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# Due Process and the Future of Class Actions

Alexandra D. Lahav\*

## INTRODUCTION

How should due process doctrine constrain the class action device and other forms of aggregate litigation that look and feel like class actions?<sup>1</sup> Since courts' conceptions of due process determine the scope of collective litigation, this short Essay considers these conceptions of due process and asks what ought they be. Its main contribution is to demonstrate how conceptions of due process from other areas of the procedural law map on to class actions, and to begin an inquiry into what is missing from these conceptions.

Whatever due process doctrine generally requires, for class actions it requires this: No absent class member can be bound by a class action judgment without adequate representation.<sup>2</sup> In money damages class actions, absent class members are entitled to notice and the right to opt out.<sup>3</sup> Due process ideas matter even in court decisions ostensibly based only on Federal Rule of Civil Procedure 23,<sup>4</sup> because how courts read Rule 23 appears to depend on their conceptions of how much process is

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1. These include "quasi class actions," a term recently popularized by Judge Weinstein to describe aggregate settlement practices. See *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491–92 (E.D.N.Y. 2006). See also Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 105, 116–17 (2010).

2. *Hansberry v. Lee*, 311 U.S. 32, 43 (1940) (holding that a class action cannot bind a litigant absent adequate representation); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001) (permitting Agent Orange class members who had not opted out and whose injuries manifested after the Agent Orange settlement closed to sue), *aff'd in part, vacated in part*, 539 U.S. 111 (2003).

3. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). In injunctive class actions, the Court has not yet held that absent members are entitled to notice and a right to opt out as a due process matter, and the federal rules require neither. See *id.* at 812 n.3 (declining to rule on the question of due process requirements for injunctive or other class actions); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011) (holding that where monetary relief is not incidental to a claim for injunctive relief, an injunctive class cannot be certified under Rule 23(b)(2)).

4. FED. R. CIV. P. 23.

due both to absent class members and to defendants.

There are at least three conceptions of due process embedded in the law of class actions. "Traditional" due process is based on the due process parameters traditionally available in Anglo-American law. "Cost-benefit" due process, embodied in the three-factor test from *Mathews v. Eldridge*,<sup>5</sup> balances the desire for accuracy with the need to efficiently dispose of the great mass of litigation. "Dignitary" due process values participation in legal proceedings as a way of demonstrating respect for individual dignity.<sup>6</sup>

This Essay discusses each of these conceptions and what each implies for the law of class actions. It then suggests a fourth conception that has not yet been adopted by class action law: a due process requirement of process equality, under which similarly situated individuals deserve similar outcomes and the rules of the legal system must tend to equalize the ability of system participants to participate. In so doing, this Essay provides a point of departure for exploring the role of equality in class actions and civil litigation in general.<sup>7</sup>

## I. TRADITIONAL DUE PROCESS

The traditional conception of due process is that it encompasses the process and rights traditionally available in Anglo-American law. Perhaps the most restrictive embodiment of this approach to due process doctrine is that articulated by Justice Scalia in *Burnham v. Superior Court of California*.<sup>8</sup> That case posed the question of whether a person could be subject to personal jurisdiction in a state solely on the basis of service of process. In *Burnham*, the Court held that a person who is present in a state and served with process may be subject to personal

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5. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

6. See generally Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981); Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS: NOMOS XVIII 126, 127–28 (J. Roland Pennock & John W. Chapman eds., 1977); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 273–304 (2004).

7. Other scholars have noted this principle in civil litigation more generally, although it has not received sustained analysis. See William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1866–67 & n.8 (2002) (describing how most scholars assert equality as a value in civil procedure without explaining it); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 39 (1994) ("[N]ational uniformity of federal law ensures that similarly situated litigants are treated equally; this is considered a hallmark of fairness in a regime committed to the rule of law."); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 855 (1984) ("Procedural systems are supposed to treat like cases alike; consistency is the systematic analogue to the impartiality feature demanded of individual decisionmakers.").

