2015

A Pragmatic Approach to Interpreting the Federal Rules

Suzette M. Malveaux
University of Colorado Law School

A Pragmatic Approach to Interpreting the Federal Rules

http://courtslaw.jotwell.com/a-pragmatic-approach-to-interpreting-the-federal-rules/

Elizabeth G. Porter, *Pragmatism Rules*, 101 **Cornell L. Rev.** (forthcoming, 2015), available at SSRN.

Suzette M. Malveaux

With seventeen decisions interpreting the Federal Rules of Civil Procedure in the last decade, the Roberts Court has doubled the number of cases decided by its predecessor, the Rehnquist Court, in the same amount of time. This record-breaking streak has given scholars a unique opportunity to examine the contours and direction of the modern civil litigation system. Elizabeth Porter has taken this opportunity to discern the interpretive methodologies used by the Roberts Court when deciding Rules cases. In doing so, she makes a unique contribution not only to the literature on civil process, but also to the study of interpretation, focusing it away from statutes and instead onto the Rules.

At a time when much is at flux in the procedural world, in *Pragmatism Rules*, Porter discerns two primary competing interpretative methodologies in the Roberts Court's Rules opinions. On the one hand, the Roberts Court interprets the Rules using the familiar tools of statutory interpretation. This go-to mode, although imperfect, works to provide rational, clear, and predictable outcomes. To the extent that Rules are like statutes, the Court can rely on the familiar markers of text, structure, and purpose when deciding Rules cases. The Court justifies its reliance on this mode by reminding the lower courts and parties that rule changes must come from the rulemaking process, not judicial adjudication.

On the other hand, at times the Roberts Court has taken a more hands-on approach, actively managing the litigation as if it were a trial judge. This "managerial" mode breaks from the rule-statute analogy, allowing the Court to rely on precedent, specific application of the law to the facts, and public policy considerations. In this mode, Advisory Committee Notes give way to equity and the Court leans on common-law judicial power and pragmatism. Porter observes how managerial judging has "trickled up" the food chain, resulting in Wal-Mart's heightened Rule 23(a)(2) commonality standard, Twombly and Iqbal's more rigorous plausibility pleading, and Scott v. Harris's usurpation of lower court and jury power in summary judgment determinations involving video evidence.

Scholars have criticized both interpretive modes. Traditional statutory interpretation has been criticized for being overly textualist, to the detriment of a Rule's underlying purpose. Managerial interpretation has been criticized as overreaching and potentially abusive of judicial discretion. Porter carefully threads the needle by rejecting and embracing both. She concludes that both interpretive paradigms not only are here to stay, but are the result of tensions that exist in the very fabric of the Rules themselves and the rulemaking process. Although she identifies the importance of pragmatism to the Court—as reflected in the article's title—she turns out to be a

pragmatist, too.

Porter explores three tensions (what she calls "fault lines") that characterize the Rules and rulemaking process. She takes a deep dive on characterizations often noticed, but not fully explored.

The first tension is structural. Porter puts her finger on a fundamental institutional tension in the Court's relationship to civil process. The Court is both legislative rule maker and judicial adjudicator. Subject only to rarely-used congressional override, the Court is the architect of the Rules, enjoying veto power over the Standing and Advisory Committees below. Thanks to the Rules Enabling Act, the Court has more skin in the game than it would otherwise. But this makes the Court's role all the more confusing, as it must now interpret its own creation.

The Court has recently been criticized for altering the Rules by judicial fiat in cases such as *Wal-Mart*, *Twombly & Iqbal*, and *Scott*. Such decisions, Porter contends, exhibit a lack of judicial restraint by the Roberts Court. Porter reminds us that the Court should not legislate from the bench. But does it do that already? Arguably. But as only one part of a seven-step process that includes significant public participation and transparency, the Court's formal role in rulemaking may not be as robust as imagined.

Scholars have described the Court's adjudicative power as akin to that of an administrative agency. The Court has both a unique relationship with the Rules and broad and inherent power to interpret texts, no matter what genre. And where the Advisory Committee comes up short (as in failing to amend the Rule 8 pleading standard), the Court is available to step into the breach. Porter ties these two competing perceptions of the Court – "rung on the technocratic ladder" and "adjudicator-in-chief" (P. 32.)—to the Court's two modes of Rule interpretation, noting the Court's nimble exploitation of each:

When it wants to declaim interpretive power, the Court interprets the Rules narrowly using traditional statutory interpretation tools, and urging dissatisfied parties to seek recourse through rulemaking. But when it is frustrated with the rulemaking process or otherwise wants to recalibrate litigation norms, the Court toggles seamlessly into the other paradigm—the paradigm of broad, almost unbounded, common law power. (P. 32.)

