

## PROCEDURAL DUE PROCESS

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*To Charles E. Clark and the courage of law reformers*

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## I. PREMISE

Any democratic judicial system must be built on the principle of due process, the fountain from which all procedural rules and doctrines flourish. The principle carries with it the ideas of fairness, reasonableness, and efficiency, all to be measured, balanced, and applied to the various, changing circumstances that confront a judicial system in a democracy.

The idea of balance is essential to due process. As Justice Harlan observed:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.<sup>1</sup>

What Justice Harlan said more than half a century ago is still true today. Due process has not been codified and cannot be reduced to a one-size-fit-all formula. Rather, it calls for a careful consideration of a range of factors pertaining to fairness and reasonableness, and a careful balancing among the various conflicting interests of the parties and institutions directly and indirectly involved.

Understanding the scope and contours of due process is thus crucial to the development of procedural and substantive rules that could achieve the optimal results in a democratic system. Yet the scholarly articles entirely devoted to the topic are scarce to say the least,<sup>2</sup> and most of the

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<sup>1</sup> *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds). *See also* *Rochin v. California*, 342 U.S. 165, 171–72 (1952) (Frankfurter, J., writing for the Court) (“To believe that this judicial exercise of judgment could be avoided by freezing ‘due process of law’ at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges”).

<sup>2</sup> *See, e.g.*, Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 *YALE L. & POL’Y REV.* 1 (2006); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 *COLUM. L. REV.* 309 (1993).

relevant monographs<sup>3</sup> have not articulated a theory of due process, but largely provide an historical overview or a survey of the rights that are commonly understood as due process rights.

A theory of due process is missing and this deficiency has, in my opinion, contributed to the lack of a true understanding and, thus, truthful, real investment of the system in the principle.

An article cannot do justice to the complexities and depth of the due process principle. But there are some ideas and insights I thought I might share here, to start defining the theory of procedural due process, and prompt deeper judicial investigation and scholarship on the topic.

I want to emphasize at the outset that my study focuses on civil procedural due process only, that is, it focuses only on the principle to which civil procedure rules and doctrines should conform to avoid unfair and unreasonable deprivations of liberty or property.

Even if I believe that the fairness and reasonableness that the due process principle aims to achieve do not inherently demand any artificial separation between substantive and procedural law,<sup>4</sup> I will limit myself to articulating a theory of procedural due process, given that my area of expertise is procedural law. I am confident, though, that the theory here articulated will offer valuable support to those interested in exploring more deeply the idea of substantive due process and that, when applied to substantive due process, this theory will not require significant alterations.

Part II of my study unearths the core of procedural due process through the relevant U.S. Supreme Court opinions and commentaries on the topic. Part III tests some procedural rules and doctrines against the theory as articulated in Part II, showing where those rules and doctrines are not truthful to due process. The due process theory is here revisited in view of this part's findings. Part IV shows how the procedural rules and

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<sup>3</sup> See, e.g., SULLIVAN MASSARO, *THE ARCH OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW* (2013); JOHN V ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* (2003); ALFRED THOMPSON DENNING, BARON, *THE DUE PROCESS OF LAW* (2003); VIRGINIA WOOD, *DUE PROCESS OF LAW, 1932-1949: THE SUPREME COURT'S USE OF A CONSTITUTIONAL TOOL* (1972); RODNEY L. MOTT, *DUE PROCESS OF LAW: A HISTORICAL AND ANALYTICAL TREATISE OF THE PRINCIPLES AND METHODS FOLLOWED BY THE COURTS IN THE APPLICATION OF THE CONCEPT OF THE "LAW OF THE LAND"* (1926); TAYLOR HANNIS, *DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS: A TREATISE BASED, IN THE MAIN, ON THE BASES IN WHICH THE SUPREME COURT OF THE UNITED STATES HAS GRANTED OR DENIED RELIEF UPON THE ONE GROUND OR THE OTHER* (1917); LUCIUS POLK MCGEEHEE, *DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION* (1906).

<sup>4</sup> However, concurring in *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 772 (2005), Justice Souter suggested that collapsing substantive law and procedure would be inappropriate (Gonzales's claim would thus take us beyond *Roth* or any other recognized theory of Fourteenth Amendment due process, by collapsing the distinction between property protected and the process that protects it.).

doctrines examined in Part III affect the development of substantive law. And Part V offers my concluding remarks.

## II. PROCEDURAL DUE PROCESS

I'll start from the basics. The Fifth and Fourteenth Amendments to the U.S. Constitution provide, respectively, that the federal government and the states shall not deprive any individual of life, liberty, or property without "due process of law." A law whose content impairs a liberty or property interest without a sufficient reason or justification will violate substantive due process rights. A law that is enforced through an unfair process that impairs a liberty or property interest will violate procedural due process rights.<sup>5</sup> In other words, a substantive law or procedural law that is not supported by logic, fairness, and efficiency considerations, one that has no reason other than to deprive the individual of life, liberty, or property, one that doesn't serve any individual or societal interest, violates due process.

Viewed in these terms, there seems to be no meaningful distinction between procedural and substantive due process. And, in fact, no such distinction originally defined due process. The distinction was rather a product of that separation of procedure and substantive law that came with the demise of the original writs and forms of action<sup>6</sup> and, more generally, with civilization and the development of a substantive law that was finally able to stand on its own footing.<sup>7</sup>

Originally the plaintiff's claim was probably conceived just as a component of the procedure, the process within which substantive law

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<sup>5</sup> See ALLAN IDES, CHRISTOPHER MAY, AND SIMONA GROSSI, CONSTITUTIONAL LAW, INDIVIDUAL RIGHTS 175 (7th ed. 2016).

<sup>6</sup> THEODORE F. T. PLUCHNETT, A CONCISE HISTORY OF THE COMMON LAW, 5th ed., at 381–82 (1956).

<sup>7</sup> See *id.*, at 381. Pluchnett observed that the "power to think of law apart from its procedure . . . naturally can only develop when civilization has reached a mature stage" and that this doesn't happen if "the law [is] not yet strong enough to stand alone, for obscurity rather than clarity." *Id.* The "first comprehensive attempt to state (as far as was then possible) the whole of English law in the form of substantive rules" came with the Blackstone's commentaries. *Id.*

Pluchnett added that

[t]he procedure was still there, however; in fact, the law was still entangled in it, and Blackstone's venture could be plausibly dismissed by conservatives as a mere literary device. In the course of the succeeding century the great revolution took place. With the abolition of forms of action and the unification of courts and procedure, it became possible for law to flow more freely and to escape the confinement of the old procedural categories. Only then did it become possible to consider the law in practice as being the application of substantive, rather than procedural, rules.

*Id.* at 382.

develops. It then became clear that procedure was “a means to an end,”<sup>8</sup> the end of enforcing substantive rights, and a science of procedure developed to identify “the quickest, cheapest and most reliable methods of organizing the practice side of the law,”<sup>9</sup> that is, dispute-resolution methods that would be consistent with due process.

The science of procedure has progressed over the years. And yet sometimes procedural rules and doctrines disserve logic and the democratic aspirations, and they don’t offer the quickest, cheapest, and most reliable means and methods of enforcing substantive rights.

I have written about some of those rules and doctrines and, there, have complained about their flaws,<sup>10</sup> attributing such flaws to a mechanical, check-list type of drafting and/or interpretation, as well as to case management concerns dominating and ultimately infecting the analysis. The legislature and the federal judiciary, though, seem to welcome the mechanical/check-list approach as a method that provides guidance, and they do not necessarily attribute their choices to workload concerns.

It is sometimes hard to identify the reasons behind specific legislative or judicial choices of analysis or outcomes that disserve due process and democracy.<sup>11</sup> We scholars make hypotheses, assumptions. Why, for example, are Rules 23<sup>12</sup> and 26<sup>13</sup> written in a code/check-list style which makes them so different from the other Rules? Why did the *Gunn*<sup>14</sup> Court find that there was no subject matter jurisdiction over the plaintiff’s malpractice claim arising out of patent law? Why did the *McIntyre*<sup>15</sup> Court find that there was no personal jurisdiction over the plaintiff’s claim who had been injured by the defendant’s machine sold to a resident of the forum state? Why did the *Linda R.S.*<sup>16</sup> Court or the *Clapper*<sup>17</sup> Court find that the plaintiffs in both cases had no standing? Why did the *Iqbal*<sup>18</sup> Court find

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., Simona Grossi, *The Claim*, \_\_ Hous. L. Rev. \_\_ (2017); *Frontloading, Class Actions, and a Proposal for a New Rule 23*, \_\_ Lewis & Clark L. Rev. \_\_ (2017); *Personal Jurisdiction: A Doctrinal Labyrinth With No Exit*, 47 Akron L. Rev. 617 (2014); *Forum Non Conveniens as a Jurisdictional Doctrine*, 75 U. Pitt. L. Rev. 1 (2013); *A Modified Theory of the Law of Federal Courts: The Case of Arising Under Jurisdiction*, 88 Wash. L. Rev. 3 (2013).

<sup>11</sup> Simona Grossi, *The Courts and the People*, \_\_ Notre Dame L. Rev. Online \_\_ (2017).

<sup>12</sup> Fed. R. Civ. P. 23.

<sup>13</sup> Fed. R. Civ. P. 26.

<sup>14</sup> *Gunn v. Minton*, 133 S. Ct. 1059 (2013).

<sup>15</sup> *J. McIntyre Machinery, LTD. v. Nicastro*, 564 U.S. 873 (2011).

<sup>16</sup> *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

<sup>17</sup> *Clapper v. Amnesty International*, 133 S. Ct. 1138 (2013).

<sup>18</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

that the plaintiff's claim of unlawful intentional discrimination against federal officials was not plausible?

We speculate. We make hypotheses. The code/check-list style of Rule 23 might be intended to provide more guidance to judges and lawyers, to help them cope with the complexities of modern class actions. Or perhaps it might be intended to restrain judicial discretion—the more items to check on a list, the less room for judicial discretion and case-by-case assessment of the needs of the case.<sup>19</sup> Analogous hypotheses could be made for Rule 26, and one could add that the check-list approach is there intended to contain the breadth and costs of discovery.<sup>20</sup>

As for the judicial opinions, it might have been case management concerns that led the *Gunn* Court to find no subject matter jurisdiction in that case.<sup>21</sup> It was perhaps comity concerns and concerns for international relations that suggested the *McIntyre* outcome.<sup>22</sup> Federalism concerns might have led to the standing analysis in *Linda R.S.*<sup>23</sup> In *Clapper*, the outcome might have been generated by the “special framework”<sup>24</sup> of the national security context. And it was 9/11 that suggested the adoption of a strict pleading approach in *Iqbal*, one that would apply across a wide range of cases, though, not just to sensitive national security cases.<sup>25</sup>

But what if instead of, or in addition to the above political reasons, some of the above legislative and judicial choices had been caused by a misunderstanding of the principle of due process and its true content? What if the legislature and federal judges were genuinely trying to draft rules and offer interpretations that they considered in service of the fair and efficient administration of justice? What if the problem was to be attributed to a misunderstanding of due process and the balance of conflicting interests and needs that the principle requires? I did consider the possibility that mine was just an exorbitant hypothesis. Of course, everyone knows what due process is. Everyone should know what it is and what it entails.

This thought has essentially kept me from writing this article for several years. And yet I never abandoned the idea. I continued to observe, read the signals, ponder.

My audience sometimes resisted when I described the plaintiffs' right to have access to justice and the plaintiff's reliance on the availability

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<sup>19</sup> Simona Grossi, *Frontloading*, *supra* note 10.

<sup>20</sup> Simona Grossi, *The Claim*, *supra* note 10.

<sup>21</sup> Simona Grossi, *A Modified Theory*, *supra* note 10.

<sup>22</sup> Simona Grossi, *Personal Jurisdiction*, *supra* note 10.

<sup>23</sup> Simona Grossi, *The Claim*, *supra* note 10.

<sup>24</sup> *Clapper v. Amnesty International*, 133 S. Ct. 1138, 1143 (2013).

