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Crash And Burn: *Taylor V. Sturgell's* Radical Redefinition Of The Virtual Representation Doctrine

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I. INTRODUCTION

Imagine that you are a low income individual who has been prescribed a generic medication after a visit to your doctor. The medication has an adverse side effect of which you were not warned about, causing you discomfort and possibly forcing you to take unpaid sick days and sacrifice income. You are angry and feel that the pharmaceutical company responsible for making the medication has wronged you. However, you do not have the time or money to pursue a case against the pharmaceutical company. You have no incentive to bring an individual action against the company in court. Subsequently, you learn that there are many other individuals who are in the same position as you, and together with these individuals you can file a class action to seek compensation from the defendant pharmaceutical company without spending a significant amount of valuable time or money. Class actions are but one type of preclusionary device that our legal system recognizes as valid, and are expressly permitted by our legal system's Rules of Civil Procedure.[1] While class actions have been criticized for precluding large numbers of people from litigating their claims separately and recovering reasonable damages, our legal system has recognized the positive economic effect that class actions have in promoting judicial efficiency and the legitimacy interests that class actions serve in promoting the values

1. FED. R. CIV. P. 23.

of finality and consistency.[2] The above discussion of class actions is but one example of how our legal system reinterprets due process in contexts where the due process concerns raised by a preclusion device are outweighed by the benefits that the device provides. Virtual representation, the claims preclusion doctrine which serves as the subject of this paper, is a doctrine that seeks to promote the benefits of efficiency, consistency, and finality, benefits which must be weighed against due process concerns in order for our legal system to make a proper determination of the scope and limit of the virtual representation doctrine's general applicability. *Taylor v. Sturgell*,[3] a Supreme Court case decided on June 12, 2008, grappled with the difficult issue of defining the virtual representation doctrine's parameters and raised a number of important preclusion questions in the process. At the risk of oversimplification, *Sturgell* addressed whether it should ever be proper for a court to tell a party filing a lawsuit that their case is precluded,[4] essentially a declaration that the court will not hear their problems because the court has already heard arguments on the same issues by another similarly situated party. This raises a number of questions about when it is proper to preclude a filing party's case under the virtual representation doctrine, including whether preclusion is justified when that party has already been actively involved in litigating a prior claim by using a prior party as a proxy; whether a filing party should be precluded because of an existing relationship with a prior party that points to some involvement by the current party in a prior party's prior lawsuit; and whether a filing party can be precluded, even in the absence of evidence of involvement in a prior suit, where the filing party is using the same lawyer, argument, and litigation strategy as the prior party. The answers to these questions are essential in establishing the parameters of an effective claim preclusion doctrine, and can only be properly answered by weighing the values of efficiency, consistency, and finality against countervailing interests of constitutional due process.

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2. *See* Richard Epstein, *Class Actions: The Need for a Hard Second Look*, CIVIL JUSTICE REPORT, May 2002, at 7–9.

3. Taylor v. Sturgell, 128 S. Ct. 2161 (2008).

4. Virtual representation is a claims preclusion doctrine. Claims preclusion is generally defined by Black's Law Dictionary (under the synonymous term *res judicata*) as "barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been—but was not—raised in the first suit." BLACK'S LAW DICTIONARY (8th ed. 2004). Claim preclusion is to be distinguished from issue preclusion as follows: "[T]he principal distinction between claim preclusion and issue preclusion is . . . that the former forecloses litigation of matters that have never been litigated. This makes it important to know the dimensions of the 'claim' that is foreclosed by bringing the first action, but unfortunately no precise definition is possible." CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS § 100A (6th ed. 2002).

In *Sturgell*, the Supreme Court attempted to address the above questions when it considered how to define a nebulous series of preclusionary concepts collectively referred to as the virtual representation doctrine. The virtual representation doctrine is a specific subset of claim preclusion. It can be briefly defined as the principle that a currently filing party may be bound by a judgment issued in a prior action if one of the parties to the prior action is so closely aligned with the currently filing party's interests as to be his or her virtual representative.[5] Beyond the requirement that there be an identity of interests and adequate representation in the prior case,[6] the requirements necessary for a court to invoke the virtual representation doctrine have never been clearly defined. Throughout its long legal history, the doctrine has been periodically broadened, narrowed, and rebroadened.[7] Prior to the *Sturgell* decision, federal courts broadly interpreted the doctrine, employing a totality of circumstances analysis to determine whether to apply the virtual representation doctrine.[8] However, in *Sturgell*, the Supreme Court restrictively redefined the virtual representation test as a bright-line test whereby one of six categories of legal relationships between a filing party and prior party must be met before the filing party's action can be precluded under the virtual representation doctrine.[9]

The *Sturgell* Court's restriction of the virtual representation doctrine was primarily based on due process concerns. Because our legal system views the ability to file a legal claim as a property interest, and preclusion doctrines such as virtual representation restrict one from exercising their ability to file suit, the *Sturgell* Court limited preclusion by virtual representation to cases in which the party to be precluded shares a predefined legal relationship with a party whose claim has already been adjudicated. This rigid categorical approach is inferior to a factual analysis based on flexible standards for the following reasons. First, the Court's reliance on due process to justify its rigid approach fails to take into consideration the competing values that would be served by adopting a broad interpretation of the virtual representation doctrine. The Court's interpretation of due process as an absolute value has no firm historical or social basis and furthermore gives short shrift to the countervailing values of efficiency, consistency, and finality. These

5. KARL OAKES, FEDERAL PROCEDURE, LAWYER'S EDITION § 51:239 (2008); *see also* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining virtual representation as "the principle that a judgment may bind a person who is not a party to the litigation if one of the parties is so closely aligned with the nonparty's interests that the nonparty has been adequately represented by the party in court.").

6. Oakes, *supra* note 5.

7. A thorough history of the virtual representation doctrine is provided *infra* pp. 6–19.

8. *See, e.g.*, Richards v. Jefferson County, 517 U.S. 793 (1996).

9. Taylor v. Sturgell, 128 S. Ct. 2161, 2169–2180 (2008).

countervailing values are necessary to our legal system's practical functionality and to the preservation of our system's legitimacy. Second, the Court's rigid approach fails to consider the virtual representation doctrine's uncertain legal history and the difficulty that past courts have had in articulating a clear definition for the doctrine. Because of this legal history, a flexible definition is needed to allow courts to properly define the boundary at which virtual representation ends and due process begins. A rigid definition is only likely to get overturned by judicial review as future court decisions begin scrutinizing its artificial categories, only increasing the confusion that courts face in defining virtual representation. Finally, the Court's rigid approach glosses over the substantive weight of a party's claim, determining whether or not a party will be granted their day in court solely by looking at whether or not the party falls within a predefined legal category. This approach seems to formalize due process determinations which courts have historically treated as personal, rather than mechanical, determinations.

This paper will show that the *Sturgell* Court's restriction of the virtual representation doctrine is a decision which ignores the practical realities of our legal system in order to protect a perceived day-in-court ideal which has no solid precedential or historical/traditional basis. Part II of this paper will analyze the history of virtual representation from its inception as a property concept all the way to its reinterpretation in the *Sturgell* decision. Part III will deal with the *Sturgell* decision and the specific limitations which that decision places on the virtual representation doctrine. Part IV will argue that the Supreme Court's reinterpretation of the virtual representation doctrine placed too much emphasis on the day-in-court ideal and, consequently, ignored the practical advantages that a broader interpretation of the doctrine would have provided. Part V will argue that the Court's bright line approach to virtual representation is less effective than a totality of the circumstances test because, given the virtual representation doctrine's uncertain history, a totality of the circumstances test would be more efficient than a bright-line rule approach in allowing courts to consider the competing values of due process and legal consistency, finality, and efficiency. Finally, Part VI will attempt to draft an alternative totality of the circumstances test to be used in determining when to apply the virtual representation doctrine.

II. The History of the Virtual Representation Doctrine

The virtual representation doctrine has had a long legal history of redefinition and reinterpretation. This history has been so long and variable that it is difficult to define exactly how far the virtual representation

doctrine actually extends.[10] Virtual representation originally started out as a narrow property concept used to bind unknown, unascertained, or unborn remaindermen to judgments relating to the settlement of property estates.[11] This initial iteration of the virtual representation doctrine applied to a restricted number of cases and had two basic justifications for precluding the claims of third parties in those cases: (1) it was created out of a necessity of making judgments applicable to future parties that were presently unascertainable,[12] and (2) the parties who presently owned an estate also usually controlled the interests of third party remaindermen, so in effect the third parties whose rights were being precluded had at best only tenuous claims to the property in question.[13] The virtual representation doctrine was thus originally created as a way to deal with the interests of unascertained remaindermen in real property cases. and was initially justified as a no-participation doctrine[14] whose purpose was to prevent property litigation from continuing to perpetuity[15]—if one's property interest could not be determined until there was no risk of new unascertained remaindermen claiming an interest, litigation would go on *ad infinitum* and clear determination of ownership interests in these cases would be effectively impossible, leading to a confusing social definition of property and difficult-to-manage property markets.[16] Originally, virtual representation was not actually justified as a representation theory; it was not concerned with whether an absent litigant's legal interests were or were not properly litigated by virtue of adequate representation.[17]

By the latter half of the 19th century, estate interests such as the fee tail and common recovery were abandoned in United States and the rationale for justifying the virtual representation doctrine as a no-participation theory necessary to cut off unascertained remainders was no

10. 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4457 (4th ed. 2009).

11. Jack L. Johnson, *Due or Voodoo Process: Virtual Representation as the Justification for the Preclusion of a Nonparty's Claim*, 68 TUL. L. REV. 1304, 1310–11 (1994).

12. Pugh v. Frierson, 221 F. 513, 524 (6th Cir. 1915); *see also* Johnson, *supra* note 11, at 1310.

13. Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 207 (1992).

14. *Id.* at 209.

15. Johnson, *supra* note 11, at 1311.

16. *See* John K. Morris, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered*, 56 CAL. L. REV. 1098, 1098–99 (1968); *see also* Galvin v. Curtin, 49 N.E. 523, 527 (Ill. 1898) (finding that to deny the power to determine estates via virtual representation would be to sacrifice the rights of the present generations for the sake of posterity, the effect of which would be to seriously hinder the advancement of property ownership in the United States).

