REPUBLIC OF PHILIPPINES V. PIMENTEL: THE RETURN OF RIGIDITY TO THE ANALYSIS OF QUESTIONS OF INDISPENSABILITY

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# Republic of Philippines v. Pimentel: The Return of Rigidity to the Analysis of Questions of Indispensability

*Lucas J. Myers*

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INTRODUCTION

Courts have long accepted the possibility of denying relief due to the failure of a plaintiff to join an indispensable party as an inevitable compromise between the rights of the absent, indispensable party and those of the plaintiff.\(^1\) While courts have also long affirmed the importance of having one’s day in court when contemplating matters of due process, the relationship of the Due Process Clause to the concept of indispensability remains “little more than a theoretical question.”\(^2\) Yet when a court dismisses a claim brought by a class of thousands, and that class has no other forum in which to seek relief, the “traditional notions of fair play and substantial justice implicit in due process” are implicated.\(^3\) With the contours of due process undefined as they relate to indispensability, courts have come to rely on an approach that balances the interests of the parties before the court, the absent parties, and society at large according to Federal Rule of Civil Procedure 19(b).\(^4\) Thus, if a plaintiff has no viable alternative forum, courts should be hesitant to dismiss without first accounting for every practical interest at stake and concluding that the interests of the absent, required party and society outweigh those of the plaintiff.\(^5\)

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\(^1\) See Thompson v. Baskerville, 21 Eng. Rep. 770, 770 (Ch. 1688) (holding that mortgagor must be joined in second mortgagee’s suit to set aside a first mortgage for similar reasons); Woodcock v. Mayne, 73 Seld. Soc’y 314, 314 (No. 451) (Ch. 1676) (dismissing because the absence of a necessary party created the risk of inconsistent obligations by the defendant to the plaintiff and the absent party).


\(^3\) Milliken v. Meyer, 311 U.S. 457, 463 (1940) (internal quotation marks omitted).

\(^4\) FED. R. CV. P. 19(b). The full text of Rule 19(b) reads:

When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Id.

\(^5\) WRIGHT, MILLER & KANE, supra note 2, § 1608.
But this is precisely what the Supreme Court did in *Republic of Philippines v. Pimentel*.\(^6\) By giving “near-dispositive effect” to the Republic’s claim of sovereign immunity, the Court shifted away from the pragmatic consideration of practical interests that Rule 19(b)’s framers envisioned.\(^7\) In addition, the Court excluded a class of thousands that had no alternative forum from consideration under Rule 19(b)(4), which asks “whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.”\(^8\) As one might expect, that factor weighs heaviest when parties seeking relief are without an adequate alternative forum.\(^9\) The Court asserted that the Pimentel class was not “relevant” to its analysis under that factor because the class was technically not a plaintiff in the action, though the Court conceded that the class was a party seeking relief.\(^10\) Rather than closely consider the interests actually at hand, the Court allowed formalism to effectively decide the case when it relied on labels such as “sovereign” and “plaintiff.”\(^11\) The Court erred by straying from the pragmatic mode of analysis that Rule 19(b) requires, which best accounts for the opposing interests of plaintiffs and absent, required parties. Accordingly, similarly positioned litigants should urge courts to closely consider those interests not expressly identified by the Court in *Pimentel*, stays or protective orders that would protect the rights of all parties concerned, and tolling statutes of limitations if dismissal is unavoidable.

In Part I, this Note recounts the history of indispensable party jurisprudence.\(^12\) Part I concludes with a detailed discussion of Rule 19(b) in its modern form and the Court’s analysis in *Provident Tradesmens Bank & Trust Co. v. Patterson*,\(^13\) the seminal treatment of indispensability prior to *Pimentel*. Part II analyzes the Court’s decision in *Pimentel*, beginning with the

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\(^7\) Id. at 2195 (Stevens, J., concurring in part and dissenting in part).
\(^8\) FED. R. CIV. P. 19(b).
\(^9\) WRIGHT, MILLER & KANE, supra note 2, § 1608.
\(^10\) Pimentel, 128 S.Ct. at 2193.
\(^11\) Id. at 2189-94.
\(^12\) See infra pp. 4-20.
\(^13\) 390 U.S. 102 (1968).
underlying facts and procedural history and concluding with a discussion of the Court’s changed mode of analysis. Part III examines the differences between the Court’s analysis in *Pimentel* and *Provident Tradesmens*, arguing that each Rule 19(b) analysis should fully account for all of the practical interests that “really exist,” even where the required party asserts a valid claim of sovereign immunity, because only then can myriad opposing interests be properly balanced.

I. THE HISTORY OF INDISPENSABLE PARTY JURISPRUDENCE

The history of indispensability jurisprudence is confusing. Early courts pragmatically permitted actions to proceed absent parties whose joinder they might otherwise have required where their joinder was impossible or overly complicated. Near the end of the eighteenth century, however, English courts came to value the notion of perfect or complete justice between all parties to a dispute above that of imperfect or incomplete justice, which affected only those parties before the court. Consequently, courts in both England and the United States viewed certain rights as “inseparable” and therefore as automatically requiring either joinder of the absent party or dismissal in that party’s absence. This formalism resulted in “absurd”

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14 See infra pp. 20-31.
16 See infra pp. 31-46.
17 See *Walley v. Walley*, 23 Eng. Rep. 609, 610 (Ch. 1687) (allowing plaintiff to proceed absent a trustee because the trustee was in India and not amenable to process); *Barker v. Wyld*, 23 Eng. Rep. 373, 373 (Rolls 1682) (allowing plaintiff to proceed against two of three defendants who were parties to an obligation where the third was at sea); *Castleton v. Fitzwilliams*, 21 Eng. Rep. 53, 53 (Ch. 1579) (allowing plaintiff to proceed absent a defendant that was away from the jurisdiction serving a fourteen year sentence to the Spanish galleys). Modern courts would likely regard these situations as presenting textbook cases of joint obligations that ultimately render the absent parties indispensable and require dismissal. Early courts were not so squeamish.
18 See *Palk v. Clinton*, 33 Eng. Rep. 19, 21 (Rolls 1805) (declaring the rule in *Fell v. Brown* to be one of long standing and holding similarly); *Fell v. Brown*, 29 Eng. Rep. 151, 153 (Ch. 1787) (staying the action pending an heir being made a party because decree could not be “perfected” in his absence); *Lowe v. Morgan*, 28 Eng. Rep. 1183, 1183 (Ch. 1784) (dismissing the action due to the impossibility of preparing a decree foreclosing the rights of one cotenant without making the other cotenants parties).
19 See *Shields v. Barrow*, 58 U.S. 130, 139 (1854) (dismissing action after finding that the rights of the parties were not “completely separable” from the rights of those absent); *Joy v. Wirtz*, 13 Fed. Cas. 1172, 1172 (C.C.D. Pa. 1806) (distinguishing between active and passive parties to decide question of indispensability); *Fell*, 29 Eng. Rep. at 153 (distinguishing between “active” and “passive” parties to decide question of indispensability).
outcomes as courts concluded that joinder was required and dismissed simply because the rights involved were “inseparable.” Eventually, the 1966 Amendment to Rule 19(b), which set forth four nonexclusive factors for courts to address when deciding questions of indispensability, corrected this error in federal courts. Two years later, the Supreme Court decided *Provident Tradesmens Bank & Trust Co. v. Patterson*, demonstrating the proper mode of analysis for deciding questions of indispensability.

A. The Origins of the Indispensable Party Doctrine

Though several articles have already documented the history of indispensable party jurisprudence, a brief survey of that material will help illustrate how the Court’s decision in *Pimentel* impairs proper Rule 19(b) analysis. During the seventeenth and eighteenth centuries, courts sometimes excused the joinder of interested parties when it was impossible, impractical, or involved undue complications. In *Walley v. Walley*, the court remained sensitive to the plaintiff’s lack of an adequate alternative forum and was willing to proceed to a judgment between only those parties appearing before the court. The plaintiff had no alternative forum because the necessary party, his father, was in India and therefore not subject to process in any other court. Lord Nottingham, agreeing that joinder of all interested parties was required unless it was impossible, inconvenient, or unduly burdensome, concluded simply that the

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21 See Ray v. Fenwick, 29 Eng. Rep. 387, 387 (Ch. 1789) (dismissing for want of an absent party where the defendant gave a bond to X, who assigned it to plaintiff, after which X died and could not be made a party); Moffat v. Farquharson, 29 Eng. Rep. 189, 189 (Rolls 1788) (preventing one of several owners of a ship from suing on behalf of himself and all others similarly situated for profits due the ship).
22 *Fed. R. Civ. P. 19(b).*
26 23 Eng. Rep. 609, 610 (Ch. 1687).
27 *Id.*
plaintiff could proceed because his father was not amenable to service.\textsuperscript{28} But there was another case requiring dismissal if a defendant was in danger of being subject to double or multiple liability, regardless of whether joinder was impractical or impossible.\textsuperscript{29} Indeed, through the middle of the eighteenth century there was no clear rule or accepted mode of analysis for determining whether to proceed absent an interested party.\textsuperscript{30}

Toward the end of the eighteenth century, courts grew increasingly fond of doing complete justice between all parties and sought to prevent the entering of any decree that did not completely dispose of a controversy.\textsuperscript{31} Courts disliked settlements that resolved disputes as between only some of the parties, instead preferring the “beauty and symmetry of form rather than utility of practical result.”\textsuperscript{32} Professor Hazard argued that this attitude was the origin of the indispensable party rule.\textsuperscript{33} In the 1780s, the concept of indispensability appeared suddenly and “grew from casual dictum to apparently hardened rule in the course of but a handful of decisions.”\textsuperscript{34} In \textit{Lowe v. Morgan}, an English court first reached a judgment on the merits foreclosing the interest of one creditor-beneficiary out of three in total; the other two creditor-beneficiaries were not before the court.\textsuperscript{35} The court raised the issue of indispensability after finding itself unable to properly draft a decree it had reached in the absence of the creditor-beneficiaries.\textsuperscript{36}

\textsuperscript{28} \textit{Id.}\textsuperscript{.}
\textsuperscript{29} \textit{Hooper v. Lethbridge}, 145 Eng. Rep. 678, 678 (Ex. 1730).
\textsuperscript{30} Hazard, \textit{supra} note 20, at 1262.
\textsuperscript{31} Hazard, \textit{supra} note 20, at 1266.
\textsuperscript{32} Hazard, \textit{supra} note 20, at 1269 (citing 12 \textsc{Holdsworth} 182 (1938)). \textsc{Holdsworth} observed that during the eighteenth century, English courts became increasingly preoccupied with obtaining “perfect” or “complete” justice and concerned themselves more with the symmetry, rather than the utility, of the result. 12 \textsc{Holdsworth} 182 (1938).
\textsuperscript{33} Hazard, \textit{supra} note 20, at 1269.
\textsuperscript{34} Hazard, \textit{supra} note 20, at 1273.
\textsuperscript{35} 28 Eng. Rep. 1183, 1183 (Ch. 1784).
\textsuperscript{36} \textit{Id.}
Following this seemingly innocuous result came *Fell v. Brown*, which became the leading case on indispensability despite only speaking to that point in dicta.\textsuperscript{37} In *Fell*, the absent party was an heir who was beyond service of process in America, such that the defendant’s objection for nonjoinder of a necessary party would have deprived the plaintiff of a forum altogether since he was unable to join the heir anywhere else.\textsuperscript{38} Rather than recognizing the impossibility of joinder and proceeding absent the heir, Lord Chancellor Thurlow attempted to decide whether the heir was indispensable by labeling him as either active or passive.\textsuperscript{39} The court also dwelled upon the fact that any decree entered would not be “perfect” with respect to the heir.\textsuperscript{40} Thus began courts’ reliance on formalism to decide questions of indispensability.\textsuperscript{41}

