ARTICLE

THE CLAIM

Simona Grossi[*]

To Allan Ides, my Mentor

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* 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; LL.M., UC Berkeley; J.D., L.U.I.S.S. University, Rome, Italy. I am thankful to my mentor, Allan Ides, for guiding me through some crucial, exhilarating, and disappointing moments of my life. I owe him more than words could ever express. And I'm thankful to Scott Bice, Bob Klonoff, John Parry, Jim Pfander, Robert Pushaw, and Judith Resnik for their extremely helpful comments on an earlier draft of this Article. This Article was presented at UC Irvine, USC Gould, Pepperdine, and Washington & Lee. I'm immensely thankful for the invaluable feedback and special hospitality there received.

I. INTRODUCTION

A. Premise

At the core of every liberal democracy is a commitment to a wide range of individual rights. The recognition and evolution of those rights are lively topics of public debate. Procedural law, on the other hand, is well under the public radar. Yet, without a vibrant and effective system of procedure, individual rights exist as mere abstractions. There is, for example, no right to privacy unless that right can be enforced, and enforcement in a liberal democracy requires an effective and adaptable system of procedure. Indeed, many of our most cherished rights have been forged through the system of procedure.[1] The law of procedure, therefore, should be of prime importance to both the general public and the legal profession.

Procedure is, of course, only a means to an end. But not just any end. The ultimate end of procedure is justice. As Arthur Corbin observed in the 1920s, people disagree on what constitutes justice.[2] And yet, Corbin obviously believed that this should not discourage us from seeking justice, but that we should embark on this endeavor with the "keenest and the truest analytical weapons."[3] We should properly identify and address the legal and social problems to be solved and carefully investigate and identify

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1. The most recent example would be the Supreme Court's recognition of the right to same-sex marriage. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015). But anyone who followed the serpentine litigation path that led to that recognition cannot help but marvel at the procedural complexities of the journey. *Compare* Hollingsworth v. Perry, 133 S. Ct. 2652, 2659–75 (2013) (holding that supporters of ballot initiative amending California constitution to define marriage as between a man and a woman did not have standing because they had not suffered a particularized injury), *with* United States v. Windsor, 133 S. Ct. 2675, 2682–89, 2697–703 (2013) (holding that congressional group had standing to defend Defense of Marriage Act despite lack of adverseness because prudential requirements necessitated a decision); *see infra* text accompanying notes 194 (explaining change from mechanical application of requirements for adverseness in standing cases to a more flexible approach in gay marriage cases).

2. *See* Arthur Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226, 238 (1920–1921). For a profound investigation into the scope and meaning of justice, *see* BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 31–52 (1928).

3. Corbin, supra note 2, at 238.

the *is* to prepare ourselves to approach the *ought* with the knowledge of the consequences of our moral judgment.[4]

This Article, which focuses on procedure at the federal level, is part of a larger project intended to change the mechanical way we think about procedural law and procedural reform.[5] By testing the federal rules and various federal procedural doctrines against the claim—the essential litigation unit—this study shows how procedure, when operating at a very high level of abstraction and formalism, suffocates substantive law and justice, thus failing to accomplish its essential dispute resolution mission. This study also unearths the legitimate, unifying principles of federal procedure and practice and uses those principles to design a system that promotes the coherent, fair, and efficient delivery of justice.

B. Procedural Reforms: An Unresolved Tension Between Formalism and Pragmatism

The years 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 ("Rules").[6] Both developments were a product of reform movements that addressed the perceived inefficacy of the then-existing procedural systems.

Those reform movements reflected a tension between formalism—the need for rules—and pragmatism—the need for functional flexibility. The formalists tended to defend the status quo, while the pragmatists advocated change and believed that a less formalistic approach to procedure would promote the evolution of substantive law.[7] The early codes offered a pragmatic procedural system that was structured, but significantly less so than the common law system it replaced. And the new Rules aimed to do the same in response to the codes, which some twentieth century reformers thought were overly formalistic in design or had become so through interpretation.

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4. Charles E. Clark, *The Higher Learning in a Democracy*, 47 INT'L J. ETHICS 317, 333 (1937).

5. SIMONA GROSSI, THE COURTS AND THE PEOPLE IN A DEMOCRATIC SYSTEM (Cambridge University Press, forthcoming); *see also* Simona Grossi, *The Courts and the People in a Democratic System: Against Federal Court Exceptionalism*, 92 NOTRE DAME L. REV. ONLINE 106 (Apr. 26, 2017), http://ndlawreview.org/wp-content/uploads/2017/04/Grossi_Final.pdf [https://perma.cc/AT42-XKGU].

6. Robert Bone, *Mapping the Boundaries of the Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 3–4 (1989).

7. *Id.* at 5–9, 78–79.

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. Thus, the code pleading rules drifted toward a formalistic interpretation and away from the desired pragmatic flexibility, and so have the Rules, as I will detail below.

Charles E. Clark, the driving force behind the adoption of the Rules, believed that procedure, sometimes called "adjective law," i.e., added law, should serve the fair and efficient elaboration and vindication of substantive rights. Under the procedural system envisioned by Clark, 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."[8] 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 discovered, created, and enforced. Or, as Clark explained it, procedure should be and remain no more than the modest handmaid of justice.[9]

Shortly after the adoption of the Rules, Henry Hart and Herbert Wechsler, in their seminal federal courts casebook,[10] and under the influence of Felix Frankfurter,[11] 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, and became the louder and louder context of litigation analysis and reform, to the point of finally silencing the claim.[12] The power of judicial review came to be viewed as suspect and democratically deviant.[13] Hart and Wechsler's work (and that of their acolytes) influenced generations of judges and lawyers and helped create a body of law that 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 came at the expense of the claim and, in fact, disserved the federal system. It was also completely unnecessary. In fact, as I will show, attending to the claim would *naturally* resolve any genuine federalism or separation of powers concerns.

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8. HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (1890).

9. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 299 (1938).

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

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

12. Michael L. Wells, *A Litigation-Oriented Approach to Teaching Federal Courts*, 53 ST. LOUIS U. L.J. 857, 858–60 (2009).

13. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 17–18 (1962).

Following the lead of Hart and Wechsler, federal courts often see their assigned mission as protecting an increasingly complex constitutional structure. This exceptionalism conflicts sharply with the more earth-bound philosophy of dispute resolution that animated the adoption of the Rules. The same exceptionalism has helped transform the federal judiciary into an independent, self-interested bureaucracy, overprotective of its workload and its elitist reputation. As such, it is not surprising that in modern federal judicial practice, the judicial case management[14] role—essential to a proper functioning of the judicial system—often turns into a docket-clearing one. Clearing dockets to foreclose the development of substantive rights and to 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 overtly and covertly infected with this viral philosophy.

C. Reforming Procedural Reform

Like 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, procedural rules and doctrines should be pragmatic, informed by fundamental principles, and flexible, i.e., adaptable, so as to properly address the specifics of each case and allow their "just, speedy, and inexpensive determination."[18]

Clark was steeped in the school of legal realism and recognized that experience and changing circumstances would, over time, necessarily require reconsideration and reform of the chosen rules. Thus he believed that procedural rules should be conducive of "natural lawyering" and "natural judging."[19] Essentially, procedural rules should allow judges and lawyers to do what their wisdom, knowledge, and best practices—those grounded in an understanding of the law and its

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14. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 377–78 (1982).

15. 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, 2840–44 (2015).

16. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1086–90 (1984).

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

18. FED. R. CIV. P. 1 (1938).

19. Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181–85 (1958).

consequences—would suggest them to do under the specific circumstances of the case.[20] In this sense, natural lawyering and judging rest on the same realist footing as the "best business practices" principle that informed the legislative drafting of Grant Gilmore.[21]

When presenting my work at colloquia and workshops, colleagues often ask me to explain the phrase "natural lawyering and natural judging," and I must say that their request always surprises me. But I think the reason behind this question comes from our gradual loss of focus on what is truly at stake here. We have lost track of the essence of litigation, increasingly distracted by considerations of federalism, separation of powers, case management, and (perhaps) academic success. We think more about the concepts and less about what lawyers and judges actually do.

My approach is different. I would describe it as "claim-centered." And that doesn't mean that it is claim-exclusive or even claim-dispositive. Centering one's perspective on the claim does not in any fashion erase other considerations that ought to inform the interpretation and application of the law of federal courts. A claim-centered approach does, however, offer a perspective that reminds us of the fundamental judicial mission of dispute resolution under the law. It also emphasizes that litigation is about the claim, that the context of analysis and reform should be one closer to the litigation reality than federalism and separation of powers, and that the vindication of individual rights should be a central concern in the law of federal courts, rather than a question to be assiduously avoided.

Part II suggests a working definition of the claim and offers some reflections on its essential role in the federal system. Neither the definition nor the reflections are meant to provide an absolute and definitive conception of the claim though, as the matter will shape itself as the Article proceeds and as the law evolves. Yet, this section provides a platform on which to build the discussion that follows. Part III examines and critiques various federal rules and rule-based doctrines from the perspective of the claim, showing how the purpose of litigation and claim assessment should inform the analysis and help us target our reform efforts. Part IV offers a similar analysis with respect to several judge-made procedural doctrines that operate beyond the rules. The breadth of this study as to the rules and doctrines under examination is intended to provide the reader with a holistic vision

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20. *Id.*

21. GRANT GILMORE, THE AGES OF AMERICAN LAW 85, 140 n.37 (1977).

of federal procedural law, and a sense of litigation as close as possible to reality, as I believe that this is essential to the success of any procedural reform mission. Part V provides my concluding remarks based on the findings of this study.

II. THE CLAIM

The choice of the word "claim" in Rule 8 ("Claim for Relief") represented a conscious effort by the drafters of the Rules to endorse a pragmatic understanding of the basic litigation unit and avoid the rigidity and confusion generated by the phrase "cause of action."[22] To that end, Clark described the claim as "a group of operative facts giving rise to one or more rights of action."[23] Hence, a claim was intended as a nontechnical, fact-driven narrative suggestive of a legal theory that would entitle the pleader to relief.

Clark's definition has several benefits. Besides being pragmatic, it is also "neutral" in the sense endorsed by the legal process school.[24] As Kent Greenawalt explained, "[a] person gives a neutral reason . . . if he states a basis for a decision that he would be willing to follow in other situations to which it applies."[25] The operative-facts claim perfectly fits this idea, as it applies universally and without regard to context. It adjusts to the case, rather than having the case adjust to it.

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22. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 722 & n.7 (1966) ("[T]he meaning of 'cause of action' was a subject of serious dispute. . . .").

23. 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.

24. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9–10 (1959); *see also* Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 983–90 (1978); Simona Grossi, *A Modified Theory of the Law of Federal Courts: The Case of Arising Under Jurisdiction*, 88 WASH. L. REV. 961, 969–73 (2013).

25. Greenawalt, *supra* note 24, at 985. Consistent with this idea and approach, *see* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 31 (1921) ("Given a mass of particulars, a congeries of judgments on related topics, the principle that unifies and rationalizes them has a tendency, and a legitimate one, to project and extend itself to new cases within the limits of its capacity to unify and rationalize."). Justice Cardozo further explained that these durable principles have "the primacy that comes from natural and orderly and logical succession." *Id.* Roscoe Pound espoused a similar view. *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 606–23 (1908). In that article, Pound described the jurisprudence of the early twentieth century as "mechanical," a jurisprudence that proceeded through narrow, structured formulas, and used conceptions as ultimate solutions rather than premises from which to reason. *Id.* In his view, a judge should not fail to link legal doctrine to the underlying principles and ideas from which that doctrine is derived. *Id. See also* Grossi, *supra* note 2424, at 965.

The phrase "cause of action" had been used descriptively under the common law system and in connection with statutes of limitations in the early nineteenth century, but it did not become a term of art until the advent of code pleading in 1848.[26] Before then, the phrase connoted little more than a right to recover under the form of action selected or as a bar to the action under the applicable statute of limitations.[27] However, under the new code-pleading regime, it became a term of art and an essential component of the procedural system.[28] Despite this centrality, however, the meaning of the phrase was disputed from the outset.[29] Some thought it endorsed a type of equity pleading that required no more than a factual narrative describing the controversy between the parties,[30] while others interpreted it more formalistically, as constituting a "right of action" or the assertion of a specific primary right with a corresponding duty.[31]

Clark addressed this confusion and defended the pragmatic approach as being more consonant with the ideals and goals of code pleading, which he described as "the convenient, economic, and efficient conduct of court business, the enforcing of rules of substantive law with as little obtrusion of procedural rules as possible."[32] In so doing, he drew a careful distinction between "causes of action" and "rights of action."[33] According to Clark, a right of action pertained to a "'remedial right,' that is the particular *right-duty* legal relation which is being enforced in the particular legal action under consideration."[34] A cause of action, however, was distinct from that relationship:

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26. Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 820–21 (1924).

27. *Id.*

28. Silas A. Harris, *What is a Cause of Action?*, 16 CAL. L. REV. 459, 463–65 (1928).

29. *See* O. L. McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614 (1925) ("The relation of the cause of action to the action, on the one hand, and to the parties, on the other, has proved most perplexing. The cause of action has not been understood. Eminent writers on the code have failed to agree as to its character and scope.").

30. *See, e.g.*, New York and New Haven R.R. Co. v. Schuyler, 17 N.Y. 592, 604 (1858) (endorsing an interpretation "best calculated to promote the ends of justice"); *see also* Clark, *supra* note 26, at 827–29.

31. JOHN NORTON POMEROY, CODE REMEDIES § 347 (4th ed. 1904), at 460–61:

> Every judicial action must therefore involve the following elements: a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself.

32. Clark, *supra* note 26, at 818–20.

33. *Id.* at 823–24.

34. *Id.* at 824.

> It seems clear that in the pleading section of 1848, at least, the codifiers by *cause of action* meant something other than this right. They continually insisted on a system of allegation of fact, where the demand for relief, whether legal or equitable, was no proper part of the cause. [T]hey spoke of the "*facts* constituting the cause of action," or "*facts sufficient* to constitute a cause of action." It was a deadly sin to plead law; what was necessary was to set forth the facts and these facts constituted the cause of action.[35]

Accordingly, Clark defined "cause of action" as "an aggregate of operative facts, a series of acts or events, which gives rise to one or more legal relations of right-duty enforceable in the courts."[36] He argued that this definition was, in fact, what the code commissioners had in mind when they used such phrases as "facts constituting the cause of action" and "facts sufficient to constitute a cause of action."[37]

This distinction between causes and rights makes sense from a lexical perspective. A "cause" is something "that brings about an effect or that produces . . . a resultant action or state [of being]."[38] That is quite distinct from a "right," which connotes an entitlement, i.e., "something to which one has a just claim."[39] Of course, for an action to be actionable at law it must give rise to a judicially enforceable right.[40] As Clark implicitly suggests, the phrase "cause of action," therefore, references three things: the cause, the action, and the enforceable rights arising out of the relevant facts and law.[41] In short, a cause of action is not a right of action, although it must generate at least one such right.

Responding to an anticipated critique of his operative-facts definition of a cause of action, Clark observed:

> It may be objected that here is no absolute definite definition, no mathematical test to be applied as a rule of thumb. None such is intended or thought feasible. There is no royal road to pleading for either bench or bar. Two things, however, are claimed for this analysis. First, it puts the emphasis where it should be, namely, on the operative facts. . . . Second, it affords a test or touchstone for extending or limiting our view to meet the exact situation presented in each case. There is

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35. *Id.*

36. *Id.* at 828.

37. *Id.* at 828–29.

38. WEBSTER'S THIRD NEW WORLD INTERNATIONAL DICTIONARY 356 (Philip B. Gove et al. eds., 1986).

39. *Id.* at 1955.

40. Clark, *supra* note 26, at 828.

41. *Id.* at 828–31.

> thus afforded a pragmatic instead of a purely arbitrary application of procedural rules.[42]

Moreover, the insistence on a more precise definition was inconsistent with the underlying thesis of code pleading—the creation of convenient trial units. For Clark, procedure was meant to serve the development of substantive law and not create artificial barriers to its enforcement. Hence, whether a party stated a cause of action was not to be resolved by reference to a technical set of rules or preexisting conceptions, but would require a careful examination of the cause asserted. He further observed:

> This would leave a considerable choice to the pleader himself, but still more it would leave much to the discretion of the trial judge, who after all is the one upon whom the responsibility of getting trial work done must rest. It is objected that here is outlined a system to work well only with *able judges*. Surely this must be conceded. What system will do away with the personal equation, will not depend for its ultimate success upon the human instruments who work it? What is hard to understand is why it is hoped that a system of involved and confused definition will be any easier for the incompetent judge. It is submitted that this is but the old error of "delusive exactness."[43]

The debate over the meaning of cause of action was not simply a difference of opinion on a technical matter of procedure. At the heart of this debate was a more fundamental disagreement about the nature of law.[44] The proponents of the primary-rights model viewed the law as a collection of relatively stable, enforceable right-duty relationships, each of which could be discerned as a matter of natural law and distilled into a manageable primary right.[45] Early twentieth century reformers, such as Roscoe Pound, rejected the natural law premise and viewed law as a morphing, sociological phenomenon that, at its optimum, should reflect a balancing of interests dependent on time and circumstance.[46] For

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42. *Id.* at 830–31.

