THE COURTS AND THE PEOPLE IN A DEMOCRATIC SYSTEM: AGAINST FEDERAL COURT EXCEPTIONALISM

*Simona Grossi**

The law of federal procedure is on the Supreme Court's docket for the October 2016 Term, with granted petitions addressing pleading sufficiency,[1] standing,[2] and jurisdiction.[3] And, of course, the Advisory Committee on Rules of Civil Procedure continues its annual tinkering with the Rules in an elusive effort to micromanage federal practice.[4] That

* Professor of Law & Theodore Bruinsma Fellow, Loyola Law School Los Angeles; Senior Research Scholar in Law, Yale Law School, Fall 2016; Visiting Professor of Law, USC Gould School of Law, Fall 2015; J.S.D., UC Berkeley; L.L.M., UC Berkeley; J.D., L.U.I.S.S. University, Rome, Italy. All mistakes are my own.

1 *See* Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venez., 784 F.3d 804 (D.C. Cir. 2015), *cert. granted*, 136 S. Ct. 2539 (2016) (No. 15-423). In this case, the Supreme Court granted certiorari to determine whether, when pleading jurisdiction under the expropriation exception to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1604, 1605(a)(3) (2012), a higher pleading standard should be employed—one under which it is not sufficient to state an expropriation claim but necessary to show that there *actually is* a claim, essentially requiring the plaintiff to establish something beyond the current plausibility standard. Petition for a Writ of Certiorari at i, *Bolivarian Republic of Venez.*, 136 S. Ct. 2539 (No. 15-423). The defendant's argument in *Venezuela* presents a classic example of arguing from a conception—sovereign immunity—to an abstract but controlling proposition of law. A more realistic approach, one that examines the facts, is put to the side in the interest of the conception. I think this type of analysis should be strongly resisted.

2 *See* City of Miami v. Bank of Am. Corp., 800 F.3d 1262 (11th Cir. 2015), *cert. granted*, 136 S. Ct. 2544 (2016) (No. 15-1111). The Court consolidated with this case *City of Miami v. Wells Fargo & Co.*, 801 F.3d 1258 (11th Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016) (No. 15-1112).

3 *See* Lightfoot v. Cendant Mortg. Corp., 769 F.3d 681 (9th Cir. 2014), *rev'd*, 137 S. Ct. 553 (2017).

4 Among other rules, the Advisory Committee is currently working on Rule 23, which governs class actions. The rule is already a hyper-technical, code-like provision, that elevates form over substance, obscuring the role and primacy of claim analysis, and as such, it has generated much litigation. *See* COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 211–32 (2016), http://www.uscourts.gov/rules-policies/proposed-amendments-published-public-

reality, coupled with recent exchanges with colleagues on procedural interpretation and reform, has prompted these reflections on the role of procedure in our democratic system. This short Essay is intended to summarize those reflections, which are more extensively elaborated in my other works.[5]

At the core of every liberal democracy is a commitment to a wide range of individual rights. The recognition and evolution of those rights is a lively topic of public debate. Procedural law, on the other hand, is well below the public radar. But procedure serves many purposes. One of the primary ones, perhaps the essential one, is to provide an adaptable method through which the substantive law can be examined in action and adjusted to our ever changing social landscape, thus promoting the evolution of substantive law. Yet procedure has become increasingly formalistic. By elevating form over substance, modern procedure often prevents the development of substantive law, thus silently eroding an essential aspect of our democracy. This phenomenon is visible in the courtrooms as well as in statutory and committee-based procedural reforms.

Without a vibrant and effective system of procedure, individual rights exist only as abstractions. Without process there are no rights. There are, for example, no rights to personal autonomy or privacy unless those rights can be enforced, and enforcement in a liberal democracy requires a system of procedure. Many of our most cherished rights, particularly those created in the process of judicial review, are forged in the system of procedure. Fair procedure, in short, is a necessary condition of a liberal system of justice.

As Arthur Corbin observed in the 1920s, however, people disagree on the notions of right and justice and the policies that might best promote the general welfare.[6] And yet, he obviously believed that this should not

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comment. One could argue that the complexities of class actions demand a hyper-technical rule. But I believe that such rules are not effective in coping with complexities, as they generate more litigation and debate on the details that are in the rules or the ones that are left out of them. To be coherent, fair, and efficient, procedural rules should be open-textured. Open-textured rules are flexible; they allow judges and lawyers to operate using their wisdom, experience, and common sense, and thus ultimately promote efficiency and the creation and enforcement of substantive rights.

