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Antisuit Injunctions and Preclusion against Absent Nonresident Class Members

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ANTISUIT INJUNCTIONS AND PRECLUSION AGAINST ABSENT NONRESIDENT CLASS MEMBERS

Henry Paul Monaghan*

In this Article, Professor Monaghan addresses an issue of pressing concern in class action litigation today, namely, the extent to which a trial court's class judgment can bind—either by preclusion or injunction—unnamed nonresident class members, thus preventing them from raising due process challenges to the judgment in another court. After placing the antisuit injunction and preclusion issues in the context of recent class action and related developments, Professor Monaghan discusses the Supreme Court's 1985 decision in Phillips Petroleum Co. v. Shutts and its applicability to these issues. In particular, Professor Monaghan criticizes reading Shutts' "implied consent" rationale as turning entirely on class members' failure to opt out of the class action, and using that failure as a basis for an antisuit injunction against nonresident class members. Absent minimum contact, Shutts requires, inter alia, adequate representation at all times in order to establish in personam jurisdiction over nonresident class members. That issue can always be raised in another forum. In a class action universe that includes races to judgment and reverse auctions, this rule is desirable. In the absence of a legislative reform, Professor Monaghan concludes that non-party, non-resident class members must remain free to challenge, on due process grounds, otherwise preclusive judgments in a forum of their choosing.

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* Harlan Fiske Stone Professor of Constitutional Law, Columbia University. This Article is dedicated to the memory of my former colleague at Boston University, Dan MacLeod; by any standard, he was a magnificent lawyer, and far more importantly, a great human being. Special thanks to my Articles Editor, Hilary Sunghee Seo. Many thanks also to my research assistants Nick Bravin, Ezra Field, Duane McLaughlin, Ron Schneider, and especially, Trevor Morrison.

Readers should be aware of possible author bias. This Article grew out of my participation in the representation of the *Epstein* litigants in Matsushita Elec. Indus. Co. v. Epstein (*Epstein I*), 516 U.S. 367 (1996). On remand from the Supreme Court, the Ninth Circuit held that a Delaware class action judgment could not bar a federal securities action because it had been the result of inadequate representation. See *Epstein v. MCA, Inc.* (*Epstein II*), 126 F.3d 1235 (9th Cir. 1997). Notwithstanding his doubt about the adequacy of representation, a dissenting judge believed that the issue was not open for the court's review. See *id.* at 1256. By order dated June 8, 1998, a petition for rehearing was granted and a suggestion for rehearing en banc rejected. Argument is set for August 21, 1998. See also *infra* note 162, describing the author's very limited participation in another litigation discussed in this Article.

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INTRODUCTION

Class actions occupy an uneasy place in American jurisprudence.¹ They are a salient exception to the otherwise deeply ingrained rule that a person is bound by judicial proceedings only if he or she is a party or in privity with a party thereto.² Traditional understanding holds, however, that the class action judgment (the F1 judgment, to use the conventional terminology) bars subsequent litigation only if the judgment satisfies due process.³ Thus, F2 must inquire into such matters as adequacy of class

1. Once enmeshed in a class action, class members cannot shape their own claims, and their individual rights to participate in the class proceeding are quite limited. As Professor Issacharoff observes, an attorney-client relationship is often established without any individual contact; courts determine whether class counsel provided representation "good enough" to bind the class member; and that determination concerning adequacy of representation is based upon "representations of counsel who have little if any connection to [the] parties to be bound." Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. Davis L. Rev. 805, 805 (1997). Frequently, individual class members simply become an invisible part of the "inventory" of the representative plaintiff's counsel. Particularly in the mass and toxic tort area, modern class action practice poses formidable challenges to long-standing conceptions of individual client control, or at least an individual's right to be heard in matters that purport to extinguish his rights. See Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 Tex. L. Rev. 571, 580-81, 604 n.152 (1997) (noting absent class members' limited rights to participate). To be sure, our legal system may no longer be fully able to afford such conceptions.

2. "It is a general principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party . . ." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). Nevertheless, "[w]e have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party." *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) (citing *Hansberry*, 311 U.S. at 41-42).

3. "A State may not grant preclusion effect in its own courts to a constitutionally infirm judgement, and other state and federal courts are not required to accord full faith

representation before it can accord full faith and credit to the F1 judgment.⁴

In recent years, however, nationwide antisuit injunctions have become an increasingly familiar feature of the class action landscape, not only in securities and antitrust law, but also in mass and toxic tort class actions certified under the Federal Rules of Civil Procedure, Rules 23(b)(1) and (b)(3).⁵ Typically, an antisuit injunction prohibits all class members from commencing or continuing litigation arising out of the same transaction in another forum.⁶ One important effect of such an injunction is, of course, to channel all due process challenges to the class action judgment back to F1, thereby allowing that court to retain its hold on the underlying controversy, even in the unlikely event that it sustains a due process challenge to its own prior proceedings.⁷

The prestigious American Law Institute (ALI) has endorsed the principle of antisuit injunctions as part of a comprehensive legislative proposal designed to aggregate and consolidate similar class litigations within a single tribunal.⁸ Without distinguishing between the entry of an antisuit injunction and its enforcement, several courts believe that the *existing*

and credit to such a judgement." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482 (1982) (citations omitted).

4. Numerous authorities support this rule. See Restatement (Second) of Judgments § 42(1)(d)-(e) & cmts. (e) & (f) (1982); *Richards v. Jefferson County*, 116 S. Ct. 1761, 1766 (1996); *Epstein I*, 116 S. Ct. at 888 (Ginsburg, J., concurring in part and dissenting in part); *Hansberry*, 311 U.S. at 41-42. The lower courts are in accord. See *Epstein II*, 126 F.3d at 1245 (collecting many authorities); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 200 n.7 (3d Cir. 1993) (same); see also *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1214 n.11 (6th Cir. 1997) ("absent class member may later collaterally attack a faulty judgment by challenging adequacy of representation").

5. See, e.g., *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2242 (1997); *In Re Asbestos Litig. (Ahearn I)*, 90 F.3d 963 (5th Cir. 1996), remanded sub nom. *Flanagan v. Ahearn*, 117 S. Ct. 2503 (1997), reaff'd per curiam on remand, 134 F.3d 668 (*Ahearn II*) (5th Cir. 1998), cert. granted sub nom. *Ortiz v. Fibreboard Corp.*, 66 U.S.L.W. 3799 (U.S. June 22, 1998) (No. 97-1704).

6. For example, on August 6, 1997, the *New York Times's* financial pages carried a full-page notice of a proposed settlement of a pending nationwide, opt-out securities law class action against the John Hancock Insurance Company. See Notice of Proposed Settlement, *N.Y. Times*, Aug. 6, 1997, at D5. The antisuit injunction's breadth is staggering. It purports to enjoin not only all non-opting-out class members, but also "all persons from filing, commencing or prosecuting a lawsuit as a class action on behalf of Class Members who have not timely excluded themselves." *Id.* (emphasis added). Presumably, as an attorney, this author is subject to the injunction.

7. I assume that under *existing* law the forum *must* entertain a collateral attack based upon such alleged due process violations as inadequate representation. See *In re "Agent Orange" Prod. Liab. Litig. (Agent Orange II)*, 996 F.2d 1425, 1432-33 (2d Cir. 1993) (recognizing a constitutional obligation to entertain, but rejecting on the merits, a due process collateral attack in F1 based upon inadequate representation in a prior settlement), cert. denied sub nom. *Hartman v. Diamond Shamrock Chems. Co.*, 510 U.S. 1140 (1994).

8. See American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis* § 5.04(a) (1994) [hereinafter *Complex Litigation*]. The proposal provides that when actions are transferred and consolidated:

legal framework provides sufficient warrant for such injunctions in some circumstances.⁹ That belief will be reassessed in light of the Supreme Court's recent decision in *Baker v. General Motors Corp.*, although there, the Court was concerned with issues of full faith and credit, not in personam jurisdiction.¹⁰ In *Baker*, the Court unanimously held that, in a product liability action against General Motors, a Missouri court need not accord full faith and credit to a nationwide Michigan antitestimonial injunction secured by General Motors in a Michigan court as part of a settlement of the Missouri witness's own claims against General Motors. In an elegant opinion for five members of the Court, Justice Ginsburg recognized that, while the Michigan proceeding had preclusive effect between the witness and General Motors,¹¹ the Michigan court could not "control proceedings against GM brought in other States, by other parties, asserting claims the merits of which Michigan has not considered. Michigan has no power over those parties, and no basis for commanding them to become intervenors in the [Michigan proceeding]."¹² Of special interest here, Justice Ginsburg addressed the more general issue of antisuit injunctions against litigants and other persons actually before F1. Her opinion drew a sharp distinction between issues of preclusion and direct enforcement of the injunction itself.¹³ *Baker v. General Motors* will focus

the transferee court may enjoin transactionally related proceedings, or portions thereof, pending in any state or federal court whenever it determines that the continuation of those actions substantially impairs or interferes with the consolidated actions and that an injunction would promote the just, efficient, and fair resolution of the actions before it.

Id. For a discussion of the ALI proposal, see Edward F. Sherman, *Antisuit Injunction and Notice of Intervention and Preclusion: Complementary Devices to Prevent Duplicative Litigation*, 1995 BYU L. Rev. 925. Sherman makes clear that the ALI proposal does not contemplate issuing antisuit injunctions as a matter of course. See id. at 932 ("If, as the ALI proposal contemplates, antisuit injunctions may be a normal complement to consolidation, careful scrutiny of the status of pending cases is necessary.").

9. See *infra* text accompanying notes 154-72, 181-201.

10. 118 S. Ct. 657 (1998).

11. See id. at 666.

12. Id. In a subsequent footnote, Justice Ginsburg added: "The Michigan judgment is not entitled to full faith and credit . . . because it impermissibly interferes with Missouri's control of litigation *brought by parties who were not before the Michigan court.*" Id. at 667 n.12.

13. So far as preclusion was concerned, she rejected any distinction between equity actions and other civil proceedings:

The Court has never placed equity decrees outside the full faith and credit domain. . . . We see no reason why the preclusive effects of an adjudication on parties and those 'in privity' with them, *i.e.*, claim preclusion and issue preclusion (res judicata and collateral estoppel), should differ depending solely upon the type of relief sought in a civil action.

Id. at 664 (citations omitted). But to compel F2 to enforce the F1 *injunction* itself was a different matter:

Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. . . . Orders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act

attention on the full faith and credit aspects of antisuit injunctions in class actions, that is, the extent to which even validly issued antisuit injunctions must or should not be given full faith and credit, or at least, have preclusive effect in F2. But there is a far deeper issue, one logically prior to that of full faith and credit: the scope of F1's jurisdictional authority with respect to nonresident class members in the first instance. What is the source of existing judicial authority in any state or federal court to bar, whether by way of preclusion or by injunction, due process

within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority. . . . And antisuit injunctions regarding litigation elsewhere, *even if compatible with due process as a direction constraining parties to the decree*, see *Cole v. Cunningham*, 133 U.S. 107, 10 S. Ct. 269, 33 L. Ed. 538 (1890), in fact have not controlled the second court's actions regarding litigation in that court.

Id. at 665 (emphasis added). In his brief opinion concurring in the judgment, Justice Scalia also emphasized the same distinction between preclusion and direct enforcement of the injunction: "[E]nforcement measures do not travel with sister-state judgments as preclusive effects do." *Id.* at 668 (Scalia, J., concurring).

In an important footnote, however, Justice Ginsburg acknowledged that the Court, in fact, has never authoritatively resolved the full faith and credit status of antisuit injunctions. While the Court has "held it impermissible for a state court to enjoin a party from proceeding in a federal court," it has not "yet ruled on the credit due to a state court injunction barring a party from maintaining litigation in another [s]tate." *Id.* at 665 n.9 (emphasis added) (citations omitted) (citing *Donovan v. Dallas*, 377 U.S. 408 (1964)). Justice Ginsburg, *inter alia*, cited her own article, see Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-In-Time Rule for Conflicting Judgments*, 82 *Harv. L. Rev.* 798, 823 (1969), which states that "[f]ederal law on antisuit injunctions running between state courts is notably murky." Justice Ginsburg also cited an article by Professor Reese, see Willis L. M. Reese, *Full Faith and Credit to Foreign Equity Decrees*, 42 *Iowa L. Rev.* 183, 198 (1957), which urged denial of full faith and credit. The footnote also recognized that "[s]tate courts that have dealt with the question have, in the main, regarded antisuit injunctions as outside the full faith and credit ambit." *Baker*, 118 S. Ct. at 665 n.9 (citations omitted). Moreover, Justice Ginsburg recognized both that antisuit injunctions "constraining the parties to the decree" could be "compatible with due process," and that the Michigan "decree could operate against [the witness] to preclude him from *volunteering* his testimony." *Id.* at 665, 667. Nonetheless, her opinion strongly implies that, whatever its preclusive effect, F1 cannot directly interfere "with litigation over which the ordering State had no authority." *Id.* at 665. This seems to be an extension of her 1969 conclusion that "[t]he current state of the law, permitting the injunction to issue but not compelling any deference outside the rendering state, may be the most reasonable compromise between these extreme alternatives." Ginsburg, *supra*, at 829. Concurring, Justice Kennedy, joined by Justices O'Connor and Thomas, would have reserved "announc[ing] an exception which denies full faith and credit based on the principle that the prior judgment interferes with litigation pending in another jurisdiction." *Baker*, 118 S. Ct. at 669 (Kennedy, J., concurring). For Justice Kennedy it was enough that the Missouri plaintiffs "were not parties to the Michigan proceedings, and nothing indicates [that] Michigan would make the novel assertion that its earlier injunction binds [nonparties or others] not then before [the court] or subject to its jurisdiction." *Id.* at 671.

Baker's full consequences remain to be worked out. Can F1 hold a litigant before it in contempt for "voluntarily" litigating in F2 when F2 permits such litigation? If so, what would be the measure of damages? Given the Court's sharp distinction between preclusion and direct enforcement of the injunction itself, to what extent can F1 preclude issues in F2 even when it cannot halt the F2 proceeding?

challenges in F2 by nonresident class members with whom F1 lacks minimum contacts? While F1 may have sufficient "in personam jurisdiction" to preclude the underlying substantive claims of such class members,¹⁴ prohibiting due process challenges outside F1, whether by way of preclusion or injunction, raises fundamentally different issues.¹⁵

Focusing on the position of absent, nonresident class members, this Article will address some of the pertinent preclusion and antisuit injunction issues in the class action context.¹⁶ Subject to some important exceptions, I argue that existing law does not permit F1 (by way of preclusion or injunction) to bar nonresident class members from litigating their substantive claims (individually or on behalf of a class) in F2, if F2 finds that the F1 class action judgment violated due process.¹⁷ This is *not* because of limitations inherent in the Full Faith and Credit Clause even with respect to F1 proceedings admittedly "compatible with due process."¹⁸ Rather, it is because in the absence of minimum contacts between the forum and the nonresident class members, an F1 proceeding that seeks to enjoin or preclude due process challenges outside of F1 is not "compatible" with existing due process limits on state court in personam jurisdiction.¹⁹ Perhaps nonresident class members in a class action are not precisely strangers to class litigation as were the Missouri plaintiffs in *Baker*. On many levels, however, these "inventory plaintiffs"²⁰

14. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985) ("In this case we hold that a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant.").

15. While the statement in *Baker* that "Michigan has no power over these [Missouri] parties and no basis commanding them to become intervenors in the [Michigan dispute]," *Baker*, 118 S. Ct. at 666, was made in regard to nonparties to the F1 litigation, I will argue that the Court's statement is fully applicable to, to take a salient example, the thousands upon thousands of "inventory" plaintiffs involuntarily conscripted into a class. I do not include here another set of inventory plaintiffs—those who "hire" counsel to represent their claims in mass and toxic tort cases, even though they, too often, also become a part of the class counsel's inventory.

16. Many of the arguments advanced in this Article may under existing law also apply to in-state class members and nonresident class members with in-state contacts.

17. Compare *Baker*, 118 S. Ct. at 670 (Kennedy, J., concurring) ("And whether or not an injunction is enforceable in another State on its own terms, the courts of a second state are required to honor its issue preclusive effects.").

18. *Id.* at 669 (Kennedy, J., concurring).

19. Similar limits exist on F1 federal court proceedings because Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure generally limits a federal court's in personam jurisdiction to that of the state court next door. Rule 4(k)(1) states, "[s]ervice of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant

(A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located"

Fed. R. Civ. P. 4(k)(1).

20. *Amchem Prods. Inc. v. Windsor*, 117 S. Ct. 2231, 2239 (1997). See *supra* note 15.

have a strong resemblance to such complete strangers.²¹ All too often, absent class members are simply faceless and fungible integers in class-counsel's huge warehouse.²² Notice of the pending class action or of its settlement is not legally the equivalent of a summons to appear.²³ Indeed, as a factual matter, such notices are consciously designed to encourage nonappearance.²⁴ And under existing conceptions of in personam jurisdiction, these absent, nonresident class members cannot be made the equivalent of parties for the purpose of cutting off due process challenges in F2.²⁵ Given the current absence of a comprehensive coordinating mechanism for consolidating multiple class actions and the dangers of races to judgment and of "reverse auctions,"²⁶ I believe that this limitation on *existing* judicial authority is generally desirable. However, no blanket judicial resolution of this issue will resolve all forms of class action abuse. To the extent that channeling injunctions are unavailable, migratory settler problems will remain unaddressed. Only a comprehensive legislative solution can turn the conflicting interests and incentives in the class action context into a coherent legal regime.

Part I of this Article places the issues of antisuit injunctions and preclusion in the context of recent class action developments. Part II focuses on *Phillips Petroleum Co. v. Shutts*²⁷ and the considerable uncertainty it has created. This Article argues that whether *Shutts* is read as a case of im-

21. See Issacharoff, *supra* note 1, at 823 (noting the considerable similarities between strangers to the litigation and absent class members). Indeed, *Baker* suggests a similar conclusion with respect to absent resident class members who have not been formally joined as a party. See 118 S. Ct. at 666 n.11.

22. See Issacharoff, *supra* note 1, at 805. As noted earlier, their rights to participation are virtually nonexistent.

23. A class action notice is not equivalent to a summons under Rule 4, Fed. R. Civ. P. 4, or its state law counterparts. A summons issues to defendants and certain plaintiffs joined as such under Fed. R. Civ. P. 19. See *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431, 441 (1934), quoted with approval in *Martin v. Wilks*, 490 U.S. 755, 763 (1989) ("Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights."). See also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808, 810 (1985) (contrasting the legal position of the "defendant summoned by a plaintiff [and] faced with the full powers of the forum State to render judgment *against* it" with the absent class member who, "[u]nlike a defendant in a normal civil suit . . . is not required to do anything.").

24. Under current practice, the distinction between formal process and notice reflects an important reality. See Arthur R. Miller and David Crumpp, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 17 (1986) (class action notices "are notoriously poorly understood, and lay recipients may be tempted to throw them away because they give the false impression that legal effects can be avoided by inaction"); see also text accompanying notes 173-174.

25. The Supreme Court has noted in *Richards v. Jefferson County*, 116 S. Ct. 1761 (1996), a case involving only in-state members, that under the law a person "is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Id.* at 1765-66 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)).

26. See *infra* text accompanying notes 32-33.

27. 472 U.S. 797 (1985).

plied consent or fundamental fairness, the scope of in personam jurisdiction it countenances over nonresident class members lacking minimum contact with the forum is both limited and conditional. Whether by way of preclusion or antisuit injunction, F1 cannot prevent nonappearing, nonresident class members from raising due process challenges in F2. Part III focuses on and criticizes three Third Circuit decisions that ignore the requirement of ensuring adequate representation "at all times" and misunderstand *Shutts's* "implied consent" rationale as requiring no more than a nonresident class member's failure to opt out. Part IV explores three alternative routes to in personam jurisdiction over nonresident class members—the All Writs Act, the Rooker-Feldman doctrine, and a revised preclusion doctrine—that, to the extent to which they can be invoked, could effectively bar due process challenges outside of F1. Finally, the Conclusion calls for both a clearer judicial understanding of the current law on preclusion and antisuit injunctions, and congressional reform to curtail class action litigation abuse if the law is to permit F1 to preclude or enjoin due process challenges by nonresident class members in F2.