43. *Id.* at 831.

44. Bone, *supra* note 6, at 9–18, 78–79.

45. *See, e.g.*, JOHN NORTON POMEROY, THE "CIVIL CODE" IN CALIFORNIA 47–48 (1885) (extolling the virtues of permanent and stable law). On the other hand, Pomeroy did recognize the value in the "elasticity" of the common law. *Id.* at 52–53.

46. Pound, *supra* note 25, at 605–06.

> Law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical process or the strictness with which its rules proceed from the dogmas it takes for its foundation. . . . Law has the practical function of adjusting every-day relations so as to meet current ideas of fair play. It must not become so completely artificial that the public is led to regard it as wholly arbitrary. *Id.*

Pound and others of his generation,[47] the law was in a constant state of becoming. Such a morphing legal landscape was not reducible to identifiable primary rights; nor could it operate under a rigid procedural framework. Indeed, Clark, who was heavily influenced by Pound's work, questioned the coherence of the primary-rights project. To Clark and other legal reformers of his era, a system of pleading premised on facts seemed most conducive to the promotion of their preferred sociological jurisprudence.[48]

"The claim," as used in the Rules, was designed to be what Clark thought the cause of action should have been.[49] It was not an innovation. Rather, it was a reaffirmation of his perception of code-pleading's effort to eradicate procedural formalism. Consistent with that goal, a claim is not a specified right of action; it is the confluence of the operative facts and the rights of action arising out of them.[50] It is the nontechnical narrative (cause) from which the lawsuit (action) derives. This is a simple and elegant definition and it fully captures the complete and definitive meaning of the word "claim" for purposes of federal practice.[51]

The claim controls the scope of discovery, provides the focal point for summary judgment, and determines the relevance of the

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47. Wesley Newcomb Hohfeld, who also influenced Clark's work, believed that there was no universally ideal system of legal rights and that legal rights were the result of socially contingent policy choices. For Hohfeld's idea of right and legal relations, *see* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28–59 (1913).

48. Robert Bone suggests the following distinction between the advocates of primary rights and the reform movement that led to the adoption of the Federal Rules:

> Late nineteenth century jurists believed in a fundamental dichotomy between right and remedy and in the right-remedy-procedure hierarchy that held that procedure was instrumental to granting the ideal remedy, which, in turn, was instrumental to protecting legal rights rooted in natural law beliefs. Early twentieth century reformers, on the other hand, rejected the right-remedy dichotomy and the natural law assumptions that supported it. For these reformers, there was no fixed social ideal that gave content to legal rights. Instead, legal rights, duties, privileges and a host of other legal institutions were all shaped by the changing facts of social life.

Bone, *supra* note 6, at 97.

49. CLARK, *supra* note 23, at 146–48; *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; *see also* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5 FEDERAL PRACTICE & PROCEDURE § 1216 (3d ed. 2017).

50. CLARK, *supra* note 23, at 477.

51. *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 24(1), at 196 (1982)**:**

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

evidence to be presented at trial, should there be one.[52] 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 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 . . . .
>
> 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.[53]

The above reflections will provide useful analytical tools in the assessment of the litigation reality and its shortcomings, as well as in the framing of my theory of procedural reform.

III. THE CLAIM AND THE RULES

A. Pleadings

It is fair to say that the practice of law in federal courts begins with federal pleading standards, as those standards inform the drafting of the complaint, which, when filed, commences and informs the litigation.[54] If a complaint fails to plead a claim upon which relief can be granted, the complaint will be dismissed; if the complaint does state such a claim, a wide array of potential issues must be considered, each of which depends to some extent on the nature and scope of the claim asserted.[55]

As originally conceived, the Rules endorsed a simplified pleading standard, one that was shorn of technicalities. Rule 8(a)(2) then (as now) required only "a short and plain statement of the claim showing that the pleader is entitled to relief."[56] Clark, who was the Reporter on the first Advisory Committee, described the standards of simplified pleading as "minimal requirements" that "emphasize only the setting forth of the factual situation as a

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52. ALLAN IDES, CHRISTOPHER N. MAY & SIMONA GROSSI, CIVIL PROCEDURE: CASES AND PROBLEMS (5th ed. 2016).

53. Marbury v. Madison, 5 U.S. 137, 163 (1803).

54. FED. R. CIV. P. 3.

55. FED. R. CIV. P. 8.

56. FED. R. CIV. P. 8(a)(2).

whole."[57] The primary purpose of these minimal requirements was to "particulariz[e] the matter from any other case."[58]

Clark commended the form complaints in the Appendix of Forms, particularly the original negligence form, as illustrative of the minimal and yet sufficient requirements imposed by the short and plain statement standard.[59] He described the forms as "pictures" that portray the meaning of Rule 8(a)(2),[60] and they did so by providing a sense of clarity, simplicity, and natural lawyering and judging that should inform and characterize federal pleading practices. Clark captured well his idea of natural lawyering and judging when he described the virtues of Form 9,[61] the rules-committee-endorsed form complaint for negligence:

> So the advantage of a form like Form 9 is just because of its history. That's what lawyers would naturally say. That's the way we were brought up. In general we can get that much of very definite statement, and it is helpful. It particularizes the matter from any other case. It is perfectly adequate for res judicata purposes, and yet it isn't something a lawyer is going to feel unduly pressed for, as he would as to such details as speed, defective headlights, and the like. He may not know all those details. He may not know what his witnesses are going to testify. And further the witnesses cannot and should not be limited at the trial if some fool lawyer has not put in everything he can think of.[62]

In the specific context of pleading, a natural plaintiff's lawyer would provide sufficient information to particularize the case and to suggest the general nature of the action. A natural defense lawyer would know exactly how to prepare her defense against

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57. Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 273 (1941); *see also* Robert. G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 864–65 (2009–2010).

58. Clark, *supra* note 19, at 183.

59. Clark, *supra* note 57, at 279–81; *see also* Clark, *supra* note 19, at 181–82.

60. Clark, *supra* note 19, at 181. Of course, we are about to erase those pictures on the theory that they no longer accurately portray pleading standards under the rule or perhaps to avoid the embarrassing need to explain why they don't.

61. The original Form 9 provided a simple and sufficient example of a complaint in negligence:

> On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway. . . .As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 109 (Form 9) (1938).

62. Clark, *supra* note 19, at 183.

such a case. And a natural judge would manage the processing of the claims and defenses.

There is a slight peculiarity here. As noted above, Rule 8(a)(2) requires the statement of a claim "showing that the pleader is entitled to relief."[63] Given the operative-facts definition of a claim, which presupposes one or more rights of action arising out of those facts, this language would appear to be redundant. One cannot have a claim in the absence of a right of action. On the other hand, the quoted text could be interpreted as imposing a technical pleading requirement, namely, that the pleading itself must reveal the right of action and sustain that right with sufficient allegations of fact. That interpretation, however, does not appear to be the one the Advisory Committee intended. Rather, as we will see, it was anticipated that the sufficiency of any required "showing" would be examined through a variety of post-pleading procedures designed to assess the adequacy of the claim.

Shortly after the Rules were adopted, Rule 8(a)(2)'s short-and-plain-statement requirement came under attack as giving rise to a series of abuses and concerns, such as the initiation of unfounded lawsuits, a lack of clarity with respect to the scope of discovery, and the uncertainty as to the preclusive effect of federal judgments.[64] The critics complained that the "showing" requirement had been ignored by courts and they advocated amending the Rule to require "a short and plain statement of the claim showing that the pleader is entitled to relief, *which statement shall contain the facts constituting a cause of action*."[65] In so doing, they called for a return to a more formal version of code pleading.[66] The Advisory Committee declined the invitation to amend the Rule and explained:

> The intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement. . . . [As] it stands, the rule adequately sets forth the characteristics of good pleading; does away with the confusion resulting from the use of "facts" and "cause of action"; and requires the pleader to disclose adequate information as the basis of his

63. FED. R. CIV. P. 8(a)(2).

64. *Claim or Cause of Action*, 13 F.R.D. 253, 279 (1951).

65. *Id.* at 256, 268–69.

66. *Id.* at 278 (statement by Moses Lasky). Others, however, defended the rule as working reasonably well in practice. *See id*. at 257–60 (statements by Messrs. Rockwell and Doyle).

> claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.[67]

Clark, commenting on this note, observed, "[t]hat was our final definite statement. It's not notice pleading. It's more than that. It's a general statement of the case, but it is not detailed pleading either."[68]

When the Rules were adopted, as well as now, they provided a motion to dismiss for "failure to state a claim upon which relief can be granted."[69] This motion, made pursuant to Rule 12(b)(6), is sometimes described as the federal equivalent of a general demurrer.[70] But it was not meant to be so. A general demurrer challenges a complaint for failure to "state facts sufficient to constitute a cause of action,"[71] and the Rules contemplate no such challenge.[72] In fact, the original Rule 7(c) provided, "[d]emurrers, pleas, and exceptions for insufficiency of a pleading shall not be used."[73] Imposing technicalities at the pleading stage was not only considered inappropriate, but also useless.[74] Thus, there was and is no Rule that provides a basis through which a party may challenge the factual sufficiency of a pleading, other than a motion for a more definite statement, which is limited to grounds of vagueness or ambiguity.[75] Clearly, neither the Advisory Committee nor Clark interpreted Rule 8(a)(2) as requiring a

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67. Advisory Committee Report of October, 1955, reprinted in 2 *Moore's Federal Practice*, § 8App.01[3] (Matthew Bender 3d ed.).

68. Clark, *supra* note 19, at 187.

69. FED. R. CIV. P. 12(b)(6).

70. *See, e.g.*, Curacao Trading Co. v. William Stake & Co., 61 F. Supp. 181, 184 (S.D.N.Y. 1945).

71. *See*, *e.g.*, CAL. CODE CIV. PROC. 430.10(e).

72. Dioguardi v. Durning, 139 F.2d 774, 775 (1944) (the federal rules impose "no pleading requirement of stating 'facts sufficient to constitute a cause of action'").

73. RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 9 (1938). Rule 7(c) was deleted in 2007 as part of the "stylistic" revision of the rules. *See* Advisory Committee Notes on Rules (2007) ("Former Rule 7(c) is deleted because it has done its work. If a motion or pleading is described as a demurrer, plea, or exception for insufficiency, the court will treat the paper as if properly captioned.") The Committee's explanation presumes that Rule 7(c) was about captioning—a most unlikely interpretation of a rule designed to limit the scope of allowable pleadings.

74. In commenting on the proposed new rules of federal civil procedure, Clark and Moore observed:

> The recently published report of the 'Study of the Business of Federal Courts' shows that . . . [o]f all federal civil cases only a few over three percent reach the stage of a jury verdict, and twenty-seven per cent reach the stage of court decision. The great majority of the cases are terminated before trial is reached. . . . The pleading stage of the litigation ought not to be complicated by questions . . . which are not then at issue and in the great majority of cases may never be at issue.

Charles E. Clark and James Wm. Moore, *A New Federal Civil Procedure – II. Pleadings and Parties*, 44 YALE L.J. 1291, 1295 (1935).

75. FED. R. CIV. P. 12(e).

statement of facts sufficient to constitute a cause of action. Indeed, this was the very type of technicality the pleading rules were designed to avoid.[76]

Rule 12(b)(6), as originally conceived, did permit a limited type of challenge to the substantive sufficiency of a complaint. Thus, if a complaint, on its face, disclosed an absence of any right to relief, the motion would stand.[77] For example, if the complaint itself revealed that the statute of limitations had run, a Rule 12(b)(6) motion would provide the proper means for challenging the legal sufficiency of that claim. It was assumed by the drafters of the Rules, however, that in the usual case, challenges to the legal sufficiency of a claim would be raised through "talking" motions, i.e., motions accompanied by affidavits or other forms of proof.[78] The 1948 amendments converted such motions into motions for summary judgment,[79] eliminating much of the perceived utility of Rule 12(b)(6). Indeed, at the time the original rules were drafted, summary judgment was expected to be the primary pre-trial vehicle for framing and challenging the legal and factual sufficiency of a claim. The inclusion of Rule 12(b)(6) was seen as a limited concession to those practitioners accustomed to the array of code-pleading motions.[80] The contemporary use of Rule 12(b)(6) as a readily available device to challenge the legal sufficiency of a claim at the early stages of the litigation would have come as a surprise to the drafters of the Rules, as such a challenge is too much like a general demurrer and too likely to result in a pleading contest on an undeveloped record.

If we adhere to the operative-facts definition of a claim, the presumption that most challenges to the claim would occur post-

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76. Clark and Moore also noted:

> Common law pleading was devoted to the development of an issue; with the development of code pleading and other modern systems, less emphasis was placed upon the issues and more on presenting the facts. The reason for this was in the main the endeavor to avoid the necessity arising under the common law forms of the moving party deciding at his peril on the correct legal theory applicable to his case. Typically under modern pleading, therefore, the plaintiff states what happened and the court is called upon to apply the law to it. But too great insistence upon pleadings alone was made by the early code courts, and fine distinctions between "facts" on the one hand, and "law" or "evidence" on the other, were drawn. Now it has come to be appreciated that the distinction is one between generality and particularity in stating the transaction sued upon and that considerable flexibility should be accorded the pleader.

Clark & Moore, *supra* note 74, at 1301.

77. *See* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356 (3d ed. 2004).

78. *See* Clark, *supra* note 19, at 194.

79. FED. R. CIV. P. 12(d).

80. *See* Clark, *supra* note 19, at 193–94.

discovery makes sense. The claim is not the complaint; nor is the claim simply the factual narrative included in the complaint. The claim is the operative facts and the attendant rights that exist apart from any pleading. Just as a painting of a pipe is not a pipe,[81] a description of claim is not a claim. The complaint presents at best a preliminary and tentative portrait of the operative facts and the potential rights arising out of those facts. A more complete understanding of the claim and its attendant rights should emerge from discovery and be put to the test of sufficiency either at summary judgment or trial.[82] Thus, the simplified pleading standard was not a stand-alone rule. It functioned as part of a system of rules under which pleadings and discovery were intimately intertwined, and it was intended to invite natural lawyering and natural judging in the processing of the claim. The goal was to permit the judge to reach the best result under the specific circumstances of the case, the result that in the judge's estimation best comported with justice.

But, of course, things have changed. *Bell Atlantic v. Twombly*[83] and *Ashcroft v. Iqbal*[84] have created a new pleading regime described as "plausibility pleading."[85] Under this new standard, the survival of the claim is pitted against the survival of the system.[86]

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81. *See* Rene Magritte, *La Trahison des Images* (1929).

82. When commenting on the relationship among pleadings, discovery, pre-trial, and summary judgment, Clark explained,

> [I]t will be clear how these suggested [federal] rules [of pleading] fit in naturally with, and are supplemented by, rules for discovery, pre-trial, and summary judgment. The methods of discovery stated in the Federal Rules enable the parties to find out the facts which will be presented for trial. They produce, not formal allegations of counsel, but the authentic statements of witnesses and of the parties themselves, which, of course, cannot be repudiated. One is thus not able to conceal his case by formal legal averments and defenses. Moreover, if any of the issues are not clear, the pre-trial conference may make them so, while also establishing the matters not in dispute, the arrangements for trial, and so on.

Clark, *supra* note 57, at 289.

83. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

84. Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009).

85. *See, e.g.*, Bone, *supra* note 57, at 864.