<sup>25</sup> *Id.*

of a forum as due process rights. The plaintiffs' due process rights are more clearly identifiable when we talk about class actions and absent plaintiffs that might be bound by a judgment to the rendition of which they have not participated.<sup>26</sup> But those rights become less evident when we talk about personal jurisdiction, subject matter jurisdiction, justiciability, abstention, pleadings, discovery, etc. It is the defendant who is dragged into court. The defendant is the one we need to take care of. But what about the plaintiff?<sup>27</sup> Where does the plaintiff stand in the analysis? Doesn't due process demand consideration of the plaintiff's rights too? The plaintiff's reliance and expectations? And how should we balance the conflicting interests? Would formalism (law discovery) or realism (law creation), or a combination of the two, serve due process better? If it's a combination, a balance of the two and the conflicting interests at stake, how should we balance?

This journey into procedural due process is intended to help in answering the above questions. It will shed more light into the content and contours of the principle, suggest a method to draw the optimal balance between the conflicting interests at stake, and ultimately develop a theory of procedural due process against which to assess procedural rules and doctrines.

Over the years, the Supreme Court has interpreted and applied the principle of due process. In *Kerry v. Din*,<sup>28</sup> the Court noted that

[t]he Due Process Clause has its origin in Magna Carta. As originally drafted, the Great Charter provided that "[n]o freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn

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<sup>26</sup> The mechanisms of Rule 23 are intended, among other things, to protect those very rights. See NEWBERG ON CLASS ACTIONS § 1:5 (5th ed. 2014) ("Rule 23 is construed to ensure that the representative nature of class action litigation safeguards these absent class members' due process rights.").

<sup>27</sup> As Frank I. Michelman noted, a denial of fair procedure to a civil plaintiff comes within the traditional due process concern about injurious treatment of individuals by the state, just insofar as we see the state's failure to protect the plaintiff's interests against the defendant's encroachments as itself a form of injury. Such is the SOCIAL COMPACT view according to which persons entering political association surrender to the state the use of force, for the safer protection of their several "lives, liberties, and estates." The state's regime of law and order then overrides the natural liberty of self-help, but only by replacing it with the state's obligation to protect.

Frank I. Michelman, in LEONARD W. LEVY AND KENNETH L. KARST, ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, Vol. 4, 2029 (2nd ed. 2000).

<sup>28</sup> 135 S. Ct. 2128 (2015).

him, but by lawful judgment of his peers, or by *the law of the land*.”<sup>29</sup>

In 1354, under Edward III, Chapter 29 of the Magna Carta was revised and the new provision for the first time contained the phrase “due process.”<sup>30</sup> At that time, the phrase was associated with a series of protections inherent in the trial process, like trial by jury,<sup>31</sup> and as the Court later explained, at the time of the Fifth Amendment’s ratification, the words “due process of law” were understood “to convey the same meaning as the words ‘by the law of the land’” in Magna Carta.<sup>32</sup> Of course, since the founding, “the amount and quality of process that our precedents have recognized as ‘due’ under the Clause has changed considerably.”<sup>33</sup>

At the beginning, the Magna Carta “law of the land” meant, at the very least, that a person could not be deprived of liberty or property except pursuant to established law. In other words, the “law of the land” imposed a rule of law principle.

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<sup>29</sup> *Id.* at 2132 (quoting Magna Carta, ch. 29, in 1 E. Coke, *The Second Part of the Institutes of the Laws of England* 45 (1797) (emphasis added)).

<sup>30</sup> LEONARD W. LEVY & KENNETH L. KARST, *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION*, Vol. II, at 828 (2002) (“A 1354 act of Parliament reconfirming MAGNA CARTA paraphrased its chapter 29 as follows: ‘That no man . . . shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in Answer by due Process of Law.’ This was the first reference to due process in English legal history. Chapter 29 of the 1225 issue of Magna Carta originally concluded with the phrase ‘by the LAW OF THE LAND.’”) (emphasis in original).

<sup>31</sup> Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1048 (1984) (“Well before our Constitution was drafted, British jurists had definitively associated this phrase with a variety of protections inherent in the trial process, most notably trial by jury. The framers of the fifth amendment could not have doubted that the due process concept included such protections, whatever they may have thought about its effect on substantive legislation. The framers of the fourteenth amendment were certainly of the same view. The extent to which the fourteenth amendment’s due process clause was intended to incorporate the Bill of Rights may be disputed, but it was at least intended to incorporate the due process clause of the fifth amendment. And no subsequent interpretation of either provision has seriously called its applicability to judicial trials into question.”).

<sup>32</sup> *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856); see also JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION*, 663 (1833) (“Lord Coke says, that these latter words, *per legem terrae* (by the law of the land,) mean by due process of law, that is, without due presentment or indictment, and being brought in to answer thereto by due process of the common law.”) It is true that the phrase “due process of law” technically referred to writs and forms of the law (process), but writs and forms defined the content of the law of the land. Cf. RODNEY L. MOTT, *DUE PROCESS OF LAW* 87-95 (1973) (emphasizing the “process” aspect of the phrase, but failing to see the relationship between process and substantive law).

<sup>33</sup> *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28-36 (1991) (Scalia, J. concurring in judgment).



The phrase “due process of law” then translated the law-of-the-land standard into a practical formula requiring the use of the appropriate (“due”) writ or form (“process of law”) in any act of potential deprivation. The required “process of law” reflected both the substantive and procedural components of the established law, drawing no distinction between the two. In short, all potential deprivations ought to proceed according to the process that encompassed the substantive standard. The due process standard, therefore, prohibited the King from imposing arbitrary deprivations on his subjects. Logically, it followed, a law that vested the King with arbitrary power would be invalid as inconsistent with the rule-of-law premise of due process. In short, to comply with due process an action ought to accord with an established, non-arbitrary standard of law.

*A. Procedural Due Process: The Path Traced by the U.S. Supreme Court’s Opinions*

After the Magna Carta, the scope of “due process” continued to evolve, and the phrase appears in literally thousands of Supreme Court opinions.

In many of those opinions, the phrase operates as nothing more than a passing reference; in others, it plays a pivotal role in the resolution of the controversy before the Court. A good many of the cases in that latter group address the scope of procedural due process. No single opinion, though, offers a clear statement of the theory of procedural due process.

*Murray’s Lessee v. Hoboken Land & Improvement Co.* stands as the Court’s first foray into the law of procedural due process.<sup>34</sup> At issue in that case was the constitutionality of a distress warrant issued by the Department of Treasury to secure property purchased by a customs collector who had allegedly used funds embezzled from the Treasury to purchase the property. The seizure was not preceded by notice or any form of hearing or judicial sanction, but was purely an exercise of executive authority undertaken pursuant to a federal statute that authorized the issuance of such warrants. The *Hoboken* Court upheld the executive action as consistent with due process.

The Court opened its due process analysis by observing that “[t]he words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in *Magna Charta*.

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<sup>34</sup> 59 U.S. (18 How.) 272 (1856).

Lord Coke, in his commentary on those words, (2 Inst. 50,) says they mean due process of law.”<sup>35</sup>

The Court did not elaborate on the meaning of those phrases, and endorsed a mechanical method of analysis, which was one large step removed from the principle:

The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process . . . . To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.<sup>36</sup>

The *Hoboken* Court’s method of judicial inquiry—relying exclusively on constitutional text and tradition—suggested that due process required nothing more than a pedigree of past practices. Indeed, the Court upheld the non-judicial issuance of the distress warrant based solely on its view that the Treasury had acted in conformity with a statute (law of the land) and that the statute found its roots in XVIII century practices by the Crown (due process).<sup>37</sup>

Even less enlightening was the Court’s circular approach in *Walker v. Sauvinet*,<sup>38</sup> where the Court rejected defendant’s argument that due process entitled him to a jury trial in a civil proceeding by observing that

[d]ue process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land . . . . Art. 6 Const. Here the State court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States.<sup>39</sup>

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<sup>35</sup> *Id.* at 276. This was also the view endorsed by Justice Joseph Story in his influential treatise on the Constitution. STORY, COMMENTARIES, *supra* note 32, at 663.

<sup>36</sup> *Murray’s Lessee*, 59 U.S. (18 How.) at 276–77.

<sup>37</sup> *Id.* at 276–79.

<sup>38</sup> 92 U.S. 90 (1876).

<sup>39</sup> *Id.* at 93.

In *Hurtado v. California*,<sup>40</sup> a case involving procedure in a criminal case, the Court seemed to endorse a slightly more expansive (and perhaps more theoretical) approach to due process. There it quoted, with approval, Justice William Johnson's views:

As to the words from *Magna Charta* . . . after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.<sup>41</sup>

And those of Thomas Cooley:

The principles, then, upon which the process is based, are to determine whether it is 'due process' or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen.<sup>42</sup>

Arguably, the statements of Johnson and Cooley locate the principle of due process in a non-formalistic prescription against arbitrary laws and abjure considerations of mere form. But what the *Hurtado* Court may have given with one hand, it withdrew with another:

The real syllabus of the passage quoted is that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows, that nothing else can be due process of law . . . . But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.<sup>43</sup>

Thus, the Court recognized that novel procedures could be deemed due process, but adhered to the view that established practices remained sufficient. In short, the right to due process remained grounded in past practices, though the Court was willing to recognize deviations from those past practices as constituting due process under appropriate circumstances.

The Court's methodological and non-theoretical approach to procedural due process continued into the early twentieth century, and is

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<sup>40</sup> 110 U.S. 516 (1884).

<sup>41</sup> *Id.* at 527 (quoting *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 234, 244 (1819)).

<sup>42</sup> *Id.* at 527–29.

<sup>43</sup> *Id.*

aptly exemplified by its decision in *Twining v. New Jersey*.<sup>44</sup> There the Court described a triumvirate of standards that controlled its due process jurisprudence:

First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country . . . .

Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment . . . .

Third. But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law, and protect the citizen in his private right, and guard him against the arbitrary action of government.<sup>45</sup>

In short, “settled usages” were sufficient but not necessary to due process. Applying this method, the Court concluded that the principle of self-incrimination was not a necessary settled usage within the meaning of the due process clause. The “plus” of both *Hurtado* and *Twining* was the Court’s recognition that due process was meant to prevent arbitrary government action.

It is perhaps ironic that three years prior to the Court’s decision in *Twining*, the Court had enforced an expansive version of substantive due process in *Lochner v. New York*.<sup>46</sup> There the Court found that New York’s maximum work week hour requirement was “an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty.”<sup>47</sup> The Court’s opinion, however, was less about a theory of due process than it was about a theory of economics.<sup>48</sup>

The two most important procedural due process cases of the first half of the XX century were undoubtedly *International Shoe Co. v.*

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<sup>44</sup> 211 U.S. 78 (1908), overruled in *Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>45</sup> *Id.* at 100–01.

<sup>46</sup> 198 U.S. 45 (1905).

<sup>47</sup> *Id.* at 56, 62.

<sup>48</sup> *Id.* at 74–75 (Holmes, J., dissenting).

*Washington*<sup>49</sup> and *Mullane v. Central Hanover Bank and Trust Co.*<sup>50</sup> Both cases followed the established due process model of validating novel practices that did not have the pedigree of settled usage, but they also offered more of a window into the meaning of due process. *International Shoe*'s reference to "traditional notions of fair play and substantial justice" gave prime importance to fairness and reasonableness,<sup>51</sup> while *Mullane* cast the due process inquiry as a balance between the interests of the state and the interests of the individual:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."

. . . .

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.<sup>52</sup>

Thus, *Mullane* and *International Shoe* gave us a sense that the core of procedural due process is some combination of fairness and reasonableness that requires a balancing between the interests of the state and the individual.<sup>53</sup>

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<sup>49</sup> 326 U.S. 310 (1950).

<sup>50</sup> 339 U.S. 306 (1950).

<sup>51</sup> *International Shoe*, 326 U.S. at 316.

<sup>52</sup> *Mullane*, 339 U.S. at 315 (citations omitted).

<sup>53</sup> See also *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 279 (1990) (due process requires balancing of liberty interests against relevant state interests).

Shortly after the decision in *Mullane*, the Court added some independent weight to the idea of fairness when, in *Bolling v. Sharpe*,<sup>54</sup> a companion case to *Brown v. Board of Education*,<sup>55</sup> the Court observed that

[w]e have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.<sup>56</sup>

This broader sense of fairness is also reflected in Justice Harlan’s dissent from *Poe v. Ullman*, and in the modern Court’s overall jurisprudence of substantive due process, where fairness becomes a product of the liberty interest at stake and arbitrariness is measured in light of the weight to be given that liberty interest.<sup>57</sup>

These essential components of due process analysis—fairness, reasonableness, and balancing—remain the core features of procedural due process. The balancing aspect of due process methodology is also well established and reflected in *Mathews v. Eldridge*:<sup>58</sup>

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>59</sup>

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<sup>54</sup> 347 U.S. 497 (1954).