In *Browne v. Blount*, that reliance on formalism resulted in a dismissal that denied the plaintiff any forum in which to seek relief.\textsuperscript{42} The plaintiff sought to collect on a judgment against the beneficiary of a trust and named as defendants the trustees, the other beneficiaries, and the holders of claims against the trust.\textsuperscript{43} The plaintiff did not join the judgment debtor, who had been abroad for many years.\textsuperscript{44} The court dismissed because the absentee’s interests would be “affected by the decree,” thus depriving the plaintiff of his only viable forum.\textsuperscript{45} Strictly on the basis of the dispositive weight it gave to certain rights, the court dismissed an action that prior courts permitted to proceed.\textsuperscript{46} Similarly, in *Smyth v. Chambers*, an annuitant assigned a portion of a testamentary annuity to the plaintiff, who sought to collect from the testator’s

\textsuperscript{37} 29 Eng. Rep. 151, 153 (Ch. 1787).
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Hazard, supra note 20, at 1274.
\textsuperscript{42} 39 Eng. Rep. 326, 326 (Rolls 1830).
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
executors.\textsuperscript{47} Because the plaintiff did not join the annuitant, who was outside the court’s jurisdiction, the court refused to proceed and left the plaintiff without any prospect for relief.\textsuperscript{48} It was not long until the brand of formalism set forth in \textit{Fell} and followed in \textit{Browne} and \textit{Smyth} made its way into American law.

\textbf{B. Early Indispensability Jurisprudence in the United States}

The formalism that originated in \textit{Fell v. Brown} first took root in the United States in \textit{Joy v. Wirtz}.\textsuperscript{49} In \textit{Joy}, several creditors had signed a release of their claims against the defendant debtor.\textsuperscript{50} Two such creditors later sought to set aside the release on the ground of mistake, but the district court sustained the defendant’s objection that all creditors should be joined and dismissed the action.\textsuperscript{51} The court gave the plaintiffs leave to amend their pleading and they subsequently brought suit in the name of all creditors except DuBois, who they claimed was a citizen of Pennsylvania.\textsuperscript{52} Thus, because DuBois and the defendant were both citizens of Pennsylvania, DuBois could not be joined without destroying the court’s diversity jurisdiction.\textsuperscript{53} Sitting in circuit court, Justice Washington set forth what emerged as the American doctrine of indispensable parties, declaring, “[I]t is necessary to distinguish between active and passive parties.”\textsuperscript{54} In circular fashion, he then defined active parties as “those who are so necessarily involved . . . that no decree can be made without their being before the court” and passive parties as “such as are . . . so far passive, that complete relief can be afforded to those who seek it, without affecting the rights of those who are omitted.”\textsuperscript{55}
The court then likened DuBois to parties who were overseas and thus not amenable to process, before concluding that the action could proceed in his absence.\textsuperscript{56} The court also ordered that any resulting decree take care to protect DuBois’ interest, presumably by purporting only to bind those parties actually before the court.\textsuperscript{57} The language used and result reached by the court can readily be seen as correctly describing the concept of indispensability. However, the court’s emphasis on “active” and “passive” parties added fuel to the fire by encouraging future courts to resort to formalism, rather than to pragmatically balance the practical interests involved.\textsuperscript{58} Indeed, the Supreme Court affirmed \textit{Joy} when it handed down \textit{Shields v. Barrow},\textsuperscript{59} which was the Court’s “most influential” decision on the subject of indispensability prior to \textit{Provident Tradesmens}.\textsuperscript{60}

In \textit{Shields}, the Court held that the plaintiff-signatories could not rescind a compromise agreement with respect to only two of the signatories while leaving it to stand against the others not party to the suit due to the risk of inconsistent obligations to the defendants.\textsuperscript{61} Because joining the other parties would have destroyed diversity jurisdiction, the Court held that the suit must be dismissed, even though there was no indication that the plaintiffs could join all of the signatories in another jurisdiction.\textsuperscript{62} In its analysis, the Court catalogued three kinds of parties in equity: formal, necessary, and indispensable.\textsuperscript{63} The court then defined indispensable parties as those “[p]ersons who not only have an interest in the controversy, but an interest of such nature

\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} \textit{Joy}, 13 Fed. Cas. at 1173. Professor Hazard observed that the contradictory results reached in the two proceedings of \textit{Joy v. Wirtz} are proof of the “fatuity of the rule” announced by Justice Washington, for DuBois surely was indispensable under the rationale of the rule he announced. Hazard, \textit{supra} note 20, at 1281. Yet after stating in his first opinion that the court could not set the release aside with respect to some creditors but not the others, Justice Washington stated in the second case that “the court will take care to” do exactly that. \textit{Joy}, 13 Fed. Cas. at 1173.
\textsuperscript{59} 58 U.S. 130 (1854).
\textsuperscript{60} Reed, \textit{supra} note 24, at 340.
\textsuperscript{61} 58 U.S. at 139.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.”

Setting aside the plaintiffs’ lack of an alternative forum in which to press their claim, the Court resorted to formalism, emphasizing that the rights of the parties were not “completely separable” from those absent. The Court classified the absent party as indispensable based simply upon the theoretical nature of his rights, rather than arriving at that conclusion only after carefully balancing the equities at hand. In particular, the Court failed to account for plaintiffs’ interest in having a forum.

As Professor Reed observed regarding *Shields*, “The excellent statement of principles governing compulsory joinder [contained in the opinion] was practically ignored, the Court having yielded to the temptation to justify its holding by the application of labels which are barren of meaning in the procedural context.” Indeed, a closer look at the practical interests at stake in *Shields* reveals that the Court could have held the agreement binding as to those present unless the agreement called for “some kind of interdependent performance.” Only if the agreement specified interdependent performance would a modified decree that protected those absent have been impossible. But the Court failed to expressly consider that option in its opinion, perhaps explaining why so few courts were aware of the availability of less-than-absolute decrees in the decades that followed. Unfortunately, the impact of *Shields* on the doctrine of indispensability was even more far reaching, as subsequent courts adopted its

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64 Id.
65 Id. at 142.
66 Id.
67 *Shields*, 58 U.S. at 142.
68 Reed, *supra* note 24, at 346.
69 Reed, *supra* note 24, at 343.
70 Id.
71 *Shields*, 58 U.S. at 146.
72 Reed, *supra* note 24, at 356.
analysis and mechanically determined indispensability by resort to the classification of rights as common, joint, or united in interest.\textsuperscript{73}

C. The Emphasis on Pragmatism in the 1966 Amendment to Rule 19(b)

\textit{Shields’} focus on the separability of rights instructed future courts to classify rights in similar terms when deciding questions of indispensability.\textsuperscript{74} Thus, courts routinely determined whether rights were classified as “joint” or “common” and whether the absent party was “united in interest” with those joined as parties, under the assumption that certain categories were “automatically and for all time relegated to” indispensable status.\textsuperscript{75} Other courts resisted such mechanical analysis, preferring instead to decide indispensability by closely evaluating the rights involved, however they were classified.\textsuperscript{76} The enactment of the Federal Rules of Civil Procedure in 1938 did little to reconcile these divergent approaches. Subdivision (a) stated that “persons having a \textit{joint interest} shall be made parties,”\textsuperscript{77} retaining the emphasis on whether certain classifications of rights were involved and reinforcing the mechanical analysis such a system of classification promotes. Indeed, some courts held that Rule 19 as revised simply codified existing common law and therefore did not disturb the precedent laid down in \textit{Shields}.\textsuperscript{78} The lingering confusion in the jurisprudence of indispensability was best evidenced by courts that

\begin{itemize}
\item \textsuperscript{73} Reed, \textit{supra} note 24, at 355.
\item \textsuperscript{74} 58 U.S. at 142.
\item \textsuperscript{75} \textit{Id.}; see also Washington v. United States, 87 F.2d 421, 431 (9th Cir. 1936) (holding a lessor indispensable in an action to eject the lessee without inquiring whether the lessor and lessee-defendant would be impacted by continuing without the lessor).
\item \textsuperscript{76} See Niles-Bement-Pond Co. v. Iron Moulders’ Union, Local No. 68, 254 U.S. 77, 80 (1920) (“[T]here is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not.”); Roos v. Texas Co., 23 F.2d 171, 172 (2d Cir. 1927) (“The general statement does little to advance matters, until one knows what is the test by which to ascertain when such rights can be protected and when not, and this we understand to be an entirely practical question, dependent in each case upon the facts.”) (Hand, J.).
\item \textsuperscript{77} \textit{Fed. R. Civ. P.} 19(a) (emphasis added).
\item \textsuperscript{78} See Wesson v. Crain, 165 F.2d 6, 8 (8th Cir. 1948) (“Rule 19 made no change in existing law relative to compulsory or dispensable joinder.”); Caldwell Mfg. Co. v. Unique Balance Co., 18 F.R.D. 258, 261 (D.C.N.Y. 1955) (“The enactment of Rule 19(a) was not intended to change the rules governing compulsory joinder as laid down by existing case law. \textit{Shields v. Barrow} still furnishes the fundamental definition of indispensable party.”).
\end{itemize}
found absent parties indispensable but were unwilling to dismiss the actions; indispensable parties were not indispensable after all.\textsuperscript{79}

Professor Reed first sought the end of courts’ mechanical reliance on the classification of rights to decide questions of indispensability.\textsuperscript{80} He argued against the use of labels to classify rights and also specifically called for the abandonment of the labels “necessary” and “indispensable” in Rule 19(b) itself. “It is not simply that labels have determined the outcome of many cases. The trouble rather is . . . a ready reliance on labels for solutions of particular cases, a thoughtless reiteration—instead of a critical examination . . . ."\textsuperscript{81} The 1966 revision of Rule 19(b), \textsuperscript{82} which first required the close examination of four nonexclusive factors, reflected Professor Reed’s criticisms.\textsuperscript{83} Though the revised rule retained the word “indispensable,” it was “solely as a conclusory, not as an operative, term,”\textsuperscript{84} suggesting that it should attach only after careful consideration of the relevant factors and not be employed as justification for any indispensability determination.\textsuperscript{85}

