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## ESSAY

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### CLASS CERTIFICATION'S PRECLUSIVE EFFECTS

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*In September 2010, the Supreme Court granted certiorari in the controversial Baycol litigation. The central question will be whether, subsequent to a denial of class certification, preclusion can prevent an absentee from seeking to certify another class action on a similar claim. This Essay answers that question in the affirmative, while warning that the preclusion is very limited in scope. It arrives at this answer by analogizing to the more established doctrine of jurisdiction to determine no jurisdiction: if a court's finding of no jurisdiction over the subject matter or the person can preclude, then a finding of no authority to proceed as a class action should be preclusive—but only on that precise issue of no authority.*

#### INTRODUCTION

A federal court denies certification of a plaintiff class action, thereby declaring the absentees to be nonparties. One of those absentees then brings a class action on a similar claim in a different jurisdiction with an identical class action rule, provoking the common defendant to invoke res judicata. Is the issue of certifiability subject to collateral estoppel?<sup>1</sup> Academics might answer “no,”<sup>2</sup> on the ground that res ju-

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<sup>1</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) (stating the general rule of issue preclusion). The cases speak only of collateral estoppel, but direct estoppel might be a more appropriate term here, as a certifiability issue will already have been litigated with respect to the same claim. See *id.* § 17 cmt. c, § 27 cmt. b. Better yet, as this Essay argues, one might invoke the separate res judicata doctrine called jurisdiction to determine no jurisdiction. See Kevin M. Clermont, *Sequencing the Issues for Judi-*

dicata normally does not bind nonparties.<sup>3</sup> But the courts generally answer “yes,”<sup>4</sup> based on the idea that no reasons sufficiently justify retrying the same issue as long as the class representative adequately represented the absentee in the certification attempt.<sup>5</sup> Now the U.S. Supreme Court stands poised to enter the fray via the controversial *Baycol* case.<sup>6</sup>

This Essay tackles *Baycol*'s central question of whether, after a denial of class certification, preclusion can reach an absentee. Although this question is central in many cases, only occasional class actions will present it cleanly. On the one hand, many cases will fall beyond the reach of preclusion because some doctrinal requirement, as measured by the rendering court's law,<sup>7</sup> is unmet. First, only a final

*cial Decisionmaking: Limitations from Jurisdictional Primacy and Intrauit Preclusion*, 63 FLA. L. REV. (forthcoming 2011) (manuscript at 19), available at <http://ssrn.com/abstract=1658931> (“A court should have authority to determine its lack of authority. The initial court's ruling that it lacks authority should prevent a second try that presents exactly the same issue.”).

<sup>2</sup> See, e.g., ALI, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.11 (2010) (supporting a rebuttable presumption against aggregate treatment as a matter of comity, but rejecting collateral estoppel because absentees were not parties and because preclusion would therefore rest on forbidden virtual representation). But see Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1016 (2006) (“And if the plaintiff refiles the case as a class action in state court, it is again subject to removal to federal court, where preclusion will presumably apply to both jurisdiction and certification issues.” (citing cautiously *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 767-69 (7th Cir. 2003))).

<sup>3</sup> See ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 149-69 (2001) (“As a general proposition, a judgment can bind only persons who were before the court.”).

<sup>4</sup> See, e.g., *In re Baycol Prods. Litig.*, 593 F.3d 716, 724 (8th Cir.) (finding “that the parties against whom the rule is asserted are the same parties or parties in privity to those in the prior action and that their interests have been adequately represented”), cert. granted sub nom. *Smith v. Bayer Corp.*, 131 S. Ct. 61 (2010); BRIAN ANDERSON & ANDREW TRASK, THE CLASS ACTION PLAYBOOK 245 (2010). But see *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 180 (5th Cir. 1996) (alternative holding) (“It is our considered view that the wide discretion inherent in the decision as to whether or not to certify a class dictates that each court—or at least each jurisdiction—be free to make its own determination in this regard.”).

<sup>5</sup> See CASAD & CLERMONT, *supra* note 3, at 29-38. The same issue can arise from state court denials of certification. Compare *Johnson v. GlaxoSmithKline, Inc.*, 83 Cal. Rptr. 3d 607, 618-19 (Cal. Ct. App. 2008) (refusing preclusion, but in a case involving an earlier federal court denial), with *Daboub v. Bell Gardens Bicycle Club, Inc.*, No. B200685, 2008 WL 4648797, at \*4-6 (Cal. Ct. App. Oct. 22, 2008) (applying preclusion by earlier state court denial and rejecting *Johnson*'s dictum).

<sup>6</sup> *Smith*, 131 S. Ct. at 61. The Court held oral argument on January 18, 2011.

<sup>7</sup> See *Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1014 (8th Cir. 2002); KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE § 5.6 (2d ed. 2009) (recognizing, within limits, the ability of a sovereign to control the scope of the preclusive effects of its

judgment is binding.<sup>8</sup> Second, only issues actually litigated and determined in a manner essential to the judgment are binding.<sup>9</sup> Third and most pertinently, the issues in the two suits must be the same, which is a requirement with a strict meaning that demands that the factual or legal issues be identical.<sup>10</sup> Preclusion will extend neither to a new situation in which the facts have changed<sup>11</sup> nor to another jurisdiction with a class action rule that differs in writing or in application.<sup>12</sup> On the other hand, some class action certification decisions can satisfy all these requirements of preclusion, a situation that prevails more readily between courts in the same system, but possibly could arise between federal and state courts or between different states when certification presents itself identically under the second sovereign's laws.<sup>13</sup> Still, the central question may nevertheless sink toward obscurity if matters such as interjurisdictional injunctive powers complicate the procedural setting.

This Essay assumes a certification decision satisfying those requirements of preclusion. Thereupon it cleanly asks whether the

courts' judgments); *infra* note 77 and accompanying text (discussing the analogous choice of law for jurisdiction to determine jurisdiction). In the case first discussed in the text below, the court correctly observed, but confusedly explained, that "federal law regarding collateral estoppel will be applied to the present case." *Murray v. Sears, Roebuck & Co.*, No. 09-05744, 2010 WL 3490214, at \*2 (N.D. Cal. Sept. 3, 2010) (involving a class action certification decision in a CAFA action); *cf. In re Baycol*, 593 F.3d at 721, 724 (incorporating state preclusion law as federal common law and calling incorporation the usual practice, but indicating that the court would not incorporate state law that was less preclusive than federal *res judicata* law). On the governing law for ordinary *res judicata*, see generally *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), and Patrick Woolley, *The Sources of Federal Preclusion Law After Semtek*, 72 U. CIN. L. REV. 527 (2003).

<sup>8</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. g (1982); *see also* Kara M. Moorcroft, Note, *The Path to Preclusion: Federal Injunctive Relief Against Nationwide Classes in State Court*, 54 DUKE L.J. 221, 239 (2004) ("[T]he certification decision seems 'final' enough for purposes of the relitigation exception."). As to finality, note that a class certification decision is now appealable, in the appellate court's discretion, under Federal Rule of Civil Procedure 23(f). *See generally* Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277 (2008) (examining in detail the substance, origin, and application of the Rule).

<sup>9</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); Moorcroft, *supra* note 8, at 248-49.

<sup>10</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1982); Moorcroft, *supra* note 8, at 242-48.

<sup>11</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1982); CLERMONT, *supra* note 7, § 5.3, at 329, 332-33.

<sup>12</sup> *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 146 (3d Cir. 1998) (refusing to preclude a state court action involving a different class action rule).

<sup>13</sup> *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. e (1982) (applying federal legal determinations to a state setting).

denial of certification in action *A* can, to any degree, preclude certification in an action *B* brought by someone who was an adequately represented<sup>14</sup> absentee in that prior action.

## I. LEADING CASES ON CERTIFICATION PRECLUSION

### A. *Murray v. Sears, Roebuck & Co.*

A straightforward presentation of the question arises when *res judicata* comes as a defense in the second class action. In *Murray v. Sears, Roebuck & Co.*,<sup>15</sup> the plaintiff brought a statewide class action against Sears and Electrolux Home Products under California's consumer protection statutes. The essential allegation was that Sears had marketed Electrolux's laundry dryers using deceptive trade practices, which misrepresented the dryers as having a one-hundred-percent stainless steel drum when in fact the drum contained a nonstainless steel part. The defendants removed under the Class Action Fairness Act of 2005 (CAFA).<sup>16</sup> Then, in their motion to deny certification, the defendants invoked collateral estoppel on the basis of a Seventh Circuit decision that had reversed the certification of a similar class action against Sears alone.<sup>17</sup>

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<sup>14</sup> See *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1245 (11th Cir. 2006) ("Here, the district court refused to grant class certification in the Bayshore Action because the Dealers failed to demonstrate that they would be adequate class representatives, a prerequisite to certification under Rule 23(a)(4). Once this decision was made, Westgate became a stranger to the Bayshore Action."). Thus, if the first court decides that the plaintiff does not satisfy Rule 23(a)(4), then the certification denial will not be preclusive. Otherwise, the question of adequacy is open only on collateral attack and hence should be limited to due process adequacy. See RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 907-10 (10th ed. 2010) (discussing the screening role of Federal Rule 23 and its state counterparts). The preclusion should extend, under a conservative approach, to all persons who were adequately represented with respect to the same issue and also were described as being within the proposed but rejected class. Cf. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983) (extending tolling "to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action" (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974))).