8. 495 U.S. 604 (1990).

jurisdiction there for actions that are unrelated to his presence or conduct in the state.<sup>9</sup> Justice Scalia began his opinion by citing the English Year Books and subsequently Lord Coke (in decisions dating from 1482 and 1612, respectively) for the proposition that in order for a court to issue a valid judgment, it must have jurisdiction over the defendant.<sup>10</sup> He went on to explain that “[t]o determine whether the assertion of personal jurisdiction is consistent with due process, we have long relied on the principles traditionally followed by American courts . . . .”<sup>11</sup> *International Shoe Co. v. Washington*, the decision that moved away from the concept of presence as the touchstone of personal jurisdiction to the idea of fairness to the defendant, is framed by Justice Scalia in *Burnham* as about tradition: “[W]e have only been called upon to decide whether these ‘traditional notions’ permit States to exercise jurisdiction over absent defendants in a manner that deviates from the rules of jurisdiction applied in the 19th century.”<sup>12</sup> The baseline in this conception of due process is some point in the distant past which comports with due process per se and to which all changes in the doctrine are to be compared. Accordingly, under this view, the process due need not comport with modern ideas of fairness. In Justice Scalia’s conception of due process, the process due was frozen in 1868, the year the Fourteenth Amendment was adopted.<sup>13</sup>

Although many due process cases focus on tradition, not all of them take Scalia’s freezer approach. Tradition can be defined at various levels of generality.<sup>14</sup> The more abstractly the tradition is described, the

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9. *Id.* at 619.

10. *Id.* at 608.

11. *Id.* at 609. The Justice cited *Pennoyer v. Neff*, 95 U.S. 714 (1877), for this proposition. The majority in *Pennoyer* itself did not invoke tradition, but instead relied on fundamental principles of sovereignty as well as the newly minted due process clause of the Fourteenth Amendment. *Id.* at 733. Justice Hunt’s dissent in *Pennoyer* argued that the case was wrongly decided in part because it diverged from tradition. See *id.* at 737 (Hunt, J., dissenting) (“In my opinion, this decision is at variance with the long-established practice under the statutes of the States of this Union, is unsound in principle, and, I fear, may be disastrous in its effects.”).

12. *Burnham*, 495 U.S. at 609–10. The reference to “traditional notions” of course refers to the test articulated in *International Shoe* that courts may exercise personal jurisdiction over a defendant so long as he has such minimum contacts with the forum that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

13. *Burnham*, 495 U.S. at 611.

14. See Laurence H. Tribe and Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) (“Even when prior cases explicitly designate a right in those terms, limitations of space as well as the institutional limitations embodied in Article III’s case or controversy requirement will mean that those prior cases have not spelled out the precise contours of the right. The question then becomes: *at what level of generality should the Court describe the right previously protected and the right currently claimed?* The more

more malleable the tradition can be to the needs of modern practice. The more specifically or narrowly the tradition is defined, the less adaptable it will be to modern circumstances.<sup>15</sup> Whether this is normatively desirable depends on the observer's point of view in the particular context in which the due process question arises.<sup>16</sup>

A number of due process cases invoke tradition at a more abstract level. In *Joint Anti-Fascist Refugee Committee v. McGrath*, for example, Justice Frankfurter wrote that due process expresses "respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization . . . ."<sup>17</sup> Unlike the view expressed by Justice Scalia in *Burnham*, however, Justice Frankfurter presents a tradition of due process less grounded in a particular historical moment and more as an evolving conception rooted in our common law tradition. He wrote: "Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess."<sup>18</sup>

More recently, in *Taylor v. Sturgell*,<sup>19</sup> the Supreme Court rejected the emerging doctrine of "virtual representation," which threatened to preclude absent parties from bringing suit without the protections of the class action. Writing for a unanimous court, Justice Ginsburg underscored the importance of the traditional principle that every person is entitled to his or her day in court. She explained, "[i]ndicating the

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abstractly one states the already-protected right, the more likely it becomes that the claimed right will fall within its protection.").

15. These tactics have come up explicitly in the substantive due process context. In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the Supreme Court was asked to decide whether a California statute that created a presumption that a child born within a marriage was the biological child of the husband violated a putative father's procedural and substantive due process rights. Justice Scalia explained that to determine the relevant tradition the courts must "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Id.* at 127 n.6.

16. For example, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court controversially applied the *Mathews* due process factors to the detention of an American citizen. The more traditional view in that case, articulated by Justice Scalia in dissent, was more rights protective than the process that the due process calculus would require. *See id.* at 555, 575–76 (explaining the constitutional tradition of trial for treason and writing that, with respect to the *Mathews* test, "Whatever the merits of this technique when newly recognized property rights are at issue (and even there they are questionable), it has no place where the Constitution and the common law already supply an answer").

17. 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring).

18. *Id.* at 162–63.

