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Civil Procedure: The Last Ten Years

Jay Tidmarsh
Notre Dame Law School, jay.h.tidmarsh.1@nd.edu

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In my view, the story of the last ten years in civil procedure is the slow but inexorable creep of ideas and solutions developed for complex cases into routine cases, and the continued effort of litigators and judges in complex cases to develop ideas and solutions that push the procedural envelope still farther out—thus setting the agenda for the next generation of procedural reform.

I do not want to overstate my claim. The procedures for a lawsuit are still basically the same: a short pleading stage followed by a lengthy discovery stage followed by a culminating event of trial. But there have been a number of significant changes in civil procedure; the most prominent are the modification of Federal Rules of Civil Procedure 11, 16, and 26, the reinvigoration of summary judgment, the delegation of greater authority to federal district courts to reduce expense and delay in civil cases, and the creation of new supplemental jurisdiction and venue provisions. Taken together, and looked at in both historical and theoretical context, these changes suggest that a procedural evolution, if not a revolution, is under way.

Some of that evolution is attributable to the tremendous growth of procedural scholarship in the last ten years. When we were in law school, procedure was pretty much a jurisprudential backwater; although there were important exceptions, the issue in most scholarship was whether this word, phrase, or doctrine should be changed, added, or deleted in order to achieve some marginally better litigative result. The 1980s changed all that, so that procedural scholars now have begun to work in and with the same jurisprudential traditions that inform your own fields of study. There is a burgeoning law-and-economics literature regarding procedure,[1] and there are critical and feminist critical perspectives,[2] pragmatic accounts,[3] and fundamental rights scholar-

Jay Tidmarsh is Associate Professor at the Notre Dame Law School. He thanks Joe Bauer, Steve Burbank, John Garvey, Robert Keeton, John Robinson, Patrick Schiltz, and Roger Trangsrud for their comments and ideas.

1. See Richard A. Posner, Economic Analysis of Law, 4th ed., 549–50 (Boston, 1992); John M. Olin Program in Law and Economics Conference on "Economic Analysis of Civil Procedure," 23 J. Legal Stud. 303 (1994).
2. See Michel Rosenfeld, Deconstruction and Legal Interpretation, *in* Deconstruction and the Possibility of Justice, eds. Drucilla Cornell et al., 187 (New York, 1992); Judith Resnik, Revising the Canon: Feminist Help in Teaching Procedure, 61 U. Cin. L. Rev. 1181 (1993); Symposium, Gender, Empiricism, and the Federal Courts, 83 Geo. L.J. 461 (1994).
3. See Robert A. Baruch Bush, Dispute Resolution Alternatives and Achieving the Goals of Civil Justice: Jurisdictional Principles for Process Choice, 1984 Wis. L. Rev. 893.

ship as well.[4] Thanks to pioneering work by Steve Burbank and others, we have developed a rich historical account of our modern American procedural system—and with that history an appreciation of possibilities for further change.[5] The result is that we can increasingly expect that students will be making conceptual links between substantive courses and the procedural mechanisms used to enforce substantive rights.

Let me highlight two of these concepts as a way of explaining how complex litigation fomented the practical changes that our procedural system has undergone. The first concept is efficiency in procedural rules. Efficiency was a goal of procedure long before law and economics became fashionable, but the rise during the 1980s of economic analysis helped to give efficiency a preeminence and an urgency in procedural thought. From the viewpoint of a Coasean legal economist, litigation is an important source of the transaction costs that distort the workings of perfectly efficient markets.[6] Hence, for the legal economist, it is important both to describe the full effects of the distortion and its consequences and to seek to reduce the distortion by reducing costs.[7] The middle 1980s also saw empirical studies by organizations like RAND and the Brookings Institution—studies that could fairly be interpreted to suggest that civil litigation was too costly and too slow.[8] The combination of fashionable jurisprudence and empirical data created a demand for more efficient rules that has certainly been one of the stories—if not *the* story—of the last decade's procedural reform.