<sup>15</sup> No. 09-05744, 2010 WL 2898291 (N.D. Cal. July 21, 2010). I am indebted to J. Russell Jackson, *Preclusive Effect of Class Certification Denial*, NAT'L L.J., Aug. 16, 2010, at 26 (favoring application of *res judicata*), for drawing my attention to this case.

<sup>16</sup> 28 U.S.C. § 1453 (2006).

<sup>17</sup> *Thorogood v. Sears, Roebuck & Co.*, No. 06C1999, 2007 WL 3232491, at \*3 (N.D. Ill. Nov. 1, 2007) (certifying this CAFA class action, which Sears had removed from Illinois state court), *rev'd*, 547 F.3d 742 (7th Cir. 2008) (Posner, J.) (denying class action while incorrectly describing the case as an original federal action), *cert. denied*, 130 S. Ct. 90 (2009). On remand, the district court retained jurisdiction over the indi-

That Seventh Circuit decision, *Thorogood v. Sears, Roebuck & Co.*, had denied class certification for a multistate class action that would have included purchasers in California. The appellate court had found “no common issues of law [or fact] because there did not appear to be a single understanding of the significance of labeling or advertising of the allegedly deceptive statements.”<sup>18</sup> Instead, the court had characterized the concerns of the plaintiff—who had relied on an advertisement of the “stainless steel drums” to conclude that the drums would not leave rust stains on clothes—to be “idiosyncratic.”<sup>19</sup>

Although Martin Murray was neither a named plaintiff nor a witness in the Illinois federal class action, the federal district judge in California accepted the collateral estoppel argument of the two defendants. Thus, she denied class certification in the new class action. First, the judge found the requirements for issue preclusion were met. She found, in particular, the pertinent legal and factual issues to be identical, having recognized that estoppel would not apply unless the same issue arose in both suits.<sup>20</sup> Second, the judge rejected the plaintiff's argument that he was a stranger to the prior action.<sup>21</sup> Admittedly, collateral estoppel required adequate representation in the prior

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vidual plaintiff's action but dismissed it as moot after the plaintiff refused a full settlement; the Seventh Circuit affirmed on February 12, 2010. *Thorogood v. Sears, Roebuck & Co.*, 595 F.3d 750 (7th Cir. 2010) (Posner, J.). On remand, the district court discretionarily denied an injunction against bringing state class actions and left the defendant to invoke collateral estoppel; the Seventh Circuit reversed on November 2, 2010, holding Sears to be entitled to an injunction that would protect it from “settlement extortion” in the form of plaintiffs' pursuing extensive discovery and huge recovery in class actions brought in multiple states. *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 843, 848 (7th Cir. 2010) (Posner, J.) (characterizing “this third appeal [as] arising out of a near-frivolous class action suit by Steven Thorogood”).

<sup>18</sup> *Pella Corp. v. Saltzman*, 606 F.3d 391, 393 (7th Cir. 2010) (summarizing the *Thorogood* decision).

<sup>19</sup> *Thorogood*, 547 F.3d at 747.

<sup>20</sup> See *Murray*, 2010 WL 2898291, at \*4 (finding that the issues were sufficiently identical in the *Thorogood* action to justify collateral estoppel). Mr. Murray subsequently amended the complaint to avoid collateral estoppel by convincing the court that his action had become sufficiently different from *Thorogood*. See *Murray v. Sears, Roebuck & Co.*, No. 09-05744, 2010 WL 3490214, at \*4 (N.D. Cal. Sept. 3, 2010). But that non-appealable success prompted the Seventh Circuit to enjoin Mr. Murray's further pursuit of the class action in California. See *Thorogood*, 624 F.3d at 854 (deciding that the amended complaint still fell within the reach of collateral estoppel because it presented the same issue of commonality), *reh'g denied*, 627 F.3d 289, 292-93 (7th Cir. 2010) (rejecting a petition that attacked “the Panel's role as the self-assured Simon Cowell of the Circuits”). That outcome left the *Murray* plaintiff in the position of filing an amicus brief in the *Baycol* litigation. See Brief of Steven J. Thorogood & Martin Murray as Amici Curiae in Support of Petitioners, *Smith v. Bayer Corp.*, 131 S. Ct. 61 (2010) (No. 09-1205).

<sup>21</sup> *Murray*, 2010 WL 2898291, at \*5.

suit, but the judge found that Murray had received adequate representation in Illinois because (1) the Illinois district court had so found in certifying the class;<sup>22</sup> (2) the parties in California had not “seriously contested” the point, presumably because the plaintiff’s counsel clearly had done an adequate job;<sup>23</sup> and (3) the same lead counsel had brought both actions, even if this made the second class action “appear to be an example of ‘deliberate maneuvering to avoid the effects of *Thorogood*.’”<sup>24</sup>

### B. In re Baycol Products Litigation

The same question of preclusion can arise in connection with an injunction in the first court prohibiting putative class members from bringing new class actions. That situation describes the *Baycol* litigation, coming out of the Eighth Circuit and now before the Supreme Court.<sup>25</sup>

Here the first class action involved plaintiff George McCollins seeking in 2001 to represent a West Virginia class against the makers of Baycol, an anticholesterol drug. The defendants removed on the basis of diversity. The Judicial Panel on Multidistrict Litigation consolidated the action with thousands of similar cases in the District of Minnesota for pretrial proceedings.<sup>26</sup> In 2008, upon the defendants’ motion,

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<sup>22</sup> See *id.* The *Murray* court relied on the district court’s certification in *Thorogood*, 2007 WL 3232491, at \*3. This alternative holding in *Murray* is a suspect application of collateral estoppel against the victorious party. See *LaBuhn v. Bulkmatic Transp. Co.*, 865 F.2d 119, 122 (7th Cir. 1988) (dictum) (“[A] finding which a party had no incentive (other than fear of collateral estoppel) to appeal, because he won, *has no collateral estoppel effect.*”); *CASAD & CLERMONT*, *supra* note 3, at 139. Moreover, it rests on a finding rendered nonessential by reversal. See *id.* at 127-29. But the earlier case of *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 333 F.3d 763, 769 (7th Cir. 2003), had likewise looked to just such a flimsy finding of adequacy. Indeed, *In re Baycol Products Litigation*, 593 F.3d 716, 724-25 (8th Cir.), *cert. granted sub nom.* *Smith v. Bayer Corp.*, 131 S. Ct. 61 (2010), took this dangerous approach further by looking to the prior court’s *assumption* of adequacy in the course of *denying* certification for lack of commonality. Even putting these basic mistakes in applying *res judicata* aside, there remains the more fundamental concern of using a finding of adequate representation to cut off an attack for inadequate representation. See generally Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998); Patrick Woolley, *Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages*, 58 U. KAN. L. REV. 917 (2010).

<sup>23</sup> *Murray*, 2010 WL 2898291, at \*5.

<sup>24</sup> *Id.* (quoting *Tice v. Am. Airlines, Inc.*, 162 F.3d 966, 971 (7th Cir. 1998)). Later the Seventh Circuit found that the representation in fact “was adequate (it was energetic and pertinacious to a fault).” *Thorogood*, 624 F.3d at 853.

<sup>25</sup> *In re Baycol Prods. Litig.*, 593 F.3d 716 (8th Cir.) (Murphy, J.), *cert. granted sub nom.* *Smith v. Bayer Corp.*, 131 S. Ct. 61 (2010).

<sup>26</sup> *Id.* at 720.

the presiding judge denied certification for McCollins's class, pointing to the predominance of individual issues of showing harm or injury.<sup>27</sup>

Two of the absentees, Smith and Sperlazza, had brought the second class action in West Virginia state court in late 2001.<sup>28</sup> They sought to represent a West Virginia class and made allegations similar to McCollins's, but structured the action to defeat diversity.<sup>29</sup> They moved for certification in the state court in late 2008.

Defendant Bayer Corporation then moved in the District of Minnesota to enjoin Smith and Sperlazza from relitigating the certification issue in the West Virginia state court. The federal district court granted the injunction.<sup>30</sup> Although granting an injunction raises issues concerning the Anti-Injunction Act<sup>31</sup> as well as the existence of personal jurisdiction over the absentees sufficient to enjoin them,<sup>32</sup> the central issue—and the concern of this Essay—remains the permissibility of precluding absentees.<sup>33</sup> “The district court’s injunction was

<sup>27</sup> *In re Baycol Prods. Litig.*, 265 F.R.D. 453, 456-58 (D. Minn. 2008). The judge also granted summary judgment against McCollins on his individual claim, because McCollins sought only refunds for economic loss and failed to show that Baycol was different from what he had bargained for. *Id.* at 458-60. There was no appeal.

<sup>28</sup> *In re Baycol*, 593 F.3d at 720.

