Notre Dame Law Review

Volume 79
Issue 5 *Honoring David Shapiro*

Article 4

10-1-2004

How like a Winter - The Plight of Absent Class Members Denied Adequate Representation

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HOW LIKE A WINTER? THE PLIGHT OF ABSENT CLASS MEMBERS DENIED ADEQUATE REPRESENTATION

*Susan P. Koniak**

INTRODUCTION: THE PLEASURE OF THE FLEETING YEAR[1]

Class actions assume absent class members.[2] Notices in class actions tell class members that they need not show up in the courthouse, although they may if they choose.[3] Class members are told that class counsel and the named class representatives will look out for them,

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* Professor of Law, Boston University School of Law. Many of the arguments made here were first made by me in an amicus brief co-authored by Professors David Dana and David Shapiro, the latter of whom appears as counsel of record on the brief, filed in the case of *Dow Chemical Co. v. Stephenson*, 539 U.S. 111 (2003). *See* Brief of the Law Professors as Amicus Curiae in Support of Respondents at 2, *Stephenson* (No. 02-271). The brief was submitted to the court on behalf of ourselves and Professors Kevin Clermont, John Coffee, George Cohen, Roger Cramton, John Leubsdorf and Henry Monaghan. I thank all of those people, but especially my co-authors, my two Davids, who were so helpful in developing these arguments. Without them these ideas would not have been presented to the Court for its consideration. I want to thank David Dana also for having read and commented on a draft of this Article and Jonathan Whitby for his research assistance.

1 "How like a winter hath my absence been / From thee, the pleasure of the fleeting year!" WILLIAM SHAKESPEARE, *Sonnet XCVII*, *in* THE GLOBE ILLUSTRATED SHAKESPEARE 2300 (Howard Staunton ed., 1978).

2 *See* FED. R. CIV. P. 23(a)(1) (first prerequisite of a class action is that the class is "so numerous that joinder of all members is impracticable"). In theory, that could be true and yet all class members might show up in court to participate in a fairness hearing. I know, however, of no instance in which that has happened. In many, probably most, class actions, the entirety of the class could not fit in the courtroom. All that aside, it is nonetheless true that class actions assume many or most members of the class will take no part in the case at any stage in its progress through the courts.

3 *See* MANUAL FOR COMPLEX LITIGATION (THIRD) § 41.4, at 474 (1995) (providing a sample notice for a class action which states, inter alia, that "[A.B. Co. and its attorney, X.Y.,] will act as your representative and counsel for the presentation of the charges against the defendants. If you *desire*, you may also appear by your own attorney") (emphasis added). Moreover, I have seen notices that are even more direct in communicating that class members need not appear, but may do so if they desire.

although if they choose to hire their own lawyer, she may appear on their behalf.[4] They are also routinely told that once the decision in the class action becomes final they will be bound by it, losing any and all right to protest the resolution of their claims by the class action court or to bring an individual proceeding on the claims resolved by the class suit.[5] They will be bound by it, that is, unless they opt out in those class actions that provide an opt-out right.[6]

Is the language in notices telling absent class members that their claims cannot be brought in any other court true in all circumstances? If one sits out a class action, trusting that her rights will be protected by class counsel and the named representatives, and those rights are not, is she nonetheless bound by the judgment?

Class actions are not new devices.[7] Even their so-called modern form, embodied in Rule 23 of the Federal Rules of Civil Procedure and all the state rules that are modeled on that federal rule, has been around for well-nigh forty years.[8] Do class actions bind absentees even when they have not been adequately represented? One would think there was a simple answer to that question by now.[9] I certainly

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4 *Id.*

5 The *Manual for Complex Litigation*'s sample notice says: "By remaining a class member, any claims against the defendants for damages [covered by the class suit] will be determined in this case and cannot be presented in any other lawsuit." *Id.* In the *Agent Orange* class settlement, discussed in detail *infra* Part I.D., the settlement said that "all members of the Class are forever barred from instituting or maintaining any action against any of the defendants . . . arising out of or relating to, or in the future arising out of or relating to, the subject matter of the Complaint." *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 864 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

6 Absent class members are guaranteed the right to opt out in Rule 23(b)(3) class actions, generally those class actions for individual money damages, but are not in Rule 23(b)(1) or (b)(2) class actions, for example, class actions to resolve competing claims the resolution of one will necessarily resolve the others, such as water rights cases, and class actions for injunctive relief, such as school integration cases. Generally, the same is true under state procedural rules. *See, e.g.*, OHIO R. CIV. P. 23; PA. R. CIV. P. 1701–1716; *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (holding that state courts must provide out-of-state absent class members an opportunity to opt out, as well as notice and adequate representation, in class action suits for money damages).

7 *See, e.g.*, Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 ARIZ. L. REV. 687 (1997) (providing a fascinating historical appraisal of class action litigation).

8 Rule 23 was revised in 1966. *See* Christopher J. Willis, *Collision Course or Coexistence?* Amchem Products v. Windsor *and Proposed Rule 23(b)(4)*, 28 CUMB. L. REV. 13, 13 (1997).

9 To assert, as I do, that there has long been an answer, i.e., class members who are adequately represented are not bound, does not mean that there is a clear answer

thought so. And I was not alone. The venerable trio, Professors Wright, Miller, and Cooper, seemed to think so.[10] Newberg, long considered *the* authority on class actions, seemed to think so.[11] And David

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to what constitutes adequate representation. There is not. *See* Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1945 (1998) (noting that the *Hansberry* Court "announced a rationale for determining when class suits should be given preclusive effect—only upon adequate representation"). The *Hansberry* Court "provided little guidance, however, concerning the *content* of that standard." *Id.*; *see also* Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 387 (2000) (finding that "the law remains remarkably unsettled with respect to what qualifies as inadequate representation"). And that is a problem, deserving serious scholarly attention, as Professor Nagareda points out in a recent article. *See* Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 289 (2003) (arguing that "[t]he uncertainty over what makes for inadequacy in class representation . . . casts a shadow over the finality of any class judgment").

Filling out the contours of "adequacy" is not, however, my focus here, although I have provided some ideas on that matter in other writing. *See* Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1048–49 (1995) [hereinafter Koniak, *Feasting*] (proposing, inter alia, a ban on simultaneous representation by class counsel of two classes against a common defendant; a duty of candor to the court requiring lawyers to disclose all material adverse facts when advocating a class settlement; and offering a detailed analysis of the kinds of conflicts that should matter in class litigation); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1056 (1996) (using standards from tort law, antitrust law, and consumer protection statutes to bring content to the concept of adequacy); *see also* Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 2 (1995) [hereinafter Koniak, *Through the Looking Glass*] (discussing the inadequacy of "rights" theory to protect absent class members and suggesting that an "obligation" approach would work better, i.e., if obligations were imposed on the court and counsel which, if not fulfilled, would render a class settlement void).

Although I agree with Nagareda that the concept of adequacy is indeterminate in the extreme, I disagree with his take on the consequences of that indeterminacy. Nagareda follows Kahan and Silberman in overstating the consequences for class action practice created by the current state of the law on preclusion in class actions. *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, 266–74 (1996). I refute these predictions of impending doom. *See infra* Part II.C. On some of the other problems I have with Nagareda's analysis, see *infra* notes 48, 199, 220–21, 296, and 349.

10 *See* 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4455, at 484–87 (2002) (describing the traditional approach as one that not only demands that absent class members be adequately represented before they are bound but that allows absentees to challenge adequacy in a collateral proceeding and criticizing the more novel approach that denies absentees the right to raise adequacy in collateral proceedings).

11 *See* HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS §§ 16-133, 16-136 to 16-137 (3d ed. 1992) (explaining that Rule 23 "does not disturb the recog-

Shapiro, a leading light in civil procedure and federal practice whose work is honored by this Issue, seemed to think so too.[12]

The simple answer was that class actions do not bind absentees who have not been adequately represented.

But are they nonetheless bound by the class action court's conclusion (necessary for any settlement in or judgment of a class action case) that they were indeed adequately represented, or may they challenge the binding nature of the class action judgment or settlement in a collateral proceeding in which they personally appear to contest the adequacy of the representation provided by class counsel in the original class action?[13]

Well, I thought that question had long ago been answered too and answered correctly. They could collaterally challenge the adequacy of their representation. That had to be so. Consider just the two most obvious reasons: (1) by definition absentees have no obligation to show up to challenge anything in the first proceeding, i.e., absentees are allowed to be absent; and (2) to insist that all challenges to adequacy be made in the first proceeding would require challenges to be made before the first representation was even complete. In other words, the right of absentees to attack adequacy in a collateral proceeding seemed to flow naturally from the first proposition, i.e., that absentees could not be bound without having been adequately represented. And here too, Wright, Miller, Cooper, Newberg, and

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nized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment" and that "[d]ue process of law would be violated for the class judgment" to be held binding "unless the court applying res judicata could conclude that the class was adequately represented in the first suit").

