Richards v. Jefferson County: The Supreme Court Stems the Crimson Tide of Res Judicata

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[Our] deep rooted historic tradition [is] that everyone should have his own day in court.

—Justice John Paul Stevens

I. INTRODUCTION

The United States jurisprudence is full of what were thought to be principled exceptions to the day-in-court ideal. Rules of preclusion—more commonly referred to as res judicata and collateral estoppel—have become commonly used
mechanisms for courts to deny those not parties to litigation from having their day-in-court. Courts are aided in their "search for circumstances that justify preclusion" by many commentators who also zealously advocate for broader preclusion principles. Such judicial and academic collaboration, however, raises serious Constitutional concerns; namely, whether such proactive steps are consistent with the due process right to be heard.

The United States Supreme Court addressed these concerns in Richards v. Jefferson County, where the Court reaffirmed its reluctance to expand nonparty preclusion to those not a party to litigation. In so doing, the Court chose to preserve the flexible, case-by-case method of determining whether preclusion should attach, as set out in the seminal case of Hansberry v. Lee. More specifically, the Richards Court held that "[b]ecause [the Richards class] received nei-

Evaluation of People v. Sims, 40 HASTINGS L.J. 907, 909 (1989); see also infra text accompanying notes 28-36.


6. WRIGHT ET AL., supra note 1, § 4449.


8. It is important to note that the application of res judicata implicates constitutional issues other than the Due Process Clause. See VESTAL, supra note 3, at V429. These other issues include Article IV ("Full Faith and Credit Clause"), Article III ("Right to Trial by Jury"), and section 1 of the Fourteenth Amendment ("Equal Protection Clause"). U.S. CONST. arts. IV, III, amend. XIV, § 1; see generally VESTAL, supra note 3, at V429-59.

9. See Bone, supra note 7, at 196 ("Courts have hesitated to expand nonparty preclusion—the preclusion of persons who were not parties to the first lawsuit—even though current nonparty preclusion rules are narrow and formalistic, and even though they tolerate extensive relitigation at substantial cost.").

ther notice of, nor sufficient representation in, the [prior] litigation, that adjudication, as a matter of federal due process, may not bind them . . . ."11

The right to have one's day-in-court stems from the United States Constitution, which prohibits a person from being deprived of "life, liberty, or property without due process of law."12 In the middle of this century, Justice Jackson observed that "a chose in action is a constitutionally recognized property interest . . . ."13 Speaking about the meaning of due process, Chief Justice Stone emphasized that due process concerns "traditional notions of fair play and substantial justice."14 Less than twenty years ago, Justice Blackmun warned of the potential danger that the doctrine of res judicata poses to these traditional notions: "[B]ecause res judicata may govern grounds and defenses not previously litigated . . . it blockades unexplored paths that may lead to truth. For the sake of repose, res judicata shields the fraud and the cheat as well as the honest person. Therefore, it is to be invoked only after careful inquiry."15 In perhaps the best modern example of the significance of the day-in-court ideal, a unanimous Supreme Court in the author's case of Richards v. Jefferson County recognized the extent to which courts have relied on res judicata to deny a litigant his or her due process right to be heard.16 Justice Stevens wrote, "We have long held . . . that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental in character.'"17 He also noted, "The opportu-

12. U.S. CONST. arts. V, XIV; see also U.S. CONST. art IV ("Full Faith and Credit Clause").
17. Id. at 1765 (citing Postal Tel. Cable Co. v. City of Newport, 247 U.S. 464, 475 (1918)); see also Braveman & Goldsmith, supra note 5, at 599-600 ("[T]here is the danger that a growing preoccupation with the need to economize judicial resources will lead to an overly zealous application of preclusion rules . . . .").
nity to be heard is an essential requisite of due process of law in judicial proceedings. 18

Are these pronouncements to be taken at face value? Can they be reconciled with the current trend favoring non-party preclusion? 19 These are among the central questions explored in the discussion that follows. This article explores these questions in light of Richards v. Jefferson County. 20 The purpose of this discussion is not to suggest that res judicata is always an inappropriate means of finding nonparty preclusion. Indeed, it is well recognized that the doctrine is an essential part of our court system—principally as a means of preserving scarce judicial resources. 21 Rather, this article simply argues that the Richards opinion represents a fine illustration of a case in which a lower court's liberal preclusion rules could not withstand principled scrutiny. 22

First, this article briefly reviews the history of the doc-

18. Richards, 116 S. Ct. at 1765 n.4.; Postal Tel. Cable Co. v. City of Newport, 247 U.S. 464, 476 (1918); see also Mullane 339 U.S. at 314 (“The fundamental requisite of due process of law is the opportunity to be heard.”).

19. Compare William Daniel Benton, Application of Res Judicata and Colateral Estoppel to EPA Overfilling, 16 B.C. ENVTL. AFF. L. REV. 199, 232 (1988) (“Although the Supreme Court has acknowledged the existence of this trend, it has yet to adopt it and continues to use res judicata in the narrow sense.”), with William V. Lundeburg, The Opportunity to be Heard and the Doctrines of Preclusion: Federal Limits on State Law, 31 VILL. L. REV. 81 (1986) (“[T]he [Supreme Court] trend has been in favor of preclusion.”).

20. 116 S. Ct. 1761. While working as a runner at the Birmingham, Alabama law firm of Baxley, Dillard, Dauphin & McKnight during college, the author became aware of the Jefferson County Occupational Tax. Under this tax, professionals who were required to pay an annual license fee from either the state or county were exempt from paying the occupational tax. JEFFERSON COUNTY, ALA., ORDINANCE 1120 (1987). Such “professionals” included manicurists, fortune tellers, and mule dealers. Id. Meanwhile, teachers, police officers, and judges were not considered “professionals” under the tax law. Id. Because the “professional” label under the tax’s exemption scheme was considered unfair and irrational, and because the author was subject to paying it, he, with the assistance of the law firm in which he was working, initiated the class action suit of Richards v. Jefferson County, 662 So. 2d 1127 (1995), rev’d, 116 S. Ct. 1761 (1996).

21. See Brown v. Felsen, 442 U.S. 127, 131 (1979); see also Gramatan Home Investors Corp. v. Lopez, 386 N.E.2d 1328, 1331 (N.Y. 1979) (noting that the doctrine is “necessary to conserve judicial resources by discouraging redundant litigation”). It is generally recognized that preserving judicial resources is the most important reason for invoking res judicata. See Benton, supra note 19, at 231 (“[W]hatsoever the reasons cited in a specific case, conservation of judicial resources always seems to figure prominently on the list in recent cases.”).

22. It is particularly difficult to deny a litigant her right to be heard because few rights are as deeply-seated as the day-in-court ideal, and still fewer rights are more cherished.
trine of res judicata. This section includes a discussion of privity, adequate representation, virtual representation, and due process. Next, the paper examines the circumstances leading up to the Richards decision. A detailed discussion of the lower courts’ opinions is followed by an analysis of the Supreme Court’s decision. This article concludes by arguing that the Court was justified in limiting the expansion of non-party preclusion law and by suggesting the implications of Richards for the future.

II. BRIEF HISTORY OF RES JUDICATA

The precise origin of res judicata is difficult to determine, although it is believed that the doctrine has its roots in both Germanic and Roman law. Res judicata constitutes a traditional common law affirmative defense, developed to prevent relitigation of matters already resolved. According to the Supreme Court, the doctrine embraces the fundamental principle that a “right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . .” At its most basic level, the doctrine denies those who have had one day-in-court from seeking another. In common parlance, we say an individual “gets just one bite of the apple.” Over the years the doctrine has become synonymous with two terms: “issue preclusion” and “claim preclusion.”

Issue preclusion, or collateral estoppel, establishes that once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the

23. See discussion infra Part II.
24. See discussion infra Part II.
25. See discussion infra Part III.
26. See discussion infra Part III.
27. See discussion infra Part IV.
28. VESTAL, supra note 4, at V17-19.
30. VESTAL, supra note 4, at V19.
32. See Braveman & Goldsmith, supra note 5, at 599 (“[I]f, as many believe, our court systems are drowning in a rising tide of litigation, we can ill afford any litigant who, having had one day in court, seeks a second.”).
issue in a subsequent suit involving the same parties. On the other hand, res judicata, or claim preclusion, prevents parties or their privies from relitigating a claim that was or could have been raised in the prior action. Thus, issue preclusion, or collateral estoppel, is simply an element of the broader notion of claim preclusion, or res judicata.

33. Allen v. McCurry, 449 U.S. 90, 94 (1980). Because Richards v. Jefferson County was decided on claim preclusion grounds, this article will only briefly touch on the issue preclusion component of res judicata. Issue preclusion imposes a so-called "estoppel" or "bar" on the issue that was actually decided in the prior suit. VESTAL, supra note 4, at V6. For issue preclusion to apply, three requirements must be met: (1) the issue must be the same in both cases; (2) the party against whom preclusion is sought must have had a fair opportunity to litigate the issue in the prior suit; and (3) the issue actually litigated must be essential to the judgment in the first case. Id.; see generally RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

34. "Privity" has been defined as:
[A] mutual or successive relationship to the same rights of property, and if it is sought to bind one as privity by an adjudication against another with whom he is in privity, it must appear that at that time he acquired the right, or succeeded to the title, it was then affected by the adjudication, for if the right was acquired by him before the adjudication, then the doctrine cannot apply.

In re Richardson's Estate, 93 N.W.2d 777, 781 (Iowa 1958) (emphasis deleted).

35. See VESTAL, supra note 4, at V6; RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). The phrase "cause of action" has largely been replaced by the more modern term "claim" in the field of res judicata. The former, older and more restrictive; the latter suggests the modern, pragmatic approach. VESTAL, supra note 4, at V43. The change in terminology was largely due to the difficulty in defining "cause of action," as Justice Cordozo pointed out in United States v. Memphis Cotton Oil Co., 288 U.S. 62, 67-68 (1933), where he said:

A "cause of action" may mean one thing for one purpose and something different for another. It may mean one thing when and question is whether it is good upon demurrer, and something different when there is a question of the amendment of a pleading or application of the principle of res judicata.

Id.

36. Arthur D. Spatt, Res Judicata and Collateral Estoppel, 42 ARB. J. 61, 63 (1987). Another analysis was given by Judge Rubin of the Court of Appeals for the Fifth Circuit:

"[C]laim preclusion," or true res judicata, treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." When the plaintiff obtains a judgment in his favor, his claim "merges" in the judgment; he may seek no further relief on that claim in a separate action. Conversely, when a judgment is rendered for a defendant, the plaintiff's claim is extinguished; the judgment then acts as a "bar." Under these rules of claim preclusion, the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial.

The second doctrine, collateral estoppel or "issue preclusion," rec-
The elements necessary for claim preclusion or res judicata include "(1) a judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or their privies in the two suits." Also within claim preclusion, or res judicata, exist the concepts of "merger" and "bar." When the plaintiff prevails, her claim is said to "merge" in the judgment, thus precluding her from relitigating the same cause or claim. When the defendant prevails, that judgment serves as a "bar" to any subsequent action brought against the defendant by the plaintiff on that claim. Claim preclusion, therefore, recognizes that suits addressed to particular claims may present issues relevant to suits on other claims. Issue preclusion bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation.

It is insufficient for the invocation of issue preclusion that some question of fact or law in a later suit was relevant to a prior adjudication between the parties; the contested issue must have been litigated and necessary to the judgment earlier rendered.

Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 535-36 (5th Cir. 1978).

Similarly, the United States Supreme Court articulated the distinctions between res judicata and collateral estoppel in the historic decision of Cromwell v. County of Sac, 94 U.S. 351 (1876), where it observed:

"[T]here is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." Id. at 352-53.

37. Lee v. City of Peoria, 685 F.2d 196, 199 (7th Cir. 1982).


39. See RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982); see also G.
truly protects the once-bitten apple. Regardless of the titles, the purposes of res judicata are the same: to preserve the integrity of judicial decisions, bar vexatious litigation, avoid inconsistent judgments, and promote judicial economy.