Though it revised Rule 19(b) again in 2007, the Rules Committee stated that the changes were stylistic only,\textsuperscript{86} and the Supreme Court agreed with that assessment in \textit{Pimentel}.\textsuperscript{87} In its current form, Rule 19(b) reads:

\begin{itemize}
\item \textit{Parker Rust-Proof Co. v. W. Union Tel. Co.}, 105 F.2d 976, 980 (2d Cir. 1939); \textit{Benger Labs. Ltd. v. R. K. Laros Co.}, 24 F.R.D. 450, 452 (D.C. Pa. 1959).
\item \textit{See generally Reed, supra} note 24 (arguing against label-driven approach to decide questions of indispensability).
\item Reed, \textit{supra} note 24, at 328-29.
\item \textit{FED. R. CIV. P. 19(b)}.
\item Kaplan, \textit{supra} note 83, at 368.
\item \textit{FED. R. CIV. P. 19} advisory committee’s note. Specifically, the Committee Note states, The subdivision [19(b)] uses the word ‘indispensable’ only in a conclusory sense, that is, a person is ‘regarded as indispensable’ when he cannot be made a party and, upon consideration of the factors mentioned, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it.
\item \textit{Id.} (emphasis added).
\item \textit{Id.}
\item Republic of Philippines v. Pimentel, 128 S.Ct. 2180, 2184 (2007).
\end{itemize}
When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. 88

Specifically, there were three minor changes: the word “required” replaced “necessary” in subsection (a); the 1966 Rule listed the factors in longer clauses whereas the 2007 Rule uses lettered headings to separate each factor; and the drafters deleted the word “indispensable” altogether from the text. 89 The Court observed that the Rules Committee removed the label “indispensable” due to its “latent potential to mislead.” 90

Most importantly, by setting forth a nonexclusive list of factors, the 1966 revision made it clear that courts must decide questions of indispensability by carefully weighing the practical interests involved, as opposed to quickly referencing a catalogue of rights and taking summary action without deeper analysis. 91 Specifically, it declared that "the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action." 92 Thus, by doing away with the “sloganeering process” 93 of classifying rights that pervaded compulsory joinder law, the

88 FED. R. CIV. P. 19(b).
89 FED. R. CIV. P. 19 advisory committee’s note.
90 Pimentel, 128 S.Ct. at 2184.
91 Kaplan, supra note 83, at 364-65.
92 FED. R. CIV. P. 19 advisory committee’s note.
93 Kaplan, supra note 83, at 362.
amended rule insured that courts would no longer needlessly ignore the practical interests of those involved.⁹⁴

D. The Court’s Analysis in Provident Tradesmens

Two years after the 1966 amendment to Rule 19(b), the Court decided Provident Tradesmens Bank & Trust Co. v. Patterson,⁹⁵ which remained the leading case on indispensability until Pimentel. In Provident Tradesmens, Edward Dutcher loaned his automobile to Donald Cionci, who lost control, veered across the highway median, and collided with a truck, killing Cionci, the driver of the truck, and Cionci’s passenger John Lynch.⁹⁶ Lynch’s estate, after obtaining a judgment against the estate of Cionci, brought a diversity action for a declaratory judgment that Cionci had Dutcher’s permission to drive the vehicle.⁹⁷ Dutcher’s insurance policy covered any person driving his car with his permission.⁹⁸ The only defendants in the diversity action were the insurance company, Lumbermens Mutual Casualty Company, and the estate of Cionci.⁹⁹ Lynch’s estate, which was administered by Provident Tradesmens Bank, was joined by two other tort plaintiffs, all of whom were residents of Pennsylvania.¹⁰⁰ Thus, the joinder of Dutcher, also a citizen of Pennsylvania, as a defendant would have destroyed diversity jurisdiction and was therefore not feasible.¹⁰¹ However, those

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⁹⁶ Id. at 104.
⁹⁷ Id. at 105.
⁹⁸ Id.
⁹⁹ Id.
¹⁰⁰ Id. at 104, 105.
¹⁰¹ Id. at 108.
present did not object to Dutcher’s absence at trial, and the jury found that Cionci had permission to drive Dutcher’s vehicle.

Lumbermens raised various issues of state law on appeal, but the Third Circuit did not reach any of them, deciding instead to reverse on two grounds the district court did not consider at trial, the first being that Dutcher was indispensable. The majority opinion set forth the law of indispensability, saying, “The command of the indispensable party doctrine that a court cannot proceed to a final decision where an absent party may be so much affected by the decree is bare of ifs, ands, and buts.” The court reasoned that the insurance company and its policyholder had “complete identity of interest” and that their interests were “joint,” while agreeing with the district court’s classification of Dutcher’s interests as “adverse.” The Third Circuit held that such interests were substantive, that they could not have been affected by the enactment of the Federal Rules, and that Rule 19 did not apply to the indispensable party doctrine. Since Dutcher could not be joined without destroying diversity jurisdiction, the Third Circuit dismissed the action. Judge Freedman disagreed with the court, writing, “Rule 19 . . . is an effort to restate the liberal view which requires a practical consideration of the circumstances and an effort to shape relief to avoid injustice rather than the automatic dismissal of the action . . . .”

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102 Id. at 105.
103 Id. at 106.
104 Id.
106 Id. at 809 (citing Fireman’s Fund Ins. Co. v. Dunlap, 317 F.2d 443, 446 (4th Cir. 1963)).
107 Provident Tradesmens, 365 F.2d at 809 (citing State Farm Mut. Auto. Ins. Co. v. Hugee, 115 F.2d 298, 302 (4th Cir. 1940)).
108 Provident Tradesmens, 365 F.2d at 805.
109 Id. (citing 28 U.S.C. § 2072 (2000) for the proposition that the Federal Rules cannot "abridge, enlarge or modify any substantive right").
110 Provident Tradesmens, 365 F.2d at 816.
111 Id. at 822 (Freedman, J., dissenting).
Since the Third Circuit’s ruling “presented a serious challenge to the scope of the newly amended Rule 19,” the Supreme Court granted certiorari.\footnote{Provident Tradesmens Bank & Trust Co v. Patterson, 390 U.S. 102, 107 (1968).}

Finding that the “inflexible approach” taken by the Third Circuit exemplified the rigid analysis that the Rules Committee revised Rule 19(b) in order to avoid, the Supreme Court reversed.\footnote{Id.}

Underscoring the importance of carefully considering practical interests, the Court declared that

> [t]he decision whether to dismiss . . . must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests. Rule 19 does not prevent the assertion of compelling substantive interests; it merely commands the courts to examine each controversy to make certain that the interests really exist.\footnote{Id. at 119 (emphasis added).}

Accordingly, the Court considered only those interests that persisted past the entering of the judgment at trial on the theory that courts should consider only practical—as opposed to theoretical—interests under Rule 19(b)’s “equity and good conscience” test.\footnote{Id. at 109. The Court remarked, “Each of these interests must, in this case, be viewed entirely from the appellate perspective since the matter of joinder was not considered in the trial court.” Id.}

The Court therefore had to adjust the weight properly attributed to each Rule 19(b) factor in light of the fact that a jury had already rendered a judgment.\footnote{Id.}

1. The Provident Tradesmens Court’s Analysis Under Rule 19(b)(1)’s Consideration of Prejudice

Considering the first factor, “the extent to which a judgment rendered in the person’s absence might prejudice that person or the existing parties,”\footnote{FED. R. CIV. P. 19(b)(1).} the Court explained that defendants have an interest in avoiding “multiple litigation, or inconsistent relief, or sole
responsibility for a liability he shares with another.” The interest of the outsider concerns whether a judgment as a practical matter would impair or impede his ability to protect his interest in the subject of the dispute. The Court refused to recognize the defendants’ interest in joining Dutcher because their failure to object to his absence at trial foreclosed any such interest. The Court then addressed the interests of the absent party, Dutcher. Rejecting the Court of Appeals’ reasoning that Dutcher’s “adverse” interest entitled him to dismissal in his absence, the Court proceeded to identify Dutcher’s practical interests that still remained on appeal.

The Court noted first that, in Dutcher’s absence, a judgment in favor of the insurance company would have ended the matter in Dutcher’s favor as well. Conversely, a judgment for the plaintiffs on the permission issue would not bind Dutcher, who would remain free to relitigate that issue, though his liability coverage would remain vulnerable to judgments against Cionci and could diminish as a result. The Court concluded that risk was “neither large nor unavoidable,” noting that other state-court actions against Dutcher had been dormant for years. The Court went further, however, observing that even in the event of judgments against Dutcher, the prejudice to him as a result of his absence was minimal, since he could still raise the permission issue defensively. Moreover, courts could credit any payments on Cionci’s behalf from Dutcher’s policy against Dutcher’s own liability. All of these considerations lessened the significance of the prejudice to Dutcher under Rule 19(b)(1) and exposed the rigidity inherent in the Court of Appeals’ analysis.

118 Provident Tradesmens, 390 U.S. at 110.
119 Id.
120 Id. at 112.
121 Id. at 113-14.
122 Id. at 114.
123 Id. at 114-15.
124 Id. at 115.
125 Id.
126 Id.
2. *The Provident Tradesmens Court’s Analysis Under Rule 19(b)(2)’s Consideration of Modified Judgments*

Under the second factor,\(^{127}\) the Court explained that “the Rule now makes it explicit that a court should consider modification of a judgment as an alternative to dismissal.”\(^{128}\) It then observed that “[p]ayment could have been withheld pending the suits against Dutcher and relitigation (if that became necessary) by him” and that, therefore, the Court of Appeals “could have avoided all difficulties by proper phrasing of the decree.”\(^{129}\) Indeed, the district court, without giving a reason, did not grant immediate payment on the Cionci judgment.\(^{130}\) Additionally, the Court recognized that the tort plaintiffs accepted a limitation of all claims to the amount of the insurance policy at oral argument, further reducing any risk of prejudice to Dutcher under the first factor.\(^{131}\) “Obviously such a compromise could have been reached below had the Court of Appeals been willing to abandon its rigid approach and seek ways to preserve . . . a perfectly valid judgment.”\(^{132}\)

3. *The Provident Tradesmens Court’s Analysis Under Rule 19(b)(3)’s Consideration of Judicial Efficiency*

The Court described the third factor, “whether a judgment rendered in the person's absence would be adequate,”\(^{133}\) as the “interest of the courts and the public in complete, consistent, and efficient settlement of controversies.”\(^{134}\) The third factor thus favors the settlement of disputes “by wholes, whenever possible, for clearly the plaintiff, who himself chose both the forum and the parties defendant, will not be heard to complain about the sufficiency of

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\(^{127}\) “[T]he extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures.” *Fed. R. Civ. P. 19(b)(2).*

\(^{128}\) *Provident Tradesmens,* 390 U.S. at 111-12.

\(^{129}\) *Id.* at 115.

\(^{130}\) *Id.*

\(^{131}\) *Id.* at 115-16.

\(^{132}\) *Id.* at 116.