17. Bone, *supra* note 13, at 209 ("[T]his form of representation had nothing to do with the tenant in tail representing remaindermen in the sense of litigating on their behalf. It had to do . . . with the tenant in tail representing . . . legal rights that attached to the estate.").

longer valid.[18] Courts therefore had to justify using virtual representation in property cases under a new rationale. This rationale no longer looked at whether a property owner had legal rights in an estate that should preclude future remaindermen from bringing suit, but instead asked whether the absent remainderman had an entitlement to participation in the litigation.[19] The United States' abandonment of several British common-law estates in the 19th century therefore led to a fundamental redefinition of the virtual representation doctrine: courts no longer looked to the legal ownership of the estate owner, but to the entitlement of the potential remainderman to participate, in order to determine whether virtual representation was proper.[20] This new rationale meant that virtual representation was no longer limited to estate cases. Courts began applying the virtual representation doctrine to a wide variety of property cases, including disputes over trusts,[21] stock distributions,[22] and taxpayer interests in government actions.[23] This 19th century shift broadened the virtual representation doctrine considerably. The doctrine's application was no longer limited to precluding the interests of unidentified third parties with future property interests,[24] and was expanded to preclude future claims where there was an identity of interest between a prior litigating party and a present litigating party.[25] While many of the property law vestiges of the virtual representation doctrine have since been shed, this "identity of interest" element of virtual representation remains a key requirement of the doctrine to this day.

During the early 20th century, our legal system underwent a pragmatic shift whereby courts became concerned with legal procedure's impact on fairness, efficiency, and distributional justice.[26] Courts began to wrestle with the challenges of overcrowded courts and the challenge of keeping outcomes consistent and fair in a litigious society. Because

18. *Id.* at 209.

19. *Id.*

20. *Id.* at 210.

21. Hale v. Hale, 33 N.E. 858 (Ill. 1893).

22. Bacon v. Robertson, 59 U.S. 480 (1855).

23. Harmon v. Auditor of Public Accounts, 13 N.E. 161 (Ill. 1887).

24. Johnson, *supra* note 11, at 1313.

25. *Id.* ("Courts interpreting the old rule of virtual representation . . . presumed representational adequacy from an identity of interests. Beyond this incidental identity of interests, the old rule of virtual representation required no legally significant relationship between the party and nonparty."); *see also* Bone, *supra* note 13, at 211 ("Virtual representation no more required that the litigating party actually represent class members . . . [r]ather, the party 'represented' the status-based legal rights that attached to the class *qua* class, and he brought those rights to the court for its determination."); Webster v. State Mut. Life Assur. Co., 50 F. Supp. 11, 14 (S.D. Cal. 1943) (emphasis added) (finding that it is "not so much the representation of the persons, but the representation of the *interests*, with which the law is concerned in this type of action.").

26. Bone, *supra* note 13, at 212.

virtual representation had become intertwined with the concept of identity of interests during the mid 19th century, it fit nicely into the 20th century pragmatists' view that procedural efficiency required at least some limitation of litigation opportunities.[27] Courts began to evaluate the doctrine in terms of its impact in promoting judicial efficiency, resulting in virtual representation's transition from a niche property exception to a more generalized preclusion doctrine. As virtual representation became a generally accepted procedural doctrine, courts began to seriously consider the doctrine's constitutional ramifications for the first time.[28] The benefits of judicial efficiency, cost saving, and finality derived from the virtual representation doctrine were weighed against the doctrine's impact on individual constitutional rights.[29] In practice, this new consideration of virtual representation's impact on individual rights led to diminished use of the doctrine as courts began recognizing that the use of virtual representation was, in many cases, a violation of the Due Process Clause and its perceived day-in-court ideal.[30] As virtual representation became a certified procedural doctrine in the 20th century, our legal system began the strenuous exercise of defining the boundaries of virtual representation through the unenviable task of setting the tipping point at which due process concerns outweighed our legal system's interests in efficiency and judicial economy.

As courts began analyzing the virtual representation doctrine under this new Constitutional microscope, the logical reader would predict that the virtual representation must have been significantly restrained. However, our legal system's newfound concern with consolidating virtual representation and Constitutional due process during the early 20th century led to surprising results. Two Supreme Court cases decided in the early 20th century actually served to broaden the applicability of the virtual representation by allowing courts great leeway in applying the doctrine to class actions and limiting procedural notice requirements in federal courts.[31] First, in *Hansberry v. Lee*,[32] the Supreme Court refused to allow the enforcement of a restrictive property covenant that, if signed by 95% of owners in a specified area, would have forbidden the sale of property to "people of color" within that area.[33] The Court based its decision on the fact that one landowner had previously brought suit in Illinois Supreme Court purporting to represent all property owners to

27. *Id.* at 213–215.
28. *Id.* at 212
29. Johnson, *supra* note 11, at 1313–14.
30. Bone, *supra* note 13, at 214.
31. *See* Bone, *supra* note 13, at 214-216.
32. 311 U.S. 32 (1940).
33. *Id.* at 37–38.

whom the covenant applied.[34] The Supreme Court held that a party's due process rights were not violated by virtual representation preclusion as long as that party had notice of a prior action and there was an identity of interest between the party and a party to the prior hearing.[35] The Court reasoned that as long as absent parties are adequately represented by parties litigating a case, those absent parties may be precluded from bringing suit without a violation of due process because their interests have been adequately represented.[36] *Hansberry* also recognized the need for lenient preclusion rules in class-action suits but refused to adopt a bright-line rule as to when preclusion by virtual representation would apply in these cases.[37] *Hansberry*'s "adequate representation" requirement set an ambiguous standard for when to apply virtual representation without violating due process. *Hansberry*'s recognition of the need for a more liberal application of the doctrine in certain types of cases also implicitly signaled that the judicial realities of overcrowded courtrooms and legal costs were of greater concern than preserving a literal reading of the Due Process Clause in our legal system.

Ten years later, the Supreme Court's decision in *Mullane v. Hanover*[38] rejected the notion that notice was always required to be given to unidentified parties, holding instead that, where a party was not readily identifiable, reasonable notice was all that due process required.[39] In *Mullane*, the Supreme Court held that, while a trust company had to give notice to all beneficiaries before undergoing a judicial settlement of its accounts as a common trustee, notice via a newspaper of general circula-

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34. *Id.* at 42–43.

35. *Id.* at 40:

> State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.

36. *Id.* at 43.

37. *Id.* at 41–42 (The Court held that while the general rule in American jurisdictions is 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," there is a recognized exception that "to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it."); *see also* Royal Arcanum v. Green, 237 U.S. 531, 538 (1915).

38. 339 U.S. 306 (1950).

39. *Id.* at 320.

tion was enough to satisfy due process with respect to beneficiaries whose whereabouts could not be ascertained with due diligence.[40] *Mullane* is especially important in the context of virtual representation because, like *Hansberry*, it demonstrates that our legal system recognizes the limitations of practical reality on the Due Process Clause.[41] Clearly, the symbolic notice prescribed by the *Mullane* Court would not have the intended effect of putting the targeted beneficiaries on notice. By holding that general publication sufficed where the trust company could not obtain beneficiaries' addresses, *Mullane* effectively held that reasonable attempts to abide by the textual requirements of the Due Process Clause were all that the clause requires.[42] This was an implicit assertion by the Supreme Court that due process is not absolute, and must defer to judicial efficiency when protecting the interests of future parties no longer becomes practicable. Indeed, both *Mullane*'s and *Hansberry*'s limits on due process combined to acknowledge that due process must be weighed against judicial efficiency in the context of preclusion. As courts began recognizing the procedural limitations of due process, it was natural for courts to adopt a broader interpretation of the virtual representation doctrine.

The Supreme Court's liberal interpretations of due process and notice requirements in *Mullane* and *Hansberry* were consolidated and integrated into the virtual representation doctrine by the 5th Circuit in *Aerojet-General Corp. v. Askew*.[43] The court in *Aerojet* was asked to consider whether Dade County, Florida could bring forth a suit asserting that the county had the right to purchase land currently being held by a private corporation with an option to purchase, or whether the county's claim was precluded because it had already been virtually represented by a Florida state board in a previous suit.[44] In determining that the county was precluded from bringing suit, the court laid out a broad definition of virtual representation. The *Aerojet* court stated that the question of whether a prior party has acted as a virtual representative to a party

40. *Id.* at 317–320.

41. The Court in *Mullane* stated that adequate notice could be provided to parties not readily ascertainable by taking out an advertisement in a newspaper of general circulation. This method of "notice" clearly had little to no chance of reaching the unidentified parties in question but was the only practical way to deal with the due process notice requirement in the given case. *See* Dusenbery v. United States, 534 U.S. 161, 162 (2002) ("The Due Process Clause does not require heroic efforts by the Government to assure the notice's delivery, nor does it require the Government to substitute petitioner's proposed procedures that would have required verification of receipt.").

42. Harvey Rochman, *Due Process: Accuracy or Opportunity?*, 65 S. CAL. L. REV. 2705, 2723–2724 (1992).

43. 511 F.2d 710 (5th Cir. 1975).

44. *Id.* at 712–15.

bringing suit is a question of fact, to be determined by looking at the closeness of the relationship between the prior party and party bringing suit and by making a judgment as to whether the interests of the current party were adequately represented by the prior party.[45] While *Aerojet* established a fact-based test for determining virtual representation, the court failed to specify how its interpretation of virtual representation meshed with the due process concerns that had been raised at the start of the twentieth century.[46] In fact, the opinion makes no mention of the Due Process Clause. *Aerojet*'s broad holding, coupled with its failure to define a plausible approach to consolidating the virtual representation doctrine with due process requirements led to more questions than it did answers, ushering in a period of confusion in defining the virtual representation doctrine.[47] Federal Circuits split between narrow and broad interpretations of the virtual representation doctrine, and two polarized views emerged.[48] On one end of the spectrum was the Fifth Circuit, which reconsidered its liberal interpretation of the doctrine in *Aerojet* and decided instead to apply a narrow interpretation of the doctrine in *Pollard v. Cockrell*.[49] In *Cockrell*, massage-parlor owners brought suit challenging a city ordinance regulating massage parlors, and the court was faced with the issue of whether the owners' suit should be precluded because the same statute had already been challenged by other owners.[50] The current owners filing suit used the same lawyer as previous owners, had identical interests, and even filed complaints that were identical, except for their jurisdictional averments.[51] Nevertheless, the Fifth Circuit refused to apply the virtual representation doctrine, stating that virtual representation requires the showing of an express legal relationship between the current party filing suit and a prior party that has already filed suit in order for preclusion of the current party to be proper.[52] While the court did not provide an exhaustive list of legal relationships that would subject a claim to preclusion by virtual representation, the

45. *Id.* at 719–20.

