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Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action

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FEDERAL JURISDICTION AND DUE PROCESS IN THE ERA OF THE NATIONWIDE CLASS ACTION

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INTRODUCTION

The class action has come of age in America. With increasing regularity, class litigation plays a central role in discussions about theory, doctrine, and policy in the American civil justice system. The dy-

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[†] Professor of Law, University of Pennsylvania Law School. I received excellent feedback on an early version of this Article from the participants in the April 2006 Branstetter Litigation and Dispute Resolution Program at Vanderbilt University Law School, particularly Myriam Gilles, Richard Nagareda, Erin O'Hara, Suzanna Sherry, and Catherine Struve, for which I am most grateful. I also benefited from the comments of members of the University of Pennsylvania Law School faculty when I presented a draft in workshop, and from discussions with Beth Hillman, Judith Resnik, and Rhonda Wasserman. I am especially grateful for the generous attention that Steve Burbank, Geoffrey Hazard, Sam Issacharoff, Cathy Sharkey, David Shapiro, Linda Silberman, and Allan Stein provided at key junctures in this project. The attention proved invaluable in helping to focus and clarify my thinking.

namics of the class action lie at the heart of current debates over the nature of the litigation process and the limits of adjudication in effectuating social policy. Choice of law analysis has enjoyed a renaissance as its significance to the question of class certification has become apparent. Class litigation now frequently drives debates over tort reform and the phenomenon of regulation through litigation. In these and many other respects, we have entered a new dispensation: the era of the nationwide class action. The passage of the Class Action Fairness Act of 2005 (CAFA)[1]—the first occasion on which Congress has enacted a generally applicable legislative policy pertaining to aggregate representative litigation[2]—aptly punctuates that arrival.

The class action's ascendance to center stage, however, has not always been accompanied by the development of a sophisticated doctrinal and analytical apparatus that is adequate to its needs. This is particularly the case in the two important areas that will be my primary focus in this Article: the analysis of the content and impact of federal jurisdictional policy when parallel class actions are filed in state and federal courts, and the due process standards that govern the various aspects of representative litigation. In the former case, much of the discussion among courts and commentators has been mired for too long in forms of analysis that are inapposite and inadequate. In the latter, the discussion has been riddled with outright mistakes and misunderstanding.

The enactment of CAFA offers an important occasion for revisiting our treatment of these vital questions of federal jurisdictional policy and due process in representative litigation. This is so for several reasons. First, the Act promises to move large numbers of nationwide class actions into the federal courts.[3] This dramatic change in the al-

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[1] Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

[2] Congress has enacted more narrowly targeted legislation pertaining to class actions in the field of securities litigation. *See* Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (imposing standards for securities litigation in federal court); *see also* Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (extending the provisions of the PSLRA to state court litigation).

[3] The most recent interim report of the Federal Judicial Center indicates that the rate of diversity class actions in the federal courts—including both original filings and removals—increased by approximately 100% between the last calendar year before CAFA was enacted and the twelve-month period between July 2005 and June 2006. *See* THOMAS E. WILLGING & EMERY G. LEE III, THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: THIRD INTERIM REPORT TO THE JUDICIAL CON-

location of class actions within the dual American court system will increase the stress on the flawed doctrines that are currently available for administering parallel class action proceedings and, at the same time, provide a concomitant opportunity for achieving a more uniform and comprehensive restatement of those doctrines. Second, the Act itself contains a serious flaw—a jurisdictional paradox, as I call it—that promises to intensify further the need to rationalize the methods available for administering multiforum class actions. To appreciate the legislative impetus that CAFA provides for this larger project of reexamination, it is necessary to understand the impact that the Act has on the federal jurisdictional policies that govern class litigation and the manner in which the Act operates in allocating class actions to the federal forum.

CAFA operates in two basic modes. First, it dramatically expands the ability of federal courts to exercise jurisdiction over class action lawsuits by liberalizing the rules on citizenship and amount in controversy that ordinarily constrain diversity jurisdiction.[4] This expansion of diversity jurisdiction, in turn, is an expression of the instinct that lies at the Act's foundation: the belief that federal courts will apply different and more restrained standards to the administration of class actions than will state courts, thus providing greater confidence that the interests of parties on both sides of the dispute will be protected from abuse. The shift to the federal forum, in other words, is expected and intended to alter the outcome in class litigation based on state law.

Second, the Act imposes limits on the forms of class action settlement that may be approved once a class action is brought to the federal forum, singling out practices believed to be particularly prone to

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FERENCE ADVISORY COMMITTEE ON CIVIL RULES 14 fig.3 (2007), *available at* http://www.uscourts.gov/rules/CAFA_Third_Interim.pdf.

[4] The changes to diversity jurisdiction are twofold. The statute loosens the normal requirement of complete diversity, authorizing jurisdiction whenever any plaintiff is diverse from any defendant; it also alters the ordinary rules on aggregation, authorizing jurisdiction over small-stakes claims provided that the total amount in controversy in the proceeding exceeds $5,000,000. *See* CAFA § 4(a), 28 U.S.C. § 1332(d)(2) (Supp. V 2005). This change is subject to an abstention provision that limits its effects somewhat, giving the district court discretion to decline jurisdiction if a sufficient proportion of the class and the "primary defendants" are all from the state in which the action was originally filed, and instructing the district court to dismiss if a supermajority of the class and at least one significant defendant are both from the forum state. *See id.* § 1332(d)(3)–(4). *See generally* LINDA J. SILBERMAN, ALLAN R. STEIN & TOBIAS B. WOLFF, CIVIL PROCEDURE: THEORY AND PRACTICE 1047-49 (2d ed. 2006) (describing CAFA's jurisdictional provisions).

abuse and imposing certain reporting requirements before a settlement may be approved.[5] All of these changes are effectuated against the backdrop of a set of affirmative statements of policy contained in the Act regarding the proper role of class actions—and, in particular, the federal forum—in promoting the fair and efficient resolution of claims by aggrieved plaintiffs.[6] Modern federal class action practice, in other words, is no longer purely a creature of the rulemaking process and judicial innovation. It can now claim at least some of the benefits of legitimacy that federal legislation confers.

One of the first orders of business in assessing the significance of the Act will be to understand the change that it effects in the authority structure governing the administration of federal class actions. Until now, scholarly and judicial debates surrounding class litigation have centered largely on second-order questions: what is the proper role of judges in using aggregation to bring about substantive goals, and what principles should guide them in that endeavor in the absence of an affirmative congressional mandate or express statement of policy? CAFA provides a long-deferred occasion to pose some first-order questions: what congressional policies toward federal jurisdiction can CAFA fairly be understood to embrace, and how should those policies affect the administration of representative litigation?

The answers to such first-order questions will necessarily be shaped, in part, by the jurisdictional paradox that is embodied in the statute. One of the primary stated purposes of CAFA is to protect absent class members from the faithless or collusive behavior of their

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[5] The most significant limitation on settlement involves coupon settlements. The Act imposes strict constraints on the amount and the timing of the compensation that attorneys may receive for negotiating coupon-based settlements for the class. *See* 28 U.S.C. § 1712 (Supp. V 2005). It also prohibits awards that treat class members in certain geographic locations more favorably (to prevent bounties) and makes it difficult to secure approval of any class settlement that would require class members to pay money in order to obtain a benefit. *See id.* §§ 1713–1714. Finally, the Act requires the defendants to notify relevant state or federal authorities of any proposed class action settlement and imposes a mandatory waiting period prior to any approval of a settlement during which authorities may seek to intervene or object. *See id.* § 1715; *see also* SILBERMAN, STEIN & WOLFF, *supra* note 4, at 1050-52 (describing these provisions).

[6] *See, e.g.*, CAFA § 2(a)(1), 28 U.S.C. § 1711 note (Supp. V 2005) ("Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm."); *id.* § 2(b)(1) (stating that a purpose of the Act is to "assure fair and prompt recoveries for class members with legitimate claims").

own class counsel.[7] As has been extensively analyzed, aggregate litigation can create a serious misalignment between the interests of class counsel and the interests of the absentees they represent, a mismatch that in turn can lead class counsel to sacrifice the welfare of the class in return for personal gain.[8] The Act recites this problem as one of the principal evils that it seeks to remedy and offers access to the federal forum as the solution.[9] What it fails to do, however, is to make any change to the gatekeepers who will control that access. More precisely, the Act offers no mechanism by which absent class plaintiffs can act independently of class counsel to move their lawsuits into federal court.

The paradigmatic case of the faithless or collusive class counsel takes the following basic form: Defendant has engaged in a course of conduct that leaves it exposed to the threat of substantial liability. In response, various lawyers have filed multiple overlapping class actions in courts around the country, some purporting to represent the citizens of a particular state or region, others attempting to represent all

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[7] *See, e.g., id.* § 2(a)–(b) (identifying protection of absent class members from mistreatment as a primary purpose of the Act, along with protection of defendants against abusive litigation, safeguarding national economic interests, and preventing excessive exercises of state power).

[8] Among the more prominent expositions of this problem are John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996); and Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

[9] The Act identifies the following findings among the primary reasons for its enactment:

> (2) Over the past decade, there have been abuses of the class action device that have—
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> (A) harmed class members with legitimate claims and defendants that have acted responsibly;
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> . . . .
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> (3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—
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> (A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;
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> (B) unjustified awards are made to certain plaintiffs at the expense of other class members; and
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> (C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

CAFA § 2(a)(2)–(3), 28 U.S.C. § 1711 note (Supp. V 2005).

claimants nationwide. Defendant, apprehending a real threat of liability exposure or major litigation costs, wishes to arrive at a settlement that binds all claimants to a global release while keeping its payment obligation at the lowest possible level.[10] For their part, the competing class lawyers all have an incentive to arrive at a binding resolution quickly in order to ensure that they will be awarded attorneys' fees before being preempted by a competitor lawsuit. The stage is thus set for Defendant to shop for the lowest bidder by engaging in some form of reverse auction, seeking lead counsel in one of the nationwide proceedings who will settle the class claims at a price that may seriously undervalue those claims, perhaps providing no meaningful relief to class members at all, in return for receiving a lock on a generous fee award.

The actual prevalence of suits in which class counsel exhibit such malfeasance is a matter of dispute.[11] Nonetheless, Congress enacted CAFA on the basis of an express finding that such faithless or collusive proceedings present a serious problem that occurs most frequently in state court, and it offered expanded access to federal court as the primary solution.[12]

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[10] As Professor Hensler has explained, "defendants facing large-scale exposure in mass product defect litigation, once they recognize and can quantify that exposure, will prefer a comprehensive settlement of all claims arising out of a single set of facts to individual case-at-a-time litigation." Deborah R. Hensler, *Bringing* Shutts *into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions*, 74 UMKC L. REV. 585, 588 (2006).

[11] Broad, comprehensive figures on class action practice are not readily available, in part because of the lack of consistency among state court systems in collecting and reporting data. *See, e.g.*, Memorandum from Bob Niemic & Tom Willging, Fed. Judicial Ctr., to the Advisory Committee on Civil Rules 3 (Sept. 9, 2002) *available at* http://www.fjc.gov/public/pdf.nsf/lookup/AmChem.pdf/$file/AmChem.pdf (describing limits on the availability of state court data). As a consequence, much of the information on state court abuses that has informed the debate has been anecdotal in nature, and respected advocates disagree strongly about the extent to which the scope of abuse has been accurately reported or, instead, overstated. *Compare, e.g.*, *NLJ Roundtable: Class Action Fairness Act*, NAT'L L.J., May 16, 2005, at 18, 18 (reproducing the remarks of Elizabeth Cabraser, arguing that "the notion that there were class action abuses that cried out for the geographic or jurisdictional cure of transfer from state court to the federal court system will be exposed as basically baseless"), *with* Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787 (2004) (offering a much bleaker account of the representation received by absentees).

[12] Professor Issacharoff takes this observation much further, suggesting that CAFA envisions the transfer into federal court of all national consumer class actions, and perhaps all national class actions under most state law regimes:

But how are class members to gain access to a federal forum in such a case? When original federal subject matter jurisdiction exists over a dispute, the ordinary methods of gaining access to federal court are well established. For a plaintiff, the ordinary route is to file the lawsuit in federal court in the first instance. For a defendant in a case that has been filed in state court, the ordinary route is to remove the suit to the federal forum. In class action litigation, the routes into federal court remain the same but the relevant actors change, with the role of class counsel becoming central to the choice of forum for plaintiffs. But an absent class member has no power to direct class counsel to select the federal forum in the first instance—indeed, as a formal matter, "absent class members" do not exist as such until a putative class proceeding is filed—and even named class plaintiffs play almost no role in strategic decision making in all but the most unusual of proceedings. As a consequence, neither of the established methods of invoking the federal forum is generally available to absentees. It is class counsel (and defendants), rather than class members, that serve as the gatekeepers for access to the federal forum in a class action proceeding. If class counsel are as self-regarding as the Act assumes, however, they clearly cannot be relied upon to file suit in a court that

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> [T]he concern about creating a dominion of exclusive federal oversight . . . raise[s] the question of what should serve as the baseline for measuring federal court fidelity to preexisting legal treatment. If federal courts are to be the only game in town for national market consumer cases, it is difficult to argue that they should handle them the way all other courts do. There are simply no other courts in the game anymore.

Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1864 (2006); *see also id.* at 1865 ("There is more than a touch of irony in holding fast to a doctrine honoring state autonomy in the context of a statute that takes away precisely the power of state courts to adjudicate nationwide class actions."); *id.* ("Congress has taken state courts out of the mix altogether.").

Professor Issacharoff's characterization may be largely correct with respect to class actions that are filed with the expectation that they will or may be adjudicated, since in most cases either class counsel or the defendant, considering the matter ex ante, will likely see some significant benefit to invoking the federal forum. His observation clearly does not hold true in settlement-only class actions, as the reverse auction scenario makes clear. Professor Burbank levies a similar criticism. *See* Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1940-43 (2006).

The question remains whether the decision of class counsel and defendant to keep a settlement action in state court is always indicative of the kind of malfeasance that this Article examines, or whether class counsel and defendant might both choose to keep a settlement action in state court even in the absence of any sacrifice of the class members' interests. I take up that question briefly in Part II.A.3, *infra*.

promises to police their actions more closely.[13] They will eschew the federal forum and file in a hospitable state court in the first instance. Neither can the defendant be counted upon to remove the case to a more protective federal court, since, by hypothesis, the defendant is counting upon the permissive standards of the state court to carry out its plan to bind the entire class to a bargain-basement settlement.[14] Because Congress chose a framework for class action reform that expanded voluntary access to a protective federal forum but still preserved the power of state courts to exercise concurrent jurisdiction, it was necessary to craft the means of access to federal court in a manner that would be responsive to the types of malfeasance that the Act aimed to combat. But Congress did not do so. Instead, it left the choice of access to federal court in the hands of the very actors from whom class members might require protection.

In order for a case of this type to receive the benefit of a protective federal forum, absent class members would need an independent

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[13] The conventional wisdom that federal courts are stricter than state courts in administering class certification does not always hold true. In some state courts, judicial skepticism and constraining precedents make federal court a more attractive option for class plaintiffs. In New York, for example, state law prohibits the use of the class action to aggregate claims for statutory penalties or minimum recoveries, unless the law creating the penalty specifically provides for recovery via class action. *See* N.Y. C.P.L.R. 901(b) (McKinney 2006) ("Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."); Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc., 799 N.Y.S.2d 795, 796 (N.Y. App. Div. 2005) (holding that C.P.L.R. 901(b) prohibits class action under the federal Telephone Consumer Protection Act); *cf.* Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1885-88 & n.57 (2006) (discussing C.P.L.R. § 901(b) and the "amplification effect" that it seeks to redress). Even so, the suggestion that faithless class counsel will ordinarily seek to file suit in state court is an acceptable generalization. Class counsel will usually have the opportunity to shop for a highly permissive state forum in suits against large corporate entities—an option made possible by the frequent amenability of such entities to general jurisdiction around the country.

[14] Professors Kahan and Silberman (among others) make this point in their important treatment of collateral attacks. *See* Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 765, 776 (1998) ("[B]oth class counsel and defendant may prefer a forum that rubberstamps any settlement they reach."); *see also, e.g.*, Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 282 (7th Cir. 2002) (Posner, J.) ("The ineffectual lawyers are happy to sell out a class they anyway can't do much for in exchange for generous attorneys' fees, and the defendants are happy to pay generous attorneys' fees since all they care about is the bottom line—the sum of the settlement and the attorneys' fees—and not the allocation of money between the two categories of expense.").

means of invoking the federal forum without the acquiescence of class counsel. For the first six years of its eight-year journey through Congress, the Act contained a mechanism that might have solved this gatekeeper problem: a provision that would have empowered absentees to remove class actions filed in state court, without the approval of class counsel or defendant.[15] That provision was excised from the Senate version of the bill in late 2003, however, and stayed out when the conference committee produced the final version that the President signed in February 2005.[16] As a consequence, and despite its express statements of concern for the welfare of absentees, there appears to be a danger that CAFA will operate almost exclusively to the benefit of class action defendants in its most immediate applications.

There do exist other mechanisms by which absent class members might seek protection from collusion, faithless behavior, or incompetence in such cases. Early in the proceedings, competing class counsel can file a parallel class action in federal court and attempt to secure an antisuit injunction to halt the state court litigation. At the close of a federal class action, the court can consider issuing an injunction to prevent duplicative litigation in contravention of the court's judgment—a possibility that is most likely to be significant, and has provoked the most controversy, in the situation exemplified by Judge

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[15] In the Senate, the provision last appeared in the version of the bill that was placed on the calendar on October 17, 2003. The relevant portions read:

> IN GENERAL—A class action may be removed to a district court of the United States in accordance with this chapter, without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed—
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> (1) by any defendant without the consent of all defendants; or
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> (2) by any plaintiff class member who is not a named or representative class member without the consent of all members of such class.

S. 1751, 108th Cong. § 5(a) (2003). Absent plaintiffs were given thirty days to remove an action from the time that they received notice, "through service or otherwise, of the initial written notice of the class action." *Id.*

[16] *See* S. REPUBLICAN POLICY COMM., 108TH CONG., S.2062—THE CLASS ACTION FAIRNESS ACT 3 (2004) (noting the deletion of a provision allowing plaintiffs to remove class actions); *see also* 28 U.S.C. § 1453(b) (Supp. V 2005) (containing no provision for removal by absent class plaintiffs); S. 2062, 108th Cong. § 5(a) (Feb. 11, 2004) (same).

The deletion, which occasioned little comment in the legislative record, was justified at the time as a necessary step for preventing rogue class members from extorting payments from defendants and class counsel, the stated concern being that they might threaten to disrupt ongoing state court proceedings through the guerilla use of removal. *See* S. REPUBLICAN POLICY COMM., *supra*, at 3-5. I discuss the cogency of this concern, and the virtues of various mechanisms for policing malfeasance in state court proceedings, in Part III, *infra*.

Easterbrook's opinion for the Seventh Circuit in *Bridgestone/Firestone II*, where the federal court denied class certification and then prohibited further attempts to certify the same class in any other court by issuing an injunction to enforce its denial of certification.[17] Finally, if a state class action that was marred by collusion or malfeasance produces a final judgment on the merits without any prior interdiction by a federal court, members of the class may attempt to seek relief from that judgment in a collateral challenge, usually alleging a lack of adequate representation in the initial proceeding as the basis of the attack.

This Article will use these alternative mechanisms by which the jurisdictional paradox of CAFA may be addressed as the occasion for revisiting certain basic questions of jurisdictional policy and due process that have received inadequate treatment in the emerging era of the nationwide class action. It begins, in Part I, with the issue of federal jurisdictional policy and examines the possibility of interdicting ongoing state court proceedings by filing a parallel class action in federal court and obtaining an antisuit injunction. The All Writs Act[18] and the Anti-Injunction Act (AIA)[19] together provide the primary statutory authority for injunctions aimed at protecting federal court jurisdiction from threats posed by ongoing or anticipated state lawsuits, along with the primary limitations upon the issuance of such orders. Those limitations, which have frequently been defined through clumsy analogies to in rem jurisdiction, have generally prevented any injunctive intervention until a complex federal proceeding has reached an advanced stage. This unsatisfying approach to injunctions under the AIA has developed, for the most part, in anticipation of cases where federal subject matter jurisdiction will rest upon all-purpose jurisdictional statutes—provisions that are general in their scope, generic in their function, and enacted against a broad presumption that state courts exercise concurrent jurisdiction over federal claims, providing little guidance as to the specific policies that the grant of jurisdiction is designed to promote. CAFA, in contrast, includes a targeted grant of jurisdiction that both justifies and requires more focused analysis under the AIA. CAFA presents an apt occasion to reconsider the unsatisfactory approach to the AIA that has predominated in the administration of antisuit injunctions in complex disputes. If the policies embodied

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[17] *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig. (*Bridgestone/Firestone II*), 333 F.3d 763, 769 (7th Cir. 2003).

[18] 28 U.S.C. § 1651 (2000).

[19] *Id.* § 2283.

in its jurisdictional provisions are given their proper effect, CAFA will authorize much earlier federal injunctive intervention in those cases that exhibit indicia of the malfeasance or collusion that the statute was designed to combat.

In Part II, the Article takes up the question of due process in class litigation and examines the power that a federal court possesses to attach finality and preemptive effect to a denial of class certification once it has adjudicated the certification question. In claiming broad authority for federal courts to prevent any relitigation of a denial of certification, the court in *Bridgestone/Firestone II* challenged widely accepted assumptions about preclusion doctrine, finality, formal party status, and the limits that the Rules Enabling Act imposes upon the authority of federal courts.[20] Indeed, it is surprising how little serious scholarly attention that decision has received thus far, given the radical nature of its holding. Nonetheless, as I will argue, a proper understanding of the Supreme Court's decision in *Phillips Petroleum v. Shutts*,[21] along with its largely unacknowledged antecedent, *Mullane v. Central Hanover Bank & Trust*,[22] leads to the conclusion that federal courts do sometimes have the power to enforce a denial of certification against an entire class, particularly where the order enjoys the imprimatur of a statute like CAFA. Such an order, which has the effect of denying one particular remedial avenue to the members of a class, generally entails a lesser alteration in legal position or status than does the final adjudication of an absentee's underlying claim. Under the approach to due process and representative litigation that the Court employed in *Shutts* and *Mullane*, a federal court can enforce a properly crafted denial of certification through the issuance of an antisuit injunction without providing individualized process to every class member. Neither the Federal Rules nor the Constitution prohibits that outcome.

Part III then moves to the aftermath of state court litigation and takes up the ongoing debate over collateral attacks upon class action judgments. I join here with those who approach the collateral attack question systemically, rather than with extravagant formalism. That systemic approach is aided by the prescriptions in the earlier sections of this Article, which help to clarify the opportunities that class members have in various types of lawsuits to protect their interests from in-

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[20] *See id.* § 2072(b).

[21] 472 U.S. 797 (1985).

[22] 339 U.S. 306 (1950).

competence or malfeasance. The absent-plaintiff removal provision that was excised from CAFA would have provided one such opportunity, and its absence can legitimately be pointed to by proponents of collateral attack as a point in their favor. But the net impact of CAFA will not provide comfort to those proponents. The forms of interdiction that I advocate in Parts I and II through the expanded use of the antisuit injunction offer a superior approach to the protection of class members' interests in cases of possible malfeasance, from both a formal and a systemic perspective. When such an injunction is both available and likely to be effective but competing counsel choose not to pursue it, the case for prohibiting collateral attacks in subsequent proceedings becomes much stronger. If the prescriptions set forth in this Article are not embraced, however, then the case for collateral attack will continue to retain some of its current vitality.

I. INTERDICTING STATE COURT PROCEEDINGS: TARGETED GRANTS OF JURISDICTION AND THE ANTISUIT INJUNCTION

The failure of CAFA to solve the gatekeeper problem will be felt most directly when putative class counsel file settlement-only actions in state court for the apparent purpose of arriving at a cheap settlement with defendants so as to preempt other actual or potential class proceedings and be the first to secure a fee. Unable to force the state lawsuit into federal court directly, absentees or competing counsel who become aware of such proceedings might file a new action in federal court (if a parallel federal action is not pending already) and seek to enjoin the allegedly improper state lawsuit from moving forward. Any such attempt would have to pass muster under the AIA, which imposes broad limitations on antisuit injunctions. Nonetheless, as I will argue, the targeted extension of jurisdiction contained in CAFA provides an independent justification for bringing such protective antisuit orders outside the AIA's categorical prohibition.

That argument will be structured around one basic proposition—that the line of inquiry under the AIA that has centered on the Act's "expressly authorized" provision has been fundamentally misdirected. In identifying the "expressly authorized" language as the source of the governing standard for inquiries into the propriety of an antisuit injunction aimed at effectuating the congressional policies bound up in a federal statutory scheme, the Supreme Court in *Mitchum v. Foster*[23]

[23] 407 U.S. 225 (1972).

made a wrong turn that strained the statutory language and has led to an ineffective and unsustainable jurisprudence under the Act. That unsustainability has become particularly apparent in the current era of nationwide complex litigation, as I discuss below. The line of inquiry that the language of the AIA properly invites is one that would focus on the policies that Congress has expressed in its jurisdictional statutes for making a federal forum available, asking when an injunction may be necessary "in aid of" that jurisdiction to effectuate the policies bound up in the jurisdictional grant. This is particularly the case in those situations where Congress has enacted a specialized provision that extends a targeted grant of jurisdiction for a particular class of cases. CAFA is such a provision, and it offers an important opportunity to reexamine *Mitchum v. Foster* and reframe the AIA inquiry.

A. *The Anti-Injunction Act in an Era of Nationwide Complex Litigation*

The current state of the law governing the ability of federal courts to enjoin parallel state court proceedings is an unattractive mess. The reason for this mess is relatively straightforward. The permissible scope of federal injunctions directed at state proceedings is codified in the AIA, styled as a series of exceptions to a general prohibition against antisuit orders.[24] The exception that would seem to be most pertinent to parallel or competing lawsuits in state and federal court is the clause authorizing federal courts to issue injunctions "in aid of [their] jurisdiction." When the Supreme Court has analyzed the effect of that provision, however, it has generally behaved as though the only jurisdictional policies that ever need to be considered are those contained in general-purpose jurisdictional statutes like 28 U.S.C. § 1331 and § 1332(a).[25] Those statutes, in turn, operate against a

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[24] 28 U.S.C. § 2283.

[25] One of the most striking examples of this tendency to focus only on generic jurisdictional concerns may be found in *Amalgamated Clothing Workers of America v. Richman Bros.*, the Court's first AIA decision following the 1948 Act, in which it said the following in rejecting a request for an antisuit injunction to give effect to a grant of exclusive federal jurisdiction under the Taft-Hartley Act:

> The assumption upon which the argument [that a grant of exclusive federal jurisdiction might warrant broad intervention under the AIA] proceeds is that federal rights will not be adequately protected in the state courts, and the "gap" complained of is impatience with the appellate process if states go wrong. But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court.

broad principle of concurrent jurisdiction according to which state courts are presumed to be adequate and appropriate tribunals for the adjudication of federal claims.[26] As a consequence, when parallel federal and state litigation occurs, courts and commentators seeking to define the contours of a federal court's power to issue an antisuit injunction often appear to face a stark choice. One option is to conclude that federal courts possess the authority to enjoin parallel state court proceedings whenever such proceedings threaten to disrupt or preempt an ongoing federal action, despite the background principle of concurrent jurisdiction. Although several distinguished commentators have embraced this broad approach to the AIA,[27] the position

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Amalgamated Clothing Workers of Am. v. Richman Bros., 348 U.S. 511, 518 (1955). As the Court saw it, *Amalgamated Clothing* involved the "rather subtle line of demarcation between exclusive federal and allowable state jurisdiction over labor problems," *id.* at 519, and not a clear usurpation of federal exclusive jurisdiction by a state tribunal. The case was also made more complicated by the fact that the primary authority to enforce the provisions of the Act lay with the National Labor Relations Board (NLRB), not private plaintiffs, and that the NLRB did possess jurisdiction to enjoin state proceedings. Thus, when the Court was specifically asked to analyze the AIA's "in aid of jurisdiction" language in the case, it briskly dismissed the argument, explaining:

> Under no circumstances has the District Court jurisdiction to enforce rights and duties which call for recognition by the [NLRB]. Such nonexistent jurisdiction therefore cannot be aided. . . . Since the very presupposition of this proceeding is that jurisdiction of the subject matter of which the employer complained was in the Board and not in the state court, any aid that is needed to protect jurisdiction is the aid which the Board may need . . . . Such aid only the Board could seek . . . .