<sup>29</sup> Again, the Eighth Circuit took a lax approach to the requirements of res judicata. See *supra* note 22. Here the second action had some different allegations, such as adding a claim for fraud, but the court brushed this point aside. “The same cause of action framed in terms of a new legal theory is still the same cause of action.” *In re Baycol*, 593 F.3d at 723 n.5 (quoting *Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1015 (8th Cir. 2002)). But the *Canady* court was discussing claim preclusion. The *Baycol* court picked up this faulty argument directly from the defendant’s brief. See Brief of Defendant-Appellee Bayer Corp. at 24, *In re Baycol*, 593 F.3d 716 (No. 09-1069). However, the defendant seemed to back away from this argument in its Brief in Opposition to Petition for Certiorari at 19-20, *Smith v. Bayer Corp.*, 131 S. Ct. 61 (2010) (No. 09-1205) (suggesting that issue preclusion—not claim preclusion—is presented in *Smith*), and abandoned it in the Brief for Respondent at 30-31, *Smith*, 131 S. Ct. 61 (No. 09-1205) (arguing directly that the issue was the same).

<sup>30</sup> *In re Baycol Prods. Litig.*, No. 02-0199, 2008 WL 7425712, at \*7 (D. Minn. Dec. 9, 2008).

<sup>31</sup> 28 U.S.C. § 2283 (2006).

<sup>32</sup> Compare *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 806-14 (1985) (requiring some equivalent of personal jurisdiction over out-of-state class members), with *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 141 (3d Cir. 1998) (finding that absentees could not be subjected to the court’s injunctive power for lack of minimum contacts).

<sup>33</sup> The Supreme Court granted certiorari in *Smith v. Bayer* on these obscurely phrased questions:

1. Among the elements for the doctrine of collateral estoppel to be used in support of the relitigation exception to the Anti-Injunction Act are requirements that the state parties sought to be estopped are the same parties or in privity with parties to the prior federal litigation and that issues necessary to the resolution of the proceedings are also identical. In determining whether

proper if collateral estoppel would bar respondents from seeking certification of a West Virginia economic loss class in state court.”<sup>34</sup>

The Eighth Circuit affirmed. It conceded that Smith and Sperlazza had not received notice or an opportunity to opt out because McCollins’s class had never attained certification, but held that McCollins had adequately represented them.<sup>35</sup> Smith and Sperlazza had enjoyed the opportunities to intervene and to appeal.<sup>36</sup> If left unbound, absentees could keep trying for certification until they got some anomalous court to certify—perhaps in a nationwide class action that would erase all the prior losses—even though a contrary decision on certification would have bound the defendants.<sup>37</sup> Finally, the dispute involved whether to bind the two new plaintiffs on certification, not on the merits. Smith and Sperlazza “are still free to pursue individual claims in state court. . . . The protections available to [them] in the context of an adverse certification ruling include their right to adequate representation, their ability to appeal, and the fact that the decision still allows them to pursue their individual claims.”<sup>38</sup>

issues are identical, courts have also recognized that state courts should have discretion to apply their own procedural rules in a manner different from their federal counterparts. Can the district court’s injunction be affirmed when neither the parties sought to be estopped nor the issues presented are identical?

2. It is axiomatic that everyone should have his own day in court and that one is not bound by a judgment *in personam* in a litigation in which he has not been made a party by designation or service of process. One exception to this rule are absent members of a class in a properly conducted class action because of the due-process protections accorded such absent members once class certification has been granted. Does a district court have personal jurisdiction over absent members of a class for purposes of enjoining them from seeking class certification in state court when a properly conducted class action had never existed before the district court because it had denied class certification and due-process protections had never been afforded the absent members?

Petition for Writ of Certiorari at i, *Smith*, 131 S. Ct. 61 (No. 09-1205).

<sup>34</sup> *In re Baycol*, 593 F.3d at 721.

<sup>35</sup> *Id.* at 724-25; see also *supra* note 22.

<sup>36</sup> *In re Baycol*, 593 F.3d at 725.

<sup>37</sup> See *id.* (noting that Smith and Sperlazza “would have been included in a certified class in this case”); see also *id.* at 723-24 (“Relitigation in state court of whether to certify the same class rejected by a federal court presented an impermissible ‘heads-I-win, tails-you-lose situation.’” (quoting *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 767 (7th Cir. 2003))).

<sup>38</sup> *Id.* at 725. Actually, all of the points in this paragraph of text, except for adequacy of representation, appeared in the court’s discussion of the first court’s personal jurisdiction over the absentees, justifying the conclusion that “[t]hese safeguards satisfy due process and are sufficient to bind them in personam to the district court’s certifi-



The Supreme Court may very well reverse for, say, lack of authority to enjoin, or even for inadequacy of representation<sup>39</sup> or failure to satisfy the same-issue requirement.<sup>40</sup> The concern of this Essay, however, is the correctness of the Eighth Circuit's extension of preclusion to the absentees.

### C. In re Bridgestone/Firestone

In affirming the *Baycol* injunction, the Eighth Circuit relied heavily on the granddaddy of precedent in this area, *In re Bridgestone/Firestone*.<sup>41</sup> Leading up to that "unprecedented decision,"<sup>42</sup> the *Bridgestone/Firestone* district court had certified a nationwide class action based on diversity jurisdiction and alleging defects in many models of tires, but the Seventh Circuit had reversed for unmanageability.<sup>43</sup> After the filing of many follow-up class actions around the country, the defendants asked the district court to enjoin all such class actions. The district court denied the motion and the Seventh Circuit reversed again, ruling that the district court should enjoin pursuit of all duplicative nationwide class actions, but not any statewide class actions with their different manageability concerns.<sup>44</sup> The district court then did so.<sup>45</sup>

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cation decision." *Id.* But the Eighth Circuit relied here on the discussion of *Bridgestone/Firestone*, which appeared to be addressing preclusion, rather than personal jurisdiction. See *In re Bridgestone/Firestone*, 333 F.3d at 768 ("[U]nnamed class members have the status of parties for many purposes and are bound by the decision whether or not the court otherwise would have had personal jurisdiction over them."); see also *infra* Part IV (discussing preclusion and jurisdiction's similarities and differences).

<sup>39</sup> See *supra* notes 14 & 22.

<sup>40</sup> See *supra* notes 12 & 29.

<sup>41</sup> *In re Bridgestone/Firestone*, 333 F.3d at 763.

<sup>42</sup> Moorcroft, *supra* note 8, at 238 (arguing in favor of the decision as protecting federal courts from state intrusion); see also *id.* at 235 n.75 (discussing the novelty of *Bridgestone/Firestone's* approach).

<sup>43</sup> *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 205 F.R.D. 503 (S.D. Ind. 2001), *rev'd*, 288 F.3d 1012 (7th Cir. 2002) (Easterbrook, J.), *cert. denied*, 537 U.S. 1105 (2003).

<sup>44</sup> *In re Bridgestone/Firestone*, 333 F.3d at 769; see also *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 844 (7th Cir. 2010) (confirming the *Bridgestone/Firestone* precedent); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2117 (2008) (favoring issuance of such injunctions and arguing that "due process imposes no obstacle to a federal order enforcing a denial of certification"). But see Timothy Kerr, *Cleaning Up One Mess to Create Another: Duplicative Class Actions, Federal Courts' Injunctive Power, and the Class Action Fairness Act of 2005*, 29 HAMLINE L. REV. 217, 233 (2006) (arguing that issuing an injunction based on a decision not to certify a class "is an incorrect application of preclusion law").

<sup>45</sup> *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 271 F. Supp. 2d 1080, 1080 (S.D. Ind. 2003) (adopting the Seventh Circuit's language in ordering that "all

## II. APPROACHING THE CENTRAL QUESTION

A. *The American Law Institute's Route*

The American Law Institute explicitly rejects *Bridgestone/Firestone*.<sup>46</sup> The ALI's blackletter provides: "A judicial decision to deny aggregate treatment for a common issue or for related claims by way of a class action should raise a rebuttable presumption against the same aggregate treatment in other courts as a matter of comity."<sup>47</sup> Having chosen to rest this presumption on comity rather than preclusion, the ALI refers to "due-process limitations" in the accompanying comment while explaining:

The choice of comity rather than preclusion as the focus of this Section stems from the difficulties associated with the latter with respect to a denial of class certification. The major difficulty arises from the recognition that, as to such a denial, the prospective absent class members have become neither parties to the proposed class action nor persons with any attributes of party status (such as the capacity to be bound thereby, as in a duly certified class action). Nor is there any guarantee that prospective absent class members even would be aware of the court's determination of their ability to assert claims as a class action. The notion that absent class members could be bound in an issue-preclusion sense with respect to the seeking of certification in another court, even for the same proposed class action, runs afoul of existing precedents that confine to certain narrowly defined categories the situations in which preclusion can be extended to reach nonparties. Issue preclusion arising from a denial of class certification as to would-be absent class members would approach the kind of "virtual representation" disallowed under current law.<sup>48</sup>

I assume that the ALI is not resorting to some abstract party/nonparty line.<sup>49</sup> It is instead asking whether absentees can and should be

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members of the putative national classes . . . , and their lawyers,' are hereby prohibited 'from again attempting to have nationwide classes certified over defendants' opposition with respect to the same claims'" (quoting *In re Bridgestone/Firestone*, 333 F.3d at 769)).