46. Bone, *supra* note 13, at 220 ("Unfortunately, the court [in *Aerojet*] did not also provide a theory of participation that could support its new doctrine, nor did it explain how an interest representation rationale could possibly satisfy an absentee's right to a personal day in court.").

47. Professor Bone notes that later cases interpreting *Aerojet's* broad redefinition of virtual representation were "ad hoc" in nature and lacked a "clear organizing framework." Bone, *supra* note 13, at 220. *See also* Colby v. J.C. Penny Co., 811 F.2d 1119, 1125 (7th Cir. 1987) (holding that, where J.C. Penny raised a virtual representation defense, the plaintiff's suit would be barred as long as there had been an adequate representation of the plaintiff's interest, but there is no uniform case law defining the parameters of adequate representation).

48. *Id.* at 223.

49. Pollard v. Cockrell, 578 F.2d 1002 (5th Cir. 1978).

50. *Id.* at 1005.

51. *Id.* at 1008.

52. *Id.*

court gave the following examples: (1) estate beneficiaries bound by administrators of the estate, (2) presidents/sole stockholders and the companies they own, (3) parent corporations and their subsidiaries (4) trust beneficiaries and trustees, and (5) government authority that is the public enforcer of an ordinance or statute and private parties suing for enforcement as private attorneys general under the statute.[53] The Fifth Circuit's requirement of a preexisting legal relationship[54] essentially eliminated the applicability of any substantive analysis. Indeed, given the parties' use of the same lawyer and litigation in *Pollard*, the outcome would have been entirely different had the court adopted a broad interpretation of virtual representation. On the other end of the spectrum, the Eighth Circuit, in *Tyus v. Schoemel*,[55] adopted a much more liberal interpretation of the virtual representation doctrine, requiring only the existence of a "special relationship" between a current party and a party to a prior action in order for virtual representation to apply.[56] In *Tyus*, the court was asked to decide whether a suit by African American voters alleging that the city of Saint Louis had engaged in gerrymandering after the 1990 census precluded a subsequent suit by the city's aldermen challenging the same boundary redrawing.[57] The court considered and expressly rejected *Pollard*'s limited definition of virtual representation, noting that a broad application of virtual representation allows for a more precise balancing of due process against judicial economy.[58] Unlike *Pollard*'s rigid categorical approach, *Tyus* adopted a fact-intensive totality of the circumstances analysis to determine whether the present party has already been adequately represented by a prior party.[59] The factors which the court considered dispositive in identifying a special relationship under *Tyus* were: (1) identity of interests, (2) a close relationship in fact, (3) participation in the prior litigation, (4) apparent acquiescence, (5) deliberate maneuvering to avoid the effects of the first action, (6) the incentive of the prior party to seek protections of interests which are important to the first party, and (7) whether the claims raise a

53. *Id.* at 1008–1009.

54. *Id.* at 1008.

55. Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996).

56. The underlying problem with the "special relationship" approach adopted by the Eighth Circuit is that courts have often struggle to define when the relationship between two parties is "sufficiently close" to justify preclusion. *See* Phillips v. Kidder, Peabody & Co., 750 F.2d 603, 607–08 (S.D.N.Y. 1990) (holding that a current party may be precluded based on a relationship that is "sufficiently close" to that of a prior party, but that there is no bright line rule for making this determination).

57. *Tyus*, 93 F.3d at 451–53.

58. *Id.* at 454–55.

59. *Id.* at 455–56 ("Due to the equitable and fact-intensive nature of virtual representation, there is no clear test for determining the applicability of the doctrine. There are, however, several guiding principles.").

public law or private law issue.[60] The Eighth Circuit's totality of the circumstances approach is a marked departure from the Fifth Circuit's legal-relationship test because it looks at the substantive weight that each claim presents rather than using predefined categories to decide cases on an inflexible basis. In fact, the *Pollard* court would very likely have reached an opposite decision under this substantive test. This split between the Fifth Circuit and Eighth Circuit definitions of virtual representation speaks to the difficulty that courts have had in consolidating the practical utility of the virtual representation doctrine with the due process concerns that broad application of the doctrine inevitably raises.

Faced with two polarized definitions of the virtual representation doctrine at the Circuit level, the Supreme Court tackled the problem of defining virtual representation in *Richards v. Jefferson County*.[61] *Richards* involved a suit by Birmingham, Alabama, county taxpayers who challenged the city's occupational tax. The issue centered on whether these parties should be precluded from bringing suit where Birmingham's finance director had already challenged the occupation tax in a previous suit.[62] The Court adopted a broad definition of virtual representation that required only adequate representation between a present and prior party in order for preclusion to be proper. In the Court's eyes, adequate representation was met when there was privity between the present and prior party; privity, in turn, was said to cover "various relationships between litigants that would not have come within the traditional definition of that term."[63] The *Richards* Court used *Hansberry* to further broaden the applicability of virtual representation by stating that the *Hansberry* opinion "may be read to leave open the possibility that in some class suits adequate representation might cure a lack of notice."[64] Having used *Hansberry* to dispense of notice concerns, all the Court required to justify the applicability of virtual representation to a current action was that the prior action would have been "so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue."[65] While the *Richards* Court ultimately refused to conclude that the county taxpayers were adequately represented by the finance director, the Court's application of the adequate-representation standard is effectively an endorsement of the esoteric def-

60. *Id.* at 455–57; *see also* 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4457 (4th ed. 2009).

61. 517 U.S. 793 (1996).

62. *Id.* at 793–94.

63. *Id.* at 798.

64. *Id.* at 801.

65. *Id.*

inition adopted by the Eighth Circuit. The Court did not look to see if there was a preexisting legal relationship between parties. Instead, it focused on whether the finance director represented the pecuniary interests of county taxpayers rather than the corporate interests of the city itself.[66] The Court concluded that the record and the pleadings evinced that the finance director did not have the taxpayers' interest in mind and adequate representation was therefore lacking where the finance director and the county taxpayers were at best "'strangers' to one another."[67] By engaging in a substantive analysis of whether adequate representation has been met, the *Richards* decision gave courts broad discretion in applying the virtual representation doctrine.[68] *Richards* therefore impliedly rejected the notion that virtual representation should be determined by looking to predetermined legal classes.

The broad definition of virtual representation propounded by the Court in *Richards* has been significantly narrowed in *Taylor v. Sturgell*, a decision which replaces *Richards* substantive virtual representation test with an approach that requires the existence of a defined legal relationship between the current party and a party to a prior action before preclusion by virtual representation is proper,[69] an approach that is closely analogous to the Fifth Circuit's approach in *Pollard*.

III. THE *TAYLOR V. STURGELL* DECISION

The *Sturgell* decision adopted a narrow interpretation of the virtual representation doctrine, requiring a legal relationship between a party and nonparty to a suit before the virtual representation doctrine is applicable. The Supreme Court justified its narrow interpretation of the doctrine on the grounds that it is necessary to preserve the due process day-in-court ideal at the expense of the benefits that a broader interpretation of the virtual representation doctrine could provide.

The facts in *Sturgell* are outlined below; they are important for the purposes of this paper because they give the reader a better sense of the artificially narrow results that the Court's definition of virtual representation may produce. *Sturgell*'s story starts with an antique airplane. The owner of that airplane was Greg Herrick, an aircraft mechanic and

66. *Id.* at 801–02.

67. *Id.* at 802.

68. Laura Evans, *Limiting Virtual Representation in* Headwaters Inc. v. United States Forest Service*: Lost (Opportunity) in the Oregon Woods?*, 33 ECOLOGY L.Q. 725, 733 (2006) (*Richards* "indicate[s] that, in the case of public actions with indirect impact on personal interests, it would allow states broad discretion in determining what judicial proceedings to apply, and even whether to grant standing in the first place").

69. Taylor v. Sturgell, 128 S. Ct. 2161, 2169–2180 (2008).

enthusiast.[70] He was also a member of the Antique Aircraft Association (AAA). Herrick owned an F-45 airplane manufactured by the Fairchild Engine and Airplane Corporation (FEAC) in the 1930s.[71] In 1997, Herrick became interested in obtaining technical data on his F-45 to complete restoration of the airplane. He filed a Freedom of Information Act (FOIA) request asking the Federal Aviation Administration (FAA) for copies of the necessary documents (the FAA had copies of these documents because it keeps certifications of all airplanes authorized for sale).[72] The FAA denied Herrick's request.[73] Herrick filed suit in Wyoming against the FAA, and the FAA invoked a trade secrets defense, prompting the District Court to grant summary judgment in the FAA's favor in 2000.[74] Herrick appealed and, on July 24, 2002, the 10th Circuit Court of Appeals affirmed the District Court's decision, also relying on the trade secret doctrine.[75] On August 22, 2002, Brent Taylor submitted an FOIA request for the same documents Herrick had just unsuccessfully sued to obtain.[76] Taylor was a friend of Herrick's, and was also a member of the Antique Aircraft Association.[77] The FAA failed to respond to Taylor's request in a timely manner and Taylor sued in the U.S. District Court of Columbia using the same lawyer that Herrick used.[78] The District Court concluded that Taylor's suit was barred by the virtual representation doctrine, applying a seven factor totality of the circumstances test that looked at: (1) the identity of interest between the parties; (2) the presence of a close relationship between the parties; (3) participation of the present party in the prior party's litigation; (4) the present party's acquiescence to preclusive effects of a prior judgment; (5) the present party's deliberate maneuvering to avoid the applicability of a prior judgment to the presently filed action; (6) adequate representation of the present party in the prior party's action; and (7) whether the suit raises a public, rather than private, law issue.[79] Using this test, the Court found that Taylor had been virtually represented in Herrick's prior action and Taylor's case should therefore be precluded.[80] In coming to this decision, the court placed special importance on the following facts: Taylor was the president of the AAA, an organization of which Herrick

