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TAYLOR V. STURGELL, PROCEDURAL DUE PROCESS, AND THE DAY-IN-COURT IDEAL: RESOLVING THE VIRTUAL REPRESENTATION DILEMMA

Martin H. Redish & William J. Katt†*

INTRODUCTION

The notion that the individual litigant possesses a foundational constitutional right to his day in court before his rights may be judicially altered has long served as a guide for the shaping of modern procedure.[1] In no area of procedure has this ideal traditionally played a more important role than the field of judgments. Virtually every first-year law student has learned that due process generally prevents a court from imposing either res judicata or collateral estoppel against litigants not represented in the prior litigation.[2] To be sure, there exists a narrow group of well-accepted qualifications that allow a nonparty to be bound when he is in privity with a prior party[3] and respected scholars have occasionally challenged the precept's valid-

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1 *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 845–46 (1999) (discussing the "day-in-court ideal" as it relates to class action suits).

2 RESTATEMENT (SECOND) OF JUDGMENTS § 28(5) (1982).

3 RESTATEMENT (FIRST) OF JUDGMENTS § 83 (1942).

ity.[4] However, the day-in-court limitation on the imposition of res judicata and collateral estoppel has generally withstood the test of time—that is, until the development of the doctrine of so-called "virtual representation."

Virtual representation is a preclusion doctrine that permits a litigant to be bound by a judgment in a prior case in which she was not a party.[5] Unlike the other primary forms of nonparty preclusion, virtual representation (at least in some of its manifestations) does not require a preexisting legal relationship between the nonparty and a party in the case in order to bind the nonparty by the case's findings and judgment. Instead, the nonparty is bound if her interests are deemed to have been sufficiently aligned with a party in the prior case and certain other factors are satisfied,[6] even if there is no preexisting formalized relationship between them. As of the start of 2008, the definition of virtual representation varied widely among the federal circuits, with at least one circuit disapproving its use almost entirely.[7]

Virtual representation is in direct tension with the day-in-court ideal. By its very nature, the doctrine deprives litigants of their right to a day in court by binding them to judgments in cases in which they were not parties and in which they did not have the opportunity to defend their own interests. Because of this tension with the day-in-court rule, virtual representation has been the subject of controversy in the lower courts since its inception.

The Supreme Court provided important guidance on the viability of virtual representation in its 2008 opinion in *Taylor v. Sturgell*.[8] After recognizing the inherent clash between the day-in-court ideal and the doctrine of virtual representation, the Court recognized significant tension between the doctrine and the dictates of due process.[9] Specifically, it unanimously rejected the D.C. Circuit's multifactor balancing test for virtual representation.[10] In doing so, however, the Court quite clearly signaled the demise of *all* versions of virtual representation. For reasons we subsequently explore,[11] the Court was correct to reject

4 *See generally* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 232–88 (1992) (arguing for a less rigid approach to nonparty preclusion).

5 *See, e.g.*, Aerojet-Gen. Corp. v. Askew, 511 F.2d 710, 719 (5th Cir. 1975).

6 Different courts of appeals employed different variations of virtual representation. *See infra* notes 37–42 and accompanying text.

7 *See* Perry v. Globe Auto Recycling, Inc., 227 F.3d 950, 953 (7th Cir. 2000); Tice v. Am. Airlines, Inc., 162 F.3d 966, 970–73 (7th Cir. 1998).

8 128 S. Ct. 2161 (2008).

9 *Id.* at 2171, 2173–74.

10 *Id.* at 2169–70, 2175.

11 *See infra* Part II.

virtual representation as a general matter. In most cases, the doctrine unconstitutionally undermines the individual's due process right to his day in court—a doctrine whose value has generally been ignored by those courts and scholars who have advocated some form of virtual representation. However, the Court in *Taylor* failed in two important ways: Initially, it failed to articulate the true constitutional grounding for the day-in-court ideal, thereby leaving itself vulnerable to the charge of some that it has overvalued this right. On the other hand, somewhat paradoxically, the Court simultaneously overvalued the day-in-court ideal, by rejecting virtual representation even in cases of indivisible relief, where the harm from failing to employ the doctrine could well outbalance the harm from using it.

The concept of indivisible relief refers to cases in which the relief sought by multiple parties from the same defendant demands that the defendant take singular action—in other words, that the defendant cannot, either legally or physically, provide wholly separate, disjointed, or inconsistent relief to the various plaintiffs. For example, when a municipality's ability to issue a bond is challenged in separate suits, it is impossible for the municipality to issue the bond in one suit, but not issue it in another suit; either the municipality issues the bond, or it does not.[12] Similarly, in the case of *Supreme Tribe of Ben-Hur v. Cauble*,[13] a fraternal benefit organization sought a financial reorganization, which was challenged in separate suits by different policyholders.[14] In this situation, either the organization financially reorganized, or it did not; it could not reorganize as to certain plaintiffs while simultaneously failing to reorganize as to others. In these situations, allowing separate suits could establish what Rule 23(b)(1)(A) of the Federal Rules of Civil Procedure, concerning class actions, describes as "incompatible standards of conduct."[15] It is important to distinguish this situation from damage suits, where a defendant could, both practically and legally, be made to pay damages to some plaintiffs but not to others.[16] In situations of indivisible relief, it is quite conceivable that allowing separate suits to result in "incompatible standards" could cause severe hardships to a defendant. In these situations, *not* binding subsequent plaintiffs to the result in the

12 *See* FED. R. CIV. P. 23(b)(1)(A) committee note.

13 255 U.S. 356 (1921).

14 *Id.* at 357–59.

15 FED. R. CIV. P. 23(b)(1)(A).

16 *See, e.g.*, Green v. Occidental Petrol. Corp., 541 F.2d 1335, 1340 & n.9 (9th Cir. 1976); *see also* Note, *Class Actions for Punitive Damages*, 81 MICH. L. REV. 1787, 1799 n.69 (1983) (citing several district and appellate court cases in which not all plaintiffs were compensated).

first suit through virtual representation might threaten the defendant's due process rights, and at the very least threaten sub-constitutional interests in reason and fairness.

Procedural due process has long been thought to involve a balancing of competing interests: the value of providing a given procedure is balanced against the cost, either to the state or to one of the parties, of providing it.[17] For the overwhelming majority of cases, the significant value of providing a litigant with her day in court outweighs the costs in providing it. Indeed, this calculus is so simple in most cases that a commitment to the provision of a day in court has become the presumptive rule. However, in multiple suit situations involving claims for indivisible relief, the issue is far more complex.

In this Article, we tackle the two glaring omissions in the *Taylor* Court's analysis of virtual representation: its failure to explain the theoretical grounding of the day-in-court ideal in American constitutional and political theory and its failure to explore the implications of indivisible relief for the viability of virtual representation. In Part I, we explore the facts and holding of *Taylor*. In Part II, we fashion a theoretical explanation of the day-in-court rule. We conclude that the day-in-court rule springs from society's democratic commitment to the precept of process-based autonomy. Just as the government cannot dictate to individuals how to participate politically in the democratic process, individuals should not be forced to defer to the judgment of others when pursuing their legal rights. Like political participation rights such as freedom of expression, the value of litigant autonomy is extremely high but not absolute.[18] In Part III, we explore the concept of indivisible relief and its implications for virtual representation. Indivisible relief, we believe, can be subdivided into three categories: inconsistent liability, double liability, and contradictory liability. Each situation raises unique due process concerns that could be substantially avoided by use of virtual representation. After conducting a detailed due process analysis, we conclude that the value of avoiding the problems associated with double and contradictory liability is sufficiently significant to outweigh the competing value of litigant autonomy, and therefore virtual representation may be employed to avoid these problems.[19] It should be emphasized, however, that the threat of double or contradictory liability is necessary but not sufficient for virtual representation to pass due process scrutiny. As our analysis will show, virtual representation also requires a showing that the absent

17 *See* Mathews v. Eldridge, 424 U.S. 319, 347–49 (1976); *infra* Part II.A.

18 *See infra* Part II.B–C.

19 *See infra* Part III.A.1–2.

party has been adequately represented by a present party. Only if both conditions are satisfied should virtual representation be permitted.

In Part IV, we consider prophylactic measures that might be employed to avoid the entire dilemma caused by the problems associated with indivisible relief. Despite the conclusion that our limited recognition of virtual representation—confining its use to situations where failure to invoke it would produce intolerable results to opposing parties—satisfies due process, it nevertheless has the harmful effect of depriving litigants of their day in court and should therefore be avoided if at all possible.

I. VIRTUAL REPRESENTATION IN THE COURTS

Our legal system employs a presumption that each person has a right to her day in court. This ideal is most easily seen in the binding effect of judgments. The doctrines of res judicata and collateral estoppel preclude parties from relitigating claims or issues that have reached a final judgment. Because of the day-in-court ideal, these preclusion doctrines typically bind only the parties in the underlying suit; in most situations, imposition of a preclusive impact on a nonparty is deemed to violate due process.[20] In certain situations in which a formal prelitigation arrangement exists between a party and a nonparty, however, the nonparty may be bound. These prelitigation arrangements are often classified together under the heading of "privity."[21] Although a person in privity with a party is deprived of her personal day in court, the nature of the preexisting relationship is deemed to create an exception to the presumptive day-in-court ideal.

Virtual representation departs from these traditionally accepted limitations. Unlike traditional exceptions to the day-in-court dictate, its preclusive bar is often not grounded in a formalized prelitigation arrangement between a party and nonparty. Instead, virtual representation, in some versions, binds a nonparty to a judgment any time that her interests are found to be sufficiently aligned with the interests of a party to that judgment.[22] Although the phrase's definition is a matter of some debate, having aligned interests essentially means that a non-

20 *See* Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989) (recognizing that due process permits preclusion of nonparties when they are "adequately represented by someone with the same interests who is a party" (citing FED R. CIV. P. 23; Hansberry v. Lee, 311 U.S. 32, 41–42 (1940))).

21 *See* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 131.40[3][a] (3d ed. 2008) ("[Privity] describes those relationships that the courts have *already* determined will qualify for preclusion.").

22 *See* Aerojet-Gen. Corp. v. Askew, 511 F.2d 710, 719–20 (5th Cir. 1975).

party to the first suit would, in the second suit, advance the same arguments and seek the same outcome as a party in the first suit.[23] Because of the broad range of situations in which a nonparty's interests may be aligned with a party's interests, since its inception courts have labored to find ways to restrain virtual representation.[24]

The inception of the modern concept of virtual representation can be traced to a trio of Fifth Circuit cases in the 1970s.[25] The doctrine continued to evolve, with each circuit developing its own version, until the Supreme Court last year called a halt to its use in *Taylor*.[26] The Court there held that virtual representation deprives litigants of due process because it improperly denies them their right to a day in court before their rights are adjudicated.[27] The Court rightly rejected general application of virtual representation as a violation of due process. Nevertheless, as previously noted, the Court's analysis in *Taylor* failed to fully explain the basis for its commitment to the day-in-court ideal and failed to recognize the dangerous competing concerns arising from indivisible relief.