The second tension is linguistic. The language of the Rules themselves creates a schism in interpretation. The text is deliberately crafted to maximize the Court's discretion and flexibility to achieve procedural due process. But the text may be so ambiguous—if not downright poetic—that the Court has too much play, thereby undermining a uniform interpretive theory.

Porter anchors her examination of the linguistic tension in Rule 1. Porter explains that the "master Rule" was drafted as "a statement of interpretive methodology" (P. 33.), designed to steer decisions away from procedural formalism and toward resolution on the merits. She bemoans the fact that the Rule seems to have lost its original moorings, and is instead used to sell cost-savings and systemic efficiency, all of which promote managerial Rule interpretation. Undervalued by scholars and courts, Rule 1 has been made more vulnerable to this pitch. Of course the Rule's text itself (calling for "speedy and inexpensive" determinations) gives license to the managerial interpretive mode and, unsurprisingly, sends mixed messages.

Porter observes that the language of the Rules—with their roots in equity—often wax poetic, inviting rule interpretation that is highly discretionary, factually based, and purpose-driven. This freedom, invited by such poetic text, has been applied not only by the district courts—who are tethered to a factual record and live litigants—but by the Supreme Court, as well. Porter concludes that the Roberts Court has exploited this freedom, enabling it to disrespect the abuse-of-discretion standard of review and rebuke judicial restraint.

The third tension is epistemological. Porter explores how two unresolvable dichotomies mirror, if not create, the Court's statutory and managerial interpretive modes. One dichotomy is between substance and procedure. When

this divide is clean, it supports a statutory interpretation of the Rules. When messy, it invites a managerial interpretation. The other dichotomy is between Rule trans-substantivity and case- and fact-specific Rule application. When the Court uses statutory interpretation, trans-substantivity is clearly valued; but when the Court favors managerial interpretation, fidelity to trans-substantivity wanes.

Porter does a great job teeing up these three tensions or interpretive fault lines and exploring how they might explain, if imperfectly, the conflicting paradigms the Court uses when interpreting the Rules. But Porter doesn't stop there. In addition to identifying the Court's contradictory interpretative paradigms and fleshing out the underlying tensions in the Rules and rulemaking process that undergird and concretize such paradigms, she attempts to reconcile these uncomfortable contradictions with a proposal modeled on administrative law.

Because the Rules resemble agency regulations more than statutes, Porter draws from administrative law when crafting a way for the Court to properly employ both statutory and managerial interpretive modes. Porter proposes a framework that supports the Court's reliance on statutory interpretation and de novo review for cases dealing with pure questions of law and managerial interpretation for cases dealing with the application of Rules to the facts. In the latter, if the Court is faced with a merits question, the Court should remand to the lower court to apply the Court's new Rule interpretation. This *Chevron*-type deference scheme strives to preserve Court flexibility while checking overreaching and abuse of power. Porter makes the important and unique observation that the real problem may be that the Roberts Court fails to give proper deference to the lower courts, rather than to the rulemakers.

While recognizing the legitimacy and value of both the statutory and managerial interpretive modes, Porter concludes that this new theoretical framework is necessary to reign in the Roberts Court's usurpation of the district courts' managerial discretion. She contends that the Court has not only created new procedural standards through Rule interpretation, but aggressively inserted itself into merits determinations belonging squarely to the courts below. Thus, the problem is not one of Rule interpretation, but of proper deference. Porter contends that a *Chevron*-inspired framework would promote transparency that discourages merits-based overreach and return the Roberts Court to the minimalist procedural decisions of the Rehnquist Court.

Porter concludes by challenging us to remember the uniqueness of the Rules—as neither statutes nor agency regulations—and the concomitant value of creating an interpretive theory that recognizes both statutory and managerial Rule interpretation. Her proposal starts us down this important and groundbreaking path.

Cite as: Suzette M. Malveaux, *A Pragmatic Approach to Interpreting the Federal Rules*, JOTWELL (August 11, 2015) (reviewing Elizabeth G. Porter, *Pragmatism Rules*, 101 **Cornell L. Rev.** (forthcoming, 2015), available at SSRN), http://courtslaw.jotwell.com/a-pragmatic-approach-to-interpreting-the-federal-rules/.