\(^{133}\) *Fed. R. Civ. P. 19(b)(3).*

\(^{134}\) *Provident Tradesmens,* 390 U.S. at 111.
relief obtainable against them.”\textsuperscript{135} After noting that the potential for relitigation of the permission issue was relevant under this factor, the Court held the resulting risk of inefficiency acceptable.\textsuperscript{136} Despite acknowledging that it would have been preferable to join all of the defendants at trial if such a forum were available, the Court reasoned that the argument in favor of dismissal on efficiency grounds lost all force once a valid judgment was entered, declaring, “there was no reason then to throw away a valid judgment just because it did not theoretically settle the whole controversy.”\textsuperscript{137}

4. The Provident Tradesmens Court’s Analysis Under Rule 19(b)(4)’s Consideration of Plaintiffs’ Alternative Fora

The Court explained that, before trial, the strength of the fourth factor, “whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder,”\textsuperscript{138} depends upon the existence of a satisfactory alternative forum.\textsuperscript{139} After prevailing at trial, the plaintiff has a significant interest in preserving that judgment, one that coincides with society’s interest in judicial economy under Rule 19(b)(3).\textsuperscript{140} The Court was unable to determine whether the plaintiffs in Provident Tradesmens would have had an adequate alternative forum because it could not tell from the record whether the plaintiffs could have brought an action against the “same parties plus Dutcher” in state court.\textsuperscript{141} Regardless of whether an adequate alternative forum existed before trial, however, the Court held that the adequacy of any alternative forum to the plaintiffs was “greatly diminished” after trial.\textsuperscript{142} Thus, only “rather greater opposing considerations than would be required at an earlier stage” could defeat the plaintiffs’ interest in

\begin{itemize}
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Id.} at 116.
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} \textit{Fed. R. Civ. P.} 19(b)(4).
\item \textsuperscript{139} \textit{Provident Tradesmens}, 390 U.S. at 109.
\item \textsuperscript{140} \textit{Id.} at 110.
\item \textsuperscript{141} \textit{Id.} at 112.
\item \textsuperscript{142} \textit{Id.}
\end{itemize}
preserving their judgment. With only the first factor’s consideration of prejudice to Dutcher favoring dismissal, and to a reduced extent on appeal, the Court vacated the judgment and remanded the case to the Court of Appeals with orders to preserve the judgment of the district court and protect “the interests of nonjoined persons.”

II. ANALYSIS OF THE COURT’S DECISION IN PIMENTEL

The Court’s opinion in Republic of Philippines v. Pimentel strayed from the careful consideration of practical interests exemplified in Provident Tradesmens by resorting to a formalistic approach to decide questions of dispensability. First, the Court relied on the Philippine Republic’s classification as “sovereign,” giving “near-dispositive” weight to the first factor’s consideration of prejudice and impairing proper Rule 19(b) analysis. Second, the Court held that the Pimentel class of human rights victims was not a “plaintiff” and excluded it from consideration under Rule 19(b)(4)’s factor concerning whether the plaintiff has an adequate alternative forum. The Court argued that because interpleader claimants are defendants by statute, the interest of the Pimentel class in having a forum was not “relevant” under Rule 19(b)(4), ignoring the functional similarity between plaintiffs generally and interpleader claimants. Before undertaking a more detailed analysis of the Court’s opinion, it is worthwhile to recall the factual and procedural history of Pimentel.

A. The Factual and Procedural History of Pimentel

Ferdinand Marcos, formerly the president of the Republic of the Philippines (“Republic”), formed Arelma, Inc. in Panama in 1972. Arelma then deposited two million

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143 Id.
144 Id. at 128.
146 Pimentel, 128 S.Ct. at 2193.
147 Id.
148 Id. at 2185.
dollars with Merrill Lynch in New York.\textsuperscript{149} That account, as of 2000, was worth approximately thirty-five million dollars.\textsuperscript{150} While president, Marcos achieved international notoriety when he dissolved the Philippine Constitutional Convention, declared martial law, and installed himself as dictator on September 21, 1972.\textsuperscript{151} Immediately thereafter, he issued a series of arrest orders that resulted in the detention and torture of each member belonging to the Pimentel class of human rights victims.\textsuperscript{152} Eventually, in 1986, Marcos fled to Hawaii, where nearly ten thousand such victims\textsuperscript{153} brought a class action pursuant to the Alien Tort Statute\textsuperscript{154} and the Torture Victim Protection Act.\textsuperscript{155} The class action resulted in a two billion dollar judgment for the Pimentel class against Marcos in the United States District Court for the District of Hawaii.\textsuperscript{156} The class then sought to collect on that judgment by attaching the Arelma assets that Merrill Lynch held in New York.\textsuperscript{157} The Republic also claimed a right to those same assets.\textsuperscript{158}

After Marcos’s demise from power, the Republic created the Philippine Presidential Commission on Good Governance (“Commission”), which moved to seize Marcos’s assets around the world.\textsuperscript{159} In 1991, the Commission asked the Sandiganbayan, a special Philippine court with jurisdiction over matters of corruption, to declare all property that Marcos obtained through the misuse of his office forfeited to the Republic effective as of the time it was misappropriated.\textsuperscript{160} When the Court decided \textit{Pimentel}, the litigation before the Sandiganbayan

\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} \textit{In re Estate of Marcos Human Rights Litig.}, 910 F. Supp. 1460, 1462 (D. Haw. 1995)
\textsuperscript{152} Id. at 1463.
\textsuperscript{153} Id. at 1461.
\textsuperscript{155} Id.
\textsuperscript{157} Id. at 2186.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
had been pending for nearly seventeen years.\textsuperscript{161} Though the Swiss government complied with the Commission’s request to transfer Marcos’s holdings to an escrow account at the Philippine National Bank (“PNB”), Merrill Lynch did not follow suit.\textsuperscript{162} The Pimentel class action was tried before Judge Manuel L. Real, of the United States District Court for the Central District of California, who sat by designation in the District of Hawaii after the Judicial Panel on Multidistrict Litigation consolidated several similar human rights complaints against Marcos in that court.\textsuperscript{163} The same Judge Real directed Merrill Lynch, then faced with various competing claims to the Arelma assets, to file a defensive interpleader action in the District of Hawaii under 28 U.S.C. § 1335 so he could preside over the matter.\textsuperscript{164}

In the interpleader action, both the Republic and the Commission asserted sovereign immunity under the Foreign Sovereign Immunities Act of 1976.\textsuperscript{165} Each moved to dismiss, arguing that their claims to sovereign immunity made joinder impossible and that they were indispensable under Rule 19(b).\textsuperscript{166} Without addressing whether they were entitled to sovereign immunity, Judge Real denied their motions to dismiss.\textsuperscript{167} The Republic and the Commission immediately appealed that ruling and the Court of Appeals reversed, holding both parties entitled to sovereign immunity and entering a stay pending the outcome of the litigation in the Sandiganbayan over the Marcos assets.\textsuperscript{168} After deciding that the pending litigation in the Sandiganbayan could not influence the court’s determination of ownership of the Arelma assets, Judge Real vacated the stay ordered by the Court of Appeals, allowed the action to continue, and

\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Pimentel}, 128 S.Ct. at 2186.
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{In re} Republic of the Philippines, 309 F.3d 1143, 1149-53 (9th Cir. 2002).
entered a judgment awarding the assets to the Pimentel class.\textsuperscript{169} A week after Judge Real entered that judgment, the Republic again asked the Sandiganbayan to rule, arguing the matter was ripe for decision.\textsuperscript{170} The Sandiganbayan still has not so ruled.\textsuperscript{171}

The Republic and the Commission appealed the district court’s judgment in favor of the Pimentel class, but this time the Ninth Circuit affirmed.\textsuperscript{172} Recognizing that Philippine law had previously established the Republic’s right to recover the spoils stolen by Marcos in 1988, the court reasoned that the Republic’s delay as a practical matter weighed against it, stating, “In all this time, the Republic has not obtained a judgment that the assets in dispute belong to it . . . . [W]e do note as an equitable consideration that its failure to secure a judgment affecting these assets is a factor to be taken into account.”\textsuperscript{173} It went on to observe that the prospects of the Republic’s success on the merits were so minimal that the interpleader action could proceed in the Republic’s absence.\textsuperscript{174} The Ninth Circuit also stressed that because the Republic was not a party to the interpleader action, it was not bound and remained free to press its rights in subsequent litigation.\textsuperscript{175} Finally, after noting that the Pimentel class would have no adequate alternative forum, the court elaborated:

The counter consideration, that most of the victims are citizens of the Philippines and should find redress from their own government, is outweighed by the fact that the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic. If we dismiss the action for nonjoinder of the Republic, they will have no forum within the Philippines open to their claims. They might sue again within the United States, perhaps in New York, yet such a suit would merely raise the same question of indispensability.\textsuperscript{176}

\textsuperscript{169}Pimentel, 128 S.Ct. at 2187.
\textsuperscript{170}Id.
\textsuperscript{171}Id.
\textsuperscript{172}Id.
\textsuperscript{173}Merrill Lynch v. ENC Corp. 464 F.3d 885, 892 (9th Cir. 2006) (citing Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 115 (1968)).
\textsuperscript{174}Pimentel, 128 S.Ct. at 2187.
\textsuperscript{175}Merrill Lynch, 464 F.3d at 893.
\textsuperscript{176}Id. at 894.
Stressing that dismissal would leave the Pimentel class without any viable forum in which to press its claim, the court entered a judgment as between Merrill Lynch and the class in the absence of the Republic, prompting the Supreme Court to grant certiorari.\textsuperscript{177}

B. Justice Kennedy’s Majority Opinion

The Court ordered the interpleader action dismissed for want of an indispensable party, reasoning that the Court of Appeals gave inadequate weight to Rule 19(b)(1)’s consideration of prejudice to the Republic and should not have addressed the interests of the Pimentel class in having an alternative forum under Rule 19(b)(4).\textsuperscript{178} In reaching this decision, the Court stressed the significance of the interests in comity and national dignity that attended the Republic’s status as sovereign.\textsuperscript{179} It also reasoned that the interests of the Pimentel class in an alternative forum were not relevant under Rule 19(b)(4) because the federal interpleader statute classified the Pimentel class as a defendant in the interpleader action.\textsuperscript{180}

Justice Kennedy began his opinion for the Court by observing that the Republic’s status as a required party under Rule 19(a) was uncontested because its interests would not be protected if it were not party to the interpleader action.\textsuperscript{181} Because joinder of the Republic was not feasible due to the validity of its claim of sovereign immunity, the question of whether the action should proceed in the Republic’s absence turned on the Court’s analysis under Rule 19(b).\textsuperscript{182} Immediately, the Court declared that the Ninth Circuit erred by not giving “the necessary weight” to the Republic’s claim of sovereign immunity, remarking that the “court’s consideration of the merits was itself an infringement on foreign sovereign immunity; and, in any

\textsuperscript{177} Id.
\textsuperscript{178} Pimentel, 128 S.Ct. at 2181-82.
\textsuperscript{179} Id. at 2189-91.
\textsuperscript{180} Id. at 2193.
\textsuperscript{181} Id. at 2189.
\textsuperscript{182} Id.
event, its analysis was flawed.”¹⁸³ Then the Court signaled that its own analysis would retain the standard Rule 19(b) structure, remarking that “the outcome suggested by the first factor is confirmed by our analysis under the other provisions of Rule 19(b).”¹⁸⁴

1. The Pimentel Court’s Analysis Under Rule 19(b)(1)’s Consideration of Prejudice

In analyzing “the extent to which a judgment rendered in the person’s absence might prejudice that person or the existing parties” under Rule 19(b)(1),¹⁸⁵ the Court concluded that the Court of Appeals gave insufficient weight to the prejudice to the interests of the Republic and the Commission if the interpleader action continued without them.¹⁸⁶ The Court devoted much attention to the interests in comity and dignity flowing from the Republic’s valid assertion of sovereign immunity, noting in particular the Republic’s “unique interest” in resolving disputes over ownership of the Arelma assets.¹⁸⁷

The Court cited Dole Food Co. v. Patrickson for the proposition that the sovereign immunity doctrine gives “foreign states and their instrumentalities some protection from the inconvenience of suit,” a consideration the Court said favored dismissal of the interpleader action.¹⁸⁸ The Court next cited two cases “involving the intersection of joinder and governmental immunity,” where the United States claimed sovereign immunity, did not consent

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¹⁸³ Id.
¹⁸⁴ Pimentel, 128 S.Ct. at 2189.
¹⁸⁵ FED. R. CIV. P. 19(b)(1).
¹⁸⁶ Pimentel, 128 S.Ct. at 2189.
¹⁸⁷ Id. at 2189-90. The Court elaborated:

Comity and dignity interests take concrete form in this case. The claims of the Republic and the Commission arise from events of historical and political significance for the Republic and its people. The Republic and the Commission have a unique interest in resolving the ownership of or claims to the Arelma assets and in determining if, and how, the assets should be used to compensate those persons who suffered grievous injury under Marcos.