A. Modern Development of Virtual Representation

Virtual representation developed originally in the area of probate law. It provided that parties whose identity could not be determined (for example, the unborn) could be bound by an existing party whose interests were aligned with the undetermined party.[28] In the 1970s, however, the doctrine was transformed to apply not only to probate cases but also in the litigation context.[29] Initially, the litigation version of virtual representation authorized nonparty preclusion only when it was necessary to protect a prior judgment from being undermined by indivisible relief sought in a subsequent suit.[30] In this way, the modern concept of virtual representation paralleled its traditional

23 *See, e.g.*, *In re* L & S Indus., Inc., 989 F.2d 929, 934–35 (7th Cir. 1993) (holding that the interests of a principal and a guarantor who are bringing the same claims are not necessarily aligned because the two parties might be seeking different outcomes).

24 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4457, at 532 n.33 (2d ed. 2002 & Supp. 2008).

25 Pollard v. Cockrell, 578 F.2d 1002, 1008–10 (5th Cir. 1978); Sw. Airlines Co. v. Tex. Int'l Airlines, 546 F.2d 84, 97–101 (5th Cir. 1977); *Aerojet*, 511 F.2d at 719–20. For a discussion of *Southwest Airlines Co.* and *Pollard*, see *infra* notes 96–127 and accompanying text.

26 128 S. Ct. 2161, 2178 (2008).

27 *Id.* at 2176, 2178.

28 *See* 18A WRIGHT ET AL., *supra* note 24, § 4557, at 513.

29 *See* cases cited *supra* note 25.

30 *See Pollard*, 578 F.2d at 1005; *Sw. Airlines Co.*, 546 F.2d at 102; *Aerojet*, 511 F.2d at 715, 719–20; 18A WRIGHT ET AL., *supra* note 24, § 4557, at 513 n.2.

role in probate as a doctrine of necessity. However, as time went on, courts lost sight of the doctrine's grounding in necessity.[31]

B. The Supreme Court Speaks: Taylor v. Sturgell

Greg Harrick filed a Freedom of Information Act (FOIA) request with the Federal Aviation Administration (FAA) for documents related to an antique F-45 aircraft he was restoring.[32] The FAA denied Harrick's request on the grounds that the documents included trade secrets of the aircraft's original manufacturer.[33] Harrick brought suit in federal court, seeking to require the FAA to produce the requested documents. The U.S. District Court for the District of Wyoming granted summary judgment for the FAA, and the Tenth Circuit upheld the award, noting in its opinion two potential arguments that Harrick had failed to present.[34]

A month later, Brent Taylor, an acquaintance of Harrick, filed an identical FOIA request with the FAA. After the FAA failed to provide the documents, Taylor brought a suit in the U.S. District Court for the District of Columbia to require production of the documents. His arguments were identical to Harrick's with the addition of the two arguments that had been suggested by the Tenth Circuit.[35] The district court concluded that Harrick's prior suit precluded Taylor's suit because given their identical interests, Harrick had effectively acted as Taylor's virtual representative.[36] In reaching this conclusion, the district court adopted the Eighth Circuit's seven-factor test for virtual representation.[37] This test required an identity of interests between the plaintiffs in both suits and in addition considered six factors that were found to weigh in favor of virtual representation in the present case: (1) a close relationship between the party and the precluded nonparty; (2) participation in the prior litigation by the precluded nonparty; (3) acquiescence to preclusion by the precluded nonparty; (4) deliberate tactical maneuvering to avoid the initial judgment; (5) adequate representation; and (6) a public law issue rather than a private law issue.[38]

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31 *See Taylor*, 128 S. Ct. at 2170 (describing the D.C. Circuit's balancing test for virtual representation).

32 *Id.* at 2161, 2167–71.

33 *Id.* at 2167–68.

34 *Id.* at 2168.

35 *Id.*

36 *Id.* at 2169.

37 *Id.*

38 *Id.*; *see also* Tyus v. Schoemehl, 93 F.3d 449, 454–56 (8th Cir. 1996) (establishing the seven-factor test).

The district court found that Taylor and Harrick had identical interests in obtaining the documents and that all of the relevant factors but one were satisfied. Accordingly, the district court held that Taylor's suit was precluded because of the disposition of Harrick's prior suit.[39] Taylor appealed to the D.C. Circuit, and that court affirmed.[40] In doing so, the appellate court adopted its own five-factor test for virtual representation, requiring both identity of interests and adequate representation.[41] In addition to these prerequisites, at least one of three additional factors had to be present: a close relationship between the party and the precluded nonparty, substantial participation in the prior litigation by the precluded nonparty, or tactical maneuvering by the prior party that indicated he was attempting to relitigate through a proxy.[42] The court found that Harrick had an identity of interests with and had adequately represented Taylor. The court also found that Harrick and Taylor had a close relationship. Having satisfied its test, the court held that Taylor's suit was precluded on grounds of virtual representation.[43] The Supreme Court granted certiorari and reversed.[44]

Justice Ginsburg began the Court's unanimous opinion by noting that an individual is generally not bound by a judgment in a suit to which he is not a party.[45] The standard rule, rather, is that each person has a right to her day in court.[46] However, the Court noted six recognized exceptions to this rule.[47] First, if a person beforehand agrees to be bound, she may be bound despite not being a party to the suit. Second, a preexisting substantive legal relationship—for example, a successor in property interest—may dictate that a nonparty be bound. Third, in some situations a nonparty may be bound if she was adequately represented by a party to the prior suit. Fourth, a nonparty may be bound if she controlled the prior suit. Fifth, a second suit may be barred if the prior party is relitigating through a proxy. Sixth, a special statutory scheme within the bounds of due process may allow for nonparty preclusion. The Court concluded, however,

39 *Taylor*, 128 S. Ct. at 2169.

40 *Id.*

41 *Id.* at 2169–70.

42 *Id.* at 2170.

43 *Id.*

44 *Id.* at 2171, 2180.

45 *Id.* at 2171.

46 *See id.*

47 *See id.* at 2172–73.

that virtual representation unconstitutionally exceeds the limits of these recognized exceptions to the day-in-court requirement.[48]

The Court's analysis focused on the exception for when the plaintiff in the first case "adequately represented" the interests of the nonparty.[49] Its elaboration, however, made clear the narrowness of the exception, despite its seeming breadth. It developed the exception by reasoning from its prior decision in *Richards v. Jefferson County*.[50] In *Richards*, a class of taxpayers challenged an Alabama tax under both federal and state constitutions.[51] The State argued that taxpayers had been adequately represented in a prior suit, brought by individual taxpayers, where the tax had been upheld, and that the present suit should be found to be precluded by the prior judgment.[52] The Court in *Richards* rejected this argument, holding that the taxpayers had not been adequately represented.[53] The Court first noted that its decision requiring due process in class actions in *Hansberry v. Lee*[54] stood for the proposition that a prior proceeding must have been designed to protect the interests of the absent party in order to bind that party by the result of that proceeding.[55] Applying this logic to the prior tax challenge, the *Richards* Court stated:

> [T]here is no reason to suppose that the [prior] court took care to protect the interests of petitioners in the manner suggested in *Hansberry*. Nor is there any reason to suppose that the individual taxpayers in [the prior case] understood their suit to be on behalf of absent county taxpayers. Thus, to contend that the plaintiffs in [the prior case] somehow represented petitioners, let alone represented them in a constitutionally adequate manner, would be "to attribute to them a power that it cannot be said that they had assumed to exercise."[56]

From this negative language in *Richards* the Court in *Taylor* inferred a positive dictate: if the interests of a litigant in a second case *had* been adequately represented in the prior case, that litigant could constitutionally be bound by the result in the first case.[57]

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48 *See id.* at 2178.

49 *Id.* at 2173–74.

50 517 U.S. 793 (1996); *see Taylor*, 128 S. Ct. at 2173–74.

51 *Richards*, 517 U.S. at 794–95.

52 *Id.* at 795.

53 *Id.* at 799–802.

54 311 U.S. 32 (1940).

55 *Richards*, 517 U.S. at 801.

56 *Id.* at 802 (quoting Hansberry v. Lee, 311 U.S. 32, 46 (1940)).

57 Taylor v. Sturgell, 128 S. Ct. 2161, 2172, 2174 (2008).

For a nonparty to be bound by a judgment based on adequate representation, the Court reasoned, one of two requirements must be met: either the prior court must have adopted "special procedures" to protect the absent person or the representative party in the prior suit must have understood itself to be representing the absent party.[58] Because the D.C. Circuit's definition of virtual representation did not include these requirements, the Supreme Court concluded that it fell outside the recognized exception to the day-in-court rule on the basis of adequate representation.[59]

There is a strong argument that by limiting the "adequate representation" exception to cases involving "special procedures" or a preexisting understanding, the Court effectively stripped the exception of any meaning. The Court's only example of a sufficiently "special" procedure was a "properly conducted class action."[60] Class actions, of course, operate as an independent basis for nonparty preclusion and it is not at all clear that any other procedures exist that would satisfy this limit on adequate representation–based preclusion. Furthermore, the preexisting understanding requirement is strikingly similar to the privity exception recognized by the Court for "a person who agrees to be bound."[61] The Court cited the *Restatement (Second) of Judgments* for the proposition that a person may expressly or impliedly agree to be bound.[62] It is unclear how a representative party could understand herself to represent the interests of an absent person without an express or implied agreement. Thus, the "adequate representation" exception—against which the Court tests virtual representation—appears to be void of any independent meaning.

Whatever one thinks of the Court's questionable logic concerning its "adequate representation" exception to the day-in-court ideal, the fact remains that the exception failed to include the D.C. Circuit's concept of virtual representation. The Court further rejected the argument that the existing exceptions should be replaced by virtual representation as fashioned by the lower court. First, the Court noted that prior decisions stressed the value of the day-in-court rule, and exceptions had been created only in discrete and narrowly limited circumstances.[63] In other words, existing precedent did not support virtual representation, and the Court was not about to expand that precedent. Second, the Court reasoned that adopting a virtual repre-

58 *Id.* at 2174 (citing S.C. Bell Tel. Co. v. Alabama, 526 U.S. 160, 168 (1999)).
59 *Id.*
60 *Id.* at 2172.
61 *See id.* (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 40 (1982)).
62 *Id.* at 2172 n.7 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 62 (1982)).
63 *Id.* at 2175–76.

sentation balancing test to govern nonparty preclusion could render the class certification process meaningless and effectively authorize the creation of "'*de facto* class actions at will.'"[64] Finally, the Court pointed out that while the preclusion doctrine is supposed to reduce the burden on the courts, the application of a complex balancing test and the discovery required to establish its elements could give rise to more judicial work than its use avoids.[65] The Court thus rejected the D.C. Circuit's balancing test for virtual representation and quite probably signaled the demise of the doctrine in its entirety.

