-court transaction, not the legal categories in which the parties' conduct can be conceptualized.⁵ The third change was, of course, in discovery.

Under discovery law as it previously stood, the discovering party generally had to specify matters as to which discovery was sought. The disclosing party was required to answer only "relevant" questions and to produce specifically identified documents.⁶ The discovery law in the

⁴ See FED. R. CIV. P. 8.

⁵ See FED. R. CIV. P. 13, 14 & 18-24; see also Hazard, *Forms of Action Under the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 628, 629-32 (1988) (comparing transaction-based joinder under the Federal Rules and legal-category joinder under the Field Code); Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 982-91 (1987) (emphasizing the foundation of the Federal Rules on equitable principles to ease the complexity of litigation rather than on technical legal concepts).

⁶ See generally G. RAGLAND, *DISCOVERY BEFORE TRIAL* (1932) (describing dis-

Federal Rules in effect requires the responding party to come forth with whatever information she would have to concede was relevant to the subject matter of the action, so long as the request was made by the discovering party.

In form, discovery under the Federal Rules still requires specifically formulated requests by the discovering party. Taking a deposition generally requires that the discovering party name the person to be interrogated,⁷ not that the disclosing party identify the witnesses who have information. Obtaining admissions through interrogatories or requests for admission requires that the matters to be conceded must be stated with particularity,⁸ not that the disclosing party promptly offer a stipulation of matters not in issue. Obtaining documents requires that the discovering party "designate" categories of documents to be provided,⁹ not that the disclosing party produce whatever documents are relevant.¹⁰

Except for documents discovery, however, in operation the system is one of mandatory response rather than focused inquest. The disclosing party is required to identify witnesses who might be worth deposing,¹¹ and parties are subject to subtle coercions to stipulate undisputed facts.¹² The controversy over the discovery rules therefore centers on documents production.

This is not to say that excesses in deposition and interrogatories practice are not also deeply troublesome. It is simply to say that the broad access to document repositories is the most powerful weapon in the Rules discovery armory, particularly in cases involving conduct by business or government. This is because documents discovery is not only a vital disclosure mechanism in itself, but because it feeds the deposition process by providing clues as to whom to question and what questions to ask. Moreover, although it may be impolite to say, in oral deposition the past can be reshaped in the deponent's recollection, whereas the content of a document is immutable. Without documents discovery, depositions would be far less effective and interrogatories

covery procedures and devices governing various American jurisdictions in 1932).

⁷ See FED. R. CIV. P. 30(b)(1). *But see* FED. R. CIV. P. 30(b)(6) (when disclosing party is an organization, it must designate agents to respond on its behalf).

⁸ See FED. R. CIV. P. 33(a), 36(a).

⁹ See FED. R. CIV. P. 34(a).

¹⁰ *Cf.* *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1328 (8th Cir. 1986) (work-product doctrine protects certain relevant documents from being discoverable).

¹¹ See FED. R. CIV. P. 26(b)(1), 30(b). Both rules together operate to this effect, permitting interrogatories to seek the identity of individuals with knowledge of discoverable matters.

¹² See FED. R. CIV. P. 16(c) (admissions should be used for "obtaining admissions . . . which will avoid unnecessary proof"); FED. R. CIV. P. 11 (cost sanctions).

would have much less purpose. It is therefore the device provoking the most intense resistance and game-playing.

Discovery of documents in cases involving the conduct of business or government often proceeds by a vicious game in which the respondent has every incentive to trim and cheat.¹³ Highly developed dialectical skills have evolved. One skill is that of construing a documents demand so that it does not reach the very smoking gun document that the responding lawyer holds in her hand. Another skill is that of instructing the paralegals, without actually saying so, to bury the important documents in a pile of paper chaff or to fail to find the important documents in the first place. Still another skill is dividing search responsibility with the client so that the latter takes care of documents that can be made to disappear. The prevalence of such underside discovery practice cannot be measured, for evident reasons. It is believed to be pervasive enough, however, to sustain widespread suspicion and cynicism among the trial bar. This effect is itself sufficient cause to question the present discovery rules.