19. 553 U.S. 880 (2008).

strength of that tradition, we have often repeated the general rule that ‘one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.’”<sup>20</sup> Although Justice Ginsburg did not give tradition as one of the reasons for rejecting the doctrine of virtual representation, the opinion makes clear that exceptions to the “day in court ideal” are modern aberrations from a solid traditional core conception that each person is entitled to his or her own day in court. Justice Ginsburg presents the class action as one of these, a “limited circumstance” where representation can stand in for actual participation.<sup>21</sup>

The due process cases discussed above are not squarely about class actions. In class action cases, the traditional view is more subtly framed, but still present. In *Hansberry v. Lee*, the Court took pains to produce a common law pedigree for the class action as an “invention of equity” imported from England.<sup>22</sup> And in a number of cases, the Supreme Court has limited class actions in order to vindicate the “day in court ideal” which forms the traditional baseline against which the class action exception is judged. For example, in *Martin v. Wilkes*, the Court affirmed each individual’s right to their own day in court, holding that individuals whose rights are affected by a class action need not intervene in order to avoid the preclusive effect of the suit; it is the responsibility of the litigants to join them.<sup>23</sup> Recently, in *Wal-Mart Stores, Inc. v. Dukes*, the Court reiterated the exceptionalism of the class action, in contradistinction to the “usual rule” which, although unstated, must be defined by tradition.<sup>24</sup>

Relying on the tradition of the individual’s right to his day in court, the focus of class action jurisprudence has been on providing robust individual opt-out rights, permitting collateral attack by absent class members, and strengthening defendants’ rights to bring individual defenses in order to defeat class certification.<sup>25</sup> Tradition is not the only argument driving a preference for individual litigation, but it is among them.

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20. *Id.* at 893 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)).

21. *Id.* at 894.

22. 311 U.S. at 42 (citing English common law cases permitting class actions).

23. *Martin v. Wilks*, 490 U.S. 755 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1074, 1076–77.

24. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (“The class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’” (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979))).

25. On this last point, see *id.* at 2561 (underscoring Wal-Mart’s entitlement to individual determinations of plaintiffs’ entitlements to back pay).

This tradition is contested. Able scholars have shown that the class action and other types of non-party preclusion have antecedents in the distant past.<sup>26</sup> We even see this invention of the past in the Court's own citation patterns. Initially, the Court cited a civil procedure treatise for the proposition that every person is entitled to his or her own day in court.<sup>27</sup> More recently, the court has assimilated the proposition and cites precedent.<sup>28</sup> Nevertheless, the perception of tradition may be more important than the true history.<sup>29</sup> Traditional due process doctrine understands the class action as an aberration which ought to remain limited and marginalized.

## II. COST-BENEFIT DUE PROCESS

In contrast to the traditional view of due process, the cost-benefit approach entirely rejects tradition in favor of balancing of interests. The due process doctrine articulated in *Mathews v. Eldridge*<sup>30</sup> is founded on a cost-benefit analysis—it requires the court to balance the risk of error of a particular procedure and the value of additional procedural safeguards in light of the interests of the parties and/or the government.<sup>31</sup> Justifications for the class action device based on the accurate disposition of the great mass of cases or enabling class litigation to deter corporate misconduct best fit this conceptualization of due process.

This positive view of the class action was more often invoked in the

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26. See generally STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987); Robert Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990); Robert Bone, *The "Day in Court Ideal" and Non-Part Preclusion*, 67 N.Y.U. L. REV. 193, 206–12 (1992) (describing eighteenth and nineteenth century common law doctrines of virtual representation that bring the "day in court ideal" into question); Samuel Issacharoff & John F. Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Accident Law*, 57 VAND. L. REV. 1571, 1573 (2004) (describing aggregate settlement as a powerful counter-tradition in American tort law).

27. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999); *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 798 (1996); *Martin v. Wilkes*, 490 U.S. 755, 762 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1074, 1076–77 (all quoting 18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 4449 (1st ed. 1981)).

28. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) (citing *Richards*, 517 U.S. at 797).

29. See Adriaan Lanni, *Precedent and Legal Reasoning in Classical Athenian Courts: A Noble Lie?*, 43 AM. J. LEGAL HIST. 27, 51 (1999) ("The extravagant rhetorical gestures to the rule of law and precedent in Athenian lawcourt speeches seem to indicate that the Athenians recognized the value of promoting respect for the judicial process but were not prepared to sacrifice the broad discretionary powers of the Athenian juries for predictability.").