C. *What* Taylor *Did Not Consider*

At the outset, we should emphasize our agreement with the Court's general skepticism about virtual representation. Because we believe the day-in-court ideal reflects core democratic and constitutional values, the dictate should be ignored only in the most extreme circumstances, if at all. But while the Court has often noted its support for the day-in-court ideal as a dictate of due process,[66] surprisingly, at no point has it articulated any firm conceptual grounding or theoretical rationale for the precept. It is almost as if the Court simply intuits the normative basis for this important requirement of procedural due process. Yet as respected scholars have noted, even where relief is divisible the requirement is far from costless.[67] It has reasonably been contended that litigation is expensive, and relitigation of issues that have already been resolved is therefore wasteful.[68] Cost avoidance, of course, cannot be deemed the sole value involved in the procedural due process calculus. The problem, however, is that the Court's failure to articulate the counter value leaves the day-in-court ideal vulnerable to attack on the basis of the competing considerations of cost and efficiency. In the following Part, we seek to fashion an argument that the day-in-court ideal represents a core element of the participatory autonomy that is both pragmatically and conceptually central to American democracy. Although it is conceivable that counter interests may be so compelling as to overcome it, absent the presence of such an extraordinary interest—one that must be far

64 *Id.* at 2176 (quoting Tice v. Am. Airlines, Inc., 162 F.3d 966, 973 (7th Cir. 1998)).

65 *Id.* at 2176–77.

66 *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 846–47 (1999); Hansberry v. Lee, 311 U.S. 32, 40–41 (1940).

67 *See* Bone, *supra* note 4, at 247–56.

68 *See id.* at 246–47.

more compelling than the simple cost of litigation—the day-in-court dictate must be followed.

II. THE DAY-IN-COURT IDEAL IN AMERICAN CONSTITUTIONAL AND POLITICAL THEORY

The Court in *Taylor* noted the "'deep-rooted historic tradition that everyone should have his own day in court.'"[69] Indeed, the primary reason the Court rejected virtual representation was that applying virtual representation to bar Taylor's suit would have deprived him of his day in court. But why, exactly, is ensuring one's day in court so important? Although the Court in *Taylor* outlined the established exceptions to the day-in-court rule, it did so by merely recounting precedent. The Court failed to explain why a litigant's right to have her day in court should be protected as a moral, political, or constitutional matter or why exceptions to that rule are nevertheless permitted in certain situations. The following discussion provides a theoretical framework for understanding the importance of the day-in-court ideal.[70]

A. The Background of the Day-in-Court Ideal: Procedural Due Process Theory

In both its class action and res judicata jurisprudence, the Court has made clear that the day-in-court precept, much like the 55-mile-per-hour speed limit of years past, is not just a good idea; it is the law. A litigant's right to a day in court is not merely a judicial policy choice. Rather, it is a constitutional directive that presumptively trumps any legislative or judicial choice to the contrary.[71] Therefore, to under-

69 *Taylor*, 128 S. Ct. at 2171 (quoting Richards v. Jefferson County, 517 U.S. 793, 798 (1996)).

70 In an article presenting a theory of acceptable virtual representation very different from our own, Professor Robert Bone rejects the value (and existence) of a day-in-court ideal. *See* Bone, *supra* note 4, at 288–89. His argument for rejecting the ideal, fashioned prior to *Taylor*, is seemingly based on the conclusion that the ideal and virtual representation are mutually exclusive: the day-in-court ideal and virtual representation cannot both exist; virtual representation exists; therefore, the day-in-court ideal does not exist. *See id.* at 288–90. This argument presumes that the day-in-court ideal is absolute and in doing so fails to recognize the balancing of interests inherent in any due process calculus. More accurately, the day-in-court ideal, while not absolute, nevertheless does carry a very high value in the due process balance that may be overcome only by the showing of truly compelling competing interests. *See infra* Part II.C.

71 *See* Rock v. Arkansas, 483 U.S. 44, 51 (1987) (stating that the right to a day in court is a "necessary ingredient[]" of due process (citing *In re* Oliver, 333 U.S. 257, 273 (1948))).

stand the precept's importance, it is first necessary to understand the scope and rationale of the procedural due process guarantee.

Procedural due process theories are typically divided into two camps: outcome-based (or instrumental) and process-based (or dignitary). Outcome-based theories measure the quality of procedure based solely on the procedure's effect on the accuracy of the outcome of cases. For example, utilitarianism, a common outcome-based due process theory, balances the ability of a given procedure to produce accurate outcomes against the costs of providing the procedure, either to the other parties or to the system itself.[72] If the marginal increase in the likelihood of attaining an accurate outcome produced by the procedure outweighs the costs of providing the procedure, the procedure is deemed to be required by due process. If, on the other hand, the costs of providing the procedure are found to outweigh the gain in accuracy, the procedure is prohibited. If two procedures produce the same level of accuracy but one is cheaper to provide, the more expensive procedure is not required by due process. This conclusion is unaffected by the fact that the more costly procedure might provide additional benefits that do not affect the accuracy of outcomes.

Process-based theories, in contrast, focus on nonutilitarian values associated with a given procedure.[73] Such process-based theories vary in their exact formulation, but one common characteristic is recognition of a value in permitting individuals to directly participate in the adjudication of their rights.[74] Participation may in some circumstances increase the accuracy of outcomes. For example, in the litigation context, a party has a strong incentive to vigorously pursue every possible argument because she bears both the risk and reward of the case's resolution. To the extent vigorous advocacy enhances the accuracy of outcomes in the adversary system, use of a procedure that enables participation may increase the accuracy of outcomes. A strictly outcome-based theory would reject the constitutional necessity of participation whenever another procedure could produce roughly the same accuracy at a lower cost or whenever the cost of enabling participation is deemed to outweigh the marginal increase in accuracy produced by participation. A process-based theory, on the other hand, values participation either for its legitimizing effect in the eyes of the litigants or its facilitation of the citizen's role in democratic

72 *See, e.g.*, Connecticut v. Doehr, 501 U.S. 1, 10–11 (1991).

73 *See* Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 509 n.10 (2003).

74 *Id.* at 509.

governance, whether or not decisionmaking accuracy is improved as a result. Thus, there may be a value in permitting each litigant to personally participate—have her day in court—that is entirely distinct from the value in securing an accurate outcome.

It is our position that an exclusive focus on the utilitarian view of procedural due process is unduly truncated, because it ignores values inherent in liberal democracy that are appropriately deemed embodied in constitutional guarantees of liberty. Procedural due process is more appropriately viewed as a means of furthering and vindicating foundational democratic values. From this perspective, the litigant's ability to participate in the legal process as a means of vindicating his legally protected rights is seen as a core function in the democratic process. Participation in the judicial process, like the citizen's participation in the political process, is a means by which the individual asserts his dignity and worth, both necessary conditions to a viable liberal democracy. Correspondingly, by providing the citizen with the opportunity to defend his legal rights and interests in the judicial process, government evinces its respect for the individual, also an essential element of a viable democratic system grounded in notions of individual integrity. Therefore, the due process protection of litigant autonomy springs from a democratic commitment to process-based autonomy. As one of us has previously argued, just as the "government may not impose on [a democratic] society leaders who are unwanted by the electorate on the grounds that the electorate does not know what is good for it,"[75] "individuals or groups should not be required to trust in or defer to the competence, resources, or enthusiasm of others in the protection or advancement of their chosen interest."[76]

In fashioning the participatory right embodied in notions of procedural due process, it is important to distinguish between the concepts of autonomy and paternalism. "Autonomy" means that the individual has the right to choose how to fashion his own representation and to participate in the process as he sees fit, within the prescribed adjudicatory framework. In contrast, "paternalism" refers to the obligation of the government or other private individuals to assure representation of the citizen's rights in the course of an adjudicatory process in which the citizen does not directly participate. To be sure, due process may well require some form of paternalism when, even

75 Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1581 (2007).

76 Martin H. Redish, *The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953-1971*, 51 DEPAUL L. REV. 359, 366 (2001).

though his rights will be directly or indirectly affected by the outcome of the judicial process, it is either impossible or infeasible for the citizen to participate. However, when it is not beyond the bounds of practicality for an individual to protect her own interests by being afforded the opportunity to directly participate in the proceeding, there is no need for paternalism to enter the procedural due process calculus. It is only when the individual's participation is not feasible, but her interests will inevitably be affected, that paternalism should be employed to provide a constitutional floor of protection.

Most of the Supreme Court's procedural due process doctrine affecting multiparties focuses on the need to satisfy the minimum requirements of paternalism. The most authoritative statement on the paternalism version of procedural due process came in the landmark case of *Hansberry v. Lee*.[77] In *Hansberry*, in which the Court applied due process as a limitation on the class action procedure, the Court noted the "principle of general application in Anglo-American jurisprudence that one is not bound *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."[78] Recognizing the class action as an exception to this rule, the Court emphasized the due process limits on this exception: "[T]his Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interest of absent parties who are to be bound by it."[79] The Court in *Hansberry* failed to address the question of whether or not the class device permissibly infringes on litigant autonomy, even if the interest in paternalism is satisfied. Ignoring that question, the Court instead focused exclusively on what paternalistic protections are required to ensure a minimum amount of fairness. These required paternalistic protections, often grouped under the heading of adequate representation, are the primary legacy of *Hansberry* and form a cornerstone of the Court's procedural due process doctrine. In the next subpart, we explain why paternalism fails to satisfy the demands of due process. Except in the most extreme circumstances, due process demands that litigant autonomy be respected.

77 311 U.S. 32 (1940).

78 *Id.* at 40.

79 *Id.* at 42.

B. Litigant Autonomy, Liberal Democratic Theory, and the Day-in-Court Ideal

As already noted, the theoretical foundation of the nation's commitment to the day-in-court ideal is grounded in democratic theory.[80] At its core, democracy is based on the notion of self-determination. Society as a whole expresses this self-determination through the election of governing representatives. However, individual self-determination drives this communal expression through the individual's participation at the voting booth. Whatever precise theory of democracy one ascribes to,[81] it must provide citizens autonomy in the way they choose to involve themselves in the political system. Participation in the activity of choosing leaders is a minimum requirement of any democratic theory.[82]

In order to effectively participate in democracy, individuals must also have the freedom to choose *how* to participate in the process of societal choice. The value of self-determination gives meaning to political participation, and a certain zone of individual autonomy is necessary to achieve self-determination.[83] Our constitutional commitment to this idea is found in both the Bill of Rights and the Fourteenth Amendment. For example, under the First Amendment, as a general matter government may neither suppress nor compel private expression.[84] This freedom of expression allows individuals to make decisions for themselves, free from external forces,[85] concerning what

80 Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753, 764–70 (2007).