Being deeply troubled by the present discovery rules, particularly documents production, is one thing. Coming up with coherent alternatives is something else. Everyone seems frustrated by this challenge. In a moment of my own frustration, I suggested not long ago that the documents discovery procedure be reversed in cases in which production was voluminous or threatened with motion practice. The discovering party would no longer play the game of Twenty Questions, and the responding party would no longer play Hide-and-Seek. Instead, a neutral documents archivist would be appointed to survey the responding party's whole information system and identify all sets of materials that appear "relevant to the subject matter" of the action, in the phrase in Rule 26(b). These files then would be examined by a lawyer for the discovering party whose participation would be limited to the discovery process and governed by suitable confidentiality rules.¹⁴ Claims of privilege and irrelevance could be identified and fought within this framework.¹⁵ The procedure could be made to work because something like this was used in the massive anti-trust case, *United States v. American*

¹³ See Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 278 (1979) (referring to an "irresistible temptation to cheat" in discovery).

¹⁴ Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.3 (1983) ("A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client . . .").

¹⁵ Cf. *United States v. American Tel. & Tel. Co.*, 86 F.R.D. 603, 603-53 (D.D.C. 1979) (adopting guidelines for asserting privilege protection in the context of complex documents discovery).

*Telephone & Telegraph Co.*¹⁶

There has been no second to this suggestion that corporate and governmental documents simply be turned over for inspection to a parajudicial officer. Although such a procedure would cut through a lot of the nonsense in present documents discovery in big cases, it could be intrusive in a way that could concern civil libertarians.

The powerful effects of the Federal Rules on discovery are augmented by their synergism with the pleading and joinder provisions. Pleading in general terms permits a claimant to prosecute another party without having to explain exactly why the party is being charged.¹⁷ The joinder of parties rules permit a civil prosecutor to proceed in quite the same way a criminal prosecutor goes after conspirators, giving all participants inducement to point fingers at each other. Correlatively, discovery facilitates adding parties whose participation in the transaction was not known at first. The open disclosure ethos of the Federal Rules makes them a boon to persons with legal grievances, that is, plaintiffs.

As far as I can see, in no respect have the Federal Rules put civil plaintiffs in a worse position than they were under the code pleading system. Perhaps the only exception to this generalization is the enlarged potential scope of summary judgment and the mandatory physical examination in personal injury cases. Even these devices are not major impediments or detriments compared to the situation of plaintiffs fifty years ago.

Summary judgment has had a tortuous career in the Federal Rules. The original intent was that summary judgment have a substantial role. Court interpretations, however, rendered the device virtually dormant, except in commercial cases, until its recent revitalization by the Supreme Court.¹⁸ Even with summary judgment revitalized, plaintiffs are generally no worse off than they were under code pleading. Under revitalized summary judgment, a plaintiff loses upon failure through discovery to produce evidence to substantiate her suspicions. Under the codes, a plaintiff could not even get into discovery unless she could independently substantiate such suspicions, for substantiation had to be manifested in a complaint that stated "facts."

As far as mandatory physical examination is concerned, that procedure at worst has been neutral to plaintiffs. It prevents sham dam-

¹⁶ 86 F.R.D. 603 (D.D.C. 1979). See generally W. BRAZIL, G. HAZARD & P. RICE, *MANAGING COMPLEX LITIGATION: PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS* (1983) (analyzing the role special masters can play in discovery).

¹⁷ This is the effect of the rule in *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

¹⁸ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

ages claims in personal injury cases, but it also provides a mechanism of persuasion in settling cases involving serious injuries.

Remembering as I do how a defense could be conducted under old code pleading, I see little in the Federal Rules that on balance helps defendants. The codes required the plaintiff to plead with particularity; the Rules let her get away with generalities. The codes required a plaintiff to elect between tort and contract; the Rules allow her to proceed on both. The codes limited depositions to parties, except upon a showing of special need, and a discovery fishing expedition could be launched only by a party who could tag the fish before catching it.

This expansive effect in favor of grievants has been felt across the board. Liberalization in pleading had its earliest conspicuous effect in FELA claims¹⁹ and then in antitrust claims.²⁰ Liberalization of joinder had great, if uncelebrated, effects in civil rights cases, in which articulation of rights and remedies was unconstrained by old doctrines that separated law and equity, direct injury from indirect, and barely indulged the class action.²¹ Modern products liability, toxic tort, and environmental litigation would be simply inconceivable without the combination of liberal pleading, liberal joinder, and liberal discovery. The total effect of this development has redounded to the benefit of "have nots" relative to "haves."