I. PRECLUSION AND ANTISUIT INJUNCTIONS IN THE CONTEXT OF RECENT CLASS ACTION DEVELOPMENTS

The class action litigation explosion beginning in the late 1970s has attracted considerable attention, much of it concerning abuses, real or perceived, of the class action mechanism.²⁸ The allegedly exploitative nature of some plaintiff class actions has been a matter of long-standing concern that has drawn congressional scrutiny in the securities area.²⁹ More recently, however, concern has turned to the danger of manipulation of the class action mechanism by defendants.³⁰ When faced with large, independently viable individual claims, many defendants welcome

28. Complex litigation, of which class actions are the salient example, has been the dominant focus of civil procedure for at least the past decade. See, e.g., Jay Tidmarsh, *Civil Procedure: The Last Ten Years*, 46 J. Legal Educ. 503 (1996) (describing the impact of complex litigation on "routine" litigation).

29. The Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.), amends both the Securities Act of 1933 and the Securities and Exchange Act of 1934. Since the federal legislation applies only in federal courts, it has not been as effective as Congress envisioned. Legislation is now pending in Congress to correct that deficiency. See Rachel Witmer, *Congress Focuses on Closing "Loophole" in 1995 Act Barring Vexatious Class Suits*, 66 U.S.L.W. 2131, 2131 (Sept. 9, 1997). More recently, the proposed Securities Litigation Uniform Standards Act of 1997 vests exclusive jurisdiction over securities litigation that arises out of nationally traded securities in the federal courts. See Rachel Witmer, *Bill to Federalize Securities Class Actions Reported to Senate by Banking Committee*, 66 U.S.L.W. 2669 (May 5, 1998).

30. See, e.g., John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 Cornell L. Rev. 851, 851 (1995) ("[I]t is increasingly the corporate defendant that wishes to be sued in a class action and—with the help of a friendly plaintiffs' attorney—that often actively arranges for such a suit to be brought by a nominal plaintiff."); John Leubsdorf, *Co-Opting the Class Action*, 80 Cornell L. Rev. 1222, 1225 (1995) (analyzing how defendant can manipulate class actions).

class action suits as a vehicle for limiting overall liability, sometimes at bargain-basement prices.³¹ Indeed, in a world of multiple nationwide class actions, defendants may effectively pick the class counsel by conducting a "reverse auction" in which they settle with the counsel offering the best terms.³² These auctions have been aptly described as a "full bore race to the bottom."³³

A. *The Changed Landscape: Two Important Developments*

The concern over class action abuse has greatly intensified as a result of two important developments. The first is the emergence of multistate and nationwide state court damage class actions. In *Phillips Petroleum Co. v. Shutts*, the Supreme Court rejected a due process, in personam jurisdictional challenge to the certification in Kansas of a nationwide plaintiffs' class action for damages involving delayed interest on royalty payments on natural gas leases.³⁴ A unanimous Court concluded that the Fourteenth Amendment imposes no absolute bar to such actions involving the claims of nonresident class members lacking minimum contacts with the forum. Nonetheless, if the forum state wishes to bind an absent plaintiff concerning a claim for money damages or similar relief, the Court stated that the state must accord "minimal procedural due process protection"³⁵:

[t]he plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. . . . Additionally, . . . due process requires at a minimum that an absent plaintiff be provided with an opportu-

31. See the testimony of Professor John C. Coffee, Jr., describing various forms of egregiously "cheap" class action settlements whose primary benefits inure to defendants and settling counsel. The testimony was given on October 30, 1997, before the subcommittee on Administrative Oversight and the Courts of the Senate Judiciary Committee (on file with the Columbia Law Review) [hereinafter Coffee, Testimony]. The gap between the interests of class counsel and those of the class members in damage cases has, of course, long been well understood. Class action lawyers have been described as "lawyer-entrepreneur[s]." See Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. Legal Stud. 47, 61 (1975). See generally John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877 (1987) (noting that economic self-interest of plaintiffs' attorneys causes conflict with clients' interests in class action litigation).

32. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1354 (1995) ("At its worst, this process can develop into a reverse auction, with the low bidder among the plaintiffs' attorneys winning the right to settle with the defendant."); see also *In re Asbestos Litig. (Ahearn I)*, 90 F.3d 963, 995 (5th Cir. 1996) (Smith, J., dissenting) (questioning "for whom counsel really worked"). Informal judicial cooperation in this context has proved to be quite problematic. See Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. Rev. 1851, 1852 (1997).

33. Issacharoff, *supra* note 1, at 813.

34. 472 U.S. 797 (1985).

35. *Id.* at 811.

nity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court. Finally the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.³⁶

Given Kansas's scant prelitigation contact with the relevant events, however—"over 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for th[e] lawsuit"³⁷—the *Shutts* Court seemed wholly unconcerned with the monitoring or participation burdens placed on nonresident class members in a legal universe of multiple state (and federal) damage class actions, race-to-judgments, and reverse-auctions.³⁸

Matsushita Electric Industrial Co. v. Epstein (Epstein I) displayed a similar lack of concern.³⁹ Without dissent on the point, the Court put aside questions of adequate representation and permitted a state trial court to compromise federal claims that it could not adjudicate—those claims were within the exclusive jurisdiction of the federal courts—and thereby precluded a pending federal class action appeal.⁴⁰

36. *Id.* at 811–12.

37. *Id.* at 815. Indeed, the class certified also included residents of foreign countries. See *id.* at 815–16 n.6.

38. Although the opinion does not say so, perhaps the Court's hospitableness to state court class actions for money damages was partly due to the fact that federal courts have no jurisdiction over diversity-based class actions with damage claims below the jurisdictional amount. *Shutts* itself could not have been maintained as a diversity suit because, until recently, all members of the class, not simply the representative parties, had to satisfy the jurisdictional amount under 28 U.S.C. § 1332, now \$75,000. See *Zahn v. International Paper Co.*, 414 U.S. 291, 294–95 (1973); *Snyder v. Harris*, 394 U.S. 332, 338 (1969). *Zahn* seems to have been inadvertently overruled by amendments to 28 U.S.C. § 1367(b). See *Free v. Abbott Labs.*, 51 F.3d 524, 527–29 (5th Cir. 1995); see also Joel E. Tascia, Comment, Judicial Interpretation of the Effect of the Supplemental Jurisdiction Statute on the Complete Amount in Controversy Rule: A Case for Plain Meaning Statutory Construction, 46 *Emory L.J.* 435 (1995) (discussing possibility that § 1367(b) overruled *Zahn*). But even if *Zahn* has been overruled, cases like *Shutts* and *Snyder* are difficult to maintain in federal court because the representative parties must satisfy the jurisdictional amount. See *Snyder*, 394 U.S. at 336. Moreover, in Rule 23(b)(3) class actions, the Court has required that the representative plaintiffs shoulder the cost of providing individual notice to *all* reasonably identifiable class members, a requirement that functions as a strong deterrent to bringing such actions. See, e.g., *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 349 (1978); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178–79 (1974). In the settlement class action context, it is common for the defendant to shoulder notice costs.

39. 516 U.S. 367 (1996). See also *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig. (GM Trucks II)*, 134 F. 3d 133, 142 (3d Cir. 1998) (suggesting that the Supreme Court might be "disturbed by what Matsushita has wrought" in "facilitat[ing] an end run" around a Multi-District Litigation (MDL) proceeding in a state court).

40. The claims arose under the Securities Exchange Act, and accordingly, could only be litigated in the federal courts. See *Epstein I*, 516 U.S. at 370. The Supreme Court majority did not even mention that the state court had approved the compromise even though it had observed that the benefits to the class were "meager" and that "suspicions [of collusion] abound." *Id.* at 393.

The second and perhaps most important recent class action development is the expanding practice of certifying classes for settlement purposes only, i.e., if the court rejects the proposed settlement, the class remains uncertified.⁴¹ The special dangers inherent in such limited certifications were finally addressed by the Supreme Court last term in *Amchem Products, Inc. v. Windsor*.⁴² There, the Court noted that, with less information about the class, the judge is less able to guard against abuses such as collusion, individual settlements, and buy-offs.⁴³ One solution to these dangers would be to ban the certification of classes for settlement purposes only. Indeed, such certification does seem impermissible under the language of Rule 23 of the Federal Rules of Civil Procedure and its state rule counterparts.⁴⁴ *Amchem Products*, however, did not adopt such a strong position. Instead, the Court attempted to mitigate the dangers associated with settlement-only classes by prohibiting the use of a measurably lower standard when certifying such classes.⁴⁵ Rejecting an argument that a "fairness" hearing was an adequate substitute for inquiry into adequacy of representation, the Court said:

[I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, *see* Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1379-80 (1995), and the court would face a bargain proffered for its approval without benefit of adversarial investigation, *see, e.g., Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (CA7 1996) (Easterbrook, J., dissenting from denial of rehearing *en banc*) (parties "may even put one over on the court, in a staged performance"), *cert. denied*, 117 S. Ct. 1569 (1997).⁴⁶

41. On the difficulty in pinning down the frequency of this practice, see Judith Resnick, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. Davis L. Rev. 835, 849 (1997) (one limited study indicates a figure of 39%).

42. 117 S. Ct. 2231 (1997).

43. *See id.* at 2248-49.

44. *See* Comment, *Back to the Drawing Board: The Settlement Class Action and the Limits of Rule 23*, 109 Harv. L. Rev. 828 (1996).

45. *See Amchem Prods.*, 117 S. Ct. at 2247-48. The Court recognized that settlement-only classes assuage manageability concerns.

46. *Id.* at 2248-49. Several lower courts had voiced similar concerns even before *Amchem Products* was decided. *See, e.g., In Re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig. (GM Trucks I)*, 55 F.3d 768 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 88 (1995), on further proceedings, *GM Trucks II*, 134 F.3d 133 (3d Cir. 1998). *See also* *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 954 (Tex. 1996) ("Settlement classes . . . raise special concerns."). But *see* Resnick, *supra* note 41, at 843-45 (cautioning against judging settlement-only classes on the basis of a few highly visible suits).

B. Due Process Challenges and the Problematic Expansion of F1's Jurisdiction

Recent academic and judicial concern with potential class action abuse has been targeted towards attempts to employ the class action mechanism in the area of mass and toxic torts.⁴⁷ In particular, this concern has centered on a proposal to amend Rule 23 so that (b)(3) classes certified for settlement only need not satisfy (b)(3)'s predominance requirement.⁴⁸

But little attention has been paid to another potential source of abuse in the class action mechanism: the expansion of F1's jurisdiction to preclude due process challenges in F2, whether by way of preclusion or injunction.⁴⁹ In purporting to prevent absent class members from insti-

47. For examples of academic concern regarding the difficulties of managing class actions in such cases, see the extensive bibliography collected in David L. Shapiro, *Class Actions: The Class As Party And Client*, 73 *Notre Dame L. Rev.* 913, 914-16 n.2 (1998). For expression of such concern in the judicial context, see e.g., *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 628-29 (3d Cir. 1996), *aff'd*, *Amchem Prods. v. Windsor*, 117 S. Ct. 2231 (1997); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 166-67 (2d Cir. 1987). More importantly, consolidation and settlement in the mass and toxic tort area raise fundamental issues on such matters as due process, the nature of judicial power, and federalism. See *infra* note 73.

48. However, *Amchem Products* held that a "settlement only" class must satisfy Rule 23(b)(3)'s predominance requirement. 117 S. Ct. at 2246; see also *supra* text accompanying notes 42-46. As the Court noted, the proposal to eliminate this requirement has received widespread criticism. See *id.* at 2247. For an especially penetrating criticism, see Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Legitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 *Ariz. L. Rev.* 461 (1997). The authors conclude that "[i]t is quite possible that the proposed [change] would violate every constitution in the world." *Id.* at 476. In *Ahearn II*, a per curiam court decided that predominance was not required in a (b)(1) toxic tort proceeding, and thus approved, over a powerful dissent by Judge Smith, the settlement of a "futures only" asbestos class action. See *In re Asbestos Litig. (Ahearn II)*, 134 F.3d 668, 670 (5th Cir. 1998), *cert. granted sub nom. Ortiz v. Fibreboard Corp.*, 66 U.S.L.W. 3799 (U.S. June 22, 1998) (No. 97-1704). The majority seemed completely unaware of the fact that predominance may be constitutionally required by the Due Process Clause in order to ensure adequate representation. For a rare defense of the proposed new rule, see Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 *UCLA L. Rev.* 1773 (1997) [hereinafter Green, *What*]. Professor Greene advocates casting aside traditional conceptions of due process and judicial power. For him, this is a new evolutionary stage. To borrow the author's words, this is the "Age of Settlement," and older conceptions of the litigation process, the nature of judicial power, and the meaning of due process must be discarded. See *id.* at 1774; see also Eric D. Green, *Advancing Individual Rights Through Group Justice*, 30 *U.C. Davis L. Rev.* 791 (1997) (arguing in favor of proposed rule that would allow certification for settlement purposes only) [hereinafter Green, *Advancing*].

49. As *Baker v. General Motors* reaffirmed, state court injunctions enjoining pending or future federal in personam litigation are clearly void on federalism grounds, even as to parties to the F1 proceeding. See *Baker v. General Motors Corp.*, 118 S. Ct. 657, 665 n.9 (1998) (quoting Court's previous holding in *Donovan v. City of Dallas* that it is impermissible "for a state court to enjoin a party from proceeding in a federal court"); *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964) ("[S]tate courts are completely without power to restrain federal-court . . . in personam actions."); Charles A. Wright, *Law of Federal Courts* 296 (5th ed. 1994) ("Since the states cannot limit the jurisdiction of the

tuting or continuing an F2 proceeding, F1's antisuit injunction effectively transfers all due process challenges back to itself.⁵⁰

In a class action universe in which similar claims are not consolidated in a single forum, the problem of "distant-forum" abuse may be exacerbated to the extent that F1 can effectively bar due process challenges in F2. Absent, nonresident class members must travel to F1 and incur legal expenses in order to monitor or participate in a proceeding in a distant and unfamiliar forum to protect his or her interests adequately.⁵¹ In a world of multiple class actions, the dangers of races to

federal courts, they *cannot* enjoin proceedings in federal courts, except to protect the jurisdiction of the state court over property in its custody or under its control.").

But what about F1's power to preclude in situations other than those covered by *Donovan*? Prior to *Baker*, judicial and academic attention on this issue concentrated on such formidable questions as whether the Anti-Injunction Act, 22 U.S.C. § 2283 (1994), bars federal court antisuit injunctions against pending state proceedings. The relevant cases are collected in Sherman, *supra* note 8, at 935-48. For a general discussion of the Anti-Injunction Act, see Fallon et al., Hart & Wechsler's The Federal Courts and the Federal System 1189-1210, 1205-26 (4th ed. 1996 & Supp. 1997) [hereinafter Hart & Wechsler]. Suffice it to note here that the act has so far not proved a barrier when the federal court class action was near final disposition, or when the F1 court was seeking to protect a final judgment that had erected a private administrative "agency" for the payment of claims. See, e.g., *In re "Agent Orange" Prod. Liab. Litig. (Agent Orange II)*, 996 F.2d 1425, 1432 (2d Cir. 1993); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 203 (3d Cir. 1993) ("Hence the prospect of settlement was indeed imminent, as in other cases in which federal courts have issued injunctions."). According to Hart and Wechsler, there is no "class action exception to the Anti-Injunction Act." Hart & Wechsler, *supra*, at 1205. In general, lower courts have relied on the "in aid of [its] jurisdiction" exception of the Supreme Court's language preventing "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." *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970). Reliance on *Atlantic Coast* is problematic, however. In *Atlantic Coast*, the Court believed that parallel proceedings, even when federal jurisdiction is exclusive, do not ordinarily implicate the "in aid of" exception. *Id.* at 295-96. Subsequently, the Court said that it had "never viewed parallel *in personam* actions as interfering with [the district court's jurisdiction]." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977). Hart and Wechsler seek refuge in an "in rem" analogy. See Hart & Wechsler, *supra*, at 1204-06. Leaving aside *arguendo* "limited fund" cases, class actions seeking damages are *in personam*. See, e.g., *Ahearn II*, 134 F.3d at 673 (Smith, J., dissenting). Recently, in *GM Trucks II*, the Third Circuit suggested that the Anti-Injunction Act may be a far more formidable barrier than recent cases had implied. See *GM Trucks II*, 134 F.3d at 143-45. The court noted that the "typical application of the [in and of its jurisdiction] exception has been in removal cases . . . and in *in rem* cases' . . . *Carlough* . . . fashioned a third, and narrow [exception] . . . where a settlement was imminent," where the federal court "had already expended considerable time and resources . . . and where the pending state action threatened to derail the provisional settlement." *Id.* at 145 (citations omitted) (citing *Carlough*, 10 F. 3d at 204).

50. I proceed on the premise that the F1 court would consider the merits of a due process challenge. See, e.g., *Agent Orange II*, 996 F.2d at 1432-34. Indeed, in my view, F1 courts are constitutionally obliged to do so under existing law.

51. See Note, Steven T.O. Cottreau, The Due Process Right To Opt Out of Class Actions, 73 N.Y.U. L. Rev. 480, 487-90 (1998) (describing distant forum abuse problems because of the nonresident class members' lack of relationship with the forum). The

judgment and reverse auctions are considerable. Accordingly, by way of either preclusion or antisuit injunction, giving the F1 court the authority to bar due process challenges in F2 significantly increases the risks of class action abuse. F2's traditional checking function, however minimal, to ensure that an F1 proceeding comports with due process, is eliminated. That is a high price. As Judge Becker said in *Real Estate Title*:

Ever since *Hansberry v. Lee* was decided in 1940, collateral attacks have been considered to be a necessary part of the class action scheme. Rather than threatening the vitality of the class action mechanism . . . [collateral attack] is integral to the constitutionality of the class action procedure.⁵²

Due process concerns are particularly acute in settlement class actions, given the danger that the settlement court will lack information sufficient to judge adequacy of representation.⁵³

Even prior to *Baker v. General Motors*, antisuit injunctions invited an examination of the current understanding of the relationship between class actions and concepts of in personam jurisdiction. The Court's opinions have consistently recognized that the unnamed class members are just that: "absent."⁵⁴ Is there, however, an emerging conception that, unlike the Missouri plaintiffs in *Baker*, even absent, nonresident class members are somehow sufficiently "present" so that at least in some circumstances (and perhaps in many more than was previously thought) they *now* have a legal status comparable to that of named class representatives?⁵⁵ Or do conceptualizations of this nature—party v. non-party—no longer really matter because evolving notions of "fundamental fairness" now sometimes permit enjoining, or at least precluding, absent nonresident class plaintiffs from litigating in F2? Either mode of analysis would

burden on the absent class member is closely akin to a compulsory intervention requirement. American law generally does not require compulsory intervention by absent class members in a lawsuit. See *Epstein v. MCA, Inc. (Epstein II)*, 126 F.3d 1235, 1243–45 (9th Cir. 1997) (absent class members are under no duty to intervene or to monitor the proceedings); *Martin v. Wilks*, 490 U.S. 755 (11th Cir. 1989).

52. In re *Real Estate Title and Settlement Servs. Antitrust Litig. (Real Estate Title)*, 869 F.2d 760, 769 (3d Cir. 1989); see also *Miller & Crumpp*, supra note 24, at 52 ("One way to view *Shutts* is as a case about distant forum abuse. The right to opt out is essential to the Supreme Court's inference of consent, and that reasoning, in turn, is essential to the Court's validation of jurisdiction over members who have no affiliation with a distant forum."). Judge Becker's opinion does not make reference to this language in *GM Trucks II* at points where it might have been invoked.

53. See *Amchem Prods.*, 117 S. Ct. at 2248–49. See also supra text accompanying notes 42–46.

54. In *Shutts*, for example, the Court uses the term four times in a single page. See *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985); see also *Richards v. Jefferson County*, 116 S. Ct. 1767, 1767 (1996) (describing petitioners, unnamed class members who did not receive notice in prior class action, as "absent parties").

55. *Shutts* states that an "absent" plaintiff is not "*fully* a party in the traditional sense," 472 U.S. at 808 (emphasis added), language that might suggest that he or she may be *partly* a party. See *id.* at 805.

transform long-standing understandings of what it means for absent class members to be "bound" by a class action judgment.

Baker v. General Motors simply sets the stage for further inquiry into these difficult questions in the class action context. That decision, I believe, will quickly shift focus from issues concerning the compulsive effect of the F1 antisuit injunction against nonresident class members to the question of the extent to which F1 can preclude issues in F2. The underlying issues center on due process, not full faith and credit. This understanding takes us back to *Shutts*, because *Shutts* was all about the conditions necessary for the existence of in personam jurisdiction sufficient to preclude the claims of absent, nonresident class members.