5 *See* SIMONA GROSSI, THE U.S. SUPREME COURT AND THE MODERN COMMON LAW APPROACH (2015); Simona Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth with No Exit*, 47 AKRON L. REV. 617 (2014); Simona Grossi, *A Modified Theory of the Law of Federal Courts: The Case of Arising-Under Jurisdiction*, 88 WASH. L. REV. 961 (2013); Simona Grossi, Forum Non Conveniens *as a Jurisdictional Doctrine*, 75 U. PITT. L. REV. 1 (2013).

6 *See* Arthur L. Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226, 238 (1921). For a profound investigation into the scope and meaning of justice, see BENJAMIN CARDOZO, THE PARADOXES OF LEGAL SCIENCE 31 (1928).

discourage us from seeking justice, but only that we should embark on this endeavor with the "keenest and the truest analytical weapons."[7]

Much of the story of procedural reform involves the tension between formalism—the need for rules—and pragmatism—the need for functional flexibility. 1848 and 1938 were landmark years in the history of American procedural law. The first marked the advent of code pleading, and the second introduced the Federal Rules of Civil Procedure. Both developments were a product of reform movements that addressed the perceived inefficacy of the then-existing procedural systems. The goal of each reform movement was to create a system of procedure that was both efficient and instrumental to the vindication of substantive rights.

The procedural systems preceding the reforms also reflected a tension between formalism and pragmatism. The formalists tended to be defenders of the status quo, while the pragmatists were advocates of change and believed that a less formalistic approach to procedure would promote the evolution of substantive law. The early codes offered a pragmatic procedural system that was structured but significantly less so than the common-law system it replaced. And the Federal Rules aimed to do the same in response to the codes, which some twentieth-century reformers thought had become overly formalistic.

The difficulty facing both sets of reformers, though, was that their respective tasks of reform required the imposition of rules and, at the same time, a pragmatic but principled approach to applying those rules. Rule-based systems, however, tend to drift toward formalistic interpretations and away from the desired pragmatic flexibility. Thus the rules of code pleading came to dominate the instrumental goals of that system, and the same is happening to the federal system of procedure, which is composed of ever more precise federal rules and an arcane body of judge-made doctrine that is less about litigation than it is about the exceptional nature of federal courts.

Charles E. Clark, the driving force behind the adoption of the Federal Rules of Civil Procedure, thought that procedure, sometimes called "adjective law," i.e., added law, should serve the fair and efficient vindication and elaboration of substantive rights.[8] Under the procedural system envisioned by Clark, as Henry Sumner Maine explained, we would no longer view the substantive law "through the envelope of its technical forms" or as having been "secreted in the interstices of procedure."[9] Rather, we would assign to substantive law a place of primacy and view procedural law as the means through which that substantive law would be

7 Corbin, *supra* note 6.

8 Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938).

9 HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM: CHIEFLY SELECTED FROM LECTURES DELIVERED AT OXFORD 389 (N.Y.C., Henry Holt & Co. 1883).

discovered, created, and enforced. Or, as Clark explained it, procedure should be and remain no more than the modest handmaid of justice.[10]

Shortly after the adoption of those rules, Henry Hart and Herbert Wechsler in their seminal federal courts casebook[11]—and under the influence of Felix Frankfurter[12]—spiked legal-process analysis with a structural principle that placed a variant of federalism and separation of powers as a powerful check on the law of federal courts. This became the dominant perspective of federal practice and reform to the point of finally silencing the analysis of the claim, the creation and enforcement of substantive rights, and, eventually, the development of substantive law. The power of judicial review was considered suspect and democratically deviant.[13] Hart and Wechsler's work has influenced generations of judges and lawyers—including several if not all of the sitting Supreme Court Justices—and helped create a body of law that has cloaked our modest handmaid of justice in thick, multi-layered robes of increasingly obscure doctrine. This emphasis on the principles of federalism and separation of powers comes at the expense of the claim—the essential litigation unit—and, in fact, disserves the enforcement of rights and the federal system as a whole.