12 *See* Brief of the Law Professors as Amicus Curiae in Support of Respondents at 2, Dow Chem. Co. v. Stephenson, 539 U.S. 111 (2003) (No. 02-271) (noting that "[t]he traditional rule in this country has been, and is, that absent class members may collaterally challenge, and receive de novo review of, the adequacy of representation afforded them in a class action proceeding"). When I heard the Supreme Court had granted certiorari to consider whether absent class members could collaterally attack a class action settlement on the ground that they had been inadequately represented, I posted an e-mail on the civil procedure website to let other professors in the subject know that I wanted to file an amicus brief in this case to support what I considered a longstanding and important principle of law. The first person I heard from was David Shapiro who selflessly stepped up to devote his time and energy to this project, agreeing to be counsel of record on the brief that we wrote with Professor David Dana of Northwestern, and which we filed on behalf of ourselves and the professors named earlier. *See supra* note *.

13 *See* FED. R. CIV. P. 23(a)(4) ("One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representatives parties will fairly and adequately protect the interests of the class.")

Shapiro all seemed to have reached the same conclusion that I had.[14] Indeed, in their treatise on federal practice and procedure, Wright, Miller, and Cooper described a 1997 opinion holding that absent class members could collaterally attack a class settlement on the ground of inadequate representation this way: "The initial panel opinion [in *Epstein v. MCA, Inc.*] seemed surprising only by taking such great effort to reach conclusions that many students would have thought clearly required by long tradition."[15] But last term, the Supreme Court seemed unable to answer the question that Wright, Miller, and Cooper had seen as simple enough for a student. Having granted certiorari to decide whether absent class members may raise the adequacy of the representation they had received in a class action suit through a collateral proceeding, the Supreme Court, with Justice Stevens not participating in the case, was evenly divided.[16] What I and others had thought so obvious and so right was apparently neither, at least not for the Supreme Court.[17]

The Supreme Court's 4-4 split in *Stephenson* was not a complete surprise. In 1998, two leading academics, Marcel Kahan and Linda Silberman, published an article weighing in against the right of absen-

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14 *See* NEWBERG & CONTE, *supra* note 11, at 16-133 to 16-134; 18A WRIGHT ET AL., *supra* note 10, § 4455, at 448; Brief of the Law Professors, at 2, *Stephenson* (No. 02-271).

15 18A WRIGHT ET AL., *supra* note 10, § 4455, at 478–83 (describing the Ninth Circuit's opinion in Epstein v. MCA, Inc. (*Epstein II*), 126 F.3d 1235 (9th Cir. 1997), an opinion that was subsequently withdrawn and replaced by an opinion holding that class members could not challenge adequacy in a collateral proceeding, Epstein v. MCA, Inc. (*Epstein III*), 179 F.3d 641 (9th Cir. 1999)). *See* discussion *infra* note 104 and accompanying text (explaining the bizarre circumstances that led to *Epstein II*'s withdrawal by the Ninth Circuit panel).

16 Dow Chem. Co. v. Stephenson, 539 U.S. 111 (2003).

17 Indeed, I thought the answer so obvious that even after *Epstein II* (holding collateral attack based on inadequacy of representation not available to absentees) and Kahan and Silberman's article, *supra* note 9, espousing the no-collateral-attack view, I had little interest in writing an article to refute either. When Woolley published his excellent work on this matter, any lingering doubts about writing on this were removed. *See* Woolley, *supra* note 9. Although the arguments he presented there differed from my own ideas in a few details and somewhat in emphasis, it seemed that a position obvious enough to need little defense could hardly need to have that defense presented more than once. The petition for certiorari in *Stephenson* made me rethink the need to publish on this topic. The 4-4 split convinced me that the right side, Woolley's side, was in jeopardy of going down for the count. I write this to honor David Shapiro, beside whom I have fought for the principle I defend here in two cases in the last eight years. I also write to stand in Woolley's corner, supporting the same principle he wrote to support.

tees to challenge adequacy in collateral proceedings.[18] They were sharply critical of the court holding that Wright, Miller, and Cooper suggested was clear enough to make the lengthy court explanation of its holding a puzzlement.[19] Kahan and Silberman stated that allowing absent class members an "unfettered" right to attack adequacy in a collateral proceeding was a "novel" idea.[20] They argued that the right answer was to allow absent class members to challenge the *procedures* used by the first court in concluding that the representation was adequate but to preclude absentees from challenging adequacy itself, given that absentees could have raised that matter in the original proceeding.[21] This, Kahan and Silberman argued, would give state courts, at least when they were exercising jurisdiction over absentees from other states, an incentive to establish and use procedures designed to protect the right of out-of-state absentees[22] and would, by encouraging absentees to raise objections to adequacy in the original court, help ensure that the first court had sufficient information upon which to assess adequacy.[23] Professor Patrick Woolley wrote a powerful and careful refutation of the Kahan-Silberman position.[24] Much as I admire his work, I must, however, confess that my reaction when I first read it was similar to the sentiment expressed in similar circumstances by Wright, Miller, and Cooper:[25] Did this position really need so painstaking a defense? The passage of time has proved that Woolley understood what I did not: the other side was getting up a head of steam. Indeed, when *Stephenson* went to the Supreme Court, the business community came out in force to argue against the right of collateral attack.[26]

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18 Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 765 (1998).

19 *See id.* at 786–90 (advocating a more limited collateral attack based upon process values).

20 *Id.* at 765–66; *cf.* Hazard et al., *supra* note 9, at 1945 (providing an illuminating and careful analysis of the history of preclusion in class actions and concluding that, since 1940 when *Hansberry* was decided, the right to collaterally attack a class judgment on the ground of adequacy has been recognized).

21 Kahan & Silberman, *supra* note 18, at 786.

22 *Id.* at 789.

23 *Id.* at 788.

24 Woolley, *supra* note 9.

25 *See supra* text accompanying note 15 (quoting Wright, Miller, and Cooper's reaction to *Epstein II*).

26 Brief for the American Insurance Association, the National Association of Manufacturers, and the Chamber of Commerce of the United States as Amici Curiae in Support of Petitioners at 4–5, Dow Chem. Co. v. Stephenson, 539 U.S. 111 (2003) (No. 02-271).

Apart from the business community, academics, and a divided Supreme Court, in recent years three appellate courts have addressed this question in depth.[27] Two gave the answer that I keep describing as simple: without adequate representation these absentees are not bound.[28] But increasingly, the emphasis seems to be on *these* parties, as if the facts in the particular case were the decisive factor thereby suggesting that in many (maybe most) other situations the absentees might well be bound. The Second Circuit opinion affirmed by the equally divided Supreme Court in *Stephenson* is a "these" opinion,[29] and, albeit to a somewhat lesser extent, so is the recent decision by the Vermont Supreme Court in *Vermont v. Homeside Lending, Inc.*[30] Both of those decisions reject the collateral estoppel argument of the defendants, but hold back from providing the simple answer I will argue the Constitution demands: Any and all absentees may challenge adequacy in a collateral attack.

And then there is *Epstein v. MCA, Inc.* (*Epstein III*).[31] In that case, after having gotten the answer right, a Ninth Circuit panel reversed itself, an unusual move,[32] and held that absentees must challenge adequacy in the original class action or forever hold their peace.[33] Although the Ninth Circuit's adherence to the holding in *Epstein III* is

27 From my longstanding interest in this topic, I can attest to the infrequency of court decisions on this subject, which itself is evidence of the overstated nature of the arguments that equate a right to attack to the near certain use of that right in all, most or even a substantial minority of class action cases. For more on the sky-will-fall arguments, see *infra* Part II.C.

28 *See* Stephenson v. Dow Chem. Co., 273 F.3d 249, 261 (2d Cir. 2001), *aff'd by an equally divided Court*, 539 U.S. 111 (2003); Vermont v. Homeside Lending, Inc., 826 A.2d 997, 1017–18 (Vt. 2003). The third case was *Epstein III*. It stands alone in its absolute rejection of the position advocated in this Article. All three cases are discussed in depth *infra* Parts I.B, I.C, and I.D.

29 *Stephenson*, 273 F.3d at 261 (holding only that "*these* plaintiffs [are not precluded] from asserting their claims . . . [b]ecause *these* plaintiffs were inadequately represented in the prior litigation") (emphasis added).

30 *Homeside Lending*, 826 A.2d at 1017:

> We need not enter the heart of the debate [in the post-*Shutts* decisions on whether adequacy of representation can be raised on collateral attack]. . . . [Even courts that restrict collateral attack have] recognized that collateral attack based on inadequate representation is permissible if 'the opposing party was on notice of facts making that failure apparent.' . . . Here, we believe that Defendants were on notice of the facts that made representation inadequate.