A second procedural idea, which I would place more in the fundamental rights tradition, also became widely debated during the 1980s. That idea was "trans-substantivism." Trans-substantive procedural rules apply equally to all substantive claims, so that the same procedures are used to resolve tort cases, contract cases, antitrust cases, and so on.[9] Historically, Anglo-American procedure had not been trans-substantive; at common law, procedure varied with

4. See Ernest J. Weinrib, Legal Formalism: On the Immanent Rationality of Law, 97 Yale L.J. 949 (1988); Jay Tidmarsh, Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power, 60 Geo. Wash. L. Rev. 1683 (1992); John R. Allison, Ideology, Prejudgment, and Process Values, 28 New Eng. L. Rev. 657 (1994).

5. Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015 (1982); Judith Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U. Chi. L. Rev. 494 (1986); Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909 (1987).

6. See sources cited *supra* note 1.

7. Given the theory of the "second best," most economists would strongly qualify this latter, normative half of their inquiry. Cf. Stephen F. Williams, Second Best: The Soft Underbelly of Deterrence Theory in Tort, 106 Harv. L. Rev. 932 (1993). Nor is it always true that reductions in litigation costs lead to socially optimal outcomes. See A. Mitchell Polinsky, An Introduction to Law and Economics, 2d ed., 107–18 (Boston, 1989); Steven Shavell, The Social Versus the Private Incentive to Bring Suit in a Costly Legal System, 11 J. Legal Stud. 333 (1982).

8. See James S. Kakalik, Costs and Compensation Paid in Tort Litigation (Santa Monica, 1986); Deborah R. Hensler, Asbestos Litigation in the United States (Santa Monica, 1992); Brookings Institution Task Force, Justice for All: Reducing Costs and Delays in Civil Litigation (Washington, 1989).

9. The classic article on trans-substantivism is Robert M. Cover, For James Wm. Moore: Some Reflections on a Reading of the Rules, 84 Yale L.J. 718 (1975).

the form of action, and procedure in equity was different as well. One of the great experiments of the Federal Rules of Civil Procedure was the use of a procedural code in which all cases—equity and law, contract and tort, federal question and state law—received the same set of procedural rules. Today the notion of trans-substantive procedure—in other words, the divorce of procedure from substance—is so obvious that we take it for granted in our curricula and our scholarship.

But the point was not so obvious to academics and practitioners who worked in the field of complex civil litigation. "Complex" cases had been around since some of the great antitrust fights of the late 1940s, but the field really came into its own with the civil rights, securities fraud, and environmental and toxic tort cases of the 1970s and early 1980s. These cases presented enormous problems of consolidation, of discovering huge quantities of information, of narrowing issues for trial, of trial itself, and of implementing remedies.[10] Procedural rules designed for simpler cases—rules that assumed that plaintiffs chose the party structure, that lawyers did the discovery, and that judges remained neutral, distant, and umpireal—simply did not work. Put differently, in complex cases the modern adversarial process did not work. The solution developed to fix the problem was a more activist judge—a judge who, along with the lawyers and the parties, became an active participant in shaping the structure of the case, choosing the relevant issues and the best means of narrowing those issues for trial, streamlining the trial, and ensuring the efficacy of the remedies.[11]

In retaining an adversarial set of rules for routine cases but developing a less adversarial set for complex cases, courts were abandoning the experiment in trans-substantivism. Hence, there arose the great debate in the 1980s about trans-substantivism: how fundamental is it, and when, if ever, can we depart from it?[12] Significantly, these questions were being asked during a time when powerful forces in the bar, bench, and academy were decrying the excesses of the adversarial system (the 1983 revisions to Rule 11 being the most visible, but by no means the only, manifestation of the dissatisfaction). Added to the debate, therefore, was the question whether it was worth maintaining an adversarial system. And then, at this point, the push for efficiency entered the debate. Trans-substantivism and adversarialism can impede as much as they can assist the search for an efficient outcome. From an efficiency perspective, departures from trans-substantive and adversarial process (in other words, modern American process) were justified when greater efficiencies could be achieved with alternate rules.