Id. at 519-20; *see also* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 642 (1977) (plurality opinion) (explaining, in a case involving an exclusively federal antitrust claim, that the Court "ha[s] never viewed parallel *in personam* actions as interfering with the jurisdiction of either court").

[26] As the Court has put it, "The Act, which has existed in some form since 1793, is a necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts." Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146 (1988) (citation omitted) (interpreting the AIA's "protect or effectuate" language narrowly in deference to the concurrent jurisdiction principle); *see also* Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 295 (1970) ("In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts."); *id.* at 296 ("[L]ower federal courts possess no power whatever to sit in direct review of state court decisions.").

To clarify, when I use the term "federal claims" in the text above, I mean any claim that could potentially be filed as an original matter in federal court, not merely claims that arise under federal law.

[27] Most notable among these commentators is Professor Redish, who has argued for a system of "zero tolerance." *See* Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75

faces resistance from the long-standing interpretation of the Act as embodying a strong preference for avoiding federal interference with state court proceedings, even at the cost of duplicative suits and wasted effort.[28] In the alternative, one can conclude that the existence of parallel federal and state actions, without more, never provides support for the issuance of a preemptive federal injunction—a narrow interpretation of the Act that gives powerful voice to the precept of concurrent jurisdiction but, in so doing, appears to leave federal courts largely powerless to prevent state court subversion of their efforts in compelling cases.[29]

NOTRE DAME L. REV. 1347, 1349 (2000). Professor Redish's model "would require that in every instance the assertion of federal jurisdiction automatically precludes the continued conduct of the parallel state litigation, while the refusal of a federal court to enjoin such state litigation would automatically lead to the federal court's abstention." *Id.*; *see also* Diane P. Wood, *Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act*, 1990 BYU L. REV. 289, 319-20 (calling for reform of the AIA in order to permit federal courts to enjoin state proceedings whenever necessary to prevent irreparable harm to party interests, so long as they take state prerogatives into account).

[28] *See, e.g.*, *Atl. Coast Line*, 398 U.S. at 297 ("Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy."); *Amalgamated Clothing*, 348 U.S. at 514 (opining that it is "clear beyond cavil that the prohibition [of the AIA] is not to be whittled away by judicial improvisation"); Kline v. Burke Constr. Co., 260 U.S. 226, 230 (1922) ("[An *in personam* action brought in state court] does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court.").

I will be calling into question the broad application that many courts and commentators have given to this rhetoric. Professor Redish has done the same, and quite sharply so, rejecting as incorrect and ill-considered the Court's interpretation of the AIA as broadly tolerating the inefficiency of parallel state-federal litigation. Observing that such inefficiency is inconsistent with other levers of litigation policy that aim to prevent relitigation and wasted effort, Professor Redish writes:

> This counterintuitive and often inefficient result flows not from a carefully considered legislative or judicial choice following a thorough examination of all relevant competing social, political, and constitutional considerations. It flows, rather, from a wholly coincidental and unintended combination of common law and statutory jurisdictional doctrines, each of which focuses myopically upon different jurisdictional galaxies far, far away from each other.

Redish, *supra* note 27, at 1348. I am broadly sympathetic with these observations. Nonetheless, I find the consistent core of interpretive practice surrounding the AIA—to which Congress appears to have acquiesced in its 1948 revision, even if somewhat carelessly so—more difficult to dismiss in those cases where federal jurisdiction is based on a general-purpose statute.

[29] Timothy Kerr gives a good summary of the problem in a recent article. *See* Timothy Kerr, *Cleaning Up One Mess To Create Another: Duplicative Class Actions, Federal*

The language and reasoning of the Supreme Court's AIA decisions have tended to favor the narrower interpretation. This was particularly the case in the early years following the 1948 amendments that produced the modern version of the Act.[30] Most notably—and, as I will argue, erroneously—the Court has given little weight to the decision by Congress to reserve certain claims to the exclusive jurisdiction of the federal courts, adopting a narrow interpretation of the AIA's "in aid of jurisdiction" language even in cases where the congressionally expressed federal interest in avoiding state interference seems most acute. In essence, the Court has moved toward imposing unilateral disarmament upon federal courts since those early years in almost all cases involving ongoing federal and state parallel proceedings.

That trend, if followed faithfully, would require striking a balance in AIA jurisprudence that many lower federal courts have found inadequate in the modern era of nationwide complex litigation, where extensive parallel proceedings are becoming increasingly common. As courts and commentators have exhaustively demonstrated, almost any high-stakes class action can produce incentives on the part of competing class counsel to file multiple lawsuits in an attempt to be the first to arrive at a remunerative settlement or to circumvent the scrutiny of a skeptical forum. In such cases, unilateral jurisdictional disarmament by the federal courts is not sustainable. Indeed, the early Supreme Court decisions that have been interpreted to require

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Courts' Injunctive Power, and the Class Action Fairness Act of 2005, 29 HAMLINE L. REV. 218, 224-28 (2006).

[30] The 1948 revisions to the AIA operated to overrule the decision of the Supreme Court in *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1941). Prior to *Toucey*, the Court had crafted various exceptions to the apparently unyielding prohibition of the AIA, including an exception permitting federal courts to enjoin state court proceedings that sought to relitigate issues already decided in a federal judgment. The Court overruled its precedents and disapproved this practice in *Toucey*. The 1948 revisions explicitly reinstated the relitigation exception and added the "in aid of jurisdiction" language. For the standard account of this doctrinal history, see Martin H. Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717 (1977).

A "Reviser's Note" accompanying the amendment, which explains that the revisions "restore[] the basic law as generally understood and interpreted prior to the Toucey decision," 28 U.S.C. § 2283 Reviser's Note (1948), is often read as suggesting a narrow ambit for the new amendments, reinstating the specific exceptions that had been recognized at the time, but authorizing no further interpretive growth. This narrow reading clearly is not the best one. The Note indicates that the amendments restore the basic law "as generally understood and interpreted" prior to *Toucey*. *Id.* It is restoring the interpretive practice that preceded that decision, under which the Court crafted sensible exceptions to the Act's broad prohibition, not merely the particular repertoire of exceptions that *Toucey* had disapproved.

such disarmament are particularly ill-suited to provide guidance in modern complex cases. Those decisions offer little more by way of explanation for their approach to the AIA than vague invocations of federalism values—maxims that are particularly poorly suited to describing the interest of any single state in the emerging dispensation of nationwide class actions with national economic implications.[31]

These perceived inadequacies have led many lower federal courts to draw upon the limited vocabulary that the Supreme Court has made available in order to push against the limits of the doctrine. The result has been an unsatisfying reliance upon the inapt analogies and anachronisms that characterize AIA doctrine in high-stakes representative litigation today.

Under the current state of the doctrine, two related avenues are available to lower federal courts to interdict state court proceedings that threaten to preempt ongoing federal litigation. The primary avenue derives from the distinction that the Court has drawn between in rem and in personam actions. The Court articulated the distinction in *Kline v. Burke Construction Co.*, finding that state proceedings that threaten to deprive a federal court of formal or physical custody over a legal res constitute an exception to the broad prohibition of the AIA, but that the threat of preempting an in personam action, without more, never does.[32] Following the 1948 amendments to the statute, which added the "in aid of jurisdiction" exception, the Court has apparently preserved this formal distinction, both authorizing injunctions in support of in rem actions and discouraging injunctions where the claims before the court are in personam.[33] In complex class action proceedings, almost all of which involve claims that are in personam in nature, this rigidity threatens to leave federal courts wholly disarmed when state judges demonstrate a willingness to disrupt federal efforts to coordinate proceedings from multiple jurisdictions so as to achieve an appropriate and comprehensive resolution. Using the tools available to them, some lower federal courts have responded to these threats by analogizing their efforts at coordinating complex cases to the creation of a judicial res. In an early and influential ex-

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[31] *See generally* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1416 (2006) (analyzing features of modern class action practice that have national economic implications despite being based on state law).

[32] 260 U.S. 226, 235 (1922).

[33] *See* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 641-42 (1977) (plurality opinion) (appearing to reaffirm *Kline*'s sharp distinction between in rem and in personam actions in the administration of the "in aid of jurisdiction" exception).

ample of this maneuver, the Second Circuit authorized a district court to issue an antisuit injunction in *In re Baldwin-United Corp.*, where the court "had before it a class action proceeding so far advanced that it was the virtual equivalent of a res over which the district judge required full control."[34]

In a second and related caveat, the Supreme Court has allowed for the possibility that "some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."[35] The Court has never issued a ruling in which it has given affirmative meaning to this dictum, and the import of the pronouncement is not self-evident. (Why, for example, is federal jurisdiction compromised by a state judgment that threatens a federal court's "flexibility" in resolving one component of a complex proceeding late in the game, but not by a state judgment that threatens to preempt the entire federal proceeding from the very start?) Nonetheless, lower courts have seized upon this language to bolster the in rem analogy and have issued antisuit injunctions when a federal court's efforts to resolve a multijurisdictional proceeding have reached an advanced phase, often detailing the obstacles that state court orders would pose to the coordination of the many different factions and interest groups in complex settlement proceedings as evidence of a threat to the court's "flexibility."[36]

These instances of judicial innovation are not inherently objectionable. Lower federal courts have been given the task of administering resource-intensive, complex proceedings with little statutory or Supreme Court guidance, and they have often come up with sensible ways around the waste and manipulation that unilateral federal disar-

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[34] *In re* Baldwin-United Corp., 770 F.2d 328, 337 (2d Cir. 1985); *see also id.* at 337 (explaining that "the need to enjoin conflicting state proceedings [when a complex federal proceeding is on the verge of settlement] arises because the jurisdiction of a multidistrict court is analogous to that of a court in an *in rem* action or in a school desegregation case, where it is intolerable to have conflicting orders from different courts" (internal quotation marks omitted)). *In re Baldwin* involved an interpretation of the All Writs Act's authorization for the issuance of writs by federal courts "in aid of their respective jurisdictions," 28 U.S.C. § 1651(a) (2000), rather than the related language in the AIA. As noted above, the two passages have been interpreted in tandem, and *In re Baldwin* is regularly cited as authority in AIA cases.

[35] Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 295 (1970).

[36] The Third Circuit, in particular, has produced a highly developed set of doctrines in this regard. *See, e.g.*, *In re* Diet Drugs Prods. Liab. Litig., 282 F.3d 220, 234-39 (3d Cir. 2002) (setting forth detailed factors for consideration in the issuance of an AIA injunction).

mament would otherwise entail.[37] If not objectionable, however, these solutions are deeply analytically unsatisfying. The analogy to in rem proceedings is palpably a product of an earlier era. The occasions when it actually applies in the mode originally intended are few,[38] and it is far from clear why such cases should be the particular beneficiaries of solicitude under the AIA in any event.[39] Likewise, any effort to develop and apply a standard under the "in aid of jurisdiction" exception requires an account of the values that the exception aims to preserve and the circumstances that implicate those values. The Court's references to flexibility and authority in *Atlantic Coast Line* hardly satisfy that need. In general, this important area of federal-state relations has unfolded without the benefit of the careful jurisdictional equilibration (to borrow Professor Burbank's term[40]) that is necessary in balancing the intersecting forces of jurisdiction, choice of law, and preclusion in complex multijurisdictional litigation.[41]

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[37] *See generally* Andrew S. Weinstein, Note, *Avoiding the Race to Res Judicata: Federal Antisuit Injunctions of Competing State Class Actions*, 75 N.Y.U. L. REV. 1085 (2000) (describing methods employed by lower federal courts to avoid waste and strategic behavior and advocating more aggressive injunctive intervention).

[38] The rare exceptions prove the rule. *See, e.g.*, James v. Bellotti, 733 F.2d 989, 993 (1st Cir. 1984) (recognizing the authority of federal district courts to enjoin any form of state proceeding, "whether purporting to exercise concurrent jurisdiction in rem or in personam," that would interfere with district court's disposition of Indian land claim cases (citations omitted)).

[39] Ascribing great doctrinal or constitutional significance to the in rem quality of a proceeding is inconsistent with the established modern trend toward analyzing the impact of judicial actions upon individual or state interests, regardless of the form of the proceeding in which those actions are taken. The Court embraced this proposition in a little-noticed passage in the *Mullane* case and later made it the centerpiece of its analysis in the watershed case, *Shaffer v. Heitner*. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 312-13 (1950) (holding that the formal in rem quality of trust accounting does not control personal jurisdiction analysis); Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (stating that all exercises of personal jurisdiction, including in in rem actions, must satisfy the minimum contacts standard of *International Shoe* and its progeny). *See also* Redish, *supra* note 27, at 1359 (criticizing the Court's distinction between in rem and in personam cases in AIA doctrine as "little more than a metaphysical relic of a very different epistemological age" that "no longer plays a significant role, even in its originating context of personal jurisdiction").

[40] *See* Stephen B. Burbank, *Judicial Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203 (2001).

[41] Professor Redish is certainly correct when he describes this area of federal jurisdiction law as suffering from "a kind of doctrinal myopia." Redish, *supra* note 27, at 1347; *see also id.* ("The product of such [poorly coordinated, case-by-case] doctrinal development, not surprisingly, is often a doctrinal synthesis that either defies common sense, ignores or undermines sound policies of federalism or litigation practice, or both.").

B. *Targeted Jurisdiction and the Anti-Injunction Act*

A doctrinal readjustment is clearly needed, and CAFA provides an apt occasion for undertaking that readjustment. There is a partial solution that would be uncontroversial in most other areas of law and should be uncontroversial here, once the shackles of inertia are cast off. It is simply this: statutory grants of federal court jurisdiction embody congressional policies, just as statutes containing liability rules or regulations of primary conduct do. This fact, which is surely unexceptionable as an abstract proposition, finds little expression in the present landscape of AIA doctrine. That is where a change is needed. It is necessary to begin inquiring much more actively into the congressional policies bound up in statutes authorizing federal jurisdiction and to administer the exception to the AIA for antisuit injunctions "in aid of [a federal court's] jurisdiction" with explicit reference to those congressional policies. It is necessary, in other words, to recognize a principle of targeted jurisdiction in the administration of AIA injunctions.

Looking to jurisdictional provisions as embodiments of particularized congressional policies is a familiar and established practice in the American legal tradition. Indeed, many of the Supreme Court's most important early constitutional rulings arose from disputes over federal subject matter jurisdiction and included several in which the Court interpreted Article III itself to pronounce upon weighty and disputatious issues.[42] The earliest jurisdictional statutes played a similar role.

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[42] Two examples stand out most strikingly. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the majority found in the state diversity prong of Article III an intention to abrogate any immunity from suit that states might have retained following nationhood in their roles as quasi-sovereigns—an alteration in status that several members of the Court identified as part of a larger repudiation of the concept of royal sovereign prerogatives that was inconsistent with a democratic system of government. *See id.* at 469-73 (holding that state sovereignty does not require sovereign immunity). Sixty-four years later, in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), the majority undertook a perversely similar interpretive exercise, this time finding antidemocratic principles of white supremacy to be inherent in Article III's citizen diversity prong and hence to exclude black people entirely from invoking that element of federal court jurisdiction. *See also* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 314 (1816) (interpreting the definition of "judicial power" in Article III of the Constitution to define the powers and purpose of the federal judiciary in our coordinate system of government in a dispute over section 25 of the Judiciary Act); Cohens v. Virginia, 19 (6 Wheat.) U.S. 264, 378-80 (1821) (reaffirming the power and purposes of Supreme Court appellate review even in light of the Eleventh Amendment); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 760 (1824) (giving broad interpretation to the Article III extension of judicial power to cases "arising under" federal law and thereby reinforcing the power of Congress to establish a national bank); *cf.* Marbury v. Madison, 5

Section 25 of the Judiciary Act of 1789 (the predecessor to 28 U.S.C. § 1257) authorized appeals to the Supreme Court of the United States from state court judgments only where a federal claim of right had been denied below, and not when such a claim had been upheld, suggesting that the policy underlying the jurisdictional grant was to prevent the subversion of federal interests rather than to exercise a general supervisory power over state court pronouncements on federal law of the type that the Court now employs to ensure correctness and uniformity of interpretation.[43] That same foundational statute contained what we now call the Alien Tort Claims Act,[44] a jurisdictional provision that the Supreme Court has found to embody a congressional intent that federal courts should take cognizance of certain unenumerated causes of action under international law.[45] During the height of the *Swift v. Tyson* era, of course, access to the federal courts translated directly to predictable impacts on the rule of decision that would govern a dispute, and congressional debates over the possible elimination of diversity jurisdiction were infused with an awareness of the regulatory consequences of federal jurisdiction, as Edward Purcell details in his important study of the origins of *Erie*.[46] Professor

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U.S. (1 Cranch) 137, 147 (1803) (using a dispute over the original jurisdiction of the Supreme Court to articulate the principle of judicial review).

[43] Section 25 read, in pertinent part:

> *And be it further enacted*, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error . . . .

Judiciary Act of 1789 § 25, 1 Stat. 73, 85-86 (footnote omitted).

[44] *Id.* § 9(b), 1 Stat. 73, 85-86 (current version at 28 U.S.C. § 1350 (2000)).

[45] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004) (holding that Congress intended to empower courts to articulate and enforce "a relatively modest set of actions alleging violations of the law of nations").

[46] *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 77-91 (2000) (discussing congressional debates in the 1920s and 1930s over the elimination of diversity jurisdiction as a progressive reform); *see also id.*

Wechsler stated the point succinctly over fifty years ago: "A grant of jurisdiction is, in short, one mode by which the Congress may assert its regulatory powers."[47]

All of this is unexceptional. Professor Wechsler's important analytical heuristic, like all statements that become canonical, now sounds entirely prosaic. And yet, this essential mode by which Congress asserts its regulatory powers has not yet found coherent expression in the administration of the AIA.

In the case of generic jurisdictional statutes like 28 U.S.C. § 1331 and § 1332(a), the Supreme Court has held that the general policies embodied in such provisions—providing a competent and hospitable forum for federal claims (in the case of federal question jurisdiction), and protecting out-of-staters from the danger of parochialism or inadequate tribunals that they had no voice in creating (in the case of diversity)—are insufficient to warrant broad antisuit injunctions that would displace the background principle of concurrent jurisdiction in the state courts. It is at least arguably true that Congress's apparent acquiescence in these propositions in its 1948 amendment of the AIA warrants a conservative approach to the Act in this limited respect (that is, where jurisdiction rests entirely upon one of the generic provisions), since, as the plurality complained in *Vendo*, there would otherwise be a danger that the generic federal jurisdictional provisions could render the highly specific limitations of the AIA a "dead letter."[48] Hence my acknowledgement at the start of this Section that the alteration I propose to AIA doctrine only represents a partial revision: it would not alter the administration of injunctions where only a generic provision supports federal jurisdiction.

In the case of more targeted and specialized jurisdictional grants, however, the complaint of the plurality in *Vendo* loses its force. It is both appropriate and desirable for federal courts to ask how the specific policies that Congress has sought to promote when it shapes federal jurisdiction in particular classes of claims might be undermined by parallel state court proceedings, warranting the issuance of an antisuit injunction in aid of the federal court's jurisdiction. As Professor Wechsler observed, Congress often creates targeted exercises of federal jurisdiction when it apprehends that "state remedies may be too uncer-

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at 19-26 (describing congressional attitudes toward expanding the federal courts and altering their structure in response to the increased caseloads of Prohibition).

[47] Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 225 (1948).

[48] Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 638-39 (1977).

tain, slow, or ineffective . . . in particular situations"[49]—apprehensions, Wechsler suggested, that could be equally well answered by the authorization of original federal jurisdiction or by what he termed the "analogous" use of antisuit injunctions to protect that jurisdiction.[50]

In modern practice, one of the clearest examples of targeted jurisdiction is the decision by Congress to vest adjudicatory jurisdiction over a claim exclusively in the federal courts. A grant of exclusive jurisdiction expresses the explicit intention of Congress that a particular claim not be adjudicated in the state courts, and it strongly implies a policy of preventing state court proceedings from interfering with the exercise of jurisdiction by the federal forum that Congress has determined to be vital to the effectuation of federal interests.[51] In the preclusion context, of course, the Supreme Court has held that even this strong policy interest is not sufficient to overcome the express command of the Full Faith and Credit Act, which requires federal courts to give effect to the valid final judgments of state courts, even when those judgments include a settled release of exclusively federal claims.[52] When a state proceeding is still ongoing and preclusion has not attached, however, the AIA's "in aid of jurisdiction" proviso expressly invites federal courts to take these jurisdictional policies into account when determining whether interdiction of the state proceedings is appropriate.

A few federal courts have accepted that invitation and interpreted a grant of exclusive federal jurisdiction in a comprehensive statutory scheme as conferring broad authorization to issue an antisuit injunction in aid of jurisdiction, often simply ignoring the Supreme Court's discouraging dicta on the issue in cases like *Vendo* and *Amalgamated Clothing*.[53] Other courts, though unwilling to break ranks so dramati-

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[49] Wechsler, *supra* note 47, at 229.

[50] *Id.* at 229 & n.65. Professor Wechsler made this observation with specific reference to the relitigation problem that was most actively under discussion at the time in light of the Supreme Court's decision in *Toucey*. *Id.*

[51] In a narrow and odd line of cases, the Supreme Court has given strong voice to this proposition by identifying statutes in which Congress's expressed desire to preempt state law is so "complete" that it warrants an exception to the well-pleaded complaint rule and authorizes removal on the basis of a preemption defense. *See* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6-8 (2003) (describing the development of the complete preemption doctrine).

[52] *See* 28 U.S.C. § 1738 (2000); *see also* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 374 (1996) ("Further, § 1738 is not irrelevant simply because the judgment in question might work to bar the litigation of exclusively federal claims.").

[53] *See, e.g.*, Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 540 (9th Cir. 1994, amended 1995) (noting that where federal law provides for exclusive jurisdiction

cally, have moderated the impact of *Vendo* and *Amalgamated Clothing* by finding that federal courts retain authority to issue antisuit injunctions in order to prevent the frustration of federal jurisdiction in particular cases, even if the grant of exclusive jurisdiction cannot be read to authorize such injunctions on a categorical basis.[54] These holdings constitute significant movement in the right direction.

Indeed, in the particular context of exclusive federal jurisdiction, a complementary set of observations may be made about the proper shape of *Younger* abstention, the judge-made doctrine that sometimes calls for a stay of federal proceedings to avoid interference with an ongoing state court action.[55] While the Supreme Court has not yet had occasion to rule on the issue, several appeals courts have held that

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over claims, "state court proceedings [on those claims are] in derogation of federal jurisdiction" and a federal antisuit injunction is "necessary to preserve federal jurisdiction"); *see also, e.g.*, AT&T Mgmt. Pension Plan v. Tucker, 902 F. Supp. 1168, 1173 (C.D. Cal. 1995) (interpreting a grant of exclusive jurisdiction over ERISA claims, and statutory authorization for injunctive relief against "any act or practice" that violates ERISA provisions, as together satisfying AIA exceptions relating to jurisdiction and express authorization); Cartledge v. Miller, 457 F. Supp. 1146, 1151-52 (S.D.N.Y. 1978) (arriving at similar conclusion as to ERISA and antisuit orders, but resting solely on AIA exception for "expressly authorized" injunctions).

The plurality's skepticism in *Vendo* over the relevance of a grant of exclusive jurisdiction to the issuance of an AIA injunction, in particular, is entitled to limited precedential weight. That opinion conspicuously represented the views of only three members of the Court. Six members of the Court found that the statute at issue in that case (the Clayton Act) contained an express exception to the AIA's prohibition and did not reach the exclusive jurisdiction question. *See Vendo*, 433 U.S. at 643-44 (Blackmun, J., concurring in the judgment) (concluding that the Clayton Act contains an express exception to the AIA but holding that an injunction was inappropriate in the case at bar, hence joining the plurality's disposition, albeit "for reasons that differ significantly"); *id.* at 660 (Stevens, J., dissenting) (explaining that agreement of six Justices on express exception under the Clayton Act "establishes that proposition as the law for the future").

[54] *See, e.g.*, 1975 Salaried Ret. Plan for Eligible Employees of Crucible, Inc. v. Nobers, 968 F.2d 401, 407-08 (3d Cir. 1992) (finding that exclusive federal jurisdiction is relevant to the availability of an AIA injunction, but that the Supreme Court's discouraging statements limit federal district courts to determining whether an antisuit injunction is necessary to prevent frustration of the court's jurisdiction in "the very case before it").

[55] As Professor Redish has trenchantly pointed out, the Supreme Court has not developed its AIA and abstention doctrines in harmony, nor even fostered an active dialogue between the two, despite their obvious connection:

> At no point has the Court ever considered the problem of duplicative litigation from a holistic perspective. Instead, it has developed its Anti-Injunction Act interpretation . . . without regard to its abstention analysis, and it has developed its abstention analysis without any meaningful discussion of the relevance of its Anti-Injunction Act construction.

Redish, *supra* note 27, at 1360.

Younger[56] abstention is inappropriate where the federal court has been granted exclusive jurisdiction over the claim it is adjudicating.[57] These courts have generally framed their rulings on the issue in practical terms: *Younger* abstention aims to permit a state court to resolve claims that are concurrently raised in federal and state proceedings, and that aim generally will not be served by abstention where federal jurisdiction over the claim is exclusive. But it is a simple matter of semantic focus to reframe that pragmatic conclusion as a description of the regulatory policies bound up in the grant of exclusive federal jurisdiction, as indeed some courts have done.[58]

More broadly, this focus on jurisdictional policies invites a reexamination of the specialized jurisdictional provisions that Congress has included in many federal statutory schemes, particularly those that predated Congress's elimination of the amount-in-controversy requirement for the general federal question statute.[59] In one of his more memorable but less well-chosen turns of phrase, Judge Posner has dismissed these provisions as "so many beached whales" and proclaimed them to be redundant.[60] At the time of their enactment, however, such provisions often evidenced an intent on the part of

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[56] Younger v. Harris, 401 U.S. 37 (1971).

[57] *See, e.g.*, Int'l Ass'n of Entrepreneurs of Am. v. Angoff, 58 F.3d 1266, 1271 (8th Cir. 1995) ("There is no need for abstention unless the state and federal courts have concurrent jurisdiction of an issue or case."); *Sycuan Band*, 54 F.3d at 541 (finding that the grant of exclusive jurisdiction in the federal courts obviated *Younger* abstention); Levy v. Lewis, 635 F.2d 960, 967 (2d Cir. 1980) (holding that abstention applies "only where concurrent federal state jurisdiction exists"); *see also* Silberkleit v. Kantrowitz, 713 F.2d 433, 435-36 (9th Cir. 1983) (holding that, where no special abstention doctrine applies, abstention under *Colorado River*'s "wise judicial administration" doctrine is inappropriate in claims subject to exclusive federal jurisdiction); *cf.* Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 559-60 (1983) (noting that a stay of a federal suit would "clear[ly]" be "improper" under *Colorado River* where "there was no jurisdiction in the concurrent state actions to adjudicate the claims at issue in the federal suits").

[58] *See, e.g.*, *Sycuan Band*, 54 F.3d at 540-41 (recognizing the availability of an anti-suit injunction and the inapplicability of *Younger* abstention as complementary expressions of congressional purpose in grants of exclusive federal jurisdiction). *Sycuan Band* involved the rights of an Indian tribe, and subsequent courts have interpreted its holding and that of similar cases as giving voice to the distinctive congressional purpose of protecting Indian rights that is embodied in the grant of exclusive jurisdiction over such claims. *See, e.g.*, Bowen v. Doyle, 880 F. Supp. 99, 130-31 (W.D.N.Y. 1995) (emphasizing the importance of "the well-established rules protecting Indian tribes' interests in their sovereignty and property, and the primacy of federal authority in Indian affairs" in considering AIA injunctions).