31 179 F.3d 641 (9th Cir. 1999). *Epstein* and the reason for the "*III*" is discussed *infra* note 103 and accompanying text.

32 *See infra* notes 104 and accompanying text.

33 *Epstein III*, 179 F.3d at 648–49.

somewhat in doubt,[34] the decision has not been overruled. The desire to ensure finality to class action settlements so as to provide defendants with certainty on their liabilities has thus produced upheaval and uncertainty in the law. If the price of jettisoning bad law is uncertainty, so be it. But good law should remain.

Those who argue against an unfettered right of absentees to mount a collateral attack based on inadequacy of representation bemoan the lack of finality to class action settlements that right creates. Due process is, however, always in tension with efficiency, speed and finality. If our goal was to design a system to resolve disputes cheaply, quickly and once-and-for-all, one proceeding would always suffice and that proceeding would surely not be adversarial or conducted in what we understood to be a court.[35] I say the simple and longstanding answer on the question of collateral attack is right and should be preserved. It is time to turn to the reasons for my conviction.

I. "WHAT FREEZINGS HAVE I FELT, WHAT DARK DAYS SEEN!"[36]

A. The Exception or the Rule?

I am about to tell you three stories of inadequate representation. Before I do, however, I want to address this question: How representative are these stories? In other words, is the treatment of absentees in these stories closer to an exception or the rule?

I have been writing about class actions since 1995.[37] My critics claim that I concentrate unfairly on those rare cases of egregious

34 *See* Frank v. United Airlines, Inc., 216 F.3d 845, 851–53 (9th Cir. 2000).

35 Class actions already come dangerously close to being process-less. Fairness hearings are, in almost all cases, extremely perfunctory. No particular rules apply on the presentation or need for evidence, pre-hearing discovery rights of objectors or any other matter of significance, and the result (acceptance of the class settlement offered) is a virtual given. *See* Susan P. Koniak, *The Lawlessness in Our Courts*, 28 STETSON L. REV. 283, 291–98 (1998) (describing the lawlessness of contemporary class action practice). The move to deny absent class members the right to complain later about the inadequacy of their representation in the original proceeding is thus, in one sense, all too predictable. But that, of course, does not make it right.

36 SHAKESPEARE, *supra* note 1, at 2300.

37 The first article I wrote on this subject was *Feasting While the Widow Weeps*, *supra* note 9. I was the expert witness for the objectors in the *Georgine* class action, which came to the Supreme Court as *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). I was paid what for me was (and still is) a great deal of money for the time I spent working on that case. Since *Amchem*, I have written a series of articles on class action abuse. *See* Susan P. Koniak, *Class Action Against Class Counsel*, 1 J. INST. STUD. LEGAL ETHICS 249 (1996); Susan P. Koniak & George M. Cohen, *In Hell There Will be Lawyers without Clients or Law*, 30 HOFSTRA L. REV. 129 (2001); Koniak, *supra* note 35; Koniak, *Through the Looking Glass*, *supra* note 9; Koniak & Cohen, *supra* note 9.

abuse,[38] first *Amchem Products, Inc. v. Windsor*[39] and then the notorious *BancBoston* cases,[40] the last chapter of which has just been written and will concern us here.[41] Some academics contend that most class actions are resolved fairly.[42] Implicit in their arguments is the assumption that judges who preside over fairness hearings generally function as effective guardians of the rights of the absent class, including its right to adequate representation, and are able to assess the fairness of a class settlement.[43] That assumption is based not on actual evidence from the class action world but rather seems to rest on two other articles of faith: the widespread assumption (which by and large I share) that almost all judges do their jobs diligently and honestly; and, perhaps to a lesser extent, the assumption that our courts generally produce just results.

To be fair, the academics who portray judges as adequate monitors of class action abuse can hardly be faulted for relying on assumptions instead of concrete evidence. There is no all encompassing catalog of class actions,[44] and even if there were, there is no agreed upon definition of abuse. Take *Amchem.* Before that case reached the Supreme Court I wrote about it as a case of abuse. I said the absent class (and the named representatives, for that matter) had been inadequately represented by class counsel.[45] I said class counsel had sold out the entire class and that, despite the fact that this was one of those rare class actions in which well funded and competent objec-

38 *See, e.g.*, Eric D. Green, *Advancing Individual Rights Through Group Justice*, 30 U.C. DAVIS L. REV. 791, 803 (1997) ("Susan Koniak has written about atrocious abuse of class actions in some of her articles. There is, however, no empirical evidence . . . showing any widespread abuse or collusion.").

39 *See* Koniak, *Feasting*, *supra* note 9, at 1051–86 (discussing the *Amchem* case in detail).

40 Koniak & Cohen, *supra* note 9, at 1057–89.

41 *See* discussion of *Homeside Lending*, *infra* Part I.C.

42 *See, e.g.*, Green, *supra* note 38, at 803 (finding no "widespread abuse or collusion" in class actions); Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1172 (1995) (arguing that it is the failure of ethical rules to take into account the special scenarios created by mass tort class action settlements that creates a faulty perception of unfairness); David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210, 252–53 (1996) (challenging "the orthodox assumption that collectivization of risk-based tort is antithetical to the notion of individual justice as self-determination").

43 *See generally* sources cited *supra* note 42.

44 *See* Koniak & Cohen, *supra* note 9, at 1081–89 (describing the difficulties of collecting evidence on judicial performance in class actions).

45 *See* Koniak, *Feasting*, *supra* note 9, at 1137–51 (describing the inadequate representation of the widowed class representatives in *Amchem*).

tors appeared to explain all this to the court, the district court judge could not have cared less.[46] In large measure the Supreme Court agreed with me.[47] Some of my critics use *Amchem* as an example of my writing about only the most egregious cases of abuse. But before the Supreme Court decision and even after it, many others (also critics of mine) denied or were unsure that this case was an example of abuse at all.[48] One might say abuse is in the eye of the beholder, but I believe

46 *See id.* at 1048 (criticizing "the district court's willingness to turn a blind eye to the facts and neglect the law").

47 *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625–28 (1997).

48 For articles supportive, in whole or part, of the *Amchem* settlement prior to the Supreme Court's decision, see Menkel-Meadow, *supra* note 42, at 1159 n.† (stating that while she did not fully agree with the brief submitted by the law professors in *Amchem*, she also did not fully disagree either); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 962 (1995) (dismissing the "doubters" who "tend to focus on the specific terms of particular settlements" rather than "comparing the treatment of claimants under the settlement against the likely disposition of their claims at trial"); *cf.* Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After* Amchem *and* Ortiz, 80 TEX. L. REV. 1899, 1923–24 (2002) (arguing that class settlements like that in *Amchem* are less abusive of the rights of plaintiffs than one alternative to them, aggregate settlements, and that critics of class settlements seem blind to that fact); Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1749–50 (2002) (finding an analogy between the "overgrazing of the commons and . . . current [claimants]" in the *Amchem* case). Hensler's criticism notwithstanding, I am fully aware of the abuse that occurs in the aggregate settlement process. But abuse elsewhere simply does not prove that the abuse in class actions is not serious and pervasive. Both systems need to be cleaned up. Moreover, there is a specific ethics rule that applies to aggregate settlements, MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2002) (providing that a lawyer cannot make an aggregate settlement for two clients' claims unless the clients have both individually given informed consent). I fully realize that this rule is more honored in the breach, but it provides a solid starting point for checking abuse because tort suits have been brought and relief received for violations of that rule in the aggregate settlement process. That means that there is some meaningful deterrent to abuse, a conclusion confirmed by the many calls I get from lawyers seeking advice on how to stay out of trouble in making an aggregate settlement. In contrast, as fully explained in Koniak & Cohen, *supra* note 9, at 1140–41, tort suits to deter abuse in class actions are virtually nonexistent. Nagareda states that Professor Cohen and I propose treating class judgments "specially." Nagareda, *supra* note 9, at 376. In fact, our entire argument that class lawyers should not be immune from malpractice suits for shortchanging their clients, and should not be immune from the antitrust laws or any other law, is explicitly grounded in the cases that hold that lawyers in ordinary settings are subject to these laws. *See, e.g.*, Koniak & Cohen, *supra* note 9, at 1166 n.355 (describing a case holding the lawyer liable for a settlement made for individuals even when the court has approved the settlement because the client is a minor). Similarly, in discussing antitrust law we begin by noting that those laws apply to other lawyers and argue that class lawyers should be treated not specially, but the same as their non-class action colleagues.

when it comes to class actions, abuse is more a function of proximity than of taste. From a distance even the outrageous *BancBoston*-type settlement looked good enough to pass court muster.[49]