Following the lead of Hart and Wechsler, federal courts are currently treated as exceptional institutions somehow above the common fray of judging, their assigned mission being to protect an increasingly complex constitutional structure. This exceptionalism conflicts sharply with the more earth-bound philosophy that animated the original federal rules and that informs the fundamental judicial mission of dispute resolution. It has also helped transform the federal judiciary into an independent, self-interested bureaucracy, overprotective of its workload and elitist reputation. As such, it is not surprising that docket management is often the protagonist in modern federal judicial practice.[14] Clearing the dockets to foreclose the development of substantive rights and avoid the cost of discovery has become an independent goal of federal procedural law, with the active promotion of alternative dispute resolution[15] and pretrial settlement.[16] Indeed, a wide range of federal procedural doctrines has been

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10 Clark, *supra* note 8.

11 HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

12 Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism,"* 27 GA. L. REV. 697, 768–69 (1993).

13 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 18 (1962).

14 *See generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

15 *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2806–10 (2015).

16 Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1073–74 (1984).

overtly and covertly infected with this new philosophy. A fastidious approach to docket management has disserved the rule of law and the public's interest in the vindication of constitutional principles. It has also made federal dispute resolution unnecessarily complicated, obsessively concerned with formalities, and ultimately less productive.

As did Charles Clark, I see the courts "neither [as] a sacred institution nor [as] a foe to progress but merely [as] one of the instrumentalities through which a democracy attempts to function."[17] Like Clark, I believe that procedure exists to assist the courts and the people in the resolution of legal disputes. Hence, procedure should be flexible and sufficiently adaptable to accommodate the variable needs of the litigants and "secure the just, speedy, and inexpensive determination of every action."[18] Clark believed that when interpreting and applying rules and precedents, judges and lawyers should use their wisdom, knowledge, and best practices, what he called "natural lawyering" and "natural judging."[19] Hence, his federal rules were designed to allow them to do so, assigning to the claim and the enforcement of rights a place of primacy within the procedural system.

Clark described the claim as "a group of operative facts giving rise to one or more rights of action."[20] Hence, a claim was intended as a fact-driven, nontechnical narrative suggestive of a legal theory that would entitle the pleader to relief, and generative of the lawsuit. He explained that this definition was not going to be absolute, and did not intend to provide a mathematical test. But it was intended to operate well within a pragmatic, rather than an arbitrary approach to procedural rules.[21]

The claim should indeed have a place of primacy in litigation analysis and procedural reform. The claim is the story that generates the litigation and evokes one or more rights of action. As such, the claim controls the scope of discovery, provides the focal point for summary judgment, and determines the relevance of evidence to be presented at trial, should there be one. It is the heartbeat of the case. But it is much more than that. A claim presents a demand for justice under the law and, as such, the judicial

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17 Charles E. Clark, *The Courts and the People*, 57 LOCOMOTIVE ENGINEERS J. 626 (1923).

18 FED. R. CIV. P. 1.

19 *See* Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 183–85 (1958) (explaining these concepts).

20 CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 477 (2d ed. 1947); *see also id.* at 137 ("The cause of action must, therefore, be such an aggregate of operative facts as will give rise to at least one right of action . . . ."). While the quoted materials specifically refer to the code-pleading phrase, "cause of action," Clark made it clear that his pragmatic definition of cause of action was embraced by the term "claim" under the federal rules. *Id.* at 146–48.

21 Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 830–31 (1924).

recognition and enforcement of claims are essential components of the rule of law. As famously stated in *Marbury v. Madison*:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.
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> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[22]

From the perspective of constitutional law, the individual is the one player in our constitutional scheme most in need of a judicial forum. The collective people have a voice in the election of their representatives, including the President; both Congress and the President have tools to defend their own constitutional prerogatives; and the States have a significant voice in Congress, and particularly so in the Senate. Only the individual is left out of these structural checks and balances. An individual's constitutional voice is heard, if at all, when the individual presents her claim in the system of justice. As the Advisory Committee continues its review of the Federal Rules, and as the Supreme Court prepares to address yet more questions on the law of federal practice, my hope is that these revisers and interpreters keep in mind the instrumental and essential role of the claim in the discovery, creation, and vindication of fundamental rights, and that the courts are the instrumentalities through which a democracy attempts to function.

22 5 U.S. (1 Cranch) 137, 163 (1803).