<sup>55</sup> 347 U.S. 483 (1954).

<sup>56</sup> *Bolling*, 347 U.S. at 498–99.

<sup>57</sup> ALLAN IDES, CHRISTOPHER N. MAY & SIMONA GROSSI, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS 78-131 (7th ed 2016).

<sup>58</sup> 424 U.S. 319 (1976).

<sup>59</sup> *Id.* at 334–45.

A wide range of decisions incorporates these features through a case-by-case, context-specific assessment of due process. What emerges is a collection of platitudes, rules with exceptions, and a somewhat ad hoc and inconsistent applications of the variable standards of fairness and reasonableness. Here is a broad sampling of recent decisions.

*Ingraham v. Wright*:<sup>60</sup>

“[T]he range of interests protected by procedural due process is not infinite.” We have repeatedly rejected “the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause.” Due process is required only when a decision of the State implicates an interest within the protection of the Fourteenth Amendment. And “to determine whether due process requirements apply in the first place, we must look not to the ‘weight’ but to the nature of the interest at stake.”<sup>61</sup>

*O’Bannon v. Town Court Nursing Center*:<sup>62</sup>

Procedural due process seeks to ensure the accurate determination of decisional facts, and informed unbiased exercises of official discretion.<sup>63</sup>

*Davis v. Scherer*:<sup>64</sup>

Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment . . . . This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. The ‘right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.’ The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’<sup>65</sup>

*Walters v. National Ass’n of Radiation Survivors*:<sup>66</sup>

[T]he very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, “procedural due process rules are shaped by the risk of error

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<sup>60</sup> 430 U.S. 651 (1977).

<sup>61</sup> *Id.* at 672.

<sup>62</sup> 447 U.S. 773 (1980).

<sup>63</sup> *Id.* at 797.

<sup>64</sup> 468 U.S. 183 (1984).

<sup>65</sup> *Id.* at 202 (quoting Justice Powell in *Mathews v. Eldridge*, 424 U.S. at 332–33).

<sup>66</sup> 473 U.S. 305 (1985).

inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.”<sup>67</sup>

*Dowling v. U.S.*:<sup>68</sup>

Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate “fundamental fairness” very narrowly. As we observed in *Lovasco* . . .

”Judges are not free, in defining ‘due process,’ to impose on law enforcement officials [their] ‘personal and private notions’ of fairness and to ‘disregard the limits that bind judges in their judicial function.’ . . . [They] are to determine only whether the action complained of . . . violates those ‘fundamental conceptions of justice which lie at the base of our civil and political institutions,’ and which define ‘the community’s sense of fair play and decency.’ ”<sup>69</sup>

*Zinermon v. Burch*:<sup>70</sup>

First, the [Due Process] Clause incorporates many of the specific protections defined in the Bill of Rights . . . . Second, the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions “regardless of the fairness of the procedures used to implement them.” . . .

The Due Process Clause also encompasses a third type of protection, a guarantee of fair procedure . . . . In procedural due process claims, the deprivation by state action of a constitutionally protected interest in “life, liberty, or property” is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*. (“Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property”) . . . . Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

. . . .

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<sup>67</sup> *Id.* at 321 (internal citations omitted).

<sup>68</sup> 493 U.S. 342 (1990).

<sup>69</sup> *Id.* at 352–53 (internal citations omitted).

<sup>70</sup> 494 U.S. 113 (1990).



Due process, as this Court often has said, is a flexible concept that varies with the particular situation. To determine what procedural protections the Constitution requires in a particular case, we weigh several factors:

“First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

Applying this test, the Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property [and] “some kind of notice . . . . In some circumstances, however, the Court has held that a statutory provision for a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process.”<sup>71</sup>

Justice Scalia concurring in *Pacific Mut. Life Ins. Co. v. Haslip*:<sup>72</sup>

[O]ur due process opinions in recent decades have indiscriminately applied balancing analysis to determine “fundamental fairness,” without regard to whether the procedure under challenge was (1) a traditional one and, if so, (2) prohibited by the Bill of Rights. Even so, however, very few cases have used the Due Process Clause, without the benefit of an accompanying bill of Rights guarantee, to strike down a procedure concededly approved by traditional and continuing American practice. Most notably, in *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 340 (1969), over the strenuous dissent of Justice Black, the Court declared unconstitutional the garnishment of wages, saying that “the fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms.” And in *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Court invalidated general *quasi in rem* jurisdiction, saying that “‘traditional notions of fair play and substantial justice’ can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage,” *id.* at 212. Such cases, at least in their broad

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<sup>71</sup> *Id.* at 125–28.

<sup>72</sup> 499 U.S. 1 (1991).

pronouncements if not with respect to the particular provisions at issue, were in my view wrongly decided.<sup>73</sup>

*Honda Motor Co., Ltd. v. Oberg*:<sup>74</sup>

Because the basic procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which a party has complained of their denial. In fact, most of our due process decisions involve arguments that traditional procedures provide too little protection and that additional safeguards are necessary to ensure compliance with the Constitution. *Ownbey v. Morgan*, 256 U.S. 94 (1921); *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604 (1990); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

Nevertheless, there are a handful of cases in which a party has been deprived of liberty or property without the safeguards of common-law procedure. *Hurtado v. California*, 110 U.S. 516 (1884); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Brown v. Mississippi*, 297 U.S. 278 (1936); *In re Oliver*, 333 U.S. 257 (1948) . . . . When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process. Of course, not all deviations from established procedures result in constitutional infirmity. As the Court noted in *Hurtado*, to hold all procedural change unconstitutional “would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.”<sup>75</sup>

*County of Sacramento v. Lewis*:<sup>76</sup>

The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense

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<sup>73</sup> *Id.* at 36. Although Justice Scalia would not go as far as to say “that every practice sanctioned by history is constitutional,” *id.* at 38, he would certainly give dispositive weight to widespread adherence to a historical practice (“I reject the principle . . . that a traditional procedure of our society becomes unconstitutional whenever the Members of this Court ‘lose . . . confidence’ in it.” Scalia, J., concurring in judgment, *id.* (internal citations omitted)), emphasizing that the Due Process’s “function is negative, not affirmative, and it carries no mandate for particular measures of reform.” *Id.* at 39 (internal citations omitted).

<sup>74</sup> 512 U.S. 415 (1994).

<sup>75</sup> *Id.* at 430–31 (internal citations omitted).

<sup>76</sup> 523 U.S. 833 (1998) (internal citations omitted).

of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.<sup>77</sup>

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We have emphasized time and again that “[t]he touchstone of due process is protection of the individual against arbitrary action of government,” *Wolff v. McDonnell*, 418 U.S. 539 (1974), whether the fault lies in a denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972), (the procedural due process guarantee protects against “arbitrary takings”), or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, see, e.g., *Daniels v. Williams*, 474 U.S., at 331 (the substantive due process guarantee protects against government power arbitrarily and oppressively exercised). While due process protection in the substantive sense limits what the government may do in both its legislative, see, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965), and its executive capacities, see, e.g., *Rochin v. California*, 342 U.S. 165 (1952), criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue.<sup>78</sup>

*Ortiz v. Fibreboard Corp.*:<sup>79</sup>

[M]andatory class actions aggregating damages claims implicate the due process “principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *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,” it being “our ‘deep-rooted historic tradition that everyone should have his own day in court[.]’” Although “we have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party,” or “where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate,” the burden of justification rests on the exception . . . .

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. . . We raised the flag on this issue of due process more than a decade ago in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) [and] held that out-of-state plaintiffs could not invoke the

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<sup>77</sup> *Id.* at 850 (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)).

<sup>78</sup> *Id.* at 845–46.

<sup>79</sup> 527 U.S. 815 (1999).

same due process limits on personal jurisdiction that out-of-state defendants had under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny. But we also saw that before an absent class member's right of action was extinguishable due process required that the member "receive notice plus an opportunity to be heard and participate in the litigation," and we said that "at a minimum . . . an absent plaintiff [must] be provided with an opportunity to remove himself from the class."<sup>80</sup>

*Lujan v. G & G Fire Sprinklers, Inc.*:<sup>81</sup>

In *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961), we said: "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. '[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. It is compounded of history, reason, the past course of decisions . . . ."<sup>82</sup>

Justice Ginsburg dissenting in *Republican Party of Minnesota v. White*:<sup>83</sup>

This judicial obligation to avoid prejudgment corresponds to the litigant's right, protected by the Due Process Clause of the Fourteenth Amendment, to "an impartial and disinterested tribunal in both civil and criminal cases[.] The proscription against pledges or promises thus represents an accommodation of "constitutionally protected interests [that] lie on both sides of the legal equation." Balanced against the candidate's interest in free expression is the litigant's "powerful and independent constitutional interest in fair adjudicative procedure." ("Two principles are in conflict and must, to the extent possible, be reconciled . . . . The roots of both principles lie deep in our constitutional heritage.").

The impartiality guaranteed to litigants through the Due Process Clause adheres to a core principle: "[N]o man is permitted to try cases where he has an interest in the outcome." Our cases have "jealously guarded" that basic concept, for it "ensur[es] that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."<sup>84</sup>

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<sup>80</sup> *Id.* at 846–48.

<sup>81</sup> 532 U.S. 189 (2001).

<sup>82</sup> *Id.* at 196–97.

<sup>83</sup> 536 U.S. 765 (2002).

<sup>84</sup> *Id.* at 813–14 (Ginsburg, J., dissenting) (internal citations omitted).

*Wilkinson v. Austin*.<sup>85</sup>

Our procedural due process cases have consistently observed that these are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations.<sup>86</sup>

*Turner v. Rogers*:<sup>87</sup>

“[W]e consequently determine the ‘specific dictates of due process’ by examining the ‘distinct factors’ that this Court has previously found useful in deciding what specific safeguards the Constitution’s Due Process Clause requires in order to make a civil proceeding fundamentally fair.”<sup>88</sup>

*J. McIntyre Machinery, Ltd. v. Nicaastro*:<sup>89</sup>

“Due process protects the defendant’s right not to be coerced except by lawful judicial power.”<sup>90</sup>

*Bank Markazi v. Peterson*:<sup>91</sup>

“The Due Process Clause also protects the interest in fair notice and repose that may be compromised by retroactive legislation.”<sup>92</sup>

Although a general pattern of due process analysis has emerged and is reflected in many of the above quotations, the absence of a unifying theory is evident and there remains some areas of critical disagreement pertaining to application.

The Court’s decision in *Burnham v. Superior Court*<sup>93</sup> reflects some of that tension. Justice Scalia, writing for a plurality, tightly linked due

<sup>85</sup> 545 U.S. 209 (2005).

<sup>86</sup> *Id.* at 226 (citing *see Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1, 15 (1979); *Cleveland Bd. of Ed. V. Loudermill*, 470 U.S. 532, 543 (1985); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (“For more than a century the central meaning of procedural due process has been clear: ‘Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified’” (quoting *Baldwin v. Hale*, 1 Wall. 223, 233, 17 L.Ed. 531 (1864))).

<sup>87</sup> 564 U.S. 431 (2011).

<sup>88</sup> *Id.* at 444–45. It is interesting to note how the Court, in determining whether the case presents a violation of procedural due process rights, refer to “factors” of a test, rather than to the overarching principle. Will those “factors” always provide the right guidance? Are those factors exhaustive, comprehensive? Do they properly capture the wide range of interests that any given situation might present? Do they thoroughly address the risk of error? In the absence of an underlying, comprehensive, overarching due process theory/principle capable of application to a wide range of cases, it is hard to answer. Also, the absence of any such theory will require the formulation of further tests as we are presented with new situations that do not perfectly fit the *Mathews* test.

<sup>89</sup> 564 U.S. 873 (2011).

<sup>90</sup> *Id.* at 877.

<sup>91</sup> 136 S. Ct. 1310 (2016).

<sup>92</sup> *Id.* at 1325.