86. "Although it is contestable," observes David Marcus, "there are reasons to think that Clark would have found the Court's interpretation raising the threshold an anathema and unjustified in light of current procedural needs. But there is nothing in the vague text of Rule 8 that conflicts with the Court's construction." David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433, 507–08 (2010). Marcus believes that "[t]he Federal Rules . . . illustrate realism's shortcomings as a jurisprudence of law reform . . . the open texture required for rules to be flexible guides means that little protects against the use of a realist law reform effort in a way that its author might have found lamentable." *Id.* at 507. But Marcus is only right if we read the rules formalistically and in isolation. However, as explained above and by Clark extensively, Rule 8(a)(2) and the simplified pleading standard functioned as part of a

One could attempt to defend *Twombly* viewing it as a case in which the plaintiffs pleaded themselves out of court by focusing on a theory of liability that could not be sustained by their allegations—the theory that the defendants' parallel conduct established an inference of an illegal agreement to restrain trade in violation of the Sherman Act. If so, we might say that the complaint affirmatively showed that the pleaders were not entitled to relief, and that a Rule 12(b)(6) motion would be a natural response to that deficiency. But this interpretation of *Twombly* is difficult to sustain. The plaintiffs' parallel conduct theory was not asserted as an alternative to an illegal agreement, but as an inferential means through which to establish the existence of such an agreement. Nothing in the complaint disclaimed reliance on direct proof of an illegal agreement, and surely if such proof were uncovered during discovery the plaintiffs would have relied on it at other stages of the litigation. The *Twombly* Court, however, imported a substantive standard used at the post-discovery summary judgment stage—the so-called "plus" factor—into the pleading analysis,[87] thus truncating the dynamic process through which the claim would have been evaluated under the original conception of the Rules. This relocation of the assessment of claim sufficiency to the pleading stage was itself a major alteration of pleading standards, and harkened back to the sensibilities of strict code pleading by requiring factual allegations addressed to a particular substantive issue.

Iqbal took *Twombly* a step further. The *Iqbal* Court instructs us to apply a three-step formula in determining the adequacy of a complaint. First, we should identify the right at issue and then configure that right into its established elements.[88] Second, we should identify any conclusory allegations, i.e., any allegation that merely replicates the elements of the right asserted (e.g., intent, negligence, breach of duty, etc.).[89] Such allegations may frame the claim, but they cannot sustain it, as they are not entitled to the presumption of truth. Third, we must measure the remaining non-conclusory allegations against the elements of the identified right to determine whether a plausible claim has been asserted.[90]

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system of rules under which pleadings and discovery were intimately intertwined, and ought to be read and considered holistically. The open texture nature of the Rules was meant to maximize judicial problem solving, not to impose conceptual limits on that process.

87. *Twombly*, 550 U.S. at 553–57.

88. *Iqbal*, 556 U.S. at 675.

89. *Id.* at 679.

90. *Id.*

If each of the elements is supported by sufficient non-conclusory factual allegations or by reasonable inferences drawn therefrom,[91] the claim is plausible and will survive a Rule 12(b)(6) challenge; if not, the complaint must be dismissed.[92]

It is difficult to distinguish the *Iqbal* Rule 12(b)(6) motion from a code-pleading general demurrer.[93] Indeed, the *Iqbal* Court describes the as-applied standard as requiring "sufficient facts to state a claim for purposeful and unlawful discrimination,"[94] which, of course, is just another way of saying facts sufficient to constitute a cause of action. In addition, the *Iqbal* Court's refusal to credit so-called conclusory allegations is a clear remnant of the notoriously ambiguous code-pleading distinction between ultimate facts and conclusions of law, and it is a distinction that the Rules were clearly and carefully designed to avoid.[95] The code-pleading character of the *Iqbal* Rule 12(b)(6) analysis is further illuminated by the simple and obvious fact that Iqbal had adequately stated a sufficient claim under the Rules. His factual allegations particularized that claim and gave the defendants more than a general idea of the nature of the action filed against them. The only pleading flaw in Iqbal's complaint was that it did not anticipate the new pleading regime. Indeed, it is unlikely that the defendants Ashcroft and Mueller would have challenged the sufficiency of Iqbal's complaint had *Twombly* not intervened and invited that possibility.[96]

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91. The process of drawing inferences, however, seems out of place here, given that it is normally the trier of fact that may draw specific inferences from the facts proven. 1 CLIFFORD S. FISHMAN, JONES ON EVIDENCE § 4:1 (7th ed. 2014) ("An inference is a factual conclusion that can rationally be drawn from other facts. If fact A rationally supports the conclusion that fact B is also true, then B may be *inferred* from A. The process of drawing inferences based on a rough assessment of probabilities is what makes indirect or circumstantial evidence relevant at trial. If the inference (fact B from fact A) is strong enough, then fact A is relevant to prove fact B.").

92. *Iqbal*, 556 U.S. at 678.

93. Doe v. City of Los Angeles, 169 P.3d 559, 570 (Cal. 2007). The equivalence of the standards is abundantly evident if you compare *Iqbal* to a standard code-pleading decision, such as *Doe v. City of Los Angeles*, which actually seems a bit more generous than *Iqbal* when it comes to the drawing of inferences. As noted by Robert Bone, the *Iqbal* approach "facilitates overly aggressive screening at the pleading stage. A judge bent on screening aggressively does not have to work as hard to apply the plausibility standard if she can classify problematic allegations as legal conclusions and eliminate them at the initial stage." Bone, *supra* note 57, at 869.

94. *Iqbal*, 556 U.S. at 687.

95. Bone, *supra* note 57, at 863–65.

96. *Twombly* was decided when the *Iqbal* defendants' appeal on qualified immunity grounds was pending before the Court of Appeals. *See* Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007).

The *Twombly* and *Iqbal* Courts each denied that they had adopted a heightened pleading standard.[97] And that is correct to the extent that neither opinion expressly requires particularity or specificity, the hallmarks of heightened pleading.[98] But both Courts did endorse a pleading system considerably stricter than the one envisioned by the Rules.[99] This is most evident in *Iqbal* where the Court converted Rule 12(b)(6) into a general demurrer that effectively mimics a code-pleading standard.[100] It is possible that the *Iqbal* standard is a form of "code-pleading" lite, requiring only a "suggestion" of a claim for relief, and some lower federal courts have so held.[101]

As previously noted, the Rules were a product of a reform movement that envisioned the law as a sociological project in which rights and duties were in a steady state of recalibration.[102] The *Twombly-Iqbal* standard presumes the opposite. Rights and duties are defined and established with precise contours, much like the primary-rights vision of nineteenth century legal theorists. Hence, the law of discrimination must have precise metes and bounds, including a showing of discriminatory purpose.[103] A more sociological jurisprudence would be comfortable with a law of discrimination that calibrated the scope of the right to be free from invidious discrimination on a realistic

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97. *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 685.

98. *See*, *e.g.*, FED. R. CIV. P. 9(b) (imposing a "particularity" requirement for fraud and mistake).

99. One could argue that aside from the use of some unfortunate language, the *Twombly* Court's decision was consistent with established pleading standards to the extent that the complaint in *Twombly* can be interpreted as pleading the plaintiffs out of court by adopting a theory of liability that was untenable as a matter of law. *See* Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 629–32 (2007). But that possibility aside, the "unfortunate" language of *Twombly* became the law of Rule 8(a)(2) in *Iqbal*.

100. *See* Doe v. City of Los Angeles, 42 Cal. 4th 531, 570 (2007) (describing the doctrine of "less particularity," which is applicable when the relevant information is in the possession of the defendant); *see also* Bockrath v. Aldirch Chem. Co., 21 Cal. 4th 71, 80 (1991) (conclusory allegations permitted if plaintiff's "knowledge of the precise cause of injury is limited").

101. *See*, *e.g.*, Turkmen v. Hasty, 789 F.3d 218 (2d Cir. 2015), *cert. granted*, 137 S. Ct. 293 (2016); Moss v. United States Secret Service, 711 F.3d 941 (9th Cir. 2013), *rev'd*, 134 S. Ct. 2056 (2014) (on non-pleading grounds); Littlejohn v. City of New York, 795 F.3d 297 (2d Cir. 2015); Swanson v. Citibank, N.A., 614 F.3d 400 (7th Cir. 2010); *but see* McCleary-Evans v. Maryland Dep't of Transp., 780 F.3d 582 (4th Cir. 2015); In re Musical Instruments Antitrust Litig., 798 F.3d 1186 (9th Cir. 2015) (endorsing alternative inferences from plaintiffs' plus-factor allegations). *See also* Brief of Professors of Civil Procedure as Amici Curiae in Support of Respondents, Ziglar v. Abassi, No. 15-1358 (2016) (co-authored with Allan Ides); Brief of Professors of Civil Procedure as Amici Curiae in Support of Respondents, Wood v. Moss, No. 13-115 (2014) (co-authored with Allan Ides).

102. *See supra* text accompanying notes 47–48.

103. *Iqbal*, 556 U.S. at 676–77.

assessment of the facts. There would be no insistence on the alignment of those facts with specified elements of a primary right; rather, there would be a consideration of whether the facts themselves called for the enforcement of a right-duty relationship.[104] That consideration would take into account previous decisions and future consequences. On the other hand, the pleading standards endorsed in *Twombly* and *Iqbal* would not invite this type of analysis, and thus, the law becomes frozen in its steps.

The decisions in *Twombly* and *Iqbal* did not literally abandon the "operative facts" definition of a claim, but the approach endorsed by the Court in those cases changed how those operative facts and the rights arising out of them will be processed and assessed. *Twombly* invited a skeptical examination of the claim in the pre-discovery phase, while *Iqbal* resurrected the general demurrer.

Thus, while Rule 8(a)(2) invites the pleader to provide a short and plain statement of a *claim*, the Court's interpretation of Rule 12(b)(6) now requires dismissal of the claim as a whole for failure to allege facts sufficient to state a specified *cause of action*, defined in the narrowest possible way, as a form of remedial right.[105] The result is that the user-friendly standard of Rule 8(a)(2) is trumped by an aggressive application of a general demurrer in the guise of a Rule 12(b)(6) motion. Rule 12(b)(6) operates as a filter that forecloses access to the federal forum, regardless of circumstances that may call for a more generous or flexible approach and regardless of the consequences for the plaintiff. In essence, the law of pleading is valued over the pleader's substantive rights. Procedure trumps substance.

This approach is fundamentally at odds with the approach envisioned by the Rules. The proponents of the Rules saw contests over pleadings as a wasteful form of "shadowboxing."[106] The role of pleadings was limited to providing the factual context from which the rights of action arose. They particularized the case. The system of the Rules, including the Rules on discovery, would provide the

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104. The Court's decision in Washington v. Davis, 426 U.S. 229 (1976), is often cited for the proposition that the law of discrimination requires a showing of discriminatory purpose of intent. *See Iqbal*, 566 U.S. at 676. But *Washington* can also be viewed as a case in which the facts suggested an absence of any need for the judicial enforcement of a right-duty relationship. *See Washington*, 426 U.S. at 254 (Stevens, J., concurring) ("the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume"). *And cf.* Rogers v. Lodge, 458 U.S. 613, 622–27 (1982) (affirming a finding of discriminatory purpose by inference from a pattern of racial indifference).

105. *Iqbal*, 556 U.S. at 678, 687.

106. Clark, *supra* note 57, at 272.

method through which to examine the facts and rights relevant to the case. A court that adhered to simplified pleading would want to know if the fully developed record supported the claim, not if the pleading crossed some magic line of sustainability. The principal question under *Twombly* and *Iqbal* is quite different though. It is not whether the pleader has a claim that entitles her to relief, but whether she satisfies the technical standards of pleading.

A natural lawyer or judge would recognize that cases vary in their complexity, in their potential costs to the parties, in the relative ease of access to information, including asymmetries of access, and in their potential for abuse. And a natural lawyer and judge would not be necessarily bound to adhere to the simplicity of Form 9 for all types of actions regardless of consequences. The Rules embrace this recognition by presuming a wide range of judicial discretion in the management of a case, including a more demanding expectation at the pleading stage.

Thus, while complex cases should not require particularity or specificity in pleading (unless mandated by Rule 9(b) or Congress), a judge sensitive to the complexity of the case or the potential imbalance of costs might push the plaintiff to provide more information than a bare-bones outline of the claim, perhaps focusing the initial discovery on those aspects of the claim that seem most in need of further development.[107] That judge could use her managerial authority to streamline the processing of the case in a manner that is consistent with the just, speedy, and inexpensive resolution of the dispute. And then the discovery process and the pre-trial motions would provide further and more precise screening. Certainly, concerns about attorney abuse were operating in the close background of *Twombly*.[108] It also seems "plausible" that *Iqbal* was driven by the Court's doubts about the wisdom of permitting a *Bivens* action[109] against high government officials engaged in the post 9/11 sweeps. The difficulty with *Twombly* and *Iqbal*, though, is that they have endorsed a narrow, structured formula, a mechanical test that departs from the neutral principle of the claim, ignores Clark's effective vision of the procedural system and its *natural* operation, and is incapable of adjusting to the changing circumstances and social changes. Also, this one-size-fits-all formula creates a significant barrier to a range of cases that may not trigger the policy concerns that

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107. *See* Scott Dodson, *New Pleadings, New Discovery*, 109 MICH. L. REV. 53 (2010).

108. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 584 (2007).

109. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

animated *Twombly* and *Iqbal*. The most obvious impact of this alteration of standards will be on cases involving state-of-mind, i.e., cases where the plaintiff is least likely to have access to the most relevant information.

It is true that this more aggressive approach to pleading sufficiency might promote efficiency, help clear the docket, and provide solace to a wide array of institutional defendants. But judicial efficiency is only a legitimate value to the extent that it advances the project of justice; and a clear docket is not necessarily a just docket.[110]

In any event, the *Iqbal* pleading standard does not represent a balancing of equities; rather, it imposes a formal rule that will apply regardless of consequences and regardless of context. It did not arrive amid an examination of empirical studies, but as an ersatz interpretation of an established rule. As to the defendant, solace is warranted only if the claim is without merit. Yet if defendants are in need of protection from meritless claims or abusive litigation practices, other Rules can provide those protections when circumstances so warrant.[111] The blunt instrument of a stricter (and inflexible) pleading regime is a crude method through which to accomplish these ends, for it exalts case management considerations and the formality of procedure over substantive rights, and it does not consider countervailing costs and consequences.

The new pleading standard has drifted from the claim intended as the nontechnical narrative from which the lawsuit derives, and it has drifted from the idea of natural lawyering and judging, given that an experienced lawyer and judge would not expect a litigant, at the outset of the litigation, to have all the details of the case. The standard is also in deep tension with the judicial obligation to provide a forum for the vindication of individual claims of right[112] and with our constitutional commitment to the rule of law. The claim has regressed into a primary rights cause of action, the very thing it was designed to supplant.

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110. *See* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1029 (2000); Resnik, *supra* note 14, at 395, 421, 444–45.

111. *See, e.g.*, FED. R. CIV. P. 11(c), 12(c), & 12(e).

112. *See* Raymond H. Brescia & Edward J. Ohanian, *The Politics of Procedure: An Empirical Analysis of Motion Practice in Civil Rights Litigation Under the New Plausibility Standard*, 47 AKRON L. REV. 329, 331–32 (2014) ("The question about the impact of procedural rules on civil rights litigants is an important one in light of the critical role the federal courts play in the protection of those rights.")

To address the current problems we don't need to amend the pleading rules, replace the original Rules with new rules, or add more details to the original text. More details in the Rules would not help us address the complexities of today's litigation. Rather, they would likely generate more litigation and ultimately reduce access to justice. And we don't even need a new set of rules to handle the different types of claims that might be filed. What we need is a true understanding of how litigation actually works and can work to serve people, not the courts as institutions or the system.

We need to own a vision of the litigation and how it operates. That will help us design different standards for the different types of actions, where necessary. And where necessary, we would identify those types of actions in a coherent manner that distinguished them by reference to characteristics calling for a different treatment, such as the imbalance of costs, the potential for abusive litigation, or asymmetries in access to information. A method that simply imposes a stricter regime across the board is not claim-centered and disserves the legal system, as "nothing could be more fluid and mobile than the law."[113] Indeed, a rule that imposes a strict regime across the board is coldly indifferent to the claim. I would not say that the Court's revisionist interpretation of Rules 8(a)(2) and 12(b)(6) is unconstitutional, but it is clearly hostile to the constitutional interests the Court is most clearly obligated to protect.