Yet, because res judicata is a common law, judge-made doctrine based upon policy considerations, exceptions are recognized when its application will offend the ends of equity and fairness, or when substantial public policy concerns exist. For example, "preclusion will not attach if the litigant


40. Heiser v. Woodruff, 327 U.S. 726, 733 (1946); see 18 WRIGHT ET AL., supra note 1, § 4403; VESTAL, supra note 4, at V8-9; FLEMING JAMES, JR. & GEOFFREY HAZARD, JR., CIVIL PROCEDURE § 11.22, at 630 (3d ed. 1985).

41. Federated Dep't Stores v. Moitie, 452 U.S. 394, 401 (1981); Allen v. McCurry, 449 U.S. 90, 94 (1980); Montana v. United States, 440 U.S. 147, 153-54 (1979); Brown v. Felsen, 442 U.S. 127, 131 (1979); Mandarino v. Pollard, 718 F.2d 845, 849-50 (7th Cir. 1983); see also Allen D. Vestal, Extent of Claim Preclusion, 54 IOWA L. REV. 1, 4 (1968) ("Claim preclusion, as established by a long line of cases, can be a very useful concept in avoiding harassing litigation that should not be permitted.").

42. Allen, 449 U.S. at 94; Montana, 440 U.S. at 153-54; Brown, 442 U.S. at 131.

43. Moitie, 452 U.S. at 401; Montana, 440 U.S. at 153-54; Brown, 442 U.S. at 131; see also Benton, supra note 19, at 232; Shell, supra note 39, at 641; Allen D. Vestal, Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts, 66 MICH L. REV. 1723, 1723 n.3 (1968).


45. Edward W. Cleary, Res Judicata Reexamined, 57 YALE L.J. 339, 349 (1948). Cf. Federated Dep't Stores v. Moitie, 452 U.S. 394 (1981), where the Supreme Court criticized the Court of Appeals for the Ninth Circuit, explaining that while the doctrine of res judicata should only be invoked after carefully inquiry, it is unacceptable to carve out exceptions on the grounds of "public policy" and "simple justice." Id.; Benton, supra note 19, at 232. Expressing its disapproval, the Court said:

"Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata." [The] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, "of public policy and private peace," which should be cordially regarded and enforced by the courts...
did not have a 'full and fair opportunity' to litigate the issue or claim in the state forum."\textsuperscript{46} In fact, it is a prerequisite to the application of res judicata principles that a party be provided the "full and fair opportunity to litigate" the preceding case.\textsuperscript{47} The Supreme Court recognized this exception in \textit{Allen v. McCurry}, where it stated: "[O]ne general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case."\textsuperscript{48} Notwithstanding this fact, the full and fair opportunity exception is open to interpretation in that the doctrine has been both narrowly and broadly applied. In one such narrow case, the Supreme Court held that a prior judgment "need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law."\textsuperscript{49} In another case, however, the Court explained the full and fair opportunity exception in a much broader way, concluding that "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."\textsuperscript{50} Thus, whether the full and fair opportunity doctrine is applied in a narrow or broad sense, it is a fundamental prerequisite of res judicata that the doctrine at least be considered before res judicata attaches.

As a general rule, parties to an action may be bound by a prior judgment, while nonparties may not.\textsuperscript{51} It is far more
difficult to bind nonparties to a prior judgment because of the due process right to be heard. Nevertheless, this right is not absolute. Two generally recognized exceptions exist to the right to be heard: privity and adequate representation. When a court finds that a nonparty fits into one of these two categories, as has increasingly been the case, the

1328 (N.Y. 1979). But see Montana, 440 U.S. at 154 n.5 (finding that a non-party may be bound to a judgment by their conduct without being "in privity").

52. See Richards v. Jefferson County, 116 S. Ct. 1761, 1765 n.4 (1996); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 803 (1985); Postal Tel. Cable Co. v. City of Newport, 247 U.S. 464, 476 (1918); Lopez, 386 N.E.2d at 1332; WRIGHT ET AL., supra note 1, § 4449; Benton, supra note 19, at 249. "It is a violation of due process for a judgment to be binding on a litigant who was not a party nor a privy and therefore has never had an opportunity to be heard." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979).

53. Benton, supra note 19, at 248. Another recognized but controversial exception to an individual’s right to be heard is the doctrine of virtual representation. See Jack L. Johnson, Due or Voodoo Process: Virtual Representation As a Justification for Preclusion of a Nonparty Claim, 68 TUL. L. REV. 1303, 1316 (1994). For a discussion of the doctrine of virtual representation, see infra Part II.C.


State and federal district courts have similarly expanded the types of claims precluded under the doctrine of res judicata. See, e.g., O’Brien v. City of Syracuse, 429 N.E.2d 1158 (N.Y. 1981); In re Air Crash Disaster, 350 F. Supp. 757 (S.D. Ohio 1972), rev’d sub nom. Humphreys v. Tann, 487 F.2d 666 (6th Cir.)
court may preclude the nonparty from litigating his claim.

A. The Doctrine of Privity

An exception to the general rule against nonparty preclusion exists where the nonparty is in privity with the party of record.\(^{55}\) When such a relationship exists, preclusion principles bar the nonparty from litigating her own claim.\(^{56}\) Various parties fall within the circumstances described by the concept of privity: "It includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and possibly co-parties to a prior action."\(^{57}\) For example, privity exists where a litigant, after having brought suit, leases his property interest to someone else.\(^{58}\) In such a case, the lessee is said to be in privity with the lessor.\(^{59}\) Thus, when the lessor of the property interest subsequently loses his lawsuit, the lessee, now in privity with the losing party, is barred from litigating the matter again in any suit concerning the property.\(^{60}\) This result, although harsh, is said to be justified by the close relationship of the parties.\(^{61}\) According to one court, "[C]ertain individuals may be so closely related, their interests so closely interwoven, or their rights so similar that it is unfair to treat them separately."\(^{62}\)

The privity doctrine originally applied only in a limited number of cases in which property interests were at stake,\(^{63}\) such as in the lessee-lessor or mortgagee-mortgagor type relationship described in the above example.\(^{64}\) Today, however, the privity doctrine has been expanded to include other kinds

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56. Gramatan Home Invest., 386 N.E.2d at 1332.
58. VESTAL, supra note 3, at V121.
59. Id.
60. Id. at V122.
61. Id. at V121.
63. Johnson, supra note 53, at 1317.
64. VESTAL, supra note 3, at V122.
of relationships, such as guardian and ward, corporation and stock holders, trust beneficiaries and trustee, decedent and her successors, and, in community property states, husband and wife. Given its many, yet restricted uses, privity has been described as "an amorphous term not susceptible to ease of application." Regardless of the means in which it is used, the privity label may be summed up as follows: if someone is in privity with another, she may be bound by a judgment even though she was not a literal party to the litigation. In an oft-quoted phrase, privity "is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata." In other words, the privity label has simply come to mean that preclusion is

65. See, e.g., New Mexico Veteran’s Serv. Comm’n v. United Van Lines, Inc., 325 F.2d 548, 550 (10th Cir. 1963); In re Campbell’s Estate, 382 P.2d 920, 950-51 (Haw. 1963).
66. See, e.g., Green, 572 F.2d at 630-32; Jordan v. Stuart Creamery, 137 N.W.2d 259, 263, 266 (Iowa 1965). But see RESTATEMENT (SECOND) OF JUDGMENTS § 59 (1982) (judgment against corporation not preclusive against officers, shareholders, etc.).
67. See, e.g., Coleman v. Alcock, 272 F.2d 618, 622 (5th Cir. 1959).
68. See, e.g., Gerrard v. Larsen, 517 F.2d 1127, 1134-35 (8th Cir. 1975); Lesser v. Megden 328 F.2d 47, 50 (2d Cir. 1964).
70. Gramatan Home Inv. Corp. v. Lopez, 386 N.E.2d 1328, 1332 (N.Y. 1979); see also Watts v. Swiss Bank Corp., 265 N.E.2d 739, 743 (N.Y. 1970) (reiterating that privity does not have a “technical and well-defined meaning”); VESTAL, supra note 3, at V121 (“Privity is a word of indefinite meaning given through judicial construction.”); Shell, supra note 39, at 647 (“The concept of ‘privity’ is extremely flexible under traditional res judicata doctrine . . . .”).
71. Benton, supra note 19, at 248; VESTAL, supra note 3, at V124; see, e.g., Southwest Airlines Co. v. Texas Int’l Airlines, Inc., 546 F.2d 84 (5th Cir. 1977).
72. WRIGHT ET AL., supra note 1, § 4449 n.23 (quoting Bruszewski v. United States, 181 F.2d 419, 423 (3d Cir. 1950), cert. denied, 340 U.S. 865 (1950)).
proper. Not only is it proper, it is encouraged. The doctrine is so popular today that “[m]odern decisions search directly for circumstances that justify preclusion.” The reality of this “privity seeking” environment is that the doctrine has lost its intended focus, having “sacrificed bright-line clarity for functional flexibility.”

Finding “flexibility” within the privity category is justified by many courts because of the need to ease the congestion of crowded judicial dockets. Courts would rather stretch the privity doctrine to unintended extremes than confront head on the deep-rooted historic tradition that everyone is entitled to their own day-in-court. The United States Supreme Court recently conceded this fact, stating in dictum that while there are limits on the privity exception, “the term . . . is now used to describe various relationships between litigants that would not have come within the traditional definition of that term.”

This phenomenon manifests itself in many of today’s courtrooms. In most of these cases, privity is found when the relationship between the party and the nonparty is deemed “sufficiently close” to justify preclusion. Put another way, if the nonparty’s interests are believed to have been

73. Id.
74. Id.
75. Johnson, supra note 53, at 1317.
76. See Federated Dept. Stores v. Moitie, 452 U.S. 394 (1981) (noting that the use of res judicata “is even more compelling in view of today’s crowded dockets”); see also Braveman & Goldsmith, supra note 5, at 599-600 (“[T]here is the danger that a growing preoccupation with the need to economize judicial resources will lead to an overly zealous application of preclusion rules . . . .”); Morris, supra note 7, at 1102 (noting discouragingly that the “broader standard of privity is evolving in response to an unarticulated desire to advance the interests of judicial efficiency”); James R. Pielemeier, Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation, 63 B.U. L. REV. 383, 426 (1983) (“[T]he arguments favoring expanded preclusion of nonparties focus primarily on ‘judicial efficiency.’”); Shell, supra note 39, at 626 (“Courts favor . . . expansion of the applicability of claim and issue preclusion because . . . of the ever-increasing caseloads burdening the judicial system.”).
77. See Johnson, supra note 53, at 1316.
78. Richards v. Jefferson County, 116 S. Ct. 1761, 1766 (1996); see also Tyus v. Schoemehl, 93 F.3d 449, 455 (8th Cir. 1996) (refusing to be “artificially limit[ed]” by traditional notions of privity); United States v. ITT Rayonier, Inc., 627 F.2d 996, 1003 (9th Cir. 1980) (proclaiming enthusiastically that courts “are no longer bound by the rigid definitions of parties or their privies”).
79. Southwest Airlines Co. v. Texas Int’l Airlines, Inc., 546 F.2d 84, 94-95 (5th Cir. 1977); United Merchants & Mfrs., Inc. v. Sanders, 508 So. 2d 689, 692 ( Ala. 1987).
“adequately represented” by the party in the prior action, then the nonparty cannot bring his own lawsuit. This notion is problematic in that, at least theoretically, “[t]he broadest conception of an adequate relationship would collapse the privity label.”

B. The Doctrine of Adequate Representation

Just as issue and claim preclusion are components of the broader concept of res judicata, the doctrine of adequate representation is an arm of privity. The key to binding a nonparty to an action that has been previously adjudicated seems to be that the nonparty’s “interests have been adequately represented by others who have litigated the matters [involved] and have lost.” The idea of adequate representation is most commonly associated with the class action lawsuit, but a class action is not its only application. A party may be bound by a prior judgment even though the prior lawsuit did not take the form of a class action if the two parties’ interests are so closely related as to be essentially the same.