81 There exist numerous versions of democracy other than its liberal or individualist form. *See generally* JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 8–22 (1980) (contrasting "adversary democracy," democracy based on the theory that democracy should weigh various selfish competing interests and where the individual is protected through equal distribution of voting power, with "unitary democracy," democracy where decisions are made in face-to-face meetings by individuals with equal power through consensus).

82 *See* Redish & Larsen, *supra* note 75, at 1581.

83 *Id.* at 1581–82.

84 *See* U.S. CONST. amend. I; *see also* Wooley v. Maynard, 430 U.S. 705, 714–15 (1977) ("[T]he right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all.").

85 Redish & Larsen, *supra* note 75, at 1582 ("Consistent with the premises of both autonomy and self-determination, government may not control the minds of its citizens. The First Amendment prohibits government from suppressing private expression on the grounds that it would lead society to make unwise policy choices. These are decisions we leave to the individual citizens to make for themselves. They are not to be made for the individual by external forces, ultimately unaccountable to the electorate, who have paternalistically decided what is and is not good for both the individual and the populace. Nor, under the First Amendment, may government

they say and how they say it.[86] The zone of individual autonomy created by the Bill of Rights and the Fourteenth Amendment allows individuals to interact effectively with the political branches of government in the exercise of democracy.

The notion of autonomy represented by voting or speech rights is fundamentally different from the form of autonomy typically associated with general libertarian theory. Libertarian theory calls for expansive protection of what can be called *substantive* autonomy.[87] Substantive autonomy relates to the ability to conduct our lives in the way we choose—to own guns, to use marijuana, to cross the street. Substantive autonomy seeks to prevent government intrusion into our daily lives. In contrast, the ability to make choices about the way in which we interact with the political system, or what can be labeled *process-based* autonomy, seeks to assure that when the government intrudes on our lives it is doing so in a manner that has been democratically authorized. In this way, process-based autonomy is agnostic as to a normative commitment to any particular political policy; rather, process-based autonomy upholds the mechanisms without which we could not democratically express our personal policy preferences.[88]

Acceptance of process-based political autonomy leads logically to acceptance of the day-in-court ideal; the United States' commitment to participation in legal settings can be viewed as an outgrowth of the political commitment to process-based participation values.[89] Just as

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require that individuals utter political messages with which they disagree." (footnotes omitted)).

86 *See, e.g.*, Cohen v. California, 403 U.S. 15, 18–25 (1971).

87 *See generally* JOHN STUART MILL, ON LIBERTY 139–75 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) (explaining libertarian theory's broad view of individual autonomy); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26–120, 268–71 (1974) (same).

88 *See* Redish & Berlow, *supra* note 80, at 765–70.

89 A notable alternative theory of participation has been developed by Professor Jerry Mashaw in the administrative law context. Mashaw builds his theory on a normative commitment to the second formulation of the Kantian moral command that each person be treated as end and not merely a means. *See* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 189–99 (1985). From this commitment, he derives certain fundamental due process values including equality and comprehensibility. Mashaw also derives certain prudential values, including participation, that are thought to further these fundamental values. *Id.* at 204. Mashaw recognizes that participation and indeed all of his prudential values cannot be absolute, but rather "present prima facie constitutional claims for realization." *Id.* He believes that an individual's participation has value "not only because he might contribute to accurate determinations, but also because a lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently

citizen participation in the electoral process legitimizes the decisions of democratic government, individual participation in the litigation process as a means of vindicating his rights adds legitimacy to judicial outcomes. "Individuals are presumed to have no legitimate complaint if they were allowed to present their case in the way they chose to present it—or, to put it another way, had their 'day in court.'"[90] In this way, the day-in-court ideal does much more than increase the accuracy of outcomes; like the electoral process, it provides a foundation for citizens' trust in the decisions of an organ of the government. In one context that organ is the legislative or executive branch while in the other context it is the judicial branch, but this difference does not alter the fundamental democratic dynamic. The adversary system and the day-in-court ideal each constitute an extension and further evidence of our commitment to liberal democratic theory.[91]

C. Limitations on the Day-in-Court Ideal

As mentioned above, although the Court in *Taylor* failed to explicate the theoretical underpinnings of the day-in-court ideal, it nevertheless relied on that ideal in rejecting virtual representation. The Court recognized that the value of a party's participation in litigation is a strong due process value that cannot be overcome simply because a litigant's interests are similar to those of a prior litigant.[92]

It would be unrealistic and unwise, however, to view the day-in-court ideal as an absolute. Procedural due process has always been thought to implicate some form of a balancing of interests,[93] and therefore, it is at least conceivable that even highly valued autonomy interests may be outweighed by higher valued competing interests.[94] In many circumstances an individual's strategic litigation choices may

valuable." Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 50 (1976).

90 Redish & Berlow, *supra* note 80, at 769.

91 Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 576 (2006).

92 *See* discussion *supra* Part I.B.

93 For a more detailed discussion of procedural due process doctrine, see discussion *supra* Part II.A.

94 This is not to suggest that some due process floor must be recognized. *See* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 468–75 (1986) (explaining that the modern Supreme Court has abandoned its former approach to due process—with certain procedures integral to English common law as a floor—and has adopted a balancing approach to procedural due process where there may no longer be a floor).

be overridden by competing concerns. For example, rules of evidence restrict the way a case is presented. Compulsory counterclaims force a litigant to raise claims she might have preferred to bring later. Although neither example eliminates participation entirely, each restricts the litigant's choices. Similarly, although participation is a fundamental value of our litigation system arising from a commitment to democracy, in the face of a strong enough competing concern participation might be completely overridden within the bounds of due process. Because of participation's fundamental nature, however, a person should only be prevented from participating in the adjudication of her own legal rights for truly compelling reasons.

When the Court considered the legitimacy of virtual representation in *Taylor*, it was not presented with any compelling reason to prevent participation; the gain in efficiency, standing alone, was deemed insufficient.[95] As the unanimous decision suggests, the Court apparently thought that *Taylor* was an easy case from a procedural due process standpoint. As the following Part makes clear, however, the situation is not always as simple.

III. Indivisible Relief, Due Process, and Virtual Representation

Indivisible relief refers to situations in which the relief granted in one suit and the relief sought in a second suit cannot be treated separately—in other words, one is necessarily tied to the other. Indivisible relief situations often involve cases in which injunctive relief is sought. For example, a judgment in one case might require that the defendant take a specific action, while a different plaintiff in a later suit against the same defendant might seek relief that would prohibit the defendant from taking that very action. If the requested relief were to be ordered in the second suit, the defendant would be prohibited by law from performing the very act he had been required to perform in the first suit. In this scenario, the relief requested in the second suit is indivisible from the relief granted in the first suit because as a practical matter the defendant can physically comply with only one of the conflicting orders.

In recognizing the dangers of indivisible relief to a defendant in multiple suits where inconsistent relief is sought, it is important to draw certain distinctions. The serious danger the defendant faces does not arise unless the relief is, in fact, truly indivisible. Thus, as long as it is physically possible for a defendant to treat different plaintiffs differently, the mere possibility of aesthetic inconsistency between

95 Taylor v. Sturgell, 128 S. Ct. 2161, 2175–77 (2008).

the two suits should not be deemed prohibitive. To understand the distinction, consider two decisions from the Fifth Circuit: *Southwest Airlines Co. v. Texas International Airlines, Inc.*[96] and *Pollard v. Cockrell*.[97] In *Southwest Airlines Co.*, plaintiffs—first the City of Dallas[98] and later a group of airlines[99]—in two separate suits sought to apply a city ordinance to exclude Southwest from the Dallas airport known as Love Field.[100] In the first suit, the district court found in favor of Southwest and against the city, holding that the ordinance could not be properly applied to Southwest.[101] In the second suit, the airlines effectively sought the same relief against Southwest that had been denied to the city in the prior suit.[102] Because the airlines had not yet had their day in court, however, it seemed that there was a danger that the second suit could undermine, if not effectively revoke, Southwest's victory in the prior case: in the first suit Southwest had successfully prevented its exclusion from Love Field, yet a successful suit by the airlines would obliterate that victory. Under the traditional day-in-court ideal, however, the second group of plaintiffs could not constitutionally be bound by the decision in the first suit. The airlines were clear that their goal in bringing the litigation was to undo the effect of Southwest's original judgment.[103] The district court in the first suit issued a preliminary injunction preventing the airlines from relitigating the question of whether the Dallas ordinance barred Southwest from operating at Love Field.[104] The Fifth Circuit affirmed the injunction on the grounds that the airlines were bound by the original judgment.[105]

It is puzzling that the Fifth Circuit emphasized that its decision to preclude the airlines' suit was not based on a theory of virtual representation. The court noted that the "doctrine offers little analytical

96 546 F.2d 84 (5th Cir. 1977).

97 578 F.2d 1002 (5th Cir. 1978).

98 City of Dallas v. Sw. Airlines Co., 371 F. Supp. 1015 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir. 1974).

99 Sw. Airlines Co. v. Tex. Int'l Airlines, Inc., 396 F. Supp. 678 (N.D. Tex. 1975), *aff'd*, 546 F.2d 84 (5th Cir. 1977).

100 *Sw. Airlines Co.*, 546 F.2d at 87–88.

101 *Id.* at 88.

102 *Id.* at 88–89.

103 *Id.* at 89 ("'This is [not] an effort to undermine the federal decision [in the first case]. . . . This is a frontal attack on it. The word undermined implies something covert about it. We come in with flags flying.'" (first alteration in original) (quoting at attorney at oral argument for Continental Airlines)).

104 *Sw. Airlines Co.*, 396 F. Supp. at 683–86.

105 *Sw. Airlines Co.*, 546 F.2d at 100.

assistance . . . because of its wide and inconsistent application."[106] Southwest had argued that virtual representation applied to bind the second group of plaintiffs in part because the City of Dallas, as a governmental body, had the power to represent private interests.[107] The court agreed with this position, but declined to "identify[] the doctrinal scope of virtual representation"[108] because it believed the case could be resolved without relying on that doctrine.[109]

The court found that res judicata—even without resort to virtual representation—barred the airlines' claims because their interests had been adequately represented by governmental authorities.[110] The primary focus of the court's inquiry was the degree to which the airlines' interests aligned with the interests of the City of Dallas in the initial suit. According to the court: "Because [the] legal interests of the carriers do not differ from those of Dallas in . . . [the first suit, *City of Dallas v. Southwest Airlines Co.*[111]], we hold that they received adequate representation in the earlier litigation and should be bound by the judgment in that litigation."[112]

Although the court expressly declined to rely on a theory of virtual representation by name, its focus on alignment of interests and adequate representation is strikingly similar to that doctrine. Indeed, in a later case, the Fifth Circuit noted that its holding in *Southwest Airlines* was actually based on the theory of virtual representation.[113] Thus, *Southwest Airlines* is properly viewed as a virtual representation case in which the court found that the interests of the airlines and the City of Dallas were sufficiently aligned to bind the airlines to the original suit.

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106 *Id.* at 97.

107 *Id.* at 97–98.