[59] *See* Act of Dec. 1, 1980, Pub. L. No. 96-486, 94 Stat. 2369 (amending 28 U.S.C. § 1331 to eliminate the amount-in-controversy requirement).

[60] Winstead v. J.C. Penney Co., 933 F.2d 576, 580 (7th Cir. 1991).

Congress to ensure that an effective federal forum be available for the full and comprehensive vindication of the statutory scheme of which they were a part.[61] That was surely true, for example, in the case of the civil rights jurisdictional provision (one of the statutes that Judge Posner breezily dismissed),[62] which was enacted at a time when there was no general federal question jurisdictional statute at all.

It is particularly appropriate to recall the Court's treatment of the civil rights statutes at this juncture, for the inquiry I advocate into targeted jurisdiction levies a broadside challenge to the approach adopted by the Court in *Mitchum v. Foster*. The *Mitchum* Court held that antisuit injunctions can sometimes issue in § 1983 civil rights actions, despite the broad prohibition of the AIA.[63] In justifying that outcome, the Court fixed upon the AIA's "expressly authorized" exception, finding that this language encouraged an examination of the overall purposes of a statutory scheme in determining when an antisuit injunction is warranted.[64]

Although the unanimous result in the case was clearly correct, the Court's reasoning in *Mitchum* has always occupied an uneasy position in AIA doctrine. The proposition upon which the Court rested its holding—that an antisuit injunction is warranted if "an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding"[65]—is attractive in the abstract, but it fits uncomfortably into a statutory provision allowing injunctions only where "*expressly authorized* by Act of Congress."[66]

The *Mitchum* Court would have done much better to refer to the specialized grant of jurisdiction that accompanies the civil rights statute in describing the particular imperative for preserving a federal forum in a § 1983 action—to focus, in other words, upon the jurisdic-

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[61] *See, e.g.*, Califano v. Sanders, 430 U.S. 99, 105-07 (1977) (interpreting the statute eliminating the amount-in-controversy requirement in federal question actions brought against federal agencies as defining jurisdictional policy in the agency context, to the exclusion of arguments about implied purposes contained in the APA itself).

[62] *Winstead*, 933 F.2d at 580.

[63] Mitchum v. Foster, 407 U.S. 225 (1972) (defining the inquiry and finding the "expressly authorized" exception satisfied in the case of § 1983 actions).

[64] *Id.* at 237-38.

[65] *Id.* at 238.

[66] *See, e.g.*, Redish, *supra* note 27, at 1357-58 (describing the Court's treatment of the "expressly authorized" exception in *Mitchum* as "unjustifiably broad" and suggesting that much of the work that the Court has assigned to that provision would fit better into an analysis of jurisdictional policy).

tional policies that Congress enacted when it created the civil rights cause of action, policies that sometimes require the aid of the federal courts for their effectuation.[67] Professor Mishkin performed a similar type of analysis in the noted article that he wrote in response to the 1948 revision of the jurisdictional code, wherein he scrutinized the special removal provisions that were preserved and expanded in the revisions for suits brought against federal officers.[68] Professor Wechsler did likewise, commenting on a draft of the same provision be-

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[67] The Court readily recognized the interplay between the two provisions when it construed the jurisdictional statute, now codified at 28 U.S.C. § 1343, to reach actions brought against state officials in Puerto Rico:

> The federal civil rights legislation, with which we are here concerned, was enacted nearly 30 years before the conflict with Spain and the resulting establishment of the ties between Puerto Rico and the United States. Both § 1343(3) and § 1983 have their origin in the Ku Klux Klan Act of April 20, 1871, § 1, 17 Stat. 13. That statute contained not only the substantive provision protecting against "the deprivation of any rights, privileges, or immunities secured by the Constitution" by any person acting under color of state law, but, as well, the jurisdictional provision authorizing a proceeding for the enforcement of those rights "to be prosecuted in the several district or circuit courts of the United States." Jurisdiction was not independently defined; it was given simply to enforce the substantive rights created by the statute. The two aspects, seemingly, were deemed to coincide.

Exam'g Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 581-82 (1976) (footnote omitted).

[68] In that instance, the grant of jurisdiction aimed to prevent overenforcement of legal norms against government officials, rather than underenforcement. More specifically, as Professor Mishkin observed, the apparent purpose of Congress in expanding removal jurisdiction for that highly prioritized class of cases was to provide a tribunal that would produce reliable and unbiased resolutions of contested factual disputes:

> The importance of trying factual issues in the federal courts tends to be highlighted by the continuance of specific jurisdictional grants to the district courts in situations where reliance on the Supreme Court would mean at most a negligible increase in the latter's business. Consider, for example, the provisions for removal to a federal trial forum of civil actions or criminal prosecutions brought in a state court against a federal officer for acts done under color of office. The possibility of misconstruing the national law involved in these cases would not, at least in present times, seem to require their trial in a federal tribunal; Supreme Court policing of that law would apparently be sufficient and feasible on the few occasions on which such cases arise nowadays. Yet in the 1948 revision of Title 28, United States Code, this head of trial jurisdiction was not only retained but extended. That action certainly implies the existence of some consideration in addition to a desire for the uniform construction of national law.

Paul J. Mishkin, *The Federal "Question" In the District Courts*, 53 COLUM. L. REV. 157, 172 (1953) (footnotes omitted).

fore its enactment.[69] Thus, my argument here may be understood as a call to relocate and revitalize the *Mitchum* inquiry, which has been received with disfavor, turning to the "in aid of jurisdiction" provision to refocus our attention on targeted grants of jurisdiction and the particular role of the federal forum as a replacement for the more nebulous and rootless inquiry into the overall purposes of a statutory scheme.

This change in approach will also allow us to recover the distinct function that the "expressly authorized" exception to the AIA should serve in the administration of the Act—a function that was occluded when the *Mitchum* Court pressed that language into service to do work that should have been defined in terms of jurisdictional policy. The AIA imposes a broad prohibition on the issuance of most antisuit injunctions against state proceedings. But even when the AIA's broad prohibition is inapplicable and one of the exceptions obtains, the circumstances under which an antisuit injunction should issue are limited.[70] Such injunctions, like any form of equitable relief, require the petitioner to show that he would have no adequate remedy at law from a threatened harm in the absence of an injunction, that the public interest would be well served by such intervention, and that the petitioner has not engaged in untoward behavior that would render the court's intervention unjust.[71] Where courts are empowered to award injunctive relief, they have jealously guarded their prerogative to administer such relief with flexibility and discretion,[72] and have frequently exercised their authority cautiously, lest an injunction prove difficult to administer or enforce.[73]

The AIA's "expressly authorized" exception invites a more categorical approach to identifying the circumstances under which a court should issue an antisuit injunction once the bare availability of such an order has been established. It suggests, for example, that express

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[69] Wechsler, *supra* note 47, at 220-21.

[70] Recall Justice Blackmun's separate opinion in *Vendo*, for example. *See* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 643 (1977) (Blackmun, J., concurring) (finding that an antisuit injunction, though not categorically prohibited, was inappropriate in the case at bar).

[71] *See* DAVID SCHOENBROD ET AL., REMEDIES: PUBLIC AND PRIVATE 51-55 (1990) (discussing the nature of and requirements for an injunction).

[72] *See, e.g.*, Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) (adopting a narrow interpretation of a federal statute so as to avoid a construction that would have imposed constraints upon the equitable discretion of the federal court).

[73] *See generally* SCHOENBROD ET AL., *supra* note 71 at 97-100 (discussing the issue of enforceability and exploring concerns that often lead judges to craft injunctions narrowly and with caution).

statutory authorization for an injunction may sometimes embody a legislative determination that certain forms of injunctive relief are presumptively in the public interest, or that a court should tip the scale of equity in favor of broad injunctive intervention in order to ensure that the overall purposes of a statutory scheme are fully realized. The "in aid of jurisdiction" exception, in contrast, invites more case-specific questions about the propriety of injunctive relief, with a particular focus on the distinctive role of the federal forum whose jurisdiction has been invoked.

The federal interpleader provisions provide an apt illustration of these principles. The purpose of an interpleader action is to permit an insurer or other stakeholder to join multiple claimants with potentially conflicting claims into a single coercive action in order to obtain a consistent and comprehensive resolution of those claims that will protect the stakeholder from duplicative liability. To invoke the procedure, the stakeholder deposits the contested stake with the court (money representing the full extent of coverage in an insurance policy, for example, or a unique piece of property), and the claimants then assert their claims in a single proceeding so that the claims can be resolved simultaneously. In service of these purposes, Congress has enacted two statutory provisions.[74] First, 28 U.S.C. § 1335 defines the parameters of an action "of interpleader or in the nature of interpleader" and sets forth the basic procedures for invoking it. It also loosens the requirements for diversity jurisdiction in such an action, authorizing federal courts to exercise jurisdiction over interpleader claims whenever minimal diversity exists between at least two of the potential claimants.[75] Section 2361 then empowers district courts to enjoin potential claimants from "instituting or prosecuting" any competing action for the contested stake in state or federal court and provides guidance as to the types of orders that the court should consider issuing. This antisuit provision is one of "those very few statutes" that the Supreme Court has recognized as an explicit exception to the

[74] Rule 22 of the Federal Rules of Civil Procedure also provides for joinder of an interpleader action, but the provision is largely superfluous in light of the statutory provisions—except, perhaps, in the unusual case where the claimants in an interpleader action would exhibit complete diversity with the stakeholder but no diversity among themselves. *See generally* SILBERMAN, STEIN & WOLFF, *supra* note 4, at 978-79 (discussing Rule 22 in light of statutory interpleader provisions).

[75] *See* 28 U.S.C. § 1335(a)(1) (2000).

AIA.[76] The current provision, an expanded version of an earlier statute, was added in the wake of the 1948 amendment to the Act.[77]

Even under a conservative approach, it seems clear that the AIA would not have foreclosed antisuit injunctions altogether in federal interpleader practice, even without the "expressly authorized" exception of § 2361. In the first instance, an interpleader proceeding is an action in rem and should ordinarily merit a straightforward application of the formalistic in rem exception described earlier in this section. Moreover, § 1335 itself should be understood as providing an independently sufficient basis for issuing antisuit injunctions in aid of a district court's interpleader jurisdiction. The statute creates a targeted expansion of the court's original jurisdiction in service of a specifically enumerated goal. That goal requires that district courts have the authority to issue antisuit injunctions against competing state actions, since the purpose of Congress in extending specialized interpleader jurisdiction would often be frustrated if the federal suit could not be exclusive and comprehensive. Section 1335 is thus a grant of targeted jurisdiction that is distinct from the background landscape of ordinary diversity, and any antisuit injunction that constitutes a necessary and proper tool for the effectuation of that jurisdictional policy is an injunction in aid of the district court's jurisdiction. Under either approach, the AIA would seem to pose no categorical obstacle to an antisuit injunction, so why did Congress feel the need to add § 2361?

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[76] Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 640 (1977); *see also* Mitchum v. Foster, 407 U.S. 225, 234 n.14 (1972) (noting the ability of a district court to prevent suits affecting an interpleading action).

[77] *Compare* Law of June 25, 1948, ch. 646, § 1335, 62 Stat. 931 (reflecting the changes made by the amendment), *with* Law of May 24, 1949, ch. 139, § 117, 63 Stat. 105 (broadening the statute to include suits "in the nature of interpleader" and to include cases "prosecuted" under § 1335).

Interpleader already constituted a recognized and express exception under the AIA at the time the *Toucey* decision was handed down. *See* Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 134-35 (1941) (discussing the Interpleader Act of 1926 and the express provision for injunctions); *see also* Interpleader Act of 1926, ch. 273, § 2, 44 Stat. 416 ("Notwithstanding any provision of the Judicial Code to the contrary, [a federal district] court shall have power to issue its process for all such claimants and to issue an order of injunction against each of them, enjoining them from instituting or prosecuting any suit or proceeding in any State court or in any other Federal court . . . ."). That statute amended a previous version that was more vague in the authority it granted district courts to issue antisuit injunctions. *See* Interpleader Act of 1917, 39 Stat. 929 (repealed 1926) (providing that a district court in an interpleader action "shall have the power to make such orders and decrees as may be suitable and proper and to issue the necessary writs usual and customary in such cases for the purpose of carrying out such orders and decrees").

One answer might be that Congress thought it necessary to act with an abundance of caution when it amended the jurisdictional code following the *Toucey* decision in order to ensure that antisuit injunctions would not be categorically prohibited. There is probably some truth in that explanation.[78] But § 2361 also performs other functions. After expressly authorizing antisuit injunctions against competing state lawsuits, the statute goes on to provide that the district court "shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment."[79] The first phrase appears to supersede any abstention doctrines that might otherwise be thought to apply. The next three phrases invite the district court to employ its injunctive powers broadly for the complete effectuation of the interpleader scheme—and thus have they been interpreted.[80]

Accordingly, the difference between the "expressly authorized" inquiry and targeted jurisdictional analysis "in aid of jurisdiction" lies not only in the types of congressional policies for which one might search in a statutory scheme but also in the types of authorization and guidance that one should expect to find there. In the former case, the search for express authorization implies the possibility of a more categorical mandate. In the latter, the search for jurisdictional policies invites a more case-by-case approach to the administration of antisuit orders.[81] The fact that, in the event, antisuit injunction practice

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[78] In its first major decision on the AIA following the 1948 amendment, the Court suggested that the express exception in the 1948 interpleader statute was recodified and expanded in order to bring interpleader clearly within the new exception to the AIA. *See* Amalgamated Clothing Workers of Am. v. Richman Bros., 348 U.S. 511, 514 (1955) ("In lieu of the bankruptcy exception of [the old version of the AIA], Congress substituted a generalized phrase [in the 1948 amendment] covering all exceptions, such as that of the [amended] Interpleader Act, to be found in federal statutes." (citation omitted)).

[79] 28 U.S.C. § 2361 (2000).

[80] *See, e.g.*, Francis I. du Pont & Co. v. Sheen, 324 F.2d 3, 4-5 (3d Cir. 1963) (relying upon § 2361's invitation to "make the injunction permanent" in issuing a broad, permanent antisuit injunction); *id.* at 5 (interpreting compliance with interpleader procedures by the stakeholder as presumptive indication of responsible behavior as warranting an antisuit injunction to prevent harassment).

[81] In *Vendo*, for example, the sequence of events in the lower courts appears to suggest that the parties who were seeking an antisuit injunction to effectuate the grant of exclusive jurisdiction over federal antitrust claims deliberately sat on their rights, attempting to pursue every possible avenue in state court before seeking a federal order to interdict enforcement of the state judgment. *See Vendo*, 433 U.S. at 628-29 ("During the entire nine-year course of the state-court litigation, respondents' antitrust

under § 1983 has often borne a greater resemblance to the latter type of inquiry than the former is yet another indication that the Court chose the wrong basis for its landmark holding in *Mitchum v. Foster.*

C. *The Class Action Fairness Act and the Interdiction of Collusive Suits*

In asking whether and under what circumstances a federal court can use its injunctive powers to interdict collusive state court proceedings under CAFA, it is thus necessary to determine the nature of the specialized jurisdictional provision that Congress has enacted. What policies did Congress codify with its targeted expansion of federal diversity jurisdiction, and how should those jurisdictional policies find expression in the administration of class actions governed by the Act? In answering these questions, it will be useful once again to return to the period surrounding the 1948 amendments to the AIA and to recall one of the leading disputes over the power of Congress to effectuate remedial policies in the federal courts that was taking place at that time: the debate over the doctrine of protective jurisdiction. That debate provides guidance in discerning the jurisdictional policies that CAFA embodies.

Modern commentators have begun to raise sharp questions about the constitutionality of CAFA's expansion of diversity jurisdiction to include minimally diverse suits. The Act's change in jurisdictional policy will frequently have the effect of taking independent claims that would fail to satisfy the requirements of diversity if considered in isolation and sweeping them into federal court through the device of expansive joinder. On the only occasion on which the Supreme Court has expressly validated such an expansion of diversity jurisdiction, when it upheld minimal diversity under the federal interpleader statute,[82] the nondiverse claims that were swept into federal court unquestionably constituted part of a single Article III "case" or "controversy" in the strictest sense: the resolution of any one claim over the con-

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suit in the District Court was, in the words of the Court of Appeals, allowed to lie 'dormant.' But the day after [all avenues of appeal were exhausted in the state proceedings], respondents moved in District Court for a preliminary injunction against collection of the Illinois judgment." (citation omitted)). A more proper basis for denying relief in that case might thus have been that the course of behavior followed by the party seeking the antisuit injunction failed to satisfy ordinary requirements for the intervention of equity. *But see id.* at 662-65 (Stevens, J., dissenting) (offering an account of litigation delays in Illinois courts and strategic considerations that suggest an innocuous interpretation of this period of delay).

[82] *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530 (1967).

tested stake in an interpleader action would necessarily affect the resolution of the competing claims.[83] That characteristic will often be lacking in minimally diverse suits brought into the federal courts under CAFA, particularly those proceeding under Rule 23(b)(3). It may also be difficult in some 23(b)(3) damages actions to argue that the nondiverse claims in the action share a constitutionally sufficient "common nucleus of operative fact,"[84] if such a showing is required. Unless the diversity clause in Article III is read to track whatever joinder policies Congress enacts in the class action context, free from any independent constraint as to what constitutes a proper "case" or "controversy" under the Clause—an analytically unsatisfying proposition—it may be that CAFA will have to answer serious Article III challenges.[85]

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[83] The Court adopted this "logical relationship" approach in *Moore v. New York Cotton Exchange*, finding that jurisdiction is permissible—over a counterclaim, in that case—where "[e]ssential facts alleged by [the claimant with the independent federal claim] enter into and constitute in part the cause of action set forth in the [jurisdictionally insufficient claim]." 270 U.S. 593, 610 (1926).

[84] *See* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966) (holding that federal jurisdiction over pendent state claims is constitutionally permissible where they share a "common nucleus of operative fact" with the federal claim). Consider, for example, the asbestos cases. To be sure, asbestos claimants share elements of commonality in the scientific proof of general causation tying their injuries to asbestos exposure. But the circumstances surrounding an individual's exposure and the extent of her damages will generally share little or no factual nexus with the circumstances of other claimants. *See, e.g.*, Georgine v. Amchem Prods., Inc., 83 F.3d 610, 626-30 (3d Cir. 1996) (detailing the vast array of individual circumstances that characterize asbestos exposure and the concomitant difficulty of establishing commonality and predominance in class certification), *aff'd in part and modified in part sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). If diversity jurisdiction over such a case depended upon satisfying the *Gibbs* standard, it is far from clear that the federal courts would have power to resolve it.

Even in cases involving a denial of certification, as in *Georgine*, note the important difference between a dismissal for lack of federal jurisdiction and an order resolving the certification issue and denying class treatment. In the one case, the federal courts disclaim any power to adjudicate. In the other, they issue an order forbidding the case, as filed, to proceed as a class. This difference takes on added significance in light of the analysis in Part III of this Article.

[85] Professor Floyd has offered one such challenge in a thorough article. *See* C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613, 652-71 (2004) (discussing the minimal diversity provisions of the proposed Class Action Fairness Act). I must admit that I find his discussion of the issue unsatisfying in some ways. Floyd articulates his arguments about CAFA and minimal jurisdiction primarily as an exercise in discerning the purposes ascribed to the Diversity Clause by "the Framers of the Constitution." *Id.* at 652. Whatever views the Framers may have held about the purpose of the Diversity Clause, they lived within a legal arena in which the legislative authority of states and the adjudicatory authority of courts were both conceptualized in strictly territorial terms. The broad extension of statutory and adjudicatory jurisdiction by states that sometimes characterizes modern class action litigation was not a problem that an

Such challenges, in turn, may provoke a return to the disputes over the doctrine of "protective jurisdiction" that the Court left unresolved in the 1950s. As it has generally been used, the term "protective jurisdiction" refers to the possibility that Congress might have the power to extend the jurisdiction of the federal courts beyond the apparent limits of Article III in service of important regulatory policies. The doctrine has most frequently been discussed in relation to federal statutory schemes in which Congress appears to have authorized certain claims to be heard in federal court, without regard to diversity, but has not imposed a federal rule of decision that would mark the claim as arising under federal law, instead permitting state law to govern. If Congress could employ its Article I powers to preempt state law and impose a federal rule of decision in such cases, the argument frequently goes, it should, a fortiori, enjoy the power to leave the state rule of decision in place (or to adopt the state rule by reference) but remove state claims to the protective arena of a federal forum.[86]

The issue of protective jurisdiction arose most prominently in conjunction with the Taft-Hartley Act of 1947, which appeared to authorize federal jurisdiction over certain classes of nondiverse labor disputes without imposing a federal rule of decision.[87] Several eminent commentators indicated their approval of the protective jurisdiction doctrine at the time,[88] though the Supreme Court avoided the issue by

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eighteenth-century lawyer would have had any reason to consider. From this fact, one could fairly say that the Framers did not have the expansive joinder scenarios of CAFA affirmatively in mind when they drafted the Diversity Clause, but that says little about the propriety of Congress's decision to invoke the Clause today to respond to a new problem. Assessing the constitutionality of CAFA in light of a late-eighteenth-century conception of the forms and function of litigation thus seems particularly inapposite.

[86] *But cf.* Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507-09 (1900) (interpreting a federal "arising under" jurisdictional statute not to reach federal land grant claims where federal law arguably "creates" a cause of action but leaves state law in place to provide the rule of decision).

[87] *See* 61 Stat. 156 (codified at 29 U.S.C. § 185(a)) (allowing for suits in federal court "without regard to the citizenship of the parties"). *See generally* Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 559-64 (1983) (describing the Taft-Hartley Act and the debate over protective jurisdiction that it provoked).

[88] *See* Mishkin, *supra* note 68, at 191-93 (arguing that Article III allows for "protective" jurisdiction); Wechsler, *supra* note 47, at 224-25 (adopting Marshall's view that federal jurisdiction should extend "to every case that might involve an issue under federal law").

finding that Taft-Hartley in fact authorized the creation of substantive federal common law in the area of collective bargaining disputes.[89]

I will not engage here with the constitutional disputes surrounding protective jurisdiction. Rather, my purpose in invoking the term is to call to mind the broadly recognized precept that underlay the heated debate over that doctrine in the 1950s: that the central function of certain extensions of federal jurisdiction is to protect specific, congressionally favored values and interests, even in the absence of a federal rule of decision. Professor Mishkin put the point succinctly:

> [When Congress enacts a specialized jurisdictional provision that seeks to] bring to a national tribunal cases where no construction or enforcement of federal law is required—that is, where the substantive law is not national, but state . . . [—such a statute] could not be aimed at vindicating federally created rights; by hypothesis, none would be involved. Rather, the purpose of such jurisdiction would be the protection of some congressionally favored interest by exploiting the institutional differences between the federal and state courts. Even in wholly "local" cases, those variations between the national and state judiciaries would tend to be reflected in their treatment of the evidence in the case before them.[90]

Without inquiring into the outer bounds of Article III, or Congress's power to extend those boundaries through its Article I powers, the protective jurisdiction debate reminds us that Congress sometimes acts to shape federal jurisdiction in order to protect vital interests that will benefit from the particular features of a federal forum, even in the absence of a federally created rule of decision for the dispute.[91]

The minimal diversity provision of § 1332(d) operates in a manner similar to a grant of protective jurisdiction. It identifies a class of

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[89] Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 457 (1957); *see also* Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1, 6-14 (1957) (criticizing *Lincoln Mills* for using federal common law as a means of avoiding the difficult questions surrounding protective jurisdiction, though allowing for the possibility that protective jurisdiction might be appropriate).

[90] Mishkin, *supra* note 68, at 184; *see also* Wechsler, *supra* note 47, at 224-25 ("Where, for example, Congress by the commerce power can declare as federal law that contracts of a given kind are valid and enforceable, it must be free to take the lesser step of drawing suits upon such contracts to the district courts without displacement of the states as sources of the operative, substantive law.").

[91] Professor Goldberg-Ambrose makes similar observations in her treatment of the protective jurisdiction debate. *See, e.g.*, Goldberg-Ambrose, *supra* note 87, at 569 ("It is instructive to observe how federal jurisdiction by itself can become an instrument of federal policy insofar as it permits the use of federal rather than state procedures."); *id.* at 569-72 (discussing how jurisdictional statutes can be used as tools for effectuating substantive policies).

cases in which Congress apprehends a distinct federal interest—cases, that is, that may inflict broad commercial harms or threaten to undermine confidence in the national judicial system when mishandled. Rather than preempting state law and imposing a federal rule of decision, Congress has chosen to protect the federal interest in this class of cases by expanding access to the federal forum, which Congress believes to be reliably more diligent in the administration of class proceedings. One of the primary aims of the Act's jurisdictional provision is to prevent collusive or faithless state court litigation from compromising the federal interest in responsible adjudication of absentees' claims.[92]

Thus, when absent class members and competing counsel file suit in federal court and seek to enjoin what they believe to be a collusive state court proceeding, they are invoking the jurisdiction of the federal court for the very purpose for which it was created. An antisuit injunction in such a case operates directly in aid of the federal court's exercise of protective jurisdiction. In overcoming the categorical prohibition of the AIA, no showing should be required that a federal proceeding under CAFA has reached such an advanced stage that it effectively constitutes a "res," is in danger of having its "flexibility" compromised, or satisfies any of the other legal fictions that have characterized AIA doctrine in complex litigation. Indeed, in many instances, a federal proceeding seeking to interdict malfeasance or collusion by class counsel will be filed only after the state proceeding is underway. These distinctions are not disqualifying. The policies bound up in CAFA's jurisdictional provision permit the federal court to escape the categorical prohibition of the AIA without resorting to the fictions that might be necessary in a case that depended entirely upon a generic jurisdictional provision for entrance to the federal forum.

To say that CAFA's jurisdictional provision exempts these cases from the categorical prohibition of the AIA is not to say that an antisuit injunction will automatically be appropriate. As is always the case with requests for preliminary injunctive relief, it will be necessary for the federal petitioners to demonstrate an imminent danger of irrepa-

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[92] *See* CAFA § 2(a)(2)–(3), 28 U.S.C. § 1711 note (Supp. V 2005) (summarizing the purposes of the Act). Professor Issacharoff makes a similar "greater-includes-the-lesser" observation in describing CAFA, arguing that the case for uniform federal choice of law rules is bolstered by the power that Congress presumably has to impose national standards for most forms of common law commercial liability. *See* Issacharoff, *supra* note 12, at 1867.

rable harm.[93] It will also be incumbent upon the petitioners to demonstrate how the allegedly offending state class proceeding (or state class counsel) implicates the jurisdictional purposes of the Act. In this connection, it is appropriate to recall the discussion in the last Section concerning the different functions that are served by the provisions of the AIA dealing with "expressly authorized" injunctions and those "in aid of jurisdiction."[94]

Had CAFA included an express authorization for antisuit injunctions similar to the provisions contained in the interpleader and bankruptcy statutes, federal courts would be justified in issuing such orders freely to ensure the prerogatives of the federal forum—perhaps even automatically, as in the case of the automatic statutory stay of competing proceedings that is one of the hallmarks of bankruptcy litigation.[95] As in those other contexts, the express authorization would raise a presumption that the requirements for equitable relief are satisfied.

When petitioners must demonstrate that an injunction operates "in aid of [the federal court's] jurisdiction," in contrast, a more case-specific inquiry is needed. The federal petitioners in a CAFA proceeding should be required to show that they are threatened with the type of harm that the Act's jurisdictional provision was designed to prevent—a state proceeding tainted by collusion or malfeasance—and that there is a concomitant need for an antisuit injunction to prevent that harm. In order to administer such requests, the federal courts, in turn, will need to identify the indicia of collusion or malfeasance that may warrant an injunction. Structural features of the lawsuit (for example, a settlement that aims to release claims that the forum would have no power to adjudicate even though other, more suitable fora are available),[96] the larger litigation context (for example, a suit filed in an unlikely or inconvenient forum for the apparent purpose of exploiting permissive local standards), and the actual course of the events or negotiations that gave rise to the state court action are all

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[93] *Cf.* Wood, *supra* note 27, at 319-20 (describing the general principles embodied in AIA doctrine).