II. *SHUTTS* AND NATIONWIDE STATE COURT CLASS ACTIONS

A. *Background Developments*

While *Shutts* is the starting point with respect to the legal status of absent class members,⁵⁶ it is best understood against several important background developments, which both give rise to and shed light on the problematic extrapolation of the *Shutts* analysis in the class action context. First, discussions of in personam jurisdiction have been overwhelmingly concerned with the extent to which *defendants* can be hauled into distant forums.⁵⁷ Current jurisprudence emphasizes notions of fundamental fairness that, in turn, largely focus on a defendant's prelitigation affiliation with a forum or a defendant's consent.⁵⁸ These requirements protect the "personal liberty interest" of a defendant from the "travail of defending in a distant forum."⁵⁹ Federalism concerns, that is, the extent to which the federal structure of the government requires that the states, including their courts, "stay at home,"⁶⁰ are, at least superficially, no longer seen as an independent constraint upon the reach of state court

56. Prior thereto, the Court was concerned with the issue of when representative suits bound absent members of the plaintiff class, see, e.g., *Hansberry v. Lee*, 311 U.S. 32, 42-44 (1940). This is an issue that still arises. See, e.g., *Jefferson County*, 116 S. Ct. at 1765-66; *Epstein II*, 126 F.3d at 1242-48.

57. See, e.g., Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. Davis L. Rev. 871, 873 (1995).

58. See *Shutts*, 472 U.S. at 807-08. Ideas of fairness here may be in flux. See *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560 (2d Cir.), cert. denied, 117 S. Ct. 508 (1996), criticized by Note, *Civil Procedure—Personal Jurisdiction—Second Circuit Applies "Reasonableness" Test for General Personal Jurisdiction*, 110 Harv. L. Rev. 1328 (1997) (refusing to uphold "general" jurisdiction over a multi-state defendant when the underlying controversy had no connection with the forum); Symposium, *Fifty Years of International Shoe: The Past and Future of Personal Jurisdiction*, 28 U.C. Davis L. Rev. 513 (1995) (analyzing the current status of Supreme Court doctrines).

59. *Shutts*, 472 U.S. at 807.

60. But see *Baker v. General Motors Corp.*, 118 S. Ct. 657, 663-65 (1998) (addressing the issue of full faith and credit to injunctions).

adjudicatory authority.⁶¹ So far as *plaintiffs* are concerned, the Court had, prior to *Shutts*, repeatedly rejected arguments that a plaintiff must have some minimal contact with the forum.⁶² "Prior to *Shutts*, . . . plaintiffs' contacts [with the forum] were only viewed through the lens of defendants' procedural due process rights."⁶³

Second, considerable uncertainty existed in the nineteenth and early twentieth centuries over the preclusive effect of class actions. Sometimes they were allowed to have such effect; sometimes they were not.⁶⁴ This disarray continued even after the codes took over the equity practice.⁶⁵ The 1938 amendments to the Federal Rules sought to reorder the legal

61. See *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guine*, 456 U.S. 694, 703 n.10 (1982) ("The restriction on state sovereign power . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns."). This statement has been described as "historically, analytically, and functionally incorrect," Fleming James et al., *Civil Procedure* § 2.4, at 60 (4th ed. 1992) [hereinafter James & Hazard]. For similar criticism, see Martin H. Redish & Eric J. Beste, *Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries*, 28 U.C. Davis L. Rev. 917, 933-40 (1995). The authors argue that "both in its initial formulation . . . and its subsequent elaboration . . . the purposeful avilment limitation was expressly derived from notions of interstate sovereignty, which the Court chose to incorporate into the Due Process Clause." *Id.* at 945.

Albeit an "absent plaintiffs" case, *Shutts* itself illustrates the demise of overt federalism concerns. The Court stated that due process "represents a restriction on judicial power not as a matter of [state] sovereignty, but as a matter of individual liberty." *Shutts*, 472 U.S. at 807; see Woolley, *supra* note 1, at 577-78 n.32. This is an odd statement because *Shutts* then went on to impose essentially federalism-based limits on the state court's choice-of-law rules, insisting that no state interest existed sufficient to warrant application of state substantive law to the vast bulk of the leases. 472 U.S. at 814-23. The emphasis on state interests, however, has played no comparable role in the law of personal jurisdiction. According to Linda Silberman, "although *dicta* in several Supreme Court [personal jurisdiction] cases allude[] to the importance of such state assertions of interests, the Court does not seem inclined to move in that direction." Linda J. Silberman, "Two Cheers" For *International Shoe* (And None For *Asahi*): An Essay on the Fiftieth Anniversary of *International Shoe*, 28 U.C. Davis L. Rev. 755, 758 (1995). For an illuminating and comprehensive treatment of the historical and contemporary "federalism" dimensions of in personam jurisdiction, see Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 Tex. L. Rev. 689 (1987). Professor Stein argues that "assertions of jurisdiction, as exercises of power, ought to reflect the general limits on state sovereignty inherent in a federal system." *Id.* at 689.

62. See, e.g., *Caldor v. Jones*, 465 U.S. 783, 788 (1984) ("The plaintiff's lack of 'contacts' will not defeat otherwise proper jurisdiction."); see also Mullenix, *supra* note 57, at 885-93 (describing the case law).

63. Mullenix, *supra* note 57, at 893.

64. See *Hansberry v. Lee*, 311 U.S. 32, 41 (1940) ("[T]o an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit . . . may bind members of the class or those represented who were not made parties to it."). See also 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1751 (1981) [hereinafter Wright & Miller] (noting the doctrinal uncertainty prior to *Hansberry*).

65. For a brief and illuminating discussion, see James & Hazard, *supra* note 61, § 10.21, at 560. The authors observe:

landscape of class actions by fashioning preclusion doctrine based upon certain "jural" relationships.⁶⁶ In *Amchem Products*, the Court noted that the 1966 revision of Rule 23 abandoned that approach. Instead, it substituted functional categories for legal ones, and it allowed class action suits for purely legal claims, including damage actions based solely upon common questions of law or fact, to have preclusive effect.⁶⁷ Most states now have class action provisions patterned on the federal rule, and the general assumption is that, due process considerations aside, preclusion will occur if the terms of the rule are satisfied.⁶⁸

Third, *Amchem Products* considerably understates matters when it describes the lower courts' use of the class action mechanism "to secure their just, speedy, and inexpensive determination" as "adventuresome."⁶⁹ The "framers" of Rule 23 did not envision the expansive interpretations of the rule that have emerged, a point frequently overlooked by lawyers and judges in their discussion of preclusion and anti-litigation injunctions.⁷⁰ No draftsmen contemplated that, in mass torts, (b) (1) (B) "limited fund" classes would emerge as the functional equivalent to bankruptcy by embracing "funds" created by the litigation itself;⁷¹ that (b) (2)

The uncertainty in the nineteenth century case law was compounded by a curious combination of determinations by the U.S. Supreme Court. In 1842 the Court promulgated Equity Rules governing the procedure in federal courts. One of them, Rule 48, dealt with class suits. That Rule provided that when the parties were very numerous, their joinder could be excused but that the "decree shall be without prejudice to the rights and claims of all the absent parties." Only a decade later, in *Smith v. Swormstedt* the Court passed on a federal class action case with language plainly implying that absentees would be bound. Understandably, the decisions in the federal courts thereafter were in profound confusion.

Id. at 560 (citation omitted).

66. The class action world was divided into "true," "hybrid," and "spurious" class actions. On the nineteenth and early twentieth-century origins of this trichotomy, see James & Hazard, *supra* note 61, § 10.21, at 560-61 n.21. The true class action was binding; the hybrid class action was binding with respect to specific property; and the spurious class action, the paradigmatic example of which was a lawsuit for money damages based upon common questions of law and fact, was binding only for the named parties. See generally *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2245-51 (1997). Spurious class actions were, in effect, a permissive joinder device under which a class member could join in the litigation even if the member could not independently satisfy the requirement of complete diversity from the defendant or defendants. See *id.* at 2245.

67. See *id.*

68. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985).

69. 117 S. Ct. at 2247 (quotations omitted).

70. For a brief account of Rule 23's expansion, see Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 *Brook. L. Rev.* 961 (1993).

71. See *In re Asbestos Litig. (Ahearn I)*, 90 F.3d 963, 1001-1102 & n.17 (5th Cir. 1996) (Smith, J., dissenting); see also Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 *Emory L.J.* 85, 98-101 (1997) (describing the evolution of the (b)(1) class in the mass tort context). Without focusing upon the action's use in mass and toxic torts, Professor Issacharoff characterizes (b)(1)(B) actions "as the plaintiffs' interpleader—a mechanism by which to avoid the 'run on the bank' risk when outstanding liabilities can be expected to outstrip

class actions could provide substantial damage awards so long as the equitable relief “predominates”;⁷² or finally, that there could be (b) (3) certification of settlement-only classes for large-scale mass tort and toxic damage actions,⁷³ a phenomenon now clearly limited in the federal courts by *Amchem Products*.⁷⁴

available assets.” Issacharoff, *supra* note 1, at 820. In its choice of law discussion, *Shutts* provides some succor to limited fund enthusiasts by stating, “there is no specific identifiable res in Kansas, nor is there any limited amount which may be depleted before every plaintiff is compensated.” 472 U.S. at 820.

72. See *Eubanks v. Billington*, 110 F.3d 87, 95–96 (D.C. Cir. 1997) (noting dangers of this development). “Structural” injunction suits are frequently brought under (b) (2). See 7A Wright and Miller, *supra* note 64, § 1775. While money may be required to effectuate such a (b) (2) class judgment, the money is not a personal award for damages because of prior misconduct.

73. See Carrington & Apanovitch, *supra* note 48, at 491 (“Assuredly, no one in 1966 considered the possibility of an action being certified as a class action for the sole purpose of approving a settlement under that subdivision, thereby ostensibly conferring a res judicata effect on an essentially non-judicial resolution of the claims of thousands and even millions of non-parties.”). Classes certified for settlement only in the mass and toxic tort context place an intolerable strain upon existing conceptions of judicial power. To begin with, these classes lack a “baseline [established by the threat of litigation] by which to judge whether or not the plaintiffs are getting a good deal.” Issacharoff, *supra* note 1, at 811; see also *id.* at 814 (describing risk of manipulation by defendants). The problems run deeper, however. Suppose that Congress were to authorize a few lawyers, supervised by a judge, to resolve nationwide tort problems without any guidelines as to how funds are to be allocated among right holders. The invalidity of such delegation would seem obvious. Yet that is precisely what happens in many settlement classes. See Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”: An Introduction*, 80 Cornell L. Rev. 811, 827 (1995) (“Class action settlements [in the mass tort context] generally involve large tradeoffs in which certain valid legal claims are subordinated to other claims.”). These settlements involve the destruction of pre-existing property rights and arguably violate the Fifth Amendment. See Carrington & Apanovitch, *supra* note 48, at 469–71. Moreover, by design these settlements disregard the content of state tort law. They are a “procedural camouflage” used to revise state substantive law, writes one of its leading practitioners. See Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 Brook. L. Rev. 827, 829 (1993); see also Judge Smith’s dissent in *Ahearn I*, 90 F.3d at 995 (criticizing the district court for “legislat[ing] a bold and novel tort reform proposal thinly disguised as the settlement of a lawsuit”). The overall pattern of these proceedings would clearly violate the principles of separation of powers, usurping congressional authority, as well as the federalism principles contained in the Enabling Act and the Rules of Decision Act. See generally, Carrington & Apanovitch, *supra* note 48, at 461–74 (1997) (raising points of criticism against a proposed revision of Rule 23, many of which are applicable to existing practices). These settlements also involve judicial approval of the creation of what are in effect private administrative agencies. See, e.g., Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 Colum. L. Rev. 2010 (1997). The role of judges in the process is especially problematic. See Resnick, *supra* note 41, at 837 (“[O]ver the past few decades, judges have shifted roles, becoming ‘managerial judges,’ ‘settlement judges,’ and one of many ‘players’ around a bargaining table.”). See generally Peter Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* 241–44, 258–76 (1986) (discussing the court’s departure from a traditional judicial role in Agent Orange litigation).

74. See Green, *What*, *supra* note 48, at 1778 (“Although the majority left the door slightly open for class action treatment of mass disaster cases (such as explosion or plane

B. Shutts, *In Personam Jurisdiction, and Procedural Due Process*

Shutts is about due process limitations on state court in personam jurisdiction over absent, nonresident class "plaintiffs."⁷⁵ What is most striking about *Shutts* is its deeply conservative character. Although stressing the distinction between the positions of defendants and absent class members, the Court's opinion is dominated by the reigning paradigms governing the exercise of in personam jurisdiction over defendants: minimum contacts or consent. Under *Shutts*, the preclusive effect of a state court class action judgment over nonresident class members is circumscribed by long held assumptions about territorial limits on state court jurisdiction. However the case is read, *Shutts* recognizes only a *limited* and *conditional* jurisdiction over nonresident class members. The right to "opt out" is a necessary but not a sufficient condition for in personam jurisdiction. In addition, adequate representation must exist "at all times."⁷⁶

At issue in *Shutts* was the preclusive effect of a nationwide state court (b)(3) (i.e., an opt-out) class action. The state court had certified a nationwide plaintiffs' class action involving delayed interest on royalty payments for natural gas leases. In what may prove to be a footnote of overriding significance, the Court characterized the action as involving "those class actions which seek to bind known plaintiffs concerning claims *wholly or predominately for money judgments*."⁷⁷ As noted earlier, some 97 percent of the plaintiffs had no prelitigation affiliation with the forum.

In the Supreme Court, petitioner made no challenge to the adequacy of representation or class notice. Instead, petitioner argued that it was denied due process because any state court judgment against nonresident class members would not have a preclusive effect.⁷⁸ Nonresident class members held property rights,⁷⁹ petitioner insisted, rights that

crash cases), it apparently slammed it shut for mass torts involving multiple impacts or exposures."). But see *In re Asbestos Litig. (Ahearn II)*, 134 F.3d 668 (5th Cir. 1998), cert. granted sub nom. *Ortiz v. Fibreboard Corp.*, 66 U.S.L.W. 3799 (U.S. June 22, 1998) (No. 97-1704) where, in a laconic per curiam opinion, a divided panel held that (b)(1) certifications did not need to satisfy the (b)(3) "predominance" requirement. The majority did not discuss—in fact, it did not discuss anything—the extent to which predominance is a requirement of due process if there is to be adequate representation by the class representatives.

75. Its applicability to the federal courts is, as previously noted, a function of Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure.

76. *Shutts*, 472 U.S. at 812.

77. *Id.* at 811 n.3 (emphasis added).

78. Petitioner was held to have standing to raise the issue. The Court reasoned that the defendant had an interest in ensuring that any classwide judgment would be effective to foreclose further litigation. See *id.* at 804–05. This seems to me entirely correct. See generally Henry P. Monaghan, *Third Party Standing*, 84 *Colum. L. Rev.* 277 (1984) (arguing that many third-party standing cases are, in fact, *first-party* standing cases).

79. Petitioner observed that:

an adverse judgment . . . would be every bit as onerous to an absent plaintiff as an adverse judgment on the merits would be to a defendant. Thus, the same due

could not be affected unless the absent, nonresident plaintiffs had some prelitigation affiliation with the forum, which in this instance was lacking, or they *affirmatively* consented to the suit by opting in.⁸⁰

A unanimous Court rejected petitioner's attempt to analogize completely nonresident class members to defendants, pointing out the many differences in their situations.⁸¹ The Court observed that, unlike a defendant, an absent class plaintiff "is not required to do anything."⁸² With "minimum procedural due process protection"⁸³ in place, the absent class member may "sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."⁸⁴

Shutts carried uncertain implications for many nationwide state, and because of Rule 4, federal class actions, such as suits for wholly equitable relief, suits combining claims for substantial class damages and equitable relief, and "limited fund" mandatory suits.⁸⁵ That uncertainty resulted, at least in part, from the Court's mixture of two closely linked but, in the end, distinct modes of analysis—consent and fundamental fairness—and the importance of an opt-out right in either mode of analysis. But before examining that mixture, we must clearly identify what *Shutts* is about: the

process protections should apply to absent plaintiffs: [The forum] should not be able to exert jurisdiction over the plaintiffs' claims unless the plaintiffs have sufficient minimum contacts with [the forum].

Shutts, 472 U.S. at 807–08. Petitioner made no effort to address the status of in-state class members; however, because they had not been served with process, a "consent" determination would have been needed for them also.

80. Petitioner insisted that, "unless out-of-state plaintiffs affirmatively consent, the [state] courts may not exert jurisdiction over their claims." 472 U.S. at 806.

81. See *id.* at 808–11.

82. *Id.* at 810. The Court noted that:

the burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant. An out-of-state defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment *against* it. The defendant must generally hire counsel and travel to the forum to defend itself from the plaintiff's claim, or suffer a default judgement. The defendant may be forced to participate in extended and often costly discovery, and will be forced to respond in damages or to comply with some other form of remedy imposed by the court should it lose the suit. The defendant may also face liability for court costs and attorney's fees. These burdens are substantial, and the minimum contacts requirement of the Due Process Clause prevents the forum State from unfairly imposing them upon the defendant.

Id. at 808.

83. *Id.* at 811–12.

84. *Id.* at 810.

85. For example, after *Shutts*, may the state courts certify nationwide, mandatory (non-opt-out) plaintiff class actions for damages such as "limited fund" classes? *Shutts* itself leaves the issue open. See, e.g., Lawrence J. Restieri, Jr., Note, The Class Action Dilemma: The Certification of Classes Seeking Equitable Relief and Monetary Damages After *Ticor Title Insur. Co. v. Brown*, 63 Fordham L. Rev. 1745, 1765 n.151 (1995); Patricia Anne Solomon, Note, Are Mandatory Class Actions Unconstitutional?, 72 Notre Dame L. Rev. 1627 (1997).

existence of in personam jurisdiction sufficient to preclude the substantive claims of nonresident class members.⁸⁶ With “minimal procedural due process protection” in place, F1 can preclude the underlying substantive claims of the nonresident class members. If viewed only in jurisdictional terms, *Shutts*’s opt-out right is limited to contexts in which F1 would not otherwise have a basis for in personam jurisdiction.⁸⁷ *Shutts* did *not* address the very different issue of whether the Due Process Clause guarantees to class members an independent substantive right to opt out of all damage claims or, at least, personal injury claims.⁸⁸ Obviously, such a right, if it exists, inheres in in-state absent class members as well as out-of-state class members. And since the case arose in state court under state class action law, *Shutts* did not address the question of whether substantial damage claims may properly be certified outside of the federal framework prescribed by Rule 23(b)(3) of the Federal Rules of Civil Procedure. Most importantly for our purposes, the Court did not consider whether, with “minimal procedural due process protection[s]” in place, F1 could do more than *preclude* an F2 proceeding with respect to the underlying substantive claims of nonresident class members. The Court said, “[a]bsent plaintiff class members are not subject to coercive or punitive remedies. Nor will an adverse judgment typically bind an absent plaintiff for any damages, although a valid adverse judgment may extinguish any of the plaintiff’s claims which were litigated.”⁸⁹

Despite the Court’s distinction between defendants and absent class members, the Court’s analysis drew heavily upon the standard in personam jurisdictional concepts applicable to defendants: prelitigation contacts and implied consent. Miller and Crumpp state that, under the Due Process Clause, “a substantial relationship [must exist] between a

86. “[T]he right to opt out enunciated in *Shutts* is not intended to protect . . . a right to a separate trial [It] is linked to personal jurisdiction requirements.” Woolley, *supra* note 1, at 602.

87. See, e.g., *White v. National Football League*, 41 F.3d 402, 407 (8th Cir. 1994) (noting that, since all plaintiffs were subject to the district court’s jurisdiction, there was no party “whose due process rights must be protected in [the *Shutts*] fashion”); *Grimes v. Vitalink Comm. Corp.*, 17 F.3d 1553, 1560 n.8 (3d Cir. 1994) (concluding that, even without the opportunity to opt out, the other “due process protections as articulated in *Shutts* are sufficient to bind absent class members who had sufficient minimum contacts with the forum.”); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992) (finding that, since plaintiffs had already submitted to the court’s in personam jurisdiction, *Shutts* was “inapposite”).

88. In an interesting variation on this issue, Professor Woolley argues that there may be no substantive right to opt out of damage claims, but “as a general matter a class member must be allowed to intervene as a full party in a proceeding that will extinguish her claim,” by “presenting evidence and making legal arguments not otherwise before the court.” Woolley, *supra* note 1, 573. He is sharply critical of *Ahearn I*, where the divided panel believed that adequate representation alone was sufficient to preclude the rights of absent members. See *id.* at 581 n.42.