Id. at 2190. The Court also remarked, “The doctrine of foreign sovereign immunity has been recognized since early in the history of our Nation. It is premised upon the ‘perfect equality and absolute independence of sovereigns, and th[e] common interest impelling them to mutual intercourse.’” Id. at 2189-90 (quoting Schooner Exchange v. McFaddon, 11 U.S. 116, 137 (1812)).
¹⁸⁸ Id. (quoting Dole Food Co. v. Patrickson, 538 U.S. 468, 479 (2003)).
to suit, and the court consequently dismissed the action.\footnote{Pimentel, 128 S.Ct. at 2190-91 (citing Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371, 373-75 (1945); Minnesota v. United States, 305 U.S. 382, 386-88 (1939)).} before declaring, “A case may not proceed when a required-entity sovereign is not amenable to suit.”\footnote{Pimentel, 128 S.Ct. at 2191.} The Court continued, “These cases instruct us that where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action \textit{must be ordered} where there is a potential for injury to the interests of the absent sovereign.”\footnote{Id. (emphasis added).}

The Court’s analysis under Rule 19(b)(1)’s consideration of prejudice suggests that rather than closely examine the practical interests of the absent sovereign, courts should simply consider whether the claim of sovereign immunity is valid and whether the sovereign’s legal claims could be termed nonfrivolous. The Court then curtailed its inquiry under the first factor, declaring, “We need not seek to predict the outcomes. It suffices that the claims [of the sovereign] would not be frivolous.”\footnote{Id. at 2191.} Such language is uncharacteristic of the close scrutiny of practical interests exemplified in \textit{Provident Tradesmens}.\footnote{See discussion infra Section III.A.} Thus, the Court gave “near-dispositive effect” to the Republic’s claim of sovereign immunity under the Rule 19(b)(1)’s consideration of prejudice, once again resorting to formalism to decide questions of indispensability.\footnote{Pimentel, 128 S.Ct. at 2195 (Stevens, J., concurring in part and dissenting in part).}

The Court acknowledged that Rule 19(b)(1) contemplates prejudice to both absent and present parties, which included the Pimentel class.\footnote{Pimentel, 128 S.Ct. at 2192.} The Court remarked that it did not “discount the Pimentel class’ interest in recovering damages it was awarded pursuant to a judgment” and admitted there was a strong policy argument in favor of combating public
The Court, however, held that the treaties cited as evidence of that policy also implicated the “comity concerns” attendant with sovereign immunity—and thus weighed in favor of dismissal. The Court then reiterated that the Court of Appeals gave insufficient weight to the likely prejudice to the Republic’s interests should the action proceed without it and moved to the second 19(b) factor.

2. The Pimentel Court’s Analysis Under Rule 19(b)(2)’s Consideration of Modified Judgments

The Court concluded that “there [was] no substantial argument to allow the action to proceed” relevant to Rule 19(b)(2)’s consideration of protective provisions and shaped relief. Specifically, the Court asserted that no “alternative remedies or forms of relief have been proposed to us or appear to be available,” reasoning that none of the parties could proceed absent any of the others because they all had competing claims to the same property. The Court noted that such conflicting claims present the “textbook” case where the absent party would be severely prejudiced by a ruling in his absence. Interestingly, the Ninth Circuit found it unnecessary to protect the Republic or otherwise shape relief because it concluded that the Republic had “little practical likelihood of obtaining the Arelma assets.” Justice Stevens also thought the Republic’s claim against the assets could well be “meritless” for reasons not yet explored, while Justice Souter would have vacated the judgment and remanded with a stay in 196

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the proceedings “for a reasonable time to await the decree of the Philippine court,” upon which all of the Republic’s claims hinged. The Court did not expressly consider the possibility of staying the proceedings to await a decree from the Sandiganbayan under Rule 19(b)(2)’s consideration of protective provisions. Instead, the Court concluded that the second factor favored dismissal because no protective order could be fashioned and moved to the third factor.

3. The Pimentel Court’s Analysis Under Rule 19(b)(3)’s Consideration of Judicial Efficiency

The Court also discussed Rule 19(b)(3)’s consideration of “whether a judgment rendered in the person's absence would be adequate” in succinct fashion. It first noted that “adequacy” refers to the “'public stake in settling disputes by wholes, whenever possible,'” and that courts have traditionally viewed this factor as favoring the compulsory joinder of parties. It then reasoned that proceeding without the Republic “would not further the public interest in settling the dispute as a whole,” because the Republic could not be bound in an action to which it was not a party. The Court did not consider the inefficiency of dismissing the interpleader action due to nonjoinder of the Republic, which effectively nullified the judgment for the Pimentel class against Marcos because the class had no other means of executing upon that judgment.

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204 Pimentel, 128 S.Ct. at 2197-98 (Souter, J., concurring in part and dissenting in part).
205 Pimentel, 128 S.Ct. at 2191.
206 Id. at 2192.
207 Id.
209 Pimentel, 128 S.Ct. at 2193 (quoting Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111 (1968)).
211 Pimentel, 128 S.Ct. at 2193.
212 Id.
4. The Pimentel Court’s Analysis Under Rule 19(b)(4)’s Consideration of Plaintiffs’ Alternative Fora

Finally, the Court discussed the fourth factor’s consideration of whether the plaintiff has an adequate alternative forum.\textsuperscript{213} Justice Kennedy found fault with the Ninth Circuit’s emphasis on the Pimentel class’ interest in an alternative forum, arguing, “This seems to assume the plaintiff in this interpleader action was the Pimentel class. It is Merrill Lynch, however, that has the statutory status of plaintiff as the stakeholder in the interpleader action.”\textsuperscript{214} Justice Kennedy continued, “We do not ignore that . . . the Pimentel class (and indeed all interpleader claimants) are to some extent comparable to the plaintiffs in noninterpleader cases. Their interests are not irrelevant to the Rule 19(b) equitable balance; but the other provisions of the Rule are the relevant ones to consult.”\textsuperscript{215} Thus, the class was excluded from consideration under Rule 19(b)(4)’s consideration of alternative fora and forced to assert its interests under the other 19(b) factors.\textsuperscript{216} The Court then discussed Rule 19(b)(4)’s consideration of whether the plaintiff has an adequate alternative forum solely in terms of Merrill Lynch, concluding Merrill Lynch would not be left without an adequate remedy because it could seek the joinder of the Republic to obtain dismissal in any subsequent action.\textsuperscript{217}

In spite of the Court’s “near-dispositive”\textsuperscript{218} language concerning claims of sovereign immunity under Rule 19(b)(1)’s consideration of prejudice,\textsuperscript{219} the Court closed by remarking that the “balance of equities” could change in the future, particularly “if it appears the Sandiganbayan cannot or will not issue its ruling within a reasonable period of time.”\textsuperscript{220} The Court’s reference

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\textsuperscript{213} \textit{Fed. R. Civ. P.} 19(b)(4).
\textsuperscript{214} \textit{Pimentel}, 128 S.Ct. at 2193 (citing 28 U.S.C. § 1335(a) (2000)).
\textsuperscript{215} \textit{Pimentel}, 128 S.Ct. at 2193.
\textsuperscript{216} \textit{Id.}
\textsuperscript{217} \textit{Id.}
\textsuperscript{218} \textit{Id.} at 2195 (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{219} See discussion \textit{supra} Subsection II.B.1.
\textsuperscript{220} \textit{Pimentel}, 128 S.Ct. at 2194.
to the “balance of equities” clearly implies that under different circumstances, similar actions might proceed even in the absence of a required sovereign.\textsuperscript{221} The Court thus left future courts and litigants to wrestle with the tension between its definitive statements concerning claims of sovereign immunity and the possibility that a shift in the balance of equities under Rule 19(b) could permit an action to continue absent a required sovereign.

C. The Opinions of Justices Stevens and Souter

Though Justice Stevens agreed the Court should not affirm the Ninth Circuit’s decision on the merits of its analysis, he argued the Court should have remanded the action for further proceedings,\textsuperscript{222} which is generally the proper course of action when a reviewing court concludes a lower court gave inadequate consideration to a Rule 19(b) factor.\textsuperscript{223} He believed the Court should have stayed the action “pending a reasonably prompt decision of the Sandiganbayan” or reassigned the matter to a different district court judge for fresh proceedings, noting the Republic could avoid the risk inherent in proceeding without it by waiving its claim of sovereign immunity.\textsuperscript{224} He would not give “near-dispositive effect to the [Republic and the Commission’s] status as sovereign entities.”\textsuperscript{225} Rather, he pragmatically balanced the interests that “really exist[ed],”\textsuperscript{226} focusing in particular on practical considerations that mitigated the prejudice to the Republic’s interest under Rule 19(b)(1).\textsuperscript{227}

Justice Souter wrote briefly to note his agreement with all aspects of the Court’s opinion except for the question of relief, “because a conclusion of the matter pending before the

\textsuperscript{221} Id.
\textsuperscript{222} Id. at 2195 (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{223} Indeed, the Court recognized this fact in its opinion when it stated that the failure of the Ninth Circuit to give adequate weight to the first factor “would, in the usual course, warrant reversal and remand for further proceedings.” \textit{Pimentel}, 128 S.Ct. at 2194.
\textsuperscript{224} Id. at 2195 (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{225} Id.
\textsuperscript{226} Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119 (1968).
\textsuperscript{227} \textit{Pimentel}, 128 S.Ct. at 2195-97 (Stevens, J., concurring in part and dissenting in part).
Sandiganbayan may simplify the issues raised in this case and render one disposition or another more clearly correct.”