30. 424 U.S. 319 (1976).

31. *Id.* at 335.



early years of class action litigation. For example, in *Phillips Petroleum Co. v. Shutts*, the Court explained, "Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually."<sup>32</sup> An opt-out class action, the Court held, correctly balances the benefits of collective action with the costs of binding absent parties without express consent.<sup>33</sup> The Court explained:

The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution. If, on the other hand, the plaintiff's claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney or have thought about filing suit, and should be fully capable of exercising his right to "opt out."

... [F]or the reasons stated we do not think that the Constitution requires the State to sacrifice the obvious advantages in judicial efficiency resulting from the "opt out" approach for the protection of the *rara avis* portrayed by petitioner.<sup>34</sup>

In *Phillips Petroleum*, the Court also considered the limits of due process protection for absent class members and noted the limited benefits of the additional safeguard of direct participation as compared to the likelihood of loss.<sup>35</sup> The class action plaintiff will not suffer a default judgment should the proceeding not go his or her way. The Court explained:

Unlike a defendant in a civil suit, a class-action plaintiff is not required to fend for himself. The court and named plaintiffs protect his interests.

...

... They need not hire counsel or appear. They are almost never subject to counterclaims or cross-claims, or liability for fees or costs. Absent plaintiff class members are not subject to coercive or punitive remedies. Nor will an adverse judgment typically bind an absent plaintiff for any damages, although a valid adverse judgment may extinguish any of the plaintiff's claims which were litigated.<sup>36</sup>

The cost-benefit approach is also evident in the courts' concerns about the impact of class actions on defendants, especially the pressure to settle non-meritorious cases. The best known articulation of this concern is Judge Posner's opinion in *In re Rhone-Poulenc Rohrer*,

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32. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

33. *Id.*

34. *Id.* at 813–14 (footnote omitted).

35. *Id.* at 809.

36. *Id.* at 809–10 (footnote omitted).

*Inc.*<sup>37</sup> One reason for class de-certification in that case was the threat of bankruptcy such a class action allegedly posed to the defendant.<sup>38</sup> The same balancing of plaintiffs' and defendants' interests can be found in more recent Supreme Court decisions. Justice Ginsburg's dissent in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.* described the small claims class action as "alchemy" that turns a small right into a massive reward.<sup>39</sup> While Justice Ginsburg agreed that the class action device was an efficient means of allowing plaintiffs to vindicate rights, she also saw the collective action as potentially causing an "exorbitant inflation of penalties."<sup>40</sup>

The Supreme Court has been losing its taste for prioritizing the efficient collective resolution of disputes over individual autonomy. Adventuresome attempts to resolve large-scale problems, such as the massive influx of asbestos cases, met with strict readings of Rule 23.<sup>41</sup> This pushed mass settlements to more informal, aggregative procedures.<sup>42</sup> Courts' interpretation of the adequacy of representation requirement also seems to have made it impossible to settle any class actions where future class members' claims are at issue.<sup>43</sup> As Sam Issacharoff explained, "class actions seemed to drop out of the available set of tools for attempting to settle most mass torts, absent some extraordinary willingness of a settling defendant to allow some form of future claims to return to the tort system."<sup>44</sup>

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37. 51 F.3d 1293, 1298–99 (7th Cir. 1995). See also Charles Silver, "We're Scared to Death": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (critiquing the blackmail thesis).

38. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1299.

39. See 130 S. Ct. 1431, 1460 (2010) (Ginsburg, J., dissenting) ("The Court today approves Shady Grove's attempt to transform a \$500 case into a \$5,000,000 award, although the State creating the right to recover has proscribed this alchemy.").

40. *Id.* at 1465.

41. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821–22, 864 (overturning use of Rule 23(b)(1)(B) to certify a mandatory limited fund class action arising out of injuries caused by exposure to asbestos); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597, 619–20 (1997) (overturning class settlement of large numbers of asbestos claims in part on grounds of inadequate representation).

42. See *supra* note 1 (describing quasi class actions); Alexandra D. Lahav, *The Case for "Trial by Formula"*, 90 TEX. L. REV. 571, 592 (2012) (describing the use of a matrix to settle aggregated claims).

43. See, e.g., *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 261 (2d Cir. 2001) (permitting a collateral attack on class settlement of Agent Orange litigation on grounds of inadequate representation), *aff'd in part, vacated in part*, 539 U.S. 111 (2003).

44. Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 208 (footnote omitted). The problems that result from permitting back end opt outs for currently uninjured class members can be seen in spades in the Fen-Phen litigation. See Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 413–16 (2007) (describing Fen-Phen settlement). The use of class actions for

The culmination of the trend against a cost-benefit analysis that takes into account the collective benefits of the class action to plaintiffs as well as its costs to defendant is *Wal-Mart Stores, Inc. v. Dukes*, in which the Court rejected the idea of using statistical analysis to determine and allocate damages.<sup>45</sup> Without the possibility of what that opinion derisively referred to as “Trial by Formula,”<sup>46</sup> it will be difficult to certify many class actions. This demonstrates the shift away from a balancing approach to greater concern about individual rights and litigant autonomy. In *Wal-Mart*, that concern was triggered by the defendant’s assertion of its rights to litigate its individual defenses against plaintiffs.<sup>47</sup>

By contrast, in *AT&T Mobility LLC v. Concepcion*,<sup>48</sup> another class action case from the 2011 term, the Court embraced the concept of efficiency paradoxically, by favoring individual arbitration over collective arbitration. Though it described AT&T’s arbitration agreement in favorable terms, the federal district court found that the agreement was unconscionable because it did not render the same deterrent effects as would a class action.<sup>49</sup> The Supreme Court reversed, claiming that “the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process *slower, more costly, and more likely to generate procedural morass than final judgment.*”<sup>50</sup>

The cost-benefit approach to due process does not dictate how the costs and benefits of a procedure will be weighed.<sup>51</sup> As a result, the cost-benefit framework permits the increased emphasis on individual

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resolving mass tort cases is not yet dead, as the attempts to resolve the BP oil spill through a class action settlement shows; but even if that settlement succeeds, it will be a rare case that can be resolved in this way. See Preliminary Approval Orders, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico on April 20, 2010* (E.D. La. May 2, 2012) (MDL No. 2179, Rec. Docs. 6418 & 6419).

45. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011).

46. *See id.* at 2561 (“We disapprove [of] that novel project.”).

47. *Id.*

48. 131 S. Ct. 1740, 1751 (2011).

49. *Id.* at 1745.

50. *Id.* at 1751. The Court’s assumptions about arbitration led Justice Breyer to ask, “Where does the majority get its contrary idea—that individual, rather than class, arbitration is a ‘fundamental attribute[e]’ of arbitration?” *Id.* at 1756 (Breyer, J., dissenting).

51. As Jerry Mashaw pointed out when the *Mathews* calculus was first articulated by the Supreme Court, it requires a theory of value that the Court did not supply. *See* Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48 (1976) (“The Eldridge Court conceives of the values of procedure too narrowly: it views the sole purpose of procedural protections as ensuring accuracy, and thus limits its calculus to the benefits or costs that flow from incorrect decisions. No attention is paid to ‘process values’ . . .”).

rights, either the defendants' rights or those of individuals within the class, that worked against class treatment in the *Wal-Mart* decision. The same framework can also emphasize the access to justice made possible by collective litigation. Both individual rights and access to justice are important values and the due process calculus provides no framework for evaluating their relative merits. Nevertheless, the modern class action fits best within a cost-benefit framework that asks to what extent the procedure will allow plaintiffs to vindicate rights compared to the alternative of individual suits.

### III. DIGNITARY DUE PROCESS

The dignitary theory of due process focuses on the importance of individual participation in litigation. This theory is most closely associated with the work of Jerry Mashaw and Frank Michelman.<sup>52</sup> Dignitary theory dovetails with social-psychological studies of procedural justice finding that people perceive outcomes as more legitimate when the participants are given the opportunity to be heard.<sup>53</sup> Frank Michelman, for example, considered participation to be important psychologically to individuals even when their participation did not affect the outcome and when the outcome is "the most unfavorable one imaginable."<sup>54</sup> Participation may also have a slightly different expressive function of recognizing the (often powerless) individual directly.<sup>55</sup> Permitting participation so as to promote individual dignity may have an important expressive function of recognizing the equal worth of individuals, even if the individual's participation does not improve outcomes or provide psychological wellbeing to the participant.

A dignitary theory of due process is difficult to reconcile with the class action device. Dignitary theory depends on individual participation and the court's attention to the individual's concerns, whereas the class action is a collective device that obscures individuals

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52. See sources cited *supra* note 6.