89. *Shutts*, 472 U.S. at 810. To be sure, the Court cannot be said to have resolved the issue of antisuit injunctions, but the quoted language certainly supplies room to doubt their validity.

state and any individual over whom its courts seek to assert jurisdiction In *Shutts*, the Court did not remove this protection from class plaintiffs. Its reasoning, instead, was based upon the inference of consent from class members' failure to opt out."⁹⁰ *Shutts* sanctions a preclusion doctrine that is both *limited* and *conditional*. Under *Shutts*, due process challenges cannot be barred in F2 simply because the absent nonresident class member fails to opt out.

The implied consent rationale which runs through the Court's opinion⁹¹ has an obvious appeal when it is confined to situations where the absent plaintiffs lack independently viable claims and stand only to "win" by the lawsuit, as was the case in *Shutts*.⁹² But the rationale has an equally

90. Miller & Crumpp, *supra* note 24, at 16. This is a standard reading of *Shutts*. See, e.g., Redish & Beste, *supra* note 61, at 956.

91. The Court initially framed petitioner's argument in consent terms: 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. Petitioner claims that failure to execute and return the 'request for exclusion' provided with the class notice cannot constitute consent of the out-of-state plaintiffs; thus Kansas courts may exercise jurisdiction over these plaintiffs only if the plaintiffs possess the sufficient "minimum contacts" with Kansas as that term is used in cases involving personal jurisdiction over out-of-state defendants. Since Kansas had no prelitigation contact with many of the plaintiffs and leases involved, petitioner claims that Kansas has exceeded its jurisdictional reach and thereby violated the due process rights of the absent plaintiffs. *Shutts*, 472 U.S. at 806 (citations omitted). After observing that states "place fewer burdens upon absent class plaintiffs than they do upon absent defendants," *id.* at 811, and prescribing the constitutionally required minimum safeguards for multi-state court damage actions, see *id.* at 811-12, the Court then returned to the consent theme, rejecting the argument that an opt-in was required: "Any plaintiff may consent to jurisdiction The essential question, then, is how stringent the requirement for a showing of consent will be." *Id.* at 812. Noting the number of class members who had either opted out or been excluded, the Court continued:

We think that such results show that the "opt out" procedure provided by Kansas is by no means *pro forma*, and 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.

Id. at 813.

92. The Court assumed that, as rational actors, absent class members would either consent to the suit of their "representatives" or opt out. That assumption was, in turn, clearly grounded in a belief that the non-opt-out class members were small investors who lacked independently viable claims. The class finally certified consisted of over 28,000 royalty owners, and the average claim of each royalty owner for interest on the suspended royalties was only \$100. See *id.* at 801. Under these circumstances—where individuals have negative-value claims—the Court saw no plausible danger of distant forum abuse. Nonresident class members stood only to "win." In these circumstances, invocation of the consent rationale is akin to its use in tort law. A doctor who operates on an unconscious person injured by an accident is not charged with battery. The law assumes that such a person, if fully informed, would consent to the otherwise unprivileged touching. (To be sure, a few class members might have preferred not to sue for altruistic or other noneconomic reasons, but that seems a consideration not entitled to much weight. They

obvious bootstrapping quality: "Absence of power to compel appearance is logically inconsistent with power to compel a binding choice through the compulsory filing of a paper with the court."⁹³ In stretching to discover "consent," however, *Shutts* drew upon the Court's longstanding jurisprudential practice: results are initially explained in terms of an "implied" consent, and the fictional nature of that explanation is subsequently admitted.⁹⁴ In fact, of course, *Shutts* announced a rule of forfeiture (i.e., "you are precluded if you do not take affirmative step X.")⁹⁵ The fundamental issue is, therefore, the scope of the jurisdictional forfeiture allowed by *Shutts*'s "implied consent" fiction. That is the basic issue that must be dealt with regardless of whether *Shutts* is understood as a decision about fictional "implied consent" to personal jurisdiction or one ultimately grounded in more general notions of "fair play and substantial justice."⁹⁶

could, however, refuse to accept their "winnings.") But—and it is a large but—the Court's reasoning was not limited to negative-value claims, and thus, *Shutts* "also may affect the rights of a large plaintiff." Miller & Crumpp, *supra* note 24, at 18.

93. Miller & Crumpp, *supra* note 24, at 17.

94. See, e.g., *Oberding v. Illinois Cent. R.R. Co.*, 346 U.S. 338, 340–41 (1953) ("It is true that in order to ease the process by which new decisions are fitted into pre-existing modes of analysis there has been some fictive talk to the effect that the reason why a non-resident can be subjected to a state's jurisdiction is that the non-resident has 'impliedly consented.');" see also Stein, *supra* note 61, at 694–97 (discussing the schism between theories of personal jurisdiction and requirements of the Due Process Clause).

95. See Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 Ind. L.J. 597, 620 (1987) ("The *Shutts* consent finesse, whereby consent can be inferred from a failure to opt out, does violence to the general theory of consent."). Even ordinary contract law does not ascribe a binding effect to an offeree's failure to respond to an offer. More importantly, in dealing with constitutional guarantees, consent or waiver (the voluntary relinquishment of a known right) is not usually ascribed to inaction. This should be especially clear where the "consent"-inducing notices are written obscurely and are *designed by counsel to encourage inaction*. *Shutts*'s forfeiture doctrine may be plausible if the sole interest believed to be involved is individual fairness, *and only if* the absent class members stand only to *gain* from the lawsuit. When those conditions are relaxed, however (for example, when the claims involved are not negative-value claims), the outcome becomes less clear. And if previously forgotten federalism concerns are factored in, *Shutts* becomes most problematic. Fully assuming that multi-state and nationwide state-court class actions are a good thing in the abstract, what precisely was *Kansas*'s interest in reaching beyond its borders and adjudicating the overwhelming portion of the interests of the *Shutts* claimants, the vast majority of whom were nonresidents who neither owned land in Kansas nor affirmatively consented to such an adjudication? In sanctioning class actions in forums with little or no connection to the prelitigation events, and with no effective coordinating mechanisms in place, the Court overlooked the potential for abuse inherent in such proceedings due to races to judgment and reverse auctions.

96. *International Shoe v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Several decisions read *Shutts* as concerned with fundamental fairness only. See, e.g., *In re Joint E. & S. Dists. Asbestos Litig.*, 78 F.3d 764, 777–78 (2d Cir. 1996) (distinguishing *Shutts* on the ground that the class action before it involved restructuring a trust, an equitable action); *In re "Agent Orange" Prod. Liab. Litig. (Agent Orange II)*, 996 F.2d 1425, 1435 (2d Cir. 1993) (treating *Shutts* as a case about fundamental fairness); *Grimes v. Vitalink Comm. Corp.*, 17 F.3d at 1553, 1558–61 (3d Cir. 1994) (same). For efforts at formulating a multi-factored test for the assertion of

Much in the Court's opinion supports an interpretation of *Shutts* that is mainly about fundamental fairness, not "implied consent."⁹⁷ And a fundamental fairness standard might not invariably require either prelitigation contact or consent in order to establish in personam jurisdiction over nonresident class members.⁹⁸ Explaining *Shutts* in terms of implied

jurisdiction over absent class members, and thereby allowing certification of non-opt-out damage actions, see Miller & Crumpp, *supra* note 24, at 55-57. Their proposal, mixing as it does such factors as efficiency and fairness, suffers from considerable indefiniteness.

97. The Court's emphasis on wide differences between absent class members and defendants resonates with such a conception:

Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter *In this case we hold that a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant.*

Shutts, 472 U.S. at 811 (emphasis added).

So too does the Court's belief that the damage claims of the non-opt-out class members were not individually viable. See *id.* at 812-13. As noted, the median class claim was \$100.00. See *id.* at 801. For any constitutional standard grounded in concepts of reasonableness, an arguable difference exists, as *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2246 (1997) indicated, between negative value class action claims and class actions in which the individual class members' claims are independently viable, as in the asbestos cases. See Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 *Rev. Litig.* 79, 103 nn.72-73 (1994) (outlining arguments for more lenience in certification of "small-claimant class actions"). But see Perino, *supra* note 71, at 95 (granting opt-out rights in mass tort cases involving individually viable claims prevents global resolution of claims). Moreover, the facts of *Shutts* did not present an occasion to trigger any judicial concern over distant forum abuse. As noted, class certification occurred only after notice of the proceedings and of the absent members' rights to be heard and to opt out had been given by first class mail. Unlike many class action notices, the notice actually seemed calculated to inform. Over three thousand opt-outs occurred and an additional fifteen hundred class members were excluded because of inadequate proof that they had received notice. See *Shutts*, 472 U.S. at 801; Solomon, *supra* note 85, at 1633-34. Miller and Crumpp cast considerable doubt on this apparently worry-free proceeding. They argue that Kansas was a "magnet forum" because of its especially favorable substantive law for plaintiffs. See Miller & Crumpp, *supra* note 24, at 57-67. Efforts to obtain application of Kansas substantive law (though limited by the Supreme Court) had been the very purpose of the litigation. They also argue that the Supreme Court, in fact, left open the possibility that Kansas could apply its own law to many unaffiliated transactions. See *id.* at 60. But if Kansas had been chosen because of its favorable substantive law, that fact could only inure to the benefit of absent class members. Finally, the Court's concern that the consequences of a contrary holding "would require the invalidation of scores of state statutes and of the class-action provision of the Federal Rules of Civil Procedure," and would "sacrifice the obvious advantages in judicial efficiency resulting from the 'opt out' approach," is expressive of concerns about fairness. See *Shutts*, 472 U.S. at 813-14.

98. Framed in terms of fundamental fairness, the underlying issue in *Shutts* was under what circumstances (assuming adequate representation "at all times") F1 might have an interest sufficient to allow it to preclude fairly (by adjudication or settlement) the underlying substantive rights of nonresident class members who lacked minimum contacts with the forum or meaningful consent. See *Shutts*, 472 U.S. at 808. The Court also noted

consent or fundamental fairness still leaves open the content of these terms, if the issue is the scope of F1's in personam jurisdiction over non-resident class members. And here, commentators and courts have ignored the role played by the Court's emphasis on "minimum procedural safeguard[s]"⁹⁹ in the jurisdictional analysis of *Shutts*. While the sharp distinction between issues of in personam jurisdiction and procedural due process has been criticized,¹⁰⁰ it is a distinction deeply embedded in our jurisprudence. To the extent that the "minimum procedural safeguard[s]" take on a dimension beyond that of simple procedural due process and are also viewed as conditions necessary for F1 to have sufficient in personam jurisdiction to preclude the underlying substantive claims of nonresident class members, *Shutts* magnifies the importance of this distinction.¹⁰¹ For many courts and commentators, however, in personam jurisdiction in *Shutts* turns entirely on only one of these safeguards: the right to opt out. A class member's failure to opt out establishes in personam jurisdiction. This premise has had two consequences: first, it has obscured the vital role played by adequate representation in the Court's jurisdictional analysis; second, it has engendered considerable confusion over the nature of the opt-out right. In the process, issues of jurisdiction and those of substantive due process have become blurred.

Hansberry v. Lee and other decisions make clear that, to bind absent class members on the basis of representation, there must, at a minimum, have been adequate representation.¹⁰² This is a matter of procedural

that, as it had "pointed out in *Hansberry*, the class action was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the litigation was too great to permit joinder." *Id.* at 808. This is an old recognition. See, e.g., *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366 (1921) ("[C]lass suits were known before the adoption of our judicial system, and were in use in English chancery"). Fed. R. Civ. P. 23(b)(3), however, maintains some element of consent because individual members can opt out. To be sure, state legislative interests have not provided a basis for in personam jurisdiction even with respect to defendants. See Silberman, *supra* note 61, at 758 ("[s]tate legislative interests do not appear to count for much in the constitutional jurisprudence" of jurisdiction). But see, e.g., Harold L. Korn, *Rethinking Personal Jurisdiction and Choice of Law in Multistate Mass Torts*, 97 *Colum. L. Rev.* 2183, 2208-09 (1997) (arguing that legislative jurisdiction should provide a basis for judicial jurisdiction). Contemporary standards of reasonableness, however, might permit considerations of such interests with respect to some claims of nonresident class plaintiffs. Preclusion might occur with respect to the substantive claims of nonresident class members who failed to take an affirmative step, such as opting out in favor of individual damage claims, or who failed to respond to a notice of the right to intervene and intent to preclude.

99. Namely, notice, the right to opt out, the right to participate, and the right to adequate representation at all times.

100. See, e.g., Korn, *supra* note 98, at 2208-09; Redish & Beste, *supra* note 61, at 947-48.

101. Whether described as minimum procedural safeguards or in personam jurisdictional prerequisites, however, interesting problems abound. The Court, for example, nowhere explains the necessity for the existence of both a right to opt out and a right to participate; nor does the Court explain why it characterizes a right to opt out as a "procedural" rather than a "substantive" right.

102. See *supra* notes 2-3 and accompanying text.

due process applicable to all absent class members, whether in-state or out-of-state.¹⁰³ Existing doctrine holds that challenges to adequacy can be made in F2.¹⁰⁴ Why, then, does the Court mention adequate representation in *Shutts* when the only issue before the court is in personam jurisdiction? It could simply be by way of caution and might not constitute a part of the Court's in personam jurisdictional analysis. Whether it is part of the jurisdictional mechanism is, however, an issue of considerable importance. We can assume *arguendo* that in some circumstances F1 could restructure its existing practices and confine due process challenges to itself. For example, due process challenges by in-state class members and out-of-state class members with sufficient contacts with the forum could be confined to the F1 court.¹⁰⁵ To the extent, however, that adequate representation "at all times" also has an in personam jurisdictional dimension, F1's authority to so restructure challenges is far more limited. F1's in personam jurisdiction—the power to bind—is not permanently established by a class member's failure to opt out. That jurisdiction is conditioned upon adequate representation "at all times," such that jurisdiction is lost when representation is inadequate.

Put differently, *Shutts* allows F1 only a *conditional and limited* in personam jurisdiction over nonresident class members. Under *Shutts*, failure to opt out is only one part of what is necessary for the exercise of jurisdiction sufficient to bind, whether *Shutts* is viewed in terms of "implied consent" to jurisdiction or fundamental fairness. It is not finally established until the F1 proceedings have been concluded in accordance with due process. And, following standard preclusion law, the lack of in personam jurisdiction can be collaterally attacked by nonappearing class members. In the current world of multiple class actions, it seems to me eminently desirable to understand the Court's insistence upon adequacy of representation in jurisdictional terms. So understood, the requirement reduces the dangers of class action abuse ("fundamental fairness") and respects the territorial limits on state court jurisdiction.

As noted, courts and commentators alike have focused on *Shutts*'s requirement of a right to opt out of damage claims as a sufficient condition for the exercise of in personam jurisdiction. They have incorrectly assumed that a failure to opt out is a consent to jurisdiction for all purposes.¹⁰⁶ Not surprisingly, when "in personam" jurisdiction has been otherwise established, the lower federal courts have refused to read *Shutts*

103. See *Epstein v. MCA, Inc. (Epstein II)*, 126 F.3d 1235, 1242 (9th Cir. 1997) ("There is nothing in *Shutts*, however—or in any other case—to suggest that *Shutts* offers protection only to those absentees who are beyond the *in personam* reach of the forum.").

104. See *supra* note 4 and accompanying text.

105. See *infra* Conclusion. Of course, adequate notice must exist if the F1 proceeding is expected to foreclose an absent member's rights with respect to due process issues. See *Richards v. Jefferson County*, 116 S. Ct. 1761, 1768 (1996). However, unless state law does alter its practice (as the ALI proposal, for example, contemplates), absent class members cannot now be bound in the same manner in which parties to the litigation are bound.

106. See, e.g., *infra* Part III.

as requiring an opt-out.¹⁰⁷ Much confusion remains, however, because opt-out issues arise at several distinct levels, and they have become intertwined. One question is whether Rule 23 authorizes certification of substantial damage claims under (b)(1)(B) and (b)(2), both of which normally do not envisage an opt-out right, and whether the Anti-Injunction Act bars such certification.¹⁰⁸ More generally, another question is whether an opt-out right is required as a matter of substantive due process for some or all damage claims.¹⁰⁹ While this Article is not an appropriate forum in which to explore these topics at length, clarity demands that the separate nature of these issues be kept in mind. Debate continues over whether *Shutts* and *Amchem Products* should be understood as presuming that all absent class members have a substantive due process right to opt out of some or all damage claims.¹¹⁰ If so, that result is not tied to conceptions of preclusion or in personam jurisdiction; in-state class members would possess such a right even though clearly subject to the court's territorial jurisdiction.

Recognition of a substantive due process right to opt out of at least some damage claims has considerable plausibility. It would limit the threat posed by modern aggregation practice to our long-standing tradition of individual litigation autonomy.¹¹¹ That tradition's appeal is at its

107. See cases cited in *supra* note 87.

108. In *In re Federal Skywalk Cases*, 680 F.2d 1175, 1180-81 (8th Cir.), cert. denied, 459 U.S. 988 (1982), for example, a divided court of appeals involving parallel state and federal proceedings refused to certify a Rule 23(b)(1)(B) non-opt-out claim for damages on the ground that it was the equivalent of an injunction forbidden by the Anti-Injunction Act. While the district court's order did not formally enjoin the state court proceeding, the court of appeals concluded that the certification was equivalent to an injunction for purposes of its appellate jurisdiction. See *id.* at 1179-80. The court then assumed that the district court's order was also an "injunction" for purposes of the Anti-Injunction Act. See *id.* at 1181-84. While most appellate courts have been reluctant to permit certification of non-opt-out damage classes under (b)(1)(B), Judge Weinstein has not been so hesitant. In *In re Joint Asbestos E. & S. Dist. Litig.*, 134 F.R.D. 32 (1990), he certified such a class assuming that his order was a nationwide injunction, and in the process rejected *Federal Skywalk Cases*: "The *dicta* in the *Skywalk* decision and its subsequent interpretation by other courts have generated considerable criticism." *Id.* at 39. For additional discussion, see Mullenix, *supra* note 57, at 896-908.

109. Clearly . . . the purpose and the utility of (b)(1)(B) limited fund would be fatally subverted by requiring or providing an opt out right to class members. On the other hand, there is great force to the argument that binding absentee or future class members to a limited fund settlement, where the plaintiff lacks sufficient minimum contacts with the forum, denies those claimants due process. Mullenix, *supra* note 57, at 914-15.

110. See, e.g., *Nottingham Partners v. Dana*, 564 A.2d 1089, 1097-1101 (Del. 1989) (holding that *Shutts* does not require an opt-out of monetary claims in an action that is predominantly for equitable relief). Since the objector asserting such a right was actually before the Delaware court, the court's discussion must be taken to reflect a substantive, not a jurisdictional, holding. But the court itself seemed unaware of that distinction.

111. The Court has referred to "[o]ur deep-rooted historic tradition that everyone should have his own day in court," *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (quoting *A. Miller & E. Cooper, Federal Practice & Procedure* § 4449 (1981)), and *Phillips Petroleum*

strongest when individual plaintiffs seek compensatory damages for personal injuries,¹¹² and they resist “conscriptio” by a class “representative” (or, more realistically, his attorney).¹¹³ “The right to individual control and management of one’s own personal injury claim is itself a substantive right, indeed perhaps a constitutional right.”¹¹⁴ In any event, “[t]here is no reason to believe that a serious personal injury claimant desires to be represented by class counsel.”¹¹⁵ As of yet, however, opt-out issues remain unresolved by the Supreme Court.¹¹⁶

C. *The Need for Clarification*

Brown v. Tigor Title Insurance Co.,¹¹⁷ a sequel to *Real Estate Title*,¹¹⁸ illustrated the existing uncertainty in class action doctrine that has resulted from intertwining such notions as implied consent, the right to opt out, and preclusion. In the *Real Estate Title* litigation, a multi-district panel in the Eastern District of Pennsylvania approved a settlement between a class of insurance consumers alleging federal antisuit violation and the defendant title insurance companies.¹¹⁹ However, on the basis of

Co. v. Shutts itself noted that a plaintiff’s claim may be “sufficiently large or important that he wishes to litigate it on his own,” 472 U.S. 797, 813 (1985), a concern again recognized in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2246–47 (1997). Patrick Woolley reads *Shutts* as mandating not an opt-out for individual damage claims but rather a right to intervene and participate. See Woolley, *supra* note 1, at 572. This may prove to be correct in the end, but it is not a fair reading of *Shutts*. *Shutts* was about the conditions sufficient for preclusion of nonresident class members, not whether all class members, in-state or out-of-state, had opt-out rights.