70. Herrick v. Garvey, 298 F.3d 1184, 1199 (10th Cir. 2002).
71. *Id.* at 1188.
72. Taylor v. Sturgell, 128 S. Ct. 2161, 2163 (2008).
73. *Id.* at 968.
74. Taylor v. Blakely, 490 F.3d 965, 969 (D.C. Cir. 2007).
75. *See* Taylor v. Sturgell, 128 S. Ct. 2161, 2161 (2008); *Blakely*, 490 F.3d at 965.
76. *Blakely*, 490 F.3d at 969.
77. *Id.* at 968–69.
78. *Id.*
79. *Id.* at 971.
80. *Id.* at 978.

was also a member; Herrick had asked Taylor for help in restoring the F-45 prior to Taylor filing suit; Taylor was represented by the same lawyer that represented Herrick in the prior suit; and finally, Taylor used a number of documents that Herrick had obtained from the FAA and had used in his suit.[81]

Taylor appealed, and the D.C. Circuit Court affirmed the District Court's decision but rejected the District Court's seven factor test in favor of its own "five factor test," which is really a hybrid three factor test.[82] The D.C. Circuit's test also employed a totality of the circumstances test, looking at whether there was (1) identity of interest, (2) adequate representation in the prior action, and (3) *at least one of* the following three factors: (A) a close relationship between the current party and a party to the prior action; (B) Substantial participation by the present party in the prior action; (C) tactical maneuvering by the current party to avoid applicability of a prior judgment to their case.[83] The D.C. Circuit's test goes one step further than the District of Columbia's test in that it requires at least one of elements (A)–(C), all of which involve a party's knowing participation in the prior suit.[84] Elements (A)–(C) could therefore be said to meet the due process notice requirement because a party who does any of the acts in (A)–(C) must have had notice of the prior action and, furthermore, must have been directly involved in the prior action as well.[85] The D.C. Circuit concluded that, under its seven factor test, Taylor had already been virtually represented by Herrick.[86] The Court reasoned that Taylor and Herrick had identical interests in seeking the airplane data, Taylor and Herrick were close associates who were members of the same organization, and Herrick had adequately represented Taylor in the prior suit where Herrick had used the same lawyer and litigation strategy.[87]

The Supreme Court rejected both of the aforementioned totality of the circumstances tests in favor of an even more stringent test that

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81. *Id.* at 969.
82. *Id.* at 971–72.
83. *Id.* at 971–73.
84. *Id.*
85. *Id.* at 974:

> The district court concluded Taylor apparently had notice of Herrick's litigation based primarily upon their shared interest in antique aircraft, their common membership in the AAA, their use of the same lawyer for their respective cases, Herrick's sharing with Taylor the information he obtained through discovery, and his request that Taylor assist in the restoration of his F-45. As Taylor and the amicus note, however, these facts do not show that Taylor had notice of Herrick's lawsuit while it was ongoing. We turn to other indicia, therefore, to determine whether Taylor was adequately represented by Herrick.

86. *Id.* at 978.
87. *Id.*

requires a showing of one of the following six legal relationships between a current party and a party to a prior action before virtual representation can be used to preclude the current party's claim: (1) the current party expressly agrees to be bound by the judgment of a prior action; (2) a preexisting substantive legal relationships between the current party and a party to a prior action (ex. assignor-assignee, bailor-bailee); (3) the current party was already adequately represented by a party to a prior action that was a member of the same representative class as the current party or that has a fiduciary relationship with the current party (ex. trustor-trustee, guardian-dependent); (4) the current party assumed control over the litigation of the prior action; (5) the current party uses the party to a prior action as a proxy to litigation; or (6) a statutory scheme expressly forecloses successive litigation by the current party.[88] Each of the above six categories requires a defined preexisting legal relationship between the current party and a prior party, effectively replacing the virtual representation's "identity of interests" and "adequate representation" requirements with a "prior legal relationship" requirement. The Supreme Court based its decision to restrict the virtual representation doctrine on two grounds. First, the Court opined that adequate representation is only present when there are special procedures to protect nonparties' interests or there is an understanding by the concerned parties that the first suit was brought in a representative capacity.[89] The Court's view is that, in order for a party's interests to be protected, preclusion cannot be based on anything less than a defined legal relationship between a current party and a prior party if the day-in-court ideal is to be upheld.[90] Second, the Court's narrow redefinition of the virtual representation doctrine was based on the Court's concern over the inconsistent application of totality of the circumstances tests by lower courts; the Court's fear is that such a test would result in different definitions and tests for determining when virtual representation applies.[91] In short, the Supreme Court's holding in *Sturgell* is an attempt to create a clear, bright-line approach to the virtual representation doctrine.[92] However, the Court has perhaps been too hasty in narrowing the scope of the doctrine without considering the potential benefits that a broader totality of the circumstances approach has to offer. As explained

88. Taylor v. Sturgell, 128 S. Ct. 2161, 2169–2180 (2008).

89. *Id.* at 1774.

90. *Id.* at 1771.

91. *Id.* at 1776; there is certainly some justification for this concern as evinced by the historic split in interpretation between the 5th and 8th Circuits, *see supra* pp. 14–17; however I would argue that it is precisely because of the virtual representation doctrine's historically elusive definition that a totality of the circumstances test would be a better fit for the doctrine than a bright line rule, *see infra* pp. 43–46.

92. *Sturgell*, 128 S. Ct. at 2176–77.

below, there is a strong argument to be made that these benefits outweigh the concerns of due process and applicability on which the Supreme Court based its decision.

IV. THE *STURGELL* DECISION NEEDLESSLY LIMITS THE VIRTUAL REPRESENTATION DOCTRINE BECAUSE OF DUE PROCESS CONCERNS

A. *The* Sturgell *Decision Fails to Properly Account for Countervailing Values of Efficiency, Consistency, and Finality in its Due Process Analysis*

The Due Process Clause, and the day-in-court ideal[93] which the clause embodies, were the first of two factors influencing the Supreme Court's decision in *Sturgell*. However, in limiting the virtual representation doctrine to address due process concerns, the Supreme Court has chosen to ignore the countervailing benefits of judicial efficiency, finality, and consistency. As discussed below, these countervailing interests would have been protected by a broader interpretation of the virtual representation doctrine. Instead, these values have been sacrificed, and the political realities of our modern judicial system have been largely ignored, at the expense of preserving due process concerns based on shaky legal precedent.

The first issue with the *Sturgell* decision is that the Supreme Court overstates legal precedent when it quotes *Richards* as requiring a legal relationship between parties in order for a current party to have been adequately represented by a party to a prior action. The Supreme Court quotes *Richards* for the principal that a nonparty may be bound by a judgment when there has been an adequate representation of a nonparty by a party to the case,[94] essentially interpreting the concept of adequate representation as being a synonym for an identifiable legal relationship between two parties.[95] The Court's interpretation harkens back to a pre-*Hansberry* interpretation of the virtual representation doctrine, one where the doctrine was strictly limited in application to specified groups of people sharing legal relationships.[96] In this case, the D.C. Circuit's

93. The legal justification for a day in court ideal is discussed *infra* pp. 26–28; the day in court ideal can be broadly expressed as the notion that each person should have access to a legal system that allows them to tell their own story, the implicit assumption being that "each story is unique to that individual and, therefore, one that only she can tell," Leah Bressack, *Small Claim Mass Fraud Actions: A Proposal for Aggregate Litigation Under RICO*, 61 VAND. L. REV. 579 (2008).

94. *Sturgell*, 128 S. Ct. at 2168.

95. *Id.* at 2165 (the Court claims that *Richards* "delineate[s] discrete, limited exceptions to the fundamental rule that a litigant is not bound by a judgment to which she was not a party.").

96. *See supra* pp. 6–9.

interpretation of *Richards* in *Taylor v. Blakely* is more accurate than the Supreme Court's interpretation of *Richards* in *Taylor v. Sturgell*; the D.C. Circuit acknowledged that "[a]t one time courts tended not to find two parties in privity absent a specific legal relationship between [litigants],"[97] but clarified that the term is now "'used to describe various relationships between litigants that would not have come within the traditional definition of that term.'"[98] The D.C. Circuit rejects the historical legal-relationship requirement and instead adopts an interpretation that is more in line with the post-*Hansberry* test of asking whether the "litigation is so conducted as to insure the full and fair consideration of the common issue."[99] By narrowly interpreting the definition of "adequate representation" to only include cases in which the current party and party to a prior action stand in predefined legal relationships, the Supreme Court has effectively ignored the *Richardson* definition of adequate representation, which required courts to look at the substantive aspect of the prior representation rather than limiting the definition of "adequate representation" to a few predefined categories.[100] The Supreme Court's replacement of a fairness test with a bright-line categorical approach is a shift that is not supported by *Richards*.

The Supreme Court justifies this narrowing of the virtual representation doctrine by arguing that the Due Process Clause requires that every potential litigant be given his day in court. This argument, though noble, has no solid precedential basis in the judicial history of the United States. The day-in-court argument can be logically broken down into four steps:[101] (1) the argument starts out with the assumption that a legal cause of action is a property right;[102] (2) the Constitution protects an individual from having their property taken away by either the federal or state governments;[103] (3) the goal of due process is to prevent the deprivation of one's property rights unless the depravation is fundamentally fair; (4) a person's right to file a lawsuit therefore cannot be denied by a state or federal court without leading to a due process violation because a piece of the individual's property has unjustly been taken away by the government.[104] This argument appears, at first blush, to be logically

97. Taylor v. Blakely, 490 F.3d 965, 970 (D.C. Cir. 2007).

98. *Id.* (quoting Richards v. Jefferson, 517 U.S. 793, 798 (1996).

99. *Id.* at 970; *see also* Hansberry v. Lee, 311 U.S. 32, 43 (1940).

100. *See Richards*, 490 F.3d at 801-02; Evans, *supra* note 68, at 733.