53. See generally Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, in 25 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 115 (Mark P. Zanna ed., 1992) (arguing that regular procedures convey respect for the individual and thereby increase legitimacy of the process). For a general reflection on the relationship between Tyler's work and federal court procedures, see Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 *HASTINGS L.J.* 127 (2011).

54. Michelman, *supra* note 6, at 127-28.

55. Cf. SUSAN SILBEY & PATRICIA EWING, *THE COMMONPLACE OF LAW* 188 (1998) (discussing the possibility of individual acts of resistance in legal proceedings to spur collective resistance). One of the most significant contributions of Silby and Ewing's book is to demonstrate the variety of relations between individuals and formal legal structures.

in favor of group treatment. Dignity, and the values of participation and individual autonomy that are its corollaries, have been mostly a tool for dismantling class actions. Phillips Petroleum Co., for example, tried to argue against a regional class action on the grounds that due process demanded a sufficient contact between each class member and the forum.<sup>56</sup> Wal-Mart successfully argued that collective litigation would effectively bar it from presenting individualized defenses against plaintiffs.<sup>57</sup> Although dignitary theory may have had its genesis in academic considerations of the rights of persons against the state with respect of social programs, such as welfare and social security payments,<sup>58</sup> in the class action realm today, the threads of dignitary theory are picked up in defendants' assertions of their rights to present individualized defenses against each of the plaintiffs. This is because while dignity of plaintiffs may imply access to equalizing resources in litigation, dignity of defendants implies individualized trials.

Nevertheless, some rights provided for in current class action practice may have a relationship to dignitary theory, even if this relationship is not directly expressed in the case law. For example, in *Devlin v. Scardeletti*, the Court held that class members who objected to a settlement may appeal without intervening,<sup>59</sup> because "[t]o hold otherwise would deprive non-named class members of the power to preserve their own interests in a settlement that will ultimately bind them, despite their expressed objections before the trial court."<sup>60</sup> The Court thereby recognized the importance of the class members' individual voices, even if it didn't use the language of dignity. The right to opt out of a class litigation—at least in money damages class actions—and to challenge class actions on behalf of claimants whose injuries are not yet manifest present similar cases where dignity theory could be a rationale for the outcome.<sup>61</sup>

#### IV. PROCESS EQUALITY

A fourth conception of due process is grounded in the idea that the

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56. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

57. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011).

58. See Mashaw, *Administrative Due Process*, *supra* note 6 (discussing dignitary theory in the context of Social Security benefits); Michelman, *supra* note 6 (discussing dignitary theory in the context of entitlement programs).

59. 536 U.S. 1, 16 (2002).

60. *Id.* at 10.

61. See FED. R. CIV. P. 23(c)(2)(B); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626–27 (1997) (discussing conflicts of interest between currently injured class members and those with future injuries in a nationwide asbestos class action settlement).

legal system ought to equalize individuals' opportunity to litigate and the outcomes that litigation reaches with respect to similarly situated individuals. The idea of a due process right to equality is expressed in the axiom that like cases ought to be treated alike.<sup>62</sup> Process equality could entitle similarly situated individuals to similar outcomes and, as a corollary, reject any process that results in unequal treatment of similarly situated litigants without explanation, because such a process appears arbitrary.<sup>63</sup> Less controversially, equality as a process right could imply that participants in the legal system must be subjected to rules that tend to equalize their ability to litigate.<sup>64</sup>

The class action device and some other aggregate litigation procedures further both conceptions of litigant equality. First, the class action furthers equality between litigants on opposite sides, especially with respect to resources. For example, in the recent BP litigation, one of the plaintiffs' lawyers said that, "There's only one place where a waitress or a shrimper can be on equal footing with a company the size of BP, and that's a courtroom."<sup>65</sup> The truth, however, is that the shrimper or waitress is not standing on his or her own, but is in fact a member of a large group represented by the same lawyer or set of lawyers. These economies of scale enable the plaintiffs' lawyers to obtain the resources necessary to litigate against a defendant with substantial assets, such as BP. In contrast, in the ordinary case, very few free or low-cost legal resources are available to individuals who cannot pay for counsel.<sup>66</sup> As a result, class actions enable individuals to

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62. See, e.g., *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) ("Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.").