I contend that the class action world is full of abuse. But if, as I maintain, there is no catalog of class action cases and no definition of abuse accepted by all, can I demonstrate my point without lapsing into mere assertion, the problem I said plagues the other side in this debate? I believe I can by describing the mechanics of the process and the incentives of the players in that process. Most class actions are settled.[50] On that my critics and I agree, and there is solid empirical support for that proposition.[51] Who is at that settlement table? The defendants (or their counsel) and class counsel. Class counsel wants the defendants to agree to a settlement as the surest and quickest means to a fee, and she very much wants the defendants to agree to a "clear sailing" clause, an agreement not to challenge fees of *X* amount where *X* is a fairly hefty number. The defendants want the lawsuit concluded for as little money as possible, and they want for the least amount of dollars the greatest immunity from other suits, i.e., the broadest release possible from the greatest number of potential claimants. There is a trade to be made here: a settlement offer with clear sailing on substantial fees for class counsel in exchange for a chintzy settlement for a large class and a wide release. But that deal is at the expense of the group not at the table: the absent class. Indeed, the requirement that a judge approve any class settlement is largely, if not completely, a recognition of the serious likelihood of just such collusion. Not able to place the absent class at the table in fact (or there would be no need for a class action at all), the law insists that the judge assess what was banged out at the table by class counsel and the defendants.[52] But the judge is not actually at the table, and is not actually privy to all the give and take.

The judge is thus at a distinct disadvantage, not having been present at the table every step of the way. She has no reliable way to

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49 That can be shown by the fact that numerous courts approved settlements containing the same scheme as that used in *BancBoston*. Koniak & Cohen, *supra* note 9, at 1062 n.29.

50 *See* Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 143 (1996) (detailing empirical data on class actions in selected federal district courts and demonstrating the prevalence of settlements).

51 *See id.*

52 FED. R. CIV. P. 23(e) ("A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.").

discern in which nook or cranny (of usually quite complex deals) evidence of collusion may lie. She may not even know what she should be looking for, i.e., what a non-collusive deal would provide.[53] By and large she knows just what she is told. And the telling is not done by adversaries presenting clashing views on the settlement's fairness or the adequacy of the representation provided (or on any other matter on which she is required to rule, such as the adequacy of the notice). Very few class actions attract serious objectors who would challenge the settling parties' presentation of the virtues of the deal they jointly press upon the court.[54] There is rarely any real prospect of making money by scuttling a class deal.[55] So all most judges hear is a one-sided presentation about how wonderful the settlement is and how aggressively class counsel championed the absent class's cause. But there is more. Judges, honest as they may be and diligently as most may work, have an interest in settling any and all cases, and an even bigger interest in seeing large and cumbersome class actions settle.[56]

Class counsel are only human. They are not ethical heroes, nor should we expect them to be. That means that they are quite capable of talking themselves into believing that a deal promising them a sure and hefty fee also does right by the class, however much a disinterested observer *in possession of all the facts* would think the class had been seriously short-changed.[57] This is particularly easy given that all other class actions are settled with the same incentives on all sides, and thus the universe of settlements tends to support the assertion that *this* settlement is as fair as all those other settlements that have already been adjudged fair. The defendants, well aware of the vast number of cheap deals that have received court approval and the high probability of gaining judge approval for a deal, have no trouble believing that they can get their low-ball deal accepted by class counsel

53 *Cf.* Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1266 (1995) (describing the illusive nature of "fairness" when it comes to assessing a class settlement).

54 Willging et al., *supra* note 50, at 130–31 (reporting empirical data on the frequency of objectors).

55 *See* Koniak & Cohen, *supra* note 9, at 1102–15 (describing in detail the lack of incentives to mount serious objections to a class settlement).

56 *Id.* at 1122–30 (describing in detail the lack of information available to a judge in a class action and the incentives of judges in ruling on class action settlements).

57 I am often misread as saying that most class lawyers are consciously corrupt. I doubt that. What I believe is that the system condones behavior that enriches lawyers at the expense of their clients and that it is easy to convince oneself that things a system allows are good. When a judge will compliment a lawyer for a deal that short-changes her clients, who can blame her for thinking the deal does right by everyone?

and approved by the judge, giving them little incentive to offer good terms.

I submit that one does not need a world-class economist to predict that those who are not at the bargaining table will get the short end of the stick, even without the commentary on incentives I have just offered. When one considers the incentives along with the basic bargaining structure, I simply do not see how one can plausibly claim that abusive settlements are the exceptions and not the norm.

But you need not feel pressured to take sides on this question because the argument I will make here, that absent class members should not be bound to any settlement in which they were inadequately represented, is not dependent on the amount of abuse out there. I will argue that, whatever amount of abuse exists, denying absent class members the right to attack collaterally a settlement based on inadequacy of representation is likely to increase it,[58] but even that point is not central to my position. So why this lengthy aside on the frequency of serious abuse?

Two reasons. First, the three cases I will discuss are likely to strike you as extreme, and so a word on context seemed appropriate. They were not selected because of their facts,[59] but rather because two are the most recent examples of the new uncertainty in the courts on the issue of collateral attack—which I find troubling—and one of these is the case in which the Supreme Court granted certiorari. The third case was chosen because it contains the one clear statement by an influential appellate court, the Ninth Circuit, of the position that I am criticizing: no right to collateral attack. I imagined that reading about these cases, many of you would be wondering just how representative the facts in these cases are. I therefore felt it incumbent to give you what answer I could.

Second, and as important, the legal argument I present below depends, for the most part, on relatively abstract propositions about adequate grounds for the exercise of jurisdiction. Indeed, I could have skipped most of the factual details of these cases and thereby avoided any discussion about how representative of class action prac-

58 *See infra* text accompanying notes 356–58.

59 And my argument that abuse is widespread is not based on the abuse that I believe is evident in these cases. I recognize that one could as easily argue that collateral attacks, which are uncommon, *see infra* Part II.C, were mounted in these cases because they were not representative of other class settlements. I hasten to add that I do not buy that last argument, and I later suggest alternative explanations for the infrequency of collateral attack. *See infra* Part II.C; *see also infra* note 351 (explaining that the abusive settlement in one of the three cases was repeated in other lawsuits—none of which seems to have produced a collateral attack).

tice the facts in these cases are. But instead of skipping the facts, I spend considerable time on them. Why? The stories in these cases are striking, but there is a much more important reason to include them than that: law is not philosophy. Law is designed to operate in the real world, *now*, not in some distant tomorrow. It does not speak for our consideration, as philosophy does; it commands (however imperfectly). Thus, before we plunge into abstraction, you will be told the facts, not just the legal holdings. When we speak of law, it is important to be ever mindful that its effects on the real world are the first concern of law, not an afterthought. This is true, however much our perception of the "real world" may owe to the templates of meaning that we place on it through law and the other lenses that we use to help us make sense of what we observe.

The real world matters because real people live in it, people who get sick and die; people who get injured; people who feel wronged; people whose perception of justice is important to the maintenance of our system of law. The absent class is composed of these people. Corporations, by and large the defendants in these actions, for all their incorporeal nature affect the real world—with their power to do great good and their power to do devastating and widespread harm. A government committed to living under law and not through brute force abides in the real world, with its prisons and its schools and sometimes with abusive practices that threaten the liberty or life of masses of people at a time. The real world matters because all these constructions—from the pain of individuals to the frauds of corporations to the abusive practices of the police—are all liable to be filtered through the class action device. How we construct class actions—what the law of class actions is—thus plays a significant role in constituting the world in which we live. What could be more important than that? First things must come first. We therefore start with what happened in the real world.

B. Epstein v. MCA Inc., *a.k.a.* Epstein III[60]

Epstein III is the case that upended the apple-cart by holding that the Constitution not only allowed, but also in some instances required,[61] courts to deny absent class members attempts to attack col-

60 179 F.3d 641 (9th Cir. 1999).

61 On *Epstein III*'s insistence that its holding was required by the Supreme Court's decision in *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 369 (1996) (holding that a state court settlement of federal securities claims is entitled to full faith and credit despite the fact that state courts have no jurisdiction to litigate federal securities claims), see discussion *infra* notes 104–08 and accompanying text. The Supreme

laterally a class settlement on the ground of inadequate representation. This case is commonly referred to as *Epstein III* for reasons that will become apparent by and by.

After Matsushita took over MCA, some MCA shareholders filed a class action suit in federal district court in California, alleging violations of federal securities laws.[62] Another class action, alleging violations of Delaware law, was filed by other MCA shareholders in Delaware state court.[63] The Delaware class action did not allege any violations of federal law because state courts have no jurisdiction to hear federal securities claims.