101. *See generally* Edward L. Rubin, *Due Process in the Administrative State*, 72 CAL. L. REV. 1044 (1984).

102. Malley-Duff & Assocs. v. Crown Life Ins. Co., 792 F.2d 341, 353–354 (3d Cir. 1986).

103. U.S. CONST. amend. V; U.S. CONST. amend. XIV § 1.

104. Truax v. Corrigan, 257 U.S. 312, 332 (1921) ("The Due Process Clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry,

sound; it is also immediately attractive because it evokes elements of fairness and promotes the idea of complete inclusion into the judicial processes that profoundly affect members of contemporary society. Due process has long been recognized as a legitimate principle throughout our legal system's history, perhaps to allay fears that government will become too tyrannical if allowed to affect our rights and take our property without having to justify itself. This view is clearly expressed in *Goldberg v. Kelly*:[105]

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.[106]

There are many academics who would argue that all legal doctrines employed by our courts should first and foremost abide by the Constitution, and that "it is of the utmost importance to ground interpretation explicitly in constitutional values."[107] Clearly, there is good reason to protect due process. However, there are also weaknesses to the due process argument employed by the Supreme Court in this case, as well as countervailing interests that the Court has sacrificed in order to protect due process against the perceived threat of virtual representation. Finally, the day-in-court argument also fails to take the practical realities of our present legal system into account.

First, there is no definite historical precedent supporting the claim that due process requires that every person have their day in court. The idea that the American judicial system has always placed litigants' right to have their case heard in a courtroom above other judicial concerns, while noble, is simply not true. If the day-in-court ideal truly had a strong precedential basis in our judicial history, "the value of principled consistency over time or respect for experience as a guide to sound institutional design might offer powerful support for a prima facie right to participate."[108] No such prima facie participation right has emerged during the two hundred and twenty years that our judicial system has been in existence. On the contrary, there are a number of cases which limit the day-in-court ideal, and these cases are simply too numerous to be

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and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society").

105. 397 U.S. 254 (1970).

106. *Id.* at 270 (quoting Greene v. McElroy, 360 U.S. 474 (1959)).

107. Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1700 (1988).

108. Bone, *supra* note 13, at 233.

considered flukes or mistakes.[109] An argument in support of the day-in-court ideal cannot be supported by arguing that the ideal is one which has been historically recognized in our society; on the contrary, history shows us that our judicial system has been willing to make exceptions to the day-in-court ideal, indicating that our society's interpretation of the Due Process Clause is fluid enough to recognize that there are values which our system holds in a higher regard than the idea that every litigant should have their case heard. Nowhere is our judicial system's liberal understanding of the Due Process Clause more apparent than in the history of the virtual representation doctrine, a history which consists of a cyclical process of expanding and limiting the virtual representation doctrine with the hope of balancing due process concerns with the concerns of judicial efficiency, finality, and consistency.[110]

Contrary to the Supreme Court's claim in *Sturgell*, there is also no definable traditional justification for the day-in-court ideal. The Supreme Court justifies its limitation of the virtual representation doctrine on the grounds that "[t]he application of claim and issue preclusion to nonparties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'"[111] But there is no traditional requirement in our judicial system that every person who feels wronged or unjustly treated by our judicial system may have their complaints heard by a legal tribunal.[112] It would be impractical for our legal system to apply the Due Process Clause so adamantly as to allow anyone who wishes to challenge an action taken by our legal system to do so. Furthermore, the conceit that our government is so in tune with individual rights as to give everyone a just hearing before depriving them of rights is simply invalid.[113] For example, there are government limita-

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109. *Id.*; the limitations of due process have been recognized as early as the 1880s by American courts, *see* Lavin v. Emigrant Indus. Sav. Bank, 1 F. 641, 660 (1880) (quoting Murray v. Hoboken Land & Improvement Co., 59 U.S. 272, 280 (1855)):

> For, though 'due process of law; generally implies and includes actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, yet this is not universally true. There may be, and we have seen that there are, cases under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands and goods of certain public creditors without any such trial'.

110. For a discussion of this history, *see supra* pp. 6–19.

111. Taylor v. Sturgell, 128 S. Ct. 2161, 2171 (2008) (quoting Richards v. Jefferson, 517 U.S. 793, 798 (1996)).

112. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (holding that applying due process to administrative claims affecting the entire public is impractical and not constitutionally required).

113. In *Mullane*, Justice Jackson astutely noted that "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified." Mullane v. Hanover, 339 U.S. 306, 313–314 (1950).

tions such as driving or drinking age which are imposed upon our society by the government and which we cannot challenge in court. We recognize our government's sovereignty, and in recognizing that sovereignty there is an implicit understanding that our government can limit our legal and property rights for the purpose of maintaining social order. The takings clause, for example, allows the government to take property with just compensation.[114] This in and of itself is a limit on our property rights because our property can be taken from us as long as fair value is paid, regardless of whether we did not want to trade our property for money. Another example of government limitation of property rights is the rejection of the English *usque ad coelum* principle in favor of government ownership of airspace above private property in order to ensure the possibility of efficient air travel.[115] Our legal system also employs justiciability doctrines to limit potential litigants' access to courts. Taxpayer standing, for example, limits a person's right to challenge the government's spending of his tax money, limiting access to courts in favor of government efficiency.[116] Mootness also limits a potential litigants' ability to have a claim heard.[117] Clearly, government has traditionally been allowed to confiscate private property rights and limit legal rights to maintain social order, and virtual representation is merely an extension of that same concept. Under the Supreme Court's reasoning that the ability to file a lawsuit is a property right, limiting citizens' access to the judicial system is just another limitation which we implicitly agree to in recognizing our government's sovereignty. Because government can take away individual property rights for the sake of preserving social order and efficiency,[118] the virtual representation doctrine should be viewed as an inherently accepted government limitation on property rights. The history of the virtual representation doctrine has seen numer-

114. U.S. CONST. amend. V.

115. Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206, 1217 (D.C. Cir. 2005) (holding that property owners do not have cognizable property rights to the public airspace above their land for purposes of the 5th amendment).

116. Hein v. Freedom From Religion Found., 551 U.S. 587 (2007).

117. There is an argument to be made for the deconstitutionalization of mootness as justified by the "cases or controversies" language in the Constitution. *See* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 654–669 (1992),.If mootness were to be stripped of this Constitutional justification, it would be nothing more than a government imposed screening device designed to prevent plaintiffs from access to courts in order to clear docket space. *Id.* Such an interpretation of mootness should theoretically prompt the Supreme Court to raise the same due process concerns with mootness that they decided to employ against the virtual representation doctrine in *Sturgell*.

118. Eminent domain, for example, is essentially "the use of government power to maintain and preserve political, economic and social order in society and life." Donald C. Guy, *The Climax of Takings Jurisprudence in the Rehnquist Court Era: Looking Back from* Kelo, Chevron U.S.A. *and* San Remo Hotel *at Standards of Review for Social and Economic Regulation*, 16 PENN. ST. ENVTL. L. REV. 115, 180–181 (2007).

ous judicial policies that liberally construe the Due Process Clause, limiting the day-in-court ideal for the sake of efficiency. Because our legal system is implicitly empowered to limit private property rights in order to promote values such as efficiency, finality, and consistency, no argument can be made that there is a traditional basis by which the day-in-court ideal can be justified. In fact, one could go so far and argue that an overly stringent application of due process actually serves to decrease the equal treatment of individual claimants in our legal system:

> [T]here is a conflict between the ideal of doing justice in the individual case and the equally fundamental ideal of fairness as equality of treatment. The more judges and juries are permitted to pursue the varying details of each claim and claimant, the more they will generate uneven outcomes across cases and parties. This conflict between individualization and equality is more frequently finessed by artful categorization than confronted.[119]

Thus, there is no traditional or moral basis present in our legal system which requires that every potential claimant must have their case heard by a court or legal tribunal.

The day-in-court ideal cited by the Court also fails to take into account the modern realities of overcrowded court dockets, which are often so full that people must wait years to have their day in court.[120] Overcrowded courts justify the use of preclusion doctrines such as virtual representation because these doctrines help clear up much needed docket space for new cases to be heard.[121] Because new cases are filed every day, there is an endless stream of cases that courts could potentially have on their dockets. Under such a model, precluding a case from being heard merely allows another case to be put on the docket which may not otherwise have had a chance of being heard.[122] In fact, I would argue that overcrowded dockets *necessarily require* some type of preclusion mechanism in order to more efficiently decide which cases will and will not be heard. Under the modern realities of our legal system, the

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119. Glen Robinson and Kenneth Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481, 1513 (1992).

120. Shaun M. Gehan, *With Malice Towards One: Malice and the Substantive Law in "Class of One" Equal Protection Claims in the Wake of* Village of Willowbrook v. Olech, 54 ME. L. REV. 329, 334 (2002); *see also* Jeremy Kennedy, *The Supreme Court Swallows a Legal Fly: Consequences for Employees as the Scope of the Federal Arbitration Act Expands*, 33 TEX. TECH L. REV. 1137, 1157 (2002); Estate of Baumgardner v. C.I.R., 85 T.C. 445 (1985) ("Considering the overcrowded dockets in most Federal courts, we cannot be insensitive to opportunities to avoid unnecessary litigation").

121. *See* Interview, Philip Sellinger, *Improved Court Funding and Enhanced Judicial Compensation Needed*, THE METROPOLITAN CORPORATE COUNSEL, April 2008, at 19 (discussing the effect of overcrowded dockets on class actions and the limits on issue discovery that overcrowding places on complex cases).