<sup>46</sup> See ALI, *supra* note 2, § 2.11 reporters' note cmt. b (arguing that the *Bridgestone/Firestone* court went beyond "the outer bounds for nonparty preclusion").

<sup>47</sup> *Id.* § 2.11.

<sup>48</sup> *Id.* § 2.11 cmt. b; see also *id.* reporters' note cmt. b (citing *Taylor v. Sturgell*, 553 U.S. 880 (2008), for the rejection of the "virtual representation" principle).

<sup>49</sup> See *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002) ("Nonnamed class members, however, may be parties for some purposes and not for others. The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context."). For example, the court theoretically can subject nonnamed class members to discovery as if they were parties, even before certification. See Joseph H. Park, *Precertification*, in A PRACTITION-

treated as privies. Reasonable people could certainly disagree over whether such a step would optimize class certification's preclusive effects. Nonetheless, in my opinion, the ALI's position—or rather its implication—is wrong in two other respects.

First, the ALI should not be invoking, however obliquely, the Due Process Clause as a barrier to preclusion. Our law on a judgment's preclusive reach as to nonparties does not come close to raising due process concerns. *Res judicata* law comprises society's decision on how far to go with nonparty preclusion, and society has decided to restrict its reach well short of where due process would step in to prohibit preclusion.<sup>50</sup>

This argument against the ALI begins by defining privity as a label for those persons who were nonparties to an action but who are nevertheless subject to generally the same rules of *res judicata* as are the former parties. The authorization for this treatment lies in some sort of representational relationship that existed between the nonparty and a former party. In invoking that authorization to specify which nonparties to consider privies, *res judicata* law demands that the policy reasons for binding the nonparty substantially outweigh the social costs. Indeed, of the various kinds of nonparties who are candidates for privity, the law designates only those who fall within a set of clear, simple, and rigid rules that together approximate the outcome of that balancing of benefits and costs. Moreover, because the various kinds of privies differ widely, and especially in the nature of the relationship of privity to party, qualifications and exceptions start sprouting up with respect to the binding effects of the judgment in order to reflect the privity relationship's decreasing intensity.<sup>51</sup>

The preclusion of nonparties under *res judicata* law “does not contravene the Constitution, because all that due process guarantees is a full and fair day in court enjoyed in person *or through a representative*.”<sup>52</sup> Due process, always reasonable and realistic, therefore allows binding many more nonparties than one might assume.<sup>53</sup> In this realm, due process itself requires only “adequate representation”—

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ER'S GUIDE TO CLASS ACTIONS 3, 11-12 (Marcy Hogan Greer ed., 2010) (noting the existence, but rare invocation, of federal courts' power to do so).

<sup>50</sup> See *Tice v. Am. Airlines, Inc.*, 162 F.3d 966 (7th Cir. 1998) (holding that adequate representation may satisfy due process but is not enough to create privity).

<sup>51</sup> See CLERMONT, *supra* note 7, § 5.4, at 339-41.

<sup>52</sup> *Id.* at 339.

<sup>53</sup> *Id.* The Supreme Court's seemingly more demanding decisions that have expressed a right-to-a-day-in-court theme were interpreting statutes or rules or subconstitutional doctrine, not the Due Process Clause. See generally Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992).

such that, for class actions, the absentees actually agreed with a named party as to general objectives and the party vigorously and competently pursued those objectives, as measured by the outcome of that representation.<sup>54</sup>

To summarize this response to the ALI's first error, a court's judgment could constitutionally bind all persons whose interests received adequate representation; a court could bind them not only through the flexible doctrine of stare decisis, but also through the strictures of res judicata. Society, however, chooses to bind nonparties by judgment in a narrower fashion—and expresses this choice in its res judicata law. Res judicata binds “only those nonparties closely related to the representative party or, as the law phrases it, those in privity with the party.”<sup>55</sup> That is, privity requires adequate representation plus something else. That something might be a relationship sufficiently ensuring alignment and protection of interests, or some sort of affirmative conduct signifying consent to representation. The question before us, then, is one of res judicata, not one of due process.

Second, by its reference to virtual representation, the ALI signaled its heavy reliance on the intervening precedent of *Taylor v. Sturgell*.<sup>56</sup> The ALI's deliberations had started with a draft that provided for issue preclusion.<sup>57</sup> *Taylor* led the ALI to reconsider this draft: “Informed by the *Taylor* Court's analysis of the outer bounds for nonparty preclusion, this Section rejects the *Bridgestone/Firestone* court's pre-*Taylor* view of the issue-preclusive effect that may properly flow from a denial of class certification.”<sup>58</sup> Although the ALI was wise to look to a precedent that refined privity rather than exploring due process,<sup>59</sup> it was wrong

<sup>54</sup> See 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1789 (3d ed. 2005) (“[A] judgment in a class or representative action may bind members of the class who were not parties to the suit provided their interests were adequately represented.”). See generally Woolley, *supra* note 22, at 921-49 (discussing the function and contours of the adequacy of representation requirement).

<sup>55</sup> CLERMONT, *supra* note 7, § 5.4, at 339.

<sup>56</sup> 553 U.S. 880, 900 (2008) (holding that federal res judicata law does not bind on the basis of virtual representation, but instead requires, in addition to alignment of interests, that “either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty”).

<sup>57</sup> See ALI, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.12 (Discussion Draft 2006) (“A judicial decision to deny aggregate treatment for a common issue should have issue-preclusive effect as to the bases for that decision in other courts . . .”).

<sup>58</sup> ALI, *supra* note 2, § 2.11 reporters' note cmt. b.

<sup>59</sup> See FIELD ET AL., *supra* note 14, at 760-61 (summarizing and excerpting the *Taylor* case to focus on privity).

to view *Taylor* as forbidding res judicata's application to a denial of class action certification. *Taylor* counsels caution in extending res judicata, but it does not forbid its application in the *Bridgestone/Firestone* situation.

*Taylor* recognized that "the rule against nonparty preclusion is subject to exceptions"<sup>60</sup>—albeit quite limited and rigidly defined exceptions.<sup>61</sup> The ALI read that recognition very cautiously: "The Court hastened to underscore, however, that those exceptions 'delineate discrete' situations that 'apply in "limited circumstances," none of which extend generally to the situation of a would-be absent class member with respect to a denial of class certification."<sup>62</sup> The better reading of *Taylor* is that it stands for a conservative approach to creating extensions to privity and sets up some minimum requirements for them,<sup>63</sup> but that it does not rule out looking among the existing categories of privies for one that includes a seemingly new situation.

How much nonparty preclusion does *Taylor* permit? Privies include persons whom a party *actually* represented in the litigation, thus including beneficiaries represented by a trustee or executor, as well as class action members adequately represented by their class representative.<sup>64</sup> Yet privity does not reach all persons *adequately* represented by parties. *Taylor* held that preclusion does not extend to virtual representation, which entails merely common interests shared by party and

<sup>60</sup> *Taylor*, 553 U.S. at 893.

<sup>61</sup> *See id.* at 901 ("Preclusion doctrine, it should be recalled, is intended to reduce the burden of litigation on courts and parties. 'In this area of the law,' we agree, 'crisp rules with sharp corners are preferable to a round-about doctrine of opaque standards.'" (citation and internal quotation marks omitted) (quoting *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 881 (6th Cir. 1997))).

<sup>62</sup> ALI, *supra* note 2, § 2.11 reporters' note cmt. b (quoting *Taylor*, 553 U.S. at 898 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989))).

<sup>63</sup> *See Taylor*, 553 U.S. at 900-01 (reviewing the recognized extensions of privity resting on adequate representation). In a critical passage, the *Taylor* Court identified the following required protections, which are at least "grounded in due process":

A party's representation of a nonparty is "adequate" for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and her representative are aligned, see *Hansberry v. Lee*, 311 U.S. 32, 43 (1940)]; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty, see *Richards v. Jefferson County*, 517 U.S. 793, 801-02 (1996)] . . . . In addition, adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented, see *Richards*, 517 U.S., at 801. In the class-action context, these limitations are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23.

*Id.*

<sup>64</sup> *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 41–42 (1982).

nonparty.<sup>65</sup> Instead, the required relationship must be closer. *Taylor* thus drew a line. The task is to determine on which side of the line adequately represented absentees fall with respect to a class action certification denial.

Just as the answer to this central question does not lie in the Due Process Clause, it does not lie in a reference to *Taylor*. The answer instead lies in deciding whether the law should choose to treat the absentees as privies. And that choice rests on policy and precedent.

### B. *Delineating the Reach of Privity*

As conceded above, reasonable people may disagree over how, from a policy perspective, class certification's preclusive effects may be optimized based on costs and benefits. The cases above developed the arguments on the two sides.