[94] *See supra* Part I.B.

[95] *See* 11 U.S.C. § 362 (2000).

[96] *See, e.g.*, Epstein v. MCA, Inc., 126 F.3d 1235, 1248-51 (9th Cir. 1997), *withdrawn*, 179 F.3d 641 (9th Cir. 1999) (discussing the structural danger of malfeasance in cases where class counsel appear to be using a state court proceeding as a vehicle for generating a classwide settlement that will release exclusively federal claims); *see also infra* text accompanying notes 245-246 (discussing the propriety of an antisuit injunction in the *Epstein* litigation).

likely to constitute important elements of that inquiry. When the federal court concludes that the state proceeding threatens to impose the kind of harm that Congress aimed to combat by expanding the court's jurisdiction under CAFA,[97] then an antisuit injunction in aid of the Act's jurisdiction will often be justified.

Finally, one's view about the threshold that a petitioner should have to satisfy in requesting such an injunction may be influenced by one's normative assessment of CAFA's jurisdictional provision. Although the primary focus of this Article is the proper theoretical and methodological approach to the Act and not its desirability as a policy reform, the normative question will have an inevitable bearing upon the shape of these newly articulated doctrines. I share Professor Burbank's concern that the Act's use of an aggregation rule for satisfying the amount-in-controversy requirement coupled with its poorly crafted abstention provisions is likely to result in many disputes that are essentially local in nature being taken from the control of states and moved into federal court.[98] Important questions of substantive state policy—from the principles that should govern the adjudication of negative-value claims to the proper approach to choice of law in aggregate litigation—may become the near-exclusive province of federal judges in cases governed by CAFA. That result is particularly difficult to defend in those cases that only implicate the interests of one or two states in any meaningful way. In cases where the exercise of federal jurisdiction appears unmoored from the Act's animating purposes or where an antisuit injunction would otherwise be harmful to federalism values without adequate justification, those circumstances call for a stronger showing of malfeasance before a court issues an injunction in aid of its jurisdiction under CAFA.

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[97] Or, put another way, if the court is convinced that the absentees would surely remove to the federal forum were they able to do so.

[98] *See* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1527-28 (2008) ("It suffices to note that none of the exceptions permits a state court to retain (if the defendant chooses to remove) a class action brought on behalf solely of the citizens of that state, alleging injuries sustained in the state as a result of the in-state activities of an out-of-state corporation doing substantial business in the state. Such a case is, therefore, defined as of 'national importance.'" (emphasis omitted)); *see also* SILBERMAN, STEIN & WOLFF, *supra* note 4, at 1052-53 (questioning the propriety of federal jurisdiction in a similar scenario).

II. ENFORCING DENIALS OF CERTIFICATION: *SHUTTS*, DUE PROCESS, AND THE ANTISUIT INJUNCTION

A second major question that will arise under CAFA concerns the power of a federal court to enforce its own denial of certification when class counsel make subsequent attempts to seek certification in more hospitable fora. The issue can arise both in cases where diligent class counsel believe in good faith that certification is in the best interests of their clients and in cases where class counsel are acting less faithfully toward their clients, perhaps in some form of de facto collusion with defendants in a settlement-only proceeding. If the Act achieves its stated goal of moving large numbers of class actions into federal court, both types of cases can be expected to arise with greater frequency, and those actors with an incentive to defend an original denial of certification can be expected to invoke the injunctive powers of the federal courts to prevent their opponents from taking extra bites at the apple. As with the interdiction of ongoing competing class actions explored in Part I, CAFA provides the occasion for a major analytical reassessment to determine how best to resolve such disputes.

The problem, in short, is as follows: When class counsel fail to obtain certification of a desired class in an initial forum (F_1), they will sometimes select another representative plaintiff (to avoid the most obvious preclusion problems that the original named plaintiff might otherwise encounter) and seek certification of the same class in another court, typically in another jurisdiction. In a settlement class action, where class counsel and defendants both desire certification, there may be a joint incentive on the part of both sides to try their luck in multiple successive fora until they succeed in securing an order of certification.[99] Whether the certification proceedings in F_1 are adversarial or cooperative in nature, those actors who believe that their interests would be better served by a denial of certification—

[99] The most frequently cited example of this phenomenon is the General Motors pick-up truck litigation. The named plaintiffs and defendant in that case obtained a certification order for a nationwide class action in the Eastern District of Pennsylvania that was reversed on appeal by the Third Circuit, which ruled that certification of a nationwide class was inappropriate. The parties then moved their litigation to the state courts of Louisiana, which certified the class, approved the settlement, and entered a final judgment. Objecting class members returned to the original federal forum, seeking an injunction to prevent Louisiana's interference with the original denial of certification, but the Third Circuit held that the AIA prohibited such an order. *See In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 137-40 (3d Cir. 1998) (*GM III*) (detailing the history of the litigation and denying the requested injunction).

typically the defendant in most litigated class actions and dissenting class members represented by competing counsel in most settlement proceedings—may seek to prevent the proponents of the class from attempting such serial lawsuits by obtaining an antisuit injunction to enforce the original denial of certification, thereby preempting further suits. This was the issue before the Seventh Circuit in the *In re Bridgestone/Firestone II* litigation, resulting in Judge Easterbrook's much noted opinion.[100] For present purposes, I will focus attention on those cases where F_1 was a federal forum and, hence, where it is a federal court that is asked to issue an order enforcing its original denial of certification.

Where attempts at multiple certification proceedings arise in conjunction with settlement, and particularly where a proposed settlement is marked by collusion or otherwise fails to protect the interests of the class faithfully, CAFA's policy of protecting the interests of class members appears to be directly implicated.[101] Yet the failure of the Act to provide for removal by absent class members in state court proceedings once again impedes the effectuation of that policy. Consider the situation that exists when class counsel file a successive attempt at certification. Were the second case filed in federal court, the federal district judge would presumably be likely to defer to the earlier decision of her federal colleague and deny the certification request. When class counsel file their second case in state court, however, the successive certification issue will only come before a federal judge if the case is removed—an option that lies within the exclusive control of the defendant. Thus, when the party seeking to resist certification is an absent class member—or, in cases where the defendant would resist certification, when the plaintiff is able to make the second lawsuit nonremovable—the resisting party must ask the federal court that hosted the original lawsuit to enjoin the subsequent state court proceedings. As before, this method of interdiction implicates the provisions of the AIA. More precisely, such an antisuit injunction will likely proceed under the AIA's exception for orders issued "to protect or effectuate [a federal court's] judgments."[102]

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[100] *In re* Bridgestone/Firestone Tires Prods. Liab. Litig. (*Bridgestone/Firestone II*), 333 F.3d 763, 769 (7th Cir. 2003).

[101] *See* CAFA §§ 2(a)(3)–(3)(a), 28 U.S.C. § 1711 note (Supp. V 2005) (finding that class members often receive little benefit from certain types of class settlement and placing limitations on coupon settlements and other disfavored practices).

[102] 28 U.S.C. § 2283 (2000). A denial of certification does not itself constitute a final judgment in the formal sense of the term, since the named plaintiffs theoretically

Even before the provisions of the AIA come into play, however, an antisuit injunction aimed at enforcing a denial of certification must answer a formal analytical objection. Absent class members, by definition, are never made full parties to an action in which certification is denied. Such individuals generally do not receive any form of notice regarding the proceeding, and certainly not the individual notice and opportunity to opt out that a 23(b)(3) action would require if certification were granted. When a federal court issues an antisuit injunction to enforce the denial of certification against absent members of a putative class, it appears that the court is binding the class members to the results of a proceeding to which they were never formally joined as parties, in which they were never in privity with parties, and for which they never received any form of individualized process. Some commentators have concluded that this fact alone prohibits antisuit injunctions aimed at enforcing a denial of certification.[103]

This formal objection is both overstated and misconceived. While Judge Easterbrook's analysis in *Bridgestone/Firestone II* was unsatisfying (and that opinion remains the only serious judicial pronouncement on the issue), the Seventh Circuit was correct in its core holding: there is no categorical obstacle to the issuance of an antisuit order by a federal court seeking to prevent serial relitigation of the same certification question by members of the same plaintiff class. Furthermore, in cases where the policies underlying CAFA are implicated by

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retain the option of proceeding with their individual claims. *See id.* §§ 1291–1292 (setting forth the final judgment rule and exceptions for certain interlocutory appeals); Coopers & Lybrand v. Livesay, 437 U.S. 463, 469-70 (1978) (rejecting the "death knell" theory for immediate appeals of denials of certification). Nonetheless, such orders are effectively final for most purposes, and have been treated as such. *See, e.g.*, FED. R. CIV. P. 23(f) (providing for immediate discretionary appeals of certification orders); *cf.* 28 U.S.C. § 2072(c) (2000) (authorizing the Supreme Court to promulgate rules that "define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title"); *Bridgestone/Firestone II*, 333 F.3d at 767 ("'[F]or purposes of issue preclusion . . . , "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.' Our decision that no nationwide class is tenable is 'sufficiently firm' for this purpose." (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982)). The Third Circuit has ruled that a denial of certification is not a sufficiently final order to trigger the AIA's "protect or effectuate" exception. *See, e.g.*, *GM III*, 134 F.3d at 146 ("[D]enial of class certification under these circumstances lacks sufficient finality to be entitled to preclusive effect."). This is one of many incorrect rulings in this important line of Third Circuit cases, as I will argue later in this Section.

[103] Timothy Kerr offers a good account of the due process objection. *See* Kerr, *supra* note 29, at 240-43.

the requested injunction, the Act lends additional weight to the considerations that may counsel in favor of issuing such an antisuit order.

In order to analyze these questions accurately, it is necessary to delve deeply into two important issues that are often poorly understood: the correct interpretation of the Supreme Court's procedural due process analysis in *Phillips Petroleum v. Shutts*,[104] and the proper treatment of remedial doctrines like class certification in multijurisdictional disputes. The analysis that follows ultimately distills down to the following conclusions: first, *Shutts* requires a degree of procedural due process in class proceedings that varies with the extent to which a court proposes to place class members at risk of an alteration in their legal position; and second, the alteration in legal position that attends the enforcement of a denial of certification is usually not great enough to demand the issuance of individualized process to absent class members. That being so, the objection that class members must be made formal parties through service of individual process before an antisuit injunction can bind them is usually misplaced. Rule 23, CAFA, and the All Writs Act together provide sufficient authorization for the issuance of such injunctions in appropriate cases.

A. *Understanding* Shutts

The persistent confusion surrounding the meaning of the Court's opinion in *Shutts* is attributable, at least in part, to the persistently confusing manner in which the Court has invoked the Due Process Clause in its discussions of personal jurisdiction. Understanding *Shutts* requires a clear grasp of the distinction between "procedural due process" in its most commonly used sense and the "due process" doctrine associated with personal jurisdiction, along with a clear grasp of how both concepts are deployed in *Shutts* itself. The general failure on the part of courts and commentators to distinguish between these two concepts in assessing the doctrinal implications of *Shutts* is forgivable, since the *Shutts* Court exhibits the same fallacy at various points in its own analysis.[105] The common account of *Shutts*'s holding—that class members in an action for damages can never come within the power of a court without first receiving individualized notice and an

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[104] 472 U.S. 797 (1985).

[105] *See* Stephen B. Burbank, *Jurisdiction To Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TUL. J. INT'L & COMP. L. 111, 117-18 (1999) (describing the origins of this confusion in the Court's *International Shoe* opinion).

opportunity to opt out—is oversimplified and has led to inaccurate and misleading conclusions.[106]

The decision in *Shutts* grew out of a class action, brought in Kansas state court, that resulted in an award of interest on certain royalty payments from natural gas leases that the defendant had withheld from the plaintiff customers in conjunction with a rate regulation scheme.[107] On appeal, the losing defendants raised two constitutional challenges to the award, one involving the power of the state court to apply Kansas law to the entire dispute (which produced an important ruling on choice of law that is not relevant here), and one involving the procedures employed by the lower courts in certifying the class.[108] As to the second issue, the defendant focused specifically on the state

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[106] Professor (now Judge) Wood has referred to this as the "extreme reading" of *Shutts*. *See* Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 605-06 (1987). If anything, Professor Wood's early account of the potential for misreading *Shutts* understated the case.

[107] *Shutts*, 472 U.S. at 799-801. Because the plaintiffs in *Shutts* sought damages based on a statutorily determined interest rate, their cause of action is frequently characterized as an action at law in discussions of the case. In fact, however, the Kansas Supreme Court had relied on equitable principles of unjust enrichment in determining, in an earlier case involving the same parties, that leaseholders were entitled to interest on withheld royalty payments. *See* Shutts v. Phillips Petroleum Co., 567 P.2d 1292, 1298 (Kan. 1977) (describing the plaintiffs' damages theory in terms of unjust enrichment); *id.* at 1321 (holding "on equitable principles" that plaintiffs are entitled interest payments). In a much-noted footnote, the *Shutts* Court expressly limited its holding to "class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." *Shutts*, 472 U.S. at 811 n.3. The Court itself contributed to this potential confusion in the text immediately preceding this footnote when it offered the ambiguous observation that its holding described the procedures that a state like Kansas must employ if it "wishes to bind an absent plaintiff concerning a claim for money damages *or similar relief at law*." *Id.* at 811 (emphasis added).

[108] Out of necessity, I gloss over much complexity in saying that the Court's choice of law ruling is "not relevant" to the present discussion. At a metadoctrinal level, limits on choice of law and on personal jurisdiction operate in a complementary fashion in restricting the range of burdens and outcomes that people can expect to encounter as a result of their primary activities. Professor Silberman's work has explored this relationship most profitably. *See, e.g.*, Linda Silberman, *Reflections on* Burnham v. Superior Court*: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 583-90 (1991). In most cases, relatively strict constitutional rules on personal jurisdiction operate to counterbalance relatively lax constitutional standards on choice of law. This limits the range of fora in which a plaintiff can bring suit and, indirectly thereby, the range of state laws that are likely to apply to the dispute (given the conventional wisdom that most state courts prefer to apply the law of the forum). In *Shutts*, this relationship was reversed: the permissive rule that the Court adopted on personal jurisdiction counterbalanced with a stricter constitutional standard on the choice of applicable law. As with many standards, however, this one has proven highly malleable, giving rise to some of the adventuresome nationwide state court class actions that are one of the stated targets of CAFA.

court's treatment of plaintiffs from outside the state. The question presented was one of personal jurisdiction:

> [Petitioner contended] that the "opt-out" notice [that was sent] to absent class members, which forced them to return the request for exclusion in order to avoid the suit, was insufficient to bind class members who were not residents of Kansas or who did not possess "minimum contacts" with Kansas.[109]

Although this description of the posture of the *Shutts* appeal is likely familiar to anyone who studied the case in law school, its significance has never been fully explored in the literature. If the Court's analysis of the Kansas opt-out notice in *Shutts* relates entirely to the state court's power over "class members who were not residents of Kansas or who did not possess 'minimum contacts' with Kansas," as the Court suggests, that would seem to imply two propositions. First, it implies that the holding of *Shutts* concerning the constitutional requirements of notice and opt-out rights does not necessarily apply to class members over whom the court has clear constitutional power to exercise personal jurisdiction on some other theory. Second, it implies that the analysis of notice and opt-out rights contained in *Shutts* bears solely on the issue of personal jurisdiction and should be understood exclusively in that context, with no necessary implications for broader questions of "procedural due process."

The first of these propositions is clearly correct. As I will explain—and as courts and commentators regularly fail to appreciate—the doctrinal holding in *Shutts* has no direct application in those cases where a court has the power to exercise adjudicatory jurisdiction over absent class members without having to resort to a solicitation of consent through the issuance of individualized opt-out notice.[110] That

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[109] *Shutts*, 427 U.S. at 802.

[110] Professors Miller and Crump made this basic observation in their early account of the *Shutts* decision, although they offered very little in the way of further analysis to explore its implications:

> If all class members have an affiliation with the forum, the court can compel appearance, and the inference of consent is unnecessary. Notice and an opportunity to be heard probably still would be required as independent due process guarantees, but the right to opt out presumably could be denied. It is even conceivable that cheaper notice, such as the substitutes provided by some state class action rules, would be acceptable in an action in which traditional jurisdictional requirements are met.

Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 31-32 (1986) (internal citations omitted); *see also* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE

category of cases includes state court actions in which all members of the class are residents of the forum state.[111] It also includes federal court actions in which the district court possesses express authority to issue nationwide service of process[112] or is not otherwise bound by the default territorial limits on service of the summons and complaint that are imposed by the Federal Rules of Civil Procedure as a matter of policy (rather than as a constitutional mandate).[113] This is not to say that "anything goes" in such cases. But it does mean that the doctrinal holding of *Shutts* regarding the power of a class action court is not strictly applicable when the certifying court has an independent basis for exercising territorial jurisdiction over putative class members.

This conclusion begs additional questions: just what limitations does the Due Process Clause impose upon the procedures that a court can employ in certifying a class action when jurisdiction is not an issue, and what, if anything, does *Shutts* have to say on the matter? The second, deliberately provocative proposition outlined above suggests one possible answer to these questions: that all the analysis contained in *Shutts* concerning what the Due Process Clause "requires" in class litigation is focused solely on the question of personal jurisdiction and should be understood exclusively in those terms, with no immediate

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DAME L. REV. 913, 954-55 (1998) (suggesting that the holding of *Shutts* relating to opt-out notice "may well be limited . . . to cases in which the members of the class are beyond the territorial jurisdiction of the forum"); Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 787 (2005) (making the basic point in the context of preclusion analysis).

[111] *See, e.g.*, Jahn *ex rel.* Jahn v. ORCR, Inc., 92 P.3d 984, 988-91 (Colo. 2004) (en banc) (erroneously reading *Shutts* and other authorities to stand for the proposition that class actions certified pursuant to Rule 23(b)(2) can never have claim-preclusive effects on damages claims because of their failure to provide opt-out rights, even though class members were all in-state residents).

[112] *See, e.g.*, Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 897-99 (7th Cir. 1999) (suggesting that 23(b)(2) class actions cannot compromise damages claims through preclusive effect, despite the presence of a nationwide service provision in a federal statute that eliminates personal jurisdiction problems).

[113] Federal Rule of Civil Procedure 4(k)(1)(A) establishes the default territorial limits on service of a summons to establish jurisdiction:

> (1) Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:
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> > (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . . .

FED. R. CIV. P. 4(k)(1)(A); *cf.* FED. R. CIV. P. 4(k)(1)(C) (service of summons is effective to establish jurisdiction "when authorized by a federal statute"); FED. R. CIV. P. 4.1(b) ("An order committing a person for civil contempt of a decree or injunction issued to enforce federal law may be served and enforced in any district.").

bearing on the procedures that a court may constitutionally employ during certification when jurisdiction is not an issue.[114] Although this second proposition is implied by the manner in which the Court frames its opinion, it is ultimately unsustainable. Those who have read *Shutts* to speak directly to matters of "procedural due process" outside the context of personal jurisdiction have been guilty of carelessness, but they have not been entirely unjustified in their approach, for the opinion is, in fact, about more than just personal jurisdiction. Properly understood, *Shutts* adumbrates a general analytical framework for the constitutional requirements of due process in class or aggregate litigation. It simply uses the confusing and idiosyncratic "due process" doctrine of personal jurisdiction as the occasion for the exercise.

1. *Shutts* and the Role of "Consent"

As the avalanche of scholarship on the subject can attest, personal jurisdiction has never fit comfortably into the standard paradigms of "due process" analysis. The modern formulation of the doctrine purports to be concerned primarily with preventing courts from imposing substantively unfair burdens upon defendants—that is, from imposing a level of litigation expense or inconvenience that the Court deems unwarranted in light of the defendant's level of deliberate contact (or lack thereof) with the forum state.[115] On its face, this purpose has lit-

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[114] Professor Monaghan is most forceful in staking out this position in his article discussing antisuit injunctions and the collateral attack question. *See* Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998). Monaghan insists that "*Shutts* was all about the conditions necessary for the existence of in personam jurisdiction sufficient to preclude the claims of absent, nonresident class members" and that the decision had no bearing upon more traditional notions of procedural due process. *Id.* at 1162; *see also, e.g.*, *id.* at 1167-68 ("[W]e must clearly identify what *Shutts* is about: the existence of in personam jurisdiction sufficient to preclude the substantive claims of nonresident class members."); *id.* at 1166 (arguing the same point). As will become apparent, I disagree with Professor Monaghan's approach, which I believe elides much of importance in *Shutts*.

[115] *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985) ("The purpose of [the *International Shoe* test] is to protect a defendant from the travail of defending in a distant forum, unless the defendant's contacts with the forum make it just to force him to defend there."); Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (reframing the personal jurisdiction inquiry in terms of the "traditional conception of fair play and substantial justice"). The extent of a court's adjudicatory jurisdiction also has a profound de facto impact on the law that is likely to apply in multijurisdictional disputes. *See* Silberman, *supra* note 108, at 589-90 (explaining that permissive or vague personal jurisdiction standards, combined with permissive choice of law standards, lead to ex ante uncertainty as to the law that is likely to apply to primary activity if a dispute arises).

tle to do with the concerns for reliability, accuracy, individualized consideration and impartiality that are generally identified as the core concerns of procedural due process. Only rarely have the Court's personal jurisdiction opinions attempted to tie their analysis back to these more prosaic procedural values.[116] At the same time, the Court has exhibited a fetishistic concern with state boundaries and a tin ear to the realities of inconvenience in its personal jurisdiction cases that have called into question the descriptive accuracy of even this "fair play and substantial justice" doctrine, suggesting at least an equal concern with federalism values and the limits on one state's ability to exercise extraterritorial authority at the expense of another. Yet, when the Court finally offered an explicit articulation of this proposition in its post–*International Shoe* cases, dramatically proclaiming that the Due Process Clause may impose limits on personal jurisdiction even in the absence of any actual inconvenience or harm to defendants,[117] it then quickly retreated from that bold statement, returning to the position that due process limits on personal jurisdiction are "ultimately" about the individual rights of parties, even when the doctrine prohibits exercises of jurisdiction that do not appear to impose any of the individual burdens with which the doctrine professes concern.[118] Thus, at the very least, we must begin by recognizing that any broad pronouncements concerning the requirements of "due process" that ap-

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[116] The Court has occasionally suggested, usually by negative implication, that forcing a defendant to respond in a highly inconvenient forum might impede its ability to develop evidence and secure the testimony of witnesses, in derogation of the concern for accuracy and equal treatment, or might even lead a defendant to choose to default rather than to appear, with obvious adverse consequences for the value of individual participation and the overall integrity of the proceedings. *See, e.g.*, McGee v. Int'l Life Ins. Co., 355 U.S. 220, 224 (1957) ("Of course there may be inconvenience to the insurer if it is held amendable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process. There is no contention that respondent did not have adequate notice of the suit or sufficient time to prepare its defenses and appear." (citations omitted)). Such concerns are very much the exception and do not drive the personal jurisdiction doctrine.

[117] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980) ("Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State . . . , the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.").

[118] *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982) ("The restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause."). The *Shutts* Court conspicuously reiterated this proposition when describing the purposes underlying the personal jurisdiction doctrine. *Shutts*, 472 U.S. at 807.

pear in an analysis focused on personal jurisdiction may not translate directly to any other procedural context and may have little bearing on the requirements of due process in other areas.

And the Court's analysis in *Shutts* was unquestionably focused on personal jurisdiction. The Court emphasized throughout the opinion that its due process analysis was aimed specifically at assessing the extent of a state court's power to exercise jurisdiction over out-of-state class members. It framed the due process issue as one of personal jurisdiction in its introductory section,[119] identified consent as the theory of jurisdiction that it would analyze in the section devoted to the issue,[120] and then proceeded to conduct most of its analysis exclusively with reference to its personal jurisdiction precedents.[121] Indeed, the only non-personal-jurisdiction case that the Court relied on in any substantial fashion is the seminal class action case of *Hansberry v. Lee*—a fact that I will return to shortly.[122]

Nonetheless, *Shutts* does speak to broader procedural values. It is in the Court's treatment of the question of consent that one can discern the opinion's more expansive analytical implications.

Various approaches to the question of consent have always played a significant role in the Court's personal jurisdiction analysis. In different contexts, the Court has framed at least three such approaches, which I will describe here using the terms *simple consent, procedural con-*

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[119] *Shutts*, 472 U.S. at 802 ("[Petitioner] first asserted that the Kansas trial court did not possess personal jurisdiction over absent plaintiff class members as required by *International Shoe Co. v. Washington* and similar cases." (citation omitted)); *id.* ("Related to this first claim was petitioner's contention that the 'opt-out' notice to absent class members . . . was insufficient to bind class members who were not residents of Kansas . . . .").

[120] *See id.* at 806 ("Reduced to its essentials, petitioner's argument is that unless out-of-state plaintiffs affirmatively consent, the Kansas courts may not exert jurisdiction over their claims.").

[121] *See id.* at 806-08 (discussing purposes underlying personal jurisdiction doctrine, as articulated in *International Shoe* and other cases); *id.* at 808 (accentuating the Court's earlier reliance on *Pennoyer v. Neff*, 95 U.S. 714 (1877), in the key class action precedent of *Hansberry v. Lee*, 311 U.S. 32 (1940)); *id.* at 809-12 (discussing lesser burdens on class action plaintiffs, as compared to defendants, as a key factor in defining the level of "protection from state-court jurisdiction" that the Fourteenth Amendment affords absentees); *id.* at 812-13 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), and reiterating that its analysis concerns actual or constructive consent to the adjudicatory jurisdiction of the court).

[122] *See id.* at 808 & n.1, 812. The Court also invokes *Mullane*'s due process standard for notice once, and it drops a desultory "*cf.*" cite to its opinion in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), in discussing the issues of small-stakes class actions and individualized notice. *Id.* at 812.

sent, and *implied* or *constructive consent*. One of the keys to understanding the due process analysis in *Shutts* lies in recognizing that the consent typically embodied in the notice and opt-out procedure, which the Court attempted to characterize as some hybrid of simple and procedural consent, is better understood as a form of constructive consent that is justified by the presence of other internal procedural protections like those that were present in the Kansas class action proceeding.

In a *simple consent* case, a party affirmatively chooses to be subject to the territorial jurisdiction of a court. Simple consent is most frequently exemplified by the act of an ordinary plaintiff bringing suit in a particular court, whereby she manifests simple consent to submit her claim to the jurisdiction of that court.[123] A defendant can also manifest simple consent to a court's jurisdiction, either through affirmatively declining to contest the issue or by explicitly assenting, whether at the time of suit[124] or through signing a choice of forum clause in a contract beforehand (though the latter are sometimes contested when a dispute actually arises).[125] In a similar vein, the defendant energy company in *Shutts* unsuccessfully argued that a strong expression of simple consent in the form of an "opt-in" requirement for absent class members was a constitutional necessity if a state court wished to bind out-of-state absentees to a class proceeding.[126] The term "simple consent," then, describes those situations where it may properly be said that a party has made a voluntary and autonomous choice to be subject to a court's adjudicatory jurisdiction.

In a case of *procedural consent*, a court deems certain actions taken by a party in the course of the litigation to constitute the effective expression of a willingness to be bound by the court's adjudicatory authority, even if that is not what the party desired or intended. The

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[123] *See, e.g.*, *Keeton*, 465 U.S. at 779 (noting that a plaintiff can invoke the jurisdiction of the state court and consent to have her claims decided there, irrespective of her lack of contacts with the forum).

[124] *See, e.g.*, Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived."); McDonald v. Mabee, 243 U.S. 90, 91 (1917) (stating the same rule).