B. Discovery

The claim plays a central role in determining whether a complaint satisfies federal pleading standards and, as I have shown,[114] the current standard is stricter than the one originally contemplated by the drafters of the Rules and previously endorsed by the Supreme Court. There is also a close relationship between the claim and discovery. In fact, the classic notice pleading standard was meant to open the door to discovery with minimal consideration of the claim asserted. The idea was that the factual and legal sufficiency of the claim would be examined after discovery, on a motion for summary judgment, that is, after the facts and theories supportive of the claim could be fully developed through an open exchange of information between the parties. The current approach, with a pleading standard that focuses formalistically on the cause of action and not on the general nature

113. Clark, *supra* note 17, at 626.

114. *See supra* text accompanying notes 54–113.

of the claim, is designed in part to avoid discovery and its attendant costs.[115] The idea is to extinguish the claim before the claim can be fully examined.[116]

Typically, discovery commences after the pleading stage of a controversy. The original Rules allowed discovery under a "subject matter" standard.[117] Hence, a party was entitled to discover any nonprivileged factual material relevant to the subject matter of the lawsuit.[118] Thus the standard, a more generalized one, was not focused on the claim, but on the subject matter of the suit. This distinction reflected the fact that the claim was inchoate when discovery commenced since only its broad nature had to be revealed under the original interpretation of Rule 8(a)(2). Discovery on the inchoate claim could either broaden or narrow the actual claim to be litigated.[119]

The version of Rule 26(b) adopted in 2000 defined the scope of discovery in terms of information relevant to a "claim or defense," a conceptually narrower category than subject matter:

> Parties may obtain discovery regarding any matter not privileged matter that is relevant to any party's claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).[120]

At a first glance, one would say that the 2000 amendment limited the scope of discovery, and this amendment was indeed intended to "involve the court more actively in regulating the

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115. Bell Atl. Corp. v. Twombly , 550 U.S. 544, 556 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

116. *See* Simona Grossi, *Frontloading, Class Actions, and a Proposal for a New Rule 23*, 13, L.A. Legal Studies Research Paper No. 2017-05), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2915558, 21 LEWIS & CLARK L. REV. (forthcoming 2017).

117. FED. R. CIV. P. 26(b)(1) (1994) (repealed 2012).

118. FED R. CIV. P. 26(b)(1) (1994) (repealed 2016).

119. FED. R. CIV. P. 26(b)(1) (2000). The current approach is less generous. Under *Twombly* and *Iqbal*, the claim must be defended as to each right of action, by aligning the non-conclusory factual allegations with each element of a specified right. *Twombly*, 550 U.S. at 556; *Iqbal*, 556 U.S. at 678. Only after this standard is satisfied will discovery commence.

120. FED. R. CIV. P. 26(b)(1) (2000) (repealed 2015).

breadth of sweeping or contentious discovery."[121] However, tested against our claim platform,[122] the distinction between claim and defense on one hand, and subject matter on the other, seems a bit puzzling. If the claim is a group of operative facts giving rise to one or more rights of action, there cannot be any matter that, although not relevant to any party's claim or defense, will be still relevant to the subject matter. Indeed, judges have noted that the 2000 amendment did not materially alter their task.[123] The goal, however, was to send a message that judges were to manage discovery more closely. In addition, by employing the "claim or defense" standard as an opening gambit, the rule now presumes the existence of a well-defined and neatly circumscribed claim.[124] Quite likely the drafters of the 2000 amendment were thinking of a cause of action when they used the word "claim."[125]

Rule 26(b) has again been amended (effective December 1, 2015) to further limit the scope of discovery. As newly minted, the rule now reads:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.[126]

The Advisory Committee Note accompanying the amendment explained that:

> The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense. The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000. . . . Discovery

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121. FED. R. CIV. P. 26(b)(1) advisory committee's note (2000) pp. 732.

122. *See supra* text accompanying notes 22–53.

123. *See* Breon v. Coca-Cola Bottling Co. of New England, 232 F.R.D. 49, 52 (D. Conn. 2005); Klein v. AIG Trading Grp. Inc., 228 F.R.D. 418, 423 (D. Conn. 2005); Lugosch v. Congel, 218 F.R.D. 41, 45 (N.D.N.Y. 2003).

124. FED. RULE CIV. P. 26(b)(1) (2000) (repealed 2015).

125. FED. R. CIV. P. 26(b)(1) advisory committee's note to 2000 amendment.

126. FED. R. CIV. P. 26(b).

> that is relevant to the parties' claims or defenses may also support amendment of the pleadings to add a new claim or defense that affects the scope of discovery.[127]

The new text reads more like a mechanical code provision rather than an invitation to natural lawyering and judging. And again it appears to view the claim as a cause of action since it references an amendment to add a new "claim." It's easy to predict that this new amendment will generate further litigation over forms and technicalities, thus ultimately disserving the system.

Also, the amendment process seems to have treated Rule 26 as a stand-alone rule, rather than holistically and within that unitary vision that ought to animate a procedural reform. It so appears that the Rule's proportionality test is unnecessary, given that both the test itself and the factors it lists could be inferred from Rule 1.[128]

And although the amendment eliminates the unnecessary distinction between "claim and defense" and "subject matter," the reasons offered by the Advisory Committee show, once again, a lack of understanding of what constitutes a claim. The claim is a composite of all rights of action arising out of a set of operative facts, not, as the Advisory Committee would seem to suggest, the specific rights of action validated prior to the commencement of discovery. Hence, these new proportionality standards will work in tandem with *Twombly* and *Iqbal* to narrow the range of discovery to those rights of action that survive a court's application of Rule 12(b)(6). Moved by similar considerations and concerns, Scott Dodson suggested the adoption of a "new discovery," namely, pre-suit discovery mechanisms permitting plaintiffs to obtain limited discovery before facing a decision on a motion to dismiss.[129] However, creating sub-rules and sub-categories in favor of a "delusive exactness"[130] would not serve the litigation and the system, as it would constrain even further the discretion of trial court judges into mechanical categories that would deprive the system of the flexibility necessary to achieve natural lawyering and natural judging.

C. Joinder

As we know, Clark described "the claim" as comprising a set of operative facts—the dispute-generating event—that calls for

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127. FED. R. CIV. P. 26(b) advisory committee's note to 2015 amendment.
128. FED. R. CIV. P. 1 .
129. Dodson, *supra* note 107, at 86–88.
130. Clark, *supra* note 26, at 830–31.

the consideration of one or more right-duty relationships.[131] The scope of the "operative-facts" claim is not premised on a technicality but on the idea of a convenient trial unit.[132] Although the joinder rules do not expressly define the word "claim" (or any other word or phrase), it is abundantly clear that these rules fully embrace Clark's operative-facts definition of the claim through the incorporation of equity's same-transaction standard,[133] an obviously fact-driven concept through which to construct the convenient trial unit.[134]

Of course, the word claim can also be used in a more colloquial way to describe the various right-duty relationships that may be joined in a civil action, describing each as a separate claim, as in first claim for relief, second claim for relief, etc.[135] Some of the Rules arguably support this usage.[136] A more precise approach, however, would be to label the separate rights of action as separate counts (or rights) on a single claim. In any event, this descriptive usage does not alter the Rules' fact-driven approach to defining the scope of a claim.

The range of possibilities through which a party may assert a demand for relief covers all possible variations on the claim: original claims, counterclaims, crossclaims, and third-party claims.[137] And Rule 18(a) makes it clear that a party asserting any one of these types of claims may join it with "as many" claims as it has against an opposing party.[138] This includes the assertion of rights of action arising out of a distinct set of operative facts, i.e., the assertion of a new claim. To the extent that the application of these generous rules of joinder might run counter to the principle of convenience, Rule 42 provides for "separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims."[139]

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131. *Id.* at 828.

132. *Id.* at 829.

133. *See* FED. R. CIV. P. 13(a), 13(g), 14(a)(2)(D), 14(a)(3), 15(c), 20(a)(1)(A), 20(a)(2)(A), & 24(a)(2).

134. Clark & Moore, *supra* note 74, at 1319–23.

135. The rules also use the word "claim" as a synonym of the verb "assert," *see* Rule 19(a)(1)(B) ("that person claims an interest") and Rule 24(1)(B) ("claims an entitlement"), or as a synonym of the word "request," *see* Rule 23(h)(1) ("A claim for an award."). These alternative uses have nothing to do with the "claim" as a term of art.

136. FED. R. CIV. P. 18(a) ("Joinder of Claims").

137. FED. R. CIV. P. 7(a), 13, & 14.

138. FED. R. CIV. P. 18(a).

139. FED. R. CIV. P. 42(b).

With respect to joinder of parties, some of the rules directly reference the claim.[140] Others do not.[141] However, it is clear that all of the party joinder devices revolve around the operative facts and the principle of trial convenience. As an example, Rule 14(a) permits a defending party to join a non-party on a theory of indemnity.[142] By definition, this impleader arises out of the operative facts of the claim asserted against the defending party. In addition, except in unusual circumstances, the impleader can be conveniently processed along with a plaintiff's claims.[143]

The general understanding of what constitutes a claim focuses on the rights of action arising out of an operative set of facts that one party might assert against another. The rules of joinder suggest another possibility though that might illuminate the ultimate purpose of the Rules. Rule 20, the rule on liberal joinder of parties, permits multiple plaintiffs to assert their respective rights of action arising out of the same transaction or occurrence or series of transactions or occurrences.[144] The usual reading of Rule 20 would be that each plaintiff is stating a separate claim. One could read Rule 20, however, as treating each plaintiff's right of action as part of a unified claim arising out of the same set of operative facts. In other words, one set of operative facts might give rise to multiple rights of action by multiple parties. And although this reading would not technically fit Clark's idea of the claim as a set of operative facts giving rise to one or more rights of action pertaining to each individual plaintiff,[145] it would be consistent with the idea of the claim as the dispute-generative event giving rise to a series of rights of action that could be sensibly litigated together. This approach would focus our attention on trial convenience, and it would also be consistent with the Article III case-or-controversy analysis and with the idea of a constitutional case under § 1367(a).

This holistic interpretive approach to the rules of joinder that treat them as part of the larger federal judicial system, and as essential to the system's proper functioning, should be applied consistently, across the board. Drawing inspiration from Pound's ideas, if we were to characterize the joinder rules as a scientific endeavor, we would certainly agree that the rules do not represent a scientific exercise for its own sake, sub-serving supposed ends of

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140. FED. R. CIV. P. 13, 14, 18, 22, 23, & 24.

141. FED. R. CIV. P. 19, 20.

142. FED. R. CIV. P. 14(a).

143. *See* FED. R. CIV. P. 14(a)(4) (motion to strike, sever, or try separately).

144. FED. R. CIV. P. 20.

145. After all, it is hard to imagine that Clark's idea of the claim was ever intended to operate as a limit on joinder.

science, while defeating justice.[146] Indeed, to make sense of such a scientific endeavor, we would need to consider the end that that endeavor is supposed to serve. That end is the fair and efficient administration of justice. Thus, a proper reading of the rules, one intended to achieve this end, would be premised on considerations of natural lawyering and judging, i.e., the considerations that experienced lawyers and judges would make when reading and applying these rules, to make the system work.

Both Clark[147] and Pound[148] believed that trial convenience could only be achieved through a proper exercise of judicial discretion.[149] However, they thought that judges' discretion ought to be limited to procedural questions relating to the orderly and efficient conduct of court business, and that procedural questions concerning the protection of substantive rights should be left to the legislature to avoid bias and error.[150]

Unfortunately, judges' discretion has not always been so confined, and the rules of joinder, operating independently[151] or in tandem with some other doctrines governing litigation in federal courts,[152] have been interpreted and applied to limit the substantive rights sought to be enforced.

The Rules are not supposed to be read as rules. They were written with studied lack of precision, to be adaptable and conducive to "the just, speedy, and inexpensive determination of every action and proceeding."[153]

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146. *See* Pound, *supra* note 25, at 606.

147. Charles Clark, *Procedural Fundamentals*, 1 CONN. BAR. J. 67, 72–73 (1927).

148. Roscoe Pound, *Some Principles of Procedural Reform* (pt. 1), 4 ILL. L. REV. 388, 402 (1910).

149. *Id.*; Clark, *supra* note 147, at 72–73.

150. Pound, *supra* note 148, at 404–05; Clark, *supra* note 147, at 68–69. *See also* Bone, *supra* note 6, at 100 ("Pound and Clark both believed that judicial discretion should play a much narrower role with respect to the second category of procedural questions . . . . [Substantive rights] . . . were best left to clearly draw rules in order to guard against bias and error.").

151. *See*, *e.g.*, Republic of Philippines v. Pimentel, 553 U.S. 851, 868 (2008), as an example of mechanical approach to Rule 19, driven by unpredictable considerations that end up limiting the substantive rights of the parties. *See also* FED. R. CIV. P. 23 advisory committee's note to 2007 amendment, showing that Rule 23 is still undergoing further revision by the Advisory Committee. Such revision process will likely generate the addition of further details to the already hyper-technical and hyper-detailed text of the Rule.

152. *See supra* text accompanying notes 54–113.

153. FED. R. CIV. P. 1.

IV. THE CLAIM BEYOND THE RULES

A. Justiciability[154]

Tested against the platform and the neutral principle of the claim,[155] the doctrine of justiciability reveals itself to be one of the doctrines that the judiciary has used to limit substantive rights. Article III, § 1 vests the "judicial Power" in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[156] The power vested is literally "judicial." Hence, Article III, § 1, by definition, describes the authority of the federal judiciary as one over matters that are judicial in nature. The core judicial function is "to say what the law is" in the process of resolving legal disputes.[157] Thus, a "justiciable" matter is one that is capable of resolution by the application of legal principles to an asserted right.[158] By way of contrast, Article III does not vest the judiciary with a power to legislate or a duty to see that the law is faithfully executed. Those are legislative and executive prerogatives, vested in Congress and the President, respectively.[159] There may, of course, be circumstances where the demarcation between the legislative, executive, and judicial spheres blurs, or in which the judiciary strays or has been asked to stray from its assigned duties in providing a particular remedy.[160] In such situations, a straightforward application of separation of powers principles, such as aggrandizement, usurpation, or encroachment, should supply the appropriate constitutional guidance, a point cogently recognized by the Court in *Marbury v. Madison*.[161]

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154. The claim also plays a central role in the doctrines of subject matter jurisdiction and personal jurisdiction. I have extensively dealt with both doctrines and the role of the claim within them in two separate articles. *See* Grossi, *supra* note 24, at 976; Simona Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth with No Exit*, 47 AKRON L. REV. 617, 662 (2014). Thus, I defer to those articles for purposes of this study.

155. *See supra* text accompanying notes 23–54.

156. U.S. CONST. art. III, § 1.

157. Marbury v. Madison, 5 U.S. 137, 177 (1803).

158. Flast v. Cohen, 392 U.S. 83, 97 (1968) (the dispute is one "traditionally thought to be capable of resolution through the judicial process."); *accord* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1228 (1986) (defining justiciable as "capable of being justified""); BLACK'S LAW DICTIONARY 944 (9th ed. 2009) (defining justiciable as "properly brought before a court of justice; capable of being disposed of judicially"); VIII OXFORD ENGLISH DICTIONARY 327 (2d ed. 1989) (defining justiciable as "[l]iable to be tried in a court of justice; subject to jurisdiction").

159. U.S. CONST. art. I, § 1 (legislative power); U.S. CONST. art. II, § 1 (executive power).

160. *Marbury*, 5 U.S. at 169–70.

161. *Id.* at 170 ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.").

Article III, § 2 addresses considerations pertaining to the suitability of providing a federal judicial forum for certain types of otherwise judicially cognizable matters. To that end, that provision describes two categories of such matters. The categories are distinguished by the descriptive terms "cases" and "controversies."[162] "Cases" refer to a specified range of topics, while "controversies" refer to disputes involving or between certain specified parties.[163] Robert Pushaw suggests that the former emphasize the need to invoke the interpretive or expository function of a federal court, as on questions arising under federal law, while the latter emphasize the importance of providing a neutral federal magistrate to resolve legal disputes between particular parties, as in disputes between different states.[164] Nothing in the text of Article III suggests that these descriptive terms impose additional restrictions on the judicial power vested through § 1. Rather, as the text suggests, they simply create two categories of judicial matters imbued with a federal interest.[165]

To the extent that there was a justiciability doctrine in the eighteenth and early nineteenth centuries, that doctrine recognized three specific limits to the exercise of federal judicial power: a bar to issuing advisory opinions at the request of the political branches;[166] a bar to the exercise of jurisdiction when the judgment of the court would be subject to review by one of the political branches;[167] and a proscription against reviewing policy judgments assigned to the political branches.[168] There was certainly nothing akin to the modern federal law of justiciability.[169]

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162. U.S. CONST. art. III, § 2.

163. Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 470–72 (1994).

164. *Id.* at 449–50.

165. John Harrison has criticized the distinction drawn by Pushaw largely on the ground that it lacks "direct evidence." John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 230 (1997). Harrison's view is that cases are distinguishable from controversies solely on the ground that the former category includes criminal proceedings while the latter does not. *Id.* at 222–23. He provides considerable support of this distinguishing feature, but none of that support suggests that his preferred distinction is the exclusive one. Moreover, Pushaw's circumstantial evidence of an alternate or additional distinction is considerable and is fully consistent with Harrison's evidence. Certainly, there can be little doubt that the exposition of the law was a factor in extending federal jurisdiction to cases arising under federal law. Harrison does not seem to disagree. *See id.* at 229.