Before assessing the costs and benefits, one should recognize anew that the dispute over preclusion in the subsequent class action concerns preclusion as to certification rather than as to the merits. The absentee does not risk losing the individual claim, but only the "right" to bring a class action.<sup>66</sup> However, that right is one that belongs to society; it is not a property interest of any one individual. Society should have concerns when everyone loses in advance the right to bring a class action, but society should worry less after someone has litigated the propriety of a class action for a particular set of claims. Indeed, society could defensibly conclude that absentees lose the "privilege" (and windfall returns) of bringing a class action after an adequate representative has unsuccessfully litigated the class certification question. Putting that qualification aside and assuming adequate representation in the initial class action, the two sides' arguments run as follows.

Proponents of preclusion argue that it would be, on balance, efficient and fair because preclusion (1) avoids wasteful relitigation and inconsistent adjudications, as it extends the power of the rendering court to dispose of the dispute; (2) provides repose and protects reliance interests; and (3) is fairer to class action defendants in that it (a) avoids imposing the burdens of relitigating, (b) prevents absentees from searching for the anomalous court that will certify the class, and (c) treats putative class members the same as the defendant.

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<sup>65</sup> *Taylor*, 553 U.S. at 901.

<sup>66</sup> See Brief for Respondent, *supra* note 29, at 44-50; Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011 (2010).

Opponents of preclusion argue that nonpreclusion would be, on balance, efficient and fair because it (1) allows a fresh look in pursuit of the right result, although the availability of nonmutual issue preclusion against the defendant means that the wrong result as to certification might come to prevail; and (2) is fairer to absentees, who did not receive notice or an opportunity to opt out, even if they had the opportunities to intervene and to appeal.

Thus, the argument for preclusion is not insubstantial at all.<sup>67</sup> It explains the weight of precedent favoring preclusion. Even the ALI agreed as to policy by conceding: "Short of issue preclusion . . . the court in the subsequent proceeding should generally exercise its discretion to avoid unnecessary friction with the court that initially denied class certification."<sup>68</sup>

Nevertheless, the costs on neither side are readily quantifiable. If a court eyed these costs without a proplaintiff or prodefendant bias, and without any unauthorized policy bias that favors or disfavors class actions, the court could not say with definitiveness which side has the stronger argument. *Taylor* did urge courts not to make close cost-benefit calls in favor of nonparty preclusion.<sup>69</sup> Thus, as the ALI concluded, *Taylor* counsels against creating a new category of privies to extend the preclusive effect of the denial of class action certification to absentees.

There is, however, a route around *Taylor*, one that courts and parties have yet to discover. Blazing that path requires finding an analogous provision among the existing categories of precluded privies—or parties whose treatment resembles that of privies. The analogy involves the *res judicata* law that treats jurisdictional findings.

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<sup>67</sup> See Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Respondent at 5-10, *Smith*, 131 S. Ct. 61 (No. 09-1205) (developing the argument for preclusion); Moorcroft, *supra* note 8, at 223-29 (developing a similar argument).

<sup>68</sup> ALI, *supra* note 2, § 2.11 cmt. b. The ALI's reliance on comity would not, however, provide sufficient assurance against relitigation. *Stare decisis* fails as well when the second class action is outside the domain of the first court.

<sup>69</sup> See, e.g., 553 U.S. at 906 (noting that, under similar circumstances, "courts should be cautious about finding preclusion").

III. A JURISDICTIONAL DETERMINATION'S PRECLUSIVE EFFECTS<sup>70</sup>A. *Jurisdiction to Determine Jurisdiction*

The doctrine of jurisdiction to determine jurisdiction treats a matter somewhat different from the normal application of *res judicata*: it does not involve preclusive use of determinations embedded in a valid judgment, but instead involves preclusive use of prior determinations underlying a judgment in order to establish the judgment's validity. That is to say, an affirmative ruling on subject-matter jurisdiction, territorial jurisdiction, or adequate notice can foreclose relitigation of that ruling—and thereby preclude the parties from attacking the resultant judgment by raising that ground in subsequent litigation.<sup>71</sup>

It is true that if a defendant faces suit in a court that lacks jurisdiction or fails to give notice, the defendant ordinarily does not have to respond in any way. If the defendant takes no action of any kind in response to the suit, the court may enter a default judgment, but the judgment will be invalid. If the plaintiff should attempt to assert rights based on that judgment in a later suit involving the same defendant, the defendant ordinarily can avoid the effects of the judgment by showing that its entry was without jurisdiction or notice. The defendant, in person or through a representative, has the right to a day in some court on the question of the fundamental authority of the court that rendered the earlier judgment.<sup>72</sup>

Alternatively, the defendant may choose to raise the jurisdiction or notice issue in the initial action by going before the challenged court itself. Then, the court that otherwise lacks authority could conceivably have jurisdiction to determine whether it has jurisdiction and whether its notice was good, and its affirmative rulings on such questions could bind the defendant so as to preclude relitigation of the same questions. The theory would be that because the essential issue of jurisdiction or notice was actually litigated and determined, even if erroneously, the defendant should not be allowed to relitigate the same issue in subsequent litigation. The defendant's appearance in the challenged court would then be the defendant's day in court on

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<sup>70</sup> This Part draws heavily from CLERMONT, *supra* note 7, § 5.1, and Clermont, *supra* note 1, at 16-21.

<sup>71</sup> See generally CLERMONT, *supra* note 7, §§ 4.4, 5.1(A)(3); CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 16, at 95-96 (6th ed. 2002) ("If the jurisdiction of a federal court is questioned, the court has the power, subject to review, to determine the jurisdictional issue.")

<sup>72</sup> See RESTATEMENT (SECOND) OF JUDGMENTS §§ 65-66 (1982).



the question of the forum's authority; the defendant could obtain appellate review of the erroneous ruling, of course, but could not challenge it by later seeking relief from judgment.<sup>73</sup>

Our law, in fact, accepts this so-called bootstrap principle, and so allows a court lacking fundamental authority to issue a judgment that will nevertheless be immune from attack in subsequent litigation.<sup>74</sup> Here the desire for finality outweighs the concern for validity. Indeed, our law accepts the bootstrap principle's value of finality with true enthusiasm, despite its conflict with the intuitive value of validity.<sup>75</sup>

Jurisdiction to determine jurisdiction constitutes a third body of *res judicata* law, distinguishable from claim and issue preclusion, or perhaps standing separate from *res judicata*. In particular, despite a similar appearance, it differs importantly from issue preclusion.<sup>76</sup> The

<sup>73</sup> This principle has been widely acknowledged. See, e.g., *Durfee v. Duke*, 375 U.S. 106, 116 (1963) (quasi in rem jurisdiction); *Johnson v. Muelberger*, 340 U.S. 581, 589 (1951) (jurisdiction over status); *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940) (subject-matter jurisdiction); *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525-26 (1931) (personal jurisdiction); RESTATEMENT (SECOND) OF JUDGMENTS §§ 10-12 (1982).

<sup>74</sup> See Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491, 494-99 (1967) (describing the doctrine and its operation).

<sup>75</sup> Our law applies the principle even more broadly than the foregoing illustration of actually-litigated-and-determined forum-authority defenses. Strangely, this extension comes in connection with subject-matter jurisdiction, in spite of the traditional lore about subject-matter jurisdiction's fundamental importance. On the one hand, an implicit determination of the unchallenged existence of subject-matter jurisdiction in any action litigated to judgment by contesting parties has the preclusive consequences of an actually litigated determination in foreclosing attack on the judgment. See, e.g., *Chicot Cty.*, 308 U.S. at 378 (precluding a defaulted defendant from collateral attack on subject-matter jurisdiction grounds, after other defendants had appeared and litigated the case without raising subject-matter jurisdiction and after the prior court had canceled the defendants' bonds); RESTATEMENT (SECOND) OF JUDGMENTS § 12 (1982). On the other hand, sometimes the interests inherent in subject-matter jurisdiction are too important to ignore; even an express finding of subject-matter jurisdiction will not preclude the parties from attacking the resultant judgment on that ground in special circumstances, such as where the court *plainly* lacked subject-matter jurisdiction or where the judgment *substantially* infringes on the authority of another court or agency. See *Kalb v. Feuerstein*, 308 U.S. 433, 439 (1940) (holding that a state court proceeding could not preclude a bankruptcy proceeding); see also RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmts. c, e (1982); Karen Nelson Moore, *Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 534, 543 (1981) ("[T]here is no substantial reason to depart from the application of general *res judicata* principles to collateral attacks upon subject matter jurisdiction.").

<sup>76</sup> For a fuller discussion of the differences between the doctrines, see CLERMONT, *supra* note 7, § 5.1(A)(3), at 307:

First, issue preclusion requires a valid prior judgment. Jurisdiction to determine jurisdiction does not require validity, but instead works to make invulnerable what could otherwise be an invalid judgment. Second, issue preclu-

reason for difference is that the conflicting policies that shape the doctrine of jurisdiction to determine jurisdiction are unique, and so they produce a unique set of rules. For related reasons tied to the notion that this doctrine defines the judgment even more intimately than does the rest of *res judicata*, the federal common law of jurisdiction to determine jurisdiction applies to a prior federal judgment.<sup>77</sup>

### B. *Jurisdiction to Determine No Jurisdiction*<sup>78</sup>

Can a court's ruling that it lacks jurisdiction have preclusive effect? Courts and scholars have elaborated this question less thoroughly than the jurisdiction-to-determine-jurisdiction doctrine, and thus the details of its answer remain more controversial. Nevertheless, it is clear that there exists, at least to some degree, a doctrine of jurisdiction to determine no jurisdiction.