[125] *See, e.g.*, Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (finding a choice-of-forum clause enforceable, even though neither the plaintiff nor the defendant had any contacts with the chosen forum).

[126] *Shutts*, 472 U.S. at 811-12; *see also id.* at 803-06 (holding that the defendant has standing to invoke the rights of the plaintiffs due to the distinctive procedural posture of a class action).

most obvious example here, of course, is a defendant's failure to raise a timely objection to personal jurisdiction, which will generally be deemed a waiver of that defense even if the defendant later insists that she had no intent to submit to the court's jurisdiction.[127] The Supreme Court has given wide berth to state courts in defining the conditions of procedural consent, upholding rules that force plaintiffs who have invoked the jurisdiction of a court to respond to unrelated counterclaims over which the court might otherwise have no power,[128] and rules denying defendants any opportunity to make a "special appearance" to contest jurisdiction, effectively requiring them either to submit to a court's jurisdiction in responding to a complaint or else to take a default and challenge jurisdiction collaterally.[129] Thus, "procedural consent" describes those situations where a judicial system places obligations on a party who has interacted or actively engaged with that court (for example, by making an appearance, even if only for the purpose of contesting jurisdiction) and who then fails to satisfy those obligations, justifying the court in treating that failure as a waiver of jurisdictional objections.

Finally, the *implied* or *constructive consent* cases describe situations in which the extralitigation behavior of a party, or other strong policy considerations, are treated as conferring the equivalent of the party's "consent" to have a dispute resolved in the jurisdiction. This is the type of consent argument that has generally received the most atten-

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[127] *See, e.g.*, FED. R. CIV. P. 12(h)(1) (specifying conditions under which a defense of lack of jurisdiction over a person is waived); *see also, e.g.*, Continental Bank, N.A. v. Meyer, 10 F.3d 1293, 1296-97 (7th Cir. 1993) (affirming a finding that the course of litigation conduct pursued by the defendant constituted a waiver of personal jurisdiction); Yeldell v. Tutt, 913 F.2d 533, 538-39 (8th Cir. 1990) (same).

[128] In the key case on the point, the Court said the following with respect to jurisdiction over independent counterclaims:

> There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment *in personam* may be rendered in a cross-action against a plaintiff in its courts, upon service of process or of appropriate pleading upon his attorney of record. The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff.

Adam v. Saenger, 303 U.S. 59, 67-68 (1938).

[129] *See* York v. Texas, 137 U.S. 15, 20-21 (1890) (ruling that a state may adopt a system that declines to offer the opportunity to make a special appearance and treats even an appearance solely to contest jurisdiction as a procedural consent that waives the defense).

tion in discussions of personal jurisdiction, since it was one of the primary juridical categories under which courts authorized extraterritorial service of process by states under the territoriality regime of *Pennoyer*, until the sea change brought about by the Court's decision in *International Shoe*.[130] Since *International Shoe*, it has been clear that such instances of implied or constructive consent must ordinarily be consistent with the idiosyncratic due process analysis that the Court has gone on to articulate in this field.[131] Still, this form of "consent" continues to perform some important explanatory work, particularly in cases of general jurisdiction, where the citizenship, residence, or activities of a defendant may be taken to constitute a constructive manifestation of the defendant's willingness or obligation to answer to any suit in that jurisdiction, as justified by the benefits that permanent residence confers.[132] Importantly, in a case of implied or constructive consent, unlike one of simple or procedural consent, a party may have taken no action that could meaningfully be described as a voluntary, autonomous choice to be subjected to a particular court's jurisdiction or to be affiliated with that court in any way. Rather, "consent" serves as a marker in these cases for what is essentially a policy determination that certain types of parties should be subject to jurisdiction for certain types of claims.

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[130] *See, e.g.*, Hess v. Pawloski, 274 U.S. 352, 356-57 (1927) (finding out-of-state service on a nonresident motorist to be a sufficient basis for establishing jurisdiction on the basis of implied consent, since the motorist could assertedly have been excluded from the roads of the state altogether had he declined to give his consent); *see also* Int'l Shoe Co. v. Washington, 326 U.S. 310, 318-20 (1945) (characterizing this notion of consent as a "legal fiction" and reframing the analysis in terms of fairness and substantial justice).

[131] *See* Shaffer v. Heitner, 433 U.S. 186, 207 (1977) (holding that all exercises of personal jurisdiction, whatever their form or pedigree, must satisfy the minimum contacts standard set forth in *International Shoe*). *But cf.* Burnham v. Superior Court, 495 U.S. 604, 619 (1990) (plurality opinion) (suggesting that the *International Shoe* standard is limited to the extraterritorial exercises of jurisdiction and has no application to a state's exercise of sovereign authority over people or property located within its borders).

[132] *See, e.g.*, Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 448-49 (1952) (upholding the exercise of general jurisdiction over a foreign corporation in Ohio where in-state activities were extensive and foreign offices were shut down due to foreign occupation, making Ohio the only available forum); Goforit Entm't LLC v. Digi-Media.com L.P., 513 F. Supp. 2d 1325, 1331-33 (M.D. Fla. 2007) (relying upon this feature of *Milliken v. Meyer*, 311 U.S. 457 (1940), to distinguish between various concepts of "citizenship" in determining the proper treatment of a limited liability partnership); *see also* Blackmer v. United States, 284 U.S. 421, 438-39 (1932) (holding that amenability to a suit in one's country of citizenship flows directly from the relationship between the citizen and the sovereign); United States v. Lansky, 496 F.2d 1063, 1067-68 (5th Cir. 1974) (reaffirming the *Blackmer* doctrine).

Using this taxonomy as our heuristic, which form of "consent" analysis does the Court claim to be performing in *Shutts* when it upholds the power of state courts to bind out-of-state absentees? The answer to that question reveals one of the key sources of confusion in the *Shutts* decision. The Court characterizes its jurisdictional analysis as a combination of simple and procedural consent. It asserts, in other words, that the issuance of an opt-out notice in a class action creates a state of affairs in which a class member who does not execute the opt-out form can be understood either to have made a meaningful and voluntary choice to be bound by the proceedings or else to have exhibited a level of inattention or neglect that can reasonably be interpreted as a waiver of objections. To the extent that this proposition should be understood as the true, animating spirit of the opinion—a proposition that I will challenge shortly—the Court's conclusion rests upon an astonishing and anomalous fact about the *Shutts* litigation and an aggressive assumption made in reliance upon that fact.

The astonishing fact concerns the rate at which class members executed opt-out forms in the *Shutts* litigation and exempted themselves from the class. The Court reports that 3400 of the 31,500 class members to whom notice was successfully delivered "'opted out' of the class by returning the request for exclusion."[133] In other words, approximately 11% of all those to whom notice was delivered chose to execute the opt-out form, in an action in which "[t]he average claim of each royalty owner for interest on the suspended royalties was $100."[134] That figure is breathtakingly high, particularly in an action that appears to have involved only negative-value claims.[135] By way of

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[133] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 801 (1985). Specifically, the Court reported that the certified class ultimately consisted of 28,100 members, with 3400 of the original 33,000 executing the opt-out form and 1500 being excluded because notice could not be delivered to them successfully. This makes a total of 31,500 to whom notice was actually delivered, of whom 3400, or about 10.8%, executed opt-out forms. *Id.* If one were to assume that 33,000, 3400, and 1500 are rounded numbers, which seems likely, then 11% is the most precise percentage of opt-outs that one could legitimately report.

[134] *Id.*

[135] While there was variation in the interest amounts to which each class member would be entitled in the action, depending upon the value of the royalties they owned, those variations do not appear to have been so large that owners at the top of the curve would have possessed economically viable individual claims. The point is addressed briefly in the opinion of the Kansas Supreme Court, which reproduces the following finding made by the trial court during certification: "The claims of plaintiffs are typical of the claims of all the members of the class except that each owner may be entitled to a different amount of interest *and the interest to each owner, if allowed, would be too small to enable each to file a separate action.*" Shutts v. Phillips Petroleum Co., 679 P.2d 1159,

comparison, Professors Eisenberg and Miller have performed a far-reaching empirical study in which they conclude that class members generally opt out at a rate of less then 1% across all cases and about 0.2% in small-stakes or negative-value consumer class actions. Even highly personalized, high-value mass tort and employment cases produce mean opt-out rates of only 4.6% and 2.2%, respectively.[136] Other, less comprehensive empirical studies have arrived at figures that are comparable or smaller still.[137] To say that the *Shutts* litigation was an outlier when it comes to the rate at which class members with negative-value claims opted out is a vast understatement. The case was a freak.[138]

The anomalous nature of these opt-out figures appears to be completely lost upon the Court in *Shutts*—or, alternatively, the Court made a deliberate choice to ignore the anomaly in rendering its decision. Whatever the explanation, the Court treats the opt-out rate in *Shutts* as typical of class actions generally and, hence, as reliable evidence of the manner in which a notice and opt-out procedure will generally operate in all cases. "[S]uch results," the Court proclaims, referring to the 3400 opt-outs, "show that the 'opt out' procedure

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1166 (Kan. 1984), *rev'd in part*, 472 U.S. 797 (1985) (emphasis added). Even allowing for the possibility that the trial court was speaking somewhat imprecisely here, it is clear that there was no material number of class members with substantial claims.

[136] Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004). The authors report similar results in assessing the rate at which class members appear at fairness hearings to object to proposed settlements:

> Only in commercial cases does the objection rate rise to nontrivial levels, but this case type has only four cases in the sample. No other case type displays a mean objection rate of even 5 percent of class members. Like opt-outs, objectors are rare and this result varies little across the vast majority of case types.

Id. at 1549.

[137] THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMEC, FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 10 (1996) ("Across all four districts, the median percentage of members who opted out of a settlement was either 0.1% or 0.2% of the total membership of the class . . . .").

[138] One is left to wonder what the cause was for this astonishing level of engagement among class members. I have been unable to find any obvious explanation. Class members may have been unusually attentive to the litigation given their likely awareness of the underlying dispute about royalties that preceded the *Shutts* case. But still, why should negative-value claimants opt out when they could not afford to pursue their own actions, especially given that the earlier *Shutts* decision seemingly made victory a sure thing in the second litigation so long as the case could be certified?

provided by Kansas is by no means *pro forma*" as a means of securing simple or procedural consent.[139]

This distorted view of the practical operation of opt-out notice then leads the Court to make its aggressive assumption. Having concluded that notice and opt-out generally provide a meaningful and reliable opportunity for the exercise of autonomous consent, the Court concludes that

> the Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an 'opt out' form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so.[140]

The Court assumes, in other words, that it is generally appropriate to treat the notice and opt-out procedure as one that elicits a meaningful expression of simple consent from class members ("*unwilling* to execute an 'opt out' form"[141]) or, at least, as one that generally causes the class member to become engaged with the proceedings in a sufficiently active manner that it is appropriate to treat a failure to respond as a waiver of objections and, hence, as procedural consent ("*presumed* to consent to being a member of the class by his failure to do so"[142]).

As a purely descriptive matter, these assumptions are simply untenable. It is true that the miniscule opt-out rates found by Professors Eisenberg and Miller do not alone indicate a lack of voluntary action, since one might make the assumption that many class members, if put to the choice, would elect to permit class counsel to litigate their claims, particularly if those claims cannot be economically litigated on an individual basis. However, when coupled with our common experience with the increasing proliferation of class action mass mailings, these figures undermine the plausibility of any assumption of mass voluntary choice and instead suggest a very different reality in the significance and impact of opt-out notice. The vast majority of class members in negative-value or small-stakes class actions will not even know that they possess a potential claim. Unlike in the case of a personal injury or other serious individual harm—where claimants will already be focused upon the fact of their injury, making the

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[139] *Shutts*, 472 U.S. at 813.
[140] *Id.*
[141] *Id.* (emphasis added).
[142] *Id.* (emphasis added).

chances greater that a mailing relating to the injury may catch their attention[143]—the mailing in a small-stakes class action is unlikely to be any more salient than the ubiquitous junk-mail marketing materials that we all receive regularly, dressing commercial solicitations up as checks, "urgent notices," or opportunities for unlikely sweepstakes jackpots.[144] Class action notices are not delivered by process servers, after all; they are sent through the post, often in bulk mailings.[145] The fact that such notices, by definition, do not refer to the circumstances of individual recipients in the text of the notice makes it all the more unlikely that the mailings will engage the attention of recipients in a

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[143] Even in such high-stakes cases, one should be cautious in making assumptions about the level of consent or other state of mind that an individual exhibits by failing to execute an opt out. For any but the most sophisticated or trained person, the practical and legal implications of an opt-out notice may be utterly opaque. *See, e.g.*, Debra Lyn Bassett, *Implied "Consent" to Personal Jurisdiction in Transnational Class Litigation*, 2004 MICH. ST. L. REV. 619, 626-28 (detailing these and other limitations on class action notice). As I have argued elsewhere:

> While it is probably true that most individuals who suffer serious injury or harm would consider pursuing litigation on their own, it is quite another matter to assume breezily that all those individuals will in fact exercise their right to opt out and hence require no further consideration by the certifying court. Many people do not pay attention to the notices that they receive, and some people who do receive a notice may make unwise or uninformed decisions, either from a failure to understand the consequences of not opting out or from a simple lack of good judgment.

Wolff, *supra* note 110, at 775 n.174.

[144] Professor Monaghan makes a similar observation. *See* Monaghan, *supra* note 114, at 1185 ("Indeed, it is[] beyond the experience or expectation of reasonable citizens that the failure to respond to what looks like a slightly unusual piece of junk mail constitutes assent to the solicitation . . . ." (internal quotation marks omitted) (quoting Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 467-68 (1997))).

[145] One can draw a useful comparison to the efforts that counsel make in high-stakes class litigation to contact individual class members. Whether it is class counsel or competing lawyers doing the work (which will vary with the structure and posture of the proceeding), attorneys in high-stakes class actions often create websites, undertake elaborate advertising campaigns, and make individual contact (where permissible) in order to ensure the highest possible level of voluntary participation or exclusion from such proceedings. *See, e.g.*, Asbestos Class Action, http://asbestosclassaction.100491.free-press-release.com (last visited Jan. 31, 2008); Official Pennsylvania and New Jersey Fen Phen Class Action Website, http://www.leflaw.net/fenphen/01311999.html (last visited Jan. 31, 2008); *cf.* KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11, at 48-63 (2005) (detailing the elaborate efforts that were required to communicate with known victims of the defining tragedy of the present generation in order to give confidence that victims were making informed decisions about their participation in the compensation fund).

manner sufficient for a finding of procedural consent through waiver, much less that recipients will form a state of mind that could be described as simple and voluntary consent.[146]

But the *Shutts* Court does not rely solely upon its description of the notice and opt-out procedures, or its implicit and flawed assumption that the efficacy of that procedure in the Kansas litigation was typical, in justifying the conclusion that out-of-state absentees can be bound to a state-court proceeding. It also devotes a large portion of its discussion to the other procedural protections that Kansas, like most jurisdictions, promises to absentees in modern class action proceedings. It is in these sections that the true analytical engine of the opinion may be found. Indeed, it is these sections that contain some of the most familiar passages of the opinion, including the Court's extended discussion of *Hansberry v. Lee* and its description of the cosseted absent class plaintiff who "may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."[147] This extended discussion focuses upon two basic concepts.

First, the Court emphasizes its belief that a class action proceeding threatens to alter the legal position of absent class plaintiffs to a much lesser extent than an individual lawsuit does the legal position of a defendant. Thus, the Court explains, a typical defendant faces the risk of an open-ended damages judgment or a coercive order enforced by the contempt power, the possibility of greater preclusion consequences, and the potential threat of being assessed costs and fees.[148] An absent class plaintiff, in contrast, faces only the loss of a potential cause of action—a cognizable property right, to be sure, but a less invasive and expansive form of burden than that faced by the typical individual defendant, particularly when the claim is one that the absent class plaintiff could not realistically pursue through individual litiga-

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[146] Professors Eisenberg and Miller agree:

> The results reported above also undermine the idea that absent class members may be taken to consent to the court's jurisdiction over their person by virtue of their failure to opt out of the action. The overwhelming inaction displayed by class members in the reported cases suggests that a class member's failure to opt out should not readily be equated to an affirmative consent to jurisdiction. Common sense indicates that apathy, not decision, is the basis for inaction.

Eisenberg & Miller, *supra* note 136, at 1561.

[147] *Shutts*, 472 U.S. at 808-11.

[148] *Id.* at 808.

tion.[149] Second, the Court reiterates the requirement from *Hansberry* that the interests of absent class members must be adequately represented "at all times"[150] by the named plaintiff (and her counsel) in any class proceeding—the requirement that predominated in the Court's discussions of the binding effects of class action proceedings earlier in the twentieth century.[151]

But what do these familiar features of class litigation have to do with the question of consent? To be sure, the requirement of opt-out notice does preserve the opportunity for highly motivated and attentive class members to manifest their unwillingness to participate in the proceedings, an opportunity that might be particularly important in litigation involving high-stakes claims. But that is the exceptional case, not the norm. One might also posit that a class member whose interests were implicated only to a modest extent and who was aware that the named plaintiff and class counsel share a duty to represent her interests would be willing to consent more readily, if asked. And, indeed, the Court conspicuously weaves the discourse of consent into the passages describing these procedural protections—as, for example, when it proclaims that class members are presumed to "know" that a proceeding is underway and that safeguards are in place to protect them.[152] But, however sensible these propositions may sound as a matter of class action policy, none of them is a description of the actual, simple consent of class members in the typical case, nor even of the form of procedural consent that might arise from an actual affiliation or active engagement between class members and the litigation.

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[149] *Id.* at 809-11. The Court's reasoning becomes much more problematic in the case of personal injuries or other high-value claims. A claim for personal injuries may well be the single most valuable asset that some class members own, even discounting for the possibility that individual litigation will fail to produce any recovery. What is more, individuals who have suffered serious injury will typically have a much greater level of personal and psychic investment in the disposition of their claims, making the due process concern for individualized consideration and treatment all the more acute—a species of concern that generally finds expression in the "superiority" prong of a certification analysis, when it finds expression at all. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996) (finding "[t]he most compelling rationale for finding superiority in a class action—the existence of a negative value suit— . . . missing" in a case with high-value claims); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (making a similar finding).

[150] *Shutts*, 472 U.S. at 812 (citing Hansberry v. Lee, 311 U.S. 32, 42-43, 45 (1940)).

[151] *See* Shapiro, *supra* note 110, at 937-38 (discussing *Hansberry* and *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921)).

[152] *Shutts*, 472 U.S. at 810.

Rather, these features of class litigation bear upon the question of constructive consent. That is, they bear upon the policy determination that class members *should* be bound by the proceeding *as if* they had "consented" (or consciously passed up the opportunity to object) because the Court believes that, given the type of claim at issue and the mechanisms in place for its resolution, some set of core values—deterrence, fairness, efficiency, even-handed administration of similar claims—will be well served by that legal fiction.[153] In *Shutts* itself, the legal fiction of constructive consent in class action proceedings is motivated primarily by the Court's concern that state courts should continue to have the power to entertain nationwide class actions, a power that the Court fears would be eviscerated by a requirement for a genuine expression of simple consent through the "opt-in" procedure that the petitioners sought.[154] That fiction is justified by a procedural due process calculus according to which the Court assesses the alteration in legal position with which class members are threatened and measures that threat against the degree of confidence the proceeding offers that the interests of class members will be adequately protected even in the absence of individual participation. This is essentially a specialized application of the familiar *Mathews v. Eldridge* calculus.[155] When the threatened alteration in legal position is modest and the proceeding provides a high level of confidence that the interests of class members will be protected through other means, then a lesser degree of individualized process is adequate, validating the weak form of constructive consent that is frequently the limit of what opt-out notice can provide.

Once we recognize that the "consent" that *Shutts* relies upon in authorizing state court jurisdiction over out-of-state absentees is a form of constructive consent motivated by substantive policy concerns, rather than a description of actual autonomous choices that class members are likely to make, the Court's reliance upon the internal procedural safeguards of the proceeding as a justification for ratcheting down the necessary level of "consent" acquires much broader sig-

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[153] *Cf.* Shapiro, *supra* note 110, at 924-27 (discussing deterrence as a justification supporting certain legal fictions in the administration of class action litigation).

[154] *See Shutts*, 472 U.S. at 813-14.

[155] *See* Mathews v. Eldridge, 424 U.S. 319, 332-49 (1976) (holding that, as a general matter, a claim that due process requires a certain adjudicatory procedure should be analyzed by measuring the state's interest in proceeding without the requested procedure against the likely effect of the procedure on the accuracy, reliability, and fairness of the proceeding in which the complainant's interests have been placed at risk).

nificance. Although the doctrinal holding that results from the Court's analysis of the procedural safeguards in *Shutts* is not strictly applicable to cases in which jurisdiction is not an issue, the Court's analysis is still highly relevant to such cases. It reveals a method, however clumsily expressed through the language of personal jurisdiction, that has broader application in specifying the constitutional limits and requirements for the procedures employed in representative litigation.

One might argue that this effort to discern a general constitutional method for representative due process analysis from *Shutts* requires one to impose upon the opinion as much as one gleans from it, given the confusion that the Court itself displays about the relationship between jurisdictional and procedural due process issues. For example, late in the opinion, the Court justifies its rejection of the defendant's proposed "opt-in" requirement in part by explaining that such a rule "would require the invalidation of scores of state statutes *and of the class-action provision of the Federal Rules of Civil Procedure.*"[156] This is just plain wrong. The federal courts can exercise personal jurisdiction over parties throughout the territory of the United States when authorized to do so by rule or statute, whether the underlying cause of action is based on federal or state law.[157] They would not be limited by a constitutional holding regarding the jurisdictional reach of state courts where a Federal Rule (here, Rule 23) provides an alternative to Rule 4 in attaching jurisdiction and issuing notice. The Court is confusing the jurisdictional and due process implications of

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[156] *Shutts*, 472 U.S. at 813-14 (emphasis added).

[157] An increasing number of federal statutory causes of action include provisions authorizing nationwide service of process, as does the interpleader statute, which extends to claims based on state law. *See, e.g.*, 18 U.S.C. § 1965(d) (2000) (authorizing nationwide service of process in federal securities actions); *see also* 28 U.S.C. § 2361 (2000) (authorizing nationwide service of process in statutory interpleader actions); FED. R. CIV. P. 4(k)(1)(C) (authorizing service of process for any person subject to the federal interpleader statute). And, of course, Rule 4(k)(2) authorizes worldwide service of process on federal question claims as a backup option when a plaintiff could not otherwise sue the defendant in any state, provided that the defendant has sufficient aggregate contacts with the nation as a whole. *See, e.g.*, Graduate Mgmt. Admission Council v. Raju, 241 F. Supp. 2d 589, 596-600 (E.D. Va. 2003) (applying Rule 4(k)(2)). Federal appeals courts have uniformly upheld the constitutionality of these provisions. *See, e.g.*, Pinker v. Roche Holdings Ltd., 292 F.3d 361, 369-70 (3d Cir. 2002) (embracing the "national contacts" standard for federal nationwide service provision and citing cases from other circuits that have reached a similar result). The Supreme Court has never addressed the issue squarely, though it has assumed arguendo the propriety of nationwide service in issuing a holding that disfavored interpretations of federal statutes that would find such service provisions to exist by implication. Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 106-07 (1987).

its own analysis. It is not unduly harsh to say that the *Shutts* Court shot from the hip a bit in discussing the procedural features of class proceedings, and it did not always keep the issues of jurisdiction and procedural due process straight.

Thus, in order to provide a convincing account of the proper impact of *Shutts* upon the broader constitutional parameters of representative litigation, one must skirt the line between interpreting what is actually there and discerning what the Court would have said had it been more careful. That being so, it is useful to ask whether the constitutional methodology described above is consistent, even continuous, with earlier approaches that the Court has embraced when presented with similar problems. Such continuity would give greater confidence that a "revisionist" reading of the constitutional methodology in *Shutts*—one that corrects for the opinion's slippage between jurisdiction and procedural due process—can properly claim a place in the broader analytical landscape of modern representative litigation.

2. The *Mullane* Antecedent

And, indeed, the method for the constitutional analysis of class action procedures that is revealed by a corrected understanding of *Shutts* has an important and largely unacknowledged antecedent: the Court's landmark 1950 opinion in *Mullane v. Central Hanover Bank & Trust Co.*[158] While there are some important differences, the *Mullane* opinion can profitably be thought of as a mirror image of the opinion in *Shutts* in many respects—a decision addressing the power of a state court to bind absent plaintiffs to a comprehensive adjudication, but focusing primarily upon the "pure" procedural due process rights of the absentees and addressing the question of jurisdiction over out-of-state absentees in only a perfunctory manner. The complementary nature of the two cases has been largely ignored in the literature, perhaps owing to the fact that the *Shutts* Court itself rather surprisingly failed to note the relationship between the two, despite its citation to *Mullane* for more prosaic propositions involving personal jurisdiction and notice.[159]

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[158] 339 U.S. 306 (1950).

[159] Professor Shapiro touches upon this observation without exploring it at length. *See* Shapiro, *supra* note 110, at 937 (acknowledging the broader and more flexible notions of due process in *Mullane*); *see also, e.g.*, Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1945-46 (1998) (discussing the adequacy of representation requirement and observing that "[e]ncouraging or requiring notice to absentee class members was one

Mullane involved a New York regulatory scheme for the administration and disposition of trust accounts. New York law authorized the establishment of a common trust fund, administered by a fiduciary trustee that was required to make a periodic accounting before the Surrogate's Court to answer for any possible mismanagement or waste of fund assets. In this mandatory accounting proceeding, the court appointed two special guardians, one to represent the interests of income beneficiaries and the other to represent those interested in the principal.[160] Aside from the appointment of the special guardians to protect their interests, trust beneficiaries received no individualized form of process and were given notice of the proceedings only through publication in local newspapers (a requirement that the Supreme Court described as "[no] more than a feint").[161] A constitutional challenge to the regulations placed two questions before the Supreme Court: whether the courts of New York had the jurisdictional power to adjudicate the interests of beneficiaries and potential beneficiaries who were not present or domiciled in the State; and, if so, whether due process required that some or all of them receive individualized notice and an opportunity to participate in the proceedings.

The equitable proceeding authorized under this New York banking law scheme, which was a lineal descendant of the type of proceeding that served as one of the precursors for the modern class action,

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obvious device, and the Court in *Mullane v. Central Hanover Bank & Trust Co.* and *Phillips Petroleum Co. v. Shutts* later embraced this approach" (footnotes omitted)). But even Professor Shapiro, who clearly hopes to make use of *Mullane* in articulating a more flexible constitutional jurisprudence of representative litigation, nonetheless makes a point of noting that *Mullane* was "not in form a class action." Shapiro, *supra* note 110, at 937 n.61. The observation is technically correct, but it is a distracting reminder, as it seems to reinforce the view that *Mullane* operated in a separate juridical category and so has limited direct relevance to the administration of formal class actions. *See Mullane*, 339 U.S. at 319 (approving notice only to some identifiable beneficiaries because "[t]he individual interest does not stand alone but is identical with that of a class"). A good note in the *Texas Law Review* acknowledges some of the important parallels between *Shutts* and *Mullane*, though it treats the analytical significance of those parallels only lightly. *See* Kurt A. Schwarz, Note, *Due Process and Equitable Relief in State Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 68 TEX. L. REV. 415, 430-31 (1989).

[160] It bears noting that the interests of these two groups were in fact adverse parties in the Supreme Court appeal: the guardian for the income beneficiaries (Mullane) was the sole appellant challenging the judgment of the New York Court of Appeals, and the guardian for the principal beneficiaries (Vaughn) joined the trust company in defending the judgment. *See Mullane*, 339 U.S. at 310 (identifying the guardians and their respective roles in the appeal).