For example, in Burns v. Unemployment Compensation Board of Review, a union member was barred from relitigating a claim against his employer where he had allowed union officials to act as his agents in a prior suit against his employer. In Burns, the plaintiff sought unemployment compensation when he was terminated by his employer after failed union negotiations. The plaintiff argued that he was not barred from relitigating his claim for these benefits because the prior lawsuit was a “supervisor’s strike” in which he was not considered to have been a party. Therefore, according to the plaintiff, his subsequent termination brought about as a result of that union strike was involuntary and he

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80. Sanders, 508 So. 2d at 692.
81. Johnson, supra note 53, at 1317. This concern is real since the privity doctrine is recognized as having a “nonexhaustive definition.” Id. Cf. VESTAL, supra note 3, at V129 (“The interests of society and all litigants would seem to be best served if preclusion, both claim and issue, is expanded and used to the greatest extent constitutionally permissible.”).
82. VESTAL, supra note 3, at V128.
83. Id. at V126.
84. Id.
86. Id.
87. Id. at 446.
was entitled to unemployment compensation. The Pennsylvania Supreme Court disagreed, however, finding that because the plaintiff had "voluntarily joined the union and adhered to its principles and obeyed the orders of its officials[,]" he was bound by the outcome of the union's prior litigation insofar as that case denied the union's claims for unemployment compensation.

As with many applications of res judicata, the Burns decision may be rationalized in the name of judicial economy. Yet, as both courts and commentators have pointed out, the concern for efficiency—by itself—does not substitute for denying a party an opportunity to be heard. Again, this is because the "right to be heard is at the core of procedural due process . . . ." As the Supreme Court has stated:

Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken . . . . [T]he Constitution recognizes higher values than speed and efficiency. Indeed one might fairly say of the Bill of Rights in general, and the Due Process clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy governmental officials no less, and perhaps more, than mediocre ones.

For example, in Eisen v. Carlisle & Jacquelin, the Court held that the "prohibitively high cost" of giving individual notice to 2,500,000 class members was an insufficient reason for

88. Id.
89. Id.
90. VESTAL, supra note 3, at V128; Braveman & Goldsmith, supra note 5, at 600.
92. Woolley, supra note 91, at 630; see also Richards v. Jefferson County, 116 S. Ct. 1761, 1765 n.4 ("The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."); Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").
failing to give notice in a class action. Although it may be argued that this holding is limited to Rule 23 class actions, the Court in Eisen cites as authority for this holding Mullane v. Central Hanover Bank & Trust Co., a non-class action suit. Thus, it appears that the Rules mandatory notice requirement "is designed to fulfill requirements of due process" in whatever context. In sum, while the doctrine of adequate representation may substitute for an individual's right to have her day-in-court, its use may not be justified merely as a means of clearing crowded judicial dockets, as claimed by many courts and commentators.

C. The Doctrine of Virtual Representation

Closely related to, and often used in conjunction with, the privity component of adequate representation is the doctrine of virtual representation. Contrary to what some commentators believe, virtual representation is an established doctrine in American jurisprudence. As properly observed by several legal scholars, the doctrine originated in eighteenth-century England as a part of probate proceedings and has played a role in jurisprudence ever since. The only thing new about the doctrine is its modern interpretation. In fact, virtual representation was a rarely used concept outside of probate proceedings until the Court of Appeals for the Fifth Circuit decided Aerojet-General v. Askew in 1975. In Aerojet-General, the court used a nonparty's relationship with the party of record as a means of attaching preclusion principles without utilizing the words "adequate representation" to do so, thus extending the concept of virtual representation outside the probate arena. The court held that "a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his in-

95. Id. at 166.
98. See supra note 6.
100. See, e.g., Bone, supra note 7, at 204; Wright et al., supra note 1, § 4457; Motomura, supra note 54, at 1029 n.260.
101. See Benton, supra note 19, at 258.
102. Aerojet-General v. Askew, 511 F.2d 710 (5th Cir. 1975).
terests as to be his virtual representative." This holding is generally credited with (1) breathing new life into the doctrine of virtual representation, (2) giving virtual representation its modern interpretation, and (3) providing "the most radical departure from traditional preclusion rules."

The difficulty with the Aerojet-General holding is that it offers no foreseeable limitation to nonparty preclusion. Hence, this is the reason why Aerojet-General has not been well received by other courts. After Aerojet-General, the Fifth Circuit began to pull back from this broad representative approach, and require a closer relationship between non-parties and parties of record. This retreat was first realized in Southwest Airlines Co. v. Texas International Airlines, Inc., where the Fifth Circuit hinted at the possible demise of the doctrine of virtual representation altogether. But, one year later, the Fifth Circuit decided Pollard v. Cockrell. Pollard took an intermediate approach in that it preserved virtual representation, but substantially limited its application.

Under Pollard, alignment of interests required "the existence of an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues." According to Pollard, these relationships include: "estate beneficiaries...

103. Id. at 719.
104. See Bone, supra note 7, at 218.
105. See Benton, supra note 19, at 258.
106. Benton, supra note 19, at 257; see Motomura, supra note 53, at 1026-29 ("The most radical departure from the rule against nonparty preclusion is found in . . . virtual representation.").
107. See Benton, supra note 19, at 259 (noting that the Aerojet-General holding has not been embraced by the courts); Bone, supra note 7, at 220 (noting that courts have tended to shy away the from such a broad application of the rule); see also WRIGHT ET AL., supra note 1, § 4457 (1981) (describing the doctrine as a "vague and discretionary theory"); see, e.g., Gonzales v. Banco Cent. Corp., 27 F.3d 751, 761 (1st Cir. 1994) ("There is no black letter rule."); Colby v. J.C. Penney, Inc., 811 F.2d 1119, 1125 (7th Cir. 1987) ("[N]o uniform pattern has emerged from the cases."); Ethnic Employees of Library of Congress v. Boorstin, 751 F.2d 1405, 1411 n.8 (D.C. Cir. 1985) ("The doctrine of virtual representation has a highly uncertain scope . . . ."); Harris Trust & Sav. Bank v. Olsen, 745 F. Supp. 503, 508 (N.D. Ill. 1990) (noting that virtual representation cases do not "explicitly set forth an analytical framework").
108. Bone, supra note 7, at 223.
109. 546 F.2d 84 (5th Cir. 1977).
110. Bone, supra note 7, at 222.
111. 578 F.2d 1002 (5th Cir. 1978).
112. Bone, supra note 7, at 222.
113. Pollard, 578 F.2d at 1008; see Bone, supra note 7, at 223.
bound by administrators, presidents and stockholders by their companies, parent corporations by their subsidiaries, and a trust beneficiary by the trustee.\textsuperscript{114} The intermediate position taken by the Fifth Circuit in \textit{Pollard} probably saved the doctrine of virtual representation insofar as it is applied in the procedural arena of \textit{res judicata}.\textsuperscript{115} But \textit{Pollard}’s “legal accountability” theory has, like its predecessor \textit{Aerojet-General}, also been rejected by several jurisdictions.\textsuperscript{116}

\begin{itemize}
  \item \textsuperscript{114} \textit{Pollard}, 578 F.2d at 1008-09.
  \item \textsuperscript{115} See Benton, \textit{supra} note 19, at 259.
  \item \textsuperscript{116} Many courts have taken the more restrictive approach to virtual representation as predicted by Charles Wright \textit{et al.}, \textit{supra} note 1, § 4457, where they said that “[v]irtual representation will not soon become a broad principle applied in many cases.” \textit{Id.}; see, \textit{e.g.}, Collins v. E.I. DuPont De Nemours & Co., 34 F.3d 172, 176-78 (3d Cir. 1994) (noting that there needs to be a “preexisting relationship;” it is simply not enough to bind a plaintiff who has the same interests as the plaintiffs in the first action, has joined them in the second action, and is represented by the same attorney); Gonzalez v. Banco Cent. Corp., 27 F.3d 751, 760-63 (1st Cir. 1994) (finding that there was an identity of interest, yet refusing to apply virtual representation where there was no showing that the plaintiffs in the second suit had timely notice of the first action); Estate of Brown v. Bank of Piedmont, 763 S.W.2d 719 (Mo. Ct. App. 1989) (refusing to hold a mortgagee bound by a prior judgment in an action against its mortgagee).
  \item Conversely, other courts have been more accepting of the doctrine of virtual representation, as predicted by Professor Vestal. See Vestal, \textit{Res Judicata/Preclusion: Expansion}, 47 CAL. L. REV. 357, 379-381 (1974). In his article, Professor Vestal suggests:
  
  Society allows a reasonable adjustment of the demands of due process. Thus an individual apparently can be held by a prior adjudication so long as his interests were adequately represented in the prior suit. The concept of preclusion against a nonparty is strikingly similar to the class suit in that if there is adequate representation of the interests of the nonparty he can be bound by the judgment in the earlier suit. The interest of society in preventing unnecessary duplicative litigation is closely akin to the interest of society—the expedient administration of justice—which was urged for the use of the class unit. [Ultimately, however, constitutional limits will mean] only a modest use of this type of preclusion.
  
  \textit{Id.} at 378-81. The State of California has adopted a broad approach to virtual representation. A representative case is \textit{NAACP v. Los Angeles Unified School District}, 750 F.2d 731 (9th Cir. 1984), where the court stated:
  
  [The rule has been expanded to] apply the preclusive effect of a prior judgment to nonparties whose interests were “virtually represented” by one of the parties to the litigation . . . . The nonparty is bound under the rule if he was “so far represented by others that his interests received actual and efficient protection . . . .” The application of this doctrine to desegregation cases is particularly appropriate. It has been recognized that unless subsequent generations of school children are bound by preclusion rules from relitigating identical claims of unlawful segregation, those claims would assume immortality.
\end{itemize}
As a result of its limited approval and application, a credible argument may be made that the doctrine of virtual representation should be discarded. This argument is defensible since the concepts of virtual and adequate representation are essentially identical, and the doctrine of adequate representation is better defined and more widely applied. Interestingly, the reasonableness of this argument is supported, in part, by the case law itself. For example, in Southwest Airlines Co. v. Texas International Airlines, Inc., several individual airlines sought to use a City ordinance to evict Southwest from a local airfield. The airline argued that the plaintiffs were barred from pursuing their claim based upon a prior action in which the City of Dallas had similarly tried to enforce the same ordinance against it. Because these smaller airlines had not been parties to the City’s prior suit against Southwest, the airline argued both the privity and virtual representation exceptions to nonparty preclusion. The Fifth Circuit rejected outright Southwest’s virtual representation theory, noting the “confusion surrounding the doctrine.” In its rebuke, the court questioned

Id. at 741; see also Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996) (using virtual representation to bar a city councilman from relitigating a claim over the allegedly unlawful redrawing of district lines); Eubanks v. FDIC, 977 F.2d 166, 170 (5th Cir. 1992) (binding the wife of a bankrupt husband to the order confirming his plan of reorganization where the wife’s claims “derive[d] exclusively from claims asserted by her husband”).

Related to the virtual representation doctrine in terms of the broad preclusive effect it has on nonparties is the “transactional approach” to res judicata. See Sive, supra note 99, at 1410. Under this analysis, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.” O’Brien v. City of Syracuse, 54 N.Y.2d 687, 688 (1981) (citing Reilly v. Reid, 379 N.E.2d 172 (N.Y. 1978)). Whether it is called adequate representation, virtual representation, or transactional analysis, the effect of each of these approaches is the same: they expand the types of claims that may be precluded under the doctrine of res judicata.

117. See Motomura, supra note 54, at 1031 (stating that “the virtual representation approach has met with the most resistance in both case law and commentary”).

118. See 47 AM. JUR. 2d Judgments § 670 (1995) (observing that “courts have found that [the concepts] mirror each other”); Johnson, supra note 53, at 1319 (noting that “[t]he theoretical difference . . . between adequate and virtual representation extends no further than their spelling”).

119. 546 F.2d 84 (5th Cir. 1977).
120. Id. at 86.
121. Id. at 94.
122. Id. at 96-97.
123. Id. at 97 n.50.
the continued validity of the doctrine in the face of "wide and inconsistent application."\textsuperscript{124} In the end, however, the court fell back on the privity argument, holding that the airlines were bound by the City's prior action because the municipality had adequately represented the airlines' interest in the case.\textsuperscript{125}

The substantial relationship between the two doctrines was again noted by the Fifth Circuit several years later in \textit{Freeman v. Lester Coggins Trucking, Inc.},\textsuperscript{126} where the court observed:

[the] concept of "adequate representation" does not refer to apparently competent litigation of an issue in a prior suit by a party holding parallel interests; rather, it refers to the concept of virtual representation, by which a nonparty may be bound because the party to the first suit "is so closely aligned with [the nonparty's] interests as to be his virtual representative."\textsuperscript{127}

The \textit{Freeman} court further diluted any attempt at making a meaningful distinction between adequate and virtual representation when it observed that the cases cited by Southwest "[i]n support of its adequate representation" proposition were in fact "virtual representation decisions."\textsuperscript{128}

Therefore, it is fair to say that the difference between adequate and virtual representation is really no difference at all. Virtual representation is an eighteenth-century probate "doctrine searching in vain for a twentieth century justification."\textsuperscript{129} There is just no need for it as a supplement to adequate representation: both doctrines are extensions of privity.