112. See Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L. Rev. 69, 74 (“Underlying our traditional *notion of individual claim autonomy* in substantial tort cases is the natural law notion that this is an important personal right of the individual It [is] not the duty of the government or of some third party to initiate the suit, or of some third party to interfere . . .”).

113. See Coffee, *Testimony*, *supra* note 31, at 6–8. The views of various writers are collected *supra* in note 73, and further references can be found in the works collected by Professor Shapiro. See *supra* note 47. Professor Shapiro himself is sympathetic to the use of class actions in the mass tort context. See Shapiro, *supra* note 47, at 927.

114. Carrington & Apanovitch, *supra* note 48, at 472. They add, however, that “[p]erhaps we cannot afford the luxury of treating citizens as individuals in mass torts cases, but surely a law abrogating the right of individuals to be treated as individuals in regard to their distinctive claims is a substantive enactment [to be made by Congress].” *Id.*

115. *Id.* at 462.

116. In *Adams v. Robertson*, the issue presented was whether a state court class action that had awarded only equitable relief, but “which petitioners characterize[d] primarily as involving claims for monetary relief” (thereby tracking the language of the *Shutts* footnote), must accord a right to opt out for damage claims. 117 S. Ct. 1028, 1029 (1997). The Court dismissed the writ because that issue had not been raised in the state court. Earlier, the Court had avoided a similar question in *Tigor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (majority suggesting that a Rule 23(b)(2) certification might not properly include substantial damage claims).

117. 982 F.2d 386 (9th Cir. 1992).

118. For a discussion of *Real Estate Title*, see *infra* text accompanying notes 138–153.

119. See *In re Real Estate Title & Settlement Servs. Antitrust Litig. (Real Estate Title)*, 869 F.2d 760, 762 (3d Cir. 1989).

the price fixing alleged in *Real Estate Title*, a subgroup of class representatives sought damages and injunctive relief in a federal district court in Arizona, but that court sustained the title insurance companies' preclusion defense.¹²⁰ On appeal, the Ninth Circuit reversed. The court addressed the merits of two due process objections to the F1 proceeding: inadequate representation and the lack of a right to opt out of "substantial" monetary claims. The first claim was rejected on the merits;¹²¹ but the second claim was sustained in three terse paragraphs.¹²² The court referred to the appellant's "minimal procedural due process claim," citing *Shutts*, and without elaboration concluded:

Because Brown had no opportunity to opt out of the MDL 633 litigation, we hold there would be a violation of minimal due process if Brown's damage claims were held barred by *res judicata*. Brown will be bound by the injunctive relief provided by the settlement in MDL 633, and foreclosed from seeking other or further injunctive relief in this case, but *res judicata* will not bar Brown's claims for monetary damages against Ticor.¹²³

These sentences are, at best, obscure because the reference to "*res judicata*" can be read in *Shutts*'s terms, i.e., no preclusion because of insufficient contacts with the MDL forum (and no consent). Read in this way, the opinion fails to explain why the injunctive part of the MDL judgment was binding since even assuming adequate representation, no in personam jurisdiction existed.¹²⁴ It is more likely that the court understood (misunderstood?) *Shutts* as conferring an independent substantive due process right to opt out of damage claims.

The Supreme Court opinion was inconclusive.¹²⁵ The Court described the proceedings below as follows:

The Ninth Circuit reversed, accepting respondents' contention that it would violate due process to accord *res judicata* effect to a judgment in a class action that involved money damages claims (or perhaps that involved *primarily* money damages claims) against a plaintiff in the previous suit who had not been afforded a right to opt out on those claims.¹²⁶

120. See *Brown v. Ticor*, 982 F.2d at 389 (discussing district court holding).

121. See *id.* at 390-91.

122. See *id.* at 392.

123. *Id.*

124. Professor Woolley states that "[f]ew commentators argue that the due process minima set forth in *Shutts* apply to Rule 23(b)(2) class suits seeking only equitable relief." Woolley, *supra* note 1, at 579 n.36. He criticizes the contrary view of Professor Weber, who "has it backwards, perhaps in part because he fails to give sufficient weight to the fact that, at bottom, *Shutts* was a personal jurisdiction case." *Id.* This otherwise puzzling statement rests on Professor Woolley's belief that the due process requirements for in personam jurisdiction are satisfied as long as the absent class members are given "an opportunity to be heard and participate in the litigations." *Id.*

125. See *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994).

126. *Id.* at 120.

Although it uses the term “*res judicata*,” the Court’s formulation suggests that it believed that the issue being pressed was a claim of a substantive opt-out right rather than the jurisdictional conditions necessary for preclusion to occur.¹²⁷ In any event, however, the Court declined to address either issue, stating that standard preclusion law foreclosed any collateral challenge in the Ninth Circuit to the propriety of the MDL court’s initial (b)(1)(A) and (b)(2) class certification.¹²⁸ That being so:

[the] certified question is of no general consequence if, whether or not absent class members have a constitutional right to opt out of such actions, they have a right to do so under the Federal Rules of Civil Procedure. Such a right would exist if, in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not. That is at least a substantial possibility—and we would normally resolve that preliminary nonconstitutional question before proceeding to the constitutional claim.¹²⁹

Justice O’Connor, joined by the Chief Justice (*Shutts*’s author) and Justice Kennedy, would have reached the question. Justice O’Connor’s opinion radiates a belief that, whatever *Shutts* means, it is limited to class claims that are “predominantly” for monetary relief and in which the equitable or declaratory relief sought is trivial or nonexistent.¹³⁰ The opinion, however, does not distinguish between *Shutts* viewed as a case of in personam jurisdiction and *Shutts* viewed as a case recognizing a substantive due process opt-out right for individual monetary claims. Nor does it display an awareness of how far requests for certification of damage claims under provisions other than (b)(3) may be at variance with the understanding of the drafters of Rule 23. If this is so, then any opt-out

127. *Id.* at 120, 121.

128. See *id.* at 121. The Court held that whether certification in the MDL proceeding was proper under (b)(1) or (b)(2) was a determination that could be challenged only on direct appeal.

129. *Id.*

130. See *id.* at 124–25 (O’Connor, J., dissenting). As Justice O’Connor explained: The Court’s assertion that “our resolution of the posited constitutional question may be . . . of virtually no practical consequence in fact,” is unsound. The lower courts have consistently held that the presence of monetary damages claims does not preclude class certification under Rules 23(b)(1)(A) and (b)(2). Whether or not those decisions are correct (a question we need not, and indeed should not, decide today), they at least indicate that there are a substantial number of class members in exactly the same position as respondents. Under the Ninth Circuit’s rationale in this case, every one of them has the right to go into federal court and relitigate their claims against the defendants in the original action. The individuals, corporations, and governments that have successfully defended against class actions or reached appropriate settlements, but are now subject to relitigation of the same claims with individual class members, will rightly dispute the Court’s characterization of the constitutional rule in this case as inconsequential.

Id. at 124 (citations omitted) (quoting majority opinion).

"right" may be a function of the construction of Rule 23, rather than a requirement of due process raised by *Shutts's* jurisdictional limitations.

Amchem Products, an opinion in which Justice O'Connor joined, may be the first step towards recovering this lost understanding of the original purposes of Rule 23.¹³¹ While Justice Ginsburg acknowledged that Rule 23(b)(3) "does not exclude from certification cases in which individual damage claims run high," she noted that the drafters of the rule "had dominantly in mind vindication of 'the rights of people who individually would be without effective strength to bring their opponents into court at all.'"¹³² Nevertheless, to the extent that the Supreme Court's construction of Rule 23 limits non-(b)(3) certification of damage claims, the result will simply intensify the importance of the in personam jurisdiction sustained in *Shutts*. While most states have class action rules patterned on Rule 23, state courts are not bound by the Supreme Court's construction of the federal rule.¹³³ Ultimately, therefore, the Court must address the due process limitations on nationwide state court class actions.¹³⁴

131. *Amchem Prods., Inc. v. Windsor*, 2231 (1997). Even before *Amchem Products*, considerable skepticism existed over holdings that permitted monetary relief in a (b)(2) class, at least where monetary relief did not predominate. In *Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997), the district court certified a (b)(2) class, awarding equitable relief and \$8.5 million in monetary relief. It denied the opt-out motions of two class members. On appeal, the appellants had made no challenge to the propriety of the (b)(2) certification; they had challenged only the denial of the right to opt out. In that posture, the court said:

Although the defining characteristic of the (b)(2) class is that it seeks declaratory or injunctive relief applicable to the class as a whole, it is not uncommon in employment discrimination cases for the class also to seek monetary relief in the form of back pay or front pay. Courts have generally permitted (b)(2) classes to recover monetary relief in addition to declaratory or injunctive relief, *at least where the monetary relief does not predominate*.

Id. at 92 (emphasis added). The court noted that many commentators have urged that classes should be certified under (b)(2) rather than (b)(3) whenever possible so as to avoid (b)(3)'s "often burdensome" notice requirements. *Id.* at 92-93. The court, however, was skeptical. Although the issue was not before it, the court was clearly troubled by certification of substantial money damages claims under (b)(2), doubting that the drafters of Rule 23 had contemplated such claims. See *id.* at 93. *Eubanks's* sensitivity to the dangers of certifying disparate monetary claims under (b)(2), *id.* at 94, anticipated *Amchem Products's* concern over "the class cohesion that legitimizes representative action in the first place," *Amchem Prods.*, 117 S. Ct. at 2236. But a more recent decision by the court of appeals, *Thomas v. Albright*, 139 F.3d 227 (D.C. Cir. 1998), displayed no comparable concern over the assertion of monetary claims in (b)(2) actions.

132. *Id.* at 2246 (quoting Benjamin Kaplan, A Prefatory Note, 10 B.C. Indus. & Com. L. Rev. 497, 497 (1969)).

133. Nonetheless, state courts have indicated a strong propensity to follow federal courts' interpretations of Rule 23. See, e.g., *Ford v. Murphy Oil U.S.A., Inc.*, 703 S.2d 542, 549-51 (La. 1997) (discussing Supreme Court's interpretation of Rule 23); *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 954 & n.1 (Tex. 1996).

134. For an argument encouraging such suits in state courts, see Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum over the Federal Forum in Mass Tort Cases*, 21 *Hastings Const. L.Q.* 215

III. *SHUTTS*, ANTISUIT INJUNCTIONS, AND PRECLUSION

The principle that a court may lawfully enjoin *litigants* and those parties who have sufficient minimum contacts with the forum has been applied in the class action context. In *Supreme Tribe of Ben-Hur v. Cauble*,¹³⁵ the Supreme Court upheld an antisuit injunction secured by an Indiana fraternal life insurance association against its Indiana certificate holders. The life insurance association had sought the injunction on the basis of a prior favorable class action judgment in a suit brought against it by out-of-state certificate holders. There was, of course, no question of in personam jurisdiction over the Indiana defendants. In a single sentence, the Supreme Court stated that the resident Indiana class members “were precluded by the decree of the District Court, [and] an ancillary bill may be prosecuted from the same court to protect the rights secured to all in the class by the decree rendered.”¹³⁶ But what of injunctions or preclusion against nonparty, nonresident class members lacking minimum contacts, an issue left open after *Shutts*? As already discussed, *Shutts* permits the exercise of personal jurisdiction over such parties for the purpose of precluding underlying substantive claims. But its reasoning, focusing as it does on due process concerns, does not extend to enjoining or precluding collateral due process challenges brought in F2. Nevertheless, three Third Circuit decisions, each unique in certain respects, have looked to *Shutts*’s opt-out rationale to resolve this latter issue. In so doing, they have distorted *Shutts* by putting excessive weight on its “implied consent” fiction, while giving insufficient consideration to its due process concerns, including the requirement that there be adequate representation at all times. Though in two of the three instances discussed below, an injunction did not issue, the rule that has emerged from these three cases is that the existence of a right to opt out is not only a necessary but a sufficient condition for in personam jurisdiction. Each court completely ignores the fact that, under *Shutts*, adequate representation at all times was also an indispensable requirement, and F1 could not foreclose a challenge to its jurisdiction in F2. The cases also highlight the limits inherent in ordering the class action landscape—so fraught with opportunities for abuse—with existing judicial doctrine. In the third of the three Third Circuit cases, *GM Trucks II*, where an injunction to prevent the migratory settler problem would have been desirable from a policy standpoint, the

(1994). See also Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 *Loyola L. Rev.* 373, 386–94 (1993).

135. 255 U.S. 356 (1921).

136. *Id.* at 367 (citations omitted). The Court assumed that the ancillary injunction bound both the representative parties and the absent Indiana class members. Similar principles have been applied in the preclusion context. See, e.g., *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66, 78–79 (1938) (full faith and credit must be accorded to earlier class action judgment). See also *Matsushita Elec. Indus. Co., Ltd. v. Epstein (Epstein II)*, 116 S. Ct. 873, 878 (1996) (“[A] judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit under the express terms of [28 U.S.C. § 1738].”).

court could not issue one because it did not have the requisite jurisdictional powers to do so.¹³⁷

A. Three Third Circuit Decisions

As noted above, *Real Estate Title*¹³⁸ was a Pennsylvania MDL proceeding in which the various class complaints, transferred to the MDL court pursuant to 28 U.S.C. § 1407, alleged violations of the federal antitrust laws and sought both damages for past wrongs and injunctive relief against future violations. A proposed settlement provided for injunctive relief only, and it purported to release state as well as federal claims.¹³⁹ Over strenuous objections as to adequacy of representation, the MDL court approved the settlement and certified a non-opt-out (b)(1)(A) and (b)(2) classes.¹⁴⁰ That judgment was summarily affirmed by the Third Circuit without opinion.¹⁴¹ Two Arizona school boards, meanwhile, brought suit in a state court alleging state law causes of action.¹⁴² The school boards had appeared (through the Arizona Attorney General) before the MDL court only to insist that they had a right to opt out.¹⁴³ The MDL court entered an antisuit injunction and the school boards appealed that order.¹⁴⁴

Like *Shutts*, the appeal was *not* about a substantive due process right to opt out of individual damage claims. The focus was only on the limits of the MDL court's in personam jurisdiction: the school boards did not "assert any personal jurisdiction obstacle to binding them to the settlement."¹⁴⁵ The school boards insisted, however, that "no matter what the preclusive effect [of the district court's judgment, that court] had no power to issue an injunction against them because it possessed no personal jurisdiction over them";¹⁴⁶ the court was "without power to enter an injunction against absentee class members who have neither consented to

137. See *infra* text accompanying notes 260–61, discussing proposed solution of migratory settler problem, and, in general, calling for comprehensive legislative action.

138. In re *Real Estate Title & Settlement Servs. Antitrust Litig. (Real Estate Title)*, 869 F.2d 760 (3d Cir. 1989).

139. The MDL proceeding involved a dozen class action complaints filed as tag-alongs to a prior federal proceeding. The damage claims were abandoned on the basis of a Supreme Court decision that weakened the legal theories asserted in the complaints. See Mullenix, *supra* note 57, at 877–78.

140. See *Real Estate Title*, 869 F.2d at 763. *Shutts*'s "implied consent" rationale could, therefore, play no role in the litigation.

141. See *id.* at 764.

142. See *id.*

143. See *id.* at 770 ("In its prior appearances, Arizona did not litigate the merits of the settlement agreement, nor did it litigate its adequacy of representation claim; in the district court [and on its appeal] it only moved to opt out."). They also challenged the adequacy of notice, which the court understood to be connected to a right to opt out. See *id.* at 770–71.

144. See *id.* at 762.

145. *Id.* at 765.

146. *Id.* at 760.

jurisdiction nor have established minimum contacts with the forum.¹⁴⁷ Why the appellants did not challenge the entire F1 judgment for lack of in personam jurisdiction is not clear. The appellants apparently assumed that a failure to opt out was the equivalent of consent under *Shutts*.

In his opinion for the court, Judge Becker began with a description of *Shutts* as a case about fundamental fairness; accordingly, for him “[t]he procedural protections of Fed. R. Civ. P. 23 replace the rigid rules of personal jurisdiction.”¹⁴⁸ But he quickly retreated to the precise *Shutts* framework of implied consent, and concluded that:

[I]f the member has not been given the opportunity to opt out in a class action involving both important injunctive relief and damage claims, the member must either have minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the class action.¹⁴⁹

Note the role that opt-out plays in that jurisdictional analysis. Judge Becker emphasized that no act of Congress purported to channel all litigation to the MDL court.¹⁵⁰ At least absent such channeling legislation, Judge Becker said, the fundamental issue was whether due process requires that nonresident class members have minimum contacts with the MDL court in order to support entry of an antisuit injunction.¹⁵¹ Answering that question in the affirmative, Judge Becker rejected the argument that this threatened the efficacy of the class action mechanism and emphasized the checking value of collateral attack.¹⁵² In the process, he noted that subjecting nonresident class members to an antisuit injunction would cost them more than the cost incurred by the *Shutts* plaintiffs:

147. *Id.*

148. *Id.* at 766. “[I]n this context [they] are all that is needed to meet the requirements of due process.” *Id.*

149. *Id.* at 769 (footnote omitted).

150. See *id.* at 767–68. Judge Becker made no mention of the significance, if any, of the fact that nationwide in personam jurisdiction over *defendants* exists under the antitrust act.

151. See *id.* at 769 (“The only issue we address is whether an absent class member can be *enjoined* from relitigation if the member does not have minimum contacts with the forum.”).

152. See *id.* He went on to note:

We do not agree with appellees’ dire predictions. Ever since *Hansberry v. Lee* was decided in 1940, collateral attacks have been considered to be a necessary part of the class action scheme. Rather than threatening the vitality of the class action mechanism, the fact that some plaintiffs will be able to extricate themselves from class action judgments if subsequent courts find them to be inadequately represented is integral to the constitutionality of the class action procedure.

Id. See *Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (stating that it would violate due process to bind an inadequately represented absent party to a prior judgment). Finally, on grounds of “fairness and efficiency,” Judge Becker also rejected the claim that, simply by appearing to assert a right to opt out, the objectors had “consented” to the jurisdiction of the F1 court. See *Real Estate Title*, 869 F.2d at 770–71.

[A]s the Court in *Shutts* pointed out, the absent class members in *Shutts* were bound by the class action judgment only if they were adequately represented in the class action proceeding. Indeed, the Supreme Court had previously held that it would violate due process to bind an absent class member to a judgment from a proceeding in which the member was not adequately represented. See *Hansberry v. Lee* Thus the class members in *Shutts* still possessed their right to attack the class action judgment collaterally, presumably in the forum of their choice, alleging that the representative plaintiff did not represent them adequately.¹⁵³

Carlough v. Amchem Products, Inc.,¹⁵⁴ was the immediate sequel to *Real Estate Title*. *Carlough* picked up a theme implicit in *Real Estate Title*: The "consent" of nonresident class members established in personam jurisdiction and, in turn, would support the issuance of an injunction. The court believed that, under *Shutts*, consent can be inferred simply from the failure to opt out.

On the basis of decidedly singular facts, *Carlough* upheld an antisuit injunction against class members who did not opt out. The district court was near resolving a nationwide, opt-out asbestos class action when a parallel state court class action limited to West Virginia residents was commenced in a West Virginia state court.¹⁵⁵ The state court plaintiffs sought "a declaration that the proposed *Carlough* settlement is unenforceable and not entitled to full faith and credit in the [state court]."¹⁵⁶ On appeal, the district court's order enjoining prosecution of the state proceeding was affirmed.¹⁵⁷ After reaffirming *Real Estate Title*'s rejection of "rigid rules" for personal jurisdiction,¹⁵⁸ the Third Circuit once again fell back upon *Shutts*'s implied consent rationale: "*In re Real Estate Title* afforded us an opportunity to examine *Shutts* and to reaffirm the critical importance of the right to opt out in drawing any inference of consent to jurisdiction by absent plaintiff class members who otherwise would have no affiliation with the forum."¹⁵⁹ Again, the court honed in on the fact that the right to opt out must, in fact, be in place—not just highly likely to be—before

153. *Id.* at 767 (citation omitted). Thus, while the MDL court judgment might have preclusive effect on the substantive claims of the compromise embodied in the judgment, an issue he left open, see *id.* at 768–69, due process challenges to that judgment could be made in F2, see *id.* at 769.

154. 10 F.3d 189 (3d Cir. 1993).

155. See *id.* at 193.

156. *Id.* at 195–96.

157. The fact that individual class members could opt out did not obviate the need for an injunction. The "West Virginia suit sought to undermine the viability of the class-action structure and settlement, thereby satisfying the rigorous standards of the 'in aid of its jurisdiction' exception [to the Anti-Injunction Act]." Sherman, *supra* note 8, at 943. The relief sought in the West Virginia class action raises a reverse Rooker-Feldman issue, that is, seeking state court review of a federal court judgment. See *infra* text accompanying notes 202–25.