108 *Id.* at 97.

109 *Id.*

110 *Id.* at 100.

111 371 F. Supp. 1015 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir. 1974).

112 *Sw. Airlines Co.*, 546 F.2d at 100.

113 *See* Freeman v. Lester Coggins Trucking, Inc., 771 F.2d 860, 864 (5th Cir. 1985). There the court stated:

> [B]oth from *Southwest Airlines* itself and the succeeding decisions of this circuit, the concept of "adequate representation" does not refer to apparently competent litigation of an issue in a prior suit by a party holding parallel interests; rather, it refers to the concept of virtual representation, by which a nonparty may be bound because the party to the first suit "is so closely aligned with his [the nonparty's] interests as to be his virtual representative."

Id. (second alteration in original) (footnotes omitted) (quoting Aerojet-Gen. Corp. v. Askew, 511 F.2d 710, 719 (5th Cir. 1975)).

In addition to its reliance on the parties' alignment of interests in the two suits, the court in *Southwest Airlines* recognized the fact that the relief sought in the second suit was indivisible from the relief granted in the first suit.[114] The court concluded its opinion with a discussion of due process, noting several factors that led to its finding of preclusion:

> [T]he due process balance must include the damage relitigation would visit upon the judicial system and Southwest. As discussed above, relitigation would constitute a blatant disregard for the decision of this Court and for the judgment of the federal district court in [*City of Dallas v. Southwest Airlines Co.*] . . . . It would threaten the rights granted Southwest by the [*City of Dallas v. Southwest Airlines Co.*] judgment. And finally, it would subject Southwest to the possibility of conflicting judgments.[115]

This calculation of the harm that could be visited upon Southwest were preclusion not to be invoked is important in understanding the contours of virtual representation. The court was hesitant to permit nonparty preclusion because it would deprive the airlines of their day in court. However, the court faced a situation in which the relief sought in the second case would inevitably undermine the relief granted in the first case: Southwest could not simultaneously leave Love Field and remain at Love Field. One can infer from the court's emphasis on alignment of interests that its desire to maintain the original judgment, on its own, could not establish virtual representation; however, when it was combined with the additional finding of adequate representation based on the alignment of interests of the plaintiffs in the two suits, virtual representation provided the court with a mechanism for preserving the prior judgment *and* maintaining a minimum amount of procedural fairness for the precluded nonparty.

In contrast to *Southwest Airlines*, the Fifth Circuit's decision in *Pollard* illustrates the *absence* of indivisible relief. In an effort to curb illicit sexual behavior, the City of San Antonio passed an ordinance strictly regulating massage parlors.[116] A group of massage parlor owners brought a suit challenging the constitutionality of the ordinance in

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114 *Sw. Airlines Co.*, 546 F.2d at 101 ("If courts could second guess another court each time a new litigant, dissatisfied with the previous judgment, filed a new complaint, the respect of the previous parties or of the public toward the courts would inevitably decrease. . . . Southwest and subsequent litigants would suffer the harassment and expense of still later lawsuits, as well as the possibility of numerous conflicting judgments.").

115 *Id.* at 102 (footnote omitted).

116 Pollard v. Cockrell, 578 F.2d 1002, 1004–05 (5th. Cir. 1978).

state court.[117] The state trial court found that certain provisions of the statute were unconstitutional and therefore enjoined the enforcement of those provisions.[118] Both parties appealed, and the state intermediate appellate court reversed, holding that the statute was constitutional in its entirety.[119]

After the trial court's decision in the state suit, another group of massage parlor owners brought suit in federal court, challenging the statute's constitutionality.[120] The federal district court found that one additional provision violated the Constitution.[121] Before reaching the merits of the case on appeal, the Fifth Circuit faced the question of whether or not virtual representation precluded the federal suit based on the resolution of the state suit.[122] The court began its analysis with the definition of virtual representation it had previously adopted in *Aerojet-General Corp. v. Askew*.[123] Because the massage parlor owners in the state case and those in the federal case both sought to enjoin enforcement of the ordinance, they appeared to have aligned interests.[124] The *Pollard* court, however, held that the relationship between the two sets of plaintiffs was not close enough to justify a finding of virtual representation.[125] Instead of focusing on whether each set of owners had the same goal in the litigation—which had been the focus in *Aerojet* and *Southwest Airlines*— the court in *Pollard* shifted its focus to the lack of a substantive legal relationship among the owners. The court stated, "[v]irtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues."[126] Because no such express or implied relationship existed in the case, the court refused to find preclusion.

An important element of this case overlooked by the court was that, unlike in *Southwest Airlines*, the relief sought in the second case was divisible, both legally and practically, from the relief granted in the first.[127] In *Southwest Airlines*, the first suit determined that an ordi-

117 *Id.* at 1005.
118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.* at 1006–08.
123 511 F.2d 710 (5th Cir. 1975); *see Pollard*, 578 F.2d at 1008.
124 *Pollard*, 578 F.2d at 1008.
125 *Id.* at 1008–09.
126 *Id.* at 1008.
127 For a complete discussion of the problems that arise from indivisible relief, see *infra* Part III.A. For present purposes, we only note that the relief in both *Aerojet* and *Southwest Airlines* was indivisible whereas the relief in *Pollard* was not.

nance did not apply to Southwest. The second suit sought a determination that the ordinance applied to Southwest—a result that would, of course, have been directly inconsistent with the conclusion of the court in the first case. As a practical matter, these forms of relief could not have been treated independently: the ordinance either applied to Southwest or it did not. In *Pollard*, however, the first suit determined that the ordinance applied to *one* set of massage parlor owners and the second suit sought a determination that it did not apply to a *different* set of owners. Although both suits were based on similar legal claims, the relief sought in each case *could* have been treated separately; the statute would simply have remained applicable to one group of owners but not to the other. Because there was no danger of indivisible relief, virtual representation should not have precluded the second suit. Thus, *Pollard* was correctly decided, albeit not primarily for the reasons it gave.

The threat of indivisible relief creates significant problems for strict adherence to the day-in-court ideal. In some situations, a second judgment may effectively undermine a party's prior victory. This was the situation the court faced in *Southwest Airlines*. A judgment in favor of the competitor airlines would have required Southwest to leave Love Field, despite Southwest's judgment from the first suit permitting it to stay. The second judgment could thus have forced Southwest to forgo a benefit that it is legally entitled to. It seems intuitively obvious that such a situation should be avoided if at all possible.

If the court in *Southwest Airlines* had considered the day-in-court ideal to be absolute, however, it could not have invoked virtual representation. Whether or not the City of Dallas could adequately represent the airlines' interests in a paternalistic sense, there is no doubt that their due process interests in autonomous control of their litigation had been denied. The Supreme Court's sweeping rejection of virtual representation in *Taylor* seemingly dictates a similar result. Because of the balancing nature of procedural due process, however, it is necessary to examine more closely the problems to which indivisible relief could conceivably give rise to determine whether or not the value in avoiding those problems is sufficiently compelling to outweigh the value of preserving a litigant's right to her day in court. The following subparts examine indivisible relief in detail, explore and apply the reigning procedural due process doctrine, and propose a coherent theory of virtual representation designed to reconcile the powerful competing interests.

A. The Difficulty of Indivisible Relief

Although indivisible relief may arise in many legal situations, and occasionally has been legally recognized—most notably, in the circumstances recognized by Rule 23(b)(1)(A) of the Federal Rules of Civil Procedure,[128] concerning class actions—the problem has never been comprehensively analyzed, particularly in relation to res judicata and the day-in-court ideal. To fully understand this uncharted legal topic, we have organized indivisible relief into three distinct subcategories which we refer to as "double liability," "contradictory liability," and "inconsistent liability." This subcategorization is useful for two reasons. First, each subcategory represents a specific application of the problem of indivisible relief. Second, each subcategory gives rise to distinct due process problems. Because of their differing problems, the subcategories produce differing weights in the due process balance and therefore must be kept conceptually distinct. The following sections define each subcategory and describe the problems uniquely associated with each.

1. Double Liability

The core element of the concept of double liability, as we define it, is the existence of an indivisible "stake." A stake is "[s]omething (such as property) deposited by two or more parties with a third party pending the resolution of a dispute."[129] A stake may take the form of a specific sum of money, such as a capped insurance policy, or an identifiable piece of real or personal property. The person with whom the stake is deposited is called the stakeholder. A stake could conceivably be divisible, as where separate claims may legally be apportioned (for example, individual damage claims into an insurance fund). However, where mutually inconsistent claims may be made to the whole stake, the danger to the stakeholder of double liability arises. Assume that claimant *A* sues the stakeholder for the entire stake, and the stakeholder defends on the grounds that *B* is actually the proper recipient. Assume, however, that a jury finds that *A* is the proper recipient, and awards the stake to *A*. Now assume that *B* files a subsequent suit against the stakeholder, asserting his legal right to the stake. Under traditionally accepted due process principles, the defendant stakeholder may not assert issue preclusion

128 *See* FED. R. CIV. P. 23(b)(1)(A) (permitting class action when maintenance of individual suits could subject the party opposing the class to a risk of incompatible standards of conduct).

129 BLACK'S LAW DICTIONARY 1440 (8th ed. 2004).

against *B* on the basis of the prior judgment in *A*'s suit, because *B* has not yet had his day in court.[130] Thus, it is conceivable that a second jury could find for *B*, thereby legally requiring the stakeholder to pay twice, when in theory he could only be liable to pay either *A* or *B*, but not both.

Double liability on a defendant raises significant due process problems. Although the stakeholder was charged with holding a specific sum of money and she is obligated to pay out this sum to the proper claimant or claimants, the outer limits of the stake confine her legal obligations. As the Supreme Court has stated, "the holder of such property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment."[131]

The constitutional danger of double liability could be avoided, of course, if we were to deem *B* in the later suit legally bound by the result in the first suit brought by *A*. Under traditional due process analysis, however, *B* could not be bound unless he were found to be in privity with a party to the first suit. But privity has traditionally been deemed narrowly confined to a small set of preexisting legally defined relationships,[132] and absent one of those situations, we are presented with a serious dilemma: either we deprive *B* of his day in court in contravention of due process (at least from the autonomy perspective), or we expose the stakeholder to the risk of unconstitutional double liability.

Use of virtual representation would avoid the problem by binding *B* to a party to the prior litigation who had adequately (if unsuccessfully) represented *B*'s interests. In our hypothetical, that would be the stakeholder who, we can presume, vigorously asserted the position that *B* was the proper claimant. The problem, however, is that if one adopts (as we do) an autonomy rationale for procedural due process,[133] the fact that the stakeholder may have "adequately" repre-

130 It is, of course, conceivable that the danger of double liability could have been avoided in federal court either through the stakeholder's use of interpleader, *see* 28 U.S.C. § 1335 (2006); FED. R. CIV. P. 22; *B*'s intervention into the first suit, *see* FED. R. CIV. P. 24; or the stakeholder's invocation of Rule 19 in the first suit to have *B* declared a necessary or indispensible party, *see* FED. R. CIV. P. 19. However, under certain circumstances these devices may not be legally available, and since they are not compulsory, they may not have been employed. *See* discussion *infra* Part IV.A.