\textsuperscript{124} \textit{Id.} at 97-98.
\textsuperscript{125} \textit{Southwest Airlines Co. v. Texas Int'l Airlines, Inc.}, 546 F.2d 84, 98 (5th Cir. 1977).
\textsuperscript{126} 771 F.2d 860 (5th Cir. 1985).
\textsuperscript{127} \textit{Id.} at 864 (quoting \textit{Aerojet-General Corp. v. Askew}, 511 F.2d 710, 719 (5th Cir. 1975)); \textit{Johnson, supra} note 53, at 1320; see also \textit{Gonzalez v. Banco Cent. Corp.}, 27 F.2d 751, 762 & n.12 (1st Cir. 1994) ("Properly viewed... adequacy of representation is not itself a separate and inflexible requirement for engaging principles of virtual representation, although it is one of the factors that an inquiring court should weigh in attempting to balance the equities."); \textit{EEOC v. Harris Chernin, Inc.}, 767 F. Supp. 919, 923 (N.D. Ill. 1991) ("The principle which permits the 'privity' strand of the res judicata test to be satisfied by adequate representation is known as the doctrine of 'virtual representation.'").
\textsuperscript{128} \textit{Freeman}, 771 F.2d at 864 n.4; see \textit{Johnson, supra} note 53, at 1320.
\textsuperscript{129} \textsc{Thomas Alexander Alienikoff et al., Immigration: Process and Policy} 631 (3d ed. 1995).
and both invoke due process concerns. Adding unnecessary terminology to an already adequate privity doctrine only serves to muddy the water of the turbulent sea of res judicata. Such a distinction may be even less desirable given that the Supreme Court has never expressly endorsed the use of the doctrine of virtual representation as a substitute for the more familiar notion of adequate representation.\footnote{130}

III. DUE PROCESS AS APPLIED TO RES JUDICATA

Regardless of whether the doctrine of virtual representation is justified, it is axiomatic that due process protection is a vital part of the day-in-court ideal. This is because due process guarantees are founded upon the Constitution, which prohibits the deprivation of "life, liberty, or property without due process of law."\footnote{131} This due process protection extends in the form of a property interest to an individual's right to bring a cause of action.\footnote{132} As the Supreme Court made clear in Richards v. Jefferson County,\footnote{133} "[s]tate courts are generally free to develop their own rules for protecting against the relitigation of common issues or piecemeal resolution of disputes," but governments may not resort to "extreme applications" of preclusion to deprive a nonparty of her claim.\footnote{134} This

\footnote{130. See Benton, supra note 19, at 259. As the Court of Appeals for the Sixth Circuit recently noted: }

"Virtual representation" is said by some scholars to be a useful tool for broadening the finality of judgments and enhancing the efficient administration of justice. Ironically, however, its expansion increases the burden on judges, who must apply its multi-factored balancing test to the facts of each case. In this area of the law that must be applied frequently, "crisp rules with sharp corners" are preferable to a roundabout doctrine of opaque standards easily manipulated to reach a preferred result.... "Virtual representation's" intense case-by-case analysis is particularly undesirable in circumstances where its application would replace settled, rule-like procedures. Bittinger v. Tecumseh Prod. Co., 123 F. 3d 877, 881-82 (6th Cir. 1997).

\footnote{131. U.S. CONST. arts. V, XIV. In Hansberry v. Lee, 311 U.S. 32 (1940), the Court held that the constitutional validity of claim preclusion depends on whether the party to be precluded was "afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes." Id. at 40; see also Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979) (holding that it is a "violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard").}

\footnote{132. "A chose in action is a constitutionally recognized property interest."}

\footnote{Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950).}


\footnote{134. Id.}
due process protection is justified as a means of ensuring procedural fairness, as well as the appearance of fairness, in litigation.\textsuperscript{135} These constitutional guarantees extend to res judicata principles because “the achievement of substantial justice . . . is the measure of the fairness of the rules of res judicata.”\textsuperscript{136} Any attempt to invoke a privity standard, however, must be tempered by the due process requirements as set out in the landmark decision of *Hansberry v. Lee*.\textsuperscript{137} This means that, at a minimum, the nonparty must have “notice and [an] opportunity to be heard.”\textsuperscript{138}

A. Notice in General

Notice is “an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality.”\textsuperscript{139} It can take many forms, such as posting,\textsuperscript{140} mailing,\textsuperscript{141} publication,\textsuperscript{142} or a combination of the three.\textsuperscript{143} In some

\begin{itemize}
\item \textsuperscript{136} Blonder-Tongue Lab., Inc. v. University of Illinois Found., 402 U.S. 313, 325 (1971); see also Purter v. Heckler, 771 F.2d 682, 691 (3d Cir. 1985) (“Rigid application of [res judicata] must be tempered by fairness and equity . . . .”); Thompson v. Schweiker, 665 F.2d 936, 940-41 (9th Cir. 1982) (“Both [issue and claim preclusion] are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice.”) (quoting Tipler v. E.I. DuPont DeNemours & Co., 443 F.2d 125, 128 (6th Cir. 1971)).
\item \textsuperscript{137} 311 U.S. 32 (1940).
\item \textsuperscript{138} Id. at 40. As the Supreme Court noted in *Mullane*, “[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of . . . property by adjudication preceded by notice and [the] opportunity for hearing.” Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); see also Schroeder v. City of New York, 371 U.S. 208, 211 (1962) (“[T]he requirement that parties be notified of proceedings affecting their legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process—the right to be heard.”).
\item \textsuperscript{139} Mullane, 339 U.S. at 314; see also Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100, 110 (1969) (“It is elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process.”).
\item \textsuperscript{140} See, e.g., Tate v. Werner, 68 F.R.D. 513 (E.D. Pa. 1975); Fowler v. Birmingham News Co., 608 F.2d 1055 (5th Cir. 1979).
\item \textsuperscript{141} See, e.g., Milstein v. Werner, 57 F.R.D. 515 (S.D.N.Y. 1972).
\item \textsuperscript{142} See, e.g., Greenfield v. Villager Indus. Inc., 483 F.2d 824 (3d Cir. 1973).
\item \textsuperscript{143} See generally 52 A.L.R. FED. 457 (1981); see, e.g., Mandujano v. Basic Vegetable Prod., Inc., 541 F.2d 832 (9th Cir. 1976). Of these forms of notice, the most frequently litigated is notice by newspaper publication. *Mullane*, 339 U.S.
cases, notice is deemed sufficient if it is given in a symbolic fashion.\textsuperscript{144} This is true in representative lawsuits such as class actions,\textsuperscript{145} but notice must be given in other contexts as well. For example, notice was required to be given in \textit{Mullane v. Central Hanover Bank & Trust Co.},\textsuperscript{146} even though \textit{Mullane} was not a class action per se.\textsuperscript{147} Rather, it was a special statutory accounting proceeding authorizing the judicial settlement of common trust fund accounts.\textsuperscript{148} Nevertheless, the Supreme Court analyzed \textit{Mullane} as though it was a certified class action lawsuit.\textsuperscript{149} According to the Court, "[t]his type of trust presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class."\textsuperscript{150} This holding was reaffirmed by the Court in the class action suit of \textit{Eisen v. Carlisle & Jacquelin},\textsuperscript{151} where the Court based its holding on the due process standards of \textit{Mullane}.\textsuperscript{152} Thus, in order to satisfy the Full Faith and Credit Clause of the U.S. Constitution, the procedure adopted should take the form of notice to non-party members, whether certified as a class or not.

Notice is constitutional if it "is reasonably calculated to reach interested parties,"\textsuperscript{153} as well as provide them with the opportunity to voice their concerns and objections.\textsuperscript{154} A precise formula for calculating the kind of notice to be given un-

\textsuperscript{at 315.}

\textsuperscript{144.} See 16A AM. JUR. 2D Constitutional Law § 836 (Supp. 1996).
\textsuperscript{145.} Id.
\textsuperscript{146.} 339 U.S. 306 (1950).
\textsuperscript{148.} Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 308 (1950); see Schwarz, supra note 147, at 430.
\textsuperscript{149.} Schwarz, supra note 147, at 430.
\textsuperscript{150.} Mullane, 339 U.S. at 319; see Schwarz, supra note 147, at 430.
\textsuperscript{151.} 417 U.S. 156 (1974).
\textsuperscript{152.} See Schwarz, supra note 147, at 430.
\textsuperscript{154.} 16A AM. JUR. 2D Constitutional Law § 836 (Supp. 1996); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 319 (1950). More specifically, "[a]n elementary and fundamental requisite of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." \textit{Mullane}, 339 U.S. at 314. Cf. Lehr v. Robertson, 463 U.S. 248, 249 (1983) ("The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are preemptively capable of asserting and protecting their own rights.").
der every circumstance is impossible given that it might not be possible to give personal notice to individuals who are unknown or missing. It suffices to say:

[N]otice must be of such a nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities for the case these conditions are reasonably met the constitutional requirements are satisfied.

B. The Right to Be Heard

Many commentators believe that affording an individual the “opportunity” to be heard is sufficient to satisfy the constitutional requisite of due process. But these commentators are wrong. As the Supreme Court made clear in the early 1900s, “no judgment can be regarded as res judicata...unless the party could, as a matter of right, appear and defend, even though he may have had knowledge of the suit.” This means that notice must be coupled with the right to be heard; besides, it is illogical to suggest that the right to be heard—standing alone—could be meaningfully realized without some kind of notice that such a right exists.

155. Walker v. City of Hutchinson, 352 U.S. 112, 115 (1956); see also Mullane, 339 U.S. at 317 (“[I]t has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.”).
157. See, e.g., Bone, supra note 7, at 204; Johnson, supra note 53, at 1321 n.95; Morris, supra note 7, at 1103; Stephen J. Safranek, Do Class Action Plaintiffs Lose Their Constitutional Rights?, 1996 WIS. L. REV. 263, 281.
158. Bigelow v. Old Dominion Cooper, Mining & Smelting Co., 225 U.S. 111, 131 (1912). Justice Stewart reaffirmed this holding in Fuentes v. Shevin, where he noted:

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use of and possession of property from arbitrary encroachment to minimize substantially unfair or mistaken deprivations of property....

Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972); see also Richards v. Jefferson County, 116 S. Ct. 1761, 1765 (1996) (“[T]he right to be heard [is] ensured by the guarantee of due process....”); see generally Woolley, supra note 91, (referring to the right to be heard).
159. See Walker v. City of Hutchinson, 352 U.S. 112, 115 (1956) (“The right to be heard is meaningless without notice.”); see also Woolley, supra note 91, at
The right to due process is an individual right, meaning that the individual's dual rights to notice and an opportunity to be heard work in harmony to protect the right of individual participation. The general rule concerning a nonparty's due process right was outlined in Blonder-Tongue Laboratories v. University of Illinois Foundation, where the Supreme Court explained:

Some litigants — those who never appeared in a prior action — may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stands squarely against their position.

The respect given to individual autonomy in litigation is not merely symbolic. It serves important functions that go to the heart of our adversarial system. For example, without the individual protection of due process, a nonparty would be forced to accept "the tactical decisions, arguments, presentation and mistakes of another over whom he has no control." Therefore, substantially more individual control over litigation is typically required before preclusion will bind nonparties. Well established precedent dictates that persons have the rights to both notice of, and an opportunity to participate

599 n.127 ("Obviously, notice is a prerequisite to the exercise of a right to be heard ... ").

160. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[All government action based on race should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection has not been infringed."); Shelley v. Kraemer, 334 U.S. 1, 22 (1948) ("The rights created by the first section of the Fourteenth Amendment are by its terms, guaranteed to the individual."); McCabe v. Atchison, Topeka & Santa Fe R.R., 235 U.S. 151, 161 (1914) ("The essence of the constitutional right [guaranteed by the Fourteenth Amendment] is that it is a personal one."); see also Roger H. Trangsrud, Joiner Alternatives in Mass Tort Litigation, 70 CORNELL L. REV. 799, 817 (1985) (describing the historical view that "litigation is a personal and individual enterprise").


163. Id. at 329; see Johnson, supra note 53, at 1323.

164. Johnson, supra note 53, at 1323.

165. Pielmeier, supra note 76, at 420; see Johnson, supra note 53, at 1323.

in, any litigation which might terminate their rights.\textsuperscript{167} As one commentator elaborated:

Tradition has shown respect for litigant choice and autonomy in, for instance, choice of forum, trial strategy, and settlement. Central to litigant autonomy is participation. For the due process right to be meaningfully individual, a litigant must have the opportunity to tell his story, to try his case. Consistent with the traditional respect afforded the individual litigant, the opportunity to be heard must be more than the opportunity to intervene in another individual's suit. The Court's refusal to shape a rule of mandatory intervention out of the clay of due process has been adamant. The opportunity to be heard encompasses more than the opportunity to intervene, to file an amicus brief, or to tell one's own story on the courthouse steps. Although always "appropriate to the nature of the case," the opportunity is responsive to the need for and the goal of individual participation and autonomy.\textsuperscript{168}

In sum, the United States Constitution entitles every litigant to her day-in-court. This important right serves vital interests such as "values of self-determination and adversarial justice."\textsuperscript{169} Thus, a court may not deprive a litigant of either notice or the opportunity to be heard without possibly also denying him his constitutionally protected rights. The doctrine of res judicata should therefore only be invoked after careful inquiry.\textsuperscript{170}

IV. BACKGROUND TO RICHARDS V. JEFFERSON COUNTY

A. The Jefferson County Occupational Tax

In 1987, Jefferson County, Alabama adopted the Jeffer-
son County occupational tax. The tax was passed via a county ordinance that was based on a thirty year old state statute which purportedly authorized the levy of such a tax. The tax requires that people working in Jefferson County (including the City of Birmingham—Alabama’s largest city) pay one half of one percent of their gross income to the county for the benefit of working within the county. Included in this privilege tax legislation are exemptions which provide that “professionals” (as defined in the legislation) who are required to pay license or privilege taxes to either the state or county are exempted from paying the occupational tax. By way of example, “professional” manicurists and hairdressers can pay $5 to the state, and nothing to the Jefferson County, and achieve complete exemption. Similarly, fortune tellers and crystal ball gazers avoid the tax by paying a $40 license fee, while doctors and lawyers can avoid the tax by purchasing a license for around $150. The legal effect of this legislation is that teachers and police officers earning salaries of $25,000 a year incur a tax of $125 annually, while “professional” mule dealers and hairdressers earning salaries of $200,000 can pay a flat fee—typically in the range of $5—and beat the tax.

B. The Bedingfield Decision

The Supreme Court of Alabama confronted, in part, the constitutional issues presented by the Jefferson County occupational tax in Bedingfield v. Jefferson County. In Bedingfield, the plaintiff was the acting director of finance to the City of Birmingham, who sued to prevent the levy of the tax. Bedingfield sued both as an individual taxpayer and in his official capacity as a public official for the City of Bir-

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172. Id.
174. See id.
175. See id.
176. See id.
177. See id. at 9; see also Thomas Hargrove, Tax Squabble II — Occupational Tax Subject to New Court Case, BIRMINGHAM POST-HERALD, Mar. 26, 1996, at D1.
178. 527 So. 2d 1270 (Ala. 1988).
179. See id. at 1270.
The challenge to the occupational tax was consolidated for trial with another case brought by three county taxpayers who also challenged the constitutionality of the tax. However, it is important to note that neither case was brought on behalf of a class, nor did the plaintiffs purport to be acting on behalf of any nonparties.

The Bedingfield case presented three specific issues for the Alabama Supreme Court's determination: (1) whether the Act that allegedly authorized the Jefferson County occupational tax manifested the requisite authority to support the levy of the tax; (2) whether the Act was general or local legislation insofar as it was applicable only to counties with a population of 500,000 or more; and (3) whether the Act provided for the levying of such a tax given that there was no express provision in the Act that authorized it. In general, Bedingfield challenged whether the levy of the tax was constitutional.

In finding that the county occupational tax was constitutional, the court held that: (1) the county was authorized by statute to levy the tax based upon the “express language” of the Act; (2) the Act authorizing the levy of the tax was general, rather than a local law, so it did not violate the state constitutional prohibition against enacting local laws in areas of general law jurisdiction; and (3) the Act authorizing the levy of the tax provided also for its collection. With the benefit of this holding, the county's occupational tax took effect three weeks later.

C. The Facts of the Richards Case

son County occupational tax. The argument was twofold. First, it was asserted that the "professional" exemption scheme in the occupational tax violated state and federal due process and equal protection rights in that the listed exceptions were arbitrary and lacked any rational legal basis. As the plaintiffs contended, "This exemption scheme could not be more irrational or arbitrary if it also exempted left handed men with freckles and green-eyed women who refuse to eat broccoli." Second, the plaintiffs argued that the Bedingfield decision should not prevent them from challenging the constitutionality of the tax because their class received neither notice of the Bedingfield case, nor representation in Bedingfield insofar as the Bedingfield court failed to address their class' federal due process and equal protection claims. While the Bedingfield plaintiffs did allege in their complaint that the Act "is a violation of the federal and state constitutions," neither the order of the lower court nor the Bedingfield decision made a "single reference" to the federal constitutional questions raised in Richards. Therefore, according to the plaintiffs in Richards, res judicata should not have barred their class from having their day-in-court. On the other hand, Jefferson County argued both that the exemption scheme was rational and that the Richards class was barred by the doctrine of res judicata from relitigating the constitutionality of the tax because their interests had been "adequately represented" by the plaintiffs in Bedingfield.

D. The State Court Decisions

In the complaint, the plaintiffs' claimed that the exemption scheme built into the occupational tax was "violative of the equal protection clause and the Due Process Clause of the

189. For a discussion of earlier case law concerning tax-based res judicata claims, see generally Erwin N. Griswold, Res Judicata in Federal Tax Cases, 46 Yale L.J. 1320 (1937).
190. See Richards, supra note 173, at 7.
191. Petitioner's Complaint at 9; see also Micheal Brumas, High Court to Hear Occupational Tax Case, BIRMINGHAM NEWS, Mar. 24, 1996, at A17A; Thomas Hargrove, County in Legal Quandary — High Court Takes Aim at Job Tax, BIRMINGHAM POST-HERALD, June 11, 1996, at A1 (quoting Petitioner's brief).
192. See Brumas, supra note 191, at A17A.
194. See id. at 1128.
Fourteenth Amendment to the Constitution of the United States. Jefferson County filed a motion for summary judgment based upon the Bedingfield decision, asserting res judicata. The trial court in Jefferson County granted summary judgment in favor of the county on Richards' state law claims, but denied summary judgment as to Richards' federal constitutional and statutory claims, stating:

In Bedingfield v. Jefferson County, neither the trial court nor the Alabama Supreme Court determined whether [the Act] authorizing the tax in question, or [the ordinance] imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust and improper classification of citizens subject to the tax, while exempting certain citizens from said tax in an arbitrary, irrational and unjust manner.

In an unusual procedural move, the Alabama Supreme Court granted permission to appeal this denial of summary judgment as to the federal constitutional claims directly to the state supreme court, thus bypassing the appellate court.

The Alabama Supreme Court framed the issue as follows: "Whether the trial court correctly held that the Federal constitutional claims are not barred by the doctrine of res judicata and thus correctly denied the summary judgment on these claims." In an opinion delivered by Judge Almon, the court first discussed the Act which authorized the levy of Jefferson County's occupational tax. After explaining the arguments on both sides, the court acknowledged the trial court's basis for denying summary judgment on Richards' federal constitutional claims—the failure of the Bedingfield court to address Richards' federal equal protection claims.

The court then discussed res judicata. After noting that res judicata is a "well-established principle of law," the court outlined the elements of the doctrine: "(1) a prior judgment

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196. Id.
198. Id.
199. Id.
200. See generally id.
on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both suits.\textsuperscript{201} Next, the court recited the familiar notion that res judicata generally bars not only all matters that were actually litigated and decided in the prior action, but also all issues that could have been raised and adjudicated in the prior suit.\textsuperscript{202} The court then proceeded to consider these elements in the context of \textit{Richards}.

The court first addressed the "same cause of action" element of the doctrine by discussing the similarities between \textit{Bedingfield} and \textit{Richards}.\textsuperscript{203} In so doing, the court stated that both the \textit{Bedingfield} complaint and the case consolidated for trial with \textit{Bedingfield} alleged that the Act authorizing the levy of the tax was unconstitutional insofar as it violated the plaintiffs' "equal protection and due process provisions of the State and Federal constitutions."\textsuperscript{204} Moreover, according to the court, both of these complaints asserted that the exemptions given to "professionals" were the reasons for these alleged constitutional violations.\textsuperscript{205}

The court then compared the complaint in \textit{Richards} to that in \textit{Bedingfield}, and found that the both complaints alleged the same equal protection and due process violations,\textsuperscript{206} and asserted the same bases for these alleged violations—i.e. the "arbitrary and irrational character of" the tax's professional exemption scheme.\textsuperscript{207} Thus, the court held: "The same cause of action was presented in both actions. Both were ac-

\begin{itemize}
  \item \textsuperscript{201} \textit{Id.} (quoting Hughes v. Allenstein, 514 So. 2d 858, 860 (Ala. 1987)).
  \item \textsuperscript{202} \textit{Id.} at 1128.
  \item \textsuperscript{203} Jefferson County v. Richards, 662 So. 2d 1127, 1128-29 (Ala. 1995).
  \item \textsuperscript{204} The \textit{Bedingfield} complaint alleged that the Act "is a violation of the equal protection requirements and provisions of the Federal and State Constitution," while the second complaint alleged, among other things, that the tax "constitutes a denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution." \textit{Id.} at 1129 (quoting the \textit{Bedingfield} and \textit{Phillips} complaints).
  \item \textsuperscript{205} The \textit{Bedingfield} complaint phrased the "professional" exemption scheme as "vague and ambiguous and therefore is a violation of the due process requirements of the state and federal constitution," while the second complaint alleged said that the Act unconstitutionally "exempts professional occupants required by State law to be licensed but does not exempt other professional and nonprofessional occupants." \textit{Id.} (quoting the \textit{Bedingfield} and \textit{Phillips} complaints).
  \item \textsuperscript{206} \textit{Id.}
  \item \textsuperscript{207} \textit{Id.} at 1128.
\end{itemize}
tions for declaratory judgment challenging the constitutionality of the Jefferson County occupational tax. Both complaints allege violations of the equal protection and due process provisions of the State and Federal constitutions. The court then addressed Richards' claim that the Bedingfield decision had failed to consider his class' federal constitutional claims. At this point in the decision, the court conceded that Bedingfield was decided by both the circuit court and the Alabama Supreme Court solely on "State constitutional grounds." Nevertheless, the court concluded that the "Federal and State equal protection claims and due process claims were pleaded, and it is at least true that they 'could have been adjudicated.' Therefore, according to the court, it was at least arguable that these issues "were adjudicated, because they were grounds stated as a basis for relief, and a final judgment denying relief was affirmed." In support of this statement, the court relied upon the well recognized premise within the doctrine of res judicata that if the elements of the doctrine are present, then "any claim that was or could have been adjudicated in the prior action is [generally] barred from further litigation."" Furthermore, the court addressed the remaining element of res judicata—the "substantial identity of the parties." After defining privity broadly so as to permit a finding premised upon virtual representation, the court held that the taxpayers in the Bedingfield litigation "adequately represented" the interests of the Richards class. Arguably, the court based its holding on virtual representation in that the court found that not only were the respective interests "closely aligned—they [were] essentially identical." The court therefore found that this last element of res judicata satisfied.