In elaborating the related doctrine of hypothetical jurisdiction, the Supreme Court built upon the premise of a jurisdiction-to-determine-no-jurisdiction doctrine. In *Ruhrigas AG v. Marathon Oil Co.*,<sup>79</sup> the federal district court dismissed for lack of personal jurisdiction. The understanding was that the personal jurisdiction decision would have a binding effect, so as to prevent the plaintiff from suing

sion applies only in a subsequent action, and so does not apply on a motion for relief from judgment, which is technically a continuation of the initial action. Jurisdiction to determine jurisdiction, however, does apply to preclude a validity attack by such a motion, as well as by the other methods for relief from judgment. Third, issue preclusion usually does not work to bind the party prevailing on the issue. Jurisdiction to determine jurisdiction will preclude the successful plaintiff if the unsuccessful defendant would be precluded on the jurisdiction or notice issue. Fourth, issue preclusion applies only to issues actually litigated and determined. Jurisdiction to determine jurisdiction sometimes applies to issues of subject-matter jurisdiction that were not litigated at all, and even against a defaulting party. Fifth, and most importantly, special policies and concerns are at work with respect to the jurisdiction and notice defenses, so the law needs to develop special rules and exceptions for jurisdiction to determine jurisdiction.

<sup>77</sup> See *Harper Macleod Solicitors v. Keaty & Keaty*, 260 F.3d 389, 396-98 (5th Cir. 2001) (discussing the choice-of-law principles to apply under these circumstances, while distinguishing *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001)).

<sup>78</sup> See CLERMONT, *supra* note 7, § 4.4(B)(3), at 297 ("Passing beyond the *res judicata* effects of affirmative rulings on forum-authority, what if the initial court decides that it lacks jurisdiction or failed to give notice? That is, can a court, which is admittedly without authority to enter a valid judgment, make any rulings that have preclusive effect? Yes.").

<sup>79</sup> 526 U.S. 574, 587-88 (1999) (holding that a federal court can skip over a subject-matter jurisdiction defense to dismiss for lack of personal jurisdiction); see also Clermont, *supra* note 1, at 21-31 (delineating nonbypassable and resequeceable defenses).

repetitively. The parties as well as the Justices on oral argument assumed the existence of some intersystem preclusion.<sup>80</sup> The Court itself clearly envisaged intersystem preclusion, just as Justice Ginsburg suggested in her opinion for the unanimous Court: "If a federal court dismisses a removed case for want of personal jurisdiction, that determination may preclude the parties from relitigating the very same personal jurisdiction issue in state court."<sup>81</sup>

Moreover, intersystem preclusion was a necessary implication of *Ruhrgas's* holding, because allowing the Texas state court to reconsider the federal courts' decision on personal jurisdiction would undercut the Court's decision extending hypothetical jurisdiction. Preclusion was also necessary because otherwise the judgment would mean almost nothing. As Justice Ginsburg declared during oral argument, "[t]he Federal court would be accomplishing nothing [if it did not] bind the State court."<sup>82</sup> Accordingly, under the federal preclusion law applicable to a federal judgment, the federal judgment in the defendant's favor would prevent later suit in a Texas state court for lack of personal jurisdiction.<sup>83</sup>

Indeed, a court should have authority to determine its own lack of authority. The initial court's ruling that it lacks authority should prevent a second try that presents exactly the same issue. The initial ruling will defeat jurisdiction in any attempt to sue again in a second court where the same jurisdictional issue arises,<sup>84</sup> even when one court

<sup>80</sup> See Transcript of Oral Argument at 4, 8-9, 13, 30-31, *Ruhrgas*, 526 U.S. 574 (No. 98-470), 1999 WL 183813 (suggesting that the issue was one of potential conflict between federal and Texas state courts).

<sup>81</sup> *Ruhrgas*, 526 U.S. at 585 (citing *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 524-27 (1931), with the parenthetical to *Baldwin* that "personal jurisdiction ruling has issue-preclusive effect").

<sup>82</sup> Transcript of Oral Argument, *supra* note 80, at 9.

<sup>83</sup> See 18A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4436 & n.33 (2d ed. 2002) (collecting cases); cf. Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 21 (2001) (noting the novelty of the *Ruhrgas* approach); David L. Shapiro, *Justice Ginsburg's First Decade: Some Thoughts About Her Contributions in the Fields of Procedure and Jurisdiction*, 104 COLUM. L. REV. 21, 30 (2004) (finding some "difficulty with [the] reasoning" in *Ruhrgas*).

<sup>84</sup> See, e.g., *Coors Brewing Co. v. Méndez-Torres*, 562 F.3d 3, 8-9 (1st Cir. 2009) (noting the preclusive effect of the jurisdictional determination and highlighting its contrast with other preclusion doctrines), *abrogated on other grounds*, *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323 (2010); *Hill v. Potter*, 352 F.3d 1142, 1146 (7th Cir. 2003) (identifying jurisdictional determinations as "an important and applicable exception" to the rule that dismissals without prejudice are not preclusive); *Bromwell v. Mich. Mut. Ins. Co.*, 115 F.3d 208, 212-13 (3d Cir. 1997) ("Once the [district] court determined that it lacked jurisdiction . . . that determination had a preclusive effect."); *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1191 (D.C. Cir. 1983) (same).

is state and the other federal.<sup>85</sup> One argument for assigning at least this minimal preclusive effect to a court's ruling as to jurisdiction is that leaving it with no preclusive effect might raise the constitutional problem associated with advisory opinions.<sup>86</sup> More to the point, common sense supports preclusion on the threshold issue: to prevent a party—who chose the court that ruled against its own authority—from litigating the same point repetitively. So, for this limited purpose, the dismissal is a valid judgment.

Naturally, there should be limits to the preclusive effects. Dismissal on a jurisdictional defense does not bar a second action in an appropriate court that presents different jurisdictional issues.<sup>87</sup> Further, the initial court's negative ruling on the jurisdictional issue should not have normal issue-preclusive effects in a later action, and so should not preclude some similar issue that arises on the merits of the same or any other claim.<sup>88</sup> For such purposes, the prior judgment is invalid. After all, the initial court was supposed to be exercising only its jurisdiction to determine jurisdiction.<sup>89</sup> Many good reasons support such limits on preclusion, including not only the notion that limited juris-

<sup>85</sup> See, e.g., *ASARCO, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 (5th Cir. 1990) (“[T]he Louisiana courts would be bound by our ruling that defendants had insufficient contacts with Louisiana to satisfy the federal due process clause requisites for personal jurisdiction.”); *Eaton v. Weaver Mfg. Co.*, 582 F.2d 1250, 1255 (10th Cir. 1978) (“We must agree that the merits of the issue of personal jurisdiction over Volkswagen South was decided by the unappealed state court judgments and that they bar relitigation of the jurisdictional issue in the instant cases.”).

<sup>86</sup> See Michael J. Edney, Comment, *Preclusive Abstinence: Issue Preclusion and Jurisdictional Dismissals After Ruhrgas*, 68 U. CHI. L. REV. 193, 212-13 (2001) (discussing the Article III concerns inherent in rulings that have no preclusive effect).

<sup>87</sup> See *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866).

<sup>88</sup> See, e.g., *Anusbigian v. Trugreen/Chemlawn, Inc.*, 72 F.3d 1253, 1257 (6th Cir. 1996) (“[C]ontrary to the plaintiff's fear, expressed in his brief, that he might be foreclosed from seeking damages in state court under the doctrines of *res judicata* or ‘law of the case,’ the remand order forecloses nothing except further litigation of his claim in federal court.”); *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994) (“[A]lthough Ritchie's clients were barred (after Judge Jarvis's ruling) from relitigating whether their motion to quash could be heard before the IRS brought an enforcement action, Judge Hull was not bound by any factual findings made by Judge Jarvis for the limited purpose of considering the jurisdictional challenge . . . .”); *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956, 962 (7th Cir. 1982) (“Armen-Berry can sue By-Prod and Schiff under Article 14 of the Illinois Criminal Code in an Illinois court, and that court will not be bound by our reading of the Illinois law of punitive damages.”). But see, e.g., *Matosantos Commercial Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203, 1209 (10th Cir. 2001) (holding that an issue decided in a personal jurisdiction dismissal was preclusive on the merits in a second suit).