Soon after the federal class action was filed, class counsel and defendant Matsushita told the Delaware court that they had a settlement to submit for court approval.[64] The proposed Delaware settlement would have released all the claims, state and federal, arising out of the takeover in exchange for $1 million in attorneys' fees and "an amended poison pill provision of dubious value."[65] No class member would receive any money.[66] Notice of this proposed settlement was sent to all shareholders. The notice said that class counsel had concluded that this settlement was fair after "extensive investigation of the facts and examination of the law involved."[67] The Delaware record, however, tells a different tale.

There is no sign that class counsel conducted any discovery in Delaware state court on the federal claims.[68] Indeed, class counsel told the state court that they had concluded the federal claims were frivolous after reviewing them "relatively quickly."[69] Counsel's "analysis" of the federal claims mimicked the defenses that Matsushita had raised in the California federal case.[70]

The Delaware court held a hearing on the settlement. Class counsel did its best to convince the court that its clients' federal claims

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Court decision reversed *Epstein v. MCA, Inc.* (*Epstein I*), which had denied full faith and credit to the state resolution of exclusively federal claims. 50 F.3d 644, 666 (9th Cir. 1995). Note that *Epstein I, II,* and *III* are all opinions by the Ninth Circuit, although *Epstein II* was vacated by *Epstein III,* and is thus no longer good law in the circuit. *See infra* notes 103–04 and accompanying text. The Supreme Court case will be referred to as *Matsushita.*

62 *Epstein III,* 179 F.3d at 643.

63 *Id.*

64 *Epstein II,* 126 F.3d 1235, 1251 (9th Cir. 1997).

65 *Id.*

66 *Id.*

67 *Id.* (quoting the settlement hearing record).

68 *Id.* at 1251–52.

69 *Id.* at 1252 (quoting the settlement hearing record).

70 *Id.*

were worthless.[71] They failed. The Delaware court found the *state* law claims to be of "little or no merit,"[72] but, unlike class counsel, it was not buying Matsushita's defenses to the federal claims. The state court said that the *federal* claims had "substantial merit,"[73] and held that to release those claims for no money would be unfair to the class.[74] It rejected the settlement. For the next ten months the Delaware case was dormant.[75]

Then the federal district court in California entered summary judgment for Matsushita.[76] The federal plaintiffs appealed. At that point, another proposed settlement was announced in Delaware.[77] This settlement would have given class members two cents per share, an amount the Delaware court called "meager."[78] To convince the Delaware court to accept this settlement of the federal claims (recall that at this point everyone accepted that the state claims were essentially worthless), class counsel once again set out to disparage their clients' federal claims. They said:

> [We have] reviewed the law and . . . reviewed the briefs and . . . looked at the findings of fact [and concluded that the federal claims are] so fraught with uncertainty, that those claims are so weak, that the record in that [sic] proceedings . . . is so horrendous, that the prospect of anything emerging from that case is so remote, that $2 million [the two cents per share deal] more than adequately compensates—much more than adequately compensates for the release of all the federal and state claims.[79]

In arguing to the Delaware court, class counsel continually emphasized how unlikely, in their judgment, it was that the Ninth Circuit would reverse, despite the fact that the federal appeals court would review the federal district court's decision de novo.[80] Expressing res-

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71 *Id.*

72 *Id.* (quoting *In re* MCA S'holders Litig. (*MCA I*), 598 A.2d 687, 690 (Del. Ch. 1991)).

73 *Id.* (quoting *MCA I*, 598 A.2d at 695–96).

74 *Id.*

75 *Id.* at 1253.

76 *Id.*

77 *Id.*

78 *In re* MCA S'holders Litig. (*MCA II*), No. 11740, 1993 WL 43024, at *1 (Del. Ch. Feb. 16, 1993).

79 *Epstein II*, 126 F.3d at 1253 (quoting the settlement hearing record).

80 *Id.*

ervations and suspicions,[81] the Delaware court accepted the $2 million dollar (2 cents a share) deal.[82]

Sometime thereafter the Ninth Circuit reversed the district court. The federal appeals court found, inter alia, that the federal claims had substantial merit,[83] just as the Delaware state court had suspected. That court of appeals opinion is *Epstein v. MCA, Inc* (*Epstein I*).[84] In *Epstein I*, Matsushita had argued that the Delaware settlement had disposed of the federal claims and that the Ninth Circuit was bound by the Full Faith and Credit Clause of the Constitution to honor that state court settlement by dismissing the federal claims as res judicata. The Ninth Circuit rejected that argument, holding that the Full Faith and Credit Clause did not require it to honor a state court's settlement of exclusively federal claims.[85] The Supreme Court disagreed with that holding and reversed.[86]

The case went back to the Ninth Circuit. Enter *Epstein v. MCA, Inc.* (*Epstein II*).[87] The shareholders now argued that, even if the Full Faith and Credit Clause applied to exclusively federal claims resolved by a state court through a settlement, they were nonetheless not bound by the state court class settlement unless they had been adequately represented.[88] They claimed they had not been.[89] They cited *Hansberry v. Lee*[90] for the proposition that absent adequate representation, it violated due process to bind absent class members to a class settlement or judgment.

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81 *MCA II*, 1993 WL 43024 at *1. And there was plenty of reason to do so. Why, for instance, had Matsushita not moved to dismiss the state class action after the Delaware court had (in rejecting the first settlement) announced that it found the state law claims—the only basis for its continuing jurisdiction—worthless? Instead, Matsushita let the state case sit dormant for months. And why was it dormant? Could it be that Matsushita was holding this case there to ensure that it could dispose of the federal claims cheaply whenever it found it opportune to do so? In *Epstein II* the Ninth Circuit mentions Matsushita's lackadaisical attitude toward the state case as a reason for the Delaware court's suspicion. *See Epstein II*, 126 F.3d at 1249.

82 *MCA II*, 1993 WL 43024 at *1.

83 *Epstein I*, 50 F.3d 644, 661 (9th Cir. 1995).

84 *Id.* at 644.

85 *Id.* at 661–66. In *Epstein II*, the Ninth Circuit said it had other reasons in *Epstein I* for holding that the Full Faith and Credit Clause did not apply (not inadequate representation, but still other reasons), challenging the Supreme Court's reading of its decision on full faith and credit as resting solely on the state court's lack of subject matter jurisdiction over the federal claims. *Epstein II*, 126 F.3d at 1238 n.4.

86 Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 369 (1996).

87 126 F.3d 1235 (9th Cir. 1997).

88 *Id.* at 1238.

89 *Id.*

90 311 U.S. 32 (1940).

As should be obvious from the facts presented thus far, if the absent class could raise adequacy they would win. Their lawyers had spent almost all their time arguing that their clients' federal claims were worthless. Class counsel seemed more like Matsushita's lawyers than lawyers for the class.[91] Undoubtedly, Matsushita's lawyers could see that pushing the idea that class counsel had been adequate in the Delaware proceedings was not the route to victory. They had something else in mind.

Matsushita argued that the class was not just bound by the Delaware settlement, it was bound by the Delaware court's finding that the class had been adequately represented in state court.[92] If the Delaware court said (implicitly or explicitly) that due process had been satisfied, the federal court had no right to inquire further.[93] Indeed, according to Matsushita, the Supreme Court had already decided just that in this case.[94] Never mind that in a footnote the Supreme Court had said it was not addressing whether due process had been denied the class.[95] Matsushita insisted that the Supreme Court's opinion, apart from that footnote, was broad enough to suggest it was deciding that all aspects of the Delaware court's opinion were binding on the absent class, including the state court's judgment on the adequacy of the class's representation.[96] The Ninth Circuit derided this

91 That, in fact, is how the Ninth Circuit described class counsel's behavior in the state court. *Epstein II*, 126 F.3d at 1250.

92 *Id.* at 1245.

93 *Id.* at 1238–39.

94 *Id.*

95 Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 379 n.5 (1996).