Finally, the court addressed what it deemed as the

208. Id. at 1129.
210. Id.
211. Id.
212. Id.
213. Id. at 1127 (quoting Dairyland Ins. Co. v. Jackson, 566 So. 2d 723, 725 (Ala. 1990)).
214. Id. at 1129.
216. Id.
217. Id.
"wisdom" of its decision. In this portion of the opinion, the court focused on the disastrous consequences that would result from allowing another challenge to the county tax, explaining that because hundreds of millions of dollars worth of bonds had been financed based upon Bedingfield, which had "authoritatively establish[ed]" the constitutionally of the tax, any challenge now would "improperly interfere with the operations of the county and . . . undermine the security of the bonds, to the detriment of the bondholders." Thus, the court stated that in cases such as Bedingfield, where the general public interests are no doubt paramount, the county taxpayers may properly be considered as "the real party in interest;" therefore, the Richards class was adequately represented to the extent required by the Due Process Clause of the Fourteenth Amendment.

In a dissenting opinion, Judge Maddox refused to follow the majority's analysis of res judicata, arguing that the last element of the doctrine—the same cause of action presented in both suits—was not met. Judge Maddox reasoned that nowhere in the Bedingfield decision did the court adjudicate the federal constitutional claims of the Richards class. There is not a "single reference" in either the order of the trial court nor in the opinion of Bedingfield court addressing whether the Act violated the Federal Constitution, Judge Maddox emphasized. While acknowledging that the plaintiffs in Bedingfield did allege in their complaint that the Act was unconstitutional based upon the equal protection guarantees of the state and federal constitutions, Judge Maddox felt that merely asserting that allegation was not, strictly speaking, "sufficient to satisfy 'the same cause of action pre-

218. Id.
219. Id. More specifically, the court's discussion concerned a pledge by Jefferson County to pay a portion of the tax proceeds of the tax to the Birmingham Jefferson Civic Center, which had singularly issued a series of capital tax bonds to finance its renovation on the assumption of being reimbursed by the county in the form of occupational tax proceeds. Id. Because this bond involved hundreds of millions of dollars, the court felt that invalidating the tax now would unjustly interfere with these bond commitments. Jefferson County v. Richards, 662 So. 2d 1127, 1130 (Ala. 1995).
222. Id.
223. Id. at 1130.
sented in both suits' element of res judicata. Judge Maddox based this reasoning on the issues as set out in the trial court and Bedingfield opinions themselves, which made no reference to any federal equal protection violation. Even if Richards' federal equal protection claim had been presented and decided in Bedingfield, Judge Maddox wrote, Richards' lawsuit attacked the allegedly irrational exemption scheme contained in the tax, an issue that was "clearly . . . not presented or adjudicated in Bedingfield." Judge Maddox also criticized the majority's finding insofar as it barred Richards' federal equal protection claim on the ground that that claim "could" have been raised in the Bedingfield action. The judge dismissed the majority's reasoning on this point claiming that the evidence necessary to prove Richards' claim, and the legal theories in support of those claims, would differ greatly from those in Bedingfield. Lastly, while recognizing the policy "importance of this case" to the county and various bondholders, Judge Maddox refused to be swayed by the majority's public policy argument. Simply put, Judge Maddox believed that Richards' claims were "just different from those presented in Bedingfield."

V. THE SUPREME COURT'S ANALYSIS

The Supreme Court granted certiorari to consider both Richards' equal protection challenge to the tax scheme and the challenge to the Alabama Supreme Court's finding that the claims were barred by the doctrine of res judicata. After granting this petition, however, the Court entered an order dismissing the grant of review as to Richards' equal protection question and directed the parties to address at oral argument only the issue of res judicata.

Justice Stevens, began the unanimous Court opinion with a recitation of the holding of Hansberry v. Lee, decided
in 1940: "[I]t would violate the Due Process Clause of the Fourteenth Amendment to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented."\textsuperscript{233} The application of this rule was, according to Justice Stevens, the issue before the Court in Richards.\textsuperscript{234}

The Court then reviewed prior Supreme Court cases analyzing due process. In so doing, they acknowledged the importance of allowing states to develop their own rules of preclusion, but emphasized the Court's uniform condemnation of "extreme applications" of preclusion principles because of the "fundamental" due process issues involved.\textsuperscript{235} Justice Stevens elaborated upon the importance of the due process right to be heard in a footnote, where he stated:

\begin{quote}
The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. And as a State may not, consistent with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.\textsuperscript{236}
\end{quote}

The Court then addressed the limits on a state's power to enforce preclusion rules, noting that a party is not "bound by a judgment" if he has not been "designated as a party" or "been made a party by service of process."\textsuperscript{237} Justice Stevens wrote, "This rule is part of our 'deep- rooted historic tradition that everyone should have his own day in court.'\textsuperscript{238} Consequently, the Court recognized that while parties of record are bound by a prior judgment, "strangers to those proceedings" are not.\textsuperscript{239} But, the Court addressed the well recognized exceptions to this general rule—the doctrines of

\begin{footnotes}
\item 233. Richards, 116 S. Ct. at 1764 (quoting Hansberry, 311 U.S. at 37).
\item 234. Id. at 1764.
\item 235. Id. at 1765 (quoting Postal Tel. Cable Co. v. City of Newport, 247 U.S. 464, 570 (1918)).
\item 237. Id. at 1765-66 (quoting Hansberry, 311 U.S. at 40).
\item 238. Id. at 1766 (1997) (quoting Martin v. Wilks, 490 U.S. 755, 761-762 (1989)).
\item 239. Id. (quoting Martin, 490 U.S. at 762 and Blonder-Tongue Lab. Inc. v. University of Illinois Found., 402 U.S. 313, 329 (1971)).
\end{footnotes}
privity and adequate representation. After recognizing the traditional applications of privity—as in guardian or trustee type relationships, for example—the court conceded the extent to which the doctrine of privity has been embellished by modern courts.240 As noted earlier, the opinion states: "[A]lthough there are clearly constitutional limits on the privity exception, the term 'privity' is now used to describe relationships between litigants that would not have come within the traditional definition of that term."241 The Court next discussed the doctrine of adequate representation. Justice Stevens recognized the doctrine as one that permits a nonparty to be bound by a judgment if his interests are adequately represented by the party of record,242 or if other "special remedial schemes" exist that make it possible to prevent successive litigation by nonparties.243 Then, the Court focused on the grounds urged by the county for reversal, that "petitioners were adequately represented in the Bedingfield decision."244

The Court rejected this adequate representation argument, first addressing the lack of notice. Justice Stevens determined that the opinion of Hansberry v. Lee245 would serve as the precedent setting opinion that the Court would follow in deciding this due process question.246 In Hansberry, the Supreme Court ruled that a suit brought against a racially restrictive covenant was not barred by res judicata.247 The Hansberry Court held that the property owners challenging the suit could proceed with their case "because the interests of those class members who had been a party to the prior litigation were in conflict with the absent members who were the defendants in the subsequent action . . . ."248 In his due

240. Id.
241. Id.
242. Richards v. Jefferson County, 116 S. Ct. 1761, 1766 (1996). Examples include class action or representative suits, or even situations in which one, although not a literal party to the litigation, controls the litigation on behalf of the party of record. Id.
243. For example, bankruptcy or probate proceedings may terminate certain rights if they are "otherwise consistent with due process." Id.
244. Id.
245. 311 U.S. 32 (1940).
246. Id.
247. Id. at 42-44.
process analysis, Justice Stevens apparently put to rest a reading of Hansberry that left open the question of whether “adequate representation[—standing alone—]might cure a lack of notice.”\(^{249}\) Citing to several Supreme Court cases, Justice Stevens stated that the failure to provide notice to the Richards class was “troubling because...the right to be heard ensured by the guarantee of due process ‘has little reality or worth’” without notice.\(^{250}\) The Court explained that a proper reading of Hansberry would require that “those present are of the same class as those absent and that the litigation is so conducted as to ensure the full and fair consideration of the common issue.”\(^{251}\) Having established the constitutional requisite of due process—affording nonparties both notice and the opportunity to be heard—the Court found that the Bedingfield plaintiffs did not provide notice to the Richards class.\(^{252}\)

Justice Stevens then responded to the Alabama Supreme Court’s finding that the Bedingfield plaintiffs had “adequately represented” the interests of the Richards class.\(^{253}\) First, the Court stated that the taxpayers in Bedingfield did not purport to sue on behalf of a class, adding that their pleadings failed to assert any claim on behalf of other county taxpayers, and the judgment they received likewise did not assert that absent county taxpayers’ interests had been represented.\(^{254}\) Second, the fact that the plaintiff in Bedingfield sued in both his individual and his official capacity as City director of finance did not alter the Court’s analysis.\(^{255}\) The Court reasoned that even had Bedingfield, suing in his representative capacity, intended to represent absent county taxpayers, he did not take care to protect the “pecuniary interests” of the county taxpayers like those in Richards.\(^{256}\) As a result, nothing in the Bedingfield action

\(^{250}\) Id. at 1766; see Woolley, supra note 91, at 574. Hansberry v. Lee has often been cited for the proposition that adequate representation alone may substitute for providing notice to absent class members. See, e.g., Schwarz, supra note 147, at 428-29; Bone, supra note 7, at 214; 3 Howard M. Newberg, NEWBERG ON CLASS ACTIONS § 13.20, at 36 (2d ed. 1985).
\(^{251}\) Richards, 116 S. Ct. at 1767.
\(^{252}\) Id. at 1766.
\(^{253}\) Id. at 1767-68.
\(^{254}\) Id.
\(^{256}\) Id. at 1767.
supported the proposition that his suit protected the interests of the Richards class to the extent set out in *Hansberry*. Moreover, there was no evidence that the *Bedingfield* plaintiffs “understood [their] suit to be on behalf of absent county taxpayers.” In sum, the Court concluded that because the members of the Richards class were “mere strangers” to the *Bedingfield* plaintiffs, their interests were not represented such that it might be said that they had their day-in-court.

Finally, the Court criticized the Alabama Supreme Court for its reliance on public policy as a means of asserting res judicata. The Court distinguished those cases in which a taxpayer is suing over “the alleged misuse of public funds” or other alleged public impropriety which only indirectly affects the taxpayer’s interests, and cases in which a vested property interest is at stake. As for the former, a state has “wide latitude” in invoking its own preclusion rules. In the latter case, however, “the State may not deprive individual litigants of their own day in court.” To do so, reasoned Justice Stevens, would deprive litigants of their “chose in action,” which has long been recognized as a protected property interest. Thus, the *Richards* Court refused to “deviate from the traditional rule that extreme applications of state-law res judicata principles violates the Federal Constitution.” Justice Stevens further objected to the State court’s reliance on *Bedingfield* as “precedent,” reaffirming the Court’s holding that a litigant may not be bound to a judgment where he has not been made a party of record. Thus, in reversing the Alabama Supreme Court, a unanimous Supreme Court held that “because [the Richards class] received neither notice of, nor sufficient representation in, the *Bedingfield* litigation, that adjudication, as a matter of federal due process, may not bind them and thus cannot bar them from challenging an allegedly

257. Id. at 1768.
258. Id.
259. Id.
260. Id.
262. Id.
263. Id.
264. Id.
265. Id.
266. Id.
VI. THE SIGNIFICANCE OF RICHARDS V. JEFFERSON COUNTY

The decision in Richards affirms precedent in one important area of law, and appears to establish it in two others. First, the Supreme Court affirms the rule that there must be a “full and fair consideration of the common issue” before a nonparty will be considered to have been adequately represented in a prior action.\[267\] Moreover, the action serving as the basis for preclusion must provide objective evidence—as established by the parties' pleadings, the final judgment, or the like—to support the proposition that it was brought in a representative capacity. Second, the Court appears to hold that federal due process of law requires that notice be given in any action which purports to bind the interests of nonparties. Indeed, the due process right to be heard is essentially worthless without notice that one's rights are being affected.\[268\] Third, the Court appears to reject the long standing belief harbored by many judges and commentators that adequate representation can cure a lack of notice. Put another way, the Supreme Court discounts the notion that adequate representation is the touchstone of due process. Instead, notice and adequate representation stand on similar footing, meaning that notice must be combined with adequate representation before an absent party's due process rights may be considered to have been adequately protected.