<sup>93</sup> 495 U.S. 604 (1990).

process to tradition and settled usage.<sup>94</sup> Justice White, concurring in part and concurring in the judgment, admitted the possibility that a widespread practice validated by tradition could still violate due process if it were “so arbitrary and lacking in common sense.”<sup>95</sup> And Justice Brennan, concurring in the judgment, took an even less charitable view of historical practices, stating, “‘traditional notions of fair play and substantial justice’ can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage.”<sup>96</sup>

While the distinctions among the *Burnham* Justices may turn less on the meaning of due process than on each Justice’s views of the Court’s interpretive function, it remains possible, and perhaps likely, that this divergence of views is also a product of the lack of a theoretical foundation for the Court’s jurisprudence of due process.<sup>97</sup>

### B. What’s missing?

What’s missing in the above opinions is the overarching due process principle, the foundational due process theory from which new rules and doctrines might be derived by way of interpretation. This deficiency is

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<sup>94</sup> *Id.* at 622 (characterizing due process as “a doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard.”).

<sup>95</sup> *Id.* at 628.

<sup>96</sup> *Id.* at 630 (internal citations omitted).

<sup>97</sup> *Id.* at 101–02; *see also* *Grosjean v. American Press Co.*, 297 U.S. 233, 245 (1936) (“A determination of the question whether the tax is valid in respect of the point now under review requires an examination of the history and circumstances which antedated and attended the adoption of the abridgement clause of the First Amendment, since that clause expresses one of those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’ and, as such, is embodied in the concept ‘due process of law’ and, therefore, protected against hostile state invasion by the due process clause of the Fourteenth Amendment.”) (internal citations omitted); *De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937) (“But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause.”); *Buchalter v. People of State of New York*, 319 U.S. 427, 429–30 (1943) (“The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as the ‘law of the land.’”); *Lyons v. State of Okl.*, 322 U.S. 596, 601–02 (1944) (“The federal question presented is whether the second confession was given under such circumstances that its use as evidence at the trial constitutes a violation of the due process clause of the Fourteenth Amendment, which requires that state criminal proceedings ‘shall be consistent with the fundamental principles of liberty and justice.’”).

puzzling given that every procedural category used or discussed by the Court is premised on that very theory.

So what could be the reason behind this deficiency? Could it be, as the Court observed, that “[t]he basic procedural protections of the common law have been regarded as so fundamental, [that] very few cases have arisen in which a party has complained of their denial?”<sup>98</sup> Or is it perhaps that procedural due process is one of those very concepts whose meaning and scope are so pervasive and so intuitive that they don’t require full articulation? But is either really so? What if the lack of true understanding of the theory of procedural due process were responsible for the scarce number of procedural due process complaints? And what if the lack of true understanding of the theory of procedural due process were responsible of some of the Court’s opinions that are hardly conducive of democracy?<sup>99</sup> Although the scope of procedural due process is so pervasive, it is not necessarily equally intuitive.

The theory of procedural due process that one derives from the Court’s passages above is one requiring “minimum procedural safeguards,”<sup>100</sup> “rules . . . shaped by the risk of error inherent in the truth-finding process,”<sup>101</sup> and by “those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,”<sup>102</sup> rules intended to promote an “accurate determination of decisional facts, and informed by unbiased exercises of official discretion.”<sup>103</sup> The principle, so described, remains general, and necessarily so given that, as the Court explained, the concept is “flexible and calls for such procedural protections as the particular situation demands.”<sup>104</sup> Procedural due process doesn’t demand exactness.<sup>105</sup> Instead, it only demands that the procedure in place, balancing fairness and efficiency concerns, and the opposing interests of the parties and the judicial system as a whole, reaches the optimal result.

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<sup>98</sup> *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430–31 (1994).

<sup>99</sup> *See infra* Part III.

<sup>100</sup> *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 624 (1974) (Powell, J. concurring).

<sup>101</sup> *Walters v. National Ass’n of Radiation Survivors*, 473 U.S. 305, 321 (1985).

<sup>102</sup> *De Jonge*, 299 U.S. at 364.

<sup>103</sup> *O’Bannon v. Town Court Nursing Center*, 447 U.S. 773, 797 (1980).

<sup>104</sup> *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 53 (1991).

<sup>105</sup> See, for example, the standards of “more likely than not”, “clear and convincing evidence,”—applicable in civil cases—and “beyond reasonable doubt”—applicable in criminal cases. None of these standards requires exactness, certainty. But they are all intended to achieve the optimal balance between the various conflicting interests and needs of the parties involved, of the judicial system, and society, as well as the needs of logic, efficiency, fairness, and democracy.

Justice Scalia would likely disagree with the above description.<sup>106</sup> He would argue that the text of the Constitution or, in its absence, the common law practices and procedure should control. Stare decisis, though, and adherence to the established rules and practices should be just part of the analysis if we are to adhere to due process. A due process analysis would factor in the past, but would not lead the past control the present, a result that would clearly be inconsistent not only with due process, but with the very essence of the common law system,<sup>107</sup> a system designed to be flexible, in service of the people, evolving with the people. Justice Scalia, though, viewed stare decisis as indispensable to achieve the equal protection of the laws,<sup>108</sup> and that approach, sometimes followed by

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<sup>106</sup> See *supra* notes 72 and 93–94 and accompanying text. See also Justice Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989):

I had always thought that the common-law approach had at least one thing to be said for it: it was the course of judicial restraint, “making” as little law as possible in order to decide the case at hand. I have come to doubt whether that is true. For when, in writing for the majority of the Court, I adopt a general rule, and say, “This is the basis of our decision,” I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle. In the real world of appellate judging, it displays more judicial restraint to adopt such a course than to announce that, “on balance,” we think the law was violated here—leaving ourselves free to say in the next case that, “on balance,” it was not. It is a commonplace that the one effective check upon arbitrary judges is criticism by the bar and the academy. But it is no more possible to demonstrate the inconsistency of two opinions based upon a “totality of the circumstances” test than it is to demonstrate the inconsistency of two jury verdicts. Only by announcing rules do we hedge ourselves in.

<sup>107</sup> When commenting on the common law system, Justice Scalia noted that sticking close to those facts, not relying upon overarching generalizations, and thereby leaving considerable room for future judges is thought to be the genius of the common law system. The law grows and develops, the theory goes, not through the pronouncement of general principles, but case-by-case, deliberately, incrementally, one-step-at-a-time. Today we decide that these nine facts sustain recovery. Whether only eight of them will do so—or whether the addition of a tenth will change the outcome—are questions for another day.

Justice Antonin Scalia, *The Rule of Law*, *supra* note 106, at 1177.

<sup>108</sup> Justice Antonin Scalia, *The Rule of Law*, *supra* note 106, at 1178 (“To begin with, the value of perfection in judicial decisions should not be overrated. To achieve what is, from the standpoint of the substantive policies involved, the ‘perfect’ answer is nice—but it is just one of a number of competing values. And one of the most substantial of those competing values, which often contradicts the search for perfection, is the appearance of equal treatment . . . . The Equal Protection Clause epitomizes justice more than any other provision of the Constitution. And the trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice very well. When a case is accorded a different disposition from an earlier one, it is important, if the system of



the Court, has led to results that are hardly conducive of due process and democratic values.

Roscoe Pound described the jurisprudential thinking over time in terms of jurisprudence of conceptions, a jurisprudence of premises, and an empirical jurisprudence.<sup>109</sup> Under the jurisprudence of conceptions “[c]ertain fundamental conceptions are worked out from traditional legal principles, and the rules for the cause in hand are deduced from these conceptions by a purely logical process.”<sup>110</sup> The jurisprudence of premises takes “the rules of a traditional system . . . as premises and . . . develop[s] these premises in accordance with some theory of the ends to be met or of the relation which they should bear, when applied, to the social condition of the time being.”<sup>111</sup> Here, pure logic is tempered by consideration of the consequences, but still the analysis is cabined within the abstract legal standards and categories. Finally, an empirical jurisprudence begins with the facts and operates through a “process of inclusion and exclusion” and a method of “trial-hypothesis and confirmation” to discover the law.<sup>112</sup>

Pound thought that the first two categories of jurisprudence—conceptions and premises—were inadequate, as both were premised to some extent on the perceived immutability of established legal standards. If not based on natural law itself, they operated on the natural-law understanding that law can be perfectly established and, once so established, can serve as a sufficient tool for solving present claims and controversies, even those that were unanticipated by the law maker. Pound thought that the empirical jurisprudence was problematic too: the law would develop too slowly through the case-by-case approach, and courts were “over-ambitio[us]” when “lay[ing] down universal rules,” turning the empirical jurisprudence into a jurisprudence of conceptions.<sup>113</sup> Pound still considered the empirical jurisprudence to be the best of the alternatives, despite its flaws.

As I have elsewhere argued,<sup>114</sup> the current U.S. Supreme Court’s modern jurisprudence doesn’t fit any of the above categories. The Court’s jurisprudence can’t be described as a jurisprudence of conceptions or premises as, even if the Court often invokes established principles, it just as often ignores those principles or distorts them in service of unstated

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justice is to be respected, not only that the later case be different, but that it be seen to be so.”).

<sup>109</sup> Roscoe Pound, *Courts and Legislation*, 7 AM. POL. SCI. REV. 361 (1913).

<sup>110</sup> *Id.* at 371.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 372.

<sup>114</sup> See SIMONA GROSSI, THE U.S. SUPREME COURT AND THE MODERN COMMON LAW APPROACH, 6–7 (2015).

goals. Often the Court sees cases and opinions as opportunities to legislate, and when it legislates, it does so through narrow rules and rigid multipart formulas that are not conducive to due process analysis.<sup>115</sup> And the Court's jurisprudence cannot be described as empirical either when its purported goal is to discover the true meaning of the law in original understandings and fundamental texts, beyond the very facts before the Court.

The Court's modern jurisprudence and, in particular Justice Scalia's interpretive approach, is not conducive to due process. As the Court noted in the late XIX century, to make *stare decisis* controlling "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."<sup>116</sup>

A textual approach to due process that views the due process function as a "negative, not affirmative, [one carrying] no mandate for particular measures of reform"<sup>117</sup> negates the very essence of due process and deprives due process of the potential of inspiring and ultimately shaping rules and doctrines in service of our democratic system. And, in any event, even if the Court has sometimes described the due process function as a "negative" one, that is, one intended to protect the individual against arbitrary state action,<sup>118</sup> due process has a positive function too as it imposes an obligation on the states to provide a judicial system that is fair, efficient, and just.

The core of due process is balance. It is the balance between the interests of the individuals—the parties directly and indirectly affected by the rule, doctrine, or the outcome of the litigation—and the society those individuals belong to. It is the balance between formalism—intended as adherence to the rule of law, transparency, and predictability—and pragmatism—intended as a case-by-case approach to the facts and innovation, adaptation of the given categories to the specific needs of the cases, and consideration of the totality of the circumstances presented.<sup>119</sup>

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<sup>115</sup> *Id. See, e.g.*, Justice Scalia, *The Rule of Law*, *supra* note 106, at 1177 ("[P]erfect justice can only be achieved if courts are unconstrained by such imperfect generalizations."). Justice Scalia also thought narrow rules were indispensable in a common law system where the Supreme Court only reviews "an insignificant proportion of the decided cases" and "will revisit the area in question with great infrequency." *Id.* at 1178.

<sup>116</sup> *Hurtado v. California*, 110 U.S. 516, 528–29 (1884).

<sup>117</sup> *Owney v. Morgan*, 256 U.S. 94, 112 (1921).

<sup>118</sup> *See, e.g., id.*; *see also* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY, 97–98 (4th ed. 2002).

<sup>119</sup> *See, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998). Rejecting the "totality of the circumstances" approach, Justice Scalia noted:

The demand of justice that each case presents comes from the very facts of that case, to which a judge must attend, balancing the conflicting interests and needs. And it is the balance between pre-existing ideas and conceptions and the needs for reform.

That balance is the core of due process should not surprise, as due process is intended to achieve peace, and peace is balance. The more factors, that is, the more variables meaningfully affecting any given situation that balance will ponder, the more that balance will minimize the risk of error and approximate peace.<sup>120</sup> The fact-finding role of the judge

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The fact is that when we decide a case on the basis of what we have come to call the “totality of the circumstances” test, it is not we who will be “closing in on the law” in the foreseeable future, but rather thirteen different courts of appeals—or, if it is a federal issue that can arise in state court litigation as well, thirteen different courts of appeals and fifty state supreme courts. To adopt such an approach, in other words, is effectively to conclude that uniformity is not a particularly important objective with respect to the legal question at issue.