96 In my opinion, this is not a frivolous position. The Supreme Court opinion by Justice Thomas is written quite broadly, and the footnote purporting to narrow the text seems somewhat at war with the body of the opinion. But there is nothing new about that. Appellate decisions often bear the evidence of the compromises necessary to get a majority of judges to agree. That is not a "mistake" in law. It is a manifestation of the fact that legal opinions at the appellate stage are never the product of one judicial mind but must reflect a consensus among judges broadly in agreement. That our system builds in this need for consensus is a fact that is largely ignored by most jurisprudential theories on how ideal judges should behave. It is a particular problem for Professor Dworkin's much-praised theories on jurisprudence, which posit as an ideal a judge writing opinions largely free of the need to get (on an appeals court) at least one other judge to go along unless what the first judge says will not count as law. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 87–133 (1986). This critique of Dworkin's work was first articulated in Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986). As to what the Supreme Court "meant" to say about due process in the decision under discussion, given the tension between text and footnote, there is no one "right" answer, which is why I say Matsushita's argument is plausible, footnote notwithstanding.

argument.[97]

But Matsushita had others. All absent class members were bound because some objectors had appeared to contest adequacy in Delaware. Objectors could not bind all absentees, replied the Ninth Circuit.[98] But Matshushita had yet another way to win. It argued all absent class members were bound because they had been given the opportunity by Delaware to contest adequacy (as the objectors had done) and had forgone it. It was thus fair to hold absent class members, who had not bothered to object, to the consequences of their decisions. No, the Ninth Circuit said, absentees were not required to participate in the class action in any fashion.[99] They were not required to monitor it. They were not required to voice their objections. They did not have to do anything at all.[100] They could sit home and wait to see how the representation looked in its entirety. They would then, however, be stuck with the class action settlement or judgment *unless* they could demonstrate that class counsel and the named representatives had inadequately represented them.[101] Finally, Matsushita argued that the federal court's only job was to determine whether the *procedures* the state had used to reach its judgment on adequacy were fundamentally fair, not to determine de novo whether adequate representation was provided in fact. Wrong for the last time, said the Ninth Circuit, the absent class was entitled to adequate representation before being bound, not just to adequate procedures for determining adequacy.[102] Turning to the merits of the representation in Delaware, the Ninth Circuit found more than ample cause to hold that the shareholders had been denied adequate representation:

> [T]he only "vigorous" and "tenacious" work . . . that Delaware counsel performed on behalf of the Epstein plaintiffs was to convince the Chancery Court to adopt their adversary's position and view the federal claims as essentially worthless. This was not merely "inadequate" representation, it was hostile representation that served the interests of counsel in getting a fee, but did not serve the interests of the MCA shareholders . . . .[103]

Case closed. Well, not quite yet. *Epstein II* was decided by a panel split 2-1. Judge Norris wrote the opinion. Judge Wiggins joined him. Judge O'Scannlain dissented. Shortly after the decision was issued,

97 *Epstein II*, 126 F.3d at 1242.
98 *Id.* at 1240–42.
99 *Id.* at 1242–43.
100 *Id.* at 1243.
101 *Id.*
102 *Id.* at 1245–46.
103 *Id.* at 1255.

Judge Norris retired. Matsushita saw in that retirement an opportunity. All it needed was one more vote, and it asked for rehearing. Judge Thomas was now in Judge Norris's place, filling out the panel. Rehearing was granted,[104] and anyone could guess what was coming: there would be an *Epstein III* to reverse *Epstein II*. And so it was, although there was one surprising twist. *Epstein III* was 2-1, as was its predecessor, but the new majority was not Judges O'Scannlain and Thomas, the new member of the panel. It was Judges O'Scannlain and Wiggins, the latter judge reversing himself on the opinion he had joined just a short time before. Judge Thomas dissented, espousing the view that had convinced Judge Wiggins once upon a time, but no longer.

Epstein III is largely devoted to establishing that the Ninth Circuit on remand from the Supreme Court had no power to rule on the due process claim of the absentees.[105] According to the panel's new view, if the absent class members had any viable argument that binding them to the Delaware settlement violated due process, the Supreme Court could not have held that the Full Faith and Credit Clause required the federal courts to honor Delaware's disposition of the exclusively federal claims. How could Delaware law (or the Full Faith and Credit Clause, for that matter) bind the absentees to any part of the Delaware judgment, if that judgment violated due process? Had the Supreme Court not said the disposition of the federal claims was "binding?" That had to mean, according to the panel, that the absentees were bound to the Delaware court's holding on adequacy too. What of the footnote that *Epstein II* said confirmed its reading that the Supreme Court had not ruled on binding class members to the Delaware court's holding on adequacy? *Epstein III* said that the footnote, read properly, supported its view of the breadth of the Supreme Court's holding.[106]

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104 *Epstein III*, 179 F.3d 641, 643 (9th Cir. 1999).

105 *Id.* at 644.

106 Although, as I noted earlier, I do not think Matsushita's argument on the footnote was frivolous, *see supra* note 96, I think it is all but beyond the pale for the panel to have held that on a question as important as whether absent class members are bound by a state court's initial determination of adequacy, the Supreme Court gave a definitive answer in so indirect a manner, sub silentio, if you will (although the footnote makes "sub silentio" a stretch too). Patrick Woolley, obviously a much-more generous soul than I, has carefully analyzed the contrasting views presented in *Epstein II* and the Supreme Court's decision in *Matsushita* for anyone interested in this argument. *See* Woolley, *supra* note 9, at 416–22. He comes down squarely with *Epstein II*'s resolution, i.e., that the Supreme Court had *not* resolved the question of whether the class had been denied due process through inadequate representation. *Id.* at 422. Anyone interested in further analysis of the scope of the Supreme Court's decision

Epstein III is devoted almost entirely to the not terribly persuasive dance on the head of a pin about how the Supreme Court had already decided the question before the panel. It says relatively little about how that result can be squared with the rest of the Supreme Court's due process jurisprudence, which I suppose is the virtue of claiming that the appeals court had no choice in the matter.

But *Epstein III* says something more than simply "the Supreme Court decided this." It makes some effort to show that its understanding of *Matsushita* is consistent with the rest of the law. It argues that *Kremer v. Chemical Construction Corp.*[107] supports its reading of the Supreme Court's view on collateral attacks. *Kremer* held that a federal court had to give preclusive effect under the Full Faith and Credit Clause to a judgment reached in an administrative proceeding, provided that the state procedures in that proceeding met "minimum due process" requirements.[108] In *Epstein II*, the Ninth Circuit had dismissed the notion that *Kremer* precluded a collateral attack based on inadequate representation brought by absentees, pointing out that *Kremer*'s "fair procedures" approach to full faith and credit assumed that the party to be bound had actually been before the court, as in *Kremer*.[109] The *Epstein II* court insisted that *Kremer* did not address the question of binding absentees. Not so, said the court in *Epstein III*. *Kremer*'s "procedures" approach would henceforth, at least in the Ninth Circuit, extend to absentees too.

The result of all that? *Epstein III* held that due process demanded nothing more than that absentees have a full and fair opportunity to contest adequacy in the original class action proceeding. If they had been given that chance and had passed it by, they would be bound by the class action court's ruling on adequacy. Interestingly, one of the arguments that Judge O'Scannlain made in his dissent in *Epstein II* is omitted from his majority opinion in *Epstein III*. In dissent, Judge O'Scannlain had made much of the fact that some objectors had appeared in Delaware to contest adequacy.[110] As I explain below, the

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should read Woolley's work. I will not treat the question further here, except to note that in addition to the troublesome footnote, *Matsushita* included a separate opinion by Justice Ginsburg that explicitly stated that the adequacy of representation was a separate issue that the Ninth Circuit was free to address on remand. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 388–89 (1996) (Ginsburg, J., concurring in part and dissenting in part).

107 456 U.S. 461 (1982).

108 *Id.* at 483–85.

109 *Epstein II*, 126 F.3d 1235, 1245–46 (9th Cir. 1997).

110 *Id.* at 1257–58 (O'Scannlain, J., dissenting). Kahan and Silberman advocate allowing absentees to challenge the procedures used by the state court to find adequacy and reject any suggestion that the presence of objectors, challenging adequacy,

lost argument is incoherent, a view shared by Kahan and Silberman as well, who are otherwise supportive of Judge O'Scannlain's approach to collateral attack.[111] But the omission of the argument seems to have left Judge O'Scannlain with little to say on the merits or doctrinal coherence of the holding he was so committed to securing. But no matter, he did manage to get another vote.

In the real world, *Epstein III* means that members of the Epstein class, even those from California where the Epstein federal litigation had been filed, should have gotten on a plane and flown across the country to complain about the representation they were receiving in Delaware or somehow found a Delaware lawyer who would appear for them and present their arguments. Having foregone this cross-country adventure, they would be stuck with two pennies a share for claims that the Ninth Circuit in *Epstein II* had said were worth a whole lot more (an assessment that *Epstein III* did not contest and with which the Delaware court seemed to agree).[112]

C. State v. Homeside Lending, Inc.[113]

The class action that underlies this case is a poster child for class action abuse, the *BancBoston* settlement.[114] People from many states had mortgages serviced by Bank of Boston.[115] As most people know,

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in the class action court proceeding itself is a reason to bind absentees. *See* Kahan & Silberman, *supra* note 9, at 266–74. I agree with them that it is incoherent to suggest that objectors, whom no one has found adequate to represent anyone, can by their actions or presence affect the rights of other absentees. But that is more or less where my agreement with Kahan and Silberman on these questions ends. I encourage all those interested in a strong presentation of a position at odds with my own to read their article.