122. Brown v. Felsen, 442 U.S. 127, 131 (1979).

question is not whether we should or should not preclude people from having access to courts; someone will inevitably be precluded from having their case heard (this will occur either because a party will have their case thrown out because of a preclusion doctrine such as virtual representation or because a party does not get a chance to have their case heard because of the overcrowded nature of the system). The question inevitably becomes: how we should decide who deserves to have their case heard more than the next person in line? Such questions can be best answered by looking at the substantive merits of each case and determining which cases have already been substantively decided before given the close relationship of the current party and a party to a prior action. Given the practical realities of our judicial system, we must acknowledge that courts simply cannot hear all of the cases that are brought before them on a daily basis.[123] Once one accepts this reality, preclusion doctrines such as virtual representation become not only justified but necessary. Preventing relitigation of the same issues "conserves scarce judicial resources and promotes efficiency in the interest of the public at large," which is important because "judicial resources are finite and the number of cases that can be heard [are] limited."[124] Unfortunately, *Sturgell*'s limitation of the virtual representation doctrine impedes the doctrine's ability to discern between cases that should and should not be preempted. The *Sturgell* Court's narrowing of the doctrine limits courts' decisionmaking power by making them focus on predefined narrow categories of legal relationships instead of allowing courts to base their decisions on which cases to preclude on substantive merit. In *Mathews v. Eldridge*,[125] the Supreme Court noted that there are a number of factors courts must look at to determine whether or not preclusion violates due process:

> 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.[126]

The Supreme Court's narrow interpretation of the virtual representation

123. *See* Matthew S. Tripolitsiotis, *Bridge Over Troubled Waters: The Application of State Law to Compact Class Entities*, 23 YALE L. & POL'Y REV. 163, 204–05 (2005) (arguing that when deciding whether federal courts have jurisdiction over a case, efficiency concerns must be weighed and "adding to the backlog should always be closely scrutinized to ensure that the proposed action is necessary.").

124. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 16.2 at 653 (9th ed. 2008).

125. 424 U.S. 319 (1976).

126. *Id.* at 334–35.

doctrine effectively abandons *Eldridge*'s complex analysis, an analysis required to ensure that preclusion meets due process requirements in a given case. The Supreme Court replaces this pivotal determination with a bright-line approach consisting of six arbitrarily predetermined categories of legal relationships.

This narrowing of virtual representation's reach eliminates many of the values that the more expansive interpretation of the doctrine provided, namely those of judicial efficiency, finality, and consistency. Arguably, these values are of more practical importance in our present judicial system than the abstract day-in-court ideal with which the Court appears so enamored.[127]

First, the *Sturgell* Court's definition of virtual representation fails to account for the judicial efficiency which a broader interpretation of the virtual representation doctrine would have provided. A broad interpretation of virtual representation promotes greater judicial efficiency because it allows our judicial system to preclude a broader range of cases it would otherwise have had to expend considerable resources in deciding.[128] It is true that judicial efficiency alone is not enough to overcome the value that our legal system places on due process; courts have consistently recognized that the Due Process Clause stands for values higher than speed and efficiency.[129] However, efficiency is one of the advantages to consider when balancing the pros and cons of a broad application of the virtual representation doctrine, especially given the practical realities of our legal system. Once courts recognize that they are limited both in the number of cases that they can hear a day and in the number of claims that they can hear as part of any given case, they may come to favor a broader interpretation of the virtual representation

127. One of the age old conflicts of our legal system has been to resolve the tension between doing what is realistically efficient and doing what is pragmatically and morally correct; the practice of law has continually strived to operate effectively while upholding social desirable "rights"; *see* Robert Bone, *Personal and Impersonal Litigative Forms: Reconceiving the the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 228 (1990) ("The incompleteness of the system and the existence of internal inconsistencies, for example, required that courts in particular cases apply fairness, justice, and efficiency values directly to the social circumstances of the case unmediated by the language and logic of rights. Sometimes this more pragmatic approach called for results difficult to reconcile with the normative structure of the rights-based view. In those cases, the demands of ideology set outer limits on how much deviation courts would tolerate. But within those limits, courts struggled to accommodate the aberrant results by straining the conceptual system to justify them, in the process often introducing new normative conflicts and exacerbating existing ones.").

128. *See* Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. Rev. 643 (2000).

129. Wolff v. McDonnell, 418 U.S. 539, 583 (1974) ("the Due Process Clause 'recognizes higher values than speed and efficiency. . . .'" (quoting Fuentes v. Shevin, 407 U.S. 67, 90–91, n.22 (1972))).

doctrine and the efficiency benefits such an interpretation would provide:

> Even with greater use of the class action, appointment of lead counsel, active judicial management of discovery and judicial facilitation (some would say compulsion) of settlement, there are limits to how many parties and claims a court can handle in one litigating unit . . . Nonparty preclusion holds out the hope of achieving efficiency without expanding lawsuit size, and thus it should look increasingly attractive as courts confront cases where aggregation is not cost-justified.[130]

Efficiency is a very real benefit whose value is recognized by our legal system. The very first rule of the Federal Rules of Civil Procedure encapsulates this value, stating that the Federal Rules should be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[131] The use of the words "speedy" and "inexpensive" in the first rule indicates that the value of judicial efficiency is a value that should not be easily overlooked or written off. Granted, the efficiency argument does not carry nearly as much weight as the Due Process Clause's value of increased public participation in our legal system. However, preclusion and due process are not necessarily polar opposites; it is important to note that preclusion doctrines have in some ways increased citizens' participation in the legal system through their promotion of the "class" form:

> Preclusion helps secure the class action form, and that form promotes participation. Class cases produce more—not less—participation because they tend to provide compensation for injuries and harms that would otherwise be too minor to litigate. The small claims class action is specifically justified on this ground: Absent the class form, there would be no litigation at all because each class member's claim is so small that the costs of pursuing it individually outweigh any benefit she would reap. Only because of representative litigation does this person get to participate . . . Thus, although there is less personal participation in a class suit, a greater quantity of claims is resolved with a greater number of individuals likely to receive relief, and greater deterrence is achieved. Moreover, the extent to which individuals are interested in participating in cases involving small claims, in particular, is minimal.[132]

The result is that preclusion doctrines such as virtual representation can function as somewhat of a two-edged sword. One must take into account the state of the judicial systems in which these doctrines operate in order

130. Bone, *supra* note 13, at 198.

131. FED. R. CIV. P. 1.

132. William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 836 (2007).

to determine whether their effect is to prevent the participation of litigants who would otherwise have had their day in court or whether the doctrines serve to efficiently filter out cases that deserve to be heard in full by our legal system from those that do not. "Participation, like finality, is likely best produced by a rule structure that can pinpoint the value more specifically than by an either/or solution."[133] Unfortunately, the Supreme Court in *Sturgell* chose the aforementioned either/or solution in applying a bright line test for determining when preclusion under the virtual representation is proper.

A narrow interpretation of the virtual representation doctrine also undermines the value of legal consistency. Without consistency, our legal system loses legitimacy. If multiple parties try the same issue in substantially the same manner and a court comes to two different conclusions on substantially the same issue, consistency is undermined and people will begin losing faith in the legal system. "Consistency is a prime value in a legal system . . . standards of conduct should be stable over time, as security for those who have relied on them."[134] By substantially limiting the applicability of the virtual representation doctrine, *Sturgell* threatens to undermine judicial consistency. The Court's narrow interpretation of the doctrine will allow parties who have had adequate representation that rises to the level posited in *Richards* but falls short of the "legal relationship" requirements of *Sturgell* to escape preclusion. The result is that these parties will be able to bring a claim that is the same or substantially similar to a prior party's claim before a court and have that claim litigated. Imagine two parties who raise the same claim and receive substantially similar representation, but do not share a formal legal relationship; the second party's case is not precluded after the court has already granted judgment on the first party's case; the court ends up ruling one way on the first party's case and then ruling another way on a second party's case. In such a scenario, the same court has given two different results in two circumstances that are substantially the same. There is clearly something wrong with a system that produces completely different outcomes in this situation; the validity of our judicial system will naturally be questioned when similar fact patterns yield different results.[135] The virtual representation doctrine ensures greater

133. *Id.* at 837.

134. Harold Levinson, *The Legitimate Expectation that Public Officials Will Act Consistently*, 46 AM. J. COMP. L. 549, 556 (1998) (quoting ALFRED AMAN & WILLIAM MAYTON, ADMINISTRATIVE LAW § 14.2 (1993)).

135. Michael S. Green, *Legal Realism, Lex Fori, and the Choice-of-Law Revolution*, 104 Y.L.J. 967, 976 n.40 (1995) ("The utilitarian values of judicial consistency and deference to statute are obvious: fulfillment of others' expectations, maintenance of the public order and the stability of legal institutions, even the futility, given the possibility of appeal, of deciding in an inconsistent fashion.").

judicial consistency so that society will place more weight on judicial decisions.[136] As an example, the importance of judicial consistency is most evident in our criminal system, where our legal system is willing to let a suspect who has committed a crime to a legal certainty walk because procedural safeguards have not been followed. Evidence that has been illegally seized[137] or that has been divulged to the police by a suspect in violation of *Miranda*[138] is inadmissible in court; its inadmissibility may very well decide the outcome of the case as a whole, but our system approves of these outcomes. The rationale for these oft-controversial decisions is that our legal system must uphold values of legal consistency.[139] By requiring strict adherence to procedural safeguards such as *Miranda*, our legal system ensures that justice is consistently dispensed and outcomes of cases can be better predicted in the future. Consistency has also been embodied in the Constitutional principles of double jeopardy and the prohibition of ex post facto laws.[140] The double jeopardy principle's requirement is especially relevant here. Like virtual representation, double jeopardy seeks to guarantee that courts will not come out differently when trying the same issue twice. In many ways, virtual representation is an extension of the double jeopardy doctrine, only it goes one step further in ensuring consistency as between different parties instead of simply ensuring consistent treatment of a single party being tried twice on the same charge. Consistency is a desired result of our Constitution's due process and equal representation guarantees,[141] and a broader interpretation of virtual representation than that outlined by the Court in *Sturgell* is required to preserve this value. Consistency should therefore be given the weight that it deserves, even when one is faced with the countervailing values of due process:

> The consistency principle is closely related to the rule of law, which recognizes that each citizen has a legitimate expectation that the actions of public officials will be consistent with controlling law. The consistency principle makes its strongest claim when it coincides with established legal norms, such as the rule of law, the guarantees of equal protection and due process, and the law of contracts. Its

136. Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1034 (2003) (The goal of preclusion doctrines such as virtual representation is "to promote judicial economy, avoid the disrepute to the system that arises from inconsistent results, and lay issues to rest so that people can order their affairs.").