He therefore would have vacated the judgment and remanded the matter for a stay in the proceedings for a “reasonable time” to allow for the Sandiganbayan to rule. If it appeared that the Sandiganbayan would not rule in a reasonable time, Justice Souter thought the Court of Appeals should decide how to proceed in light of the Court’s opinion.

III. THE PIMENTEL COURT’S DEPARTURE FROM PROVIDENT TRADESMENS

The Pimentel Court should not have strayed from the analysis in Provident Tradesmens Bank & Trust Co. v. Patterson because the pragmatic balancing of practical interests exemplified therein best accommodates the competing interests of the parties to a dispute and society at large. With regard to each of the factors specified in Rule 19(b), the Pimentel Court failed to follow Provident Tradesmens’ command to “examine each controversy to make certain that the interests really exist,” effectively transforming the landscape of indispensability jurisprudence. Rather than consider several practical interests weighing against dismissal, the Court betrayed its formalistic approach by claiming that the outcome “suggested by the first factor” was “confirmed” by its treatment of the other three factors set forth in Rule 19(b). Its reliance on the Republic’s classification as sovereign and of the Pimentel class as defendant resembles the “inflexible approach” towards indispensability that courts in the United States employed prior to Rule 19(b)’s amendment in 1966.

The Court’s shift toward formalism was most apparent in its analysis under Rule 19(b)(1)’s consideration of prejudice and Rule 19(b)(4)’s consideration of alternative fora.

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228 Pimentel, 128 S.Ct. at 2197 (Souter, J., concurring in part and dissenting in part).
229 Id. at 2198.
230 Id.
231 See discussion supra Sections I.C. and I.D.
232 Provident Tradesmens, 390 U.S. at 119 (emphasis added).
233 Pimentel, 128 S.Ct. at 2189.
234 Provident Tradesmens, 390 U.S. at 107.
235 See discussion supra Section II.B.
though it was perceptible in the Court’s analysis under Rule 19(b)(2) and (3) as well. This Part discusses the discrepancies between the Court’s analysis in *Provident Tradesmens* and *Pimentel*, arguing that courts should pragmatically account for all of the practical interests that “actually exist,” even where required parties assert valid claims of sovereign immunity. Accordingly, similarly positioned litigants should urge courts to closely consider even those practical interests not expressly identified by the Court in *Pimentel*, stays or protective orders that would protect the rights of all interested parties, and tolling statutes of limitations if dismissal is unavoidable.

A. The *Pimentel* Court’s Deviation from *Provident Tradesmens* Under Rule 19(b)(1)’s Consideration of Prejudice

The *Pimentel* Court’s analysis under Rule 19(b)(1)’s consideration of prejudice accounted for those interests of the Republic that favored dismissal, but ignored countervailing considerations that *Provident Tradesmens* addressed and that Justice Kennedy noted specifically in his dissent. The Court in *Provident Tradesmens* began by holding the interests of the defendants foreclosed by their failure to object to nonjoinder at trial. But the Court spoke of the Pimentel class’ interest in “recovering damages it was awarded pursuant to a judgment” and of the policy of “combating public corruption,” though it is unclear how either consideration related to the prejudice that the Pimentel class stood to suffer if the action proceeded absent the Republic. Indeed, proceeding absent the Republic could only have furthered the interest of the Pimentel class in recovering the damages it was awarded.

In both *Provident Tradesmens* and *Pimentel*, the Court properly addressed the interests of the absent party at length, though in *Pimentel* it dwelled on the Republic’s classification as

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236 *Provident Tradesmens*, 390 U.S. at 119 (emphasis added).
237 See discussion supra Subsection II.B.1.
238 *Provident Tradesmens*, 390 U.S. at 112.
240 Id. at 2187.
sovereign without accounting for the sort of practical interests noted in *Provident Tradesmens*.\textsuperscript{241} In *Provident Tradesmens*, the Court observed that the absent party, Dutcher, would not be bound by a judgment rendered in his absence and would thus remain free to litigate the issue of permission.\textsuperscript{242} Similarly, in *Pimentel*, the Republic would have retained the benefit of sovereign immunity and remained free to litigate its claim to the Arelma assets, particularly if the Court stayed the action or conditioned the judgment on the Republic having the opportunity to do so within a reasonable period of time, as Justice Stevens suggested.\textsuperscript{243} Though the assets could have dissipated over time, precluding future litigation by the Republic, the *Provident Tradesmens* Court considered that same risk with regard to Dutcher’s liability coverage “neither large nor unavoidable.”\textsuperscript{244} Furthermore, the Republic could have avoided the risk inherent in proceeding in its absence by waiving sovereign immunity and pressing its claim, an inevitability weighed heavily by Justice Stevens.\textsuperscript{245}

But without addressing those considerations, the *Pimentel* Court described the Republic’s sovereign immunity claim as “compelling,”\textsuperscript{246} emphasizing the interests of comity and national dignity attendant with claims of sovereign immunity as well as the Republic’s “unique” interest in settling claims to the Arelma assets.\textsuperscript{247} To be sure, these are powerful considerations. In its amicus brief, the United States argued that claims of sovereign immunity are “compelling by themselves,” tracking the language of *Provident Tradesmens*.\textsuperscript{248} As support, the United States noted that lower courts did not weigh sovereigns’ interests against other opposing considerations.

\textsuperscript{241} See discussion supra Subsections I.D.1. and II.B.1.
\textsuperscript{242} *Provident Tradesmens*, 390 U.S. at 114.
\textsuperscript{243} *Pimentel*, 128 S.Ct. at 2195 (2007) (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{244} *Provident Tradesmens*, 390 U.S. at 115.
\textsuperscript{245} *Pimentel*, 128 S.Ct. at 2196 (2007) (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{246} Id. at 2192.
\textsuperscript{247} Id. at 2191.
when confronted by claims of sovereign immunity in the context of indispensability. Rather, claims of sovereign immunity were compelling by themselves because society consciously decided to shield sovereigns from suit. Failing to accord sovereign immunity proper weight could have resulted in “complications in the United States’ foreign relations,” for the United States and foreign countries share reciprocal interests in comity and national dignity. Were the United States to disregard this policy, other countries might be inclined to follow suit.

But interests in comity and national dignity will always be present wherever a required party asserts a valid claim of sovereign immunity, and are now seemingly entitled to “near-dispositive” weight. Though the “historical and political significance” of the case to the Republic and its people should not be overlooked, the Court went too far when it said that “dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign,” for that potential will always exist where a valid claim of sovereign immunity is asserted. Courts are also unlikely to consider a sovereign’s legal claims frivolous by virtue of those same interests in comity and dignity, which logically counsel against terming frivolous any claim by a foreign sovereign.

Indeed, the Court’s language bears a striking resemblance to the “inflexible approach” once taken by the Third Circuit, which said that “a court cannot proceed . . . where the absent party may be so much affected . . . .” Though that formalistic mode of analysis was explicitly

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249 Brief for the United States, supra note 248, at 21 (citing Minnesota v. United States, 305 U.S. 386, 388-89 (1939); Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371 (1945)).
250 Brief for the United States, supra note 248, at 22 (citing Wichita & Affiliated Tribes v. Hodel, 788 F.2d 765, 777 (D.C. Cir. 1986)).
251 Brief for the United States, supra note 248, at 23.
252 Pimentel, 128 S.Ct. at 2195 (Stevens, J., concurring in part and dissenting in part).
253 Pimentel, 128 S.Ct. at 2189.
254 Id. at 2189-90.
set aside in Provident Tradesmens, the Court’s decision in Pimentel threatens its revival. While Provident Tradesmens specifically provided that certain factors may be “compelling by themselves,” it further instructed courts to “examine each controversy to make certain that the interests really exist.” Thus, courts should determine whether claims of sovereign immunity are compelling by reference not only to the theoretical importance of interests in dignity and national comity, but also to countervailing practical considerations not expressly weighed by the Court in Pimentel.

The Pimentel Court failed to address several countervailing considerations that favored proceeding absent the Republic under Rule 19(b)(1)’s prejudice factor. First, the Republic did not invoke sovereign immunity until after Judge Real denied its motions for transfer for improper venue, dismissal on act of state grounds, and recusal of the judge, each of which appeared aimed at escaping his particular courtroom. In his dissent, Justice Stevens recounted a few instances of Judge Real’s conduct in the proceedings and concluded that they showed sufficient personal involvement to “create at least a colorable basis for the Republic and the Commission’s concern about [his] impartiality.” When the Republic ultimately moved to dismiss on sovereign immunity grounds, Judge Real held that it was not a real party in interest. After the Ninth Circuit reversed that decision and ordered a stay in the proceedings, Judge Real vacated the stay within months and proceeded to judgment. Though Justice Stevens acknowledged that Judge Real’s decision to vacate the stay was not without merit, he noted that such behavior increased

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257 Provident Tradesmens, 390 U.S. at 119.
258 See discussion supra Part I.D.
259 Pimentel, 128 S.Ct. at 2196 (Stevens, J., concurring in part and dissenting in part).
260 Id. The judge summoned Merrill Lynch’s attorney after learning that the Republic was also seeking the Arelma assets. Id. He then directed that attorney to file an interpleader action before him and deposit the funds with the court, before sealing the file. Id.
261 Id.
262 Id.
the Republic’s concern about Judge Real’s partiality nonetheless. The Republic’s assertion of sovereign immunity was thus partly an effort to combat the risk posed by a partial judge, rather than an attempt at avoiding the inconvenience of suit generally.

Second, the Republic eventually must bring or consent to suit in order to recover the Arelma assets held by Merrill Lynch in the United States. The inevitability of the Republic consenting to suit in the United States reduced the Republic’s interest in dismissal to one of convenience as to the time and place of suit, rather than one involving issues of national sovereignty or notions of international dignity and comity. Also, as the Ninth Circuit correctly observed, another equitable consideration weighing against dismissal under Rule 19(b)(1)’s consideration of prejudice was the Republic’s failure for almost two decades to obtain a judgment in the Sandiganbayan entitling it to the Arelma assets, particularly when every theory of recovery by the Republic advanced by the Court hinged upon such a judgment.