111 *See* Kahan & Silberman, *supra* note 18, at 788–89.

112 In a short and powerful piece, Alan Morrison, who spends most of his time practicing law, makes an interesting point about the timing in the *Epstein* saga. Alan B. Morrison, *The Inadequate Search for "Adequacy" in Class Actions: A Brief Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. REV. 1179, 1184 (1998). The statute of limitations gives shareholders one year to file federal securities claims. That explains why it was important to file the federal suit while the state action was pending. Although it is true that as soon as an action is filed the statute is tolled, that only works for actions that raise the claims that are the subject of the statute of limitations. The federal claims could not be and were not pled in Delaware and thus the statute would not have been tolled as to those claims, if they had not been settled in Delaware, absent the "collateral attack." Dissenting in *Epstein III*, Judge Thomas also mentions this point. *Epstein III*, 179 F.3d at 652 (Thomas, J., dissenting).

113 826 A.2d 997 (Vt. 2003).

114 The court in *Homeside* calls the settlement "notorious" and details some of the national publicity this case has received. *Id.* at 999.

115 *Id.*

many mortgages call for mortgagees to pay interest, principal and some money to be held in escrow by the mortgage-holder—generally a bank—to be used for paying property taxes owed by the mortgagee and sometimes other obligations, such as mortgage insurance. Apparently, whenever Bank of Boston (and many other banks too) could get away with it, they required mortgagees to keep more money in escrow than the mortgage contracts demanded be there. Moreover, having forced mortgagees to deposit excess money in their escrow accounts, the bank paid the mortgagees no interest on this money. It was getting the use of the mortgagees' money for free. This allegedly violated federal and state law.

Class counsel filed a class action on behalf of Bank of Boston's mortgagees, seeking to enjoin the bank from continuing its excess-escrow practice, and to require it to release the excess money from the escrow accounts and to pay back interest for the years that the bank had the use of class members' money for free. Class counsel filed the action in Alabama state court on behalf of class members in any and all states that had been harmed by Bank of Boston's excess-escrow policy. The bank offered to settle the case in exchange for releasing the excess money and a payment of $500,000 for class counsel's attorneys' fees.[116]

Class counsel thought the bank's offer of attorneys' fees was too low.[117] Would the bank consider supporting a much larger award of attorneys' fees, many millions of dollars more, provided that the bank did not have to pay those fees (or any attorneys' fees) itself? Where would the money for attorneys' fees come from? The escrow accounts of the bank's customers. Class counsel's plan was this: it would ask the court for one-third of the "economic benefit conferred on the class."[118] The trick was to convince the court that the "economic benefit conferred on the class" should be considered the sum total of all the excess money released.[119] This was *not* the economic benefit conferred on the class. The excess money had always and consistently belonged to the mortgagees. It was kept in escrow accounts in their names. Class counsel could not "recover" this money for the class, as it had never lost that money.

What the class had lost was the use of its money, represented by the interest that the money would have earned had the class been given free use of its own cash. Thus, the true "economic benefit" to

116 *Id.*

117 *Id.*

118 *Id.* at 1000.

119 *Id.* at 1002.

be conferred on the class by the settlement of this case would be equal, not to the excess money released, but to whatever back interest the bank agreed to pay under the settlement. By forcing release of the excess funds, the settlement ensured that the mortgagees would not suffer any future damages, i.e., any further deprivation of the use of their money (interest). But the release of the funds did not otherwise affect the net worth of class members, because the excess money had always been theirs.[120]

If the bank agreed to stand mutely by while class counsel tried to convince the court that the "economic benefit" was equal to the excess money and that it deserved upwards of 30% of that money, class counsel would agree to the rest of the bank's offer of settlement and the bank would not be required to cough up any money to pay attorneys' fees.[121] The bank would just have to release the excess money, refrain from collecting any new excess money, and pay whatever back interest the settlement specified to compensate class members for the time that the bank had had the use of their money for free. That is the scheme concocted by class counsel,[122] and the bank agreed to go along.[123]

Class counsel convinced the state court to award them 28% of the total amount of excess money the bank had required class members to keep in escrow.[124] That gave class counsel attorneys' fees of between $8 and $11 million dollars.[125] Some objectors showed up at the fairness hearing to protest the size of class counsel's fee, most notably the Florida State Attorney General appearing on behalf of Floridians included in the absent class.[126] But the judge rejected these complaints, holding 28% was a reasonable cut.[127] The percentage, however, was not the problem. The problem was that class counsel was going to receive 28% of money that had never been lost. They had been granted 28% of money the class had always owned and would have continued to own without this lawsuit or the settlement.

What this meant for some absent class members was that some piddling figure, representing back interest, was deposited in their escrow accounts and a much greater figure was deducted to pay attor-

120 *Id.* at 1003.
121 *Id.* at 1001.
122 *Id.* at 1000–01 n.2.
123 *Id.* at 1001.
124 *Id.* at 1014.
125 *Id.* at 1002 n.3.
126 *Id.* at 1000.
127 *Id.*

neys' fees.[128] All those absent class members ended up poorer for having settled their claims against the bank. For example, Dexter Kamilewicz of Maine had $2.19 deposited in his escrow account as his "award" from the settlement and $91.33 deducted from his account to pay attorneys' fees.[129]

If that was not bad enough, some members of the absent class had not been harmed by the bank's excess money policy, i.e., the bank had not required that they deposit excess money in escrow. Nonetheless, as all Bank of Boston's mortgagees for the relevant years were included in the class definition (supplied by class counsel and accepted by the court), those folks were also charged attorneys' fees. If the attorneys' fees were 28% of any excess money in the escrow accounts, how could someone with no excess money held in escrow be charged anything for attorneys' fees? Because to ease administration, class counsel and the bank had agreed that the bank would take the sum of all the money it had in escrow and calculate what percentage of that was excess. That came out to be about 19%.[130] It would then assume, for purposes of calculating attorneys' fees, that 19% of each class member's account was excess and deduct 28% of that figure from each account to pay class counsel.[131] The pretend 19% excess in each account was used only to calculate a class member's share of attorneys' fees, not to calculate interest "due" the class member. All this meant that people like Ted Benn, a lawyer from Texas who had no excess money in his escrow account, had no money deposited in that account for back interest (which the bank did not owe him because it hadn't required him to keep excess money in escrow), no money released to him as excess, and yet he did have money deducted from his account to pay class counsel, apparently almost $150![132] Just to be clear: people like that got $0 in recovery and paid sometimes over $100 in attorneys' fees.

The notice sent to absent class members said that class counsel's fees would be some reasonable percent of the "economic benefit conferred" on the class by the settlement.[133] It provided no hint of what was actually to occur. When the bank began deducting money from customer accounts to pay class counsel, it did not explain to its cus-

128 *Id.* at 1003 n.5.

129 *Id.*

130 *Id.* at 1001.

131 *Id.* at 1002. (Of course, the bank did not use the 19% assumption when calculating how much money to release from each account as "excess." It used real figures for that.)

132 Koniak & Cohen, *supra* note 9, at 1274–75.

133 Vermont v. Homeside Lending, Inc., 826 A.2d 997, 1000 (Vt. 2003).

tomers (the absent class members) that money was being deducted for class counsel's fees or suggest that the deductions were in any way related to the Alabama settlement.[134] On mortgage statements the deduction for attorneys' fees was characterized as a miscellaneous charge.[135] A few curious souls, apparently meticulous about scrutinizing statements from their banks, noticed the miscellaneous charge and asked the bank what it was. When those people began to understand what had happened, they became incensed.

Dexter Kamilewicz complained to everyone and anyone who would listen.[136] He wrote to the judge in Alabama, Maine officials, and his congressional delegation.[137] Through a somewhat circuitous route, his complaint ultimately got to me. A member of then Senator Cohen's staff wanted to know whether Kamilewicz was some kind of nut and had just misunderstood the situation or whether it was possible that Kamilewicz was correct about the facts. The staff person called a former professor and that professor referred the matter to me. As it happened, Dexter Kamilewicz was quite sane. More important, he was right about the facts.

Kamilewicz wanted to sue. A good friend of mine, Ralph Wellington, of Schnader Harrison, a Philadelphia based firm, agreed to take his case. Kamilewicz and a mortgagee who was an absent class member from Wisconsin agreed to be named representatives in a class action suit against their former lawyers, class counsel in *BancBoston*, alleging malpractice, breach of fiduciary duty, and conversion.[138] The suit was filed in federal court in Illinois, where the two attorneys who had first initiated this case (in Alabama) lived.[139] But this malpractice action was to end in misery, not for the defendant-lawyers, but for Kamilewicz, his fellow named representative, my friend Ralph, and his law firm.[140]

As soon as the federal malpractice action was filed, class counsel ran down to Alabama to get the original class action court there to hold that the federal action was precluded.[141] The federal district

134 *Id.* at 1015.