63. I make the case for equality of outcomes in Lahav, *The Case for "Trial by Formula,"* *supra* note 42. See also Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575, 576 (1983) ("Equality is *morally* necessary because it compels us to care about how people are treated in relation to one another. Equality is *analytically* necessary because it creates a presumption that people should be treated alike and puts the burden of proof on those who wish to discriminate. Finally, the principle of equality is *rhetorically* necessary because it is a powerful symbol that helps to persuade people to safeguard rights that otherwise would go unprotected.").

64. See Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313 (2012) (arguing that right holders who cannot vindicate their rights for lack of resources are effectively deprived of that right and therefore that litigation resources ought to be taken into account in determining the effectiveness of rights); Rubenstein, *supra* note 7, at 1867–68 (discussing equipage equality); Alan Wertheimer, *The Equalization of Legal Resources*, 17 PHIL. & PUB. AFF. 303, 304–05 (1988).

65. Debbie Elliot, *BP's Oil Slick Set to Spill into Courtroom*, NPR (Feb. 16, 2012), <http://www.npr.org/2012/02/16/146938630/bps-oil-slick-set-to-spill-into-courtroom>.

66. DEBORAH L. RHODE, ACCESS TO JUSTICE 3 (2004) ("According to most estimates, about four-fifths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle-

be part of a lawsuit who might not otherwise be able to enforce their rights.

Second, the class action furthers equality by better ensuring equal outcomes among similarly situated litigants on the same side. In individual tort litigation, for example, outcomes are sometimes inconsistent for similarly situated parties<sup>67</sup> because cases are decided at different points in time by different judges or juries. But in collective litigation, all the cases are before the court at once. For this reason fruitful comparisons and matrixes can be set up in collective litigation to provide equal treatment to similarly situated people. For example, in the joint memorandum submitted to the court in the BP oil spill litigation, the parties wrote of the settlement: "The principle was two-fold: to design claims frameworks that fit a wide array of damage categories, and, within each category, to treat like claims alike, so as to proceed with both fairness and predictability."<sup>68</sup>

The difficulty lies in creating a conception of equality that is analytically distinct from existing conceptions of due process, coherent on its own terms, and able to be translated into existing constitutional law. For example, it is difficult for judges in mass litigation to determine who is sufficiently alike to require equal treatment and which differences between litigants ought to be recognized. Nor is a principle of equality of outcomes sufficient to justify collective procedures—after all, a legal system may be consistent across cases, but the outcomes themselves unjustifiable on other grounds. And if society as a whole does not provide equal resources for individuals but only equality of opportunity, why should the courts be any different?<sup>69</sup> After all, at the

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income individuals, remain unmet."); D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2122–23 (2012) (describing unmet need for legal services); Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 718 (2010) ("For millions of people, access to the civil justice system is virtually blocked.").

67. Lahav, *The Case for "Trial by Formula,"* *supra* note 42, at 583–91 (describing inconsistency of monetary awards in tort cases).

68. The Plaintiffs' Steering Committee's and BP Defendants' Memorandum In Support Of Joint Motion For (1) Preliminary Approval Of Class Action Settlement, (2) Scheduling A Fairness Hearing, (3) Approving And Issuing Proposed Class Action Settlement Notice, And (4) BP's Motion For Adjourning The Limitation Of Liability Trial Counsel For All Moving Parties Are Listed At End Of Motion, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010* (E.D. La. April 8, 2012) (No. 12-970).

69. The question posed here is similar to the one about constitutional law. Is it enough for the courts to assure that the process for reaching an outcome in a particular case is fair, or must the courts assure that the substance of the law is adhered to—that is, must the courts assure only a right process or also a correct outcome? Cf. Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065 (1980) ("The process theme by itself determines almost nothing unless its presuppositions are specified, and its content

moment the court system tolerates inconsistent treatment of litigants as a result of unexplained variances in jury verdicts, as well as severe inequality between participants entering the justice system.<sup>70</sup>

Process equality does not have much of a foundation in the case law. Instead, to the extent that judges attempt to adjust procedures to encourage equal treatment of litigants, process equality is a discretionary, informal process. The beginnings of a doctrine of process equality can be found in some of the due process cases, but it remains undeveloped. The Supreme Court has considered process equality for defendants in punitive damages cases,<sup>71</sup> in criminal cases,<sup>72</sup> and in considering the jurisdictional reach of the courts.<sup>73</sup> Too much unpredictability, the Court has reminded us, can become a due process violation when it makes the administration of the laws seem arbitrary *across* different cases.<sup>74</sup> Predictability, however, poorly supports a robust principle of equality among litigants on the same side and does not provide much of a justification for equalization of resources between litigants on opposite sides of a lawsuit. Neither is necessary