166. LETTER FROM CHIEF JUSTICE JAY AND ASSOCIATE JUSTICES TO PRESIDENT WASHINGTON (Aug. 8, 1793), *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488–89 (Henry P. Johnston ed., 1890) (1891).

167. Hayburn's Case, 2 U.S. 409, 409 (1792).

168. Marbury v. Madison, 5 U.S. 137, at 164–66.

169. *See* Robert J. Pushaw Jr., *Justiciability and Separation of Powers: A Neo-*

The current view of Article III is more complicated. The terms "cases" and "controversies" are seen as imposing independent separation-of-powers restrictions on the exercise of federal judicial power.[170] This restrictive view of Article III, § 2 is the source of the "iceberg quality" and the "submerged complexities" to which Chief Justice Warren famously refers in *Flast v. Cohen*.[171] But it is a complexity of the modern Court's own making, unsupported by history, text, or logic. Essentially, the Court has confused a description with a proscription, a conceptual error that is traceable to the opinions and influence of Felix Frankfurter.[172] That error has led to an unnecessarily complex and arbitrary jurisprudence of "justiciability"[173] that is difficult to explain on anything other than instrumentalist or case management grounds.

Federalist Approach, 81 CORNELL L. REV. 393 (1996) (providing a detailed analysis of the eighteenth and nineteenth century contours of justiciability).

170. Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."); Clapper v. Amnesty In'l, 133 S. Ct. 1138 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."); Allen v. Wright, 468 U.S. 737, 752 (1984) ("the law of Art. III standing is built on a single basic idea—the idea of separation of powers"); Flast v. Cohen, 392 U.S. 93, 96 (1968) (conflating cases and controversies, justiciability, and separation of powers).

171. Flast v. Cohen, 392 U.S. 83 (1968). In *Flast*, Chief Justice Warren observed:

> The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to "cases" and "controversies." As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government.

Id. at 94. It's not clear that Chief Justice Warren believed in those "submerged complexities," as the actual holding in *Flast* is more consistent with a vision of judicial review that is premised not on conceptual limits imposed by Article III, but on the Court's obligation to provide a forum for the interpretation and enforcement of constitutional principles.

172. Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting) (limiting the scope of judicial power to "matters that were the traditional concern of the courts at Westminster"); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150–60 (1951) (Frankfurter, J., concurring) (endorsing standing as an Article III limitation on federal court jurisdiction); Doremus v. Board of Ed., 342 U.S. 429, 431–35 (1952) (applying Justice Frankfurter's "limitation theory" of cases and controversies). *See also* Pushaw, *Article III's Case/Controversy Distinction*, *supra* note 163, at 452–53; HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 75–217 (1953) (compounding the error by incorporating these views into the academic mythology of federal courts); Alexander Bickel, *Foreword: The Passive Virtues, the Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 42 (1961) (arguing that, because the judicial power "may be exercised only in a case," courts "may not decide non-cases, which are not adversary situations and in which nothing of immediate consequence to the parties turns on the results").

173. *Compare* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–62 (1992) (endorsing and applying a demanding model of standing) *with* Massachusetts v. Environmental

In *Aetna Life Insurance Co. v. Haworth*,[174] the Court outlined the contours of the modern approach to justiciability:

> [An Article III controversy] must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an *adversary proceeding* upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.[175]

Much of the modern doctrine of justiciability is built on this adversarial framework. But the *Aetna* Court is almost certainly wrong. As originally understood, the federal judicial power extended to a wide range of proceedings that were non-adversarial in nature.[176] In their study of Article III and early practices under it, James Pfander and David Birk demonstrate that the federal judicial power was originally understood as embracing both contentious and non-contentious proceedings.[177] Pfander and Birk point out that neither John Marshall nor Joseph Story read the term "case" as requiring any reference to adverseness or even the assumption that there necessarily would be more than one party to the proceeding.[178] Both jurists were familiar with the range of *ex parte* proceedings that had been assigned to eighteenth and nineteenth century courts, including federal courts, and both readily upheld the exercise of federal court jurisdiction over such cases.[179]

History aside, the Court has defended its "adversarial proceeding" thesis on two normative grounds. First, the Court has suggested that "concrete adverseness . . . sharpens the

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Protection Agency, 549 U.S. 497, 516–26 (2007) (endorsing and applying a significantly less demanding model of standing); *also compare Clapper*, 133 S. Ct. at 1143 (endorsing a "certainly impending" standard for measuring the imminence of future injury), *with Susan B. Anthony*, 134 S. Ct. at 2341 (endorsing a "substantial risk" standard for measuring the imminence of future injury).

174. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

175. *Id.* at 239–40 (internal citations omitted) (emphasis added).

176. *See* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, The Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346 (2015).

177. *Id.* at 1418–19.

178. *Id.* at 1418–19. *See also* Pushaw, *Article III's Case/Controversy Distinction*, *supra* note 163, at 513–17 (no Article III bar to advisory opinions in the Court's early jurisprudence).

179. *See supra* note 176, at 1418–19.

presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[180] But is this really so? Are difficult issues of constitutional law best resolved in an adversarial contest in which each side promotes a version of the Constitution that most closely resembles its specific litigation agenda? And does the Court truly rely on the adversaries when it constructs its own vision of the Constitution? In any event, one would think that an inquisitorial process would be at least equal to this interpretative task. After all, interpretation is not a contest.

The Court has also suggested that the requirement of an adversarial proceeding is somehow grounded in the separation of powers principle, presumably as a prophylactic measure designed to prevent the Court from unduly interfering with the coordinate branches.[181] But if we are talking about the power of judicial review, it makes little sense to import separation of powers concerns into the equation. There is no encroachment on legislative or executive prerogatives when the Court interprets a law or declares an act of Congress or an action by the Executive Branch unconstitutional. Neither of those branches have authority to engage in unconstitutional action, and it is emphatically the duty of the Court to say what the law is.

A more elegant understanding of justiciability, one that focuses on the claim rather than on the "submerged complexities" of the cases-and-controversies iceberg, might offer a way out of the current jurisprudential quagmire. In fact, both John Marshall and Joseph Story endorsed claim-centric definitions of the word "case," definitions that bear a close kinship to the basic notion of justiciability as dispute resolution under the law, unadorned by "submerged complexities."[182] Thus, in *Osborn v. Bank of the United States*,[183] Marshall explained:

> [Article III, § 2] enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall

180. Baker v. Carr, 369 U.S. 186, 204 (1962).

181. *See* Pushaw, *supra* note 170, at 454–55.

182. *See supra* note 176, at 1418–21.

183. Osborn v. Bank of the United States, 22 U.S. 738 (1824).

> extend to all cases arising under the constitution, laws, and treaties of the United States.[184]

Justice Story's *Commentaries on the Constitution* offered a more succinct statement of the same principle:

> A case, then, in the sense of this clause of the constitution, arises, when some subject, touching the constitution, laws, or treaties of the United States, is submitted to the courts by a party, who asserts his rights in the form prescribed by law.[185]

In short, according to Marshall and Story, a claim for redress of a violation of federal law gives rise to a "case" within the meaning of Article III.[186] There were no additional doctrinal trimmings on this definition or on the scope of Article III justiciability.[187] The complete focus was (and should be) on the claim.

B. Standing

The doctrine of standing is a relatively recent arrival on the justiciability scene.[188] It has become, however, one of the

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184. *Id.* at 819.

185. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 856, at 609 (Carolina Academic Press 1987) (1833).

186. *See supra* note 175, at 1419–20.

187. Justice Field offered a similar view in *In the Matter of the Application of the Pacific R. Commission*, 32 Fed. 241 (Cir. Ct. N.D. CA 1887), where he observed:

> By cases and controversies are intended the *claims* of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case.

Id. at 255 (emphasis added).

188. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224–25 (1988). Fletcher notes:

> In the late nineteenth and early twentieth centuries, a plaintiff's right to bring suit was determined by reference to a particular common law, statutory, or constitutional right, or sometimes to a mixture of statutory or constitutional prohibitions and common law remedial principles. Friendly suits were prohibited, and on one occasion general pleading requirements were read in conjunction with a jurisdictional statute to deny an appeal to the United States Supreme Court on the ground that appellant had alleged insufficient personal interest. But no general doctrine of standing existed. Nor, indeed, was the term "standing" used as the doctrinal heading under which a person's right to sue was determined. As late as 1923, in *Frothingham v. Mellon*, the Supreme Court denied a federal taxpayer the right to challenge the federal Maternity Act on the ground that the taxpayer's interest was "minute and interminable" without ever employing the word "standing."

Id. (internal citations omitted).

cornerstones of the law of federal courts. The Court described the key elements of the doctrine in *Lujan v. Defenders of Wildlife*:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[189]

The granular nature of the doctrine described by the *Lujan* Court provides ample opportunities to defeat a plaintiff's efforts to establish standing. Decisions applying the doctrine are notoriously serpentine, opaque, and poorly reasoned.[190] And like the judicially imposed requirement of adversity, this doctrine finds no moorings in the text or original understanding of Article III.

But if we examine the basic elements of standing—injury, causation, and redressability—we see that they do no more than describe the generic elements of a claim. Recall Charles Clark's definition of a claim as "an aggregate of operative facts as will give rise to at least one right of action."[191] Every right of action, whether contentious or non-contentious, is premised on a violation or potential violation of an obligation or duty owed to the claimant.[192] The correlative of the obligation or duty is a right. In essence, the plaintiff is saying, "these facts show that my rights have been (or will be) violated and the law entitles me to this or that relief." Implicit in the claim, therefore, we find all the elements of standing. Hence, a party asserting a claim recognized at law has, by definition, satisfied standing.

The mechanical approach to standing, endorsed by the Court in *Lujan*, is intended to ensure "that litigants are truly adverse and therefore likely to present the case effectively, ensuring that the people most directly concerned are able to litigate the questions at issue, ensuring that a concrete case informs the court

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189. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

190. *See supra* note 188, at 223 (describing the "apparent lawlessness" and "wildly vacillating results" of many standing cases due to the structural problems of current standing doctrine).

191. *See supra* note 23.

192. *See supra* note 31.

of the consequences of its decisions, and preventing the anti-majoritarian federal judiciary from usurping the policy-making functions of the popularly elected branches."[193] These are the Court's assumptions and the latter consideration has been given high prominence in recent standing decisions.[194] But certainly we could say that anyone with a claim asserting a right recognized at law would have sufficient incentive to litigate the questions at issue. And it remains unclear how the standing doctrine prevents the federal judiciary from usurping the policy-making functions of the political branches other than as a prophylactic, door-shutting measure. The powers of interpretation and judicial review, properly exercised, present no affront to the political branches. This is as true with an advisory opinion[195] as it would be with an opinion forged in an adversarial contest. If a decision by the Court interferes with the legitimate policy-making prerogatives of the political branches (or the states), that has nothing to do with whether the party asserting the underlying claim has standing. Rather, the question might be whether the remedy imposed by the Court improperly encroaches on a prerogative of the political branches. In other words, any separation of powers concern might be properly addressed by shaping a remedy that avoids that risk.

In any event, these weighty considerations are cast aside whenever the Court favors adjudication over the niceties of standing doctrine, contributing to the sense that the standing doctrine is itself lawless and far from neutral. For example, in *United States v. Windsor*,[196] the Court found standing on appeal even though the appellant was not aggrieved by the trial court judgment, explaining that there were "countervailing considerations" that outweighed "the concerns underlying the usual reluctance to exert judicial power."[197] It was enough that participation of amici curiae would ensure the adversity that Article III demands.[198] After all, the Court explained, if it were to

193. Fletcher, *The Structure of Standing*, *supra* note 188, at 222; see also *id*. at 222, nn. 6–9.

194. Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013) (standing "serves to prevent the judicial process from being used to usurp the powers of the political branches" quoting Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013)).

195. If the Constitution truly provided otherwise, *but see* Pfander & Birk, *Article III Judicial Power*, *supra* note 176, Clark would probably observe "the Constitution is neither final nor perfect. The purpose of the constitution-makers was to change and improve—'to form a *more perfect* union'—and we do them little honor when in their names we resist experiment and possible improvement." Charles E. Clark, *The Courts and the People*, *supra* note 17, at 627.

196. United States v. Windsor, 133 S. Ct. 2675 (2013).

197. *Id.* at 2679–80.

198. *Id.* at 2680.

dismiss the case, "[t]he district courts in 94 districts throughout the Nation would be without precedential guidance not only in tax refund suits but also in cases involving the whole of DOMA's sweep involving over 1,000 federal statutes and a myriad of federal regulations."[199] In other words, the Court saw a need for an advisory opinion. Yet in *Hollingsworth v. Perry*,[200] decided on the same day as *Windsor*, the Court fabricated new principles of standing to avoid the merits of a case that certainly appeared to have all the usual earmarks of standing and adversity.[201]

Judge William Fletcher has convincingly demonstrated that the essence of the doctrine of standing is captured by the following question: "Does the plaintiff have a legal right to judicial enforcement of an asserted legal duty?"[202] This is "a question of substantive law, answerable by reference to the statutory or constitutional provision whose protection is invoked."[203] And if that is the essence of standing, then the doctrine merely describes the contours of legitimate exercise of the judicial function in accord with Article III, § 1. Thus, "the question of whether plaintiff 'stands' in a position to enforce defendant's duty is part of the merits of plaintiff's claim,"[204] and is a question that should be tested in accord with the Rules and the controlling substantive law.[205] Professor Lee Albert made a similar point a decade earlier when he observed that standing did no more than replicate the elements of a claim by asking "whether the defendant had a duty to the plaintiff [and] whether his conduct was a legal cause of the plaintiff's injury."[206] This is, of course, the familiar right-duty principle central to the operative-facts definition of a claim.[207]

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199. *Id.* at 2688.

200. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

201. *Id.* at 2663–66 (preventing State of California from determining who may represent the interests of the state in litigation pertaining to ballot initiatives). For further examples of the arbitrariness of the approach to standing, *see supra* note 176.

202. Fletcher, *supra* note 188, at 229.

203. *Id.*

204. *Id.* at 239. In his article, Fletcher describes the predominant approach to standing as a preliminary jurisdictional issue and proposes to abandon that approach, since "standing should simply be a question on the merits of plaintiff's claim." *Id.* at 223.

205. *See infra*, text accompanying notes 54–113 (discussing the Rules and controlling substantive law of pleading standards).

206. Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 428–29 (1974).

207. *See infra*, text accompanying notes 36–39. The Supreme Court seems to be on the verge of understanding this point, though it remains locked into its highly structured Article III model of standing. *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 & n.3 (2014) (recognizing that the "zone of interests" test is merely a way of examining whether the plaintiff has stated a claim on the particular statutory provision at issue). In a yet to be published essay, Professor Henry Monaghan has observed that standing doctrine is of a relatively recent vintage and that prior to 1970, the question

The standing doctrine invites a mechanical inquiry, designed to work as a trump on the neutral principle of the claim, leading to artificial lawyering and judging, and ultimately disserving the system by making it less efficient and more arbitrary. The Court has ignored these sensible critiques and instead continues to insist on the constitutional magic of standing. To the Court, standing is a jurisdictional doctrine driven by the words "cases" and "controversies."[208] As the Court explained in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,[209]

> the "case or controversy" requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are "founded in concern about the proper—and properly limited—role of the courts in a democratic society."[210]

As I have explained, this separation-of-powers mantra is without any real substance, and in practice it operates as a limit on access to justice, inconsistently with the Court's constitutional obligation to provide a forum for the interpretation and application of federal law, including exercises of the power of judicial review.[211] In *Valley Forge*, for example, the Court used the standing doctrine to avoid addressing the merits of the plaintiff's Establishment Clause claim, in effect, ruling that the plaintiff had no such claim.[212] Thus, the Court's concern for the separation of powers overwhelmed its institutional obligation to say what the law is.

Linda R.S. v. Richard D.[213] offers another example of the pernicious effects of the Court's failure to assess justiciability from the perspective of the claim. There the plaintiff sought to establish the unconstitutionality of a state child-support law that had been interpreted as not being enforceable against fathers of children

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of "standing" was, in fact, a merits question that asked whether plaintiff had stated a valid claim. Henry Monaghan, *An Essay in Honor of Daniel Meltzer*, at pages 3–5 (2016 Draft).

208. Fletcher, *supra* note 193, at 223.

209. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471–76 (1982).

210. Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

211. For the same proposition, *see* Fletcher, *The Structure of Standing*, *supra* note 188, at 228 ("It is common knowledge that from time to time the Supreme Court has used standing and other justiciability doctrines as mechanisms to control its appellate docket, particularly in constitutional cases.").