<sup>89</sup> See *Idleman, supra* note 83, at 57-63 (identifying carefully the outer bounds of a court's inherent power to determine its own jurisdiction).

diction should yield limited effects, but also the fact that the truncated procedure for deciding jurisdiction weighs against carrying jurisdictional determinations over to affect the merits.<sup>90</sup>

The main idea coming from the urge for preclusion and a sense for its limits is that a prior court lacking jurisdiction should be able to preclude little more than is absolutely necessary. A dismissal for lack of jurisdiction does not produce a generally valid judgment. Therefore, the rule emerges that the preclusive effect of jurisdiction to determine no jurisdiction reaches no further than the precise issue of jurisdiction itself, so that a finding of no jurisdiction will not otherwise be binding in any other action.<sup>91</sup>

A few corollaries follow from that basic rule. A determination of no jurisdiction probably should not generate nonmutual preclusion.<sup>92</sup> Nor should it work to establish, rather than defeat, the jurisdiction of the other court.<sup>93</sup> For example, a finding that a federal court lacks subject-matter jurisdiction because of the nonexistence of some fact critical to exclusive jurisdiction should not force a state court to accept jurisdiction.<sup>94</sup> Even though this limit on preclusion might lead to awkward situations,<sup>95</sup> extending the binding effect of the unempowered federal court's dismissal appears unnecessary and hence improper.

Additional arguments for this latter limit on preclusion might be (1) that the burden of proof for defeating jurisdiction is often lighter

<sup>90</sup> See Edney, *supra* note 86, at 206-22 (cataloging reasons).

<sup>91</sup> See Idleman, *supra* note 83, at 29 (approving limited preclusive effects); Edney, *supra* note 86, at 217-18 (noting the limited scope of the determination). It is true that 18A WRIGHT ET AL., *supra* note 83, § 4436, sounds more expansive: "Although a dismissal for lack of jurisdiction does not bar a second action as a matter of claim preclusion, it does preclude relitigation of the issues determined in ruling on the jurisdiction question." But in fact the specific discussion and the cases Wright et al. cite conform to the idea that preclusion extends only to "the same issue of jurisdiction." *Id.* at n.3. *But see id.* at n.16 (noting the collateral effect of jurisdictional determinations).

<sup>92</sup> See 18A WRIGHT ET AL., *supra* note 83, § 4436 (agreeing on the basis of the "importance and sensitivity of jurisdictional limits").

<sup>93</sup> R.G. Barry Corp. v. Mushroom Makers, Inc., 612 F.2d 651, 657 n.10 (2d Cir. 1979), *abrogated on other grounds*, Hertz Corp. v. Friend, 130 S. Ct. 1181 (2010). *But see* Roth v. McAllister Bros., 316 F.2d 143, 145 (2d Cir. 1963) ("[A] tribunal always possesses jurisdiction to determine its jurisdiction, and any fact upon which that decision is grounded may serve as the basis for an estoppel by judgment in any later action.").

<sup>94</sup> *Cf.* Kircher v. Putnam Funds Trust, 547 U.S. 633, 645-47 (2006) (stating that "[w]hile the state court cannot review the decision to remand in an appellate way, it is perfectly free to reject the remanding court's reasoning," but basing the refusal to establish jurisdiction by preclusion on the inability to obtain federal appellate review of the remand).

<sup>95</sup> See Julie Fukes Stewart, Note, "Litigation Is Not Ping-Pong," *Except When It Is: Resolving the Westfall Act's Circularity Problem*, 95 CORNELL L. REV. 1021, 1022-25 (2010) (describing cases that bounce between removal and remand).

than the burden of proof for establishing jurisdiction, and issue preclusion does not apply when the burden increases,<sup>96</sup> and (2) that establishing jurisdiction would usually work to the detriment of the defendant, and issue preclusion normally does not bind the victorious party.<sup>97</sup> These additional arguments are not determinative, however, because the rules of jurisdiction to determine no jurisdiction might be specially tailored and need not conform to those of issue preclusion.<sup>98</sup>

The jurisdiction-to-determine-no-jurisdiction doctrine is, however, not in all respects narrower than issue preclusion. The law's capability to shape this special preclusion doctrine also can broaden it. For example, by virtue of jurisdiction to determine no jurisdiction, an unreviewable remand for lack of removal jurisdiction might preclude a subsequent federal action on the same cause,<sup>99</sup> even though an inability to obtain appellate review usually defeats issue preclusion.<sup>100</sup>

#### IV. ANALOGIZING JURISDICTIONAL DETERMINATION TO CLASS CERTIFICATION

Personal jurisdiction authorizes rendering a judgment with preclusive effect. Indeed, jurisdiction over the person is a prerequisite to giving certain remedies, such as enjoining that person from suing elsewhere.<sup>101</sup>

By contrast, preclusion refers to binding someone to the outcome of a prior case. The extent of preclusion finds specification through the law of *res judicata*. *Res judicata* thus defines what the judgment decided for the parties and their privies.<sup>102</sup>

Personal jurisdiction and preclusion of privies are different concepts. Jurisdiction is possible without privy,<sup>103</sup> and *privy can exist without jurisdiction*.<sup>104</sup> The line for personal jurisdiction over absentees

<sup>96</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 28(4) (1982).

<sup>97</sup> See *supra* note 22 (collecting sources).

<sup>98</sup> See *supra* note 76 and accompanying text.

<sup>99</sup> See 18A WRIGHT ET AL., *supra* note 83, § 4436 ("Preclusion on the jurisdiction question should apply both on a subsequent attempt to remove and to an independent federal filing.").

<sup>100</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 28(1) (1982).

<sup>101</sup> See CLERMONT, *supra* note 7, §§ 4.2, 5.1(B)(1), 5.7(B).

<sup>102</sup> See *id.* § 5.1(A)(1).

<sup>103</sup> See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 34(3) (1982) (providing that a person who is neither party nor privy is beyond preclusion, which would be true even if personal jurisdiction would have existed).

<sup>104</sup> See, e.g., *id.* §§ 43–44 (providing that a successor in interest to property is a privy with respect to a judgment determining his predecessor's interest in that property,

tends to coincide with substantive due process,<sup>105</sup> while policy draws the privity line well short of procedural due process's requirement of adequate representation.<sup>106</sup>

Nevertheless, personal jurisdiction and preclusion of privies have a similar flavor and turn on similar considerations. Personal jurisdiction over absentees in a class action and preclusion of them are peculiarly similar notions. The similarity suffices to confuse some courts into mixing them together when discussing a *Baycol*-type problem.<sup>107</sup>

In certain class action settings, the two concepts begin to merge. *Phillips Petroleum Co. v. Shutts* recognized that personal jurisdiction is normally a prerequisite for valid judgment, which is in turn a prerequisite for preclusion.<sup>108</sup> But the Court further provided, in the context of a *certified* class action for damages, that adequately represented absentees who received notice and had rights to participate and to opt out were sufficiently subject to personal jurisdiction to authorize a binding judgment on the merits.<sup>109</sup> That is, certain procedures ensured enough protection to justify both jurisdiction and preclusion.

*Shutts* suggests the analogy. A denial of personal jurisdiction in an ordinary lawsuit works much the same as denial of class certification, because the latter announces that the court will not exercise personal jurisdiction over the absentees. Finding no jurisdiction means the court will not issue a valid judgment that supports preclusion. Similarly, denying class certification means the absentees are strangers un-

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which would be true even for a yet unborn successor not subject to personal jurisdiction).

<sup>105</sup> See CLERMONT, *supra* note 7, §§ 4.2(B)(1), 4.2(C)(1).

<sup>106</sup> See *supra* text accompanying notes 50-54.

<sup>107</sup> See, e.g., *supra* note 38 (describing the Eighth Circuit's *Baycol* discussion). The parties' briefs did not help the court untangle the two issues. The defendant phrased its central argument as follows: "Because Appellants' Interests Were Fully and Adequately Represented, They Are Bound *In Personam* by the Denial of Class Certification . . ." Brief of Defendant-Appellee, *supra* note 29, at iv. In the Supreme Court, the defendant did untangle the issues, arguing: "As Adequately Represented Unnamed Parties in *McCollins*, Petitioners Are Bound by the Denial of Class Certification." Brief for Respondent, *supra* note 29, at iii. The plaintiffs left it a muddle: "Both Due Process and Preclusion Principles Are Violated by Binding Absent Class Members to a Decision Denying Class Certification Because They Have Never Received Any Notice or an Opportunity to be Heard or to Opt Out." Brief for Petitioners at iii, *Smith v. Bayer Corp.*, 131 S. Ct. 61 (2010) (No. 09-1205).

<sup>108</sup> 472 U.S. 797, 820-23 (1985) (ruling, in a state plaintiff-class action seeking money damages for claimants from all over the country and abroad, that the Kansas court could not apply Kansas law to class members' claims unrelated to Kansas and that absent class members need not otherwise be subject to effective service of process as long as they received notice and had rights to participate and to opt out).

<sup>109</sup> See Woolley, *supra* note 22, at 959-75.

bound by any judgment in the lawsuit. Therefore, just as the determination of no personal jurisdiction means that there will be little to no preclusive effect from the judgment, a denial of class certification means that normally there will be no preclusion as to the class.