137. Mapp v. Ohio, 368 U.S. 871 (1961).

138. Miranda v. Arizona, 384 U.S. 436 (1966).

139. Levinson, *supra* note 134, at 558–559 ("In the interests of enforcing consistent standards for the conduct of law enforcement officers, our system accepts the risk that two equally culpable suspects will receive inconsistent treatment—conviction for one, acquittal for the other.").

140. *Id.* at 553.

141. *Id.*

> weakest claim involves situations where inconsistency is built into our system of government.[142]

Of course, it is impossible to remove all inconsistency from our legal system. Jury trials all but guarantee that there will be always be a level of inconsistency since different juries can come out differently on fact patterns that are essentially the same.[143] Nevertheless, our legal system still views consistency as "a goal to be sought,"[144] one that should have at least been weighed against countervailing values when the Supreme Court decided to narrow the scope of the virtual representation doctrine.

A third value that is lost because of *Sturgell*'s narrow reading of the virtual representation doctrine is finality. Our legal system recognizes the importance of a final judgment actually being final. A judgment is meant to be the law's last word in a judicial controversy.[145] "The preclusion approach curtails collateral attack in order to produce a final judgment that is, indeed, final. As a result, the approach furthers repose [and] guards against inconsistent outcomes . . . ."[146] Indeed, one may argue that finality is the very purpose for litigating a case; parties who choose to engage in a lawsuit want their problems to be permanently settled one way or another.[147] The concept of finality is incorporated into our system through the use of final judgments. Final judgments serve as a bar to a subsequent action by the same parties on the same issue, and these judgment are conclusive both to issues that were actually decided in a case and to those issues that could have been, but were not, raised.[148] Preclusion doctrines such as "artful pleading" also make sure that final judgments at the federal level preclude the filing of cases at the state level, giving federal judgments a greater sense of finality by prohibiting a final judgment issued at the federal level from being challenged at the state level,[149] which effectively removes at least one avenue whereby a party familiar with the procedural rules of our legal system could circumvent the finality of final judgments. This concept of finality is also embodied in Federal Rule of Civil Procedure 60(b), which requires that motions seeking relief from a final judgment be made no more than a year after the entry of the final judgment.[150] By limiting the time that

142. *Id.* at 551.

143. Nancy J. King, *Silencing Nullification Advocacy Inside the Juryroom and Outside the Courtroom*, 65 U. CHI. L. REV. 433 (1998).

144. Levinson, *supra* note 134, at 560.

145. 46 AM. JUR. 2D *Judgments* § 1 (2008).

146. Rubenstein, *supra* note 132, at 830.

147. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525 (1931); *see also* S. Pac. R.R. Co. v. United States, 168 U.S. 1, 49 (1897).

148. Bunker Ramo Corp. v. United Bus. Forms Inc., 713 U.S. 1272, 1277 (1983).

149. Ultramar American Ltd. v. Dwelle, 900 F.2d 1412, 1415 (9th Cir. 1990).

150. FED. R. CIV. P. 60.

one has to challenge a judgment to one year, our legal system is increasing the finality of a final judgment by ensuring that all final judgments that were decided on the merits are final, whether right or wrong, if not timely challenged.[151] In short, our system strives to certify final judgments against future challenge while maintaining avenues of appeal, allowing our system to correct its mistakes. While at first glance, finality might seem less of a concern than upholding due process rights, our legal system has often viewed this issue differently. Finality "has a business-like quality to it that may seem insubstantial when juxtaposed with the constitutional rights simultaneously at issue; yet the state's interest in repose in civil matters regularly outweighs individual interests in all sorts of situations. Indeed, finality typically trumps accuracy."[152] The need for finality is especially salient in a crowded legal system such as ours. As Judge Cardozo observed: "The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[153] In order to have any credibility, our legal system must guarantee the finality of judgments, and a broad reading of the virtual representation doctrine is a way to increase finality. The virtual representation doctrine helps preserve the finality of judgments by stopping similar parties from bringing separate actions that litigate the same issue. Take, for example, the class-action doctrine and its effect on finality. First, assume that a class-action lawsuit is brought by victims of a bus crash. The victims who were part of the legal class go to trial and fail to obtain a judgment in their favor. At this point, those who chose not to file are precluded from suing on the same issue. In this way, courts' judgments on a particular issue or claim are insulated from further challenge and are perceived as more legitimate because there is no longer the risk that there will be a subsequent judgment on the same issue that leads to a different result.[154] A broader interpretation of the virtual representation doctrine, one which applies to parties who have informal relationships that do not rise to the level of the legal relationships required by *Sturgell*, will guarantee that judgments in our legal system will have a higher level of finality because more cases that could potentially deliver future contrary judgments would be precluded.

151. *See* Federated Dep't Stores v. Moitie, 452 U.S. 394, 398 (1981).

152. Rubenstein, *supra* note 132, at 831.

153. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (Dover Publ'ns 2005) (1921).

154. Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 361.

B. *The Bright Line Test Adopted by the* Sturgell *Court for Determining Virtual Representation is Less Efficient Than a Totality of the Circumstances Test*

The Supreme Court in *Sturgell* chose to replace the totality of the circumstances approach applied by the D.C. Circuit with a bright-line rule. Despite the Supreme Court's claim that a balancing approach would "create more headaches than it relieves,"[155] a totality of the circumstances test such as the one proposed by the D.C. Circuit would be more appropriate than a bright-line-rule approach. Because the virtual representation doctrine is not a well-established legal principle, a balancing test would allow courts to weigh and balance the competing interests of both a narrow and a broad interpretation of the virtual representation test in an effort to come up with an effective middle ground. There is certainly a formalist argument to be made for the bright-line approach: a bright-line test is more effective than a totality of the circumstances test because bright-line rules give a greater appearance of equal treatment, yield more consistent results when applied by different courts, and arguably lead to more predictable outcomes over time.[156] However, it is equally well understood that there is necessity for moldable standards in our legal system in order to give courts discretion, when appropriate; the decision whether to apply bright-line rules over flexible standards depends very much on the legal principle being scrutinized.[157] Even the most ardent formalists acknowledge that an effective bright-line test can only be formulated when one has a clear understanding of the legal principle underlying that rule.[158] Unless a legal principle is understood perfectly, at least some judicial discretion will be required in order to properly interpret that principle. "The advantages of the discretion-conferring approach are obvious. All generalizations . . . are to some degree invalid, and hence every rule of law has a few corners that do not quite fit. It follows that perfect justice can only be achieved if courts are

155. Taylor v. Sturgell, 128 S. Ct. 2161, 2176 (2008).

156. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–79 (1989).

157. Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 41–42 (2004):

> A law of standards—with few narrow opinions—leaves room in which judges at all levels retain considerable space in which to maneuver. One could consider this space a vacuum, an area of lawlessness, or merely a set of gaps bounded by the fabric of the law, when a judge must figure out how to decide a case not bounded by an existing decision. For the most part, the rule of law and the popular desire for limits on an unelected, undemocratic judiciary, requires that judicial actors in this "lawless" territory act with restraint—aware of their legal surroundings and the landmarks of judicial decisions in order to properly navigate the legal landscape.

158. Scalia, *supra* note 156, at 1183–84.

unconstrained by such imperfect generalizations."[159] The formalist argument that rules provide greater consistency through clear application is also limited by the power of judicial review, which ensures that even the clearest rules have the potential to be overruled at any point.[160] Judicial review effectively removes the guarantee of consistency that bright line rules seem to provide. In fact, a bright-line rule is actually more likely to be replaced than a totality of the circumstances test because a totality of the circumstances test can have elements added and reinterpreted.[161] In contrast, a bright-line test is more likely to be overruled because of its rigid, all or nothing approach.[162] A totality of the circumstances approach is therefore more effective than a bright-line-rule test when dealing with a legal issue that does not present a widely acceptable solution or where interest analysis seems inevitable.[163] The history of the virtual representation doctrine reveals that it is not a well-understood legal doctrine.[164] Therefore, in the virtual representation context, a totality of the circumstances test would be more appropriate than a bright-line rule. Given the uncertain history of the virtual representation doctrine, a totality of the circumstances test would allow courts to gauge, on a case by case basis, whether the practical interests which the virtual representation doctrine is meant to further outweigh the due process concerns central to our legal system. Courts can tinker with the line that they draw between due process and the practical benefits of efficiency, consistency, and finality. That balance can be redefined as our legal system changes over time. A bright-line rule threatens to take this ability to adjust the balance between due process and practical application out of the courts' hands.[165] Similarly, a bright-line rule oversimplifies the prob-

159. *Id.* at 1177.

160. James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 834 (1995).

161. *Id.*

162. *Id.*

163. Michael Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court*, 4 INT'L J. OF CONST. L. 618, 639 (2006):

> Indeed, when a formal legal (that is, constitutional) norm is well established and widely accepted, it is likely to be perceived as rising above interests. Under such circumstances, adherence to formalism is apt to be more authoritative and persuasive than engaging in policy analysis. Conversely, when no widely acceptable formal solution is at hand, interest analysis seems inevitable. In the latter case, finding the best interests, the ones prompted by the largest majorities, and weighing and balancing competing interests to reach the most productive and least restrictive accommodation of interests seem to provide the best means of reconciling unity and diversity.

164. 18 CHARLES ALAN WRIGHT ET AL., FED. PRACTICE AND PROCEDURE § 4457 (4th ed. 2009) ("The uncertain state of virtual-representation preclusion is illustrated by the juxtaposition of these enthusiastic expansions with the more restrained approaches described earlier").

165. *Id.*:

lem of how to apply virtual representation by ultimately deciding to completely ignore the advantages that a judicious application of the doctrine would provide.