The product of this procedural ferment was a movement to create less adversarial, less trans-substantive, but more efficient procedural rules. The issue remained, of course, exactly what those rules would look like. But proceduralists did not need to look far. We already had experience with the less adversarial, less trans-substantive, but more efficient rules of complex

10. See generally Jay Tidmarsh & Roger H. Trangsrud, Complex Litigation and the Adversary System (forthcoming).

11. Tidmarsh, *supra* note 4.

12. See Tidmarsh & Trangsrud, *supra* note 10, at 7 (collecting authorities).

litigation. These rules were readymade, field-tested, and easily transplanted. The result: within the last ten years we have adopted procedural mechanisms that would have been unthinkable in any case forty years ago, and unthinkable in any but the most complex case twenty years ago. Today students learn them as if they were God-given truths.

I have painted this history with a broad brush, and there are counter-examples to the trend. Let me, however, prove the general validity of my thesis by describing six specific procedural changes during the past decade that strike me as particularly noteworthy.

The first change is the greater pretrial involvement of the district judge. Rule 16 of the Federal Rules of Civil Procedure is the provision that describes the functions of a trial judge in federal civil litigation. In 1982, the year that I started practicing law, Rule 16 was a couple of paragraphs long, and gave judges the discretion to call pretrial conferences in appropriate cases. My own early experience showed me that judges rarely invoked Rule 16 until they held a final pretrial conference a few days in advance of trial; judges essentially left pretrial to the lawyers. After an amendment in 1983 and a subsequent amendment in 1993, however, Rule 16 covers nearly two pages of text, requires judges to enter scheduling orders,[13] and encourages judges to schedule immediate, interim, and final pretrial conferences in which a host of issues—more than sixteen in all—are to be addressed.[14] All these issues concern, in one way or another, the way in which the pretrial and trial process should be structured; many of them are designed to streamline the pretrial process and make it more efficient.

Fundamentally, revised Rule 16 makes the judge an active player in pretrial litigation. The judge now is involved in deciding how discovery should be ordered, how much discovery the lawyers may conduct, and how long the lawyers have to complete their tasks. In the proceduralist's vernacular, the judge is now a "case manager" or, somewhat more disparagingly, a "managerial judge"; his or her function in pretrial is termed "case management."[15]

Two aspects of case management are noteworthy. First, the case manager is not the judge of modern adversarial theory. Neither is the case manager the judge of the modern inquisitorial system, but there are strong pulls in that direction. Second, the case management concept was not made from whole cloth. It had first been developed in the 1950s as the solution to complex antitrust litigation, and its basic tenets of early and frequent judicial involvement in pretrial litigation had been refined and distilled into specific subsidiary principles during the complex litigation of the 1970s.[16] By virtue of Rule 16, these principles have now been carried over to routine cases.

13. Fed. R. Civ. P. 16(b).

14. Fed. R. Civ. P. 16(c)–(d).

15. See 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 (1981); Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 376 (1982).

16. See Report of the Judicial Conference of the United States on Procedure in Anti-Trust and Other Protracted Cases (1951), *reprinted in* 13 F.R.D. 62 (1952); Manual for Complex Litigation, 1st ed. (St. Paul, 1973).

A second significant change has been the reinvigoration of Rule 56, the summary judgment rule. The basic text of Rule 56—that summary judgment is appropriate when there is "no genuine issue as to any material fact"[17]—has remained unchanged, but in a trilogy of cases in the middle 1980s the Supreme Court seemingly ignored older precedent that suggested a more limited role for summary judgment, and blessed its more liberal use.[18] Exactly how the cases did so is not important for our purposes; it is enough to know that the cases seemed to impose *somewhat* greater burdens on parties opposing summary judgment to come forward with credible evidence to defeat a summary judgment motion. It is a matter of degree. Cases with serious disputes about material facts will still survive summary judgment, as they always have. But the quantum and quality of evidence needed to defeat a motion for summary judgment seems to be greater today than twenty to thirty years ago. Summary judgment is no longer a bastard device; the Supreme Court has rehabilitated it and made it a respected case management tool.[19]