Yet, a determination of no personal jurisdiction will have a preclusive effect, albeit a very limited one. The jurisdiction-to-determine-no-jurisdiction doctrine stands for the proposition that lack of the normally required personal jurisdiction will not prevent a judgment binding only on the issue of no jurisdiction. In making a determination that it lacks jurisdiction, a court is indicating that it has enough hold of the parties to say authoritatively that it has no jurisdiction. The court can say that with binding effect, even though it in fact lacks jurisdiction to render a valid judgment on the merits. It can thereby accomplish something by its holding and avoid repetitive litigation of the exact same issue of jurisdiction.

If a court without jurisdiction can bind someone to a finding that jurisdiction is lacking, a court without authority of a comparable sort should be able to bind someone to a finding that authority is lacking. The denial of class certification is a comparable determination of no authority—arguably it is the only comparable determination of no authority, besides failure to give adequate notice—in that it announces that there will be no valid judgment as to the absent class members.<sup>110</sup> In other words, the term “jurisdiction” in the name of the jurisdiction-to-determine-no-jurisdiction doctrine means *authority prerequisite to validity*.

Therefore, a finding of no certification should preclude in the same way that a finding of no jurisdiction precludes. Moreover, giving such preclusive effect would serve the same policies of effectuating the holding and avoiding repetitive litigation. Still, the effect should be limited to binding only on the factual and legal issues that generated the no-certification ruling if they arise in a repeated attempt to certify.

Cutting against the analogy is that the determination of no jurisdiction over the defendant binds the ordinary plaintiff, over whom the court in fact has personal jurisdiction.<sup>111</sup> In the class action setting, the aim is instead to bind a noncertified class absentee. The response is fourfold. The first two arguments address the jurisdictional side of

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<sup>110</sup> Cf. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (viewing class certification as a matter of statutory standing); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612 (1997) (treating class certification as “logically antecedent” to jurisdiction).

<sup>111</sup> See *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938) (holding that the institution of a lawsuit subjected the plaintiff to personal jurisdiction for a transactionally related counterclaim).



the analogy, while the next two speak to the class action side. Together they establish that whether the person whom the jurisdiction-to-determine-no-jurisdiction doctrine precludes was subject to personal jurisdiction is irrelevant to determining by analogy the preclusive effect of a denial of class certification.

First, the jurisdiction-to-determine-jurisdiction doctrine might provide a better analogy than the no-jurisdiction doctrine. When a court erroneously determines that it has personal jurisdiction, that finding will bind the defendant over whom the court by hypothesis has no personal jurisdiction. Personal jurisdiction over the bound party is not a *sine qua non*. Second, even the jurisdiction-to-determine-no-jurisdiction doctrine gives courts without jurisdiction the power to preclude parties. A court that determines it has no subject-matter jurisdiction will bind the plaintiff on that point. No form of jurisdiction with respect to the bound party is a prerequisite.

Third, even if *Shutts* requires a strange breed of personal jurisdiction over absent plaintiffs to bind them *on the merits* of a class judgment for damages, that case did not address any requirements for jurisdiction to determine no jurisdiction. A court denying certification, but having properly conducted a class action to that point, will have afforded the absentees some procedural protections—albeit mainly through representation, rather than by notice, participation, or opt-out safeguards. In fact, one could read the *Bridgestone/Firestone* line of cases as ruling that there was therefore sufficient jurisdiction with respect to adequately represented absentees, especially in a federal court, to bind them to the denial of class certification. Fourth, as already noted, the system can preclude privies not subject to personal jurisdiction at all.<sup>112</sup> The central question is whether the law *should* choose to treat the class action absentees as privies. The answer does not definitively turn on whether personal jurisdiction over them exists.

In sum, the analogy may not be perfect, but it seems strong enough to conclude that a finding that no class exists should be as binding as a finding that no jurisdiction exists. The *Bridgestone/Firestone* progeny therefore could adopt the proposition that certification of a class action is not necessary to render a judgment valid enough to bind absentees only on the determination of no certification.

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<sup>112</sup> See *supra* note 104 and accompanying text.

## V. A CLASS ACTION'S PRECLUSIVE EFFECTS

Our law permits an action to be brought by or against named parties as representatives of a class of absent persons similarly situated. The judgment in such a class action binds all persons included within the class, not just those named as parties.<sup>113</sup> Class members normally cannot relitigate matters the class representatives have litigated.<sup>114</sup> To ensure the adequacy of the representation and thereby to obviate the nonjoined class members' need for an independent day in court, class action rules commonly require, as does Federal Rule of Civil Procedure 23(a), that the court prospectively test commonality, typicality, and representation by deciding at the outset whether to certify the case as a class action. Appropriate notice to class members may be required, although it is usually not necessary that a class member actually receive notice in order to be bound by the judgment. On collateral attack, an absent class member can attack a class action judgment's binding effect not only on the usual grounds of lack of jurisdiction and procedural due process, but also by raising the due process question of inadequate representation of the class members' interests.<sup>115</sup>

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<sup>113</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 41 cmt. e (1982) (noting the binding effect provided adequacy is found); CASAD & CLERMONT, *supra* note 3, at 161-63 (explaining the extension of preclusion to class members); 7AA WRIGHT ET AL., *supra* note 54, § 1789 (exploring the effect of a judgment in a class action); Andrew S. Tulumello & Mark Whitburn, *Res Judicata and Collateral Estoppel Issues in Class Litigation*, in A PRACTITIONER'S GUIDE TO CLASS ACTIONS, *supra* note 49, at 605, 606-07 (detailing these rules); Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 721-22 (2005) (suggesting the difficulties with applying preclusion in the class setting). Such *res judicata* follows only a valid judgment in a certified class action. It does not provide for preclusion by the affirmative certification decision within the original class action suit itself. See *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2008) ("Although the district court's findings for the purpose of class certification are conclusive on that topic, they do not bind the fact-finder on the merits."); Clermont, *supra* note 1, at 39-40 (explaining that "there simply is no doctrine of *intra*suit *res judicata*").

<sup>114</sup> Of course, complications exist. For preclusion to take effect, the claims must be the same in the class action and the later individual action. See *Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 880 (1984) (refusing to preclude absent class members from pursuing different claims in individual actions); 5 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* §§ 16:21--:22 (4th ed. 2002) (noting absentees can bring individual actions on issues that a class could not have raised). And nonmutuality must be extended to absentees gingerly. See *Germonprez v. Dir. of Selective Serv.*, 318 F. Supp. 829 (D.D.C. 1970) (applying preclusion); 5 CONTE & NEWBERG, *supra*, §§ 16:27--:30 (illustrating the possible unfairness to the defendant of allowing new claims to be litigated using collateral estoppel by absentees).

<sup>115</sup> See *supra* note 14.

This Essay, however, does not treat such matters. It concerns instead the binding effect of a would-be class action that the court refuses to certify. The decisions implicit in a no-certification ruling have a binding effect in any attempt to sue again in a court where the exact same issue arises. Of course, the named parties may find themselves bound under the ordinary rules of *res judicata*.<sup>116</sup> Additionally, and less ordinarily, preclusion may extend to the absentees, who would thus be in privity with the class representatives for that limited purpose. By analogy to the jurisdiction-to-determine-no-jurisdiction doctrine, the absentees would face preclusion if the exact same issue arose when they sought certification elsewhere.

By contrast, the decision not to certify should carry no other preclusive effects. Although, just as for the jurisdiction-to-determine-no-jurisdiction doctrine,<sup>117</sup> courts might sometimes embrace preclusion too enthusiastically, they are thereby disassociating the limited preclusion from its narrow rationale. For example, a court might conceivably incline toward binding decertified absentees on the merits. That would be going too far. There should be no preclusion on the merits.<sup>118</sup> The denial of certification makes the absentee a stranger to the action for all other purposes.

Analogizing this class action question to the jurisdiction-to-determine-no-jurisdiction doctrine bears significant benefits. It suggests a path to preclusion that avoids the natural judicial reluctance to augment the categories of privies. It reaches the result of preclusion on certification denial, a result policy suggests and the weight of precedent accepts. Almost as importantly, the analogy brings with it all the limits on preclusion associated with the jurisdiction-to-determine-no-jurisdiction doctrine.

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<sup>116</sup> See, e.g., *Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1012 (8th Cir. 2002) (involving same named plaintiffs repetitively bringing class actions).

<sup>117</sup> See *Clermont*, *supra* note 1, at 24-25 (discussing the complexities of intersystem preclusion in jurisdictional determinations).

<sup>118</sup> See, e.g., *Muhammad v. Giant Food Inc.*, 108 F. App'x 757, 765 n.5 (4th Cir. 2004) (observing, when affirming the grant of summary judgment in favor of the employer on each of the employees' individual claims and the declaration of mootness on a pending class-certification motion: "While the rejection of the named employees' individual claims is binding as to those employees, it does not preclude later efforts to certify a class action against Giant or bar any individual claims that might be asserted in such an action.").

## CONCLUSION

A denial of certification yields a judgment valid, with respect to the adequately represented absentees, for the very limited purpose of preclusion on the same issue of certification. This preclusion works just like the jurisdiction-to-determine-no-jurisdiction doctrine. Thus, it will defeat certification in any attempt to sue again in a court where the exact same issue arises, but it will have no wider preclusive effects.

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