212. Valley Forge, 454 U.S. at 482–86.

213. Linda R.S. v. Richard D., 410 U.S. 614 (1973).

born out of wedlock.[214] The plaintiff sought an order that would preclude the state from denying enforcement of those laws solely on the basis of the father's unmarried status.[215] But she ultimately wanted the father of her child to pay child support.[216] The Court focused on the probability of success of this ultimate "remedy" to show that her claim was not redressable since it was not clear that the father would pay that support even if the law were enforced against him.[217] But had the Court attended to the plaintiff's equal protection claim, it would have realized that the plaintiff had asserted a well-recognized right of action—the equal enforcement of the laws—that, if meritorious, would entitle her to relief, namely, a wedlock-neutral application of prosecutorial discretion.[218]

The current standing doctrine also operates in a manner that is inconsistent with the separation of powers. A claim-centered approach presumes the authority of Congress to create rights of action. The function of the federal judiciary is to adjudicate claims asserting those rights of action. A cases-or-controversies-centered approach, however, presumes that the Court has the final word on what constitutes a constitutionally sufficient injury, chain of causation, or form of redressability.[219] Indeed, this was the specific holding of *Lujan*.[220] Hence, a doctrine that purports to be based on the separation of powers, in fact, operates in derogation of that doctrine, by disrespecting Congress's legislative and policy-making prerogatives.[221]

Fletcher has observed that the doctrine of standing was introduced as a "separately articulated and self-conscious law" in

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214. *Id.*

215. *Id.*

216. *Id. See* Heckler v. Matthews, 465 U.S. 728, 739–40 (1984) (remedy for equal protection violation is equal treatment).

217. *Linda R.S.*, 410 U.S. at 618 ("The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative. Certainly the 'direct' relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a prerequisite of standing, is absent in this case.")

218. *See supra* note 216.

219. *Lujan*, 504 U.S. at 571–78 (declaring citizen-suit provision of the Endangered Species Act unconstitutional as inconsistent with Article III's cases and controversies requirement).

220. *Id.*

221. *See also Lujan*, 504 U.S. at 602 (Blackmun, J., dissenting) ("The Court expresses concern that allowing judicial enforcement of 'agencies' observance of a particular, statutorily prescribed procedure' would 'transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3.' In fact, the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates.").

conjunction with "the growth of the administrative state and [the] increase in litigation to articulate and enforce public, primarily constitutional, values."[222] Thus, the law of standing, purportedly based on the cases-or-controversies "requirement" of Article III[223] and on separation of powers principles,[224] grew out of efficiency concerns and operates as a case-management tool that allows the Court, and lower federal courts, to maximize judicial prerogatives at the expense of claimants and the political branches.

The neutral principle of the claim would dissolve the doctrine of standing and focus attention on a simple but more profound question: has the plaintiff stated a claim upon which relief can be granted? Of course, that question should be asked and answered only after a fair opportunity to process the asserted claim through the federal procedural system.

C. Ripeness and Mootness

The doctrines of ripeness and mootness are also empty doctrines that clutter litigation, causing inefficiencies and ultimately disserving the system. The doctrine of ripeness asks whether a claim has been filed too soon.[225] Assertions that a claim is not ripe arise when the challenged activity has yet to occur.[226] In the realm of constitutional litigation, the Supreme Court has recently suggested that such future-harm considerations are more appropriately considered as part of standing analysis, the question being whether the threat of a future injury is sufficiently impending to satisfy the injury-in-fact standard.[227] In fact, ripeness is largely a product of administrative law, and its standards seem particularly well suited to that context.[228] But the doctrinal choice of standing over ripeness

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222. Fletcher, *supra* note 188, at 225.

223. *See Allen*, 468 U.S. at 750 ("The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government.").

224. *See supra* note 170.

225. 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3532 (3d ed. 2008).

226. *Id.*

227. *Susan B. Anthony*, 134 S. Ct. at 2347 (suggesting that ripeness considerations are superfluous once standing has been established).

228. In *National Park Hospitality Ass'n v. Department of the Interior*, the Court described ripeness as follows:

> Ripeness is a justiciability doctrine designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been then formalized and its effects felt in a concrete way by the challenging parties." The ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction," but, even in a case raising only prudential concerns, the question of ripeness may be considered on a court's

in the context of constitutional litigation is subject to my critique of the standing doctrine in general, as it overlooks the central question, which is whether the operative facts of a plaintiff's claim give rise to a right of action. To answer that question, we must look at the facts and the substance of the claim. If the claim has been filed prematurely as a matter of substantive law, then it should be dismissed under the standards of Rule 12(b)(6), on the assumption that it can be filed once the facts have matured sufficiently to state a recognized claim.[229] If the claim is mature under the applicable substantive law, no specialized theory of cases-and-controversies is required to move forward with the litigation.

Mootness lies at the other end of the justiciability timeline. The doctrine of mootness is also premised on the Court's cases-and-controversies jurisprudence. In *DeFunis v. Odegaard*,[230] the Court observed:

> The starting point for analysis is the familiar proposition that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. The inability of the federal judiciary "to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy."[231]

Similarly, in *Chafin v. Chafin*,[232] the Court explained that a case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," and "it is impossible for a court to grant any effectual relief whatever to the prevailing party."[233]

Of course, if a claim has been rendered moot by a change of facts or law, it follows that the plaintiff no longer has a claim upon which relief can be granted. The claim is no longer viable because one of the following has occurred: the possibility of redress has passed; the facts have changed in a manner that no longer sustains the right; or the right has changed in a manner that renders the facts inadequate. But it should take no specialized theory of

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> own motion.
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> Determining whether [an] action is ripe for judicial review requires us to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.

538 U.S. 803, 807–08 (2003) (internal citations omitted).

229. FED. R. CIV. P. 12(b)(6); *See Nat'l Park Hosp.*, 538 U.S. at 812 (showing that waiting for more facts can lead to a judicial conclusion).

230. DeFunis v. Odegaard, 416 U.S. 312, 316 (1974).

231. *Id.* (internal citations omitted).

232. Chafin v. Chafin, 568 U.S. 165, 172 (2013).

233. *Id.*

Article III, prudential or required, to address this relatively simple claim-centered issue.

D. Political Questions

In *Marbury v. Madison*,[234] the Court drew a distinction between those governmental actions that are subject to judicial review and those that are not.[235] Essentially, the Court concluded that where the law imposed a duty on a government actor, the failure to exercise that duty was subject to judicial review, but where the law vested discretion in a government actor and where the government actor acted within the bounds of that discretion, the action undertaken was not subject to review:

> [W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.[236]

The distinction between discretion and duty forms the seeds of the political question doctrine.[237] The Court also makes it clear that the doctrine is claim-centric. A claim that an officer of the government has breached a legally imposed duty owed to the

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234. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–66 (1803).

235. *See id.*

236. *Id.* at 166.

237. In a recent article, Tara Leigh Grove has argued that the modern political question doctrine is not traceable to *Marbury v. Madison* and that modern invocations of the doctrine are completely distinct from nineteenth century practices. Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1937–39 (2015). The problem with Grove's thesis is that it is based on an incorrect description of the modern political question doctrine. In the introduction to her article, she describes that doctrine as follows: "Thus, even if a federal court is convinced that the legislative or executive branch violated the Constitution, the court lacks jurisdiction to issue such a declaration, because the constitutional question is 'committed' to another branch." *Id.* at 1909. For this proposition she cites *Nixon v. United States*, 506 U.S. 224, 228–29 (1993). *Id.* But *Nixon* does not support the asserted proposition. Nor is there any case in which the Supreme Court has held that one of the political branches has violated the Constitution but that the political question doctrine bars review of that action. I agree with Grove that the justiciability label serves no purpose in this context. The Supreme Court political question cases, as I demonstrate in the text of this Article, do neither more nor less than determine whether the party has stated a claim upon which relief can be granted. In *Nixon*, for example, the Court in essence held that Nixon had no right to any particular type of trial under the Constitution. *See Nixon* 506 U.S. at 233. It did not hold that his right to a trial was violated but that his otherwise legitimate claim was non-justiciable. *See id.*

claimant is justiciable by definition. A claim that the officer has failed to exercise discretion in the manner preferred by the claimant is not, for in this latter context there is neither a duty nor a correlative right. We can denominate this claim as a "political question," for the officer is politically answerable for her act of discretion, but that label adds nothing to the analysis.

The modern political question doctrine is described in complex terms and carries an aura of independent significance that fits well into the "submerged complexities" mode of thinking.[238] In *Baker v. Carr*,[239] the Court surveyed and then outlined the doctrine as follows:

> The nonjusticiability of a political question is primarily a function of the separation of powers. . . . .
>
> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[240]

Despite the increasingly open-ended nature of the factors as one scroll down the list, the Court's political question decisions follow a much simpler course, one that hews closely to the duty/discretion distinction drawn in *Marbury*. Under this approach, the court will examine the constitutional source of the claim and determine whether that source imposes a duty to act in accord with the asserted right or permits a range of discretion within which no right exists. In *Powell v. McCormack*,[241] for example, the plaintiff challenged his exclusion from the House of Representatives. He claimed a violation of his right to be seated in accord with the standing requirements of Article I, § 2, cl. 2, which he had clearly satisfied.[242] The House countered that under

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238. Flast v. Cohen, 392 U.S. 83, 94 (1968).

239. Baker v. Carr, 369 U.S. 186, 210–17 (1962).

240. *Id.*

241. Powell v. McCormack, 395 U.S. 486, 493 (1969).

242. "No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art.

Article I, § 5, it was "the Judge of the Elections, Returns and Qualifications of its own Members" and that it could exclude Powell for reasons other than those imposed by the standing requirements.[243] In other words, Powell argued that the House had a duty to seat him, while the House argued it had discretion to make that determination. The Court agreed with Powell; hence, no political question was presented.[244] In short, Powell had stated a claim upon which relief could be granted.

Nixon v. United States[245] further demonstrates the claim-centered nature of the political question doctrine. In that case, the House impeached a district court judge, Walter Nixon, based on his having made false statements before a grand jury.[246] The Senate, pursuant to Senate Impeachment Rule XI, appointed a committee to take evidence and to report its findings to the full Senate.[247] After the committee completed its work, a hearing was held before the full Senate, after which the Senate voted by the required two-thirds majority to convict Nixon on two of the three articles of impeachment.[248] Nixon was then removed from office.[249] He sued the government arguing that the Rule XI procedure did not constitute a "trial" before the Senate within the meaning of Art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments.")[250] In response, the Senate claimed that it had the authority to determine the manner in which it would try impeachments.[251] Again, the battle was between a claim asserting a duty and a defense premised on discretion. The Court found that Nixon's claim presented a political question.[252] But a more direct explanation is that Nixon failed to state a claim upon which relief could be granted because he had no right to any particular type of trial before the Senate.

The Court's most recent decision in this area, *Zivotofsky v. Clinton*,[253] follows the same pattern. In that case, the plaintiff, who was born in Jerusalem, sought to enforce a federal statutory right to have Israel listed on his passport as his place of birth.[254] The

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I, § 2, cl. 2. *See Powell*, 395 U.S. at 493.

243. U.S. CONST. art. I, § 5, cl. 1, 2; *Powell*, 395 U.S. at 519–22.

244. *See Powell*, 395 U.S. at 522.

245. Nixon v. United States, 506 U.S. 224, 226 (1993).

246. *Id.* at 226–27.

247. *Id.* at 227; S. DOC. 101-8, at 11 (1989).

248. *Nixon*, 506 U.S. at 227–28.

249. *Id.* at 228.

250. *Id.*; U.S. CONST. art. 1, § 3, cl. 6.

251. *Nixon*, 506 U.S. at 229.

252. *See id*. at 228–29.

253. Zivotofsky v. Clinton, 566 U.S. 189, 194–96 (2012).

254. *Id.* at 192–93.

Executive Branch refused to honor the request, citing its policy of listing only "Jerusalem" as the place of birth, so as not to take sides in the dispute over whether Jerusalem belonged to Israel or Jordan.[255] The lower court held that the case presented a political question because it involved a sensitive issue of foreign policy.[256] The majority of the Court found otherwise, concluding that the case presented nothing more than a question of statutory interpretation and a potential determination of whether the congressional enactment violated the President's constitutional authority to recognize foreign sovereigns.[257] These were questions well within the prerogatives of the judicial branch.[258] More specifically, the Court observed:

> The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.[259]

Thus, as in the case of the other justiciability doctrines, the political question doctrine, properly understood, tests the existence of a claim and commands an analysis that might be carried out under Rule 12(b)(6) or at the summary judgment stage. In other words, if the question is committed to the discretion of a coordinate political department, the plaintiff has no right. On the other hand, if the coordinate political department has breached a duty owed to the plaintiff, a claim has been stated. There is, in fact, no case in which the Court has held that, despite the plaintiff's assertion of a right recognized at law, the claim is nonjusticiable by virtue of the political question doctrine.[260] In this sense, the political question doctrine is an unnecessary layer on the more fundamental question of whether the plaintiff has stated a claim upon which relief can be granted.

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255. *Id.* at 191–93.

256. *Id.* at 193–94.

257. *Id.* at 195–97.

258. *Id.* at 196. Justice Breyer's dissent endorsed a more flexible, multi-factored approach that would permit a federal court to refuse to hear an otherwise legitimate claim based on a range of "soft" policy considerations, ranging from a perceived "minimal need for judicial intervention" to the potential "lack of 'respect' for the other branches" that might occur with a decision that favored one political branch over the other. *Id.* at 219–20 (Breyer, J., dissenting).

259. *Id.* at 196.

260. *See* Louis Henkin, *Is there a Political Question Doctrine*?, 85 Yale L.J. 597, 601 (1976).

E. Justiciability Tested Against the Platform of the Claim

The essential question posed by the justiciability doctrines is whether the plaintiff has stated a claim that gives rise to a recognized right of action.[261] The standing doctrine replicates the generic elements of a claim but adds layers of abstraction and complexity to the analysis that have no bearing on that essential question.[262] Ripeness and mootness put the standing inquiry in a time frame that could easily be reduced to an assessment of the prematurity or tardiness of the claim as a matter of the applicable substantive law and especially so in cases involving equitable remedies.[263] Finally, the political question doctrine is transparently about whether the government actor has breached a duty owed to the plaintiff, *i.e.*, whether the government actor has violated a right recognized at law or exercised discretion in a manner that violates no rights.[264]

The "essential question" posed above can be answered under either Rule 12(b)(6) or Rule 56, depending on the circumstances of the case. In cases in which no further factual development is warranted, *i.e.*, in those cases where the question of law can be resolved without reference to the facts or on an assumed version of the facts, Rule 12(b)(6) provides an effective vehicle. If further factual and legal development is warranted, the essential question should be addressed and resolved only after an appropriate opportunity for discovery and then pursuant to a Rule 56 motion for summary judgment. In either case, the fundamental question is whether the right arising out of the operative facts is one upon which judicial relief can be granted. After all, the word, "justiciability," means only that the matter before the court is capable of judicial resolution.[265] Certainly, a claim for violation of recognized rights is capable of such treatment.

The additional doctrinal layers added by the Court's justiciability doctrines unnecessarily complicate the above inquiry and create a range of obscure case-management exits that allow a federal court to ignore its "virtually unflagging obligation" to adjudicate claims of right falling within the scope of the court's

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261. *See supra* note 187 and accompanying text (explaining that a claim becomes a case when judicial power can act on it).

262. *See* Fletcher, *supra* note 188, at 223–24 (pointing out that standing should just be a question of whether the plaintiff's claim has merit).

263. *See supra* note 227 and accompanying text (showing that ripeness is not an issue once standing is established).

264. *See supra* notes 234–235 and accompanying text (explaining what governmental actions are subject to judicial review).

265. Flast v. Cohen, 392 U.S. 83, 97 (1968); *Justiciable*, BLACK'S LAW DICTIONARY (9th ed. 2009).

subject matter jurisdiction.[266] One might argue that justiciability is one of the "passive" virtues but, in fact, it is a passive-aggressive technique that overrides the fundamental, claim-centric issues presented by a case otherwise properly filed in a federal court.

F. Standards of Review on Appeal

Appellate standards of review purport to describe the scope of an appellate court's authority to review the correctness of a district court decision.[267] The various standards of review depend on the nature of the decision under review.[268] A claim-centered approach to appellate review challenges this multi-standards view and posits that a single "error of law" standard offers a more coherent and sensible alternative. But before attempting to establish this proposition, we must attend the orthodox view under which appellate standards of review are grouped into four seemingly distinct categories: questions of law, questions of fact, mixed questions of law and fact, and questions of discretion.[269] A close examination of these categories, however, reveals that they lack substance and impose a layer of abstraction between the claim and the legal standards through which it must be processed.