A. Adequate Representation in Representative Suits

The Alabama Supreme Court's contention that a person's due process right to adequate representation may be satisfied if his rights “could have been decided” in a prior adjudication is condemned by the United States Supreme Court as an “extreme application” of res judicata. In essence, the Alabama Supreme Court terminated both the state and federal constitutional rights of the Richards class without giving a “full and fair consideration” of Richards' federal claims. While states are generally free to determine the substantive law of the forum state, and in most cases the preclusive effect

\[268\] Id.
\[269\] Id. at 1766.
of state judicial proceedings, they may not unilaterally terminate a person's federal claims on the basis that those claims "could have" been adjudicated. The scope of an individual's federal due process right to bring a cause of action requires more than the mere possibility of its resolution in a prior proceeding. For adequate representation to be meaningful, the asserted "common issue" must have received a "full and fair consideration." This requires at a minimum that objective evidence be present to substantiate the claim of an adjudicated issue before a nonparty's federal claims may be deemed to be adequately represented.

The argument rejected in Richards was the county's contention that both Bedingfield and Richards challenged the "common issue" of the constitutionality of the occupational tax at both the state and federal levels, as evidenced by the references to such violations in the pleadings of both cases. However, as mentioned above, merely asserting a constitutional challenge to the validity of a public issue is insufficient. According to the Court, (1) Bedingfield was not a certified class action, (2) the Bedingfield pleadings did not assert any claim on behalf of absent parties, and (3) the Bedingfield judgment did not purport to bind any absent taxpayers' interests. In short, the Bedingfield plaintiffs did not adequately represent the common interests of the Richards class, as suggested in Hansberry. As a result, the evidence presented in Richards on this issue was insufficient to "make up for the fact that [Richards] neither participated in, nor had the opportunity to participate in, the Bedingfield action." It may therefore be gleaned from Richards that in actions which purport to adjudicate an issue of public concern, there must exist some objective evidence which establishes that there was "the full and fair consideration of the common issue" between the parties of record and those they purport to represent. Absent such evidence, nonparties may not be barred from asserting their constitutionally protected rights. The reasoning behind this result is clear. It is a fundamental

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270. See Braveman & Goldsmith, supra note 5, at 626.
271. Richards, 116 S. Ct. at 1767 (quoting Hansberry v. Lee, 311 U.S. 32, 43 (1940)).
272. Id.
274. Id.
prerequisite of adequate representation that the "interests" of absent class members be fairly represented. Without the resolution of common interests, there can be no adequate representation. But, adequate representation does not stand alone. The language of the Richards opinion suggests that notice must also be provided before a nonparty's interests may be terminated.

B. Notice in Representative Suits

In Richards, the Supreme Court cited to Mullane v. Central Hanover Bank & Trust Co. for the proposition that failing to provide notice to absent parties in a suit "which would conclusively resolve [one's] legal rights" is of doubtful constitutional validity. The citation to Mullane is significant because, as mentioned previously, Mullane was not a "class action" in the strictest sense of the term. Rather, it was a representative action which also sought to represent the interests of absent beneficiaries to a trust fund. Nevertheless, the Mullane decision concluded that the parties of record could adequately represent absent parties as long as notice reasonably calculated to inform interested parties of the action was attempted. It is fair to say, then, that had adequate representation been constitutionally sufficient to satisfy the Due Process Clause, the Mullane case would not have required notice to be given. Likewise, had the Supreme Court in Richards deemed adequate representation sufficient to meet the requirements of due process, they would not have premised their holding in part on the failure to provide notice. Thus, a class action does not appear to be a prerequisite to providing notice. Indeed, it may be derived from Richards that notice is required in any action which purports to represent the interests of nonparties.

Furthermore, by citing Mullane in the opinion, the Supreme Court seems to establish the minimum standard that will satisfy the due process notice requirement in representative suits. That is, notice must be reasonably calculated to reach all interested nonparties, notwithstanding the financial

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275. Hansberry, 311 U.S. at 41-42; see Woolley, supra note 91, at 575.
278. Woolley, supra note 91, at 583.
burden of doing so. Requiring notice in such situations appears to satisfy the Court’s concern for both fairness and the appearance of fairness, a characteristic deeply-rooted in our notions of due process and democracy. The concern for procedural fairness was similarly stressed by Justice Breyer at oral argument, who said: “tak[ing] a person’s action away from him without notice . . . would seem (a) very unfair, and (b) contrary to the precedents of the [Supreme] Court . . . .” This comment may be supplemented by other commentators’ perceptions of judicial fairness. For example, Professor Woolley believes:

By requiring the judicial system to act in a way that appears fair, the Due Process Clause insures that reasonable people feel that the judicial system is fair. In my view, a concern for fairness and the appearance intuitively leads to the conclusion that “everyone should have his own day in court.” We need not simply rely on intuition, however. Social science research on legal procedure supports the view that providing individuals an opportunity to present evidence and make arguments has a significant impact on a litigant’s perception that the process is fair, quite distinct from the objective accuracy of the result. In short, while permitting litigants to participate reduces the risk of error in the aggregate to an acceptable level, participation also has independent value.

Similarly, Judge Newman advocates a broader definition of fairness in the courts—one that embraces fairness in individual actions but also to all those who wish to participate in the judicial system and to all who are subject to its findings. He suggests that the costs and delays associated with the unflattering aspects of our judicial system is directly associated with a narrow concept of

279. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 166 (1974) (finding that notice must be provided to absent class members notwithstanding the “prohibitively high cost” imposed).
280. See Woolley, supra note 91, at 596; see also Jon Newman, Rethinking Fairness: Perspectives on the Litigation Process, 94 YALE L.J. 1643, 1646 (1985) (“Fairness is the fundamental concept that guides our thinking about substantive and procedural law.”).
282. Woolley, supra note 91, at 596.
283. See Newman, supra note 280, at 1643-44.
fairness. As a result, Judge Newman urges a broader approach to fairness:

First, we must learn to evaluate the fairness of each step in the litigation process not only in the narrow context of its own discrete contribution to the result, but in the broader context of its incremental value in promoting fairness compared to the inevitable risks of an unfair outcome. Second, we must include in our assessment of fairness not only fairness of result in the dispute at hand, but fairness in the broader context for all who use and wish to use the litigation process. Third, we must think about fairness of result not only in the familiar context of losses compensable within the legal framework, but in the broader context of all similar losses that occur across the whole spectrum of human activity.

The Richards opinion’s “strict application of preclusion rules is undoubtedly consistent with Judge Newman’s broader vision of fairness.” Thus, procedural fairness can no longer be discounted as an inconsequential aspect of our judicial system. No longer can the concerns for judicial efficiency alone justify “extreme applications” of preclusion principles. In Richards, the Supreme Court changed the way in which the game of procedural due process is played.

First, notice must now be provided in any suit which purports to terminate the legal rights of others. This would seemingly require that notice be provided where it is not explicitly mandated by the Federal Rules of Civil Procedure. Rule 23 generally requires that notice be given to absent class members so that they may have the opportunity to either opt out of or participate in the resolution of their rights. The right of an absent class member to participate in such actions stems from the opportunity to be heard, which includes the opportunity to make motions, join in discovery, as well as participate in the actual proceeding of his case. Ironically, however, the right to participate does not include the right to notice in Rule 23(b)(1) or (b)(2) class actions. Thus, at least theoretically, in a Rule 23(b)(1) or (b)(2) representative suit, the plaintiffs may represent the interests of

284. See Newman, supra note 280, at 1644; see also Braveman & Goldsmith, supra note 5, at 616.
286. Braveman & Goldsmith, supra note 5, at 616.
287. See Woolley, supra note 91, at 604.
nonparties in court but not provide them with any notice of that representation and yet this procedure will pass constitutional muster. At the same time, however, Rule 23 provides in subdivision (c)(3) that the “judgment in... a class action under subdivision... (b)(2)... shall include and describe those whom the court finds to be members of the class.” As one commentator put it: “Because the drafters of Rule 23 assumed that due process does not require notice and an opportunity to be heard in [Rule 23(b)(1) or (b)(2) suits], it is unclear how those suits should be treated.” Nevertheless, two general philosophies prevail:

Subdivision (c)(3)... can be read consistently with the due process clause in two radically different ways. One reading would honor the rule's intent not to require notice in (b)(2) suits. This reading would treat subdivision (c)(3) as simply providing that a class judgment includes a class member when the requirements of due process have been met. Because Rule 23 does not require notice in (b)(1) or (b)(2) suits, subdivision (c)(3) would be read to include in a class judgment only those who have received notice or can otherwise be bound.

An alternative reading of subdivision (c)(3) would view the subdivision as directing a court to exercise its authority to ensure that class members are bound by a class judgment. Because subdivision (d)(2) authorizes the court to exercise its discretion to order notice “for the protection of the members of the class or otherwise for the fair conduct of the action,” subdivision (c)(3) could be read to require that class members in a (b)(2) suit be given the best notice reasonably practicable.

This debate was addressed at oral argument in Richards, where the county argued the former of these two positions. The county characterized the Bedingfield suit as a (b)(2) class action insofar as the Bedingfield plaintiffs represented absent taxpayers on the public issue of the constitutionality of the occupational tax. According to the county, then, the Bedingfield plaintiffs were not technically required to give notice under the Federal Rules.

While this argument may have been technically accurate,
it did not seem to square with the Supreme Court's notion of fairness. Indeed, at oral argument, Justice Breyer asked:

What I want to know is, I couldn't find any authority that explained to me why there is not notice in (b)(2), why there shouldn't be notice, how those class actions work, or what conceivable thing was going through the rulemaker's mind in not saying you should have notice, given the precedent in the Supreme Court that you can't take a person's action away from them without notice. 291

After the attorney for Jefferson County had elaborated on the historical basis for the failure of rulemakers to provide notice in such cases, Justice Ginsburg, clearly frustrated, stated:

[T]hat's not quite right, is it? There isn't mandatory notice because there is such a variety of cases that come under (b)(1) and (b)(2), but look at (d)(3), which instructs the court to require for the protection of the members of the class or otherwise for the fair conduct of the action that notice be given in such a manner as the court may direct. I assume from that provision that in a case comparable to the Mullane situation a district court... would say ... you have to give notice. 292

From these exchanges in the courtroom, it seemed obvious that the Court was simply uncomfortable with the notion of terminating a person's constitutionally protected right to bring a cause of action without providing him with notice of some kind that his rights were being extinguished. Nevertheless, the Court in the Richards opinion failed to address the specific question of whether notice was required under Rule 23(b)(1) or (b)(2) class actions. The issue was avoided because there was no objective evidence present which supported the county's claim that Bedingfield was in fact a representative (b)(1) or (b)(2) class action. Had evidence existed to validate such a claim, however, it is likely

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292. Id. at *33-*34. Rule 23(d), to which the Court was referring, reads in relevant part as follows:

In the conduct of actions to which this rule applies, the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present their claims and defenses, or otherwise to come into the action.

FED. R. CIV. P. 23(d).
that the Court would still have required some notice be provided to absent class members. To justify this position, one need look no further than the Court's reference to Mullane at both oral argument and in its opinion for the proposition that notice be provided in any action which purports to terminate another's "chose in action." In reality, if the Court required, as it did in Richards, that a non-class action representative suit must provide notice to nonparties to whom their action asserts to bind, why would the Court not require that the same notice be applied in Rule 23(b)(1) and (b)(2) class actions, where the action is brought in an officially recognized representative capacity and likewise purports to bind nonparties to the outcome of the adjudication. This is especially true given that at least some members of the Court seemed willing to read a notice requirement into Rule 23(b)(1) and (b)(2) class actions. As a result, it appears to be the case that courts should require notice to be given in any kind of representative action, even though such notice may not specifically be mandated by the Federal Rules of Civil Procedure.