Giving district judges a somewhat freer hand to dispose of marginal cases makes the civil justice system run with greater efficiency. But it is no accident that two of the Supreme Court's three summary judgment cases—*Matsushita* and *Celotex*—were complex cases. One of the most difficult problems in complex litigation is narrowing the issues for trial in a way that necessary discovery can be expeditiously and reasonably accomplished and unnecessary discovery can be avoided. During the 1970s and early 1980s, judges and lawyers in complex cases struggled to find appropriate issue-narrowing devices.[20] Even with its shortcomings, summary judgment was one of the few devices generally available; its benefits in complex cases had been touted in much influential scholarship, and it had been used with good success in several cases. Thus the needs of complex litigation helped to shape a new attitude about Rule 56; in turn, a stronger Rule 56 has become a powerful weapon in the case manager's arsenal.

A third significant procedural change has been Rule 11. The 1983 amendments to Rule 11 converted a sleepy little rule about signing pleadings into one of the most discussed and most litigated provisions in the Federal Rules. The 1983 amendments were aimed specifically at preventing frivolous factual and legal assertions; to that extent, like Rule 56, Rule 11 can be seen as a tool designed to streamline cases in the federal judicial system. More generally, the 1983 amendments were aimed at curbing the excesses of an adversarial system that had, according to prevailing wisdom, run amok. In this regard Rule 11

17. Fed. R. Civ. P. 56(c).

18. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). *Matsushita* is difficult to reconcile with Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464 (1962); *Celotex* is difficult to reconcile with Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

19. So have the 1993 amendments to Rule 16, which specifically added a clause directing judges and lawyers attending pretrial conferences to consider "the appropriateness and timing of summary adjudication under Rule 56." Fed. R. Civ. P. 16(c)(5).

20. For a list of the devices that had been discussed, and occasionally used in actual cases, see Manual for Complex Litigation, 2d ed., § 21.33 (St. Paul, 1985) [hereinafter Manual].

must be read together with Rule 16, whose major changes also occurred in the 1983 amendments. Power was shifted from lawyers to judges by virtue of Rule 16; the scope of remaining adversarial freedom was curtailed (or at least chilled) by virtue of Rule 11.

As it turned out, Rule 11 just became another arrow in the adversarial quiver, as lawyers learned how to use Rule 11 motions to their tactical advantage. Additional amendments to Rule 11 in 1993 sought to curtail this gamesmanship; these amendments clarified the conduct proscribed by Rule 11,[21] ordered a twenty-one-day cooling-off period during which the allegedly contumacious party can amend or withdraw the paper that allegedly violates Rule 11,[22] and made the award of sanctions more discretionary and the sanctions themselves less severe.[23] As a whole these amendments sought to make Rule 11 motions less easy to win, and thus less desirable to bring. What the amendments mean for the future of adversarial procedure remains to be seen.

A fourth significant change occurred in our discovery rules. A number of these changes occurred in 1980 and 1983, when the rule-makers sought to cure the perceived problem of discovery abuse through the creation of discovery conferences, the imposition of a Rule 11–type signature requirement for discovery requests and responses, and the grant of greater discretion to district judges to control and limit discovery.[24] The revolutionary changes in discovery practice, however, occurred in 1993. These are the highlights:

- Some kinds of information—the identity of witnesses and documents relevant to facts pleaded with particularity, damage computations, and insurance policies—must be automatically disclosed without any need for an opposing party to file discovery requests to get the information. Follow-up discovery is still permissible.[25]
- Interrogatories are limited to twenty-five per side, and depositions to ten per side.[26]
- Expert witness reports must be detailed; depositions of experts are automatically allowed.[27]
- The lawyers must meet and confer at a discovery conference to discuss settlement and litigation issues, and to file with the court a discovery plan. This conference must occur fourteen days before the first pretrial conference with the "managerial" judge.[28]