[161] *Mullane*, 339 U.S. at 315; *see also id.* at 307-10 (describing the manner in which notice was required to be, and was, given).

bore many important similarities to the class action in *Shutts* that would follow it thirty-five years later. Both proceedings involved the potential extinguishment of claims for monetary damages possessed by a class of plaintiffs with an interest in an investment. In both, the only interests of class members that were placed in jeopardy were their potential monetary claims; absentees were otherwise not in danger of adverse consequences from the proceeding.[162] In both, the governing law provided for the appointment of fiduciaries who were tasked with protecting the interests of the class (the special guardians, in *Mullane*; the named plaintiff and class counsel, in *Shutts*).[163] And the policy concern that animated the statutory scheme under review in *Mullane* was similar to the concern animating the Court's analysis in *Shutts*: a desire to ensure the viable administration of small-stakes assets on behalf of stakeholders in a cost-effective manner, including a viable recovery method for small-stakes claims when disputes arose.[164] To be sure, there were formal differences between the two. Some of the trust beneficiaries in *Mullane* (though far from all) voluntarily chose to pool their assets and throw in their lot with a class of similarly situated investors, while the class in *Shutts* consisted of individual investors who likely had no antecedent expectation that their interests might be

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[162] At least, that was the assumption under which both Courts operated. Neither considered the broader potential implications of preclusion doctrine for the interests of class members. *See generally* Wolff, *supra* note 110, at 722 (discussing the potential impact of the preclusion doctrine on the unlitigated claims of class members).

[163] The trustee in *Mullane* also bore a fiduciary duty to the trust beneficiaries, but, as the Court points out, the special circumstance of the accounting places the trustee temporarily at odds with the beneficiaries and hence requires the intercession of a representative loyal only to the latter. *See Mullane*, 339 U.S. at 316 ("[T]hese beneficiaries do have a resident fiduciary as caretaker of their interest . . . [b]ut it is their caretaker who in the accounting becomes their adversary.").

[164] As the court writes in *Mullane*:

> Common trust fund legislation is addressed to a problem appropriate for state action. Mounting overheads have made administration of small trusts undesirable to corporate trustees. In order that donors and testators of moderately sized trusts may not be denied the service of corporate fiduciaries, [many jurisdictions] have permitted pooling small trust estates into one fund for investment administration.

Id. at 307-08.

In *Shutts*, the Court exhibits an unfortunate lack of attention to the source of the substantive policies that inform its analysis, apparently assuming that any of the laws that might be applied to the proceeding on remand would take the same view about the particular desirability of aggregating small-stakes claims. That is probably a safe assumption, but the careless treatment of the issue is particularly inapt in light of the Court's holding on choice of law in the same decision.

adjudicated collectively. And the representative proceeding in *Shutts* unfolded under the rubric of class certification, while *Mullane* involved an equitable accounting conducted by appointed guardians—a procedure, as the *Mullane* Court indicated, that had roots in historic in rem practice.[165] But these differences in form were considerably less significant than the functional similarities between the proceedings. In both, a state court sought to entertain a representative suit in order to adjudicate the claims of a large number of in-state and out-of-state plaintiffs, appointing a presumptively adequate representative to champion the interests at stake; and in both, the Court considered the dual questions of the state's power to exercise jurisdiction over the out-of-state claims and the level of individualized process that was due to class members.

On the issue of jurisdiction, the *Mullane* Court had little to say. After rejecting the bank's attempt to rely upon the in rem qualities of the action as a basis for binding out-of-state beneficiaries, the Court nonetheless upheld New York's jurisdictional power to entertain the multistate action, offering the following passage as the entirety of its analysis:

> It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.[166]

Personal jurisdiction was in a state of flux at this point in time—*International Shoe* having been decided just five years earlier[167]—and the Court may have been reluctant to use the idiosyncratic context of a trust accounting to break new doctrinal ground in that arena (which would have been necessary here, since the Court had yet to apply *International Shoe* to an individual, noncorporate person).[168] Rather, the

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[165] *See id.* at 311-13 (discussing the in rem pedigree of trust accountings and finding that such formal classifications do not control the question of a state's power to administer such a scheme).

[166] *Id.* at 313.

[167] Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

[168] As it turned out, however, the Court did just that eight years later in *Hanson v. Denckla*, 357 U.S. 235, 254-55 (1958), resolving a complicated trust dispute involving competing judgments from Florida and Delaware courts with a holding on personal jurisdiction to which it would later give much broader application by incorporating it into its first major decision on jurisdiction and products liability. *See* World-Wide

Mullane Court was most interested in the procedural protections that were required in a representative action.

As with *Shutts*, the central holding of *Mullane* is frequently invoked but often poorly understood. The "procedural" issue before the Court in *Mullane* involved two aspects of the constitutional requirement of notice—what type of notice due process requires, and who must receive it. As to the first question, the Court articulated its oft-quoted standard that due process requires the issuance of notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"—notice "such as one desirous of actually informing the absentee might reasonably adopt to accomplish" that end.[169] This describes the *type* of notice that the Court found due process to require, when notice is called for. As to who must receive notice in a representative action like the one before it, however, the *Mullane* Court gave a more complex and nuanced answer.

As is well known, the Court found that the failure of the New York regulatory scheme to provide individual process to *any* of the known present beneficiaries rendered the program constitutionally infirm.[170] Some of those beneficiaries, at least, had a constitutional entitlement to personal notice—some, but not all. In fact, the Court identified three categories of beneficiaries in *Mullane* whom the Surrogate Court could bind to the proceeding without providing individualized notice: (1) unknown beneficiaries who could not be discovered with reasonable effort; (2) beneficiaries who were known or discoverable but who possessed only future or contingent interests in the trust; and (3) known present beneficiaries for whom providing personal service would impose great expense or cause undue delay.[171] In each case, the Court mapped its conclusion that individual process was not required onto a distinctive concern that informed its due process approach: (1) the practical administrability of the state's regulatory scheme; (2) the qualified or conditional nature of the class member's interest; and (3) the presence of an adequate representative with

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Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (applying the principle from *Hanson*). Surprisingly, the *Hanson* majority does not even address the personal jurisdiction holding in *Mullane* (though Justice Black invokes it favorably in dissent), perhaps further indicating the limited precedential significance of that part of the opinion. *Hanson*, 357 U.S. at 260-61 (Black, J., dissenting).

[169] *Mullane*, 339 U.S. at 314-15.

[170] *Id.* at 319.

[171] *Id.* at 317-19.

closely aligned interests who could be relied upon to press arguments to the benefit of similarly situated absentees.[172]

The Court's concern over administrability revived the familiar imperative of the traditional in rem proceeding, in which the state's interest in achieving a comprehensive and stable adjudication of people's rights in disputed property authorizes a more expansive exercise of judicial authority.[173] The same imperative led the *Mullane* Court to conclude that a state's interest in making collective trust instruments available to its citizens justifies dispensing with individualized process in cases where a strict notice requirement might otherwise make a comprehensive adjudication impossible.[174] That holding has particular significance in light of the Court's finding, earlier in the opinion, that a state's formal designation of trust proceedings as in rem or in personam in nature has no relevance to the jurisdictional analysis.[175] The more permissive due process treatment of unknown beneficiaries in *Mullane* rested upon an assessment of state interests and practical impacts, rather than those qualities of the trust device that resemble a legal res in form. Note also that the state interest that does the work here—the requirement that adjudication be comprehensive if it is to be efficacious—is similarly implicated in many class actions brought under Rule 23(b)(1) or (b)(2). *Mullane* clearly lends support to the proposition, made needlessly uncertain by confusion over the meaning of *Shutts*, that individualized process in the form of notice and opt-out rights is not always a constitutional requirement in injunctive or limited-fund proceedings.

As to the second concern, *Mullane* invites an analysis of "the character of the proceeding and the nature of the interests . . . involved" when asking whether individualized process is necessary.[176] The less definite, concrete, and extant a person's property interest, the less urgent is the need for providing individualized process to absentees, particularly when the proceeding is structured so as to provide additional assurance that those interests will be safeguarded in the class member's absence. Although not making the point explicit, the

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[172] *Id.*

[173] *See* Pennoyer v. Neff, 95 U.S. 714, 734 (1877) (discussing the "larger and more general" idea of in rem jurisdiction as a means of reaching property owned by the parties to allow for comprehensive adjudication).

[174] *See Mullane*, 339 U.S. at 317-18 ("[W]e have no doubt that such impracticable and extended searches are not required in the name of due process.").

[175] *Id.* at 312-13.

[176] *Id.* at 317.

Court suggested a sliding-scale approach to the analysis, with those interests that "are so remote as to be ephemeral" requiring no individualized process at all.[177]

Finally, in the portion of its holding that is least frequently discussed or appreciated, the *Mullane* Court emphasized a principle of class representation in finding that even known, present beneficiaries need not necessarily receive individualized process. The trustee had argued that providing personal service to the "large number" of such beneficiaries, some of whom resided "without [i.e., outside] the jurisdiction," would have been unduly expensive and delayed the administration of the fund beyond the point of usefulness.[178] In contrast to its later decision in *Eisen*, where the Court interpreted Rule 23(b)(3) to require individualized process for every class member in a small-stakes damages actions even at the risk of crippling expense,[179] the *Mullane* Court concluded that, as a matter of due process, "no such service is required under the circumstances."[180] Rather, the Court explained:

> This type of trust presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all.[181]

Class representation, *Mullane* suggests, may sometimes be a proper replacement for individualized process, provided that an adequate population of potential objectors are invited to participate in the proceeding.[182]

Taken together, these passages essentially offer a more thorough exposition of the range of considerations that the *Shutts* Court employed in authorizing its lax form of constructive consent for state

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[177] *Id.*

[178] *Id.* at 318-19.

[179] *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173-76 (1974). *Eisen* is one of the important occasions on which the Court misread its own opinion in *Mullane*, conflating the standard governing the type of notice required with the standard governing who must be provided with notice in a class or representative proceeding.

[180] *Mullane*, 339 U.S. at 319.

[181] *Id.*

[182] *See id.* ("[N]otice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all . . . .").

court jurisdiction over nationwide class actions. Recall that, under our corrected understanding of *Shutts*, we have abandoned the fiction that opt-out notice generally provokes any meaningful expression of autonomous consent, and instead have recognized a form of constructive consent as the basis of a state court's power to entertain a nationwide class action. That constructive consent is justified, under *Shutts*, by (1) the imperative that comprehensive class actions remain a viable option for the enforcement of state liability regimes, particularly in the case of small-stakes claims; (2) the limited nature of the property interests of absentees that are placed at risk in such a proceeding (and by the presumed ability of class members to take steps such as entering an appearance or opting out to protect their interests, if they are sufficiently motivated to monitor the litigation); and (3) the presence of an adequate representative who is required "at all times [to] adequately represent the interests of the absent class members."[183] The analytical methodology revealed by a corrected reading of *Shutts* is both consistent and continuous with the methodology employed by the Court in *Mullane*, its closest constitutional antecedent.

B. *Class Certification, Choice of Law, and Choice of Remedies*

Under the *Mullane/Shutts* analytical methodology, then, we are invited to ask: what is the nature and extent of the change in the legal position of class members that is effectuated when a court issues a preemptive injunction to enforce its own denial of certification? In *Mullane* and *Shutts* themselves, the threatened change in legal position was the extinguishment of a cause of action (one that likely had negative litigation value in the case of *Mullane* and clearly did in the case of *Shutts*). The *Mullane* Court concluded that New York could perform a comprehensive adjudication in the trust proceeding without providing individualized process to all class members, so long as enough of the known present beneficiaries received individual notice to ensure an opportunity for adequate objectors to participate in the proceedings. In *Shutts*, the Court emphasized the limited nature of the threat to class members' legal position as one of the primary factors authorizing the lesser form of constructive consent embodied in opt-out notice, while also holding that Kansas's limited jurisdictional reach re-

[183] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985); *see also id.* at 811-12 (describing various protections that allow a state to exercise jurisdiction over the claim of an absent class action plaintiff without violating the Due Process Clause).

quired that opt-out notice be provided to every class member.[184] What treatment should a federal court's issuance of an injunction to enforce a denial of certification receive under these precedents, assuming for the moment that territorial jurisdiction poses no barrier?[185]

The answer is that an antisuit injunction of the kind issued by the court in *Bridgestone/Firestone II* constitutes a lesser alteration in position or status than does the adjudication of an absentee's underlying claim and should not require the issuance of individualized process to putative class members. When properly crafted, an injunction enforcing the denial of certification entails the removal of a single remedial option from the litigation arsenal of an absentee. While this change in position is not insignificant, such an injunction leaves the absentees' legal claims uncompromised and will permit meaningful alternative avenues for relief so long as the injunction is not overly broad. If an injunction enforcing a denial of certification aims only to prohibit nationwide proceedings, for example, it will leave open the opportunity to bring statewide class actions that can still provide relief. If the injunction aims only to prohibit an omnibus class action that would sweep in multiple and distinct injury-causing scenarios (like disparate product lines in a defective products case), it will still permit more targeted class actions that encompass a narrower array of claims. Provided that the injunction does not effectively foreclose any economically viable means of redress, class members need not be made formal parties to the action through individualized process in order to be bound by such an order.

In analyzing this question, it is useful to look at the treatment that procedural and remedial options, like the availability of class certification, receive in other contexts—in particular, the treatment of such provisions in choice of law analysis and in the retroactivity of changes to the law within a given jurisdiction. (To avoid confusion, throughout the discussion that follows, I use the terms "remedy" and "remedial options" to refer to the vehicles for enforcing a cause of action within a lawsuit—the rules governing whether a class action or other form of joinder is available, for example, or the doctrines that govern how an injunction is administered—and not the measure of damages

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[184] *See id.* at 812 ("[T]he procedure followed by Kansas . . . with an explanation of the right to 'opt out,' satisfies due process.").

[185] This assumption will prove warranted, as I explain below. *See infra* text accompanying note 213.

or other doctrines that bear upon the definition of the parties' rights under the applicable liability scheme.)

In a dispute with multistate contacts, where choice of law questions might arise, a court will ordinarily apply its own procedures to the dispute before it, even when it must apply the law of another jurisdiction in defining the rights and obligations of the parties.[186] The procedures and remedial vehicles that a court makes available for pursuing relief are ordinarily not treated as a part of the "applicable law" that must be subjected to choice of law analysis in determining the parties' rights.[187] The Supreme Court has validated this practice, holding that the use of local procedures in disputes governed by foreign law is constitutionally permissible, even if the events giving rise to the dispute have no connection with the forum.[188] A state has a legitimate administrative interest in applying its own procedures to a dispute, satisfying the requirement of the Full Faith and Credit Clause; and—more important for present purposes—litigants will not suffer hardship or undue surprise from the application of forum procedure, even when the forum otherwise has no connection to the events giving rise to the dispute, thus satisfying the requirement of the Due Process Clause.

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[186] Both Restatements set forth this principle clearly. *See* RESTATEMENT OF CONFLICT OF LAWS § 585 (1934) ("All matters of procedure are governed by the law of the forum."); *id.* § 585 cmt. a ("Matters of procedure include access to courts, the conditions of maintaining or barring action, the form of proceedings in court, the method of proving a claim, the method of dealing with foreign law, and proceedings after judgment."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 127 (1971) ("The local law of the forum governs rules of pleading and the conduct of proceedings in court."); *id.* § 127 cmt. a ("The local law of the forum governs, among other things, . . . the joinder of causes of action . . . ."); *see also, e.g.*, Travenol Labs., Inc. v. Turner, 228 S.E.2d 478, 483 (N.C. Ct. App. 1976) (applying North Carolina standards for administering an injunction to a contract dispute governed by California law). Statutes of limitations are the most prominent exception to this rule. Some states have enacted "borrowing statutes" that apply the limitations period of the forum whose law will govern the dispute if that forum considers its limitations period to constitute a substantive constraint on the parties' rights and would want other jurisdictions to enforce that constraint.

[187] There are exceptions, of course. Laws that might be regarded as "procedural" in common parlance can sometimes embody state interests that have legitimate force in multistate disputes, and courts will sometimes look past the "procedural" designation to subject such provisions to interest-based choice of law analysis. *See, e.g.*, Boyd Rosene & Assocs., Inc. v. Kan. Mun. Gas Agency, 174 F.3d 1115, 1118-26 (10th Cir. 1999) (concluding that Oklahoma's approach to the *Restatement (Second) of Conflict of Laws* calls for the performance of a choice of law analysis on a provision regarding the availability of attorneys' fees and finding an out-of-state rule applicable to the dispute).

[188] *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778 n.10 (1984) (recognizing "traditional choice-of-law principles" according to which "the law of the forum State governs on matters of procedure").

This proposition is grounded in a basic observation that captures an important part of what we mean when we attempt to define the distinction between "substantive" and "procedural" provisions of law in this context: litigants do not enjoy a strong ex ante reliance interest in the application of any particular procedural or remedial vehicle for the enforcement of their rights, even when they do possess a reliance interest with respect to the liability regime that will define the content of those rights.[189] This is not to say that the choice of procedures and remedies in a dispute is insignificant. To the contrary, it is to be hoped that the vital role that procedural and remedial vehicles can play in determining the ability of litigants to give effect to their rights now goes without saying in the American legal system.[190] The point, rather, is that our legal system treats even important procedural and remedial doctrines as matters as to which individuals have no constitutionally recognized prelitigation entitlement or expectation.

It is not only in multistate disputes that this is so. A similar principle holds true in the doctrine of retroactivity, where changes in procedural and remedial vehicles within a given jurisdiction, unlike changes in the jurisdiction's liability rules, generally do not provoke retroactivity analysis when applied to litigants whose liability-related conduct took place under the old regime.[191] Questions of retroactivity

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[189] Professor Issacharoff makes a similar point in his discussion of statutes of limitations and *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988):

> The Court . . . [in *Wortman*] found that longstanding common law principles would allow for the application of lex fori rather than lex loci to the determination of the statute of limitations for claims brought in Kansas, even if the underlying dispute bore no relation to Kansas whatsoever. Accordingly, the fact that *Shutts* liberalized personal jurisdiction for nationwide class actions did not require, as a constitutional matter, trying the underlying claims as if they were still in their home courts. Unlike the *Guaranty Trust* outcome-determinative formalism of the early *Erie* line of cases, the Court in *Wortman* drew a different line around whether the application of one or another decisional rule violated preexisting substantive commitments.

Issacharoff, *supra* note 12, at 1863-64 (footnote omitted).

[190] As the Supreme Court has memorably written, "[l]egal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." De La Rama S.S. Co. v. United States, 344 U.S. 386, 390 (1953) (internal quotation marks omitted) (quoting *In re* The Western Maid, 257 U.S. 419, 433 (1922)).

[191] *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 275 (1994) ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity."). For a discussion of circumstances in which the procedure/substance distinction produces less clear answers in retroactivity analysis, see David Frisch, *Rational Retroactivity in a Commercial Context*, 58 ALA. L. REV. 765, 785-87 nn.101-06 (2007).

and choice of law sometimes play out differently within these broad constitutional parameters, with legal systems varying their treatment of certain remedial issues as "procedural" or "substantive" for specific policy reasons.[192] But the basic tenet is the same in both the multistate and the purely domestic context: the right that a person possesses to have some predictable liability standard govern his conduct, so that he can modify his actions in light of that standard and avoid or control the extent of his liability, does not include a right to expect any particular procedural or remedial vehicle to govern the adjudication of his claims. Although such vehicles can have a significant impact on the outcome of disputes and must satisfy the requirements of due process in their own right, potential litigants generally have no enforceable ex ante interest in the application of any particular regime. In this important respect, the foreclosing of one procedural or remedial avenue for the effectuation of a claim is consistently treated as a much less substantial alteration in legal position or status than the resolution of the cause of action itself.

This is not to say that the Due Process Clause imposes no limits on the ability of a federal court to foreclose procedural options for class members. *Mullane* and *Shutts* provide guidance as to the process that is due. First and foremost, a court in such a case must ensure adequate representation and an adversarial presentation of the issues in the proceeding if it intends to bind absentees to the result. In the case of an injunction enforcing the denial of certification, this requirement will likely be satisfied in most cases. The ordinary requirements of equity would indicate that it is not appropriate to issue an antisuit injunction to enforce a denial of certification unless counsel are actively attempting to circumvent the court's order by filing another proceeding and thus threatening harm that cannot be adequately redressed at law. That being so, there will always be at least one party who will have a strong incentive to advocate in favor of class treatment and to contest vigorously the imposition of an antisuit injunction—perhaps more than one, if the defendant also desires certification in hopes of securing approval for a proposed settlement.

Due process also requires attention to the scope of any injunction enforcing a denial of certification. In a negative-value or small-stakes case, aggregate treatment is likely to be the only mechanism by which

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[192] *See, e.g.*, *Boyd Rosene*, 174 F.3d at 1119-21 (finding that the treatment of an attorneys' fee provision as "procedural" by Oklahoma courts for retroactivity purposes does not control the designation of the provision for choice of law purposes).

class members can obtain a recovery.[193] In such a case, an injunction that broadly prevents *any* subsequent class action on a body of claims following a denial of certification would be the functional equivalent of an adverse judgment extinguishing those claims. In many cases, however, it will be possible to craft an order that enforces the denial of certification in the original lawsuit without foreclosing the possibility that a more narrowly defined class action could properly be certified in a subsequent proceeding. The Seventh Circuit ultimately ordered the issuance of such a narrowly crafted injunction in *Bridgestone/Firestone II*.[194] The two problems in that products liability suit that rendered an omnibus class action impossible to certify were the choice of law obstacles that resulted from its nationwide scope and the lack of commonality that resulted from the effort to lump multiple, nonidentical product lines into a single proceeding.[195] A statewide class action that only attempted to litigate claims arising from individual or similar product lines would eliminate both problems. In exempting such actions from the scope of the injunction, the Seventh Circuit left open meaningful alternatives for aggregate relief and cannot be said to have effectively extinguished the small-stakes claims.

In the language of *Mullane* and *Shutts*, such an injunction effectuates a limited and attenuated alteration in the legal position of class members—"attenuated" not in the sense that the relevance of the change to the class members' claims is difficult to identify, but rather in the sense that it involves an aspect of the administration of their claims as to which they had no prelitigation expectation or reliance interest. A proposed injunction of this type will ordinarily be opposed by vigorous advocates with strong incentives to defeat it. And, as I discuss in the next section, an antisuit injunction prohibiting serial relitigation of the certification question is consistent with class action policies that may properly be ascribed to Rule 23 and, now, CAFA.[196] In short, the widespread due process objections that greeted the Seventh

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[193] Enforcement by public authorities will sometimes be possible in theory, of course, but in practice such enforcement is the exception even in those cases where there is an agency tasked with enforcing the provisions of a particular statutory scheme.

[194] *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig. (*Bridgestone/Firestone II*), 333 F.3d 763, 769 (7th Cir. 2003).

[195] *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig. (*Bridgestone/Firestone I*), 288 F.3d 1012, 1018 (7th Cir. 2002) (holding that the multiplicity of applicable state laws renders a class action unmanageable); *id.* at 1018-19 (holding that the multiplicity of product lines captured in the class definition also prevents certification).

[196] *See infra* notes 204-225 and accompanying text.

Circuit's injunction enforcing an order denying certification, though understandable, are simply misplaced.

As a final observation on the misplaced nature of these objections, I note that there is an established feature of class litigation that already effectuates a change to the formal legal status of class members in the absence of class certification and without the issuance of individualized process. Under the rule from *American Pipe & Construction Co. v. Utah*, a pending federal class action tolls the statute of limitations on all the putative class members' claims following a denial of certification, even though class members will typically receive no notice or individualized process when certification is denied.[197] The comparison here is not perfect. The change in legal position associated with the tolling doctrine might be described as operating only to the benefit of class members, so that one could plausibly characterize the rule as involving a change in the available remedial vehicles that "binds" only the defendant.[198] But that is not how the Court justified its decision in *American Pipe*. Quite the opposite is the case.

American Pipe was one of the first major class action decisions handed down by the Supreme Court following the 1966 amendment

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[197] *See* 414 U.S. 538, 561 (1974) (holding that the statute of limitations is tolled following the denial of certification when putative class members seek to intervene in an original action to press individual claims); *see also* Chardon v. Fumero Soto, 462 U.S. 650, 662 (1983) (holding that, in the case of a § 1983 action where a federal statute calls for a reference to state law for statute of limitations issues, the *American Pipe* tolling rule must track state law unless doing so would undermine a federal interest); Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352 (1983) (extending *American Pipe* to cases where putative class members file their own independent lawsuits following the denial of certification rather than seeking to intervene in the original suit).

The potential relevance of the *American Pipe* rule only became clear to me when I read a draft of Professor Wasserman's recent article on tolling in successive class actions, which contains a very fine exposition of *American Pipe* and the Rule 23 policies it implicates. *See* Rhonda Wasserman, *Tolling: The* American Pipe *Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803 (2006). I thank Professor Wasserman for sharing her work with me.

[198] There is, I think, an argument to be made that the tolling rule imposes cognizable burdens on class members as well. Participating in a lawsuit can carry immense psychological costs, and the decision whether or not to initiate litigation can be a difficult and troubling one. While the repose that a statute of limitations offers is usually identified as a benefit for defendants, I think it reasonable to believe that many potential plaintiffs—at least those who are aware that they possess potential claims and would consider asserting those claims—also receive an important measure of psychological peace when they know for certain that the time to initiate litigation has passed, and hence that they no longer need to revisit the difficult decision of whether to file a claim. The *American Pipe* doctrine has the effect of delaying repose for these potential plaintiffs as well.

to Rule 23—it was decided earlier in the same term as *Eisen*—and the Court took the occasion to clarify the difference between the new Rule 23(b)(3) and the "spurious" class action that had preceded it. Prior to the 1966 amendments, the Court explained, class actions for damages generally had no mandatory binding effect on absentees but rather constituted an "invitation to joinder" that class members could accept or reject at any point in the proceedings.[199] This "one-way" quality led to "recurrent . . . abuse" in that "members of the claimed class could in some situations await developments in the trial—or even final judgment on the merits—in order to determine whether participation would be favorable to their interests."[200] In response to that potential unfairness, many courts treated potential class members as nonparties for the purpose of determining whether the limitations period had been satisfied, requiring them to eschew strategic behavior and affirmatively join the action in order for their claims to be considered timely. The revision to Rule 23 eliminated that practice, and the Court explained the change in legal framework in terms of the party status of class members. With the filing of a class action under the new Rule 23, the Court held, "the claimed members of the class [stand] as parties to the suit until and unless they receive[] notice thereof and [choose] not to continue" or until the suit is formally denied certification.[201] That being so, the Court concluded, there is no unfairness in holding that the statute of limitations is tolled as to all potential class members from the moment of filing. The *American Pipe* rule, in other words, is justified by two considerations: First, it rests on the Court's understanding that potential class members become quasi-parties subject to at least some changes in their legal position upon the filing of a putative class action, even before the certification decision has been made or notice has been given. Second, it rests on the Court's conclusion that tolling the limitations period for all class members effectuates the purposes underlying Rule 23.[202]

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[199] *Am. Pipe*, 414 U.S. at 546-47 (quoting 3B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.10[1], at 23-2603 (2d ed. Supp. 1973)).

[200] *Id.* at 547.

[201] *Id.* at 551.

[202] *See id.* at 550-56. In *American Pipe* itself, the district court had determined that the requirements of adequacy and typicality were satisfied but that the class was not numerous enough to warrant certification. *Id.* at 543. That finding of adequacy and typicality gave the Supreme Court greater comfort in treating the class members as "parties" for purposes of the tolling rule (a consideration that would have been irrelevant had the tolling rule been viewed as "binding" only defendants). *Id.* at 550-53. As I explain in the pages that follow, the satisfaction of a similar requirement with respect

Once again, I do not wish to overstate the analytical significance of *American Pipe* to the present discussion. One could have accounted for the tolling rule without ascribing any quasi-party status to potential class members in an uncertified proceeding, and, with the caveat discussed in the footnote above, it may be correct to describe tolling as "binding" only the party that it most clearly disadvantages—the defendant. Nonetheless, the analytical framework that the Court chose in explaining its result in *American Pipe* supports the view that the filing of a putative class action attaches sufficient jurisdiction to the potential absentees to alter the mix of remedial vehicles that are available for the pursuit of their claims, even prior to certification, and that notice and individualized process are not always necessary to effect that alteration in their legal position.[203] That treatment of the tolling rule is fully consistent with the analysis offered above for the use of antisuit injunctions to enforce a denial of certification.