131 W. Union Tel. Co. v. Pennsylvania, 368 U.S. 71, 75 (1961) (citing Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 242–43 (1944)).

132 *See supra* note 3 and accompanying text.

133 *See* discussion *supra* Part I.A–B.

sented *B*'s interests in the first litigation is wholly irrelevant: *B* has not had his constitutionally dictated day in court, because he has not yet had an opportunity to assert and defend his own rights.

In this sense, the Supreme Court's decision in *Taylor* correctly recognized the troubling implications of virtual representation for procedural due process. What it failed to recognize, however, was the gradation in the stakes of refusing to invoke virtual representation. When the claims in the respective suits are legally divisible, as where the plaintiffs in the separate suits seek individual damages, the negative consequences of adhering to due process are relatively minimal: they are simply the costs to efficiency of relitigating. However, where the relief in the two suits is indivisible in a manner that imposes on a defendant the risk of double liability, we are presented with a serious constitutional dilemma. Before we seek to resolve that dilemma, however, it is first necessary to explain the other categories of indivisible relief, so that we may develop a holistic, comprehensive resolution of the problem.

2. Contradictory Liability

Contradictory liability occurs when a litigant faces an injunction awarded in case 1 commanding her to do *X* and an injunction in case 2 commanding her *not* to do *X*. Unlike double liability, contradictory liability does not involve an indivisible stake. Instead, the indivisible nature of contradictory liability centers around the inherent irreconcilability in the litigant's legally dictated actions: she cannot simultaneously do *X* and not-*X*.

As an example of contradictory liability, consider the facts in *Aerojet*. In the first case, Aerojet won a judgment for specific performance of the sale of a piece of land from both the Florida State Board of Trustees and the Florida Board of Education (collectively, State Boards).[134] In the second case, Dade County sought specific performance of the sale of the same piece of land from the State Boards.[135] Had the second suit succeeded, the State Boards would have been faced with contradictory judgments requiring them to sell a single piece of land to two different parties. In that situation, there is no action the State Boards could have taken that would not have violated at least one of the judgments.

The due process problems imposed upon the defendant by contradictory liability are just as devastating as those in the case of double

134 *See* 511 F.2d 710, 713–14 (5th Cir. 1975) (citing Aerojet-Gen. Corp. v. Kirk, 318 F. Supp. 55 (N.D. Fla. 1970)).

135 *Id.* at 713–14.

liability. Contradictory liability places a litigant in a situation in which *any* action she takes will violate a valid court judgment. If a litigant is simultaneously required to do *X* and not to do *X*, satisfying one requirement necessarily violates the other. Because in *Aerojet* each judgment could have been enforced by the state, failing to comply with one judgment is presumably punishable as contempt. It should not require complex analysis to recognize that it violates due process to punish someone for failing to do something she is legally or physically incapable of doing.[136] As Lon Fuller observed:

> A man who is habitually punished for doing what he was ordered to do can hardly be expected to respond appropriately to orders given to him in the future. If our treatment of him is part of an attempt to build up a system of rules for the governance of his conduct, then we shall fail in that attempt. On the other hand if our object is to cause him to have a nervous breakdown, we may succeed.[137]

Professor Henry Hart made a similar point: "People repeatedly subjected, like Pavlov's dogs, to two or more inconsistent sets of directions, without means of resolving the inconsistencies, could not fail in the end to react as the dogs did. The society, collectively, would suffer a nervous breakdown."[138] By punishing litigants for acting as they are required by legal judgments, contradictory liability inherently violates due process and therefore must be avoided.

Once again, use of virtual representation could conceivably avoid many of the constitutional problems to which contradictory liability gives rise. If the defendant in case 1 vigorously (albeit unsuccessfully) asserted the second plaintiff's legal position, the second court might conclude that that plaintiff's interests were adequately represented in the first case and therefore bind the second plaintiff, through issue preclusion, to the result in the first case. By summarily rejecting the doctrine of virtual representation,[139] the Court in *Taylor* left unrestrained the potential constitutional dangers of contradictory liability.

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136 *See* Société Internationale v. Rogers, 357 U.S. 197, 209–12 (1958).

137 LON L. FULLER, THE MORALITY OF LAW 66 (rev. ed. 1964).

138 Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 489 (1954); *see also* Martin H. Redish & Carter G. Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 381 (1977) (discussing the difficulties that arise under the *Erie* doctrine when actors do not know which set of rules will govern their actions).

139 *See supra* text accompanying notes 63–65.

3. Inconsistent Liability

Inconsistent liability occurs when a litigant obtains an injunction authorizing (but not requiring) her to do *X* and later faces an injunction preventing her from doing *X*. Like contradictory liability, the indivisible nature of inconsistent liability centers around the litigant's out-of-court actions: she cannot both do *X* and not do *X*. The nature of the initial judgment is what distinguishes inconsistent from contradictory liability, however. In the case of contradictory liability, the first judgment requires the litigant to do *X*. In this situation, if a subsequent judgment requires her not to do *X*, *any* action the litigant takes will necessarily violate one judgment or the other. In the case of inconsistent liability, in contrast, the first judgment merely *permits* a litigant to do *X*. If a subsequent judgment requires her not to do *X*, it is of course legally and physically possible for her to simply forgo the benefit of her initial judgment. It does not follow, however, that the system should necessarily be unconcerned by a second judgment's effective destruction of a right won by a party in the first suit. Again, the problem could be avoided by invocation of virtual representation to bind the second plaintiff to the result imposed on the plaintiff in the first case, as long as the first plaintiff is deemed to have adequately represented the second plaintiff's interests. However, the Court in *Taylor* exposed litigants involved in multiple litigation to the negative consequences of inconsistent liability by summarily rejecting virtual representation. Although adequate representation can safeguard against an erroneous deprivation of the substantive benefits of one's legal rights, no safeguard can prevent virtual representation from depriving a litigant of her autonomy. The only way to prevent the deprivation of litigation autonomy is to allow the litigant to participate in the adjudicatory process, which would render useless a procedure such as virtual representation that is designed to prevent such participation. In order for a procedure that prevents participation to pass due process scrutiny, therefore, an interest must exist that is sufficiently compelling to outweigh litigant autonomy.

As an example of inconsistent liability, consider the facts in *Southwest Airlines*. In its first suit against the City of Dallas, Southwest obtained a declaratory judgment stating that the city ordinance did not apply to Southwest and therefore, Southwest could stay at Love Field.[140] In a later suit, competitor airlines sought a declaratory judgment that the city ordinance did apply to Southwest and therefore,

140 City of Dallas v. Sw. Airlines Co., 371 F. Supp. 1015, 1019 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir. 1974).

Southwest had to leave Love Field.[141] Here, if the competitor airlines won the second suit, Southwest could elect to leave Love Field, thereby complying with the second judgment and forgoing the benefits of the first judgment. In this way, it is possible for the judgments to coexist.

In order for the two inconsistent judgments to coexist, however, the holder of the first judgment must be forced to forgo the fruit of her prior victory. As one of us has argued elsewhere in the analogous context of Rule 23(b)(1)(A) class actions, "[t]o completely deny a litigant the benefit of its successful litigation imposes severe harm that should be avoided if at all possible."[142] A successful litigant possesses a property interest in a valid judgment that it has won through successful litigation. A chose in action has thereby been converted into a more definite form of property right—a judgment. When a risk of inconsistent liability exists, maintaining the second suit risks undermining the value of the first judgment, depriving the holder of that judgment of her property without due process of the law.

We are quite sympathetic to the important constitutional values underlying the day-in-court ideal. Therefore, as a general matter, we concur in rejection of virtual representation because it contravenes core notions of procedural due process.[143] However, as we have argued, in cases of indivisible relief the problem is not as simple as the Court in *Taylor* seemed to believe. As previously noted, procedural due process has long been thought to require some form of interest balancing.[144] It is at least arguable that the competing interests that counter the day-in-court ideal in cases of indivisible relief should be deemed to overcome the concededly important interest in allowing a litigant to defend his rights in court.

By analyzing the competing interests implicated in the three categories of indivisible relief litigation, we seek to resolve the dilemma of virtual representation. The upshot of our analysis is that the interest in avoiding the problems associated with double and contradictory liability is sufficiently compelling to overcome even the constitutionally significant value of litigant autonomy. Both double and contradictory liability give rise to violations of due process either by forcing the stakeholder to pay a single debt twice or by punishing a litigant for failing to perform physically or legally impossible acts. It is inconceiv-

141 Sw. Airlines Co. v. Tex. Int'l Airlines, Inc., 546 F.2d 84, 87–89 (5th Cir. 1977). For a more detailed discussion of *Southwest Airlines Co.*, see *supra* Part III.

142 Redish & Larsen, *supra* note 75, at 1606.

143 *See supra* text accompanying notes 71–79.

144 *See supra* text accompanying note 17.

able that a system committed to fundamental fairness and the rule of law could tolerate such unfairness and legal incoherence except in the most dire of circumstances. Thus, as long as a court has assured itself that a litigant in the first case has adequately represented the interests of the litigant in the second case,[145] we reluctantly conclude that in these situations, virtual representation should be invoked.[146] However, where, the court concludes that the litigant in case 2 was not adequately represented in case 1, the day-in-court ideal should overcome even the incoherent and unfair consequences of both contradictory and double liability.

Whether or not the interest in avoiding the problems associated with inconsistent liability is sufficient to outweigh litigant autonomy is a much more difficult question than in the other two categories, because the problems arising from inconsistent liability do not include actual legal impossibilities. As discussed earlier, a protected property interest exists in an injunction permitting its owner to do *X*. Although a subsequent judgment preventing that person from doing *X* deprives her of the practical benefit of her original judgment and should be avoided where feasible, the fact remains that the two judgments can be reconciled by forcing her to forgo the benefits of the first judgment.

While as a general matter it is preferable to avoid such situations, it is important in fashioning our due process calculus to recall that the first judgment is, by its terms, binding only between the parties to the original case. In other words, the winning litigant's right to do *X* has been settled, but *only* between her and her former opponent, not between her and the world. To understand the distinction, one might well draw an analogy to the long-accepted distinction between judgments that are pure in rem (which bind the world) and those in the nature of rem (which bind only the particular persons named in the suit).[147] In the context of inconsistent liability, because the first judgment permitting its owner to do *X* presumably did not purport to bind the world, that litigant should, from the outset, be aware that

145 For an examination of what constitutes adequate representation, see *supra* text accompanying notes 49–65.

146 We do, however, suggest a variety of ways to prophylactically avoid such situations from arising in the first place. *See* discussion *infra* Part IV.