21. Fed. R. Civ. P. 11(b).
22. Fed. R. Civ. P. 11(c)(1)(A). This option to amend or withdraw exists only with respect to conduct that is the subject of an opposing party's Rule 11 motion; it does not apply to show-cause orders entered under Rule 11 by the judge. See Fed. R. Civ. P. 11(c)(1)(B).
23. Fed. R. Civ. P. 11(c)(2).
24. See Fed. R. Civ. P. 26(b)(1), (f), (g) (1983 version).
25. Fed. R. Civ. P. 26(a)(1)(A)-(D).
26. Fed. R. Civ. P. 33(a), 30(a)(2)(A).
27. Fed. R. Civ. P. 26(a)(2), (b)(4)(A).
28. Fed. R. Civ. P. 26(f).

The drafters of the 1993 amendments to Rule 26 recognized that the amendments would be controversial; indeed, they turned out to be so politically charged that Congress came within a hair's breadth of disapproving them.[29] Hence, revised Rule 26 authorizes each district court to opt out of the automatic disclosure, expert report, and discovery-limitation provisions.[30] More than half of the district courts have done so, although some of these districts have approved a variation of the Rule 26 scheme.[31] As a result of these varied judicial responses, our federal court system is now a procedural crazy quilt in which the discovery that lawyers engage in hinges on the court in which the case is filed.

Again, just a few observations about the discovery changes. First, they have been driven largely by the desire to process civil cases more quickly and more cheaply—in other words, more efficiently. Second, they have been driven by a dissatisfaction with adversarial process; limitations on the amount or the form of discoverable information, as well as the forced disclosure of information an opponent may never have requested, move our civil justice system closer to the inquisitorial form. Third, the fractionalization of the discovery rules means not just that antitrust and tort cases might receive different procedures; it also means two identical antitrust cases filed in two different districts might receive different procedures. We are, quite simply, sacrificing our transsubstantive aspirations. Finally, the ancestry of many (although not all) of these changes traces back to complex litigation, where managerial judges and lawyers had often created systems of voluntary information exchange as a means of facilitating the movement of vast quantities of information in a reasonable time frame.[32]

A fifth significant procedural change has been the overall fractionalization of federal procedure, of which the disparate discovery provisions are but one example. Much of the division derives from the Civil Justice Reform Act of 1990,[33] which Congress passed to address widespread concerns about cost and delay in the federal civil justice system. It is a fascinating, and unresolved, empirical and normative question whether cost and delay in federal courts actually are excessive, and whether anything can really be done to reduce them; but the point is that Congress accepted the perception—largely created

29. For a history of the congressional action (and ultimate inaction) regarding proposed Rule 26, see Rochelle C. Dreyfuss, The What and Why of the New Discovery Rules, 46 Fla. L. Rev. 9 (1994).

30. Fed. R. Civ. P. 26(a)(1), (b)(2).

31. For compilations of the approaches taken by different courts to mandatory disclosure, see Subcommittee on Mandatory Prediscovery Disclosure Rules, Committee on Pretrial Practice and Discovery, American Bar Association Section on Litigation, Mandatory Prediscovery Disclosure: A First Look app. 1, 1A (Chicago, 1994); Donna Stienstra, Implementation of Disclosure in United States District Courts, with Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26 (1996), *reprinted in* 8 Charles Alan Wright et al., Federal Practice & Procedure supp. 35 (St. Paul, 1996).

32. See Manual, *supra* note 20, § 21.422; Manual for Complex Litigation, 3d ed., § 21.423 (Washington, 1995); Francis E. McGovern & E. Allen Lind, The Discovery Survey, Law & Contemp. Prob., Autumn 1988, at 41.