C. *Enforcement of Certification Denials Under the Class Action Fairness Act*

With this constitutional framework in place, there remains only the question of authorization: what source of authority empowers a federal court "to protect or effectuate"[204] a denial of certification, and what is the scope of that authority? Once again, the jurisdictional policies bound up in CAFA provide an important part of the answer, clarifying and augmenting the power of the federal courts to issue such injunctions.

As with the "in aid of jurisdiction" provision,[205] the Supreme Court has generally given a narrow interpretation to the authority of federal courts to enjoin state proceedings in order to effectuate their judgments, limiting their power to the enforcement of a judgment's pre-

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to the certification decision itself (i.e., a finding that there was an adequate representative urging certification upon the court) should be a prerequisite to any antisuit injunction enforcing a denial of certification. This feature of the *American Pipe* litigation has not, however, been adopted by the Supreme Court in subsequent cases as a prerequisite for class members to enjoy the benefit of tolling. *See, e.g.*, *Crown, Cork & Seal Co.*, 462 U.S. at 348-354 (applying the *American Pipe* rule to a proceeding in which class certification was denied for lack of adequacy, typicality, and numerosity).

[203] Thus, Justice Scalia's strongly stated complaint to the contrary in his *Devlin v. Scardelletti* dissent is, at the very least, overstated. *See* Devlin v. Scardelletti, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting) ("Not even petitioner . . . is willing to advance the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation before the class is certified." (emphasis omitted)).

[204] 28 U.S.C. § 2283 (2000).

[205] *Id.*

clusive effect as to those issues and claims that were actually decided in the federal proceeding.[206] Once again, this narrow approach expresses deference to the countervailing federalism interest according to which class members are called to rely upon the willingness of state courts to recognize appropriate defenses of merger or bar.

CAFA significantly upsets that countervailing federalism interest. The Act presumes that state courts are not optimal fora in which to adjudicate class actions that are national in scope, even when those actions are based on state law. In debating the Act, Congress identified the particular danger that class counsel will make serial attempts at certification by shopping for sympathetic state courts that will be likely to disregard any preclusion defense following a previous denial of certification. This is one of the forms of strategic behavior that the Act expressly seeks to defeat. Enforcement of the finality of federal court orders will sometimes be an essential tool in accomplishing that purpose. Where that is so, CAFA appears to lend additional authority to the federal courts to overcome any objections from federalism that might otherwise suggest a limited scope for an injunction aimed at enforcing a denial of certification.[207]

In many instances, it will not be necessary to rely upon the broader implications of CAFA to find authorization for the type of antisuit order that the due process analysis in the last section suggests is appropriate. An injunction that merely prohibits the particular class configuration attempted in the initial federal proceeding while leaving class members free to seek certification of a more narrowly tailored lawsuit will generally comply with the Court's conservative approach to the "protect or effectuate" provision of the AIA and will satisfy the due process standards explored above without the issuance of individualized process. A broader antisuit injunction that would foreclose all future aggregate treatment for any of the class members' claims, in contrast, will often functionally extinguish the claims them-

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[206] *See* Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 147-48 (1988) (providing *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), as an example of how the relitigation exception "permit[s] a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court").

[207] Professor Issacharoff has made a much more aggressive argument in this vein, urging a reading of CAFA that would authorize federal courts to jettison the doctrine of *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), and adopt their own choice of law approach to nationwide state law disputes with an eye toward adopting a uniform liability standard to go along with the uniform treatment of certification standards. *See* Issacharoff, *supra* note 12, at 1865-66. *But see* Burbank, *supra* note 12, at 1942-44 (rebutting Professor Issacharoff's position).

selves, requiring a higher degree of individualized process to bind absentees in any event (effectively eliminating any authorization problem).

Suppose, however, that class counsel refile their lawsuit in the court of a state that has expressly adopted a more permissive standard of class certification than that contained in Federal Rule 23, such that the first proceeding arguably has not "actually litigated" the issue sought to be foreclosed in the second. Here, the added weight of CAFA comes into play. The unavoidable import of CAFA, manifested in its findings and statements of purpose,[208] its structure, and its legislative history, is that class actions of national scope and importance should be decided in a federal tribunal, according to federal certification standards. While the Act stops short of directly preempting more permissive certification standards in the state courts, it clearly elevates the federal standard to a preferred status for covered cases. A federal court's determination that a lawsuit is inappropriate for class treatment should be understood as a final disposition on the certifiability of that lawsuit—a decision with preemptive effect in any subsequent proceedings that seek to pursue the same class configuration.[209] Thus,

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[208] The Act's findings and purposes say the following about the proper treatment of class actions of national scope:

> (4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—
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> (A) keeping cases of national importance out of Federal court;
>
> . . . .
>
> (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

CAFA § 2(a), 28 U.S.C. § 1711 note (Supp. V 2005).

[209] Denials of certification under CAFA thus warrant treatment under the AIA different from the treatment that the Court found appropriate for a dismissal on forum non conveniens grounds, where the federal standard governs access to the federal forum without purporting to speak to the propriety of state courts providing a forum. The Court gave a broader explanation for its oft-cited ruling on the relitigation exception, however, finding that an argument about the preemptive effect of federal forum non conveniens doctrine in the maritime context was irrelevant to its analysis where the preemption question was not litigated in the initial federal forum. *See Chick Kam Choo*, 486 U.S. at 148-50; *see also* Kerr, *supra* note 29, at 239-40 (concluding that *Chick Kam Choo* forecloses use of the relitigation exception in denial-of-certification cases). The statutory framework of CAFA, and the clarified understanding of the sources of preemptive authority for federal judgments that the Court embraced in *Semtek International, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), both warrant stepping away from this feature of the *Chick Kam Choo* holding.

even if a state does embrace more permissive standards of certification, such that the attempt to refile and certify an identical suit in that state arguably presents a "different issue" for decision than the one resolved in the earlier federal proceeding, the federal court may still use its injunctive powers to prevent relitigation of the broader issue that it has actually decided—namely, the certifiability of that lawsuit under the federal standard that CAFA has determined to be appropriate for covered cases of national importance.

One may consider this result an application of the caveat that the Supreme Court offered when it ruled in *Semtek International, Inc. v. Lockheed Martin Corp.* that federal common law controls the preclusive effect that will be exerted by the judgment of a federal court sitting in diversity, but that ordinarily federal common law should select the rule that would have applied to a judgment rendered by a state court in the same jurisdiction.[210] The Court characterized that result as a proper expression of the policy of federal jurisdiction traditionally associated with the *Erie* doctrine, which aims to discourage forum shopping between state and federal court as a means of obtaining a different result. As a caveat to that holding, however, the Court allowed that "[t]his federal reference to state law will not obtain . . . in situations in which the state law is incompatible with federal interests."[211] CAFA's targeted grant of jurisdiction expresses a federal interest in having federal certification standards apply to class actions of national scope and importance, while at the same time displacing the presumption against vertical forum shopping that informs *Erie*'s statement of values. Under *Semtek*, it is thus doubly appropriate to craft a federal rule of preclusion for judgments under CAFA that attaches preemptive force to the ruling of the federal court that a particular class configuration should not be certified.

Finally, there are two questions relating to the territorial scope and enforcement of an antisuit injunction that require attention: what affirmative authorization does a federal court possess to apply such an order to absentees around the country, and what procedures must the court employ in enforcing its order?

The first question provides an occasion to clear up a frequent source of confusion about the scope of a federal court's authority to

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[210] *Semtek*, 531 U.S. at 508-09.

[211] *Id.* at 509. As an example of such a situation, the Court posited a case where "state law did not accord claim-preclusive effect to dismissals for willful violation of discovery orders" and "federal courts' interest in the integrity of their own processes might justify a contrary federal rule." *Id.*

exercise adjudicatory jurisdiction within the territory of the United States. As an arm of the federal sovereign, federal courts enjoy the constitutional authority to exercise power over litigants anywhere inside the United States, provided that some affirmative source of positive federal law authorizes the exercise. Although the Supreme Court itself has never opined on the issue directly, both Congress and the lower federal courts have long operated on the assumption that the federal courts can be empowered to exercise nationwide jurisdiction, and the Supreme Court regularly assumes the correctness of that proposition in cases where it might otherwise require analysis. Provided that some source of positive law authorizes the attachment of jurisdiction, federal courts have the constitutional authority to exert power over persons throughout the country. This is true of defendants and absent class plaintiffs alike.

The only provision of federal law that would limit federal courts to the jurisdictional reach available to states is Rule 4(k)(1)(A), which empowers federal courts to "borrow" state long-arm statutes in acquiring jurisdiction over defendants.[212] That provision, however, does not purport to impose any general limitation on the jurisdictional reach of federal courts, as courts and commentators frequently assume. Rule 4(k)(1)(A) is simply one potential source of affirmative authority that a federal court can draw upon in exercising jurisdiction over defendants. The provision tracks the limitations that would apply to a state court under the Fourteenth Amendment, to be sure, but it does so purely as a matter of jurisdictional policy—a self-imposed constraint upon this particular source of jurisdictional authority. Rule 4(k)(1)(A) does not impose a general limitation upon exercises of federal jurisdiction; much less does it reflect a constitutional limitation on the power of federal courts. Rather, the jurisdictional policy embodied in Rule 4(k)(1)(A) is an expression of the broader proposition that federal courts, as a general matter, should not create unnecessary incentives for vertical forum shopping. That jurisdictional policy has no constitutional component,[213] and, again, it has been

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[212] FED. R. CIV. P. 4(k)(1)(A).

[213] The Supreme Court made this proposition clear in *Hanna v. Plumer*, 380 U.S. 460 (1965). The *Hanna* Court put to rest the false constitutionalization of procedural questions under the *Erie* line of cases, explaining that *Erie* set forth no broad constitutional command regarding the applicable procedures in federal court. Rather, *Erie* created a default jurisdictional policy—"the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws"—to govern in the absence of an applicable federal rule or statute. *Id.* at 468. Rejecting the doctrine that Justice Harlan urged in his noted concurrence, the Court found that

significantly weakened under CAFA, which sets forth a new jurisdictional policy that actively encourages vertical forum shopping in class action litigation. In addition, Rule 4(k)(1)(A) does not even apply to absent plaintiffs. By its terms, the Rule speaks only to jurisdiction over defendants. Thus, the proposition that federal courts are limited to the jurisdictional reach that would be available to a state tribunal—a proposition that finds expression only in the limited context of cases governed by Rule 4(k)(1)(A) in any event—simply has no impact upon the present question.

It is the All Writs Act that a federal court should look to in assessing its authority to apply antisuit injunctions to absent class members. The Act provides federal courts with authority to issue all orders that are necessary to enforce their own judgments or to effectuate their own jurisdiction.[214] The obligation of any such injunction operates in personam as to the original parties to the lawsuit—in a putative class action, the named plaintiffs and defendants—binding them in all judicial districts.[215] It is also well established that, in appropriate cases, federal injunctions can be enforced on a nationwide basis against nonparties as well—and, a fortiori, against quasi-parties like absent class members. Such enforcement is most clearly available when nonparties aid in subverting an order or violating its terms. Were it otherwise, as the Fifth Circuit has pointed out, opponents of an injunction could "enlist the aid of out-of-state individuals in an attempt to frustrate the orders of the district court."[216] This is a danger that reso-

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Congress and the federal rulemakers could create divergences between federal and state procedural practice, even when doing so would violate *Erie*'s "twin aims," without violating any constitutional principle of federalism. *Id.* at 471-74.

[214] The provision reads, in relevant part, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2000).

[215] *See* United States v. Swift & Co., 286 U.S. 106, 114-15 (1932) (finding that a court in which a consent decree is entered retains jurisdiction over the parties for the purposes of modifying the decree); Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 452 (1932) ("The respondent could not escape the decree by removing from, or staying without, the District [in which it was issued]. Wherever it might conduct its affairs, it would carry with it the prohibition. Disobedience constituted contempt of the court which rendered the decree, and was none the less contempt because the act was committed outside the district, as the contempt lay in the fact, not in the place, of the disobedience to the requirement."); *see also* Pac. Reins. Mgmt. Corp. v. Fabe, 929 F.2d 1215, 1218 (7th Cir. 1991) (explaining that injunctions generally cannot be registered under 28 U.S.C. § 1963, the provision for the cross-district enforcement of federal judgments, "because that would be pointless: they act *in personam* nationwide").

[216] Waffenschmidt v. MacKay, 763 F.2d 711, 717 (5th Cir. 1985).

nates in the class action context, where seriatim attempts at class certification are often controlled by a single group of entrepreneurial lawyers who switch plaintiffs and venues in search of a favorable result.

When a federal court with jurisdiction over both the subject matter and the original parties in a putative class action denies certification, a properly crafted order preventing absentees from obtaining a second bite at the apple through successive attempts at certification operates in aid of that original exercise of jurisdiction and in defense of the order of denial, and therefore falls within the mandate of the All Writs Act. It is an appropriate extension of that statutory authority for the federal court to apply its antisuit order to absentees in any judicial district, just as the court would have the power under Rule 23 to apply its authority to all class members if it were to grant certification.[217] No limitation in the Constitution or the Federal Rules prevents that exercise of authority.[218]

Courts and commentators have regularly failed to understand these matters properly. For example, the Third Circuit—ordinarily a distinguished voice in federal class action jurisprudence—has issued a noted series of opinions in which it has gotten these issues flatly wrong. Beginning with *Carlough v. Amchem Products, Inc.*[219] (one of the multidistrict asbestos cases that led up to the Supreme Court's *Amchem* decision), the Third Circuit has committed two grievous errors: simultaneously forgetting the different constitutional frameworks that apply to exercises of jurisdiction by state and federal sovereigns[220] and

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[217] The Seventh Circuit essentially arrives at this conclusion in *Bridgestone/Firestone II*, though the course of its analysis is haphazard at best. *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig. (*Bridgestone/Firestone II*), 333 F.3d 763, 768-69 (7th Cir. 2003) (discussing the jurisdictional objection).

[218] I am speaking here only of the jurisdictional and geographic considerations surrounding an antisuit order. There are more purely "procedural" considerations that will attend the enforcement of such an order, which I set forth in the paragraphs that follow.

[219] 10 F.3d 189 (3d Cir. 1993).

[220] The court wrote:

> *International Shoe* arose in the state court system and the opinion expressed the due process guarantees of the Fourteenth Amendment; nonetheless, the [same] minimum contacts requirement for personal jurisdiction applies to federal courts having subject matter jurisdiction on the basis of diversity of citizenship as well as cases brought on the basis of a federal claim.

Id. at 199. The inaccuracy of this statement is astonishing. If taken at its word, the court appears to be saying that exercises of nationwide jurisdiction in federal question cases are unconstitutional, even when authorized by Congress, if class plaintiffs (or defendants) do not have "minimum contacts" with the state where the judicial district

committing the classic *Shutts* fallacy[221] of assuming that opt-out rights operate as a categorical constitutional prerequisite for any federal court seeking to exercise power over a class of absentees.[222] The Third Circuit reiterated these flawed propositions—through a spokesman no less eminent than the late Judge Edward Becker—in the well-known GM fuel tank litigation.[223] Many other courts have also gotten these issues wrong, and the Third Circuit has placed them in distressingly good company.

The second question relating to the enforcement of antisuit orders that must be addressed involves the more purely "procedural" considerations that attend ex parte injunctions. Under Federal Rule 65(d) and basic due process principles, an injunction can be enforced against nonparties only when they "receive actual notice of the order by personal service or otherwise."[224] Regardless of the precise quasi-party status that one ascribes to absent class members, due process would clearly prohibit the application of contempt sanctions against an absentee who had no actual notice of an antisuit order. Absentees must indeed be served with individual process before they can be threatened with the sanction of contempt.

This does not mean, however, that it is necessary to provide individual notice to the entire class before issuing an antisuit order. It merely means that individual notice is a prerequisite to enforcing the order against any particular class member. If an unaware absentee files suit in contravention of an antisuit injunction, the injunction's proponents must notify the absentee of the order, at which point they can require him to suspend or terminate the proceeding. Contempt sanctions would not be available for the original act of filing the sec-

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hosting the suit is located. The Third Circuit itself obviously does not believe any such thing. *See* Pinker v. Roche Holdings Ltd., 292 F.3d 361, 369 (3d Cir. 2002) ("Where Congress has spoken by authorizing nationwide service of process . . . the jurisdiction of a federal court need not be confined by the defendant's contacts with the state in which the federal court sits.").

[221] *See supra* Part II.A.1.

[222] *See Carlough*, 10 F.3d at 200 ("Thus, with neither express or inferred consent, nor minimum contacts, and prior to notice and the commencement of the opt out period, the district court did not have personal jurisdiction over the [objecting] plaintiffs and did not have authority to bind their actions when it issued the injunction."); *id.* at 201 ("Thus, prior to notice and the opt out period, and absent minimum contacts with the Pennsylvania forum or consent to its jurisdiction, a federal injunction enjoining state action would violate due process.").

[223] *See In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 141 (3d Cir. 1998) (Becker, J.).

[224] FED. R. CIV. P. 65(d).

ond lawsuit (unless the absentee in fact had notice of the order), but the federal contempt power would be available to enforce the order prospectively following the provision of notice.[225]

The Seventh Circuit's decision in *Bridgestone/Firestone II* provoked a great deal of controversy. Many commentators shared that court's intuition that any sensible class action policy must surely empower federal courts to prohibit endless attempts at securing certification in a hospitable forum, but they expressed uncertainty as to how the apparent formal obstacles could be overcome in order to bind uncertified class members to an antisuit order. Judge Easterbrook's opinion made a forceful case on the level of class action policy but did little to lay the due process foundation for the constitutionality of such an injunction. The discussion in this Section should now make clear that due process imposes no obstacle to a federal order enforcing a denial of certification, even without the issuance of individualized process, provided that the order leaves open meaningful remedial alternatives that class members can employ to pursue their claims. With the passage of CAFA, it should also be clear that what due process permits, federal law now authorizes.

III. COLLATERAL ATTACKS AND ADEQUACY OF REPRESENTATION

When a class action that suffers from collusion or malfeasance proceeds to a final judgment, the option remains for disgruntled class members or competing class counsel to attempt a collateral attack against the objectionable judgment on grounds of inadequate representation. Few issues in class action litigation have produced more heated disagreement than the question of whether, and under what conditions, absentees should be able to challenge the binding effect of a judgment collaterally by bringing a second suit and asserting a lack of adequate representation in the initial proceeding. The extraordinary saga of the Ninth Circuit's *Epstein/Matsushita* litigation focused the attention of courts and commentators on this issue. Those cases began as a pair of parallel class actions, one in California federal district court raising exclusively federal securities claims and one in

[225] One consequence of this nationwide enforceability of federal antisuit injunctions is that absentees who wish to contest such an order will be forced to travel to the issuing forum to do so, a requirement that some commentators might find objectionable. *See* Monaghan, *supra* note 114, at 1166-68 (arguing that a class member should enjoy the prerogative to challenge the binding effect of a class judgment in the forum of her choice). Nonetheless, such a result flows directly from a proper analysis of the injunctive powers of the federal courts.

Delaware state court raising state law claims, both arising out of alleged improprieties in a tender offer by the Matsushita corporation for the purchase of shares in MCA, Inc. By the time it was over, the litigation had produced a settlement and global release in the state court, an opinion by the Supreme Court of the United States on full faith and credit, and a series of Ninth Circuit decisions that included a dramatic opinion authorizing broad opportunities for collateral attack by class members on adequacy grounds that was promptly vacated by a reconstituted panel after the retirement of the opinion's author and was replaced by another dramatic opinion that seemingly foreclosed any possibility of collateral attack so long as the rendering forum purported to follow class action procedures similar to those found in Federal Rule 23.[226]

Many prominent voices in the academy have weighed in on the collateral attack question in the wake of *Matsushita*,[227] and the circuits

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[226] *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 383-86 (1996) (ruling that state courts do have the power to release exclusively federal claims in class action settlements and that the grant of exclusive federal jurisdiction does not constitute an exception under the Full Faith and Credit Act); Epstein v. MCA, Inc. (*Epstein II*), 126 F.3d 1235, 1255-56 (9th Cir. 1997) (finding that representation in state court proceedings was inadequate, both as a per se structural matter and on the facts, and permitting collateral attack), *vacated on reh'g*, 179 F.3d 641, 648 (9th Cir. 1999) (permitting collateral attack only in extremely narrow cases of complete process failure).

I should disclose that I come to the question of collateral attacks under the influence of some personal history. I served as one of the last judicial clerks for Judge William A. Norris, the author of the *Epstein II* opinion that was vacated following his retirement from the bench, and I worked extensively with the Judge and another co-clerk on the case. Although the approach that Judge Norris took in his opinion was not the one that I would have chosen in many respects, the experience of working closely on the issue with a distinguished jurist who believed strongly that an injustice had been done in the state court proceeding and that some form of federal remedy was appropriate and necessary has left a lasting impression.

[227] *See, e.g.*, William T. Allen, Response, *Finality of Judgments in Class Actions: A Comment on* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 1149, 1159-61 (1998) (arguing that a state class action judgment should have final preclusive effect when class members do not exercise a proffered opt-out option and the initial forum adjudicates compliance with Rule 23 in an adversarial proceeding); Kahan & Silberman, *supra* note 14, at 786-92 (urging a restrained approach to collateral attack that would not permit relitigation of the adequacy question in the absence of a process failure or other compelling circumstance in the initial forum); Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 156-67 (2001) (emphasizing the desirability of broad and unrestricted collateral attacks in cases where representation appears to have been inadequate in the initial proceeding); Monaghan, *supra* note 114, at 1153-54 (arguing for the availability of broad collateral attacks by class members who have no minimum contacts with the initial forum); William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 792-801 (2007) (employing post-conviction habeas practice as a point of comparison in exploring the

remain divided on whether and when class members may collaterally attack judgments on adequacy grounds—a division of authority that the Supreme Court conspicuously failed to resolve when it split 4–4 on an appeal from the Second Circuit's decision in the *Stephenson* case, which took a much broader view than the Ninth Circuit on the collateral attack question (albeit in the always idiosyncratic context of the Agent Orange litigation).[228]

There are serious arguments on both sides of this collateral attack debate. Few commentators have argued that collateral attack is categorically unavailable under a Rule 23 regime.[229] Such a position

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collateral attack question); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 388 (2000) ("The argument for limiting collateral attack contradicts two fundamental principles: first, a court has no jurisdiction over absent class members who have not been adequately represented; second, a judgment entered without jurisdiction may be collaterally attacked if the party bound by the judgment did not appear and had no obligation to do so.").

[228] The *Stephenson* litigation involved the recovery fund established by Judge Weinstein in resolving the Agent Orange litigation, and the accompanying release of claims. The fund provided a schedule of payments for individuals exposed to Agent Orange, but provided that payment was available only to those who filed claims within twenty years of exposure. Despite this limitation on recovery, the settlement bound all class members, including those whose injuries turned out not to manifest until after the expiration of the recovery period and who would thus be denied any recovery. In essence, the settlement traded off the likelihood that most class members who developed symptoms would enjoy some recovery against the possibility that some class members (unidentifiable at the time of settlement) would suffer long-delayed injury for which they could obtain no relief. The Second Circuit found that the initial proceeding did not afford adequate representation to the "future plaintiffs" whose injuries had not manifested at the time of settlement, and hence that individuals who manifested injuries outside the recovery period could escape the release of their claims and bring suit. *See* Stephenson v. Dow Chem. Co., 273 F.3d 249, 257-59 (2d Cir. 2001), *aff'd by an equally divided Court*, 539 U.S. 111 (2003) (per curiam).

[229] Professor Monaghan is unfair to Professors Silberman and Kahan when he suggests otherwise. *See* Monaghan, *supra* note 114, at 1195-99. In fact, Professors Kahan and Silberman recognize the appropriate role of the collateral attack in a limited range of class action scenarios, where the circumstances in F-1 give no confidence in the ability of the court to safeguard adequacy:

> We . . . do not take issue with the holding in *Gonzales* [*v. Cassidy*] that a collateral attack on adequacy can be brought challenging the conduct of class counsel when that conduct is no longer in the purview of the court in F-1. Moreover, in making its finding of adequacy, the court in F-1 necessarily relies on the accuracy of factual representations made in the fairness hearing. Those representations include the nature of the investigation undertaken by class counsel to ascertain the status of a competing class action or the likelihood that such claims will be filed as well as representations about the litigation value of to-be-released claims and the basis for counsel's assessment. To the extent these representations are materially false, some avenue must be provided to reassess the finding of adequate representation.

would be difficult to sustain in light of the approach that the Supreme Court has adopted in other circumstances where individuals have been bound to judgments without being made full parties. In the context of "divorce jurisdiction," for example, the Supreme Court has developed a set of doctrines for permitting limited collateral attacks to ex parte divorce decrees (that is, decrees obtained by one spouse where the other never appeared and was never served) in cases where there is evidence that the petitioner in the initial proceeding was not a true domiciliary of the forum—a condition that the Court has found to be a jurisdictional prerequisite for such ex parte orders.[230] Al-

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Kahan & Silberman, *supra* note 14, at 782 (citation omitted).

Professor Rubenstein also obscures the issue somewhat when he characterizes the debate as polarized between those who would never permit a collateral attack (whom he terms "preclusionists") and those who would always permit relitigation of adequacy questions by absentees (whom he terms "constitutionalists"). Rubenstein, *supra* note 227, at 795. While there are some who have adopted such categorical positions—Professor Monaghan, for example, adopts the strong "constitutionalist" position that absentees with no minimum contacts to F-1 must always be allowed to relitigate adequacy in the forum of their choice—most prominent commentators, including Professors Kahan and Silberman, have articulated more nuanced views. *See also* Allen, *supra* note 227, at 1159-66 (apparently adopting a "preclusionist" approach to class action settlements, but speaking only to cases in which "(1) [class members were] afforded notice of and a right to opt-out of the action and chose not to opt-out, and (2) the rendering court has, after a hearing on notice, adjudicated compliance with the terms of Rule 23 in an adversary proceeding"). On the "choice" that class members exercised to opt out, however, see *supra* Part II.A.1.

[230] The seminal statement of the Court's position on this point, the one that opened the door to the collateral attack, came in the second *Williams* decision:

> As to the truth or existence of a fact, like that of domicil, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right, when asserting its own unquestioned authority, to ascertain the truth or existence of that crucial fact.

Williams v. North Carolina (*Williams II*), 325 U.S. 226, 230 (1945). The Court soon placed limits on the doctrine, disallowing collateral challenges in cases where the complaining party had made an appearance and participated in the initial action:

> [T]he requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree.

Sherrer v. Sherrer, 334 U.S. 343, 351-52 (1948); *see also* Coe v. Coe, 334 U.S. 378, 383-84 (1948) (stating the same limit).

This much-noted line of cases appears never to have been discussed in conjunction with the class action question in any serious way, and it warrants closer examination. Not surprisingly, some litigants have raised this line of cases in arguing in favor

though the ex parte divorce problem differs in important respects from the class action, there are many points of commonality between the doctrinal problem of binding quasi-parties that each presents, enough so that the Court's approach in the divorce cases seriously undermines any claim that the question of collateral attacks by quasi-parties can be foreclosed on categorical, formal terms. Rather, the class action cases, like the divorce cases, require an inquiry into systemic values and practical consequences.[231] I aim here to make a modest contribution along those lines to the collateral attack debate, using the principles explored in this Article as a point of reference.