Questions of law pertain to the legal standard under which a decision has been rendered.[270] The court of appeals will review such questions of law under the "de novo" standard, taking a fresh look at the district court's legal conclusions.[271] When reviewing de

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266. *See* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–18 (1976). In *Diffusing Disputes*, *supra* note 15, Judith Resnik observes that:

> The case law expressly addressing constitutionally obliged access to federal courts (for claims falling within the courts' jurisdiction) is relatively thin—prompted by instances when Congress limited access for a set of claimants (such as those in detention at Guantánamo Bay), specified that particular executive decisions (such as those relating to the deportation of immigrants) were not subject to judicial review, or allocated final decision-making to non-Article III courts (such as administrative adjudication of longshoremen's injuries).
>
> . . . .
>
> The First Amendment right "of the people. . .to petition the Government for redress of grievances" also provides a basis for more general access to the federal courts. The choice of the word "government" (instead of the term "legislature"), coupled with the history of legislative responses to public and private parties' petitions, supports reading the Clause to reference access to courts.

Id. at 2821–23.

267. Hillary J. Massey, *Civil Appellate Advocacy: Effective Use of the Standards of Review*, 27 MAINE B.J. 131, 154 (2012).

268. *See id.* at 154–55.

269. United States v. Felder, 548 A.2d67, 61 (D.C. 1988).

270. State v. Schwenke, 222 P.3d 768 (Utah Ct. App. 2009).

271. Salve Regina Coll. v. Russell, 499 U.S. 225, 238–40 (1991).

novo, the court of appeals applies its independent judgment to determine the content of the law.[272]

Questions of fact pertain to the historical events as decided by the trier of fact.[273] The court of appeals reviews the factual findings of juries through a "substantial evidence" standard,[274] under which the appellate court will uphold those findings unless no rational juror could have so determined on the evidence presented.[275] Questions of fact decided by the district court are reviewed under the standard set forth by Rule 52(a)(6)[276] and may be set aside only if "clearly erroneous" and giving "due regard to the trial court's opportunity to judge the witnesses' credibility."[277] The "clearly erroneous" standard is theoretically slightly less deferential than the substantial-evidence standard,[278] and the court of appeals may reverse a trial court's findings if it reaches "the definite and firm conviction that a mistake has been committed."[279] Thus, the findings will not be reversed if "the district court's account of the evidence is plausible in light of the record viewed in its entirety,"[280] even when the court of appeals is "convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."[281] Despite this nuanced distinction, the clearly erroneous standard sounds very much like a no-reasonable-trier-of-fact standard, which differs little, if at all, from the no-rational-juror standard.

Mixed questions of law and fact are questions "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as

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272. U.S. v. Craig J.B., 900 F.2d 218, 220 (10th Cir. 1990).

273. Davis v. United States, 564 A.2d 31, 35 (D.C. 1989).

274. *See, e.g.*, Dimick v. Schiedt, 293 U.S. 474, 485–86 (1935) (observing trial by jury is an ancient and preferred method of disposing of cases, and curtailment of this right should be scrutinized with utmost care).

275. Crockett v. Long Island R.R., 65 F.3d 274, 278 (2d Cir. 1995); *see also* Galloway v. United States, 319 U.S. 372, 406–07 (1943) (Black, J., dissenting).

276. FED. R. CIV. P. 52(a)(6).

277. *Id.*; *see also* Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573–74 (1985).

278. *See, e.g.*, Carr v. Allison Gas Turbine Div. Gen. Motors, 32 F.3d 1007, 1008 (7th Cir. 1994) (Posner, J.) (scrutiny of district judge's findings is deferential but not abject).

279. United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948); *see also* Krasnov v. Dinan, 465 F.2d 1298, 1302 (3d Cir. 1972); *accord* United States v. Howe, 543 F.3d 128, 133 (3d Cir. 2008); United States v. Igbonwa, 120 F.3d 437, 440 (3d Cir. 1997). Under the clearly-erroneous standard, a judge's finding of fact must be upheld unless it "(1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data" United States v. Antoon, 933 F.2d 200, 204 (3d Cir. 1991) (quoting *Krasnov*, 465 F.2d at 1302).

280. *Anderson*, 470 U.S. at 573–74.

281. *Id.* at 574.

applied to the established facts is or is not violated."[282] Courts of appeals do not apply a single standard of review to these questions. Some courts apply the de novo standard, focusing on the theory that the application of the law presents a question of law.[283] Other courts adopt a sliding-scale approach that focuses on whether the question presented is predominantly one of law or one of fact.[284] And other courts apply the clearly erroneous standard on the theory that questions of application are essentially fact-bound.[285]

Finally, questions involving district court discretion are examined under an "abuse of discretion" standard, under which a district court will not be reversed unless it has made either an error of law or a clear error of judgment,[286] "when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones are considered, but the court, in weighing those factors, commits clear error of judgment."[287]

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282. Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982).

283. *See*, *e.g.*, United States v. Faubion, 19 F.3d 226, 228 (5th Cir. 1994).

284. In *Guzman v. State*, a court of criminal appeals, sitting *en banc*, observed

> [A]s general rule, the appellate courts, including this Court, should afford almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's fact findings are based on an evaluation of credibility and demeanor. The appellate courts, including this Court, should afford the same amount of deference to trial courts' rulings on "application of law to fact questions," also known as "mixed questions of law and fact," if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. The appellate courts may review *de novo* "mixed questions of law and fact" not falling within this category. This Court may exercise its discretion to review *de novo* these decisions by the intermediate appellate courts.

Guzman v. State, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997) (citation omitted). *See also* Villarreal, 935 S.W.2d at 139 (McCormick, P.J., concurring) (if "the trial court 'is not in an appreciably better position' than the appellate court to decide the issue, the appellate court may independently determine the issue while affording deference to the trial court's findings on subsidiary factual questions") (quoting Miller v. Fenton, 474 U.S. 104, 117 (1985)).

285. *See* Uzdavines v. Weeks Marine, Inc., 418 F.3d 138, 143 (2d Cir. 2005) ("[M]ixed questions of law and fact [are reviewed] either *de novo* or under the clearly erroneous standard depending on whether the question is predominantly legal or factual.") (quoting United States v. Selioutsky, 409 F.3d 114, 119 (2d Cir. 2005)); Armstrong v. Comm'r, 15 F.3d 970, 973 (10th Cir. 1994) ("We review mixed questions under the clearly erroneous or de novo standard, depending on whether the mixed question involves primarily a factual inquiry or the consideration of legal principles."); Woods v. Bourne Co., 60 F.3d 978, 991 (2d Cir. 1995) (explaining that in reviewing the mixed question of substantial similarity in the copyright context, the court reviews for clear error). *See generally* George G. Pratt, *Standard of Review*, 19 MOORE'S FEDERAL PRACTICE § 206.04[3][b] (3d ed. 2017).

286. *E.g.* Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 399–402 (1990).

287. Richards v. Aramark Servs., Inc., 108 F.3d 925, 927 (8th Cir. 1997) (quoting Williams v. Carter, 10 F.3d 563, 566 (8th Cir. 1993)).

Judges[288] and scholars[289] have deplored the lack of clarity, uniformity, and coherency in the above-described approach. The distinctions drawn are far from clear,[290] and the choices made often appear instrumental to achieve a particular holding or to somehow insulate the appellate court from the result achieved.[291]

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288. *See, e.g.*, United States v. Boyd, 55 F.3d 239, 242 (1995) (Judge Posner expressing doubts as to the redundancy of the available standards of review in favor of "only two degrees of review"); Landon v. Jean-Paul Budinger, Inc., 724 S.W.2d 931, 935 (Tex. App.—Austin 1987, no writ).

289. *See, e.g.*, W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 St. Mary's L.J. 1045, 1049–50 (1993); 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2589 (3d ed. 2008) ("There is no uniform standard for reviewing mixed questions of law and fact."); Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 77 (2000) ("A common vice of appellate courts is treating the various sorts and stages of discretionary decision-making under the universal rubric of abuse of discretion, giving the appearance that the courts believe they are dealing with one kind of issue."); *see* Adam Hoffman, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1428, 1430 (2001) (discussing the scope of de novo review of facts underlying the application of constitutional standards).

290. Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIRCUIT B.J. 279, 317 (2002) (internal footnotes omitted) ("The distinction between law and fact for purposes of identifying the standard of review is often a difficult line to draw. In part, this is because the line 'varies according to the nature of the substantive law at issue.' More fundamentally, many believe that the distinction blurs because '[c]haracterization of an issue . . . as fact or law for purposes of identifying a formalized standard of review depends on the perceived need for review, not on the actual status of the issue.'"). In this respect, Leon Green observed:

> No two terms of legal science have rendered better service than "law" and "fact." They are basic assumptions; irreducible minimums and the most comprehensive maximums at the same instant. They readily accommodate themselves to any meaning we desire to give them. . . . What judge has not found refuge in them? The man who could succeed in defining them would be a public enemy. They may torture the souls of language mechanicians who insist that all words and phrases must have a fixed content, but they and their flexibility are essential to the science which has to do with the control of men through the power to pass judgment on their conduct.

LEON GREEN, JUDGE AND JURY 270–71 (1930).

291. *See* Bryan L. Adamson, *Federal Rule of Civil Procedure 52(a) as an Ideological Weapon?*, 34 FLA. ST. U.L. REV. 1025, 1028 (2007):

> If an appellate court wants to reweigh the facts as found by a lower court, it may characterize the trial court's factual findings as "legal conclusions" or "mixed questions of law and fact." On the other hand, if an appellate court wishes to give the greatest deference to the trial court decision, then findings of fact will be reviewed only for "clear error." Suspicion of judges making result-oriented standard of review choices is most palpable when the substantive issues in play carry broad moral, social, or political consequences.

Id. See also FED. R. APP. P. 28(a)(8)(B), requiring a brief to include a statement of the standard of review for each issue, because "[e]xperience . . .indicates that requiring a statement of the standard of review [in briefs on appeal] generally results in arguments that are properly shaped in light of the standard." FED. R. APP. P. 28(a)(5) advisory committee's note to 1993 amendment; Bert I. Huang, *Lightened Scrutiny*, 124 Harv. L. Rev. 1109 (2011) (offering an empirical evidence that the divergences among the circuits in their levels of appellate scrutiny is not to articulated disagreements but to variation in

Yet, the romance with standards of review has achieved a type of stickiness that seems difficult to remove.

Judge Posner has made a notable effort to reduce the multiple standards down to two. In *United States v. Boyd*,[292] he observed:

> We are not fetishistic about standards of appellate review. We acknowledge that there are more verbal formulas for the scope of appellate review (plenary or de novo, clearly erroneous, abuse of discretion, substantial evidence, arbitrary and capricious, some evidence, reasonable basis, presumed correct, and maybe others) than there are distinctions actually capable of being drawn in the practice of appellate review. But even if, as we have sometimes heretically suggested, there are operationally only two degrees of review, plenary (that is, no deference given to the tribunal being reviewed) and deferential, *that* distinction at least is a feasible, intelligible, and important one.[293]

This is surely a step in the right direction. But Judge Posner did not explain why the distinction between non-deferential "plenary" or "de novo" review and deferential review was "at least . . . feasible, intelligible, and important."[294] Perhaps these polar extremes just feel different from a judicial point of view. Whether that "feel" has any substance, however, is an open question. In any event, the distinction endorsed by Judge Posner is not truthful to the neutral principle of the claim, or able to support a different, neutral and durable principle capable of application to a wide range of cases.[295]

For instance, in *Thomas v. General Motors Acceptance Corp.*,[296] a former employee brought an action under the Employee Retirement Income Security Act (ERISA) for additional severance pay.[297] After finding that the plaintiff had filed a false application in forma pauperis application, the district court dismissed the action with prejudice. Under 28 U.S.C. § 1915(e)(2)(A), the trial court was required to dismiss the action, but the decision to dismiss with prejudice was discretionary and made as a sanction for the filing of a false application.[298] On appeal, the appellate court had to identify the standard for reviewing a district court's

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caseloads).

292. 55 F.3d 239 (7th Cir. 1995).

293. *Id.* at 242 (citation omitted).

294. *Id.* (citation omitted).

295. *See* United States v. McKinney, 919 F.2d 405 (7th Cir. 1990) (exemplifying confusion over when plenary, deferential, or a hybrid for of review ought to be applied).

296. Thomas v. Gen. Motors Acceptance Corp., 288 F.3d 305 (7th Cir. 2002).

297. *Id.* at 306.

298. *Id.* at 306.

dismissal with prejudice.[299] After describing the different standards of review, Judge Posner noted that,

> whereas review of rulings on pure questions of law is plenary, review of pure factfindings, of applications of a legal standard to pure facts, and of judgmental rulings is deferential. All three of the deference categories [*i.e.* rulings on pure factfindings, of applications of a legal standard to pure facts, and of judgmental rulings] involve case-specific rulings, which, even if they do not compose a consistent pattern across similar cases (the possibility inherent in deferential appellate review—deference implying that the appellate court might well have affirmed an opposite ruling by the district court), do not unsettle the law because the rulings set forth no general propositions of law.[300]

Applying the above considerations, Judge Posner explained that the case presented a question of fact (whether the plaintiff had lied) to be reviewed for clear error, and a question for the trial court's discretion (whether the sanction was appropriate) to be reviewed for abuse of discretion.[301] He noted that both the clear error and abuse of discretion standards "are deferential standards of review and, as a practical matter, similar or even identical in the amount of leeway they give the district judge,"[302] but he still believed that the distinction between these deferential standards and the non-deferential standard (de novo) should be preserved.[303]

But are there really two standards of review? Every ruling by a district court must be guided by a particular legal standard (or group of standards). Some standards require a binary choice; others may permit two or more alternative outcomes. The question on appeal is whether the trial court acted with the applicable standard. As I see it, the Seventh Circuit in *Thomas*, upheld the district court's ruling because the lower court committed no error of law. As to findings of fact, the applicable legal standard imposed a rule of rationality (a no-rational-trier-of-fact rule). The review of the district court's decision can be described as "deferential," but it would be more accurate to say that the legal standard applicable to findings of fact permits a range of rational choices. The question on appeal is whether the district court's finding fell within that range. Similarly, the district court's decision to dismiss the

299. *Id.* at 307.

300. *Id.* at 308.

301. *Id.*

302. *Id.*

303. *See* U.S. v. Boyd, 55 F.3d 239, 242 (7th Cir. 1995) (noting that "plenary" and "deferential" forms of review should be preserved because they have a "feasible, intelligible, and important" distinction).

plaintiff's claim with prejudice must be measured by the legal standards that informed the range of choices available to it under the circumstances presented.[304] If the district court acts within that range, it will not be reversed. We can call that deferential review, but again it would be more accurate to say that the district court acted within the range of discretion permitted by the facts as found and the legal standards relevant to the question presented. Parsing the standards of review adds nothing to this inquiry, and takes the analysis farther from the neutral principles that ought to animate it.

In short, Judge Posner's use of two different standards to review the trial court's assessment of whether the plaintiff had lied (clear error) and whether the sanction was justified (abuse of discretion) was superfluous, especially when considering that the assessment of whether the plaintiff had lied constituted the necessary factual predicate for the assessment of whether the sanction was appropriate. This mechanical approach is also somehow inconsistent with Judge Posner's admonition that courts of appeals' rulings should be kept simple and elegant.[305] Let's just say it: the district court committed no error of law.

Rather than have a variety of standards to review district court judgments, I suggest the adoption of a single, "error of law" standard of review that would be more or less deferential to the trial court's ruling, depending on the range of choices made available to the trial court under the applicable legal standard. This would require an appellate court to describe the applicable legal standards and the range of permissible outcomes under that standard with the intermediary of a standard of review. Such an approach would avoid the non-productive debate over standards of review and promote a more productive debate over the scope of law to be applied by the district court.

The error-of-law standard of review would be claim-centric, for it would eliminate the unnecessary noise created by the various standards of review and would focus on the questions of law and fact essential to the processing of the claim. It would redirect the focus of the court of appeals' analysis to the claim, *i.e.*, the facts

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304. Albemarle Paper Co. v. Moody, 422 U.S. 406, 416 (1975) (quoting United States v. Burr, 25 F. Cas. 30, 35 (C.C.D. Va. 1807)).

305. *See* RICHARD A. POSNER, REFLECTIONS ON JUDGING, 95 (2013) ("I shall be urging throughout this book that law should be simple, regardless of the complexity of the issues it grapples with, and judicial opinions simple, and the judicial focus not on solving technical problems, which is for the real techies, but on managing complexity—not adding to it. Jargon, complexification, and tunnel vision are serious dangers in the operation of specialized courts."); *see also* Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge's Views*, 51 DUQ. L. REV. 3, 9 (2013).

giving rise to the claim and the law that applies to it, tested against the applicable legal principles. Essentially, under this unified standard, the question for the court of appeals would be whether the trial court, in assessing the legal standards applicable to the claim asserted or the facts giving rise to the claim, acted beyond the range permitted by the law. This unified standard would eliminate the appellate practice of using boiler-plate, bullet-proof language (plenary or de novo, clearly erroneous, abuse of discretion, substantial evidence, arbitrary and capricious, some evidence, reasonable basis, presumed correct. . . .)[306] without further support[307] and would force appellate judges to better consider the legal and factual contours of the claim.