33. Pub. L. No. 101-650, tit. I, 104 Stat. 5089, 5089–97 (codified as amended at 28 U.S.C. §§ 471–482).

by the federal courts' handling of complex litigation—that cost and delay needed to be addressed. Therefore, among other things, the CJRA required each federal court to study the causes of cost and delay in the district, and to implement a plan to reduce both cost and delay.[34] One of the primary ways in which courts have implemented these plans is to develop local rules and orders that streamline certain kinds of cases or certain phases of litigation. Some of the rules and orders that courts adopted under the CJRA are flatly inconsistent with the letter of specific Federal Rules of Civil Procedure. Many more of the plans and orders are inconsistent with the fundamental spirit of the Federal Rules: a simple, nontechnical set of rules that was applied equally by all federal courts to cases of all types.[35]

For the old-time practitioner in federal court, these district-by-district procedural splits created by the CJRA might not seem overly remarkable. After all, there have always been local rules and a local legal culture that a practitioner ignored at his or her peril. My response to that perception is that procedural splits today *are* worse—at least in degree if not altogether in kind. Practitioners used to read their Federal Rules first, and their local rules and orders second. Today this order has been inverted. What has been lost because of the CJRA is the sense—however mythological—of a coherence, a uniformity, a transsubstantivity that the Federal Rules provided.

There are some efforts under way to check this disintegration of the Federal Rules. The Supreme Court has just promulgated a revised Rule 83, which declares that local rules or orders flatly inconsistent with the Federal Rules are invalid.[36] But Rule 83 is just a modest beginning. It will be years before we will be able to speak again of the federal courts as a unified, coherent procedural system applying like procedural rules to like cases. The message of complex litigation—that all cases cannot be treated procedurally alike—may have been delivered to the wrong quarters, and the damage done by its misdelivery will not easily be repaired.

The final great change in procedure during the last ten years has been the creation of new jurisdictional and venue provisions. A new jurisdiction statute, passed in conjunction with the CJRA, combines the traditional notions of pendent claim, pendent party, and ancillary jurisdiction under a single umbrella called "supplemental jurisdiction."[37] This statute has three critical parts. First, when a federal court's jurisdiction over a case is founded in whole or part on a federal question, section 1367(a) authorizes the court to exercise "supplemental" jurisdiction over other claims asserted by the plaintiffs against the defendant, claims asserted by or against other parties, third-party claims, and counterclaims. The fact that the federal court has no independent jurisdiction over these supplemental claims is irrelevant; section 1367(a) autho-

34. 28 U.S.C. §§ 471, 473.

35. For discussions of CJRA plans and their tense relationship with the Federal Rules, see Carl Tobias, Civil Justice Reform and the Balkanization of Federal Civil Procedure, 24 Ariz. St. L.J. 1393 (1992); Symposium on Civil Justice Reform, 46 Stan. L. Rev. 1285 (1994).

36. Fed. R. Civ. P. 83(a)(1).

37. 28 U.S.C. § 1367.

rizes subject-matter jurisdiction as long as these additional claims are so closely related to the federal question claim that they can be seen as one "case or controversy" for purposes of Article III of the Constitution.[38] Second, when federal jurisdiction over a case is founded solely on diversity, section 1367(b) similarly authorizes the federal court to exercise jurisdiction over these same types of supplemental claims—except that section 1367(b) explicitly removes jurisdiction over plaintiffs or claims whose joinder would violate the rule of complete diversity.[39] Third, the district court retains the discretion not to hear supplemental claims in specified situations.[40]

What I have just described is how the statute works in theory. In practice, the statute is full of enough ambiguities, intricacies, and contradictions to keep a room full of proceduralists happily talking for a semester.

The venue provision, also passed in 1990, is more straightforward; it has only two important ambiguities, and Congress tried to fix one of them in 1992 and again in 1995. Although the 1990 amendments to the venue statute[41] did remove the right of diversity plaintiffs to sue in their home forum, in most cases section 1391 now makes venue available in more federal forums.[42] In particular, section 1391 creates a default rule, so that any federal court with personal jurisdiction over any defendant has venue over the case when no other venue is available.[43]

Both supplemental jurisdiction and the venue changes developed from two impulses. The first was the desire for greater efficiency in litigation; the assumption was that a single litigation in which all, or at least more, actions could be joined was preferable to multiple litigations. The other impetus was the history of complex litigation, which had been struggling for years to work its way through the morass of jurisdictional, venue, and party joinder rules to find a single forum in which an entire complex controversy could be adjudicated once and for all. In my view, the new venue provision rather successfully meets both objectives. The new supplemental jurisdiction statute, however, has met only the first objective; it did little to help, and something to hurt, the cause of creating a single federal forum for hearing truly complex disputes. Section 1367 is an example of a situation where the complex litigation tail may have wagged the procedural dog, but received virtually nothing in return.