158. *Carlough*, 10 F.3d at 199.

159. *Id.*

an antisuit injunction could be entered.¹⁶⁰ Nowhere in the opinion was adequacy of representation discussed.

Carlough can be regarded as dealing with cases posing the threat of extortion. F1 is far along in the class proceeding, when suddenly another proceeding is filed, attempting forcibly to introduce new class counsel into the bargaining (and fee sharing) process. The magnetic attraction of an F1 injunction in these circumstances is evident. But the conception of in personam jurisdiction that underpins its issuance is, in the end, singularly unappealing. The fundamental issue is one of the scope of in personam jurisdiction, not of remedy.¹⁶¹ As noted earlier, the in personam jurisdiction recognized by *Shutts* is a limited, conditional one. Failure to opt out cannot have the overriding significance attached to it by the Third Circuit. In personam jurisdiction sufficient to bind does not exist—or, rather, is extinguished—unless adequate representation exists “at all times” throughout the proceeding. While *Shutts*’s “implied consent” fiction permits F1 to define authoritatively the substantive legal and equitable rights of class members, it does not sanction in personam jurisdiction in F1 sufficient to prohibit (by way of injunction or preclusion) due process challenges to in personam jurisdiction in F2.

Finally, the problem presented in *GM Trucks II* is the reverse of *Carlough*: the case of the migratory settlers.¹⁶² After F1 rejects a proposed settlement as inadequate, the litigants (i.e., their counsel) simply migrate to another forum and present an identical or substantially similar settlement to a more sympathetic court.¹⁶³ In *GM Trucks II*, numerous

160. See *id.* at 200 (“We do not believe that the mere promise, even certain eventuality, that the opportunity to opt out of the class will be offered to absent class plaintiffs satisfies the requirements of due process as defined by *Shutts*.”). The *Carlough* court went on to discuss additional restrictions imposed by the Anti-Injunction Act, but noted that, while “simultaneous federal and state adjudications of the same in personam cause of action” did not trigger an exception to the Anti-Injunction Act, in this instance settlement was imminent and the state court proceeding would “cause havoc.” *Id.* at 202–04.

161. See *Grimes v. Vitalink Comm. Corp.*, 17 F.3d 1553, 1572 (3d Cir. 1994) (Hutchinson, J., dissenting) (challenging the argument that differences in remedies between damages and an injunction were relevant for purposes of in personam jurisdiction). See also Cottreau, *supra* note 51, at 497–99. But the majority in *Grimes* held otherwise, citing *Real Estate Title* for the proposition that preclusion may be proper even when an antisuit injunction is not. See *Grimes*, 17 F.3d at 1561.

162. The author participated in a limited way in the Third Circuit litigation. He advised some objectors on their oral argument in the Third Circuit and subsequently joined a Rule 28(j) submission by one group of objectors. He has also advised some objectors in the Louisiana proceedings.

163. For example, in *Romstadt v. Apple Computer, Inc.*, 948 F. Supp. 701 (N.D. Ohio 1996), after a federal court in Ohio had rejected a proposed settlement, “the settlers” simply migrated to a Texas state court. Within minutes, the state court judge conditionally certified a settlement class. “The settlers,” however, did not notify the successful Ohio federal court objectors of their migration, nor did they even inform the state court that a federal judge had already rejected the very same settlement. Excoriating the settlers, an angry Ohio district court judge made clear that, on the existing record, inadequate

class action lawsuits had been filed in various state and federal courts asserting that an exterior fuel tank design on their pickup trucks was defective and increased the risk of post-collision fire.¹⁶⁴ The Judicial Panel on Multidistrict Litigation transferred about 26 such suits to the Eastern District of Pennsylvania. In turn, that court certified a class for settlement purposes only, and it approved a highly controversial "script" settlement as "fair, reasonable, and adequate," even though the only dollars actually awarded went to class counsel.¹⁶⁵ In *GM Trucks I*, the court of appeals (anticipating *Amchem Products*) remanded the case because the district court had approved a settlement class without determining whether all of Rule 23's requirements had been satisfied.¹⁶⁶ In the process, however, the court expressed considerable skepticism about the fairness of the settlement.¹⁶⁷

On remand, the district court essentially sat on its hands, while the settling litigants simply changed venue to a Louisiana state court. There, they converted a pending statewide class action into a nationwide opt-out class action, and objectors claimed, secured approval of the same settlement upon which the Third Circuit had cast substantial doubt.¹⁶⁸ MDL objectors—who had also migrated to Louisiana to object—moved the MDL court to enjoin the Louisiana proceeding. The district court declined to do so, pointing out, *inter alia*, that at least some of the state court representatives were not class representatives in the litigation before it, and that the MDL court had no authority to enjoin such litigants.¹⁶⁹

On appeal, the Third Circuit affirmed the denial of the antisuit injunction.¹⁷⁰ Its opinion came down only days after *Baker v. General Motors*, and understandably takes no account of that decision. The court instead relied heavily upon *Carlough*. It said that any injunction of the Louisiana

representation existed, and that he would accord no preclusive effect to the Texas judgment. See *id.* at 708; see also John C. Coffee, Jr., *Class Actions: Interjurisdictional Warfare*, 218 N.Y. L.J., 5, 5 (discussing Louisiana, Alabama, and Texas courts' willingness to approve possibly collusive settlements on the eve of trial in other jurisdictions and raising the possibility that these courts may even be unaware of the original proceedings).

164. *In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig.* (*GM Trucks II*), 134 F.3d 133 (3d Cir. 1998).

165. See *In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig.*, 846 F. Supp. 330, 338, 344 (E.D. Pa. 1993).

166. *In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig.* (*GM Trucks I*), 55 F.3d 768, 799 (3d Cir. 1995).

167. See *id.* at 804–19.

168. *GM Trucks II* denied this characterization. See 134 F.3d at 139. The court said that the Louisiana settlement "differs in several ways, all responsive to our comments in [*GM Trucks I*]." *Id.*

169. See *In re Pickup Fuel Tank Prods. Liab. Litig.*, No. MDL 961, 1996 WL 683785 (E.D. Pa. Nov. 25, 1996), *aff'd*, *GM Trucks II*, 134 F.3d at 133. Since no class had been certified and no right to opt out accorded, *Carlough*, dependent as that case was on the implied consent rationale, would not support issuance of an antisuit injunction.

170. See *GM Trucks II*, 134 F.3d at 141.

proceeding "would necessarily enjoin . . . 5.7 million individual settling class members and would require [the exercise of] personal jurisdiction over them."¹⁷¹ Since no MDL class action was pending, "there is no basis upon which we can infer their consent. . . . Therefore, due process deprives us of personal jurisdiction" ¹⁷²

B. *The Weakness of the Implied Consent Rationale*

In treating the failure of a nonresident class member to opt out as decisive, the implied consent rationale invoked in *Real Estate Title, Carlough*, and *GM Trucks II* cannot bear the weight put upon it. *Carlough*, for example, nowhere explained why, in failing to opt out, absent class members had impliedly consented to the risk of *future* antisuit injunctions barring even due process challenges in F2. More importantly, in focusing on a class member's failure to respond to a class notice, the court inverts notions of "fundamental fairness." Class notices are complex, all too often uninformative, and misleading. They are designed to encourage inaction; and they are frequently "incomprehensible to average citizens."¹⁷³ 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 . . . by

171. *Id.* The fictional character of the statement is striking. The reality is that a handful of lawyers purported to settle on behalf of 5.7 million plaintiffs. Nor did the court consider the possibility that in the circumstances before it, the other Louisiana representatives were sufficiently present for purposes of in personam jurisdiction, first, because they joined the Philadelphia representatives, and second, because of common legal representation.

172. *GM Trucks II*, 134 F.3d at 141. The court also held that the injunction was barred by principles of preclusion, the Rooker-Feldman doctrine, and the Anti-Injunction Act. See *id.* at 141-46. In considering the absent plaintiff argument one should again note the often fictional quality of the argument. In reality, the class attorney has an inventory of potential plaintiffs and is, in fact, the real plaintiff. See Bone, *supra* note 97, at 104-05 ("The mass-tort case shares one feature in common with the small-claimant class action: Attorneys tend to control the litigation without much oversight by clients."); Green, *What*, *supra* note 48, at 1792 ("Substantial client supervision and monitoring of class actions is a fiction, however, in both the settlement and trial context and in the 'current' and 'futures' context."). But there are "real plaintiff" cases, and in those cases an injunction against attorney litigation becomes troublesome, all the more so because the distinction between the two situations (real and non-real class plaintiffs) may be beyond the court's competence to determine.

173. Miller & Crumpp, *supra* note 24, at 22. See Carrington & Apanovitch, *supra* note 48, at 466 n.35 ("The likelihood that a class member will actually receive and comprehend the notice of the action is in every case very small. Frequently, the cost of reading and understanding the notice exceeds the benefits, and not infrequently, the notice is impenetrable to the average citizen."); Resnick, *supra* note 41, at 855. See also Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 134 (1996) ("Our impression is that most notices are not comprehensible to the lay reader.") (quoted in Cottreau, *supra* note 51, at 481 n.7). Moreover, courts have been reluctant to insist upon actual notice rather than "best practicable" notice. See, e.g., *Silber v. Mabon*, 18 F.3d 1449, 1453-54 (9th Cir. 1994).

self-selected counsel desiring to represent the recipient in an action involving serious personal injury or death. *There is no reason to believe that a serious personal injury claimant desires to be represented by class counsel.*¹⁷⁴

If implied consent is to be derived solely from failure to respond to class notices, courts will have to be a good deal more vigilant than they have been in scrutinizing the content of these notices.

But my objection runs deeper. No court has explained why a major transformation in the law—i.e., the elimination of due process challenges in F2, a safeguard that Judge Becker has characterized as “a necessary part of the class action scheme”¹⁷⁵—should alone turn on the existence of baroquely written notices that are designed to discourage action and that require the recipient to take an affirmative action to protect his or her rights.¹⁷⁶ *Shutts* does not sanction such a doctrine. In addition to a right to opt out, adequate representation must exist at all times.¹⁷⁷ Implied “consent” to be bound by a proceeding conducted in accord with due process is one thing; implied “consent” to jurisdiction to be bound by one that has not been conducted in accord with due process surely involves quite a different conception of consent.¹⁷⁸ *Shutts*, in fact, announced a rule of forfeiture, not consent, and the extent of the forfeiture should not be judicially enlarged. *Shutts*’s forfeiture doctrine does not yet authorize such extensive adjudicatory authority in F1 over nonresi-

174. Carrington & Apanovitch, *supra* note 48, at 467–68 (emphasis added) (footnotes omitted).

175. See *supra* note 152 and accompanying text.

176. Consent theorizing will not work here. Commonly held conceptions of consent are usually based upon deliberative activity or an affirmation clearly indicating an intention to consent.

177. The existence *vel non* of a right to opt out seems largely unresponsive to the needs of modern class action litigation, whether the issue is F1’s power to preclude or to channel preclusion challenges to itself. Assuming the (doubtful) propriety of (b)(1)(B) constructive bankruptcy proceedings and of (b)(2) class judgements that contain substantial damage claims, why should antisuit injunctions automatically fail absent an opt-out right? In *In Re Joint E. & S. Dists. Asbestos Litig.*, 134 F.R.D. 32 (E. & S.D.N.Y. 1990), Judge Weinstein certified a (b)(1)(B) nationwide class action and treated the certification as enjoining all pending litigation. *Id.* at 36–39. He did allow applications for exceptions if “any court, for special circumstances, desire[d] to continue with scheduled trials or hearings.” *Id.* at 36. He concluded, however, that the Anti-Injunction Act was not a bar to his order. He did not consider the issue of in personam jurisdiction or Rule 4(k)(1)(A).

178. The Supreme Court has warned against incautious extensions of fictions concerning implied consent to jurisdiction. See *Olberding v. Illinois Cent. R.R. Co.*, 346 U.S. 338, 340–41 (1953). Surely such a major shift in legal understanding should not, at least at the close of the twentieth century, turn upon the extension of a clearly quixotic construct. As Lon Fuller so insightfully pointed out, “[a] fiction taken seriously. [sic] i.e., ‘believed,’ becomes dangerous and loses its utility. . . . A fiction becomes wholly safe only when it is used with a complete consciousness of its falsity.” Lon Fuller, *Legal Fictions* (pts. 1–3), 25 *Ill. L. Rev.* 363, 370 (1930).

dent class members that F1 can preclude (or enjoin) due process challenges in F2 on the basis of a fictional implied consent rationale.¹⁷⁹

IV. PRECLUSION OUTSIDE THE *SHUTTS* FRAMEWORK

Shutts is, at bottom, about the scope of F1's authority to preclude challenges to its decision in F2. Much attention has been directed to the relevance of minimum contacts and implied consent to the existence and scope of that authority. Other possible frameworks exist, however, that could *effectively* operate as devices to consolidate all due process challenges in F1: Use of the All Writs Act; extension of the so-called Rooker-Feldman doctrine to nonresident class members; and a recently advanced reinterpretation of preclusion doctrine are the main possibilities on which to require compulsory appearance by class members in F1 to raise due process challenges. In my opinion, however, none of these doctrines properly precludes due process challenges in F2 by nonresident class members.

A. All Writs Act

The All Writs Act authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."¹⁸⁰ Some courts have invoked the Act to avoid existing subject matter limitations on the jurisdiction of the district court by removing *otherwise nonremovable* actions from state court to federal court.¹⁸¹ Moreover, some courts invoke the Act to enlarge in personam jurisdiction.

179. In fact, under existing law, this proposition is equally true of absent in-state class members. See *Epstein v. MCA, Inc. (Epstein II)*, 126 F.3d 1235, 1242 (9th Cir. 1997), stating:

There is nothing in *Shutts*, however—or in any other case—to suggest that *Shutts* offers protection only to those absentees who are beyond the in personam reach of the forum. Because *Grimes* conflates the requirements of in personam jurisdiction with the due process safeguards that *Shutts* guarantees to absent class members, we respectfully decline to follow it.

Grimes, a 2–1 decision, seems to have assumed that in personam jurisdiction over absent, nonresident class members sufficient to preclude the underlying substantive law claims also eliminated all collateral attacks on due process grounds. See *Grimes v. Vitalink Comm. Corp.*, 17 F.3d 1553, 1561 (3d Cir. 1994). In *Grimes*, however, Mr. Grimes himself appeared and litigated in the prior state court proceeding. *Id.* at 1555.

180. 28 U.S.C. § 1651(a) (1994).

181. See *NAACP v. Metropolitan Council*, 125 F.3d 1171, 1173–74 (8th Cir. 1997), vacated on other grounds, 118 S. Ct. 1162 (1998) (collecting cases in which otherwise nonremovable actions were removed to federal court under the All Writs Act.). Compare *Hillman v. Webley*, 115 F.3d 1461, 1469 (10th Cir. 1997) (holding that, although the district court may "enjoin parties before it from pursuing conflicting litigation in the state court," the All Writs Act does not confer subject matter jurisdiction and does not provide a basis for the removal of otherwise nonremovable claims); *TBG, Inc. v. Bendis*, 36 F.3d 916, 926 (10th Cir. 1994) (stating that All Writs Act "does not authorize a court to assume

Agent Orange II is perhaps the leading illustration on how the All Writs Act can be used to expand the in personam jurisdiction of F1.¹⁸² That case was an attempt to revive the massive *Agent Orange I* tort litigation that had previously been consolidated in the Eastern District of New York before Judge Weinstein and had settled on a nationwide basis.¹⁸³ The class that was certified by Judge Weinstein in *Agent Orange I* was estimated to include as many as 2.4 million persons.¹⁸⁴ The settlement order contained a judicially approved, privately administered, administrative agency charged with providing services for Vietnam veterans and their families.¹⁸⁵ The order also contained an antisuit injunction.¹⁸⁶

In *Agent Orange II*, two class actions were commenced in the Texas state courts.¹⁸⁷ The cases were removed to two federal district courts in Texas, although seemingly, there was a lack of subject matter jurisdiction.¹⁸⁸ Nonetheless, the JPML transferred the removed cases to Judge Weinstein. The Second Circuit sustained removal on the basis of the All Writs Act, pointing to the "substantial" and "deleterious" consequences of a contrary holding on the prior *Agent Orange* settlement and the need to guard the integrity of *Agent Orange I* rulings.¹⁸⁹ This analysis might have

jurisdiction over claims not otherwise before it"). But see *DePerez v. AT&T Co.*, 139 F.3d 1368 (11th Cir. 1998) (noting conflict among the circuits).

182. See *In re "Agent Orange" Prod. Liab. Litig. (Agent Orange II)*, 996 F.2d 1425 (2d Cir. 1993).

183. See *In re "Agent Orange" Prod. Liab. Litig. (Agent Orange I)*, 597 F. Supp. 740 (E.D.N.Y. 1984).

184. See *id.* at 756. In light of *Amchem Products*, the certification of this sprawling class is exceedingly problematic.

185. See *Agent Orange II*, 996 F.2d at 1429-30.

186. See *id.* at 1429.

187. See *id.* at 1430.

188. Removal was predicated on federal subject matter jurisdiction. Although both complaints were based exclusively on state law, defendants removed by alleging "artful pleading" of a federal claim, and in the alternative, federal preemption. See *Agent Orange II*, 996 F.2d at 1430.

189. 996 F.2d at 1431 ("If Agent Orange victims were allowed to maintain separate actions in state court, the deleterious effect on the *Agent Orange I* settlement mechanism would be substantial."). Moreover:

The district court was not determining simply the preclusive effect of a prior final judgment on claims or issues expected to be raised in subsequent collateral proceedings; it was enforcing an explicit, ongoing order against relitigation of matters it already had decided, and guarding the integrity of its rulings in complex multidistrict litigation over which it had retained jurisdiction."

Id. The Second Circuit has been no stranger to All Writs Act removal. See, e.g., *United States v. City of New York*, 972 F.2d 464, 469 (2d Cir. 1992) (affirming removal of state law actions to federal court under All Writs Act where issues raised in state court could not be separated from relief ordered in consent decree); *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 864 (2d Cir. 1988) (affirming removal to federal court on the basis of "extraordinary circumstance[s]" of nonparties' state law actions where actions might have frustrated implementation of a consent decree); *In re Baldwin-United Corp.*, 770 F.2d 328, 335-36 (2d Cir. 1985) (affirming that All Writs Act authorizes enjoining of state proceedings where "necessary to prevent relitigation of an existing federal judgment").

been more persuasive had Judge Weinstein himself issued the removal order.¹⁹⁰ But the court of appeals never explained the interest of the Texas federal district courts in authorizing removal.¹⁹¹

This still leaves unresolved the issue of in personam jurisdiction over the Texas litigants. Interestingly, however, the Second Circuit did not rely on the All Writs Acts to establish that jurisdiction. Rather, it viewed that issue as foreclosed by its prior decision in *Agent Orange I*,¹⁹² which recognized that the MDL court has all the jurisdiction of the transferor courts.¹⁹³ A step is skipped here, but not a big one. On the court's reasoning, the transferor court's in personam jurisdiction must first be established.¹⁹⁴ By filing in the Texas state court, however, the class representatives placed themselves within the Texas federal courts' in personam jurisdiction.

One remaining issue was the source of the court's power to issue the *original* antisuit injunction—as distinguished from class members being bound by the settlement.¹⁹⁵ Jurisdiction to enter such an order must be established. In my view, the All Writs Act cannot fill gaps in in personam

190. As Judge Weinstein's opinion at the district court level of *Agent Orange II* corroborates, little doubt exists that he believed he had authority to issue such a removal order. See *Ryan v. Dow Chemical Co.*, 781 F. Supp. 902, 918 (E.D.N.Y. 1991). If so, however, this would mean that the act could be used to confer authority on courts otherwise lacking both subject matter and in personam jurisdiction.

191. In *United States v. New York Tel. Co.*, 434 U.S. 159 (1977), Justice Stevens, joined in dissent by three other justices, emphasized that the All Writs Act relief must be granted on the basis of the *issuing court's* interest:

[The All Writs Act] must be in aid of [the court's] duties and *its* jurisdiction. The fact that a party may be better able to effectuate its rights or duties if a writ is issued never has been, and under the language of the statute cannot be, a sufficient basis for issuance of the writ.