Justice Scalia, *The Rule of Law*, *supra* note 107, at 1179. Scalia also noted that:

when an appellate judge comes up with nothing better than a totality of the circumstances test to explain his decision, he is not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact finding. That is certainly how we describe the function of applying the most venerable totality of the circumstances test of them all—the “reasonable man” standard for determining negligence in the law of torts. At the margins, of course, that determination, like every determination of pure fact or mixed fact and law, can become an issue of law—if, for example, there is no evidence on which any jury can reasonably find negligence. And even short of that extreme, the courts have introduced some elements of law into the determination—the rule, for example, that disregard of some statutorily prescribed safeguards is negligence per se, or the opposite rule that compliance with all the requirements of certain statutes precludes a finding of negligence. But when all those legal rules have been exhausted and have yielded no answer, we call what remains to be decided a question of fact—which means not only that it is meant for the jury rather than the judge, but also that there is no single “right” answer. It could go either way. Only, as I say, at the margins can an appellate judge say that this determination must come out the other way as a matter of law.

*Id.* at 1180–81.

<sup>120</sup> Justice Scalia, though, would reduce the variables at stake in due process analysis to one: predictability.

This last point suggests another obvious advantage of establishing as soon as possible a clear, general principle of decision: predictability. Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes . . . . As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean. Predictability, or as Llewellyn put it, “reckonability,” is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.

is essential to the judge's justice mission. So, the factual component is essential to legal analysis, and in fact, it is essential to any legal analysis that is consistent with due process, as the law doesn't exist in abstract, it exists and is created through the facts, with the facts.

A judicial opinion that gave primacy to the law over the facts of the case would fail to accomplish its justice mission. Hence, the Court's approach and Justice Scalia's position to the contrary<sup>121</sup> are troublesome. And it is troublesome that Justice Scalia viewed balance in legal analysis as the very last resort.<sup>122</sup>

The legislature operates in a place far remote from cases. And in making the best synthesis, the best balance of the variables most recurring in the type of cases under exam that it can, the legislature produces rules that are capable of application to a wide range of cases. To be optimal and consistent with due process those rules should factor in the various conflicting interests at stake, the needs of fairness, efficiency, logic, democracy, and they should be drafted in a way that provides guidance to judges and lawyers without unnecessarily constraining these actors' discretion. The legislature's rules should allow judges and lawyers to draw balances of the conflicting interests that would be optimal in any given situation.

This is because judges and lawyers, unlike the legislature, will in fact be exposed to real cases, each presenting variables that might not necessarily be those originally considered by the legislature. To be consistent with the balance of due process, the legislative rules should allow lawyers and judges to catch and ponder the new variables that each case presents. And in deciding the very cases presented and formulating doctrines that interpret the existing rules and principles, judges should disclose the analytic path followed, the various conflicting interests at stake, the needs of efficiency, fairness, logic, and the way in which those

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*Id.* at 1799. And, yes, predictability ensures that procedure be fair and just and efficient, but predictability is just one factor. An opinion that is predictable but that does not make justice in the particular case presented, one that doesn't optimally balance the conflicting interests at stake, is not necessarily a just opinion.

<sup>121</sup> See *infra* Part III.

<sup>122</sup> Justice Scalia observed:

We will have totality of the circumstances tests and *balancing modes of analysis* with us forever—and for my sins, I will probably write some of the opinions that use them. All I urge is that those modes of analysis be avoided where possible; that the Rule of Law, the law of rules, be extended as far as the nature of the question allows; and that, to foster a correct attitude toward the matter, we appellate judges bear in mind that when we have finally reached the point where we can do no more than consult the totality of the circumstances, we are acting more as fact-finders than as expositors of the law.

Justice Scalia, *The Rule of Law*, *supra* note 107, at 1187 (emphasis added).

interests and needs have been balanced. The judicial doctrine or formula finally endorsed should be flexible enough to allow other judges and lawyers to use it prospectively and adapt it to still other different situations presented.

Due process fits well into a representative democracy, and easily aligns with the inherently democratic principles of liberty and equality. Thus, the requirement that the law be established honors the democratic voice in the lawmaking function as well as the principle of fair notice, while the proscription against arbitrary laws honors the democratic commitment to equality.

Whether a law is deemed arbitrary depends on whether it contains discernable standards and whether those standards are reasonable. The absence of discernable standards runs the risk of violating the principle of equality. But the absence of reasonableness would invite unjustified intrusions on liberty. As to the latter, the due process measure of reasonableness requires a balancing of the private and public interests at stake. This balancing must take into account fairness, efficiency, institutional competence, and the ultimate rationality of the standard at issue. As Justice Harlan recognized in his *Poe v. Ullman* dissent, the demands of that rationality will vary with the nature of the right and the scope of the intrusion.<sup>123</sup>

Given the inherent democratic commitment to liberty and equality, due process rationality must require something more than just a deeply held belief in the righteousness of the law.<sup>124</sup> Rather, rationality must be built on facts. In other words, democratic rationality requires a faith-neutral examination of the facts. That does not mean that faith plays no part in a democracy; faith may be the driving force that leads to the enactment of a rational statute such as the Civil Rights Act of 1964. But faith alone cannot justify the democratic rationality of the enactment. Hence, democratic rationality is a rationality premised on facts and reason. In the context of substantive due process, that means that a law's legitimacy cannot rest on faith alone; and in the context of procedure, "this is how we've always done it," cannot itself establish the modern rationality of the procedure at issue.

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<sup>123</sup> *Poe v. Ullman*, 367 U.S. 497, 522–55 (1961) (Harlan, J., dissenting).

<sup>124</sup> *See, e.g., U.S. v. Lovasco*, 431 U.S. 783, 790 (1977) ("Judges are not free, in defining "due process," to impose on law enforcement officials our "personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function.") (internal citations omitted).

### III. PROCEDURAL DUE PROCESS AND PROCEDURE

Testing some procedural rules and doctrines against the due process platform provided in Part II will help identify inconsistencies with the due process theory so far articulated, and further refine the theory itself.

#### *A. Subject Matter Jurisdiction*

In *Gully v. First Nat. Bank*,<sup>125</sup> the Court articulated the subject matter, federal-question, arising-under formula as follows:

To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto, and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense.<sup>126</sup>

The *Gully* Court also added:

This Court has had occasion to point out how futile is the attempt to define a 'cause of action' without reference to the context. To define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral,

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<sup>125</sup> 299 U.S. 109 (1936).

<sup>126</sup> *Id.* at 112–13 (internal citations omitted).

between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.<sup>127</sup>

The formula, flexible and principled, perfectly captured the law of subject matter jurisdiction as it then stood: federal law had to be an essential element of the plaintiff's claim for a federal court to have federal question jurisdiction over that claim. And it made sense. If the controversy on federal law is "merely possible or conjectural,"<sup>128</sup> a federal court's involvement in the dispute won't be supported by § 1331. And, of course, the subject matter jurisdiction inquiry must be a context-specific inquiry, one that requires a "common-sense accommodation of judgment to kaleidoscopic situations."<sup>129</sup> By assessing the plaintiff's claim in the case, one for breach of contract, one whose resolution did not depend on the interpretation, application, or effect of federal law, the Court concluded that the case was not one arising under federal law and, thus, federal courts would not have subject matter jurisdiction over it.

As described, the *Gully* subject matter jurisdiction formula seems complete, adaptable to the many different variables that each case may present, and truthful to the idea of federal courts as courts for the vindication and enforcement of federal rights and the uniform interpretation and application of federal law.<sup>130</sup> The opinion in *Gunn v. Minton*<sup>131</sup> is hard to reconcile with this formula and, more generally, with due process.

Endorsing the subject matter jurisdiction test articulated in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*,<sup>132</sup> the *Gunn* Court found that the plaintiff's malpractice claim whose success depended on the interpretation and application of federal patent law did not arise under federal law, because it foundered on the third prong of the *Grable* test. Basically, although federal law was essential to the plaintiff's claim,<sup>133</sup> and "actually disputed,"<sup>134</sup> it was not "substantial"—that is, not important enough for the federal system as a whole<sup>135</sup>—as the legal malpractice claim posed a federal question "in a merely hypothetical sense,"<sup>136</sup> and

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<sup>127</sup> *Id.* at 118–19.

<sup>128</sup> *Id.* at 113.

<sup>129</sup> *Id.*

<sup>130</sup> For further elaboration of this theme, see Simona Grossi, *A Modified Theory*, *supra* note 10, at 973–74.

<sup>131</sup> 133 S. Ct. 1059 (2013).

<sup>132</sup> 545 U.S. 308 (2005).

<sup>133</sup> *Gunn*, 133 S. Ct. at 1065.

<sup>134</sup> *Id.* at 1065–66.

<sup>135</sup> *Id.* at 1066.

<sup>136</sup> *Id.* at 1066–67 (Because of the backward-looking nature of a legal malpractice claim, the question is posed in a merely hypothetical sense: *If* Minton's lawyers had raised a timely experimental-use argument, would the result in the patent infringement proceeding

was “fact-bound and situation specific,”<sup>137</sup> that is, not “controlling numerous other cases.”<sup>138</sup> And because the claim foundered on the third prong of the *Grable* test, “[i]t follow[ed] that *Grable*’s fourth requirement [was] also not met.”<sup>139</sup>

The opinion, entangled in the *Grable* test, failed to realistically appraise the plaintiff’s claim and gave primacy to the government’s interests, whatever they were in the case—hard to imagine that the federal government would not have a “strong interest” in providing a federal forum for the interpretation and application of patent law—over the interest of the plaintiff in having a federal forum for the vindication of his federal rights. And, even more troubling, the Court indicated that claims that were “fact-bound and situation specific” would not meet the “substantial” prong of the *Grable* test. What about the realistic appraisal demanded by due process? What about the need to be attentive and responsive to the changing facts and circumstances? And was *Gunn* respectful of *Gully*? One could say that the modern approach to subject matter jurisdiction has to be traced to *Grable*, not to *Gully*. But if one could defend the result in *Grable* under the “traditional notions of fair play and substantial justice,” I’m not sure one could equally defend *Gunn* under similar bases.

What about the plaintiff’s rights and expectations? And was the interest of the judicial system as a whole in having federal courts available for the uniform interpretation and application of federal law and for the vindication of federal rights properly respected and considered? In this respect, the *Gunn* Court noted that

even assuming that a state court’s case-within-a-case adjudication may be preclusive under some circumstances, the result would be

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have been different? No matter how the state courts resolve that hypothetical “case within a case,” it will not change the real-world result of the prior federal patent litigation. Minton’s patent will remain invalid.)

<sup>137</sup> *Id.* at 1068.

<sup>138</sup> *Id.* at 1067.

<sup>139</sup> *Gunn*, 133 S. Ct. at 1068. The Court noted:

That requirement is concerned with the appropriate “balance of federal and state judicial responsibilities.” We have already explained the absence of a substantial federal issue within the meaning of *Grable*. The States, on the other hand, have ‘a special responsibility for maintaining standards among members of the licensed professions.’ Their ‘interest . . . in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been officers of the courts.’ We have no reason to suppose that Congress—in establishing exclusive federal jurisdiction over patent cases—meant to bar from state courts state legal malpractice claims simply because they require resolution of a hypothetical patent issue.



limited to the parties and patents that had been before the state court. Such “fact-bound and situation-specific” effects are not sufficient to establish federal arising under jurisdiction.

Nor can we accept the suggestion that the federal courts’ greater familiarity with patent law means that legal malpractice cases like this one belong in federal court. It is true that a similar interest was among those we considered in *Grable*. But the possibility that a state court will incorrectly resolve a state claim is not, by itself, enough to trigger the federal courts’ exclusive patent jurisdiction, even if the potential error finds its root in a misunderstanding of patent law.<sup>140</sup>

In other words, the possibility that the individual’s federal rights might not be properly honored should be given no weight in the analysis. The individual’s interests and rights were left out of the formula.

The Court seemed to be concerned about the state system more than the individual. After all, the Court noted, a state court’s decision on patent law would not affect the development of federal patent law.<sup>141</sup> But wouldn’t it? Shouldn’t we expect the patent lawyers to inform their methods and modes of litigating patent cases to the state courts’ approach to specific patent issues, as after *Gunn*, this is the exclusive place where they’ll be sued on legal malpractice claims arising from patent litigations?