C. Notice and Adequate Representation: A Cumulative Requirement

The principle import of Richards is that the Supreme Court appeared to unanimously reject the reading of Hansberry which left open the possibility that adequate representation alone might satisfy the constitutional requirements of due process. First, the Court expressed doubt that Hansberry had left open such a proposition. Even assuming it had, however, the Court found it "troubling" that one's due process right to be heard could be terminated without "any notice that a suit was pending which would conclusively resolve [her] legal rights." Indeed, quoting Mullane, the Court stated that "the right to be heard ensured by the guarantee of due process 'has little reality or worth unless one is'" provided notice. This reading of Hansberry—that notice and adequate representation are interlocking—formed the

293. See Woolley, supra note 91, at 573-74.
295. Richards, 116 S. Ct. at 1766.
296. Id.
basis of the Court's holding in Richards. "Because [the Richards class] received neither notice of, nor sufficient representation in, the Bedingfield litigation, that adjudication, as a matter of federal due process, may not bind them...." The key point is that courts may no longer assume that adequate representation may substitute for the failure to provide notice to nonparties whose interests are vulnerable to preclusion. Rather, it now appears to be the law that notice must be combined with adequate representation before any proceeding will work to preclude nonparties whose constitutionally protected rights are at stake. At least one commentator has agreed with this reading of Richards. The rationale behind this result is commonsensical. It is unrealistic and, consequently, inherently unfair, to extinguish one's constitutionally protected rights without providing notice that one's rights are being lost. This is not a revolutionary notion, however. It has been supported by courts and commentators for a very long time. It is therefore difficult to understand how some judges and commentators have blindly proclaimed that adequate representation alone was the touchstone of due process. Nevertheless, it is important to keep in mind that the Richards holding does not appear to limit the cumulative requirements of notice and adequate representation to certified class action lawsuits. Following the Mullane rationale, the Court appears to hold that in any representative action which purports to bind the interests of nonparties, notice and adequate representation must be provided. This argument is bolstered by the fact that the Court held that Bedingfield was not a class action lawsuit (even in the obscure Rule 23(b)(1)

297. Id. at 1769.
298. See Woolley, supra note 91, at 574-75.
299. See, e.g., Fuentes v. Shevin, 407 U.S. 67 (1972); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Moreover, as one leading commentator has explained:

[I]t is self-evident that a full opportunity to be heard is an essential element of res judicata, i.e., the risk of unfairness must be overcome if claim preclusion or cause of action preclusion is to be allowed. Where the opportunity to litigate was not complete and unfettered, the court should not grant preclusion because fundamental unfairness is existent.

FREEDMAN, supra note 3, at 17.
300. It appears that courts and commentators have latched onto the dictum in Hansberry v. Lee for relying upon such a proposition. For an excellent discussion of why this reliance is inherently incorrect, see Woolley, supra note 91, at 574-76.
or (b)(2) context), but nevertheless reversed the Alabama Supreme court on the basis that Bedingfield failed to provide either notice or sufficient representation to absent parties. This appears to be the rule regardless of whether the plaintiffs’ interests are “identical” to those absent parties they claim to represent, or a less substantial relationship exists.

VII. CONCLUSION

As of this writing, Richards v. Jefferson County has been cited by no fewer than fourteen state and federal courts. Although the vast majority of these cases have cited to Richards approvingly for the day-in-court ideal as well as for the proposition that notice must be combined with the opportunity to be heard, one aberration exists. In Tyus v. Schoemehl, the court applied preclusion on the basis that the plaintiff had been sufficiently represented, without directly addressing the issue of notice. Rather, the Tyus court used the doctrine of virtual representation to bar a city councilman from relitigating the allegedly unlawful redrawing of district lines to weaken the vote of African-Americans. While paying lip service to the notion that everyone is entitled to their “day-in-court,” the court used the novel approach of addressing the specific facts of the case so that it would not be “artificially limited” by the day-in-court ideal. In its analysis, the Tyus court failed to address the complete holding of

301. See Mullane, 339 U.S. at 319.
302. See Jefferson County v. Richards, 662 So. 2d 1127, 1132 (Ala. 1995), rev’d, 116 S. Ct. 1761 (1996) (Maddox, J., dissenting) (stating Richard’s claims were “just different from those presented in Bedingfield”).
304. 93 F.3d 449 (8th Cir. 1996).
305. Id. at 455.
Richards, which reversed the Alabama Supreme Court because the prior action had failed to provide “notice of, nor sufficient representation in,” the prior litigation. Instead, the Tyus court focused solely on the dictum of the Supreme Court’s decision in Richards, which addressed the fact that the scope of privity has been expanded to include relationships that were not originally associated with the term. In advocating a broader approach to virtual representation, the circuit court cited the need for judicial economy three times. As discussed earlier in this article, however, the concern for judicial efficiency—without more—is an insufficient reason for invoking nonparty preclusion. As the Supreme Court has stated, “Procedural due process is not intended to promote efficiency or accommodate all possible interests . . . . [T]he Constitution recognizes values greater than speed and efficiency.

Moreover, the Tyus court tacitly rejected Richards insofar as the Supreme Court found that there must be a “full and fair consideration of the common issue.” In so doing, the Tyus court proclaimed that it did not agree that “absent an effective and diligent prosecution of the case at the first trial, virtual representation is inapplicable.” Rather, the court believed that “adequate representation is best viewed in terms of incentive to litigate.” “No more is required,” said the court. This pronouncement flies in the face of the Court’s holding in Richards. In a concurring opinion, Senior Circuit Judge Henley correctly pointed out that the mere “incentive” to raise the same issues does not “appear” to satisfy the sufficient representation test of Richards, which mandates that there be a “full and fair consideration of the common issue.” Nevertheless, Judge Henley concurred in the judgment because he felt that the requirements of notice

307. “[A]lthough there are clearly constitutional limits on the privity exception, the term ‘privity’ is now used to describe relationships between litigants that would not have come within the traditional definition of that term.” Id. at 1766.
308. Id.
310. Id.
312. Id.
313. Id.
314. Id. at 459 (Henley, J., concurring).
and adequate representation had been met for other reasons.\textsuperscript{315} Upon appeal, the United States Supreme Court denied certiorari.\textsuperscript{316} It is difficult to speculate why the Supreme Court denied review, even for the limited purpose of issuing a summary opinion with a single citation to \textit{Richards}. Critics would likely argue, however, that the Court denied certiorari because it is inundated with petitions from cases like \textit{Richards} which are inconsistent with the purpose for which res judicata was intended, namely, the conservation of scarce judicial resources. Although, it is more likely that review was denied simply because the facts of \textit{Tyus} lend itself to a just result notwithstanding the obvious "misgivings" associated with the court’s language, as pointed out by Judge Henley in his concurrence.\textsuperscript{317} Nevertheless, it should not be surprising that the Court of Appeals for the Eighth Circuit would disfavor the \textit{Richards} opinion, given that the judges of that court advocate a "liberal" interpretation of the doctrine of virtual representation.\textsuperscript{318} However, not only is the \textit{Tyus} court's use of the term "virtual representation" inconsistent with that of the United States Supreme Court's interpretation,\textsuperscript{319} but the circuit court's reasoning is wholly inconsistent with the Supreme Court's holding in \textit{Richards}, which condemns "extreme applications" of res judicata.

By contrast, a proper reading of \textit{Richards} was noted by the Court of Appeals for the Ninth Circuit in \textit{Hiser v. Frank-}

\textsuperscript{315} According to Judge Henley, the notice requirement of due process was met because some of the plaintiffs in the second action had been plaintiffs in the prior suit. \textit{Id.} Moreover, both proceedings were litigated by the same lawyer. \textit{Id.} As a result, Judge Henley believed that the "sufficient representation" aspect of due process had been met. \textit{Tyus v. Schoemehl, 93 F.3d 449, 459 (8th Cir. 1996).}

\textsuperscript{316} \textit{Miller v. Schoemehl, 117 S. Ct. 1427 (1997); Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996).}

\textsuperscript{317} "Not withstanding [the] misgivings about the proposition of ‘virtual representation’ preclusion in general and some of the language of the panel's opinion, I believe that on the facts here, the requirements of ‘notice’ and ‘sufficient representation’ were satisfied." \textit{Tyus, 93 F.3d at 459 (Henley, J., concurring).}

\textsuperscript{318} \textit{Id.} at 455. The "liberal use [of virtual representation] better accommodates the competing considerations of judicial economy and due process." \textit{Id.}

\textsuperscript{319} \textit{But see} \textit{Bittinger v. Tecumseh Prod. Co., 123 F.3d 877 (6th Cir. 1997) (noting that the expansion of the doctrine of virtual representation actually ‘increases the burden on judges, who must apply its multi-factored balancing test to the facts of each case’).}

\textsuperscript{319} \textit{Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996).} To date, the Supreme Court of the United States has never endorsed the use of the term "virtual representation" in an opinion addressing res judicata.
which, citing to Richards, found that while common concerns were raised in both the prior and current litigation, those concerns "were not given the careful consideration they deserve[d]." Therefore, according to that court, "it would be unjust to block future consideration [of the issue] now."

Another principle feature of Richards is the requirement that notice comply at a minimum with the Mullane standard. The Hawaii Supreme Court seemed to accept this reading of Richards in Romero v. Star Markets, Ltd., where the court cited Mullane for the proposition that notice must be reasonably calculated to apprise interested parties of the action. The Romero court also cited Richards for the requirement that notice and the opportunity to be heard are interlocking requirements. In so reasoning, the court refused to bind absent parties who were "affected by a judgment" in an ex parte proceeding in which they were "without notice and an opportunity to be heard." Quoting Richards, the court stated that it is part of our "deep-rooted historic tradition that everyone should have his or her day in court."

Other courts have similarly cited Richards for the proposition that notice and the opportunity to be heard are cumulative requirements, noting that "notice is an important element of due process," and that it would be "unjust" to deprive a person of her "day-in-court." Even in those cases in which preclusion did attach, however, both notice and ade-

320. 94 F.3d 1287 (9th Cir. 1996).
321. Id. at 1293 (quoting Ferguson v. Department of Corrections, 816 P.2d 134, 139 (Alaska 1991)).
322. Id.; see also Ahng v. Allsteel, Inc., 96 F.3d 1033, 1037 (7th Cir. 1996) (citing Richards in an opinion which reversed a lower court's finding of virtual representation where there was "no need to press the point" at issue in the prior litigation).
324. Id.
325. Id.
326. Id. at 1020-22.
327. Id. at 1025-26 (quoting Richards v. Jefferson County, 116 S. Ct. 1761, 1765-66 (1996)).
329. See Hiser v. Franklin, 94 F.3d 1287, 1293 (9th Cir. 1996); see also Ahng v. Allsteel, Inc., 96 F.3d 1033, 1037 (7th Cir. 1996) (stating that persons "are entitled to their own day in court"); Romstadt v. Apple Computer, Inc., 948 F. Supp. 701, 710 (N.D. Ohio 1996) (stating that the class would be "disadvantaged and prejudiced" if barred from bringing suit).
quate representation were, with the exception already noted, required to have been present. As the case law amply demonstrates, the jurisdictions which have cited to Richards best illustrate the correct application of preclusion principles and the significance of the day-in-court ideal.

The United States Supreme Court long ago observed that "res judicata renders white that which is black, straight that which is crooked." This conundrum suggests that in applying the doctrine, the interests of individual litigants in adjudicating their own claims, and indeed society's concerns for procedural fairness in general, plays second fiddle to the Court's overriding concern for truth. At the same time, however, the Supreme Court has also recognized that a "redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." Thus, the quagmire that exists for the judicial system is how to balance the competing interests of finality and certainty against society's concerns for justice and fairness. Truth and justice is a subjective notion; it is intimately personal. As one commentator put it, "The process of litigation is a product of the mind." Although public perception of truth is a relative concept, it no doubt fosters in each of us the feeling "that justice has been done." As Justice Frankfurter observed:

No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and the opportunity to meet it. Nor has a better way been found for generating the feeling so important to a popular government, that justice has been done.  

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332. Morris, supra note 7, at 1100.
333. Montana v. United States, 440 U.S. 147, 164 n.11 (1979). But see Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981) (noting that justice is achieved "when a complex body of law developed over a period of years is evenhandedly applied").
336. Pielemeier, supra note 76, at 428.
With the sense of justice in the foreground, it is now time for courts to rethink their notions of fairness. The *Richards* case appears to be an example of such rethinking. In *Richards*, the Supreme Court appeared to reevaluate its conception of fairness, condemning on more than one occasion the “extreme applications” of res judicata. It seems that the Supreme Court recognized in *Richards* something that Justice Holmes observed a very long time ago: “[E]ven a dog distinguishes between being stumbled over and being kicked.”

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