Those who advocate making collateral attacks broadly available to absentees point to notorious instances of seemingly irrefutable malfeasance by class counsel, where attorneys have negotiated millions of dollars in fees for themselves in return for do-little, take-nothing judgments for class members. The threat of a collateral attack, advocates argue, provides an urgent and necessary check on this type of self-dealing by irresponsible attorneys.[232] Skeptics counter that the

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of collateral attack, but no court appears to have offered an extended analysis of their relevance. *See, e.g.*, Hospitality Mgmt. Assocs., Inc. v. Shell Oil Co., 591 S.E.2d 611, 617 n.8 (S.C. 2004) ("Appellants also argue that South Carolina precedent supports the proposition that the courts of this state may review the jurisdictional underpinnings of a foreign judgment before granting full faith and credit. We note, however, that nationwide class action lawsuits clearly raise very particularized due process issues, and we therefore focus our analysis on case law in that context." (citation omitted)).

[231] Professor Hensler adopts a similar approach in discussing the proper treatment of "future" claimants in class action litigation, rejecting modes of analysis that frame the issue as an abstract question of due process and instead considering the treatment of future class action claimants in light of the treatment they are likely to receive in the other remedial arenas currently available to them. *See* Hensler, *supra* note 10.

[232] *See, e.g.*, Koniak, *supra* note 11, at 1787-94 (urging the importance of a collateral attack as check on irresponsible representation). Professor Monaghan asserts that existing doctrine clearly establishes the broad right of out-of-state absentees to attack a judgment collaterally in the forum of their choice whenever they claim that there has been a lack of adequate representation in the initial proceeding, pointing to the Court's decisions in *Hansberry v. Lee*, 311 U.S. 32 (1940), *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and *Richards v. Jefferson County*, 517 U.S. 793 (1996), in support of that proposition. *See* Monaghan, *supra* note 114, at 1149-50 & n.4, 1172-73. That position rests on an incorrect reading of these cases.

Hansberry, of course, permitted a collateral attack to a collusive proceeding that did not even purport to represent the interests of the objectors who later attacked the judgment. The opinion establishes an important constitutional principle of adequate representation in the absence of individual party status, but does not speak at all to the proper remedy when a proceeding that does purport to represent the interests of absentees is claimed to have fallen short. *Richards* is a variation on the same theme. In that case, the Court applied *Hansberry* to invalidate a broad application of preclusion doctrine by the Alabama Supreme Court. The Alabama court had precluded one

problem of self-dealing is exaggerated and that, once the collateral attack door is open, it will be impossible to limit the challenges exclusively to "obvious" cases of malfeasance. Every class action, they fear, will threaten to produce satellite litigation by unsatisfied class members or entrepreneurial attorneys, resulting in a loss of true finality in class proceedings and a concomitant reluctance on the part of defendants to enter into efficient settlements.[233] It is better to allow state supreme courts to impose limits on their outlying trial judges, as many have begun to do.[234]

The concerns sometimes expressed by skeptics over finality and the impact of collateral attack upon settlement may be overstated. While there are no comprehensive empirical data on the question, there does not appear to have been any significant increase in collateral attack proceedings since the Second Circuit's decision in *Stephenson* was issued and left in place by the divided Court. Even so, it is still early, and *Stephenson* was an unusual case with unclear implications for

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group of citizens from challenging the constitutionality of a tax law on the grounds that another group of citizens had already brought a similar challenge unsuccessfully and had judgment entered against them. Those earlier litigants, however, "did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any county taxpayers who were nonparties," *Richards*, 517 U.S. at 801-02, and it was for that reason that the Court found the extension of preclusion to violate due process. Again, the Court did not speak at all to the proper treatment of a proceeding that does purport to bind a properly represented class. *Shutts* does not address the issue at all, explaining only that absent class members are entitled to adequate representation "at all times," but saying nothing about how and where to administer a remedy when such representation is claimed to be lacking. *Shutts*, 472 U.S. at 812. Whatever the virtues of Professor Monaghan's position—a position that the Ninth Circuit largely adopted in *Epstein II* before that decision was reversed on rehearing—it is not settled law. *See also* Koniak & Cohen, *supra* note 227, at 156-57 (overreading the adequacy of representation cases in a similar fashion).

[233] *See, e.g.*, Fine v. Am. Online, Inc., 743 N.E.2d 416, 421-22 (Ohio Ct. App. 2000) (characterizing collateral attack as contrary to the form of relief that class actions aim to provide to "our judicial system nationwide"); *Hospitality Mgmt.*, 591 S.E.2d at 619 ("Without limited review, a nationwide class action could be vulnerable to collateral actions in the 49 other states in which it was not litigated initially."); Kahan & Silberman, *supra* note 14.

[234] *See* Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1756-78 (2000) (detailing increasingly tight controls that state legislatures and courts in some "magnet" jurisdictions have imposed upon class action litigation); *see also, e.g.*, Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801, 820-21 (Ill. 2005) (requiring trial courts to perform a careful analysis of key issues at the certification stage rather than waiting until trial to resolve them); Sw. Ref. Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000) (rejecting the "approach of certify now and worry later" and requiring trial courts to perform a careful certification analysis).

collateral attacks generally.[235] If the Supreme Court were to issue a square holding that collateral attacks on adequacy grounds are potentially available in all cases, the risk-benefit calculation that plaintiffs' attorneys must make in deciding whether to attempt to raise such claims would shift significantly, and there is good reason to think that the number of claims would increase.[236] That would be a costly development. Any high-stakes class action that is worth litigating might be worth challenging collaterally if an arguable question of representational adequacy appears in the record. The question is how CAFA should be understood to bear upon the availability and administration of this last-ditch mechanism for policing the actions of irresponsible class counsel or overreaching trial courts.

Had the absent-plaintiff removal provision been preserved in the final version of CAFA, that provision would have provided one such opportunity and could legitimately have been relied on by skeptics in support of the argument that collateral attacks are not generally necessary to preserve the rights of absentees in cases where the statute applies. In the absence of that provision, the alternative mechanisms for interdiction explored above should be viewed as functional alternatives to collateral attack. If a preemptive antisuit injunction is available and can effectively interdict collusion, malfeasance, or opportunistic relitigation at an early stage of the state court proceeding, the institutional and systemic downsides associated with collateral attack militate in favor of the injunction as the preferred method for policing the behavior of faithless class counsel. Conversely, if preemptive injunctions are unavailable or are unlikely to be effective, the case for collateral attack in extreme cases becomes stronger. The remainder

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[235] *See* Hensler, *supra* note 10 (discussing the distinctive features of the "futures" problem).

[236] As common sense would suggest, sophisticated plaintiffs' attorneys respond to the doctrinal landscape in making judgments about which cases are likely to be financially viable, just as they do when deciding where to file suit. For example, Willging and Lee write in their interim report that their

> findings suggest that plaintiff attorneys may be anticipating the removal of class actions on the basis of CAFA's minimum diversity provisions and are filing them in federal court as original proceedings. In that way, plaintiff attorneys retain a choice of forum at least to the extent that, in a given case, jurisdiction and venue rules allow filing in more than one federal forum.

WILLGING & LEE, *supra* note 3, at 17; *see also id.* at 16 ("[CAFA's] changes in the law would be as clear to plaintiff attorneys as to anyone. As removal becomes more predictable, plaintiff attorneys might decide to file actions initially in federal court to avoid the costs and delays associated with removal.").

of this Part will use this systemic perspective to analyze several scenarios in which advocates have urged the availability of collateral attacks, beginning with the *Epstein/Matsushita* litigation itself.

What was most frustrating about the *Epstein* litigation was its capacity to present at once the best and the worst case for a collateral attack. On one hand, the representational problems in the litigation were profound. As Judge Norris explained in *Epstein v. MCA, Inc.* (*Epstein II*), class counsel in Delaware used that infamous proceeding as a vehicle for settling exclusively federal claims that they did not have the authority to litigate, all for the apparent purpose of offering the defendant a cheap means of achieving global peace so that Delaware counsel could be the ones to earn a fee award.[237] Had CAFA been in effect and applicable to the case,[238] one can readily speculate that the supposedly "pro-federal-court" defendants would have chosen not to remove the litigation to a federal forum even so, preferring instead to keep the case in state court so that it could serve as the vehicle that it eventually became for buying a cheap global settlement. In fact, the functional equivalent of this stay-in-state-court scenario played out in the case itself. The Delaware trial judge rejected an early settlement and global release that was proposed by the parties, finding that the state law claims had "little or no merit" and should not serve as the vehicle for releasing potentially valuable federal claims (especially since the proposed settlement offered no real compensation to class members).[239] Despite this blunt assessment by the trial court, the defendants took no action to have the state law claims dismissed and instead allowed the case to lay dormant for over ten months until developments in the federal proceeding allowed them to try a second settlement gambit in Delaware. This sequence of events led the Delaware Vice Chancellor to remark that "suspicions abound" of collusion between the parties, even as he ultimately approved the settlement and global release.[240] One cannot study the course of representation

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[237] *Epstein II*, 126 F.3d at 1250.

[238] The jurisdictional provisions of CAFA do not apply to "any class action that solely involves a claim . . . that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized . . . ." CAFA § 4, 28 U.S.C. § 1332(d)(9) (Supp. V 2005).

[239] *Epstein II*, 126 F.3d at 1252 (quoting *In re* MCA, Inc. S'holders Litig., 598 A.2d 687, 689 (Del. Ch. 1991)).

[240] *Id.* at 1253 n.17 (quoting *In re* MCA, Inc. S'holders Litig., No. 11740, 1993 WL 43024, at *5 (Del. Ch. Feb. 16, 1993)).

in the Delaware proceedings without dismay, and the sequence of events in that litigation, while extraordinary, was hardly unique.

In response to this performance, the *Epstein II* court went so far as to conclude that the very configuration of the litigation in Delaware—a state class action proposing to release exclusively federal claims through settlement, despite its inability to adjudicate those claims—was so compromised that it made the representation of class counsel per se inadequate, regardless of the actual course of the proceedings.[241] In effect, this holding would categorically have prohibited state courts from ever releasing exclusively federal claims in class action settlements. That part of the court's opinion appears inconsistent with the Supreme Court's decision in *Matsushita*, which had held that the release of exclusively federal claims in a state class action does not by itself trigger any categorical exception to the state judgment's entitlement to full faith and credit.[242] Even so, the configuration of the proceedings in Delaware certainly indicated a need to view the actual course of class counsel's representation through a skeptical lens. The resulting picture of opportunism and apparent collusion is an unattractive one and makes a powerful prima facie case for a collateral challenge.

But the *Epstein* litigation also offered extensive opportunities for objectors to litigate these issues before the Delaware proceeding reached a final judgment, either by raising them in the proceeding itself or by seeking an injunction in the parallel federal litigation. The record seems to indicate that the Delaware Vice Chancellor was an engaged and active judicial monitor of the state class action. He rejected the initial settlement proposed by the parties as unfair (making particular reference to the potential value of the federal claims), inquired into the nature and adequacy of the representation being offered by class counsel, and approved the revised settlement negotiated by the parties only after the district court in California granted summary judgment against the plaintiffs on their federal claims (a holding that the Ninth Circuit later reversed). Objectors appeared at the second fairness hearing in Delaware and voiced their concerns about class counsel's motives—concerns that the judge himself reiterated in issuing his ruling on adequacy. The Vice Chancellor can legitimately be faulted for substituting his assessment of the overall fairness of the final settlement for a thorough analysis of the adequacy of the representation that produced that settlement—one of the mistakes in class

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[241] *Id.* at 1251-55.

[242] *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373-75 (1996).

action administration that the Supreme Court highlighted in *Amchem*.[243] Nonetheless, the record seems to indicate that the Delaware judge took his oversight duties seriously. The Delaware class members were given the opportunity to opt out of both the initial lawsuit and the settlement.[244] Finally, and importantly, class counsel in the parallel federal proceeding were fully aware of the pending Delaware action, yet they took no steps to intervene or otherwise interdict those proceedings, even after Delaware counsel's first unsuccessful attempt to include the exclusively federal claims in a global settlement.

If we ask whether permitting a collateral attack was necessary to safeguard the interests of the *Epstein* absentees in light of the other options at their disposal, the answer appears to be that many other avenues of redress were available before the Delaware proceeding arrived at a final judgment and the mandatory command of the Full Faith and Credit Act attached. Prominent among these was the option to seek an antisuit injunction in the federal lawsuit in order to prohibit the state court from releasing the federal claims and preempting the federal court's exclusive jurisdiction. Following the first, unsuccessful attempt of the parties in Delaware to release the exclusively federal claims, class counsel in the federal proceeding were clearly on notice that the state lawsuit posed a direct threat to the federal court's ability to exercise the targeted grant of exclusive jurisdiction that Congress had enacted in the Securities Act. Neither the lessons of CAFA nor the prescriptions of this Article were required to

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[243] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997) ("[T]he standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness."). The problem of adequacy here was not one of conflicting interests within the class, as with *Amchem*, but rather the diligence and loyalty with which class counsel approached its representation in toto. But the imperative to keep the adequacy and fairness inquiries separate remains important nonetheless. As the Ninth Circuit explained, the district court's dismissal of the federal claims in the *Epstein* litigation was at odds with decisions of the Second and Third Circuits that had recognized the plaintiffs' cause of action. Class counsel did not point out those precedents to the Delaware court, instead embracing the district court's dismissal and insisting that the federal claims were worthless. The Vice Chancellor apparently did not go behind class counsel's briefs to do its own legal research, but rather relied upon the representations of the settlement proponents in approving the settlement. As a result, the court's judgment about the fairness of the settlement and the propriety of releasing the exclusively federal claims was compromised.

[244] Of course, in light of the previous discussion concerning the limited efficacy of opt-out notice in cases where class members may not have focused attention upon their claims and may not have much at stake, the significance of the opt-out notice to the analysis here may be limited.

indicate the viability of an antisuit injunction at that point. Around that time (albeit in a somewhat different context), the Ninth Circuit itself held that a state court proceeding that threatens to compromise exclusively federal claims operates "in derogation of federal jurisdiction" and justifies an antisuit injunction as "necessary to preserve exclusive federal jurisdiction."[245] The decision of federal class counsel not to seek an antisuit injunction to interdict the settlement of the federal claims in Delaware was strategic, and the consequences of that decision could legitimately affect the options of the claimants whom counsel had been certified to represent.[246]

The Fifth Circuit's decision in *Gonzales v. Cassidy*,[247] another much-discussed precedent in collateral attack literature, offers an instructive contrast to this scenario. *Gonzales* involved two parallel class actions, both filed in federal court against the same defendant, that levied constitutional challenges to a Texas statute authorizing the suspension of driver's licenses without a hearing. The first suit resulted in a loss before a three-judge district court panel, but that decision was vacated by the Supreme Court in light of intervening precedent and sent back, resulting in a victory on remand.[248] The district court, however, designated that victory as having retrospective effect (that is, providing relief for past suspensions) only as to the named plaintiff. As to all other motorists, the court provided that the judgment would have only prospective impact, effectively denying relief to the rest of the ex-

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[245] Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 540-41 (9th Cir. 1995). *Sycuan Band* involved Indian law and the claims of Indian tribes, which may present a particularly urgent case for exclusive federal jurisdiction, as noted above. *See supra* note 53 (discussing the ruling in this case in the context of exclusive federal jurisdiction).

[246] *See* Wolff, *supra* note 110, at 746-51 (discussing the range of strategic choices that class counsel can make that may have binding consequences for absentees). Ironically, *Epstein II* makes this point by negative implication when it rejects the proposition that the appearance of objectors in the Delaware fairness hearing could operate to constrain the options of class members in the federal proceeding:

> [O]bjectors are objectors, not class representatives. The individual objectors who voluntarily appeared at the fairness hearing were not authorized by the absentees to represent their interests, nor were they certified by the state to do so. Their appearance at the hearing did not bind anyone but themselves to an adjudication of adequacy of representation.

126 F.3d 1235, 1242 (9th Cir. 1997) (internal citations omitted), *withdrawn*, 179 F.3d 641 (9th Cir. 1999).

[247] 474 F.2d 67 (5th Cir. 1973).

[248] *Id.* at 70-71.

isting class.[249] The named plaintiff, content with that outcome, declined to appeal the portion of the order that would deny relief to the other motorists who had experienced suspensions. The second class action, *Gonzales*, was filed while the first was on remand from the Supreme Court but before the court arrived at a final conclusion.[250] When the final order was entered in the first suit and the named plaintiff declined to appeal, the defendant then raised a defense of res judicata in the *Gonzales* proceeding, arguing that the unappealed order barred the request for retrospective relief on behalf of the other motorists.[251] In rejecting this argument, the Fifth Circuit held that the named plaintiff's decision not to appeal the withholding of class-wide relief in the first proceeding constituted a denial of adequate representation that warranted setting aside that judgment on collateral review.[252]

As in the *Epstein* litigation, there were already parallel class actions in *Gonzales* at the time the collateral challenge was raised. Unlike in *Epstein*, however, the adequacy problem in the first proceeding was not apparent—neither on the face of the lawsuit nor during the course of the proceedings—until the last moment, when the named plaintiff declined to appeal the portion of the district court's order specifying the effect of its ruling. Indeed, given that attorneys commonly submit their notice of appeal late in the thirty-day window for filing,[253] counsel in the *Gonzales* action may have had no notice at all of the threat to their clients' interests, unless they were in contact with counsel in the first proceeding or had otherwise received advance word of the decision not to appeal. If they did have notice of that decision, perhaps the *Gonzales* lawyers could have tried to file an emergency request to intervene in the first action for purposes of appealing, but the failure to attempt such an irregular action can hardly be deemed a willful decision not to interdict that proceeding.[254] Much

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[249] *Id.* at 71.

[250] *Id.*

[251] *Id.* at 73-75.

[252] *Id.* at 77.

[253] *See* FED. R. APP. P. 4(a)(1)(A) (requiring an appealing party to file a notice of appeal in district court within thirty days of an entry of final judgment).

[254] Since the named plaintiff in the first lawsuit no longer wished to participate, the request to intervene for purposes of appealing would presumably have required the lead plaintiff and counsel in *Gonzales* to take over that lawsuit altogether. This would have been a highly irregular turn of events—switching both plaintiff and counsel between the final judgment at trial and the subsequent appeal. Compare, for example, the Court's recent holding in *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002), that

less could class counsel in *Gonzales* have sought injunctive relief, as should have happened in *Epstein.*[255] In short, a collateral attack was the only realistic litigation option available to the *Gonzales* plaintiffs to redress the last-minute representational problem that arose in the predecessor litigation. Permitting the attack was clearly appropriate in that case, even under a highly restrictive view of the role of collateral challenges.[256]

There is a good deal of space between the litigation scenarios presented in these two precedents. It will often be much more difficult than it was in either of these cases to make a clear judgment about whether class members and competing counsel had a realistic opportunity to protect their interests against faithless behavior while the initial proceeding was still pending. That very indeterminacy makes the collateral attack option more costly still, for it makes flawed results more likely—both false positives, where competing counsel can wait until a suit ends and then decide whether to threaten the results of a difficult but fundamentally appropriate proceeding, and false negatives, where competing counsel are unable to demonstrate the flaws of an objectionable proceeding after the fact or are unwilling to assume the expense and risk of trying. Because the antisuit injunction interrupts the offending lawsuit at an earlier stage in the proceedings, it reduces the danger of wasted effort, frustrated expectations, and stra-

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those who appear as objectors to a fairness hearing have standing to appeal, even if they do not formally intervene. In such a case, the original lead plaintiff and counsel would still be in the lawsuit, defending the settlement that they negotiated before the trial court. More broadly, where the structure of a class action provides ample opportunity for class members to participate, voice their concerns, and protect their interests, then the obligation to pursue that course rather than attempting a collateral attack becomes concomitantly greater—*pace* the *Epstein II* court's excessive reliance upon the *Shutts* dictum that a class member "is not required to do anything" but "may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Epstein II*, 126 F.3d at 1242-43 (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985) (emphasis omitted)).

[255] For starters, the parallel actions here were both in federal court, and federal district courts generally do not exercise injunctive authority against their sibling tribunals. Moreover, any such injunction would have been mandatory in nature rather than prohibitory (i.e., an order directing the named representative to remain in the first proceeding, file the notice of appeal, and continue prosecuting the case), a use of equity that would be highly inadvisable and might even be unconstitutional under the First and Thirteenth Amendments.

[256] *See* Kahan & Silberman, *supra* note 14, at 782 ("We . . . do not take issue with the holding in *Gonzales* that a collateral attack on adequacy can be brought challenging the conduct of class counsel when that conduct is no longer in the purview of the court in F-1."); *see also* Rubenstein, *supra* note 227, at 837 (characterizing the collateral attack in *Gonzales* as "perform[ing] a necessary corrective function").

tegic behavior in difficult cases. And because an injunction is subject to modification in light of subsequent events or an expanded understanding of the factual record, it offers a less extravagant and unyielding form of intervention than does the collateral attack. The latter forces the court to make a one-time, permanent judgment about the enforceability of a prior proceeding without opportunity for future reconsideration or modification.

To be sure, an antisuit injunction, like a collateral attack, has the potential to be used abusively or strategically. But such behavior can be policed much more effectively through the ordinary standards of equity that govern requests for injunctions—where questions involving the nature of the harm sought to be averted, the behavior of the petitioning party, and the demands of the public interest are a required part of the analysis—than in the inapt arena of a constitutional challenge to adequacy in a collateral proceeding.[257] Experience suggests that it is much easier to assess the adequacy and propriety of a contemporaneous or recent proceeding, where all the players are still active and on the scene, than it is to reconstruct the tale of a litigation after the fact and attempt to judge its adequacy on a cool record. Moreover, a lesser, subconstitutional showing of inadequacy or malfeasance would be the appropriate standard in administering an antisuit injunction. The imperative to protect the specialized grant of federal jurisdiction in the injunctive proceeding need not overcome the mandatory command of the Full Faith and Credit Act, as would be necessary in a collateral attack. Thus, once it is clear that the targeted grant of jurisdiction contained in a law like the Securities Act or CAFA makes an antisuit injunction possible in such a case, competing class counsel would have a strong incentive to interdict the initial suit while it is still pending.[258]

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[257] *Cf.* Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 283 (7th Cir. 2002) (Posner, J.) (characterizing as remarkable the decision by a federal district judge to issue an antisuit injunction halting a parallel state class action "in view of the progress and promise of the Texas suit relative to the half-hearted efforts of the [federal] settlement class counsel" and reversing the approval of the federal settlement for failure to make a sufficient inquiry into adequacy and fairness).

[258] The only other opportunity that class members are likely to have to police their representatives while an action is still pending is to appear as objectors at a fairness hearing, a step that cannot be relied upon to have any significant impact on the outcome. *See* William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1467-81 (2006) (discussing structural and institutional limitations on the efficacy of the fairness hearing and suggesting reform proposals); *see also* Rubenstein, *supra* note 227, at 807-08 (summarizing procedural and practical impediments to developing a challenge to a settlement at a fairness hearing). Class

The antisuit injunction is not a complete answer to the collateral attack question. Competing counsel will not always file a parallel federal action from which such an injunction might issue, regardless of the doctrinal incentives for doing so. Class members in a flawed state court proceeding can hardly be taxed with the failure to pursue an antisuit injunction if no certified representative has ever made the strategic decision to forgo that option on their behalf. Where no parallel federal proceeding is ever filed in response to a questionable state class action, it may be necessary to continue to entertain the possibility of a collateral attack in cases presenting extreme representational problems.

In this respect, the antisuit injunction is once again a second-best solution to absent plaintiff removal. Had CAFA afforded absentees the opportunity to effect removal, the argument would be stronger that the failure of class members to pursue that option would foreclose them from raising a collateral challenge to the representation that they received in state court. Congress's decision not to include that provision in the Act means that collateral attack must remain a part of the class member's potential repertoire of responses to collusion or malfeasance, albeit a disfavored response, in at least some cases. If courts embrace the prescriptions set forth in this Article regarding antisuit injunctions, however, then the occasions for entertaining collateral challenges will diminish.

CONCLUSION

Congress legislated indirectly when it enacted CAFA. Seeking to work a change in the landscape of state law class actions, Congress vastly expanded litigants' access to federal court, leaving state liability rules and procedures intact as a formal matter but clearly operating on the understanding that the change in forum would regularly result in a change in outcome. The indirect nature of this new law should not obscure the significance of the action that Congress has taken. In using access to federal court as its chosen regulatory mechanism for shaping outcomes in class litigation, Congress has embraced a policy of federal jurisdiction for those cases that departs dramatically from the post-*Erie* jurisprudence of *Guaranty Trust Co. v. York* and *Klaxon Co.*

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members also have the right to enter an appearance in the lawsuit, but that appearance-as-of-right generally stops well short of an intervention that will allow them to influence the proceedings, and the cases where true intervention by class members has been permitted are few.

v. Stentor Electric Manufacturing Co., as Professor Burbank has correctly noted.[259] We have truly entered a new dispensation in federal aggregation policy.[260]

The excision of absent-plaintiff removal from the final version of CAFA eliminated the most direct mechanism by which class members could have sought protection from collusion or malfeasance under this new dispensation. Hence the jurisdictional paradox of the Act: class members must now rely upon the intercession of competing class counsel in parallel proceedings as their primary means of combating the faithless attorney behavior that CAFA aims to prevent. For absentees, the statute's protections operate at a double remove, with the indirect regulatory mechanism of federal jurisdiction accessible to them only through the indirect source of a parallel federal proceeding from which state lawsuits operating in derogation of the Act's jurisdictional policies may be enjoined.

As with any true paradox, however, the seeming contradiction of the Act, with its strong statement of intent to protect the interests of class members and its lack of a direct mechanism for achieving that end, can return us to a larger truth. Our federal jurisdiction jurisprudence has moved away from careful analysis of the particular congressional policies that are embodied in specialized jurisdictional provi-

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[259] *See* Burbank, *supra* note 12, at 1939-42 (offering a detailed description of the shift in jurisdictional policy, away from *York* and *Klaxon*, that CAFA represents). In the years following *Erie*, the Court adopted a policy of federal jurisdiction according to which the choice of the federal forum should not have any predictable ex ante impact upon the outcome of a lawsuit based on state law. In *Guaranty Trust Co. v. York* (a case that was not based on the Rules of Decision Act), the Court suggested that a diversity action in equity should conform judge-made procedures to the contours of state practice in order to discourage vertical forum shopping. 326 U.S. 99, 109-10 (1945). In *Klaxon Co. v. Stentor Electric Manufacturing Co.*, the Court relied upon the same principle—discouragement of vertical forum shopping—in denying federal courts the authority to develop an independent body of choice of law rules. 313 U.S. 487, 496-97 (1941). CAFA, of course, offers vertical forum shopping as the primary mechanism for altering outcomes in class proceedings.

[260] Professor Nagareda has expressed skepticism at the suggestion that CAFA invites an overruling of *Klaxon*, as Professor Issacharoff has argued that it does. "To say that CAFA turns off *Klaxon* when the statutory text says no such thing, when the legislative history actually speaks of preserving *Erie*, and when the Senate rejected a much more modest amendment on choice of law, is to press hard at the boundaries of statutory inference." Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1919 n.198 (2006) (discussing S. Amendment 4 to S. 5, 109th Cong., 151 CONG. REC. S1215 (daily ed. Feb. 9, 2005)). While the ultimate impact of CAFA on *Klaxon* is a difficult question as to which I do not yet have a firm view, I think that Professor Nagareda underplays the shift in jurisdictional policy that the statute represents, legislative history notwithstanding.

sions—an analytical drift that is both exemplified and aggravated by the misdirected approach to AIA doctrine that has predominated for several decades. In pushing back against the unsustainable implications of that doctrine in the new era of the nationwide class action, lower federal courts have adhered to an artificial and limited vocabulary when seeking to protect their jurisdictional prerogatives.

Given the Supreme Court's early deference to the principle of concurrent jurisdiction, perhaps these half measures were inevitable in the absence of clearer congressional direction. CAFA now provides that direction, for those able to see it. The grant of targeted jurisdiction contained in Congress's first general policy statement on class action litigation provides the occasion to reclaim from its desuetude a key insight: Congress sometimes uses the jurisdiction of the federal courts as its primary tool for giving voice to regulatory policies. Now that CAFA is upon us, the most faithful reading of the statute is one that will make the benefits of those regulatory policies available to all participants in contested class-action proceedings.