The individual’s interests are not considered, the system’s interests and the consequences on the system are not properly assessed, and the contextual, realistic appraisal of the facts is discarded.<sup>142</sup> The opinion doesn’t seem informed by due process at all.

### *B. Personal Jurisdiction*

In 1945, *International Shoe Co. v. Washington*<sup>143</sup> extended the traditional territorial reach of personal jurisdiction to cases where, even if the defendant “be not present within the territory of the forum, he [has] certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>144</sup> When that happens, the exercise of personal jurisdiction will be consistent with due process,<sup>145</sup> and it is so because the defendant’s “sufficient

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<sup>140</sup> *Id.* at 1067–68 (internal citations omitted).

<sup>141</sup> *Id.* at 1068.

<sup>142</sup> In this respect, the *Gunn* Court also affirms that “for the reasons we discuss, we are comfortable concluding that state legal malpractice claims based on underlying patent matters will rarely, if ever, arise under federal patent law for purposes of §1338(a).” *Id.* at 1065.

<sup>143</sup> 326 U.S. 310 (1945).

<sup>144</sup> *Id.* at 316.

<sup>145</sup> *Id.*

contacts or ties with the state of the forum . . . make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there.”<sup>146</sup>

The *International Shoe* formula was principled and flexible, it called for a realistic appraisal of the facts (the defendant’s contacts with the forum) while being respectful of the established tradition (“traditional notions of fair play and substantial justice”); it balanced the interests of the defendant (being sued in a forum where it could expect to be sued), the plaintiff (being able to sue in the forum where the claim arose and where the injury occurred), and the forum state and the judicial system as a whole (in having lawsuits tried in the forum where the center of gravity was); and it complied with logic, fairness and efficiency. It made sense to try a case where the evidence would be, where the conduct complained of took place (center of gravity), and the injured party was. The exercise of jurisdiction in the forum would be fair to the parties and their need to defend (the bulk of the evidence would be in the forum), and it would be efficient (there would be an optimal use of judicial and parties’ resources, as the evidence would be in the forum, and a judge of the forum would be called to interpret and apply a law of the forum state that was violated).

That elegant, due process approach was not followed by the Court in *J. McIntyre Machinery, Ltd. v. Nicastro*,<sup>147</sup> an opinion that is hard to reconcile with *International Shoe*. In *McIntyre*, Nicastro, a resident of New Jersey, severely injured himself while using a three-ton metal shearing machine manufactured by the British manufacturer McIntyre UK.<sup>148</sup> McIntyre UK had not directly shipped the machine to the forum, but instead its exclusive distributor, McIntyre Machinery America, Ltd., had. But, despite the similar names, McIntyre UK and McIntyre America were separate and independent entities.<sup>149</sup> And since McIntyre UK “had no office in New Jersey; it [did not pay] taxes nor owned property there; and it [did not] advertise[] in, nor sent any employees to, the State . . . [and did not] ‘have a single contact with New Jersey short of the machine in question ending up in this state[,]’ . . . [t]hese facts . . . do not show that J. McIntyre purposefully availed itself of the New Jersey market.”<sup>150</sup> Hence, the New Jersey court had no personal jurisdiction over McIntyre UK.

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<sup>146</sup> *Id.* at 320.

<sup>147</sup> 564 U.S. 873 (2011).

<sup>148</sup> *Id.* at 894 (Ginsburg, J., dissenting).

<sup>149</sup> *Id.* at 896–97.

<sup>150</sup> *Id.* at 886.

The realistic appraisal of the facts, that is, of the defendant's contacts with the forum, is confined to the few paragraphs in Part I of the plurality opinion,<sup>151</sup> authored by Justice Kennedy. A more accurate and comprehensive assessment of those facts is offered by Justice Ginsburg, in her dissenting opinion.<sup>152</sup> It is only there that we learn that Nicastro had severed four fingers of his right hand while using the machine;<sup>153</sup> that the price of one machine was \$ 24,900;<sup>154</sup> that the machine ended up in New Jersey as a direct consequence of the successful marketing efforts of the defendant,<sup>155</sup> and in the regular course of the defendant's business;<sup>156</sup> and that McIntyre UK had instructed its exclusive American distributor to sell the machines "anywhere in the U.S.,"<sup>157</sup> with no fear of successful litigation against McIntyre in the U.S. as "the product was built and designed by McIntyre Machinery in the UK and the buck stops here—if there's something wrong with the machine,"<sup>158</sup> and, in any event, "the manufacturer had products liability insurance coverage."<sup>159</sup> As Justice Ginsburg observed, the above realistic assessment of the facts coupled with a respect for the tradition, should have led to a finding of jurisdiction:

A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user?

Under this Court's pathmarking precedent in *International Shoe Co. v. Washington*, and subsequent decisions, one would expect the answer to be unequivocally, "No." But instead, six Justices of this Court, in divergent opinions, tell us that the manufacturer has

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<sup>151</sup> *Id.* at 878–79.

<sup>152</sup> *Id.* at 893–98.

<sup>153</sup> *McIntyre*, 564 U.S. at 894.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 895 ("CSM's owner, Frank Curcio, 'first heard of [McIntyre UK's] machine while attending an Institute of Scrap Metal Industries [(ISRI)] convention in Las Vegas in 1994 or 1995, where [McIntyre UK] was an exhibitor.'").

<sup>156</sup> *Id.* at 896 ("McIntyre UK representatives attended every ISRI convention from 1990 through 2005.").

<sup>157</sup> *Id.* at 898.

<sup>158</sup> *Id.* at 897.

<sup>159</sup> *McIntyre*, 564 U.S. at 897.

avoided the jurisdiction of our state courts, except perhaps in States where its products are sold in sizeable quantities. Inconceivable as it may have seemed yesterday, the splintered majority today “turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it.”<sup>160</sup>

And the opposite conclusion reached by the plurality and Justice Breyer’s concurring opinion<sup>161</sup> took “a giant step away from the ‘notions of fair play and substantial justice’ underlying *International Shoe*.”<sup>162</sup>

The opinion in *McIntyre* also failed to balance the interest of the defendant against the interest of the plaintiff and the judicial system as a whole. Of course the defendant would be better off if sued in its own country, but what about the plaintiff, the individual who was injured in his forum while using the machine that the defendant has sold there making profit out of it? And would the judicial system as a whole support such a finding of non-jurisdiction? Essentially denying access to justice to a citizen of the forum, asking him to submit to a foreign jurisdiction and most likely foreign law to be compensated for the wrongful, and yet profitable, activity engaged in by the foreign corporation in the plaintiff’s own state? Doesn’t this result defy logic, common sense, the fundamental principles of liberty and justice?

If the answers to the above questions suggest that the opinion in *McIntyre* was not consistent with due process, then why did the Court reach that result? We may make hypotheses, build assumptions. The Court was probably motivated by concerns for international relations.<sup>163</sup> Or the Court just thought it was properly interpreting and applying the precedents—*International Shoe*, *Hanson v. Denckla*,<sup>164</sup> *World-Wide Volkswagen Corp. v. Woodson*,<sup>165</sup> *Asahi Metal Industry Co., Ltd. v. Superior Court of Cal., Solano Cty.*,<sup>166</sup> *Burnham v. Superior Court of Cal., County of Marin*.<sup>167</sup> And it was some of the precedents that might have

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<sup>160</sup> *Id.* at 893–94 (internal citations omitted).

<sup>161</sup> *Id.* at 887–93 (Breyer, J., concurring).

<sup>162</sup> *Id.* at 910 (Ginsburg, J., dissenting).

<sup>163</sup> *See, e.g.*, *Daimler A.G. v. Bauman*, 134 S. Ct. 746, 763 (2014) (“the Solicitor General informs us, in this regard, that ‘foreign governments’ objections to some domestic courts’ expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments.”).

<sup>164</sup> 357 U.S. 235 (1958).

<sup>165</sup> 44 U.S. 286 (1980).

<sup>166</sup> 480 U.S. 102 (1987).

<sup>167</sup> 495 U.S. 604 (1990).

determined the outcome of the case, more specifically, *Hanson* and *Burnham*:

The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must "purposefully avai[l] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."<sup>168</sup>

And:

The conclusion that jurisdiction is in the first instance a question of authority rather than fairness explains, for example, why the principal opinion in *Burnham* "conducted no independent inquiry into the desirability or fairness" of the rule that service of process within a State suffices to establish jurisdiction over an otherwise foreign defendant.<sup>169</sup>

But the realistic appraisal demanded by *International Shoe* did not make purposeful availment a determinative factor of the jurisdictional inquiry. If you think about it, purposeful availment—or the defendant's intent to enjoy, avail itself of "the benefits and protection of the laws of the state,"<sup>170</sup> or "target,"<sup>171</sup> using Justice Kennedy's word—might be hard, and at times very hard, to determine. And the *International Shoe* Court's innovative contribution to the law of personal jurisdiction was to make clear that fictions—like the defendant's voluntary submission to the authority of the sovereign—should be abandoned in favor of a realistic approach.<sup>172</sup>

### C. Standing

The Court described the key elements of the doctrine of standing in *Lujan v. Defenders of Wildlife*:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and

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<sup>168</sup> J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 882 (2011) (internal citation omitted).

<sup>169</sup> *Id.* at 883.

<sup>170</sup> *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

<sup>171</sup> *See, e.g., McIntyre*, 564 U.S. at 877.

<sup>172</sup> Along these lines, *see* Justice Ginsburg's dissenting opinion in *McIntyre* ("Finally, in *International Shoe* itself, and decisions thereafter, the Court has made plain that legal fictions, notably 'presence' and 'implied consent,' should be discarded, for they conceal the actual bases on which jurisdiction rests."). *Id.* at 900. (Ginsburg, J., dissenting).

particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.<sup>173</sup>

If we examine the basic elements of standing—*injury, causation, and redressability*—though, we see that they do no more than describe the elements of a claim. Thus, a plaintiff's claim should be dismissed for lack of standing if it doesn't pass the Rule 12(b)(6) motion-to-dismiss-for-failure-to-state-a-claim muster; and it should not be dismissed on those grounds when it is legally sufficient.<sup>174</sup> But this has not always been the case, and some of the Court's opinions that depart from this idea are hard to reconcile with due process, as the synthesis of conflicting interests that they are premised on discount the rights of the plaintiffs and the interest of the judicial system in providing federal courts for the vindication of federal rights.

In *Linda R.S. v. Richard D.*,<sup>175</sup> the plaintiff sought to establish the unconstitutionality of a state child-support law that had been interpreted as not being enforceable against fathers of children born out of wedlock. The plaintiff sought an order that would preclude the state from denying enforcement of those laws solely on the basis of the father's unmarried status. But she ultimately wanted the father of her child to pay child support.<sup>176</sup> The Court focused on the probability of success of this ultimate "remedy" to show that her claim was not redressable since it was not clear that the father would pay that support even if the law were enforced against him.<sup>177</sup> But had the Court attended to the plaintiff's equal protection claim, it would have realized that the plaintiff had asserted a well-recognized right of action—the equal enforcement of the laws—that, if meritorious,

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<sup>173</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992) (internal quotations omitted).

<sup>174</sup> I more extensively examine the idea of standing analysis as a Rule 12(b)(6) analysis in *The Claim*, *supra* note 10. See also William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

<sup>175</sup> 410 U.S. 614 (1973).

<sup>176</sup> See *Heckler v. Matthews*, 465 U.S. 728 739–40 (1984) (remedy for equal protection violation is equal treatment).

<sup>177</sup> *Linda R.S.*, 410 U.S. at 618 ("The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative. Certainly the 'direct' relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a prerequisite of standing, is absent in this case.").

would entitle her to relief, namely, a wedlock-neutral application of prosecutorial discretion.