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supplemented, by a full theory of substantive rights and values—the very sort of theory the process-perfecters are at such pains to avoid.”). Doctrines such as remittitur, which permits judges to offer the plaintiff a choice between a lower award or a new trial, as well as the availability of appellate review itself, point to an investment in getting the right answer, not just getting to any answer in the right way. 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2815, at 160–62 (2d ed. 1995); FED. R. CIV. P. 59 (announcing the standard for granting a new trial or altering a judgment).

70. Lahav, *The Case for “Trial By Formula,”* *supra* note 42, at 583–91 (documenting existing inequalities).

71. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499–501 (2008) (stating that “[c]ourts of law are concerned with fairness as consistency” and describing inconsistency and unpredictability of punitive damages awards as a due process violation); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996) (finding that due process requires like punitive damages and civil or criminal penalties for comparable misconduct).

72. See *Koon v. United States*, 518 U.S. 81, 113 (1996) (noting that reducing “unjustified disparities” in criminal sentencing is necessary to achieve “the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice”).

73. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (illustrating elements of personal jurisdiction related to the defendant’s procedural due process).

74. In *Exxon v. Baker*, the Court justified the requirement that punitive damages be consistent across cases on the basis that defendants need to understand what conduct will give rise to liability. The Court explained: “[W]hen the bad man’s counterparts turn up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage.” *Baker*, 554 U.S. at 503. See also *Gore*, 517 U.S. at 586 (defendant has an “entitlement to fair notice of the demands that the several States impose on the conduct of its business”). Similarly, in *World-Wide Volkswagen Corp. v. Woodson*, the Court explained that, “The Due Process Clause, by ensuring the ‘orderly administration of the laws,’ gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” *World-Wide Volkswagen*, 444 U.S. at 297.



for predicting legal system outcomes. Accordingly, more analytical work remains to be done to develop a robust principle of process equality.<sup>75</sup>

### CONCLUSION

Good answers to these questions can at least start with this durable intuition: In the United States, we expect that individuals will be treated with equal respect and concern in the court system regardless of their position.<sup>76</sup> The courts are different than other areas of social life, at least in part because they have traditionally been understood to be an antidote to the power of the state against the individual.<sup>77</sup> Equal respect and concern implies that courts should provide individuals with an equal opportunity to make their case and treat individuals the same where there is no articulable, legally relevant reason to differentiate between them. The class action device, as well as some aggregate litigation procedures that have recently been developed, goes some way toward solving the inequities in the current system.

A due process jurisprudence sounding in equality is a good way to understand the benefits of the class action device and the role of individuals within the class. The focus on individualism in recent Supreme Court jurisprudence comes at the expense of equality because the nature of mass harms and a mass consumption economy pit the individual against large institutions. This individualistic focus is consistent with the traditional conception of due process—a horse and buggy understanding of litigation that is rooted firmly in the eighteenth century. To the extent that the courts continue to view the class action

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75. I develop these justifications further in *The Case for "Trial by Formula," supra* note 42, at 594–600.

76. For one discussion of this idea, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 227–28 (1977). Different people have different views on what equality means, causing some theorists to argue that equality is an empty principle or at a minimum too confusing to be useful. *See, e.g.*, PETER WESTEN, *SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF "EQUALITY" IN MORAL AND LEGAL DISCOURSE* (1990) (focusing on the confusion created by resorting to principles of equality). Nevertheless, the invocation of equality remains powerful. Consider in this regard the judicial oath of office:

I, XXX XXX, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as XXX under the Constitution and laws of the United States. So help me God.

28 U.S.C. § 453 (2006). Or the phrase engraved on the Supreme Court building in Washington, D.C.: “Equal Justice Under Law.” *See* JUDITH RESNIK AND DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* 331 & n.355 (2011).

77. In the American tradition, this idea can be traced at least to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), which established the power of judicial review.

through the lens of the traditional conception of due process, the class action will continue to be eroded whether or not the rule-makers reform the class action rule. Competing conceptions of due process, particularly those grounded in cost-benefit analysis and equality, are more likely to support collective treatment. Ultimately, the conception of due process that the courts adopt will dictate the future of class actions.