Grievances about federal discovery, particularly documents discovery, usually are couched in terms of cost, inefficiency, and redundancy of effort. Yet these concerns, although perhaps legitimate, are not the fundamental source of discontent. A party receiving a massive documents demand can avoid the costs of complying by the simple expedient of opening the relevant files and making a photocopy machine available to the inquiring party.²² Putting the point this way, however, reveals the underlying grievance.

If the grievance were frankly presented, it is that production of the documents violates a principle of privacy which corporate and governmental officials consider ought to protect them. Corporate and government documents that are worth discovering express the thoughts of people with burdensome responsibilities making confidential decisions about tough and often insoluble problems. Documents that speak with

¹⁹ See *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 297-98 (1949).

²⁰ See *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976).

²¹ See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1289 (1976); cf. Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 CALIF. L. REV. 983, 988-91 (1979) (arguing that even more liberal procedural rules are needed for civil rights litigation).

²² Cf. FED. R. CIV. P. 33(c) (permitting a party to respond to an interrogatory by producing the business records that contain the requested information).

a candor unguarded by anticipation of litigation are particularly damaging. These communications subsequently are laid bare to the harsh light of second-guessing litigation. Counterpart communications between spouses within a domestic establishment are generally privileged.²³ So are those at high levels of government.²⁴ Yet corporate officials and lower echelon public servants enjoy no such protection.

The risk of exposure generates anxiety, anger, and resentment on the part of officials responsible for products that result in injury, toxics that result in torts, and environments that the public will want rehabilitated at someone's expense. These feelings are coming to be shared by municipal officials responsible for resolving conflicts over race relations, schools, police practices, and other social issues. The anxiety and anger reflect profound underlying differences over social choices, particularly choices for which someone must really pay. The resentment is intensified by the fact that contemporary litigation often is based on substantive norms that have become operative long after occurrence of the conduct being challenged. This is true, for example, of the legal norms applied in some of the asbestos cases and in most of the toxic dump site cases. Yet the differences in public policy regarding these issues often are left unresolved by coherent legislation and sometimes cannot even be publicly discussed in rational terms. The issues are too ugly, complex, and divisive.

According to my observation, resentment runs very deep in managerial circles over this interaction between open discovery and rapid evolution of substantive law. It is bad enough to be charged on the basis of changing substantive rules. It is more deeply galling to have the charges substantiated by documents dredged from files emanating from a prior time of innocence. Police departments have learned to keep their records clean of potentially embarrassing detail. Corporate and municipal personnel are following. Special language forms are evolving when written communication is unavoidable.

These are social costs of the open disclosure which Federal Rules discovery permits. Of course, the Federal Rules are not alone in sponsoring the principle of open access to information. The same principle is reflected in such legislative measures as the Federal Freedom of Information Act, state "sunshine" laws, and myriad federal and state laws requiring maintenance of records of public and private transactions.²⁵ Liberal discovery is a product of the citizen-consumer orienta-

²³ See MCCORMICK ON EVIDENCE § 78, at 188-89 (E. Cleary 3d ed. 1984).

²⁴ See *id.* § 106, at 261-62.

²⁵ See, *e.g.*, 5 U.S.C. § 552 (1982 & Supp. IV 1986) (Federal Freedom of Information Act); 5 U.S.C. § 552(a) (1982 & Supp. IV 1986) (providing access to govern-

tion of public policy in the last fifty years, not the misguided predilections of the committee that drafted the Federal Rules. If the Federal Rules originally did not provide for broad discovery, they would have been amended to that effect. But that does not mitigate the fact that social costs are involved, even if they are concealed in euphemisms concerning the expense of litigation. I doubt that the document discovery rules will be much changed. It is likely, however, that discovery in the future will turn up fewer documents worth discovering.²⁶

II. THE "TRANS-SUBSTANTIVE" SCOPE OF THE FEDERAL RULES

The second principal criticism of the Federal Rules is that they indiscriminately govern all kinds and types of litigation, whereas civil procedure rules properly constructed would be shaped to the needs of specific categories of litigation. This critique contemplates separate sets of rules for civil rights cases, antitrust cases, routine automobile cases, and so on. The criticism has been expressed perhaps most incisively by Professor Robert Cover, esteemed colleague prematurely gone from us.²⁷ Yet despite the great respectability of its source, the "trans-substantive" critique seems misguided to me. It overstates the reach of the Federal Rules and underestimates the technical and political difficulties of trying to tailor procedures to specific types of controversies.