Furthermore, the Republic participated in the initial litigation by the Pimentel class and other actions involving the Arelma assets without objection. Indeed, it went so far as to file an amicus brief in support of the Pimentel class in which it urged the court to allow the presentation of evidence of human rights violations by Marcos and the pursuit of justice in an American court. The Republic took that position fully aware that any judgment against Marcos’s assets threatened its claim to those same assets. As Justice Stevens astutely reasoned, “Either the

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263 Pimentel, 128 S.Ct. at 2196 (Stevens, J., concurring in part and dissenting in part).
264 Id. at 2197.
265 Id.
266 Merrill Lynch v. ENC Corp., 464 F.3d 885, 892 (9th Cir. 2006) (citing Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 115 (1968)).
267 Pimentel, 128 S.Ct. at 2191. In discussing the viability of the Republic’s claim to the Arelma assets, every nonfrivolous action discussed by the court first required a ruling by the Sandiganbayan, with the Court using language like, “[i]f the Sandiganbayan rules” and “to enforce the Sandiganbayan’s judgment.” Id.
268 Id. at 2197 (Stevens, J., concurring in part and dissenting in part).
269 Id.
270 Id.
Republic was encouraging futile and purely symbolic litigation, or the Republic believed that other creditors would have access to at least a portion of Marcos’s vast assets.”271 Just as the Court in Provident Tradesmens considered whether Dutcher’s actions prior to and during the current litigation might have foreclosed his interest, the Court should have accounted for the Republic’s strictly tactical assertion of sovereign immunity.272 In light of these considerations, the Republic’s sovereign immunity does not seem entitled to the “near-dispositive” weight afforded it by the Court.273

Hence, the Court’s approach to deciding questions of compulsory joinder in the context of sovereign immunity “represents a more ‘inflexible approach’ than [Rule 19(b)] contemplates.”274 Rather than allow formalism to drive his decision on indispensability, Justice Stevens would have subordinated sovereign immunity within the framework of Rule 19(b) so as to retain the flexibility of its pragmatic analysis.275 He therefore considered not just the Republic’s interests in national dignity and comity, but also its past behavior and the realities of its current legal position.276 On remand, Justice Stevens would have left open the question of whether to dismiss, stay, or compel the Republic to choose between asserting sovereign immunity and defending on the merits.277 True to the pragmatic policy underlying Rule 19(b), he supposed the district court might undertake additional hearings to deepen its pragmatic analysis before answering that question.278

271 Id.
272 Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 114 (1968).
273 Pimentel, 128 S.Ct. at 2195 (Stevens, J., concurring in part and dissenting in part).
274 Id. at 2197 (quoting Provident Tradesmens, 390 U.S. at 107).
275 Pimentel, 128 S.Ct. at 2197 (Stevens, J., concurring in part and dissenting in part).
276 Id.
277 Id. at 2196.
278 Id.
Indeed, as the Court acknowledged, when a lower court fails to adequately consider a Rule 19(b) factor, the proper course is to remand the matter for further proceedings. Accordingly, Justice Stevens thought it was appropriate to determine the viability of the Republic’s claim to the Arelma assets, which in turn would inform the court’s analysis under Rule 19(b)(1)’s consideration of prejudice. He asserted that while the Court “assumes that the Republic’s interest in the Arelma assets is not frivolous, on this record, it is not clear whether the Republic has a sufficient claim to those assets to preclude their recovery by [the Pimentel class].” The Republic’s claims could have been meritless for reasons not previously considered or explored, in part due to the willingness of the Court to assume their validity.

Conversely, by not expressly considering those aspects of the Republic’s claim of sovereign immunity or remanding the action for further hearings, the Court’s opinion implicitly instructs future courts to ignore analogous considerations when evaluating sovereign immunity claims and therefore threatens a return to formalism. As a result, courts will be inclined to conclude their analysis as soon as they identify a valid claim of sovereign immunity, without addressing countervailing interests that may well outweigh those of the absent sovereign. Indeed, by declaring that “dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign,” the Court came remarkably close to carving out an exception to Rule 19(b) when required parties assert valid claims of sovereign immunity. But instead of going that far, the Court rendered toothless its analysis under the remaining three

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279 Pimentel, 128 S.Ct. at 2194.
280 Pimentel, 128 S.Ct. at 2196 (Stevens, J., concurring in part and dissenting in part).
281 Id. (internal quotation marks omitted).
282 Id.
283 Pimentel, 128 S.Ct. at 2191.
Rule 19(b) factors by giving “near-dispositive” weight to the Republic’s sovereign status under Rule 19(b)(1)’s consideration of prejudice.\textsuperscript{284}

The chief advantage of Rule 19(b)’s pragmatic approach is that it requires courts to employ a method that addresses all practical interests and ignores none.\textsuperscript{285} As Professor Reed wrote, “One knows exactly what considerations produced the decision. There is no camouflage, no hiding behind slippery, conceptual terms meaning one thing this time and another the next. The court states the practical factors which moved it to this result.”\textsuperscript{286} By relying on the theoretical importance of sovereign immunity in its analysis under Rule 19(b)(1)’s consideration of prejudice, the Court encourages “naïve self-delusion in the reliance on disembodied categories,”\textsuperscript{287} risks a return to formalism, and threatens the pragmatic balancing inherent in Rule 19(b). The Court should not have exercised its power in this fashion, for it is by pragmatically balancing the opposing interests involved that courts fairly resolve questions of indispensability.\textsuperscript{288}

B. The \textit{Pimentel} Court’s Deviation from \textit{Provident Tradesmens} Under Rule 19(b)(2)’s Consideration of Modified Judgments

The Court’s failure to acknowledge the possibility of fashioning protective provisions or shaped relief disobeyed the explicit command of \textit{Provident Tradesmens} to “consider the modification of a judgment as an alternative to dismissal.”\textsuperscript{289} Just as any judgment for the tort plaintiffs could have been fashioned to protect Dutcher’s interest in \textit{Provident Tradesmens},\textsuperscript{290} the Court could have conditioned any judgment favoring the Pimentel class on the Republic having an opportunity to litigate its claim after a judgment by the Sandiganbayan within a reasonable

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\textsuperscript{284} Id. at 2195 (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{285} Reed, \textit{supra} note 24, at 493.
\textsuperscript{286} Id.
\textsuperscript{287} Kaplan, \textit{supra} note 83, at 359.
\textsuperscript{288} Id.
\textsuperscript{289} \textit{Provident Tradesmens Bank & Trust Co. v. Patterson}, 390 U.S. 102, 111-12 (1968).
\textsuperscript{290} See discussion \textit{supra} Part II.B.2.
\end{footnotesize}
time.\textsuperscript{291} The Court’s analysis suggested that the Republic could not prevail absent a ruling from the Philippine court,\textsuperscript{292} meaning a decree conditioned to allow for that possibility within a reasonable time might suffice to protect the Republic’s interest. But rather than explore the possibility of shaping relief to protect the Republic’s interest, the Court simply concluded there was no “substantial argument … to proceed” under the second factor.\textsuperscript{293} Though the Court correctly disagreed with the Ninth Circuit, which found no need to protect the Republic’s interest due to its assessment of the viability of the Republic’s claims,\textsuperscript{294} it did not follow that no protective order was possible.

Indeed, the possibility of shaping relief to protect the interests of the Republic and the Pimentel class was expressly considered by Justices Stevens\textsuperscript{295} and Souter.\textsuperscript{296} Justice Stevens would have stayed the action “pending a reasonably prompt decision of the Sandiganbayan” or ordered additional proceedings before a judge fresh to the case,\textsuperscript{297} while Justice Souter would have stayed the matter “for a reasonable time to await a decree of the Philippine court.”\textsuperscript{298} Under the facts of \textit{Pimentel}, these measures would have been the equivalent of a decree conditioned on the Republic’s opportunity to litigate if the Sandiganbayan issues a judgment within a reasonable time period.

Staying the interpleader action also would have avoided the risk of inconsistent judgments attendant with adjudicating conflicting claims to the same property, with which the Court was most concerned in its analysis under Rule 19(b)(2)’s consideration of shaped relief.\textsuperscript{299}

\textsuperscript{291} \textit{Pimentel}, 128 S.Ct. at 2195 (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{292} \textit{Pimentel}, 128 S.Ct. at 2191.
\textsuperscript{293} \textit{Id.} at 2192.
\textsuperscript{294} Merrill Lynch v. ENC Corp., 464 F.3d 885, 893 (9th Cir. 2006).
\textsuperscript{295} \textit{Pimentel}, 128 S.Ct. at 2195 (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{296} \textit{Pimentel}, 128 S.Ct. at 2197-98 (Souter, J., concurring in part and dissenting in part).
\textsuperscript{297} \textit{Pimentel}, 128 S.Ct. at 2195 (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{298} \textit{Pimentel}, 128 S.Ct. at 2197-98 (Souter, J., concurring in part and dissenting in part).
\textsuperscript{299} \textit{Pimentel}, 128 S.Ct. at 2192.
Unlike dismissal, such an order would protect the interests of both the Republic and the Pimentel class, affording a measure of national dignity to the Republic consistent with sovereign immunity while acknowledging the interest of the Pimentel class in having a forum. Though the United States sought dismissal in its amicus brief, it was also willing to accept a stay in the proceedings as an acceptable course of action, “in light of the Republic’s immunity and pending forfeiture proceeding.”\textsuperscript{300} Given the Pimentel class’ lack of an alternative forum, it seems clear that a stay would have better accommodated the competing interests of the class and the Republic, while also remaining true to \textit{Provident Tradesmens}' command to consider alternative forms of relief under Rule 19(b)(2).

C. The \textit{Pimentel} Court’s Deviation from \textit{Provident Tradesmens} Under Rule 19(b)(3)’s Consideration of Judicial Efficiency

Under Rule 19(b)(3), which pertains to the public interest in judicial efficiency, it is interesting to note that while there were already judgments entered previously in both \textit{Provident Tradesmens} and \textit{Pimentel}, they were addressed only in \textit{Provident Tradesmens}.\textsuperscript{301} In \textit{Provident Tradesmens}, the Court was unwilling to dismiss in the absence of a required party largely because it did not wish to waste a valid prior judgment.\textsuperscript{302} In \textit{Pimentel}, the prior judgment was not reached in the same action directly below, but in a prior action upon which current action attempted to execute.\textsuperscript{303} The \textit{Provident Tradesmens} Court rejected the argument that the potential for future litigation favored dismissal on efficiency grounds, refusing to cast aside a valid judgment merely because it did not completely settle the dispute.\textsuperscript{304} But in \textit{Pimentel}, the

\textsuperscript{300} Brief for the United States, \textit{supra} note 248, at 31-32.
\textsuperscript{301} See discussion \textit{supra} Subsections I.D.3 and II.B.3.
\textsuperscript{302} \textit{Provident Tradesmens} Bank & Trust Co. v Patterson, 390 U.S. 102, 109-13 (1968).
\textsuperscript{303} \textit{Pimentel}, 128 S.Ct. at 2186.
\textsuperscript{304} See discussion \textit{supra} Subsections I.D.3.
Court did not even consider the inefficiency of dismissing the interpleader action,\textsuperscript{305} which rendered the judgment for the Pimentel class against Marcos inconsequential for the foreseeable future. Though the prior judgment in \textit{Pimentel} was reached in a separate action, this distinction is of minimal consequence to judicial efficiency, for a judgment is essentially thrown away in both instances. Unfortunately, the Court’s willingness to discard the Pimentel class’ judgment against Marcos could, as a consequence, ensure that future human rights litigation under the Alien Tort Statute and the Torture Victim Protection Act is “purely symbolic.”\textsuperscript{306}

Though additional litigation may have been necessary if the action proceeded without the Republic, as Justice Stevens explained, additional litigation was inevitable in any event.\textsuperscript{307} The risk of relitigation was the same regardless of whether the action was dismissed due to the inevitability of the Republic consenting to suit in the United States to recover assets held by Merrill Lynch.\textsuperscript{308} Thus, it cannot be said that Rule 19(b)(3)’s consideration of judicial economy favored dismissal of the action outright. Indeed, given the inefficiency that inhered in casting aside the Pimentel class’ judgment against Marcos, it could be argued that considerations of judicial economy favored proceeding absent the Republic. Moreover, the arguments in favor of entering a stay under Rule 19(b)(2)’s consideration of modified judgments also address the risk of inefficiency due to relitigation under 19(b)(3), as a stay simply prolongs the existing litigation. In a sense, the risk of relitigation would therefore have been lower had the Court entered a stay than it was with dismissal. Though the possibility of relitigation might still loom, a stay would have postponed that possibility.