Id. at 189 (Stevens, J., dissenting in part) (footnote omitted). By analogy, a Texas federal court could therefore not grant All Writs Act relief to safeguard the interests of a New York federal court. The majority responded that the asserted distinction between the parties and the court was "specious" because "[c]ourts normally exercise their jurisdiction only in order to protect the legal rights of parties." *Id.* at 175 n.23.

192. See *Agent Orange II*, 996 F.2d at 1432.

193. The court stated:

Appellants next contend that they are not bound by the *Agent Orange I* class action and settlement because the court did not have personal jurisdiction over them. We rejected this argument on the appeal in *Agent Orange I* [noting that transfers under] the multidistrict litigation statute, "are simply not encumbered by considerations of in personam jurisdiction and venue" and that the transferee judge has all the pretrial jurisdiction the transferor judge would have had if the transfer had not occurred.

Id. at 1434–35 (citation omitted) (quoting *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.D.L. 1976)).

194. There is no suggestion that 28 U.S.C. § 1407 itself can be read, in effect, to authorize nationwide in personam jurisdiction in the MDL transferee court, even if the transferor court itself lacked personal jurisdiction.

195. The injunction barred all present and future claims of the (b)(3) and (b)(1)(B) class members. See *Agent Orange II*, 996 F.2d at 1429; *Ryan v. Dow Chemical Co.*, 618 F. Supp. 623, 624 (E.D.N.Y. 1985).

jurisdiction. No evidence exists that the All Writs Act was intended to be a bottomless reservoir of such jurisdiction available when everything else fails.¹⁹⁶ Surely, as a general matter, the All Writs Act cannot properly be read to side-step standard tests governing in personam jurisdiction (or to create a new relationship between subject matter and in personam jurisdiction). To be sure, in *United States v. New York Telephone Co.*, the Supreme Court, over four dissents, held that the Act authorizes a federal court to issue orders "to persons . . . not parties to the original action" if they are "in a position to frustrate the implementation of a court order or the proper administration of justice."¹⁹⁷ The Court's opinion could be read to suggest that the Act might provide a basis for in personam jurisdiction when subject matter jurisdiction otherwise exists.¹⁹⁸ But the Court was divided over whether the Act provided a statutory source for coercive process directed to a third party *who was otherwise clearly within the territorial jurisdiction of the district court*.¹⁹⁹ It is unnecessary here to examine the propriety of invoking the writ to gain personal jurisdiction over nonresident class members where the underlying federal statute contemplates nationwide service of process *on defendants*. But *New York Telephone* provides no basis for believing that the Act should be construed as a general, "emergency all purpose" nationwide long-arm statute used to relax the requirements of Rule 4(k)(1)(A) whenever a court deems that result desirable.²⁰⁰ Accordingly, the Act cannot provide an in-

196. The purpose of the All Writs Act is "to preserve jurisdiction that the court has acquired from some other independent source in law." *Taiwan v. United States Dist. Court*, 128 F.3d 712, 717 (9th Cir. 1997) (quoting *Jackson v. Vasquez*, 1 F.3d 885, 889 (9th Cir. 1993)).

197. 434 U.S. 159, 174 (1977) (citation omitted). A district court order authorized the FBI to install and use pen registers and directed the telephone company to provide facilities and technical assistance. The telephone company resisted compliance with the order in part. The dissenters did not seriously challenge the majority's claim that the order was valid. Instead, they asserted that third parties could not be conscripted to aid law enforcement. See *id.* at 178-91. In *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1985), the Court cited *New York Telephone* with approval as an illustration of using the Act "to fill statutory interstices." *Id.* at 42 n.7.

198. See *New York Telephone Co.*, 434 U.S. at 172.

199. In dissent, Justice Stevens stated that "the Court never explains on what basis the District Court had jurisdiction to enter this order." *Id.* at 188 n.19. In *Pennsylvania Bureau*, the Court said that "[i]n [*New York Telephone*] the All Writs Act filled a gap in federal statutes by granting the District Court jurisdiction over the only party capable of installing the devices." 474 U.S. at 42 n.7. While the Court concluded that the Act may be available as a basis for an order requiring federal marshals to transport state prisoner-witnesses, no question of personal jurisdiction existed because the marshals were within the territorial jurisdiction of the district court. See *id.* at 43.

200. See *Additive Controls & Measurement Sys., Inc. v. Flowdata*, 96 F.3d 1390, 1396 (Fed. Cir. 1996) ("Nothing . . . suggests that the All Writs Act can be employed as a general license for district courts to grant relief against non-parties whenever such measures seem useful or efficient."). Earlier, in *Pennsylvania Bureau*, the Court had characterized the All Writs Act as providing "extraordinary remedies when the need arises, [but] it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." 474 U.S. at 43.

dependent basis for in personam jurisdiction over nonresident class members in mass and toxic tort cases who have been “conscripted” into the class action.²⁰¹

201. See, e.g., *Carlough v. Amchem Products*, 10 F.3d 189, 198 (3d Cir. 1993), followed on this point by *GM Trucks II*, 134 F.3d 133, 140–41 (3d Cir. 1998). *Carlough* did not rely upon the Act for in personam jurisdiction. Under its understanding of *Shutts*, the court first had to ascertain that absent class members had consented to jurisdiction by not opting out. Having found consent, the court then invoked the Act to support an injunction. See *Carlough*, 10 F.3d at 199–202; see also *United States v. International Bhd. of Teamsters*, holding that the Act:

requires no more than that the persons enjoined have the “minimum contacts” that are constitutionally required under due process. . . . Appellants correctly note that the Act does not enlarge the jurisdiction of the federal courts. However, all we hold is that if jurisdiction over the subject matter of and the parties to litigation is properly acquired, [the Act] authorizes a federal court to protect that jurisdiction even though non-parties may be subject to the terms of the injunction.

907 F.2d 277, 281 (2d Cir. 1990) (citations omitted); *United States v. International Bhd. of Teamsters*, 948 F.2d 98, 103 (2d Cir. 1991) (same). More recent decisions discussing the All Writs Act cast little light on the subject because in each instance there was no serious question of in personam jurisdiction. For example, in *In re VMS Securities Litig.*, 103 F.3d 1317, 1324 (7th Cir. 1996), the court characterized the reasoning in *Agent Orange* as “sound” and held that

in the context of complex class action litigation, a federal district court may appropriately use the All Writs Act to remove and enjoin the prosecution of subsequent state court claims in order to enforce its ongoing orders against relitigation and to guard the integrity of its prior rulings over which it had expressly retained jurisdiction.

But in that case, there was no question as to the district court’s subject matter or in personam jurisdiction. The state law plaintiffs had also been plaintiffs in the federal litigation, and the district court had retained personal jurisdiction to enforce the terms of the settlement. See *id.* at 1320. In its discussion, the court favorably quotes an Eighth Circuit decision, which observes that “the ability to facilitate the present settlement by enjoining related suits of absent class members is ancillary to jurisdiction over the class action itself.” *Id.* at 1324 (quoting with approval, *White v. National Football League*, 41 F.3d 402, 409 (8th Cir. 1994), cert. denied, 515 U.S. 1137 (1995)). *White v. National Football League* itself is also a case of limited precedential value because “each of the objectors [to the 23(b)(1) class settlement] either had minimum contacts with the forum or submitted himself to the jurisdiction of the district court by appearing through counsel to contest the merits of the settlement.” 41 F.3d at 408.

Winkler v. Eli Lilly & Co., 101 F.3d 1196 (7th Cir. 1996), did not involve removal or personal jurisdiction, but it is instructive as to the scope of the Act. The court held that an antisuit injunction to stay a parallel state court action was appropriate to protect the MDL court’s prior discovery order. See *id.* at 1202. But the court did not read the All Writs Act as a source of broad power. It understood the Act to have the same scope as the Anti-Injunction Act, and said:

We are of the opinion that the district court has authority under the Anti-Injunction Act to enjoin *only* those persons (and their counsel) whose cases are presently part of federal multi district litigation, or who were properly part of such multi district litigation at the time the court granted Smith’s motion to withdraw as lead counsel.

Id. at 1202–03 (emphasis added).

B. The *Rooker-Feldman* Doctrine

28 U.S.C. § 1257 vests the Supreme Court with appellate jurisdiction to review final judgments of state courts. The *Rooker-Feldman* doctrine understands that statute to bar “direct review in the lower federal courts of a decision reached by the highest state court.”²⁰² While the Supreme Court has never considered the class action implications of this doctrine, the Seventh Circuit did so in the well-publicized *Kamilewicz* case.²⁰³ The litigation arose out of a nationwide Alabama opt-out class action settlement involving the Bank of Boston. In essence, the settlement provided for injunctive relief only.²⁰⁴ Some non-opt-out bank customers discovered that their accounts had incurred charges to pay the counsel fees of the settling Alabama class counsel. For example, the plaintiffs had received \$2.19 by way of settlement, but their mortgage accounts had been debited by \$91.33.²⁰⁵ The settlement itself drew intense criticism.²⁰⁶ Professor Issacharoff describes it as a “shocking” example of litigants “trading off rights of third parties who functionally cannot be there.”²⁰⁷

The plaintiffs brought suit in an Illinois federal district court against the settling bank and Alabama class counsel. The complaint, however, challenged only the monetary part of the state court judgment. Invoking *Rooker-Feldman*, the district court dismissed the action, and, in a decidedly opaque opinion, the district court’s decision was affirmed by a panel of the Seventh Circuit.²⁰⁸ Five of the court’s twelve judges dissented from denial of a rehearing en banc.²⁰⁹ Certiorari was, in turn, denied, even though the petition had been supported by an amicus brief filed by 24 state attorneys general, and another brief filed by prominent law school professors.²¹⁰ While the opposition to certiorari stressed the “unusual

202. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 622 (1989); accord *Johnson v. De Grandy*, 512 U.S. 997, 1005–06 (1994). The doctrine has its origins in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). See Hart & Wechsler, *supra* note 49, at 1500–04.

203. See *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996).

204. See *id.* at 508.

205. See *id.*

206. See, e.g., Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 Va. L. Rev. 1051 (1996); John C. Coffee, Jr. & Susan P. Koniak, *The Latest Class Action Scam*, Wall St. J., Dec. 27, 1995, at A11; Barry Meier, *Math of a Class-Action Suit: ‘Winning’ \$2.19 Costs \$91.33*, N.Y. Times, Nov. 21, 1995, at A1. Judge Shadur described the case as “the sort of Willie Horton of the class action.” Milton Shadur, *From the Bench: The Unclassy Class Action*, *Litigation*, Winter 1997, vol. 23, No. 2, at 3. For a detailed and sustained criticism, see Koniak & Cohen, *supra*, at 1057–68, 1270–80.

207. Issacharoff, *supra* note 1, at 823.

208. See *Kamilewicz v. Bank of Boston Corp.*, No. 95 C 6341, 1995 WL 758422 (N.D. Ill. Dec. 15, 1995), *aff’d*, 100 F.3d 1348 (7th Cir. 1996).

209. See *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1349 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

210. See 117 S. Ct. 1569 (1997).

facts" of the case,²¹¹ it was unique only because the federal plaintiffs *relied upon the state court judgment itself* as part of their cause of action.²¹²

In the Supreme Court, petitioners and their amici stressed that under *Shutts* they could not be bound by any affirmative monetary obligations because the Alabama court lacked in personam jurisdiction, the existence of opt-out rights notwithstanding.²¹³ Since an affirmative judgment had been entered against them, they were, for *Shutts* purposes, part of a *defendant* class, and *Shutts's* reasoning could not sustain an affirmative monetary judgment against nonresident defendant class members.²¹⁴ Petitioners also argued that the state court decision could not bar collateral attack because its decision was based upon inadequate notice and representation.²¹⁵

Our specific concern here, however, is with the application of the *Rooker-Feldman* doctrine. What the operative content of that doctrine adds to conventional preclusion concepts is unclear, except perhaps that, in principle, preclusion can be waived as a defense, while "want of subject matter jurisdiction" could not be, at least on direct attack.²¹⁶ If, however, the two doctrines are "quite similar,"²¹⁷ no apparent purpose exists in retaining *Rooker-Feldman* as a separate doctrine. If the two doctrines are not substantially coextensive, however, why should *Rooker-Feldman* bar an

211. Brief of Respondents at 1, *Kamilewicz v. Bank of Boston Corp.*, 117 S. Ct. 1569 (1997) (No. 96-1184) (facts "are far better suited for a law school examination than for plenary review by this Court").

212. Plaintiffs nowhere challenged the helpful part of the judgment; they rejected only that part of the judgment that required the payment of money. See id.

213. See Briefs of Petitioners and Amici Curiae Law Teachers, *Kamilewicz v. Bank of Boston Corp.*, 117 S. Ct. 1569 (1997) (No. 96-1184).

214. In *Shutts*, the Court said that, "of course, [it did not] address class actions where the jurisdiction is asserted against a *defendant* class." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 n.3 (1985).

215. Petitioners also argued that the *Rooker-Feldman* doctrine had no application to an action challenging malpractice by class counsel. Principal reliance was placed on *Durken v. Shea & Gould*, 92 F.3d 1510 (9th Cir.), cert. denied, 117 S. Ct. 1553 (1997), which, however, did not involve a federal court malpractice suit based upon the conduct of class counsel in a state court proceeding. See Brief of Petitioners at 27-29, *Kamilewicz v. Bank of Boston Corp.*, 117 S. Ct. 1569 (1997) (No. 96-1184).

216. See, e.g., *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

217. *E.B. v. Verniero*, 119 F.3d 1077, 1091 (3d Cir. 1997); see also *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 n.1 (8th Cir. 1995) (the two doctrines are "extremely similar"). If so, the purpose of retaining *Rooker-Feldman* as a separate doctrine is surely unclear. See Hart & Wechsler, supra note 49, at 1504; Wright & Miller, supra note 64, § 4469 at 663-68; Gary Thompson, Note, *The Rooker-Feldman Doctrine and the Subject Matter Jurisdiction of Federal District Courts*, 42 Rutgers L. Rev. 859 (1990) (criticizing *Rooker-Feldman* as harmful to federal jurisdiction). In general, there seems to be some confusion among the lower courts about the scope and content of this doctrine. Compare *GASH Assocs. v. Village of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993) (the *Rooker-Feldman* doctrine "has nothing to do with" full faith and credit), with *Gauthier v. Continental Diving Servs., Inc.*, 831 F.2d 559, 561 (5th Cir. 1987) (the doctrine is "very close if not identical to" full faith and credit).

F2 federal action if, under ordinary preclusion principles, the state court judgment would not be entitled to full faith and credit because it violated due process?²¹⁸

The *Rooker-Feldman* doctrine would have to be massively enlarged to bar absent, nonresident class members from asserting due process challenges to the F1 judgment.²¹⁹ The doctrine has never been applied against nonparties,²²⁰ and, as *Shutts* and other decisions make clear, absent class members are not "parties," even if they are not perfect strangers to the litigation.²²¹ *Shutts*, too, would have to be transformed in order to say that class members who do not affirmatively exclude themselves are barred from bringing a suit in F2 by the doctrine even in circumstances in which the state court judgment could not be given full faith and credit because of inadequate representation.²²² Moreover, an F2 challenge based upon inadequate representation focuses on the conduct of the F1 class representatives and class counsel, not on the correctness of the state court judgment itself.²²³ It is worth noting here that in *Amchem Products, Inc. v. Windsor*, the Court, in discussing adequate representation, quotes with approval from Judge Easterbrook's dissenting opinion on rehearing in *Kamilewicz*.²²⁴ Finally, if the F1 state court rendering judgment itself must reject the initial judgment on a due process collateral attack, how

218. See *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1350 (7th Cir. 1996) (Easterbrook, J., dissenting) ("[A] judgment that is not entitled to full faith and credit does not acquire extra force via the *Rooker-Feldman* doctrine.").

219. Without discussion, *GM Trucks II* applied the *Rooker-Feldman* doctrine to the Louisiana settlement achieved by the "migratory settlers." In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig. (*GM Trucks II*), 134 F.3d 133, 143 (3d Cir. 1998). The court simply cited *Kamilewicz*, ignoring entirely the controversy over that decision. See *id.* In any event, unlike the *Kamilewicz* plaintiffs, the objectors actually appeared in the Louisiana court to object to the proposed settlement. Moreover, in the MDL injunction proceeding, no adequacy of representation claims were raised against the Louisiana proceeding. See *id.*

220. See, e.g., *Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994) ("But the invocation of *Rooker/Feldman* is just as inapt here, for . . . the United States was not a party in the state court."); *Bennett v. Yoshina*, 140 F.3d 1218, 1223-24 (9th Cir. 1998) ("[T]he doctrine is not implicated in this case because it applies only when the federal plaintiff was a party to the state suit.")

221. See *supra* note 55.

222. See *Kamilewicz*, 100 F.3d at 1350 (Easterbrook, J., dissenting).

223. But see *Postma v. First Fed. Sav. & Loan of Sioux City*, 74 F.3d 160, 162 (8th Cir. 1996) (*Rooker-Feldman* applicable "'[w]here federal relief can only be predicated upon a conviction that the state court was wrong'") (quoting *Keene Corp. v. Cass*, 908 F.2d 293, 296-97 (8th Cir. 1990)).

224. See *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2249 (1997) ("parties 'may even put one over on the court, in a staged performance'"); see also Issacharoff, *supra* note 1, at 819 n.44 ("What makes this remarkable is that six members of the Court are endorsing the view that more vigilance is required in a case in which the Court had only recently denied certiorari review.").

can a federal court do otherwise, given the express command of the full faith and credit statute?²²⁵

C. Revised Preclusion Doctrine

The ALI proposal on complex litigation, in addition to providing authority in transferee courts to issue antisuit injunctions, also grants transferee courts authority to give class members notice of a right to intervene and notice of an intention to preclude regardless of whether or not recipients exercise their rights to intervene.²²⁶ Comments to the provision describe it as a “new procedure”—a part of a comprehensive proposal that would require legislative enactment.²²⁷ Marcel Kahan and Linda Silberman, however, insist that *existing* preclusion law already embodies the substance of notice of an intention to preclude.²²⁸ They claim that, as long as F1 has adequate procedures in place to determine due process issues such as adequate representation,²²⁹ the F1 “court’s determination [on adequacy] . . . is binding on absent class members.”²³⁰ Form alone governs: In practice, of course, this standard would allow *no* collateral attacks, because all (or nearly all) courts have procedures equivalent to Rule 23.

Kahan and Silberman’s claim lacks support.²³¹ They acknowledge that their description of existing preclusion law is inconsistent with the

225. See 28 U.S.C. § 1738 (1994); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996). See also *Epstein v. MCA, Inc. (Epstein II)*, 126 F.3d 1235, 1241 (9th Cir. 1997) (“[N]o Delaware court would attach preclusion to the issue of adequate representation Under § 1738, neither may we.”).

226. See *Complex Litigation*, supra note 8, at § 5.05. For a general discussion, see *Sherman*, supra note 8, at 950–59.

227. *Complex Litigation*, supra note 8, § 5.05 cmt., at 276.

228. See Marcel Kahan & Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 *Sup. Ct. Rev.* 219. Kahan and Silberman argue that “[t]he broad role for collateral attack advocated by the federal plaintiffs in *Matsushita* . . . claims too much. It would inhibit class action settlements” *Id.* at 277. This reasoning seems driven by a wholly undefended premise that absolute finality in any judicial proceeding is the *summum bonum* of the legal system. This assertion that less than complete finality would “inhibit” settlements is advanced without any empirical support.

229. “[A]s long as the court entertaining a proposed class action affords class members fair opportunity to raise the issue, adequacy of representation should be raised directly, and not be permitted to be raised collaterally.” *Id.* at 264.

230. *Id.*

231. Their entire affirmative case seems to be no more than a claim that “the Supreme Court . . . has left unanswered . . . whether state rulings on [adequate representation] can be second-guessed in a collateral attack.” *Id.* at 265. They claim that *Hansberry v. Lee*, 311 U.S. 32 (1940), stands for the proposition “that a judgment need not be recognized if there was no full and fair opportunity to raise objections in the initial proceeding,” but that “it offers little guidance as to the obligations of parties who forgo the opportunity to challenge adequacy in the initial proceeding and later attempt to raise a collateral challenge.” Kahan & Silberman, supra note 228, at 267. See also *infra* note 233.