In the first place, the Federal Rules as such are not a comprehensive code of civil procedure. For example, they do not provide the right to a jury trial, the feature of American civil procedure that most sharply distinguishes it from civil procedure everywhere else in the world. The right to a jury trial is prescribed in the Constitution for the federal courts and by counterpart provisions of state constitutions for the state courts.²⁸ The precise scope of the right to a jury trial is determined partly by decisions of the Supreme Court and partly by legislative specifications.²⁹ The Federal Rules simply incorporate those dispo-

ment records maintained on individuals); 5 U.S.C. § 552(b) (1982 & Supp. IV 1986) (Federal "Sunshine in Government" Act); N.Y. PUB. OFF. LAW §§ 91-99 (McKinney 1988) (providing access to government records maintained on individuals); N.Y. PUB. OFF. LAW §§ 100-11 (McKinney 1988) (New York Open Meetings Law).

²⁶ An example is the fact, as I am advised, that certified public accountant firms formerly kept a "paper trail" of all their auditing tests and queries, but no longer do so. These files became the auditors' worst enemies in litigation.

²⁷ See Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 731 (1975).

²⁸ See U.S. CONST. amend. VII; CAL. CONST. art. I, § 16.

²⁹ See, e.g., *Atlas Roofing Co. v. Occupational Health & Safety Rev. Comm'n*, 430 U.S. 442, 461 (1977) (seventh amendment does not prohibit Congress from assigning adjudication tasks to an administrative agency); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959) (right to jury trial in declaratory judgment if as-

sitions by reference.³⁰

The Federal Rules also do not undertake to define the rules of federal jurisdiction. Performing that task through rules of court is precluded by the Rules Enabling Act.³¹ Federal jurisdiction remains a "hodge-podge" even though a strong case has been made for substantial rationalization of the respective roles of the federal and state courts, particularly regarding diversity and removal of federal question matters.³² Such a transformation remains both enticing and elusive. As events have evolved, however, the Supreme Court's interpretations of the Federal Rules have severely constricted the potential for a coherent structure in diversity jurisdiction.³³

The Federal Rules also do not address such matters as *res judicata*,³⁴ bar of claims by lapse of time,³⁵ choice of law,³⁶ or, except for technical details, the reach of service of process.³⁷ Nor do the Federal Rules address the problem of federal common law; the Supreme Court, without the benefit of legislation, took care of that problem the same year it adopted the Rules.³⁸ Furthermore, in the important matter of evidentiary privileges, Congress concluded that the law should be made by judicial decision and not the rule-making process.³⁹

Hence, although the Federal Rules are trans-substantive, they are

sured in regular suit); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 538 (1958) (federal policy favoring jury determinations); Note, *Congressional Provision for Non-jury Trial Under the Seventh Amendment*, 83 *YALE L.J.* 401, 401-02 (1973) (stating the roles of the Supreme Court and Congress in determining the right to a jury trial).

³⁰ See *FED. R. CIV. P.* 38(a).

³¹ See 28 U.S.C. § 2072 (1982); Burbank, *The Rules Enabling Act of 1934*, 130 *U. PA. L. REV.* 1015, 1132-37 (1982).

³² See *AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 1-5 (1969).

³³ See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978) (no ancillary jurisdiction over joined claim despite a "common nucleus of operative fact" with federal diversity claim); *Aldinger v. Howard*, 427 U.S. 1, 18 (1976) (joinder of municipality on a state law claim not within a court's ancillary jurisdiction); *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973) (each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount for diversity suits); *Snyder v. Harris*, 394 U.S. 332, 336 (1969) (refusing to allow aggregation of the amounts involved in separate and distinct claims under Rule 23 to meet jurisdictional amount requirement).

³⁴ See *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327-28 (1979); 28 U.S.C. § 1738 (1982).

³⁵ See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980); cf. *United States v. Kubrick*, 444 U.S. 111, 125 (1979) (using federal statute of limitation to bar claim).

³⁶ See *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975).

³⁷ See *Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404, 409-10 (1987).