147 *See* Shaffer v. Heitner, 433 U.S. 186, 199 n.17 (1977) (noting that while "'[a] judgment *in rem* affects the interests of all persons in designated property,'" an action in the nature of rem "'seek[s] to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of *particular persons*'" (second emphasis added) (quoting Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1938))).

later suits might arise that might have the effect of undermining her judgment in the prior suit. Although she may have no specific knowledge of the person who will later bring suit against her, she must nonetheless be aware of the possibility of subsequent suits by plaintiffs not involved in the first suit.

Our conclusion that double and contradictory liability should be deemed sufficiently compelling to overcome a litigant's competing autonomy interest, it should be emphasized, does not automatically mean that virtual representation will be permitted when these types of relief are sought. The possibility of the first two categories of indivisible relief is necessary but not sufficient for virtual representation to pass due process scrutiny. As already noted, there must also be assurance that the precluded party was adequately represented in the initial suit to which she will be bound. Adequate representation ensures that the precluded nonparty is not erroneously deprived of the substantive benefits of her legal rights. Due process requires at least this floor of procedural protection even in the face of competing interests that are compelling enough to outweigh litigant autonomy. The next subpart examines the contours of the concept of adequate representation in the virtual representation context.

B. Defining Adequate Representation

The concept of adequate representation is not new. To the contrary, it has long been a central part of class action doctrine and forms the basis for much of the Court's procedural due process discussion in nonparty preclusion cases.[148] Particularly in the class action context, adequate representation is a fairly developed concept. As a prerequisite for class certification, Rule 23(a)(4) provides that "the representative parties will fairly and adequately protect the interest of the class."[149] This language has been interpreted to require that the representative party's interests be aligned with the represented party's interests,[150] the representative party have incentive to litigate vigorously,[151] and the representative party have sufficient resources to liti-

148 *See* FED. R. CIV. P. 23(a)(4) (requiring fair and adequate protection of the interests of the class by the representative party as a prerequisite to class action); Taylor v. Sturgell, 128 S. Ct. 2161, 2173–74 (2008) (discussing adequate representation in the context of nonparty preclusion); Richards v. Jefferson County., 517 U.S. 793, 798 (1996) (same).

149 FED. R. CIV. P. 23(a)(4).

150 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1769 (3d ed. 2005).

151 *Id.* § 1766.

gate vigorously.[152] These three concepts should also form the basis for the inquiry into adequate representation for purposes of virtual representation.

Any definition of adequate representation must demand alignment of the interests between the representative party's and the represented party's interests. Because virtual representation does not require a formalized preexisting legal relationship between the parties, there is no reason to believe that the representative party is specifically advancing any interests other than her own; in other words, she is not necessarily looking out for the absent party. However, if the representative party's interests are inevitably and inescapably aligned with those of the represented party, the represented party's interests will be indirectly protected. This alignment of interests refers to a desire for the same outcome and the availability of the same legal theories in pursuit of that outcome.[153] If the absent party possesses legal rights that the representative party is incapable of raising, the representative party's interests cannot properly be deemed sufficiently aligned with those of the absent nonparty. Conversely, if the representative party desires the same outcome and has access to the same arguments as the absent party, their interests are aligned, even if they have different reasons for pursuing the same outcome. For example, in *Southwest Airlines*, the City of Dallas and the competitor airlines each sought to force Southwest to leave Love Field and each presented the same legal arguments.[154] Their interests were aligned, despite the fact that the City of Dallas wanted to force Southwest out in order to ensure the success of the new Dallas/Ft. Worth Airport while the competitor airlines wanted to prevent a competitor from using the more convenient Love Field, thereby gaining a competitive advantage.[155]

The second requirement of adequate representation is that the representative party possess sufficient incentive to vigorously litigate the first suit. To ensure the presence of this incentive, the representative party must possess a significant personal stake in the initial litiga-

152 *Id.* § 1767.

153 *See id.* § 1769.

154 *See supra* text accompanying notes 98–115.

155 *See* Sw. Airlines Co. v. Tex. Int'l Airlines, Inc., 546 F.2d 84, 87–88 (5th Cir. 1977). While we point to *Southwest Airlines* as an example in determining adequate representation, we should emphasize that as a case of inconsistent relief, rather than a double or contradictory liability, the issue of adequate representation would not arise. Under our stratification of the three categories, the danger of inconsistent relief would be insufficient to overcome the competing interest in litigant autonomy. *See* discussion *supra* Part III.A.1–3.

tion. The motivation behind this requirement is similar to one of the motivations behind the injury-in-fact component of standing.[156] A party possessing a significant personal stake in the litigation is more likely to present her case in an effective manner. In the extreme situation, this requirement prevents a sham party from binding all others with aligned interests. At a more basic level, we simply do not trust someone to exhaust all plausible legal arguments unless she stands to suffer negative consequences as a result of an unsuccessful suit.

The final requirement of adequate representation is that the representative party possess sufficient resources to vigorously litigate the first suit. This element is purely practical. Even if the representative party's interests are perfectly aligned with the precluded nonparty's interests and the representative party has personal incentive to litigate vigorously, the representative party still may be incapable of providing adequate representation. Perhaps the party does not possess sufficient resources to present her case in an acceptably effective manner. Perhaps the party's lawyer is incompetent, despite his high fees. In either situation, it would not be fair to say that the absent party received adequate representation when the representative party clearly did not provide it. Of course, perfect lawyering is not required to satisfy this component. At the very heart of virtual representation is the fact that the absent party may disagree with certain strategic choices in the first suit but is nevertheless bound. Instead, this should serve as a practical inquiry that can be overcome only by insufficient party resources or incompetent lawyering.

We should note an important difference between making a finding of adequate representation in the contexts of class actions on the one hand and virtual representation on the other. While the adequacy determination in the class action context must be made ex ante, that determination will be made ex post in the virtual representation situation. In class actions the court makes its adequacy finding *before* the actual litigation, rendering it merely a prediction of what is likely to happen in the future. In contrast, in the virtual representation context the court in cases has the luxury of being in a position to examine

156 *See* 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.4 (3d ed. 2008). Although the injury-in-fact requirement of standing is designed to promote vigorous litigation, it is not sufficient for ensuring vigorous litigation. *See* MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 101–02 (1991). One can easily imagine a situation in which a plaintiff has suffered an injury-in-fact so small that he is not motivated to expend the resources necessary to vigorously litigate a lawsuit. *Id.* Thus, requiring an adequate representative to have *sufficient* incentive to litigate vigorously goes beyond the traditional injury-in-fact calculus.

the conduct of case 1 to determine whether the absent party's interests had been adequately represented.

Having established a working definition of adequate representation, we can briefly return to the situations of double and contradictory liability[157] to understand how the adequate representation inquiry differs for each. Suppose two suits are framed as *A v. B* and *C v. B*. For a situation involving double liability, a stake exists and *B* is the stakeholder. In the first suit, *A* claims a right to and receives a judgment for the entire stake. In the second suit, *C* also claims a right to the entire stake. For the reasons outlined above, we have concluded that the compelling need to avoid this situation dictates resort to virtual representation. However, this is so if and only if *C*'s interests had been adequately represented in the first suit. It is clear that *A*'s interests and *C*'s interests cannot be aligned: they have inconsistent and opposing claims to the same stake. It is possible, however, that *B*'s interests are aligned with *C*'s interests. But this would be the case only if *B* had defended the first suit on the grounds that *A* should not recover because *C* had a superior claim. In this situation, *B* is not wholly without incentive because she may be exposed to double liability down the road if *A* is awarded the stake in the first suit. We propose that if *B*'s and *C*'s interests were aligned and *B* possessed sufficient resources, there should be a presumption that *B* adequately represented *C*—a presumption that may be rebutted only by a showing that *B* was not sufficiently interested or competent.

In the case of contradictory liability, the situation is different. Assume that in the first suit *A* wins an injunction *requiring B* to do *X*. Presumably, *B* would prefer not to do *X* and that is why she litigated the issue in the first place. In the second suit, *C* seeks an injunction *preventing B* from doing *X*—the same position that *B* favored in the first suit. As was the case with double liability, *A*'s interests and *C*'s interests cannot be aligned; they favor opposite outcomes. Instead, even though *C* is now suing *B* and the two are seemingly adverse, *C*'s interests in the second suit are aligned with *B*'s interests in the first suit. Assuming *B* had sufficient resources and incentives, the second court should find that *B* adequately represented *C*.

C. Resolving the Virtual Representation Dilemma: A Summary

We have now presented our due process theory of virtual representation. We begin with a presumption in favor of protecting a liti-

157 Because we have concluded that inconsistent liability does not permit virtual representation, it is not necessary to consider how it interacts with the adequate representation requirement. *See supra* Part III.A.1.

gant's right to a day in court but permit virtual representation in the extreme situations that involve double and contradictory liability. Virtual representation should be deemed permissible in these situations because the value in avoiding the problems that arise from these forms of indivisible relief are appropriately found to be greater than the value of maintaining a litigant's right to a day in court. We do not allow virtual representation in cases of inconsistent liability, however, because the harm to the defendant in these situations is not as intolerable as in cases of double and contradictory liability. The threat of the double liability and contradictory liability categories of indivisible relief, we should emphasize, is necessary but not sufficient for virtual representation. There must also be a showing of adequate representation, evaluating whether or not the interests of the representative party and represented party are aligned and whether or not the representative party had sufficient incentive and resources to litigate vigorously.

IV. FINDING PROPHYLACTIC MEASURES TO AVOID THE VIRTUAL REPRESENTATION DILEMMA

A. Procedural Devices Available to Avoid the Virtual Representation Dilemma

We have developed a concept of virtual representation that begins by recognizing the important due process value of litigant autonomy as a baseline but nevertheless allows for deprivation of that autonomy in situations involving double and contradictory liability, assuming a finding of adequate representation. However, virtual representation is little more than a barely acceptable ex post Band-Aid for the problem of indivisible relief. Because it necessarily deprives litigants of their day in court, virtual representation should still be considered a disfavored doctrine—an occasionally necessary evil. The problem of virtual representation is a matter of timing. Indivisible relief, by nature, is sought in a second lawsuit and conflicts with an existing judgment. If the parties in the second suit had been parties in the first suit, there would of course be no problem. By the time the second suit arises, however, there is no way to go back in time and make them parties in the first suit.

Developing a principled and comprehensive account of virtual representation, however, allows us to anticipate when its use will be necessary. If procedures are capable of operating proactively (or prophylactically) in order to prevent the existence of separate actions seeking indivisible relief from occurring in the first place, need for the disfavored doctrine of virtual representation might be minimized

or eliminated. Of course, the best way to prevent situations of indivisible relief from occurring is, of course, to bring all interested parties together in one suit so that the relief granted is binding on all. This might happen through creative application or modification of our existing joinder and intervention rules or by adopting new rules that directly address the problem of indivisible relief.