I have tried to give a broad history, describing not only what has changed, but why, and how we might evaluate the changes against some leading proce-

38. 28 U.S.C. § 1367(a).

39. 28 U.S.C. § 1367(b). There are possible, but by no means certain, exceptions to this statement in the context of class action practice and permissive joinder of plaintiffs under Rule 20. See *In re* Abbott Labs., 51 F.3d 542 (5th Cir.), *rehearing denied*, 65 F.3d 33 (1995); Stromberg Metal Works Inc. v. Press Mechanical, Inc., 77 F.3d 928 (7th Cir. 1996).

40. 28 U.S.C. § 1367(c).

41. 28 U.S.C. § 1391.

42. See 28 U.S.C. § 1391(a)(2), (b)(2) (permitting venue in any judicial district in which "a substantial part of the events or omissions giving rise to the claim occurred").

43. See 28 U.S.C. § 1391(a)(3) (permitting venue in any judicial district in which "any defendant is subject to personal jurisdiction"); 28 U.S.C. § 1391(b)(3) (permitting venue in any judicial district in which "any defendant may be found").

dural notions like efficiency, adversarialism, and trans-substantivism. Along the way I have neglected some interesting procedural changes more important in practice than in theory.[44] I hope, however, to have shown that ideas and solutions that developed in complex cases two dozen years ago changed the face of routine civil litigation during the last dozen years.

If I am right about how complex litigation has affected routine cases, and if the trend holds over the next dozen years, significant procedural changes will continue apace. The cutting edge of complex litigation today continues to look for more efficient—albeit less adversarial and less trans-substantive—solutions. Right now the American Law Institute and other scholars in the field of complex litigation are calling for the replacement of present personal jurisdiction rules with a nationwide minimum-contacts standard;[45] for issue preclusion against parties who could have joined a case and declined to do so; for freer ability to join in one suit related cases that are dispersed among state and federal forums; for national choice-of-law standards; for liberalized class action rules; for broader use of novel information-gathering techniques; and for high-tech courtrooms and trial formats.[46] A few cases have started tentatively down these paths.[47] These are the brave new ideas that students are now exploring in their procedure courses, and these are ideas that will shape the delivery of substantive rights during the years to come.

44. Let me mention just one, so that we do not sound like procedural dinosaurs to our students: the "directed verdict" of old is now called "judgment as a matter of law," and the new term of art for the old-fashioned "judgment notwithstanding the verdict" (or "j.n.o.v.") is "renewed judgment as a matter of law." See Fed. R. Civ. P. 50(a), (b).

45. I have not addressed in this paper some of the interesting recent changes in personal jurisdiction and service of process. Two provisions, however, deserve brief mention. First, Rule 4(d) provides certain incentives to defendants to waive formal service of summons, a measure clearly designed to speed litigation up and make it less costly. Second, Rule 4(k)(2) essentially adopts a national minimum-contacts standard for defendants who are not subject to personal jurisdiction in any state and who are sued under federal law; this provides an analog for those contending for more liberal personal jurisdiction rules in all cases. Regarding the more general changes in our constitutional jurisprudence on personal jurisdiction, see Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102 (1987); Burnham v. Superior Ct., 495 U.S. 604 (1990).

46. See American Law Institute, Complex Litigation: Statutory Recommendations and Analysis (Philadelphia, 1994) and sources cited therein.

47. See, e.g., *In re* Asbestos Litigation, 90 F.3d 963 (5th Cir. 1996); *In re* DES Cases, 789 F. Supp. 552 (E.D.N.Y. 1992); *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690 (E.D.N.Y. 1984).