³⁸ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

³⁹ See *FED. R. EVID.* 501; see also *Upjohn Co. v. United States*, 449 U.S. 383, 397-99 (1981) (analysis of the scope of the attorney-client privilege based on a balancing of policies).

not trans-procedural. Recognition of this fact puts the rules-drafting process in a better perspective. If account is taken of what the Federal Rules do not cover in the way of adjective law, the jurisdiction of the Rules Committee barely intrudes upon, let alone threatens, legislative sovereignty.⁴⁰

Nevertheless, the Federal Rules have been of great—may we say substantial—significance as far as they go. Indeed, the Federal Rules have come to be defended on the ground that they afford better access to courts and thereby facilitate greater social justice. This premise is explicit in several of the papers at this conference. Reference is made of the uses of civil litigation to remedy racial discrimination, gender discrimination, environmental pollution, and other injustices. That the Rules do facilitate such social justice litigation seems little in doubt, as suggested earlier. Further, the remediation of these injustices, at least up to a point, is essential even for one whose political premises are conservative, as I consider mine to be. The examples of Northern Ireland, Lebanon, South Africa, India, and now Israel remind us of the social costs of being indifferent to effective microcosmic remedies for macrocosmic social injustice.

The Federal Rules have been an effective instrument of social justice because they reduce the barriers to the formulation and proof of claims against the existing systems of authority. Formulation of new theories of legal rights is simpler, virtually by definition, under a pleading system that is not constructed in terms of old legal categories, as was code pleading and common law pleading.⁴¹ Proof of new theories of liability likewise is simpler with the aid of comprehensive discovery.

This relationship between civil justice and social justice was not anticipated in 1938. The social wrongs whose remediation is assisted by the Federal Rules in the present era had not then appeared on the civil litigation agenda. The emergence of civil rights and environmental litigation hardly could have been anticipated. If an attempt had been made in 1938 to tailor the new Federal Rules to specific salient types of litigation, the focus probably would have been on personal injury litigation, particularly FELA and Jones Act cases, and stockholder derivative litigation. Of what use would rules for those cases have been in civil rights, gender, or environmental injury litigation? More fundamentally, if the rules-drafting process had focussed on tailoring rules to those types of litigation, there was no reason to think that the social justice interests would have prevailed. In personal injury litigation, the

⁴⁰ Cf. Burbank, *supra* note 31, at 1188, 1191-92 (noting how the scope of the Federal Rules does not interfere with congressional authority).

⁴¹ See Hazard, *supra* note 5, at 629-30; Subrin, *supra* note 5, at 973-74.

main change effected by the Federal Rules was to require a plaintiff to submit to a pre-trial physical, a rule that probably favors defendants.⁴² In stockholders derivative litigation, the model reform of the time was to require plaintiffs to post a bond for costs, a provision whose very aim was to deter derivative litigation.⁴³ How far would the NAACP have gotten if it had tried to tailor Rule 23 to its purposes in 1938, or in 1956 for that matter?

The dynamic of social justice litigation has been the use of existing general forms of procedure for new substantive purposes. Putting new wine in old bottles is especially congenial to institutional conservatives, who may support substantive change within the framework of existing procedural norms, but who are allergic to comprehensive legal transformations. If it is true that substantive legal change often is accomplished by incremental modification of procedure, it is also true that such change is politically most feasible when the change in procedure is only incremental. In this light, the "trans-substantive" critique of the Federal Rules is politically bizarre if, as is evidently the case, it is voiced from a concern that civil litigation continues to be an important instrument of social reform. The Federal Rules have been employed in "social justice" litigation precisely because they are cast in general terms, rather than tailored to specific types of litigation.

Thus, we are carried to contemplate fundamental constitutional considerations in connection with our civil procedure: maintaining a balance between institutional stability, whereby to accomplish change without tearing apart the institutions through which change is effected, and substantive dynamism, whereby preservation of institutions does not become a political straightjacket. There is no prescription for the right balance at any given time, but we should not ignore or disparage the virtues of a trans-substantive concept of procedure. After all, the due process principle stated in the fifth and fourteenth amendments is quintessentially such a concept. Trans-substantivity of procedure is a principle to which commitment is shared by persons of such different substantive orientations as, for example, Judge Posner and Judge Carter. The historical record of the Federal Rules evidences the generative power of this principle.

⁴² See *supra* text preceding note 19. Four justices of the Supreme Court thought the provision for physical examination was so "substantive" as to be beyond the scope of the Enabling Act. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 16 (1941) (Frankfurter, J., dissenting, joined by Black, Douglas & Murphy, JJ.).

⁴³ See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548-50 (1949).