\textsuperscript{305} \textit{Pimentel}, 128 S.Ct. at 2193.
\textsuperscript{306} \textit{Id.} at 2197 (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{307} \textit{Id.}
\textsuperscript{308} \textit{Id.} “First, in all events, the Republic and the Commission must take affirmative steps in United States courts \textit{at some point} in order to recover the assets held in the United States.” \textit{Id.} (emphasis added).
D. The *Pimentel* Court’s Deviation from *Provident Tradesmens* Under Rule 19(b)(4)’s Consideration of Plaintiffs’ Alternative Fora

Under Rule 19(b)(4)’s consideration of whether the plaintiff has an adequate alternative forum, the Court in *Provident Tradesmens* stressed that once the plaintiff prevails at trial, he has a significant interest in preserving that judgment.\(^{309}\) But because the Pimentel class was not a plaintiff to the interpleader action, the Court did not consider the Pimentel class’ interest in preserving its judgment against Marcos even though it lacked any viable alternative forum,\(^{310}\) a factor also stressed by the Court in *Provident Tradesmens*.\(^{311}\) Unlike in *Provident Tradesmens*, where it was unclear whether the tort plaintiffs could bring suit against all of the parties in another forum,\(^{312}\) it was clear the Pimentel class had no viable alternative forum.\(^{313}\) Though it is certainly true that some actions must be dismissed despite the plaintiff’s lack of an alternative forum to properly account for the due process rights of an indispensable party, such dismissals are proper only when the interests of the absent party and of society outweigh those of the plaintiff.\(^{314}\) In *Pimentel*, the Court did not account for all practical interests involved and thus failed to justify dismissing the action in spite of the Pimentel class’ lack of an alternative forum.

Despite acknowledging that “[i]t is true that, in an interpleader action, the stakeholder is often neutral as to the outcome, while other parties press claims in the manner of a plaintiff,” the *Pimentel* Court found that consideration insufficient to overcome the federal interpleader statute’s classification of the stakeholder as plaintiff.\(^{315}\) It then held that the interests of the class

\(^{309}\) See discussion supra Subsection I.D.4.

\(^{310}\) See discussion supra Subsection II.B.4.

\(^{311}\) *Provident Tradesmens*, 390 U.S. at 109.

\(^{312}\) Id. at 112.

\(^{313}\) *Pimentel*, 128 S.Ct. at 2193.

\(^{314}\) See discussion supra Sections I.C. and I.D.

\(^{315}\) *Pimentel*, 128 S.Ct. at 2193. “It is true that, in an interpleader action, the stakeholder [Merrill Lynch] is often neutral as to the outcome, while other parties press claims in the manner of a plaintiff. That is insufficient, though, to overcome the statement in the interpleader statute that the stakeholder is the plaintiff.” *Id.*
were not relevant under Rule 19(b)(4)’s consideration of alternative fora,\textsuperscript{316} which is normally strongest when the party seeking relief has no alternative forum.\textsuperscript{317} Unfortunately, the Court’s narrow interpretation of the term “plaintiff” strayed from the pragmatic mode of analysis modeled in \textit{Provident Tradesmens}, threatening a return to the mechanical analysis that took root in the United States following its decision in \textit{Shields v. Barrow}.\textsuperscript{318} Mechanical analysis resulted in the summary dismissal of actions in which the plaintiffs had no alternative forum in \textit{Browne v. Blount}\textsuperscript{319} and \textit{Smyth v. Chambers},\textsuperscript{320} as courts relied on rigid classifications of rights that automatically determined questions of indispensability.\textsuperscript{321} Parties in the same position as the Pimentel class may have their claims dismissed without consideration of whether they have an adequate alternative forum, not unlike those who fell prey to formalism prior to the amendment of Rule 19(b) in 1966.\textsuperscript{322}

It was with that amendment that the Rules Committee first set forth four nonexclusive factors for federal courts to consider when deciding questions of indispensability, emphasizing that the list was “nonexhaustive” and that those four factors were not the only ones to be considered.\textsuperscript{323} The drafters intended the open-ended nature of the list to encourage courts to seek out and account for all of the practical interests at stake, rather than to resort to formalism’s “siren call of abstractions like ‘joint,’ ‘common,’ ‘united,’ etc., which surely leads to shipwreck.”\textsuperscript{324} But rather than retain the pragmatic flexibility considered essential to Rule

\textsuperscript{316} \textit{Id.}
\textsuperscript{317} \textsc{Wright, Miller & Kane, supra} note 2, § 1608.
\textsuperscript{318} \textit{See} discussion \textit{supra} Section I.B.
\textsuperscript{319} \textit{39 Eng. Rep. 326 (Rolls 1830)}.
\textsuperscript{320} \textit{160 Eng. Rep. 911 (Ex. 1840)}.
\textsuperscript{321} \textit{See} discussion \textit{supra} Section I.A.
\textsuperscript{322} \textit{See} discussion \textit{supra} Section I.B.
\textsuperscript{323} \textit{Kaplan, supra} note 83, at 365.
\textsuperscript{324} \textit{Kaplan, supra} note 83, at 368-69.
19(b)’s operation by its drafters,\textsuperscript{325} the Court avoided accounting for the Pimentel class’ interest in having a forum.\textsuperscript{326} Even accepting that the Pimentel class was a defendant as defined by the federal interpleader statute,\textsuperscript{327} the Court should still have addressed the Pimentel class’ interest in having a forum elsewhere in its analysis; but it did not.\textsuperscript{328} Despite declaring that the “other provisions of the Rule are the relevant ones to consult,” the Court failed to otherwise acknowledge the Pimentel class’ interest in having a forum in which to collect upon its judgment against Marcos.\textsuperscript{329} The Court’s failure to credit the functional similarity of plaintiffs generally and of interpleader defendants is also inconsistent with the searching pragmatism of Rule 19(b), for both groups share the same practical interest in having a forum in which to seek relief. Fundamentally, courts should never deliberately avoid confronting the practical interests of any party, as doing so is plainly inconsistent with the intended operation of Rule 19(b).\textsuperscript{330}

Consistent with the Court’s opinion, the United States argued that the Republic’s sovereign immunity “largely obviate[d] consideration of the fourth Rule 19(b) factor,” since the societal decision to immunize sovereigns from suit necessarily anticipated that litigants would be deprived of a forum.\textsuperscript{331} The United States also emphasized decisions where the Court did not weigh the sovereign’s interests against “the plaintiff’s interest in a forum or other countervailing considerations.”\textsuperscript{332} It is clear these precedents conflict directly with the pragmatic analysis essential to Rule 19(b)’s operation because they argue for abruptly ending the analysis once a

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\textsuperscript{325} See discussion supra Section I.C.
\textsuperscript{328} Pimentel, 128 S.Ct. at 2189-94.
\textsuperscript{329} \textit{Id.} at 2193.
\textsuperscript{330} See discussion supra Sections I.C and I.D.
\textsuperscript{331} Brief for the United States, \textit{supra} note 248, at 31.
\textsuperscript{332} Brief for the United States, \textit{supra} note 248, at 21 (citing Minnesota v. United States, 305 U.S. 386, 388-89 (1939); Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371 (1945)).
\end{flushleft}
court identifies a valid claim of sovereign immunity, thus resembling the “inflexible approach” rejected by the Court in *Provident Tradesmens*.\(^{333}\)

Thankfully, the *Pimentel* Court did not heed the United States’ invitation to follow past precedent. Instead, it retained the pragmatic framework of Rule 19(b), considered countervailing considerations (albeit to a limited extent), and noted that the balance of equities could shift in favor of the Pimentel class.\(^{334}\) The Court’s willingness to retain the pragmatic framework of Rule 19(b) and to explore some countervailing considerations, however, makes its unwillingness to consider all such interests, and particularly those of the Pimentel class in having a viable alternative forum, hard to justify. District court judges should exploit this opening in the Court’s opinion and remain willing to consider countervailing interests that may attend a shift in the equities that justifies proceeding absent a required sovereign. Because the Court’s opinion did not account for such practical interests, the reasoning therein is insufficient to justify dismissing the action in spite of the Pimentel class’ lack of a viable alternative forum.

**CONCLUSION**

This Note does not argue the Court ruled incorrectly as to whether the Republic was indispensable, nor could it without the benefit of the additional hearings and analysis recommended by Justice Stevens.\(^{335}\) Additional hearings could shed light on the viability of the Republic’s legal claims to the Arelma assets, upon which the prejudice it stood to suffer hinged.\(^{336}\) That the Republic possessed a unique interest in settling claims of ownership to Marcos’s assets may well have sufficed to justify its indispensability after consideration of all practical interests. But the Court’s failure to account for those interests weighing against


\(^{334}\) *Pimentel*, 128 S.Ct. at 2189-94.

\(^{335}\) *Id.* at 2195 (Stevens, J., concurring in part and dissenting in part).

\(^{336}\) *Pimentel*, 128 S.Ct. at 2191.
dismissal calls into question the validity of its ruling and throws the law of indispensability into question. Its resort to the classification of rights to decide questions of indispensability threatens a return to the rigid, formalistic approach that the Rules Committee drafted Rule 19(b) to eliminate. Just as Professor Reed argued with the method used in *Shields v. Barrow* rather than the result, this Note argues not with the result in *Pimentel*, but rather with the Court’s mode of analysis. The *Pimentel* Court’s analysis encourages future courts to engage in “a thoughtless reiteration—instead of a critical examination,” when deciding questions of indispensability.

Given its “near-dispositive” language, the Court leaves future courts to ponder whether *Pimentel* requires dismissal when a required party asserts a valid claim of sovereign immunity. It also remains unclear how the balance of equities might shift in favor of proceeding absent a required sovereign, if those equities did not already favor the Pimentel class. Though one might forgive the Court for not delving into the merely theoretical intersection of the Due Process Clause and the doctrine of indispensability, the Court nevertheless should have examined the practical interests of both the Republic and the Pimentel class more closely, in keeping with *Provident Tradesmens’* pragmatic mode of analysis. Accordingly, litigants should urge courts to closely consider even those interests not expressly weighed by the Court in *Pimentel*, the possibility of shaping relief to protect the competing interests of all parties, and tolling statutes of limitations if dismissal proves unavoidable.

337 *See* discussion supra Part III.
338 *See* discussion supra Sections I.A. and I.B.
339 *See* discussion supra Section I.C.
341 Reed, *supra* note 24, at 328-29.
342 *Pimentel*, 128 S.Ct. at 2195 (Stevens, J., concurring in part and dissenting in part).
343 *Pimentel*, 128 S.Ct. at 2194.
344 *Wright, Miller & Kane, supra* note 2, § 1602.
345 *See* discussion supra Section I.D.