*Clapper v. Amnesty In'l*<sup>178</sup> is equally problematic. In *Clapper*, attorneys and human rights, labor, legal, and media organizations sued, among others, the Director of National Intelligence and the Attorney General, seeking a declaration that the provision of Foreign Intelligence Surveillance Act (FISA) allowing surveillance of individuals who were not “United States persons” and were reasonably believed to be located outside the United States, was unconstitutional, as well as an injunction against surveillance authorized by the provision.<sup>179</sup>

In an opinion authored by Justice Alito, the Supreme Court held that the plaintiffs had failed to demonstrate standing, essentially because the future injury they feared—surveillance—was not “certainly impending,” and it was not fairly traceable to the FSIA provision at issue.<sup>180</sup> In tracing the contours of the modern standing theory, the Court observed that “it is no surprise that respondents fail to offer any *evidence* that their communications have been monitored under §1881a, a failure that substantially undermines their standing theory;”<sup>181</sup> and that “respondents in the present case present no concrete *evidence* to substantiate their fears, but instead rest on mere conjecture about possible governmental actions.”<sup>182</sup> One, though, wonders how realistically could the plaintiffs have offered evidence that their conversations had been monitored, and whether asking for evidence at the pleading stage is consistent with the Rules, the jurisprudence interpreting them, and the very idea of litigation as a process that through discovery and dispositive motions, resolves disputes and provides the stage for the enforcement of rights and the development of substantive law.

Again, the individual’s rights as well as the interest of the system in providing a federal forum for the vindication of federal rights were not factored in, or if they were, they were not adequately factored. And, in any event, given that the due process balance engaged in by the Court, if any at all, was not articulated in the opinion, the opinion doesn’t meet the most fundamental due process and democratic aspirations.

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<sup>178</sup> 133 S. Ct. 1138 (2013).

<sup>179</sup> *Id.* at 1142.

<sup>180</sup> *Id.* at 1155.

<sup>181</sup> 133 S. Ct. at 1148 (emphasis added).

<sup>182</sup> *Id.* at 1154 (emphasis added).

*D. Pleadings*

Federal Rule of Civil Procedure 8(a)(2) provides that “[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>183</sup> If the complaint does not comply with Rule 8(a)(2), the defendant will be able to successfully move under Rule 12(b)(6) to dismiss it for “failure to state a claim upon which relief can be granted.”<sup>184</sup>

Rules 8(a)(2) and 12(b)(6) were meant to operate in the “notice pleading” system, a system where pleadings are intended to open the doors to discovery with minimal considerations of the claim asserted.<sup>185</sup> The idea was that the factual and legal sufficiency of the claim would be examined after discovery, on a motion for summary judgment, that is, after the facts and theories supportive of the claim could be fully developed through an open exchange of information between the parties.<sup>186</sup> Forcing the text and the spirit of Rules 8(a)(2) and 12(b)(6), though, *Bell Atlantic v. Twombly*<sup>187</sup> and *Ashcroft v. Iqbal*<sup>188</sup> created a new pleading regime described as “plausibility pleading.” The current pleading standard focuses formalistically on the cause of action and not on the general nature of the claim, and the claim is easily extinguished before being fully examined.<sup>189</sup>

Both *Twombly* and *Iqbal*’s complaints would have survived the Rule 12(b)(6) muster in the notice pleading regime preceding *Twombly* and *Iqbal*. And that makes sense. At the beginning of the litigation the plaintiff does not have access to all the information necessary to prevail on the merits. And yet, unless the plaintiff’s claim “strike[s] a savvy judge that actual proof of those facts is improbable, and ‘that a recovery is very remote and unlikely,’”<sup>190</sup> the complaint may proceed to discovery. But despite the apparent *Twombly* and *Iqbal* Courts’ adherence to this original notice pleading idea, the *Twombly* Court found the plaintiffs’ complaint under §1 of the Sherman Act<sup>191</sup> insufficient because plaintiffs’ allegations of parallel conduct and of some other reasons for not competing were not sufficient, as plaintiffs had not ruled out other valid alternatives for not competing.<sup>192</sup> And similarly, the *Iqbal* Court found that the plaintiff’s

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<sup>183</sup> FED. R. CIV. P. 8(a)(2).

<sup>184</sup> FED. R. CIV. P. 12(b)(6).

<sup>185</sup> See Simona Grossi, *The Claim*, *supra* note 10.

<sup>186</sup> *Id.*

<sup>187</sup> 550 U.S. 544 (2007).

<sup>188</sup> 556 U.S. 662 (2009).

<sup>189</sup> See Simona Grossi, *Frontloading*, *supra* note 10.

<sup>190</sup> *Twombly*, 550 U.S. at 556.

<sup>191</sup> Sherman Act, 15 U.S.C.A., §1.

<sup>192</sup> *Twombly*, 550 U.S. at 567 (“here we have an obvious alternative explanation.”).



allegations of defendants' intent to discriminate against him because of his race and religion not sufficient as there might be "other neutral, investigative reason" for the disparate treatment<sup>193</sup> that the plaintiff had not ruled out.<sup>194</sup>

What was the balance of interests analysis that the Court engaged in when deciding to discard plaintiffs' rights? Assuming those plaintiffs' rights were factored in, was the interest of the judicial system in providing a federal forum for the vindication of federal rights—those arising from the Sherman Act and those arising in the context of a *Bivens* action<sup>195</sup>—considered? And if the judicial system's interest was considered, and the national security interests prevailed over the interest in making a federal forum available, was elevating the pleading standard the best method to meet this prevailing national security interest?<sup>196</sup> And what about the consequences of both opinions—an antitrust case, and a national security case—on future cases? Where those consequences considered? After all, the *Twombly-Iqbal* pleading standard is supposed to apply to a wide range of cases.<sup>197</sup>

*Twombly* and *Iqbal* hardly meet the due process aspirations of a democratic judicial system.

#### *E. Federal Rules of Civil Procedure 19, 23, and 26*

Rule 19(a) provides that persons "required" to be joined—to accord complete relief to the existing parties, or properly protect the absent parties' interest, or avoid a risk of double, multiple or inconsistent obligations for the existing parties—should be joined if feasible, that is, they should be joined if the court would have personal jurisdiction and subject matter jurisdiction over them.<sup>198</sup> If the joinder of such required persons is not feasible, Rule 19(b) provides a non-exhaustive list of factors that a court might balance when determining "whether, in equity and good

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<sup>193</sup> *Iqbal*, 556 U.S. at 677 ("to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.").

<sup>194</sup> *Id.* at 682 ("As between that "obvious alternative explanation" for the arrests and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.") (internal citations omitted).

<sup>195</sup> *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1999).

<sup>196</sup> *See, e.g., Iqbal*, 556 U.S. at 700 (Breyer, J., dissenting).

<sup>197</sup> *Id.* at 664 ("Three of *Iqbal's* arguments are rejected. (i) His claim that *Twombly* should be limited to its antitrust context is not supported by that case or the Federal Rules. Because *Twombly* interpreted and applied Rule 8, which in turn governs the pleading standard 'in all civil actions,' Rule 1, the case applies to antitrust and discrimination suits alike.").

<sup>198</sup> FED. R. CIV. P. 19(a).

conscience, the action should proceed among the existing parties or should be dismissed.”<sup>199</sup>

Rule 19(b) factors mirror the Rule 19(a) factors. But the Rule 19(b)’s spectrum is broader than those of Rule 19(a) and seems to demand a due process analysis of the joinder mechanism and its operation by calling for a realistic appraisal of the specific facts of the case, and a balance of the various and conflicting interests.<sup>200</sup>

The Supreme Court examined the mechanics of Rule 19<sup>201</sup> in *Republic of Philippines v. Pimentel*.<sup>202</sup> In *Pimentel*, a stakeholder filed an interpleader action against several claimants—including the Republic of the Philippines (“the Republic”) and the Philippine Presidential Commission (“the Commission”)—that were claiming an interest in the stake, *i.e.*, the property allegedly stolen by Ferdinand Marcos when he was President of the Philippines.<sup>203</sup> The Republic and Commission invoked sovereign immunity and were dismissed from the action, but the action proceeded to judgment over their objection.<sup>204</sup> They contended that the action should have been dismissed as they were indispensable parties under Rule 19.<sup>205</sup> The trial court and the Court of Appeals agreed that the

<sup>199</sup> FED. R. CIV. P. 19(b).

<sup>200</sup> FED. R. CIV. P. 19(b) (“(1) the extent to which a judgment rendered in the person’s absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person’s absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.”). In *Schutten v. Shell Oil Company*, 421 F.2d 869 (5th Cir.1970), the court held that the essence of Rule 19 is to balance the rights of all those whose interests are involved in the action:

The plaintiff has the right to “control” his own litigation and to choose his own forum. This “right” is, however, like all other rights, “defined” by the rights of others. Thus the defendant has the right to be safe from needless multiple litigation and from incurring avoidable inconsistent obligations. Likewise the interests of the outsider who cannot be joined must be considered. Finally there is the public interest and the interest the court has in seeing that insofar as possible the litigation will be both effective and expeditious.

*Id.* at 873.

<sup>201</sup> FED. R. CIV. P. 19. *See, e.g.*, *Glancy v. Taubman Centers, Inc.*, 373 F.3d 656, 665 (6th Cir.2004) (“Rule 19 calls for a pragmatic approach.”); *Smith v. United Bhd. of Carpenters*, 685 F.2d 164, 166 (6th Cir.1982) (“Ideally, all . . . parties would be before the court. Yet Rule 19 calls for a pragmatic approach . . . .”); 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE CIVIL § 1602 (3d ed.2001) (Rule 19 should be applied to promote the full adjudication of disputes with minimum litigation efforts.).

<sup>202</sup> 553 U.S. 851 (2008).

<sup>203</sup> *Id.* at 854–55.

<sup>204</sup> *Id.* at 855.

<sup>205</sup> *Id.* at 862.

action could proceed without the Republic and the Commission.<sup>206</sup> The Supreme Court reversed and remanded with instructions to order the district court to dismiss the action.<sup>207</sup> Without engaging in Rule 19(a)<sup>208</sup> or Rule 19(b) analysis,<sup>209</sup> the Court essentially resolved the joinder question on comity and sovereign immunity grounds,<sup>210</sup> denying the plaintiffs access to justice. Had the Court attended to the text of Rule 19 and the due process analysis demanded by the rule, the result might have been different. But even if the result, determined by political reasons, would have still been the same, the opinion would have rested on more solid due process foundations.

Differently from Rule 19, Rule 23<sup>211</sup> governing class actions can hardly be considered a model of due process. Rule 23 was adopted to allow joinder of parties where such parties' claims couldn't be litigated individually (because of the related costs), or where it would be impractical to rely on other joinder devices to litigate such claims (because of the number of individuals with claims to be joined). In other words, without class actions there would be no way to litigate these claims, either individually or through standard rules on joinder.<sup>212</sup> So conceived, Rule 23 should have required just a simple and elegant joinder analysis, conducive of the final result of aggregation whenever that would be feasible and fair. But the Rule now contains a series of narrow and rigid multipart formulas

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 873.

<sup>208</sup> *Pimentel*, 553 U.S. at 864 (“All parties appear to concede [that Rule 19(a) is satisfied and the] disagreement instead centers around the application of subdivision (b), which addresses whether the action may proceed without the Republic and the Commission, given that the Rule requires them to be parties.”).

<sup>209</sup> The Court in *Pimentel* did not assess the plaintiffs' interests and rights and remedies available in the case. It held that Merrill Lynch, the stakeholder, and not the Pimentel class, had to be considered “the plaintiff.” And if the interpleader action was dismissed for nonjoinder, even if “[t]hat disposition will not provide Merrill Lynch with a judgment determining the party entitled to the assets . . . it likely would provide Merrill Lynch with an effective defense against piecemeal litigation and inconsistent, conflicting judgments.” *Id.* at 872. Also, “in any later suit against it Merrill Lynch may seek to join the Republic and the Commission and have the action dismissed under Rule 19(b) should they again assert sovereign immunity.” *Id.* at 870–71. The Court did not consider the possibility of shaping the relief (“[n]o alternative remedies or forms of relief have been proposed to us or appear to be available.”) *Id.* at 870. And the Court did not assess the interests of the judicial system as a whole. The Court noted that proceeding without the absent parties “would not further the public interest in settling the dispute as a whole because the Republic and the Commission would not be bound by the judgment in an action where they were not parties.” *Id.* at 870–71. But it is hard to see how after two instances of proceeding, the judicial system would have preferred dismissal over continuance.

<sup>210</sup> *Id.* at 865, 869.

<sup>211</sup> FED. R. CIV. P. 23.