G. Res Judicata

The Latin phrase *res judicata* means that the *res*, the thing or matter, has been decided.[308] In federal courts, the judge-made doctrine of *res judicata* prevents the parties from relitigating matters that have been expressly or implicitly decided between them.[309] The doctrine is intended to provide the parties assurance of finality as to the adjudication of the claims and issues that have been resolved between them and to conserve finite judicial resources.[310]

The doctrine of *res judicata* encompasses the doctrines of claim preclusion and issue preclusion.[311] The doctrine of claim preclusion determines when a claim resolved in one case precludes further litigation on that claim in a subsequent case. In *Cromwell v. County of Sac*,[312] the Court explained that the

> judgment if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or

306. *See, e.g.*, Richard H. W. Maloy, "*Standards of Review"—Just a Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603, 610 (showing adoption of more thirty different standards of review by judges).

307. *See, e.g.*, Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 247, 251–52 (2009).

308. *See* Chesterfield Vill., Inc. v. City of Chesterfield, 64 S.W.3d 315, 318 (Mo. 2002).

309. On *res judicata*, *see* IDES, MAY, & GROSSI, CIVIL PROCEDURE, *supra* note 269, at 1131 *et seq.*; *see also* Robert von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 300 (1929); Allan P. Vestal, *Res Judicata/Claim Preclusion: Judgment for the Claimant*, 62 NW. U.L. REV. 357, 357–58 (1967).

310. *See generally* 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4403 (2d ed. 2014).

311. *See Chesterfield Vill., Inc.*, 64 S.W.3d at 318–19 n.5.

312. Cromwell v. Cnty. of Sac, 94 U.S. 351 (1876).

> demand, but as to any other admissible matter which might have been offered for that purpose.[313]

Claim preclusion may be raised as affirmative defense,[314] and the defense consists of three elements that the party raising the defense must establish: (i) the claim in the second proceeding must be the same claim as that resolved in the first proceeding; (ii) the judgment that resolved the claim in the first proceeding must have been final, valid, and on the merits; and (iii) the first and second proceedings must involve the same parties or those in privity with them.[315]

The doctrine of issue preclusion bars relitigation of discrete issues that were actually litigated and decided in a previous case, even when that case involved different claims.[316] For purposes of the present analysis, though, we will focus on claim preclusion only, as most relevant to the thesis of this Article.

Defining the claim is essential to the understanding of the scope and application of the doctrine. And it is for the judges, on the basis of pragmatic considerations, on a case-by-case basis, to define the claim in view of the purpose of the doctrine, *i.e.*, "the most expeditious use of the court's time,"[317] and the due process rights of the litigants. Thus, an abstract definition of the claim would not be desirable.[318]

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313. *Id.* at 352.

314. *See* FED. R. CIV. P. 8(c)(1).

315. *See* Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003).

316. *See* White v. City of Pasadena, 671 F.3d 918, 926 (9th Cir. 2012) (citing New Hampshire v. Maine, 532 U.S. 742, 748–49 (2001)).

317. Vestal, *supra* note 309, at 360.

318. *See* Pittson Co. v. U.S. 199 F.3d 694, 704 (4th Cir. 1999) ("No simple test exists to determine whether causes of action are identical for claim preclusion purposes, and each case must be determined separately within the conceptual framework of the doctrine."); Kaiser Aerospace v. Teledyne Industries, Inc., 229 B.R. 860, 875 (S.D. Fla. 1999) ("There is no precise definition, nor simple test, for defining a cause of action. There is a predisposition, however, toward taking a broad view, looking for an essential similarity of the underlying events giving rise to the various legal claims. In measuring relatedness, courts consider whether substantially the same evidence is presented, whether the same right is claimed, and whether the two suits arise out of the same transactional nucleus of facts."); Davis v. U.S. Steel Supply, 688 F.2d 166, 171 (3d Cir. 1982) ("[R]es judicata generally is thought to turn on the essential similarity of the underlying events giving rise to the various legal claims, although a clear definition of that requisite similarity has proven elusive."); Abramson v. Univ. of Haw., 594 F.2d 202, 206 (9th Cir. 1979) ("Whether causes of action are identical for *res judicata* purposes . . . cannot be determined precisely by mechanistic application of a simple test."); Donegal Steel Foundry Co. v. Accurate Prods. Co., 516 F.2d 583, 588 n.10 (3d Cir. 1975) ("'Causes of action' cannot be precisely defined, nor can a simple test be cited for use in determining what constitutes a cause of action for res judicata purposes."); Williams v. Codd, 459 F. Supp. 804, 811 (S.D.N.Y. 1978) ("Determination of whether two causes of action are identical is hardly an exact science."); *see also* Maurice Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165,

Consistent with Clark's definition of the claim, the Restatement Second of Judgments provides that the claim extinguished by a first judgment "includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."[319] The Restatement also clarifies this definition by providing that the "factual grouping" constituting a "transaction" must be "determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."[320]

This *res judicata* formula is aimed at achieving the most expeditious use of the court's time while respecting the due process rights of the litigants.[321] Also, differently from the three or four-part tests often endorsed by the lower courts,[322] the Restatement formula seems to better endorse a neutral, durable principle capable of articulation through reasonable elaboration. And although the Restatement approach has sometimes been

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169 (1969) ("Detailed rules cannot settle it, for the factors that influence decision defy prescription. They include such complex considerations as the practical needs of administering justice conveniently and efficiently and the degree of favor or disfavor with which the law regards the type of claim made by the plaintiff."); Three Rivers Land Co. v. Maddoux 1982, 652 P.2d 240, 245 (N.M. 1982); Bockweg v. Anderson, 1993, 428 S.E.2d 157, 163, (N.C. 1993).

319. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

320. *Id.*

321. WRIGHT, MILLER & COOPER, s*upra* note 310, § 4403.

322. *See, e.g.*, Longway v. Sanborn Map Co., No. 3:10-CV-00896, 2014 WL 4851805, at *4 (M.D. Tenn. Sep. 29, 2014), *report and recommendation adopted*, No. 3:10-CV-00896, 2015 WL 222175 (M.D. Tenn. Jan. 14, 2015) ("A party asserting res judicata must show: (1) that the underlying judgment is final; (2) that both suits involve the same subject matter; (3) that both suits involve the same claims for relief; and (4) that both suits involve the same parties, or parties in privity."); Carrick v. Santa Cruz Cnty., No. 12-CV-3852-LHK, 2012 WL 6000308, at *4 (N.D. Cal. Nov. 30, 2012) ("Under California law, the doctrine of res judicata will apply if: (1) two cases involve the same claim or cause of action; (2) there has been a final judgment on the merits in the earlier decided case; and (3) the latter case is between the same parties, or parties in privity with them."); Cooper v. Old Dominion Freight Line, Inc., 781 F. Supp. 2d 1177, 1182 (D. Kan. 2011) ("Under Kansas law, res judicata 'prevents relitigation of previously litigated claims and consist of the following four elements: (1) same claim; (2) same parties; (3) claims were or could have been raised; and (4) a final judgment on the merits.'"); Anderson v. Deutsche Bank Nat. Tr. Co., No. 2:10-CV-02242-RLH, 2011 WL 2710657, at *3 (D. Nev. July 12, 2011) ("Claim preclusion applies where: (1) the same parties, or parties in privity, were involved in prior litigation; (2) the suit concerns the same claim as the prior litigation; and (3) the prior litigation ended with a final judgment on the merits."). These mechanical tests do not fully capture the elegance of the Restatement's formula and, by treating the requirement of "same parties" as separate from the requirement of "same claim," show lack of clarity on the nature and scope of the claim. Claims are the same only if they involve the same parties (or parties in privity).

criticized for its uncertain contours,[323] the approach "is not designed for case-by-case application alone,"[324] and it is consistent with the goal of achieving uniformity, by providing "a process rather than an absolute concept."[325]

As noted by Wright & Miller, "[m]any federal decisions have taken the final step of adopting explicit transactional definitions of a claim or cause of action. The Restatement formulation has been adopted by so many of these decisions, representing virtually all federal courts, as to be the predominant federal rule."[326] The problem, though, is that sometimes courts have broadened the scope of the claim to require inclusion of more related matters within the single claim that must be advanced in the first suit or lost,[327] at the expense of the adjudication of specific rights of action

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323. *See*, *e.g.*, Hermann v. Cencom Cable Assocs., 999 F.2d. 223 (7th Cir. 1993), where Judge Posner noted:

> The standard for when two claims are so closely related that they constitute the same transaction for purposes of res judicata is not as clear as it might be. It is not much use being told, as by the restaters, that the question what claims constitute a single transaction is to be decided "pragmatically," with due regard for whether they form "a convenient trial unit," whether the evidence concerning them is similar, and whether "their treatment as a unit conformed to the parties' expectations." We're all for pragmatism, but pragmatism is not an operational legal standard. Litigants and their lawyers are entitled to clearer guidance in an area where a false step can result in the forfeiture of valuable legal rights than generalities about practicality, convenience, similarities, and expectations can furnish. It is not wrong to emphasize these as factors bearing on the objectives of res judicata. Knowledge of objectives is helpful, often vital, in interpreting and applying rules. But objectives must not be confused with criteria. Where certainty is at a premium, sound lawmaking requires the setting forth of clear and definite criteria rather than a general directive to decide each case in the manner that will maximize the attainment of the law's objectives. The latter approach, carried to the extreme, would reduce all law to an admonition to do what's right.

Id. at 226 (citation omitted).

324. WRIGHT, MILLER & COOPER, s*upra* note 310, § 4407. *See also* Reilly v. Reid, 379 N.E.2d 172, 176 (N.Y. 1978) ("Thus, no single definition formulation is always determinative. This does not mean, however, that the principles are to be applied on a case-by-case basis. It does mean that there are varying categories of cases, categories which are recognized as in the rules used and suggested in the Restatement in determining 'factual groupings'").

325. WRIGHT, MILLER & COOPER, s*upra* note 310, § 4407.

326. *Id.*; *see also* Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1401, 1406 n.6 (1983) ("Today, the trend is to bar subsequent claims arising from the same transaction, occurrence, or series of transactions or occurrences making up the claims in the first lawsuit.")

327. WRIGHT, MILLER & COOPER, *supra* note 310, § 4403; *see* James v. Gerber Prods. Co., 587 F.2d 324, 328 n.5 (6th Cir. 1978) ("In recent years the courts have defined the term 'claim' for res judicata purposes in an expansive manner."); Nina Cortell, *The Expanding Scope of the Res Judicata Bar*, 54 TEX. L. REV. 527, 527–28 (1976) ("Recent decisions, however, reveal an alarming judicial tendency to suspend the individual litigant's due process right to a 'day in court' in favor of the public's interest in judicial finality, resulting in a dramatic expansion of the scope of the res judicata bar. By either abandoning the

that may not arise out of the same operative facts as the rights actually asserted. A broad interpretation and application of the claim and *res judicata* "will prove a greater trap for the unwary."[328] Wright & Miller noted how decisional rules of *res judicata* have increasingly grown in recent years, perhaps driven by concerns for judicial efficiency and to protect courts from the increased burdens of repetitious litigation.[329] However, we should be careful when deciding whether pursuing a single suit. In the search of the most effective *res judicata* formula, there are reasons to prefer more general rules and reasons than more particularized ones. But more general rules are less certain, and more particularized rules are more complex to apply and might lead to unfair results.[330]

In truth, we do not need an additional definition of "claim" for purposes of *res judicata*. A claim in the *res judicata* context is (and should be) the same thing as in the contexts of pleadings, justiciability, jurisdiction, and discovery. The definition of claim endorsed by the Restatement as a group of "all rights of the plaintiff to remedies against the defendant with respect to all or

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privity requirement altogether or expanding the privity concept to encompass nonparties previously beyond the scope of the bar, courts have enlarged the class of persons whose claims will be concluded by prior litigation and posed new threats to litigants who may thus unwittingly lose their right to bring suit."); Yuval Sinai, *Reconsidering Res Judicata: A Comparative Perspective*, 21 DUKE J. COMP. & INT'L L. 353 (2011) ("The rules of RJ have undergone a significant change in scope. In the old common law, its scope was quite narrow. A judgment entered in a case on one form of action did not prevent litigants from pursuing another form of action, although only one recovery was permitted for a single loss. With changes in the rules of litigation as part of the evolution of modern procedure, the scope of the rules of RJ is wider. . . . As the modern rules of procedure have expanded the scope of the initial opportunity to litigate, they have correspondingly limited subsequent opportunities to litigate a subsequent one."); *see also* Kilgoar v. Colbert County Bd. of Educ., 579 F.2d 1033, 1035 (5th Cir. 1978) (citation omitted) ("[T]he modern view regards the same cause of action to refer to all grounds for relief arising out of the conduct complained of in the original action. Such a view is sensible where the procedure allows, as the Federal Rules allow, a claimant to put forward all grounds for relief in one action."); Williamson v. Columbia Gas & Electric Corp., 186 F.2d 464, 469–70 (3d Cir. 1950) ("A reading of the early cases as compared with recent ones makes it clear that the meaning of 'causes of action' for res judicata purposes is much broader today than it was earlier. Formerly the whole aim in pleading, and in the elaborate system of writs, was to frame one single legal issue. That being the guiding principle, the phrase 'cause of action' came to have a very narrow meaning. If the theory in the second suit was unavailable under the writ used in the first suit, the plaintiff had no opportunity to litigate it there and so plaintiff was not barred by res judicata. The force of the rule is still operative but the scope of its operation has been greatly limited by the modernization of our procedure. The principle which pervades the modern systems of pleading, especially the federal system, as exemplified by the free permissive joinder of claims, liberal amendment provisions, and compulsory counterclaims, is that the whole controversy between the parties may and often must be brought before the same court in the same action.").

328. JAMES & HAZARD, CIVIL PROCEDURE, § 11.8 (2d ed. 1977). *See also* Edward W. Clearly, *Res Judicata Reexamined*, 57 YALE L.J. 339, 349 (1948).

329. WRIGHT, MILLER & COOPER, s*upra* note 313, § 4403.

330. *Id.*

any part of the transaction, or series of connected transactions, out of which the action arose,"[331] is consistent with Clark's operative-facts definition of the claim standard and, tested against the claim prism, naturally explains and governs litigation in federal courts from the beginning to the end. Indeed, Clark thought that *res judicata* was the test for the sufficiency of the complaint:

> [Res judicata] may perhaps be considered the final test, for if the pleadings isolate the events in question from others sufficiently to show the affair which the judgment settles, then the parties will have the protection they are entitled against relitigation of the same matter.[332]

By focusing on the fundamental question of whether there was a claim to protect, the original rule was part of the natural process of lawyering and judging.[333] Rethinking the Rules and the doctrines as explained in the preceding sections will automatically take care of the inefficiencies of the system that are sometimes left to res judicata solutions.

V. CONCLUDING REMARKS

The above reflections are intended to inspire a new approach to procedural reform. They redirect the focus of the analysis to the litigation, its essence and essential unit, the claim, and to the idea of natural lawyering and judging that inspired Charles Clark and the Rules as originally adopted in 1938. These reflections also build upon the idea of a convenient litigation unit as central to the dispute resolution mission of federal courts, that is, saying what the law is, adhering to the rule of law, and enforcing the checks and balances of our constitutional system.[334]

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

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331. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

332. Clark, *Simplified Pleading*, *supra* note 57, at 278; *see also* Clark, *Pleading Under the Federal Rules*, *supra* note 19, at 183 (showing how the endorsed pleading standard is "perfectly adequate for res judicata purposes.").

333. *See* Clark, *Pleading Under the Federal Rules*, *supra* note 19, at 183 ("We want the lawyers to 'do what comes naturally.'"); *see also* Clark, *Simplified Pleading*, *supra* note 57, at 289 (on the relationship between pleadings, rules for discovery, pre-trial, and summary judgment). Thus, considering the relationship between pleadings and discovery, natural pleading leads to natural joinder and, eventually, to natural discovery ("Whenever the parties are going ahead quite naturally with these fundamental remedies they can do it without any court interference at all." (Clark, *Pleading Under the Federal Rules*, *supra* note 58, at 191)).

334. Pushaw, *Justiciability and Separation of Powers*, *supra* note 169, at 399.

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.