V. TOWARD A PRACTICAL SOLUTION

Looking at the legal history of the virtual representation doctrine and the numerous interpretations and reinterpretations that the doctrine has undergone, a common theme emerges. The conflict over how to define virtual representation has always been one of judicial efficiency and finality versus protection of individual rights and due process.[166] Consequently, the justification for having the virtual representation doctrine disappears completely when the doctrine ceases to serve the goals of efficiency, consistency, and finality.[167] At such a point, due process concerns would clearly swallow up the doctrine altogether. Therefore, the best legal test for applying the virtual representation doctrine would require a balancing test that ensures the doctrine will be applied only when its practical advantages outweigh courts' due process concerns. The difficulty in creating such a test lies in determining what factual findings a court must make about the relationship between the current litigating party and a party to a prior litigation before a court would be justified in weighing the virtual representation doctrine's practical advantages over the current party's due process interests, thus justifying preclusion of the current party's case under the doctrine. While the *Sturgell* Court has determined that practical advantages only outweigh due process concerns when there is a preexisting legal relationship, I would argue that this is a simplistic view, especially given the historic ambiguity in formulating a workable test for the virtual representation doctrine.[168] A totality of the circumstances test would therefore be the better test for determining when to apply the virtual representation doctrine. One alternative I would suggest is a three-pronged balancing test. Under the first prong, a court's initial task would be to consider whether the efficiency goals of the doctrine would be furthered through its appli-

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> Although it seems disturbing to employ discretion in identifying the parties bound by a judgment, many of the other theories examined in these pages embody important areas of discretion as well. The alternative to a vague discretionary theory, moreover, may prove to be a general theory that goes too far. For the present, at least, the best course lies in slow evolution of the new growth.

166. The history of the virtual representation doctrine is one of constant reinterpretation, *see supra* pp. 6–19.

167. The *Sturgell* Court does makes a valid point in noting that a balancing approach with multiple factors may lead to "expensive discovery tracking factors potentially relevant under seven—or five—prong tests." Taylor v. Sturgell, 128 S. Ct. 2161, 2176 (2008). Such a result would clearly undermine the very justification for the virtual representation doctrine.

168. *See supra* note 110.

cation to the case at hand. To make this determination, the court should ask whether (1) the discovery requirements of addressing a virtual representation issue are so substantial as to overshadow the main issue of the case in question and (2) whether a failure to apply virtual representation would lead to substantially more claims being filed by related parties on the same issue. The second prong of the test would address consistency by looking at whether litigation of these claims could lead to potentially different results on the same issue (e.g. is the issue close enough that two juries could come to two different verdicts in cases based on the same claim and relying on substantially the same evidence?). If a court determines that, under these prongs, the costs of implementing the virtual representation doctrine outweigh the benefits, they should immediately reject applying a virtual representation analysis. Otherwise, courts should proceed to the test's third prong, which would ask a court to look at (1) whether a nonparty's interests were aligned with the interests of a party in a prior suit and (2) whether the nonparty was adequately represented by the party in a prior suit. The determination of adequacy of representation should be based on a totality of the circumstances analysis taking into account (a) whether there is a close relationship between the party and nonparty; (b) whether the nonparty actively participated in the party's litigation; and (c) whether the party deliberately maneuvered to avoid the effects of a prior action by acting through a nonparty. While this test is certainly more complicated than the one posited by the Supreme Court in *Taylor v. Sturgell*, it has the advantage of being more flexible.

The first prong of the test is designed to eliminate the possibility of employing the virtual representation doctrine when it becomes clear at a case's inception that virtual representation's practical advantages will be offset by situational realities such as a long discovery process or the fact that there is little risk of different results in nonprecluded cases, eliminating any threats to the values of finality and consistency. This concern was raised in the Supreme Court's *Sturgell* opinion, and was one of the factors that led the court to reject an expansive interpretation of the doctrine.[169] The first prong of the virtual representation test would address this issue, as well as other more generalized efficiency concerns, by applying the virtual representation doctrine only when preclusion would ensure a real economic gain for the judicial system. The test would first take into account the cost of the additional judicial proceedings neces-

169. *Sturgell*, 128 S. Ct. at 2176 ("[A] diffuse balancing approach to nonparty preclusion would likely create more headaches than it relieves . . . . An all-things-considered balancing approach might spark wide-ranging, time-consuming, and expensive discovery tracking factors potentially relevant under seven—or five—prong tests.").

sary to determine whether claims preclusion is proper. If the costs of those judicial proceedings outweigh the costs of deciding the case on the merits, then preclusion would not make economic sense and should not be applied *unless* the court, under part two of the first prong, believes that allowing the present claim to go forward would open the door to a substantial number of new claims being filed by new parties on the same issue. Together, the two requirements of the first prong encourage courts to consider the economic value that preclusion of a claim may have. Economic value is addressed in the first prong because it is the weakest of the values opposing due process,[170] and also the most pragmatic. If it becomes immediately evident that not even efficiency concerns will be satisfied by applying claims preclusion, then the analysis should stop there. If a court determines preclusion satisfies efficiency concerns, it should continue to the second prong.

The second prong of the test is designed to address the issues of judicial consistency and finality. In looking at the possibility of whether different outcomes may result in two cases based on the same claim, as well as whether there is a substantial risk of appeal or future filings if the case goes forward, courts would be upholding the values of consistency and finality, values which are of primary interest in our legal system.[171] Because efficiency concerns alone are not enough of a reason to remove due process protection, this prong encourages courts to establish that there is enough of a countervailing interest in applying the virtual representation doctrine before they begin the more serious task of determining whether the interests of a party have been adequately represented so as to preclude that party's case.

The third prong of the test is meant to guarantee that, when application of virtual representation is warranted, a court's decision to apply virtual representation is based on facts indicating that the current party had knowledge of the prior suit and was adequately represented in that suit. Though analysis under this test would admittedly lead to a broader application of virtual representation than the *Sturgell* Court's test, the doctrine's application would be less arbitrary. Courts' determinations would be based on facts specific to each case, rather than by rigid, predefined categories. This is more consistent with the modern approach courts have taken in looking at case-specific facts and circumstances to determine if there is a due process interest to be protected[172] and, if so,

170. *See* Wolff v. McDonnell, 418 U.S. 539, 583 (1974) (holding that economic efficiency alone is not enough of an interest to supersede Due Process).

171. This paper discusses the issues of finality and consistency and their value to our legal system at *supra* pp. 35–43.

172. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (concluding that welfare recipients' interests in

what due process should be provided.[173] The *Sturgell* decision strays from this modern approach to due process by eschewing any type of substantive analysis before it deprives a potential plaintiff of due process. A substantive three-pronged approach would be more effective in weeding out parties that have already been adequately represented and are trying to take advantage of our procedural system from parties who have a valid interest in having their case heard under the Due Process Clause. Conversely, the *Sturgell* test, while easier to apply, is based on predefined categories and therefore lacks the flexibility of a totality of the circumstances test, thereby running the risk of depriving citizens who fall into its predefined categories of legal relationships of their due process without giving their specific circumstances any consideration.

Finally, it should be noted that this test does not address the *Sturgell* Court's concern that a virtual representation test should be based on strict rules so as to provide lower courts with firm guidance on the doctrine's application.[174] However, an approach that favors strict per se rules in favor of a factual analysis would be inappropriate in the context of the virtual representation doctrine given the ambiguous treatment that the doctrine has received throughout its history. Where a legal principle has not had a consistently clear historic definition, a test based on flexible analysis is more appropriate because it allows courts to adjust and redefine the parameters of that ambiguous legal principle over time.[175] Because virtual representation is just such an ambiguous legal principle, a test determining when virtual representation applies should abandon the *Sturgell* Court's adherence to strict rules and instead adopt a more flexible approach based on totality of the circumstances analysis.

VI. CONCLUSION

Due process has been recognized as a core value of our legal system since its inception.[176] Our system strives to provide due process to all those who participate, whether voluntarily or involuntarily. The day-in-court ideal has been recognized as an extension of due process, and is

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receiving payments outweigh those of the government in cutting Due Process short, thereby extending Due Process protection to the welfare recipients).

173. *Mathews v. Eldridge*, 424 U.S. 319 (1976) (establishing a substantive three prong test for determining when process is due. This test requires courts to look at personal interests of the plaintiff, risk of erroneous deprivation, and countervailing interests of the government before the court can render a decision as to what process is due).

174. *Sturgell*, 128 S. Ct. at 2176–77 (The Court says that a totality of the circumstances or standards approach would provide less firm guidance to lower courts applying virtual representation than would "crisp rules with sharp corners.").

175. *See supra* text accompanying notes 157–164.

176. Oliver A. Houck, *Things Fall Apart: A Constitutional Analysis of Legislative Exclusion*, 55 EMORY L.J. 1, 53–54 (2006).

a noble goal that our system should certainly try to achieve. The virtual representation doctrine seems to stand firmly in the way of this goal: by its very operation, the doctrine strives to preclude cases that would otherwise have been heard. At first glance, it would therefore seem favorable to follow the Supreme Court's initiative in *Taylor v. Sturgell* and adopt as narrow a reading as possible of virtual representation in order to preserve the day-in-court ideal. However, this simplistic view fails to account for the countervailing values of efficiency, consistency, and finality that a broad reading of the virtual representation doctrine provides. Perhaps more importantly, a narrow reading of the virtual representation doctrine also fails to account for the practical reality of our modern legal system. Because our legal system hears fewer cases than are filed every day, there is a virtually limitless backlog of cases which courts must hear. In light of this fact, there will always be people who do not get their day in court, whether because of preclusion or delay. A doctrine such as virtual representation is needed to determine whether a case should be precluded so that a more contested case may be heard in its stead. Perhaps Professor Owen Fiss's pragmatic view on interest representation in general should be applied to virtual representation specifically: "We [must] embrace interest representation but at the same time appreciate its inherent dangers and anomalous character."[177] The virtual representation doctrine raises a key constitutional issue, and any court would clearly feel uncomfortable holding that due process takes a backseat to practical values of efficiency or economy. Nevertheless, the case for virtual representation is stronger than the Supreme Court may want to acknowledge. The values of due process do not operate in a vacuum; they operate within the confines of a very active and, some might say, even overlitigious society. When the virtual representation doctrine is analyzed in this context, weighing due process against the countervailing values of efficiency, consistency, and finality becomes a much more trying task. By adopting a bright-line rule, the Supreme Court has failed to wholeheartedly engage in this task. Instead, it has provided a quick fix that favors uniform applicability over substantive differentiation. *Sturgell* essentially creates a clear rule for a doctrine that courts have consistently failed to clearly define. In doing so it has missed its chance to lend some clarity to the doctrine's aura of confusion.

177. Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1452 (2003).