<sup>212</sup> See Simona Grossi, *Frontloading*, *supra* note 10.

that make aggregation hard to achieve and at times seem to favor the party(ies) resisting class certification.<sup>213</sup>

For an action to be certified as a class, Rule 23(a) provides that there must be (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation.<sup>214</sup> A class may proceed as such if it meets all the requirements of Rule 23(a) and falls within one of the three types under Rule 23(b).<sup>215</sup>

Under Rule 23(a), the proposed class must be “so *numerous* that joinder of all members is impracticable;”<sup>216</sup> there must be “questions of law or fact *common* to the class;”<sup>217</sup> the claims or defenses of the representative parties must be “*typical* of the claims or defenses of the class;”<sup>218</sup> and the representative parties must “fairly and *adequately* protect the interests of the class.”<sup>219</sup> Under Rule 23(b), the action should fall into one of the three “types”<sup>220</sup> listed in that rule: “(1) . . . prosecuting separate actions by or against individual class members would create a risk of (A) incompatible standards of conduct for the party opposing the class;<sup>221</sup> or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;”<sup>222</sup> (2) “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respective the class as a whole;”<sup>223</sup> or (3) “the court finds that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is

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<sup>213</sup> For an extensive analysis of Rule 23 and its flaws, see Simona Grossi, *Frontloading*, *supra* note 10. See also Robert H. Klonoff, *The Decline of Class Action*, 90 WASH. U. L. REV. 729, 776 (2013).

<sup>214</sup> FED. R. CIV. P. 23(a).

<sup>215</sup> FED. R. CIV. P. 23(b). The action, though, might also be certified as an “issues class” under Rule 23(c)(4).

<sup>216</sup> FED. R. CIV. P. 23(a)(1) (emphasis added).

<sup>217</sup> FED. R. CIV. P. 23(a)(2) (emphasis added).

<sup>218</sup> FED. R. CIV. P. 23(a)(3) (emphasis added).

<sup>219</sup> FED. R. CIV. P. 23(a)(4) (emphasis added).

<sup>220</sup> Rule 23(b) has three subdivisions but provides four types of class actions. This is because (b)(1)(A) and (b)(1)(B) could be considered as separate types; they are treated as one category, though, as they are both “designed to prevent prejudice to the parties resulting from multiple suits involving the same subject matter by certifying a mandatory class.” *Harris v. Koenig*, 271 F.R.D. 383, 392 (D.D.C. 2010). One could in fact count five different types, if Rule 23(c)(4) issue classes were included in the list.

<sup>221</sup> FED. R. CIV. P. 23(b)(1)(A).

<sup>222</sup> FED. R. CIV. P. 23(b)(1)(B).

<sup>223</sup> FED. R. CIV. P. 23(b)(2).

*superior* to other available methods for fairly and efficiently adjudicating the controversy.”<sup>224</sup>

The (b)(1)(A), (b)(1)(B), and (b)(2) classes are “mandatory,”<sup>225</sup> meaning that the Rule does not entitle class members to notice of class certification or the right to opt out of the class.<sup>226</sup> The (b)(3) class, however, is an “opt-out” class, as class members have the right to notice of class certification and the right to opt-out of the class.<sup>227</sup>

The text of the Rule is hyper-technical, also containing provisions on the “Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses,”<sup>228</sup> “Conducting the Action,”<sup>229</sup> “Settlement, Voluntary Dismissal, or Compromise,”<sup>230</sup> “Appeals,”<sup>231</sup> and “Class Counsel.”<sup>232</sup>

Because of the technicalities and the several redundancies in the Rule, when applying it, courts tend to look for something *else*, something that would satisfy the redundant requirement and give an independent meaning to it. In search for this independent meaning, judges often make ad-hoc, anti-plaintiffs considerations that elevate formality over substance, frontload the analysis of the merits,<sup>233</sup> close the doors of federal

<sup>224</sup> FED. R. CIV. P. 23(b)(3) (emphasis added).

<sup>225</sup> Compare FED. R. CIV. P. 23(b)(1)(A), FED. R. CIV. P. 23(b)(1)(B), and FED. R. CIV. P. 23(b)(2) with FED. R. CIV. P. 19, FED. R. CIV. P. 22, and FED. R. CIV. P. 24. See also 2 NEWBERG ON CLASS ACTIONS §4:3 (William B. Rubenstein ed., 5th ed. 2012); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 389 (1967) (observing how the similarities between Rule 23(b)(1)(A) and Rule 19 are “not incidental but logical”).

<sup>226</sup> See FED. R. CIV. P. 23(c)(2) (making notice discretionary in (b)(1) and (b)(2) classes, and containing no reference to the right to opt-out); see also *Wal-Mart Store, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011) (stating that Rule 23 “provides no opportunity for (b)(1) or (b)(2) class members to opt out”). However, as Robert Klonoff noted, “the Court in *Dukes* strongly suggested that, when monetary claims are more than incidental to claims for declaratory and injunctive relief [in (b)(2) classes], due process requires notice and opt-out rights. Indeed, the Court hinted that notice and opt-out rights may be required in (b)(2) actions even where the monetary claims in the case do not predominate.” Robert Klonoff, *Class Actions for Monetary Relief Under Rule 23(b)(1)(A) and (b)(1)(B): Does Due Process Require Notice and Opt-Out Rights?* 82 GEO. WASH. L. REV. 798, 809 (2014).

<sup>227</sup> See FED. R. CIV. P. 23(c)(2)(B) (requiring, in (b)(3) classes, “the best notice that is practicable under the circumstances,” which must also state that “the court will exclude from the class any member who requests exclusion.”).

<sup>228</sup> FED. R. CIV. P. 23(c).

<sup>229</sup> FED. R. CIV. P. 23(d).

<sup>230</sup> FED. R. CIV. P. 23(e).

<sup>231</sup> FED. R. CIV. P. 23(f).

<sup>232</sup> FED. R. CIV. P. 23(g).

<sup>233</sup> In *Wal-Mart v. Dukes*, the Court even suggested that expert witnesses offered for purposes of certification must be qualified under the Federal Rules of Evidence and after a full *Daubert* hearing. 564 U.S. 338, 353–55 (2011).

courts by increasing the procedural hurdles,<sup>234</sup> increase the costs of litigation,<sup>235</sup> and ultimately short-circuit the class action joinder mechanism.<sup>236</sup> As I said, hardly a model of due process.

Rule 26<sup>237</sup> governing discovery, although not as fraught with formalities as Rule 23, has endorsed a mechanical model that might at some point turn into the Rule 23 model.

Typically, discovery commences after the pleading stage of a controversy. The original Rules allowed discovery under a “subject matter” standard. Hence, a party was entitled to discover any nonprivileged factual material relevant to the subject matter of the lawsuit. Thus, the standard, a more generalized one, was not focused on the claim, but on the subject matter of the suit. This distinction reflected the fact that the claim was inchoate when discovery commenced since only its broad nature had to be revealed under the original interpretation of Rule 8(a)(2). Discovery on the inchoate claim could either broaden or narrow the actual claim to be litigated.<sup>238</sup>

The version of Rule 26(b) adopted in 2000 defined the scope of discovery in terms of information relevant to a “claim or defense,” a conceptually narrower category than subject matter.<sup>239</sup> But if the claim is

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<sup>234</sup> See, e.g., Arthur R. Miller, *Inaugural University Professorship Lecture: Are They Closing the Courthouse Doors?* (Mar. 19, 2012) ([www.law.nyu.edu/news/ECM\\_PRO\\_072088](http://www.law.nyu.edu/news/ECM_PRO_072088)) at 7 (“The class certification motion thus has become another procedural stop sign undermining the utility of one of the most important joinder mechanisms for handling disputes arising from conduct damaging large numbers of people with small claims.”).

<sup>235</sup> *Id.* (“If class representatives cannot clear the certification hurdle, as has become more common, individual actions are not pursued because they are not economically viable. Even when an attempt to block certification doesn’t succeed, the very elaborate process created by the courts imposes additional cost and delay, especially when interlocutory appellate review of certification is sought, let alone granted. Perhaps even more troublesome is the fact that increased costs and the heightened risk of non-certification inhibits the institution of potentially meritorious cases, leaving public policies under enforced and large numbers of citizens uncompensated.”). See also Freer, *Front-Loading*, *supra* note 7, at 723 (“This front-loading increases the expense of litigating class certification. More is on the table at an early stage than in prior practice.”).

<sup>236</sup> See, e.g., Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731, 1740 (2014).

<sup>237</sup> FED. R. CIV. P. 26.

<sup>238</sup> The current approach is less generous. Under *Twombly* and *Iqbal*, the claim must be defended as to each right of action, by aligning the non-conclusory factual allegations with each element of a specified right. Only after this standard is satisfied will discovery commence.

<sup>239</sup> FED. R. CIV. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the

a group of operative facts giving rise to one or more rights of action, there cannot be any matter that, although not relevant to any party's claim or defense will be still relevant to the subject matter. Indeed, judges have noted that the 2000 amendment did not materially alter their task.<sup>240</sup> The goal, however, was to "involve the court more actively in regulating the breadth of sweeping or contentious discovery."<sup>241</sup>

Rule 26(b) was again amended in 2015 to further limit the scope of discovery, and it now provides:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.<sup>242</sup>

The Advisory Committee Note accompanying the amendment explained that,

[t]he amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense. The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000 . . . . Discovery that is relevant to the parties' claims or defenses may also support amendment of the pleadings to add a new claim or defense that affects the scope of discovery.<sup>243</sup>

The new text reads more like a mechanical code provision, and my fear is that it will generate further litigation over forms and technicalities and that the proportionality standards will work in tandem with *Twombly* and *Iqbal* to narrow the range of discovery to those rights of action that

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action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)."

<sup>240</sup> See, e.g. *Breon v. Coca-Cola Bottling Co. of New England*, 232 F.R.D. 49, 52 (D. Conn. 2005); *Klein v. AIG Trading Group Inc.*, 228 F.R.D. 418, 423 (D. Conn. 2005); *Lugosch v. Congel*, 218 F.R.D. 41, 45 (N.D. N.Y. 2003).

<sup>241</sup> FED. R. CIV. P. 26 Advisory Committee's Note (2000).

<sup>242</sup> FED. R. CIV. P. 26(b).

<sup>243</sup> FED. R. CIV. P. 26(b) Advisory Committee's note (2015).

survive a court's application of Rule 12(b)(6),<sup>244</sup> thus frustrating the important due process aspirations that discovery is intended to meet.

#### IV. PROCEDURAL DUE PROCESS AND SUBSTANTIVE LAW

When procedural rules and doctrines stray from due process, they prevent the development and enforcement of substantive rights.

The interpretation and application of the patent law experimental use exception demanded that the federal court hear the *Gunn* case. The development of patent law was thus frustrated by the unjustified denial of subject matter jurisdiction in that case. Similarly, the denial of personal jurisdiction in *McIntyre* prevented the court from engaging in the assessment of the manufacturer's liability under the circumstances of the case and, even more troublesome, essentially evaporated the possibility for the plaintiff to enforce his rights. The Court did not assess the equal protection of the laws claim that the plaintiff had filed in *Linda R.S.*, and in *Clapper*, it refused to interpret and apply the Foreign Intelligence Surveillance Act (FISA). The law of the Sherman Act was not clarified in *Twombly*, and the plaintiffs were prevented from trying to enforce their substantive rights that they "plausibly" believed arose from that Act. The plaintiff in *Iqbal* was denied the same possibility, and similar treatment received the plaintiffs in *Pimentel*. The mechanical, check-list style of Rules 23 and 26 might generate similar results.

Many other procedural rules and doctrines cannot be squared with due process. The findings and reflections of this study are intended to provide a platform against which to test those rules and doctrines for purposes of reform, a reform of their text, of their interpretation, and/or of the way we think about them.

#### V. CONCLUDING REMARKS

Procedure and law are more deeply intertwined than one might think. Procedure is the means and method through which substantive law is enforced and developed. Thus the optimal development of substantive law requires an optimal procedure which, as I have shown, is a procedure consistent and informed by due process.

Starting from the fragmented ideas provided by the Supreme Court over the years, and moving to deeper, more holistic reflections on the common law and democratic system within which those ideas are supposed to operate, this study develops a theory of due process that will hopefully prompt further reflections and support for reform.

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<sup>244</sup> For a more extensive discussion of this topic, see Simona Grossi, *The Claim*, *supra* note 10.