Restatement (Second) of Judgments.²³² Contrary to their assertion, their claim is also inconsistent with *Hansberry v. Lee*,²³³ and ignores the language with which the Court begins its opinion in *Richards v. Jefferson County*.²³⁴ "In *Hansberry v. Lee* we held that it would violate the Due Process Clause of the Fourteenth Amendment to bind litigants to a judgment rendered in an earlier litigation to which they were not parties *and in which they were not adequately represented*."²³⁵ Finally, their claim is inconsistent with a considerable body of lower court case law,²³⁶ existing interpretations of Rule 23,²³⁷ and the understanding of commentators.²³⁸

232. See *id.* at 267 n.161 (citing Restatement (Second) of Judgments § 42 cmt. e (1982) (discussing § 42(d))).

233. Kahan and Silberman misdescribe the holding in *Hansberry v. Lee*, 311 U.S. 32 (1940). While they correctly recognize that the case is not about notice (since the person sought to be precluded in the second action was the spouse of the plaintiff in the first action), see Kahan & Silberman, *supra* note 228, at 266 n.156, they incorrectly contend that *Hansberry* is only about inadequate procedure, see *id.* at 266–67. Contrary to what they intimate, however, there were objectors in the first suit, and there is no reason to believe that these objectors were not in the position to make all available arguments. *Hansberry* referred to inadequate procedures, to be sure, see *Hansberry*, 311 U.S. at 41–42, but it was decided on the substantive ground that the F1 plaintiff could *not* be an adequate representative because his interests were in conflict with the interests of the parties in the second action. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 n.1 (1985) ("The holding in *Hansberry*, of course, was that petitioners in that case had not a sufficient common interest with the parties to a prior lawsuit such that a decree against those parties in the prior suit would bind the petitioners."); *Epstein v. MCA, Inc. (Epstein II)*, 126 F.3d 1235, 1246 (9th Cir. 1997) ("No procedure can reliably protect an absent plaintiff who does not *in fact* have an adequate representative in court championing his cause. The court recognized this salutatory principle in *Hansberry* . . . and it has never retreated from it.").

234. 116 S. Ct. 1761 (1996).

235. *Id.* at 1764 (emphasis added) (citation omitted).

236. *Epstein II*, for example, squarely rejects their claim, see *Epstein II*, 126 F.3d at 1246.

237. See *Martin v. Wilks*, 490 U.S. 755 (1989). After their union had unsuccessfully sought to intervene in a settlement between the city and black firefighters, and after several individual white firefighters had unsuccessfully challenged a class action settlement, another group of white firefighters sued, asserting that the settlement imposed a scheme of racial discrimination. The Court held that the new group was not bound by the settlement. The Court rejected the claim that they were precluded by the prior judgment or that they were under an affirmative duty to intervene. "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." *Id.* at 765. As Professor Issacharoff observes, there is a strong resemblance between strangers to a litigation and absent class members. See Issacharoff, *supra* note 1, at 823. For a strong defense of *Martin* and a penetrating examination of the congressional efforts to overrule it in the civil rights context, see Samuel Issacharoff, *When Substance Mandates Procedure: Martin v. Wilks and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 *Cornell L. Rev.* 189, 192–94 (1992).

238. See Hart and Wechsler, *supra* note 49, at 75 (Supp. 1997) (pointing out in discussion of the *Epstein I* litigation that "[t]he binding effect of a class action . . . turns on such issues as the adequacy of representation . . . [which must exist] in the proceedings leading up to the settlement and its 'final approval'"); Woolley, *supra* note 1, at 571 & n.2, 578 n.34 ("Since the Supreme Court's landmark decision in *Hansberry v. Lee*, courts and

Simply put, the authorities demonstrate that adequate representation, not simply adequate procedures, must exist at all times.

Kahan and Silberman contend, however, that collateral attack “is a post-settlement opt-out that undermines the ability to settle a class action *altogether*.”²³⁹ The “altogether” claim is without any empirical support. Moreover, collateral attack would undermine a settlement *only* if there were a problem with adequate representation. Kahan and Silberman’s obsession with absolute finality for global settlements ignores these facts and fails to account for the dangers of distant forum abuse inherent in a world of races to judgment and reverse auctions. Indeed, if this is the “Age of Settlement,” as one approving commentator asserts,²⁴⁰ Kahan and Silberman never seriously contemplate that collateral attacks are *especially* necessary to the legitimacy of settlement class actions.²⁴¹ Professor Issacharoff states:

Legal enforceability of prearranged settlements is the critical issue facing the courts today . . . [Yet] [p]erhaps in no other context do we find courts entering binding decrees with such a complete lack of access to quality information and so completely dependent on the parties who have the most to gain from favorable court action.²⁴²

Ignoring the fact that class notices are often misleading and designed to encourage inaction,²⁴³ and relying entirely and uncritically upon a version of *Shutts*’s in personam jurisdictional rationale that reduces it to a failure to opt out,²⁴⁴ Kahan and Silberman in effect advo-

commentators have often assumed that adequate representation—rather than an individual opportunity to be heard—is the touchstone of due process.” (footnote omitted) (collecting authorities in note 2)). Kahan and Silberman cite Hart & Wechsler, see Kahan & Silberman, *supra* note 228, at 227 n.44, but proceed to ignore their description of *Epstein I*.

239. Kahan & Silberman, *supra* note 228, at 268 (emphasis added).

240. Green, What, *supra* note 48, at 1774.

241. Early in the article, Kahan and Silberman acknowledge the special dangers inherent in settlement classes in connection with exclusive federal claims, see Kahan & Silberman, *supra* note 228, at 235–46, and they acknowledge that “potential dangers in the [global state court] settlement process necessarily raise questions about the adequacy of representation,” *id.* at 269. But they brush these dangers aside too quickly in their discussion of collateral attack and focus unduly on the “strong policies with respect to finality of, and respect for, state court adjudication.” *Id.* at 270.

242. Issacharoff, *supra* note 1, at 807–08.

243. Kahan and Silberman state that their “proposal would prevent a federal plaintiff who fails to respond to the state court’s *invitation* to participate in the state court hearing from attacking a state court global settlement collaterally.” Kahan & Silberman, *supra* note 228, at 258 (emphasis added). What “invitation”? Class notices are designed to discourage—not invite—participation, a matter that has escaped their attention.

244. Kahan and Silberman acknowledge that “[t]o some degree . . . adequate representation . . . is akin to . . . [personal] jurisdiction: both go to the basis of the court’s authority . . . and both implicate due process of law,” Kahan & Silberman, *supra* note 228, at 263, but they claim that “forcing a class member to object to the adequacy of representation in [F1] does not undermine the adequacy requirement,” because that court “does have personal jurisdiction over absent class members,” *id.* at 263–64. This claim

cate a rule of compulsory appearance in F1 for class members in any (b)(3) class action, according to which a class member must appear in order to preserve his or her due process rights.²⁴⁵ In so doing, they ignore that part of *Shutts* which states that absent class members may sit back and do nothing: "[A]bsent plaintiff class members . . . need not hire counsel or appear . . . [because] an absent class-action plaintiff is not required to do anything."²⁴⁶ *Shutts* contains no suggestion that the consequence of taking the opinion at its word is forfeiture of the conventional right to collateral attack. As both Justice Ginsburg and Justice Kennedy recently made clear in *Baker*, compulsory appearance is far removed from the traditions of our law.²⁴⁷ Indeed, Justice Ginsburg cited *Martin v. Wilks* for that proposition.²⁴⁸ Kahan and Silberman's protestations to the contrary, their claim is inconsistent with settled understandings regarding the binding nature of class actions.²⁴⁹

At the very end of this effort, Kahan and Silberman appear to suddenly retreat from their categorical prohibition.²⁵⁰ They seem prepared to allow collateral attack by an objector who appeared and made a challenge that was rejected:

Contrary to some federal courts who seem to regard objections by federal plaintiffs in the state proceedings as a reason not to permit collateral attack, we view such an appearance in the state proceeding as a prerequisite for collateral attack—at least as long as such an appearance is not clearly futile.²⁵¹

Kahan and Silberman characterize this "requirement [as] similar to a rule of exhaustion of remedies."²⁵² If so, it is clearly inconsistent with existing

incorrectly assumes that failure to opt out is all that is required to establish in personam jurisdiction over nonresident class members. Under *Shutts*, adequate representation is also a necessary part of the inquiry into personal jurisdiction over nonresident members.

245. See *id.* ("[A] court hearing a class action does have personal jurisdiction over absent class members if there has been notice and a right to opt out; [it is accordingly appropriate to force] a class member to object to the adequacy of representation in the court entertaining the proposed class suit.").

246. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985).

247. See *supra* notes 12–13; *Baker v. General Motors Corp.*, 118 S. Ct. 657, 666, 669 (1998).

248. See *Baker*, 118 S.Ct. at 669 (citing *Martin v. Wilks*, 49 U.S. 755, 761–63 (1989)).

249. Kahan and Silberman's result, moreover, is unworkable. Apparently, they would bar collateral attack irrespective of the class members' knowledge of the factual underpinnings relevant to the inadequate representation claim, at least as long as the class members were aware of the existence of the underlying class action proceeding itself. If so, that is a grave defect. See *Epstein v. MCA, Inc. (Epstein II)*, 126 F.3d 1235, 1244 (9th Cir. 1997). If, on the other hand, the class members' individual knowledge were a relevant inquiry, the result would be endless side bar litigation over what the individual absent class members knew or should have known.

250. Commentators have understood Kahan and Silberman's argument to be categorical in nature. See, e.g., Hart & Wechsler, *supra* note 49, at 111 (Supp. 1997) (preclusion if an adequate opportunity to object exists).

251. Kahan & Silberman, *supra* note 228, at 279 (footnote omitted).

252. *Id.* at 279 n.190.

law, which rejects such a two-bites-at-the-apple approach.²⁵³ Nor is there any convincing case made for the exhaustion argument. If any objector's claim is sustained in F2 after it has been fully considered and rejected in F1, the consequence can only exacerbate tensions between the courts. But, in reality, Kahan and Silberman do not advance an exhaustion argument. No attack based on inadequate representation is in fact allowed. The collateral challenge is limited to an assessment of "the structures that state courts employ in settling federal claims."²⁵⁴ Once again, what matters is facially fair state court procedure, not substance alone.

Epstein II presented a spin on the foregoing issue. The majority and dissent agreed that, if adequacy of representation had not been "litigated" in F1, providing a collateral challenge by absent (in-state and out-of-state) class members was appropriate.²⁵⁵ In dissent, Judge O'Scannlain asserted, however, that objectors had litigated the issue, and accordingly, F1's determination must be given preclusive effect.²⁵⁶ The majority denied that the issue had been litigated and that the Delaware courts would so hold.²⁵⁷ In any event, the majority said that the objectors could not bind absent class members. "Objectors are objectors, not class representatives."²⁵⁸ With deference, this view seems plainly correct under existing law. No state statute or case gave notice to anyone that objectors acted as class representatives with authority to preclude absent class members.²⁵⁹ Moreover, if an objector could conclusively bind all other class members, courts would have to develop a whole new body of law: the Doctrine of the Adequate Objector. Whatever the content of such a doctrine might be, surely no objector could accomplish what a representative could not: binding a class without satisfying due process requirements.

253. This is longstanding law. In *Hansberry v. Lee*, the Court said that it was "familiar doctrine . . . that members of a class . . . may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation." 311 U.S. 32, 42-43 (1940) (emphasis added); see also *Epstein II*, 126 F.3d at 1246; *In re Real Estate Title & Settlement Servs. Antitrust Litig. (Real Estate Title)*, 869 F.2d 760, 771 (3d Cir. 1989); *Deboer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1176 (8th Cir. 1985), cert. denied sub nom. *Crehan v. Deboer*, 116 S. Ct. 1544 (1996).

254. Kahan & Silberman, *supra* note 228, at 279.

255. See *Epstein II*, 126 F.3d at 1240, 1257.

256. See *id.* at 1256 (O'Scannlain, J., dissenting).

257. See *id.* at 1240-41.

258. *Id.* (quoting reply brief of *Epstein* plaintiffs); see *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29 (1917) ("[I]t must be taken to be established that a court cannot conclude all persons interested by its mere assertion of its own power, . . . even where its power depends upon a fact and it finds the fact.") (citation omitted). In protecting the integrity of the F1 proceeding, the ALI proposal of antisuit injunctions and, more importantly, notice of a right to intervene and an intention to preclude, provide a mechanism superior to treating objectors as class representatives.

259. This fact alone is constitutionally decisive of their inability to do so, as made plain in *Richards v. Jefferson County*, 116 S. Ct. 1761, 1765-68 (1996) (noting that objectors in prior proceedings had not been designated as class representatives).

CONCLUSION

This Article examines *Shutts's* reasoning and lineage, including its implied consent and fundamental fairness strains, and argues that lower courts have erred in treating an absent class member's failure to opt out as synonymous with establishment of sufficient in personam jurisdiction to prohibit, whether by way of injunction or preclusion, due process challenges in F2. Under existing law, traditional principles of in personam jurisdiction—not the relaxed version of consent endorsed in *Shutts* for class action plaintiffs—govern the issuance and enforcement of injunctions. And while the Court's opinion in *Baker* highlights the distinction between the direct enforcement of injunctions and preclusion in the context of the Full Faith and Credit Clause, this distinction is one to be minimized when the F2 challenge is based on due process grounds. In a world of reverse auctions and races to judgments, I believe that non-party, nonresident class members should remain free to challenge an otherwise preclusive class judgment on due process grounds in a forum of their choosing.

Nevertheless, notwithstanding my preference for permitting F2 collateral challenges on due process grounds to go forward, I fully recognize that neither a rule permitting nor a rule forbidding the issuance of antisuit injunctions in the class action context would prevent all forms of potential abuse. The facts of *Carlough* and the migratory settler phenomenon presented in *GM Trucks II* are examples of situations where limited injunctive authority might actually be desirable.²⁶⁰ The need for comprehensive congressional action is apparent and congressional power to reorder the legal landscape cannot be doubted. *Real Estate Title* held that, in a non-opt-out class, due process required reversal of the antisuit injunction because the nonresident class members lacked minimum con-

260. My colleague Professor Coffee proposes an intriguing solution to the migratory settler problem. The F1 court could pass a standing order which states, in effect, that to satisfy the condition of adequate representation necessary to give preclusive effect to any F2 judgment, the named plaintiffs and their counsel must agree to avoid potential conflicts of interest in any other forum. This proposal may require legislation, given the limitations of the Rules Enabling Act. See 28 U.S.C. § 2072(b) (1994); Carrington & Apanovitch, *supra* note 48, at 461 ("The limit to the Court's authority . . . is . . . explicit in the provision of the Rules Enabling Act forbidding the court to . . . modify[] or abridg[e] substantive rights."). This proposal has decided advantages over collateral attacks that are necessarily confined only to questions of adequacy of representation and other due process issues. Professor Coffee's suggestion would not constitute an impermissible collateral attack on the F2 court, because the litigants have agreed (albeit under pressure) to a procedure that facilitates an open exchange of information between forums. This format would help reduce the dangers inherent in the conduct of migratory settlers.

tacts with the forum.²⁶¹ As *Real Estate Title* itself recognized,²⁶² however, it is implausible that an antisuit injunction issued by a federal district court under the express authorization of an act of Congress would be invalid. Congress could authorize nationwide service of process.²⁶³ Indeed, it could establish a single district court for the entire United States²⁶⁴ without requiring minimum prelitigation contact with a specific forum.²⁶⁵ This is perfectly apparent when one looks at bankruptcy.²⁶⁶

In *Agent Orange II*, the Second Circuit was correct in holding that, while the Texas litigants had a due process right to challenge collaterally the adequacy of representation in *Agent Orange I*, they did not have the

261. See *In re Real Estate Title & Settlement Servs. Antitrust Litig. (Real Estate Title)*, 869 F.2d 760, 769 (3d Cir. 1989). The court concluded that an important due process distinction exists between actions taken by the court on its own and actions taken by Congress. In that context, however, the court never considered whether the existence of nationwide jurisdiction over defendants under the antitrust acts might provide sufficient basis for nationwide "ancillary" injunctions over absent plaintiff class members. See *id.* at 767-68. This postulated distinction is troublesome. The court takes no action on its own; all exercises of judicial power are pursuant to statute. Is the court holding that the existing statutes governing district courts are unconstitutional to the extent that they authorized the antisuit injunction? Further exploration of this topic is beyond the scope of this Article.

262. See *id.* at 767.

263. Many cases so assume. See, e.g., *Mississippi Publishing Co. v. Murphree*, 326 U.S. 438, 442 (1946) ("Congress could provide for service of process anywhere in the United States."); *Robertson v. Railroad Labor Bd.*, 268 U.S. 619, 622 (1925) (Brandeis, J., for a unanimous court). This conclusion is said to be open to some challenge once the *International Shoe* fairness test replaces earlier notions of territorial sovereignty, see Hart & Wechsler, *supra* note 49, at 1587-88, but I do not see it as a serious shift. Of course, if irrationally chosen (e.g., all federal claims arising in Florida must be tried in Alaska), it would offend the Fifth Amendment on conventional due process grounds. The state courts, naturally, cannot assert comparable scope to their process by invoking a doctrine of jurisdiction by necessity. See *Helicopteros Nacionales S.A. v. Hall*, 466 U.S. 408, 419 n.13 (1984).

264. See Hart & Wechsler, *supra* note 49, at 1588.

265. See, e.g., Fed. R. Civ. P. 4(K)(2). Whether this rule is validly promulgated under the Rules Enabling Act is, to say the least, doubtful. See *Carrington & Apanovitch*, *supra* note 48, at 486-88.

266. Bankruptcy is a nationwide forum for the consolidation and disposal of mass and toxic tort litigation. Jurisdiction is conferred on the district courts by 28 U.S.C. § 1334 (1994). The extent to which Rule 23 can be used to circumvent bankruptcy has generated considerable controversy. See, e.g., *In re Asbestos Litig. (Ahearn I)*, 90 F.3d 963, 982-84 (5th Cir. 1996); *id.* at 996 (Smith, J., dissenting). No serious doubt exists as to the court's nationwide jurisdiction. The relevant bankruptcy rule governing service of process has no territorial limitations. See Fed. R. Bankr. P. 7004; *In re Celotex Corp.*, 124 F.3d 619, 629-30 (4th Cir. 1997). But see *Warfield v. KR Entertainment Inc.*, No. 97-3707, 1998 U.S. App. LEXIS 8779 (8th Cir. May 11, 1998) (minimum contacts with the forum state required). Moreover, pending proceedings against a debtor in any other court are automatically stayed, see 11 U.S.C.A. § 362 (West 1993 & Supp. 1997), and the court's final judgment includes an antirelitigation injunction. See *id.* § 524(a).

right to make that challenge in a forum of their own choosing.²⁶⁷ The court said:

Likewise, there is no merit in their argument that removal in these cases interferes with their right to collaterally attack the *Agent Orange I* judgment by denying them the forum of their choice. Although appellants' attack is founded on their constitutional right to due process, nothing in the Constitution or in our jurisprudence demands that class members have an unchallengeable choice of forums in which to launch it. While the law as a general rule permits a plaintiff to choose his forum, that freedom is not absolute, as the removal, venue and multidistrict litigation statutes and the personal jurisdiction and *forum non conveniens* doctrines all demonstrate. It is obvious, from what presently is occurring herein, that the removal and multidistrict transfer in the instant case have not impinged unduly upon appellants' right of collateral attack.²⁶⁸

Constitutional considerations to the side, however, we must be mindful of the *existing* differences between class action practice and bankruptcy. Bankruptcy jurisdiction is designed as a consolidation mechanism; as such, it does not suffer from reverse auctions and races to judgment. While pre-trial MDL proceedings ameliorate the latter evils, the MDL court has no trial authority.²⁶⁹ More relevant, however, is that the MDL has limited authority to interfere with parallel state proceedings under optimum conditions.

Given the present class action landscape, absent class members should be allowed to make their collateral due process challenges in a forum of their own choosing. Finally, until Congress acts, *Real Estate Title's* antisuit injunction holding should be retained, and its reasoning understood as a principle of equitable remedial law even in instances in which the federal court has nationwide service of process.²⁷⁰ The *Shutts* fiction should be extended no further. In the present world of races to judgment and reverse auctions, and in the absence of comprehensive congressional reforms addressing these issues, further restricting adequacy of representation challenges in F2 courts would greatly exacerbate both the problems of distant forum abuse and the burdens imposed upon absent class members.

267. See *In re "Agent Orange" Prod. Liab. Litig. (Agent Orange II)*, 996 F.2d 1425 (2d Cir. 1993).

268. *Id.* at 1432-33.

269. See *Lexecon Inc. v. Milberg Weiss*, 102 F.3d 1524, cert. granted, 117 S. Ct. 1818 (1997).

270. On the joinder of the involuntary plaintiff, see Fed. R. Civ. P. Rule 19.