There already exist numerous procedural devices available to avoid the dilemma. The currently available joinder devices that could conceivably be employed to avoid the harms of indivisible relief include (1) compulsory joinder under Rule 19, (2) intervention under Rule 24, (3) interpleader under either Rule 22 or 28 U.S.C. § 1335, and (4) class actions under Rule 23(b)(1)(A).[158] Under each Rule, one actor in the process is provided the procedural opportunity in the first suit to include all those conceivably impacted, thereby avoiding the risk of the virtual representation dilemma. In the contexts of compulsory joinder, interpleader, and the class action, the defendant in case 1 is capable of triggering the comprehensive adjudicatory process. The plaintiff in case 1 may do so in the class action context, and the potential second suit party may do so through intervention into case 1. However, the devices do not always work as hoped, either because the parties in the first suit are unaware of the absent party's existence or lack the incentive to bring the outsider into the suit. The goal, then, must be to incentivize the operatives in case 1, in order to avoid the harmful dilemma created by case 2.

B. Incentivizing Avoidance of the Virtual Representation Dilemma

As previously noted, numerous procedural devices already exist to comprehensively resolve a dispute in the first suit, thereby avoiding the dilemma of virtual representation.[159] The difficulty is in appropriately incentivizing either the litigants or absent parties in the first suit to trigger use of one of those devices. In the discussion that follows, we consider the possibility of developing such devices in the context of each of the permutations of indivisible relief.

1. Double Liability

Virtual representation can occur in situations of double liability only when the stakeholder defends the initial suit on the grounds that the absent party's claim is superior to the present claim.[160] It is only

158 *See* sources cited *supra* notes 130, 148–49.

159 *See supra* Part IV.A.

160 *See supra* Part III.A.1.

in this situation that a present party could even conceivably be said to have adequately represented the precluded nonparty by vigorously asserting his arguments. A necessary condition for this to happen is that the stakeholder is aware of the absent party's claim during the initial suit; otherwise, he cannot reasonably be expected to present the absent party's arguments. In light of this knowledge, one might wonder why the stakeholder does not simply invoke interpleader or compulsory joinder to allow the second claimant to protect herself in suit 1. Indeed, this is the exact problem that interpleader was created to resolve, at least when there exists an identifiable stake that constitutes the requisite "res."[161] Similarly, in double liability situations, the absent claimant's joinder is required under Rule 19(a) because a second suit could expose the stakeholder to the risk of double liability.[162] The stakeholder's use of interpleader or compulsory joinder would prevent the possibility of double liability in the future, by including all those potentially affected in the initial suit.

One would hope that the very incentive of avoiding the risk of double liability would sufficiently induce the stakeholder to invoke either interpleader or compulsory joinder. However, in order to increase that incentive, it is advisable to impose the negative consequences for failure to invoke these devices in case 1 on the stakeholder in case 2. Thus, where a stakeholder adequately represents the absent claimant in the initial suit but fails to invoke either interpleader or compulsory joinder in that suit, the stakeholder should be precluded from binding the second claimant by virtual representation. The result would be that the stakeholder would be exposed to the risk of double liability in case 2. This assignment of risk, one could hope and expect, would force the hand of the stakeholder in case 1.

Incentive-shifting mechanisms in civil procedure are not a new concept. The Supreme Court articulated a very similar scheme over a century ago in *Harris v. Balk*.[163] In that case, Harris owed Balk $180 and Balk owed Epstein $344.[164] Harris and Balk were residents of

161 *See* 7 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1704 (3d ed. 2001).

162 *See supra* Part III.A.I.

163 198 U.S. 215 (1905). We cite *Harris* as an illustrative example of the rationale behind assigning burdens based on information and not as binding authority. The dispute in *Harris* arose from a now antiquated personal jurisdiction issue involving the discredited quasi in rem concept. *See id.* at 226; *see also* Shaffer v. Heitner, 433 U.S. 186, 200–01 (1977) (summarizing the facts and holding of *Harris*).

164 *Harris*, 198 U.S. at 216, 228.

North Carolina and Epstein was a resident of Maryland.[165] When Harris was in Maryland on business, Epstein was able to serve Harris with process and, by invoking quasi in rem jurisdiction, obtain an attachment requiring Harris to pay Epstein the $180 Harris owed Balk as partial payment of the $344 Balk allegedly owed Epstein.[166] Due to a difference in state laws, once Harris returned to North Carolina, Balk was able to obtain a separate judgment against Harris for the same $180.[167] Harris appealed to the Supreme Court, arguing that he had already discharged his debt to Balk by paying in to Balk's creditor, Epstein, in the Maryland suit. The Court initially noted that "[i]t ought to be and it is the object of courts to prevent the payment of any debt twice over."[168] The Court went on to state, however, that Harris had a duty to inform Balk of the Maryland litigation at the time it was taking place, thereby enabling Balk to defend his rights against Epstein's claim against him.[169] The Court added that if Harris had failed to notify Balk of Epstein's Maryland suit, it would be proper to expose Harris to the possibility of double liability by forcing him to pay his debt a second time.[170] This was ultimately not required because Balk had been aware of the Maryland litigation and had chosen not to intervene.[171] Based on this knowledge, the Court held that the Maryland suit barred Balk's suit to recover the original $180 debt from Harris.[172] As with the risk assignment system we propose here, the scheme in *Harris* apportioned risk based on who had information that could have prevented the problem.

Double liability may still arise in situations where the stakeholder is unaware of the absent claimant's existence. In such a situation there can of course be no case for virtual representation because no party to case 1—neither the stakeholder nor the first claimant—is in a position to present the absent claimant's arguments. However, incentive-shifting mechanisms still may be useful to combat indivisible relief. If the absent claimant is aware of the original suit and fails to seek intervention, his suit could be barred. Were such an incentivization system made clear at the outset, presumably the absent party would have been induced to seek intervention in case 1. When the stakeholder is unaware of the absent claimant and the absent claimant

165 *Id.* at 216.
166 *Id.*
167 *Id.*
168 *Id.* at 226.
169 *Id.* at 227.
170 *Id.*
171 *Id.*
172 *Id.*

is unaware of the original suit, however, we see no way to avoid double liability.

2. Contradictory Liability

Contradictory liability, it should be recalled, occurs when a person is judicially ordered, in different litigations, both to do *X* and not do *X*. Under these circumstances, there is no action the person can take without violating one court judgment or the other. As noted previously, this is the most severe form of indivisible relief.

Though where no identifiable stake is involved interpleader is unavailable, when at the time of the initial suit the party potentially subject to the risk of contradictory liability is aware of the absent party who might bring a subsequent suit creating that risk, it is appropriate to force that party to bring in the absent party through Rule 19 compulsory joinder.[173] However, where the party subject to the risk of contradictory liability is unaware of the absent party's existence but the absent party is aware of the initial suit's existence, it makes sense to shift the risk to that absent party. Instead of employing virtual representation in a subsequent suit, we could preclude subsequent suits based solely on the fact that the absent person had knowledge of the original suit yet failed to intervene.

The constitutionality of this type of mandatory intervention scheme is somewhat controversial and therefore must be briefly examined. Mandatory intervention is a concept in which a party is required to intervene in order to protect her legal right—a sort of "use it or lose it" doctrine. The Court addressed the issue in *Martin v. Wilks*.[174] In that case, after a group of African American firefighters received a consent decree from the City of Birmingham granting them advanced seniority, a group of white firefighters brought a suit alleging that the decree indirectly discriminated against them by comparative demotion.[175] The Court addressed the argument that the white firefighters' suit should be barred based on their failure to intervene in the original action.[176] Rejecting the argument, the Court stated:

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173 Where absent parties are too numerous for simple joinder, the party may resort to a Rule 23(b)(1)(A) class action, provided that other prerequisites are met. FED. R. CIV. P. 23(b)(1)(A).

174 490 U.S. 755 (1989). Section 108 of the Civil Rights Act of 1991, 42 U.S.C. 2000e-2(n)(1) (2000), overrode the the holding in *Martin* as it applied to the underlying civil rights claim. However, the court's reasoning as applied to mandatory intervention is still generally instructive.

175 *Martin*, 490 U.S. at 758.

176 *Id.* at 762.

> The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit.[177]

This reasoning counsels in favor of placing the initial onus on the existing parties: they must join outsiders or risk a second suit challenging their victory. The argument breaks down, however, when it is only the absent party who realizes his relevance to the suit. In *Wilks*, the Court's reasoning is based on the assumption that parties will have superior knowledge about who should be in the case. Whether or not the absent person is the sole actor to have actual knowledge of the first case's relevance to her, however, is simply a question of fact. While making this factual determination may be difficult, as noted by the Court in *Wilks*,[178] incurring this difficulty is a small price to pay for avoiding the danger of contradictory liability. Furthermore, although the reasoning of *Wilks* is generally instructive, Congress overruled its applicability to employment discrimination cases, essentially creating a legislatively dictated mandatory intervention scheme.[179] This statute has not been successfully challenged on constitutional grounds, suggesting that although mandatory intervention is not ideal, it is at least constitutional. In light of the particular danger of contradictory liability, we believe that under appropriate circumstances mandatory intervention is permissible.[180]

CONCLUSION

Despite the Court's recent rejection of virtual representation in *Taylor*, the doctrine has never received a comprehensive constitutional analysis. In this Article we have sought to provide that analysis. After deriving the day-in-court ideal from the foundational American political commitment to democracy, we employ the Court's existing procedural due process doctrine to create a workable, reasonable, and highly restricted theory of virtual representation. We conclude that

177 *Id.* at 765.

178 *Id.* at 767.

179 *See* 42 U.S.C. § 2000e-2(n)(1).

180 As with double liability, situations may arise in which virtual representation or other measures will be unable to prevent contradictory liability. As already noted, this creates serious due process problems. This Article does not attempt to solve these remaining problems. Instead, we have shown how virtual representation and other mechanisms could be used to minimize the threat of indivisible relief.

although the day-in-court ideal should be adhered to in nearly all situations, when a litigant faces a risk of double or contradictory liability there are compelling reasons to preclude the subsequent suit. If we can be assured that the precluded nonparty has at least received paternalistic protection of her substantive rights through adequate representation, use of virtual representation is permissible in order to avoid the even more serious constitutional harms to which both double and contradictory liability give rise.[181]

A far better solution, however, is to avoid situations of indivisible relief from occurring. This can be partially achieved by the use of existing joinder and intervention rules. In addition, we have proposed a system of risk allocation in cases of indivisible relief by imposing the risk on the party who failed to prevent it. It should be noted that this proposal is preliminary in nature and intended more to start rather than end the conversation. Despite the extreme problems that result from indivisible relief, the topic has received little treatment. The concept is hinted at in nearly every multiparty tool, yet no one has presented a comprehensive analysis of the topic. Although we have focused in this Article primarily on virtual representation as a means to combat indivisible relief, we hope the Article's greatest contribution is its effort to bring indivisible relief into the due process conversation in a cohesive manner.

181 *See supra* Part III.A.1–2.