135 Koniak & Cohen, *supra* note 9, at 1275.

136 From conversations between the author and Dexter Kamilewicz and between the author and members of Senator Cohen's staff.

137 *Id.*

138 *Homeside Lending*, 826 A.2d at 1003.

139 Koniak & Cohen, *supra* note 9, at 1270–71.

140 *Homeside Lending*, 826 A.2d at 1003–05.

141 You might rightly wonder if the Alabama court could actually threaten, as it did, the plaintiffs in a federal lawsuit to drop their federal claims or risk contempt in Alabama, a state that neither Kamilewicz or the other named representative had ever stepped foot in. Good question. The bizarre procedural aspects of the Alabama

court, obviously unhappy about finding itself in a tug-of-war with an Alabama judge, reached for a somewhat obscure procedural doctrine, Rooker-Feldman,[142] as a means to escape.[143] The Rooker-Feldman doctrine says that federal courts (below the Supreme Court) may not hear claims that are in essence appeals of state court rulings.[144] A malpractice action is not an appeal, or even close to an appeal, of the judgment in the case in which the malpractice allegedly occurred.[145] The federal judge wanted out of the case, and he found a way. More disturbing, a unanimous panel of the Seventh Circuit agreed with his ruling that Rooker-Feldman applied.[146] Rehearing en banc was denied over a powerful dissent by Judge Easterbrook, joined by four of his colleagues.[147]

Meanwhile, while the case was pending before the Seventh Circuit, class counsel in the original Alabama case filed suit against Kamilewicz and the other named representative in the Illinois case and their new lawyers, my friend Ralph and his law firm.[148] The allegations were malicious prosecution and abuse of process in connection with the Illinois malpractice case. On the same day that the Seventh Circuit panel's decision was issued, the Alabama trial court ruled that the Alabama malicious prosecution case could proceed.[149]

Kamilewicz and his co-named representative, Martha Preston, now had to get lawyers to defend them in that case as Schnader Harrison, their lawyers in the Illinois suit, were their co-defendants in Alabama. Schnader helped them do that and, in my opinion, got them

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court's tug-of-war with the federal court in Illinois are, however, outside the scope of this Article. A fuller description of the tug-of-war itself can be found in Koniak & Cohen, *supra* note 9, at 1270–74. The Alabama court's later tug-of-war with the Vermont courts is a little closer to the subject matter here, which occurred after *Under Cloak* was published, and is discussed *infra* notes 162–76 and accompanying text, although some aspects of that contest are similarly outside the scope of this Article.

142 *Homeside Lending*, 826 A.2d at 1003.

143 *Id.*

144 *Id.*

145 Having to cite something for this obvious proposition all but breaks my heart. For a pithy discussion of how clear the proposition should be, see Judge Easterbrook's dissent from the denial of the rehearing in this case. Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1349–53 (7th Cir. 1996) (Easterbrook, J., dissenting).

146 Kamilewicz v. Bank of Boston Corp., 92 F.3d 506 (7th Cir. 1996), *reh'g denied*, 100 F.3d 1348 (7th Cir. 1996). "Apart from other aspects of this case, the [Rooker-Feldman ruling by the Seventh Circuit] is itself notorious, having been subject to extensive critical comment by academics." *Homeside Lending*, 826 A.2d at 1003 n.7.

147 *See Kamilewicz*, 100 F.3d at 1349 (joining Judge Easterbrook in the dissent from the denial of en banc were Judges Posner, Manion, Rovner, and Wood).

148 Koniak & Cohen, *supra* note 9, at 1274.

149 *Id.*

better lawyers than it got itself. Kamilewicz and Preston's lawyers succeeded in getting a writ from the Alabama Supreme Court ordering the Alabama trial court to dismiss the lawsuit against them.[150] Schnader's lawyers did not ask for a writ. Schnader was thus stuck in the trial court, which refused to dismiss the action against it, and ended up settling so as to be free of the Alabama court. Schnader ended up paying the costs of the lawyers, who had concocted the *BancBoston* scheme, incurred by those lawyers in their suit against Schnader.[151]

But the battle for justice was not over. Nine state attorneys general had filed an amicus brief with the Seventh Circuit, urging reversal of the district court's Rooker-Feldman ruling. One of the nine, Vermont's Attorney General, refused to let the matter die when the Seventh Circuit issued its opinion. Elliot Burg, a Vermont Assistant Attorney General, was simply not about to let this matter rest. He sued BancBoston and Homeside Lending, Inc., (a successor to all or part of BancBoston's mortgage business) in Vermont state court for implementing and acquiescing to the attorneys' fee scam in Alabama.[152] That suit alleged that the defendants thereby violated the Vermont Consumer Fraud Act and its escrow account law, and breached fiduciary and contractual obligations to their mortgagees.[153]

The defendants moved for summary judgment, arguing, among other things, that all absent class members were bound by the Alabama settlement and that the Vermont Attorney General was thus similarly precluded from collaterally attacking the class settlement. The Vermont trial court agreed, stating that the Attorney General's suit was "an improper and ill-disguised effort to overcome the preclusive

150 *Ex Parte* Kamilewicz, 700 So. 2d 340, 347 (Ala. 1997).

151 I know this from personal conversations with Ralph Wellington. And this wasn't the only injustice added to the original injustice of the Alabama class settlement. Tedd Benn, *see supra* note 132 and accompaying text, without knowing anything about the Kamilewicz action, filed his own action pro se against Bank of Boston and class counsel in the Alabama case. Like Kamilewicz and Martha Preston, his attempt to fight back soon became more painful for him than for the persons who had wronged him. Koniak & Cohen, *supra* note 9, at 1274–77.

152 Vermont law required the bank to pay interest on all money held in escrow, so the "harm" to Vermont mortgagees from the bank's practice is more illusory than it was for people in states without that requirement. It also makes it likely that every Vermont absent class member ended up paying more in attorneys' fees than they "recovered" in back interest. *Homeside Lending*, 826 A.2d at 1003.

153 *Id.* at 1004.

effect of the Alabama judgment."[154] The Vermont Attorney General appealed to the Vermont Supreme Court.[155]

More than two years after argument in that case, the Vermont Supreme Court issued its opinion. It was worth the wait. The court could have avoided the entire question of whether the absent class was bound by holding that whether or not the absent class members from Vermont were bound, the Vermont Attorney General was not.[156] Instead, it held the Attorney General was not bound because, having been denied adequate representation, the absent class members were not bound.[157] The court, in effect, treated the case before it as a collateral attack by absent class members.

The Vermont Supreme Court gave three independent reasons for its holding. First, the absent plaintiff class was transformed into a defendant class by the risk (and then the actuality) that members of it would have to pay more than they received at the end of the suit.[158] Thus, Alabama could not exercise personal jurisdiction over out-of-state absent class members under *Phillips Petroleum Co. v. Shutts*.[159] In *Shutts*, the Supreme Court had said state courts could exercise jurisdiction over out-of-state absentees in a class action for money damages without a showing of minimum contacts provided those absentees had notice, an opportunity to opt out and adequate representation. The *Shutts* Court had, however, reached that result by emphasizing the distinction between plaintiffs and defendants,[160] the latter of whom are free to ignore state court judgments purporting to exercise power over them when the defendant had not even "minimum contacts" with the state in which the judgment was rendered.[161] The Vermont court reasoned that here the absent class, by virtue of the attorneys' fee formula, could and (many did) end up, in effect, liable just as a defendant might be and thus notice, opportunity to opt out and adequate representation (assuming for the moment all of those *Shutts* requirement had been provided in Alabama) were insufficient to sustain

154 *Id.*

155 Here again David Shapiro stepped up to the plate. Along with Jonathan Massey, an appellate lawyer from D.C., and me, David filed an amicus brief, on file with author, with the Vermont Supreme Court on behalf of ourselves and other law professors in support of the state of Vermont.

156 *Homeside Lending*, 826 A.2d at 1005 n.9.

157 *Id.* at 1018.

158 *Id.* at 1013.

159 472 U.S. 797 (1985).

160 *Id.* at 805.

161 *See id.* at 806–07 (discussing Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945), which set forth the "minimum contacts" test for the exercise of jurisdiction by a state court over an out-of-state defendant).

the Alabama court's assertion of jurisdiction over Vermont's citizens. Although not stated expressly by the Vermont court, it is obvious that the Alabama court, not thinking of the absent class as defendants, made no finding that the absent class had minimum contacts with the state and could not possibly have made such a finding as to the vast majority of the absentees.[162]

Second, the court held that, if one viewed the absent class as plaintiffs (which they were, at least, in name) that the Alabama class action could not bind the absentees from Vermont because the notice sent to them did not alert them to the possibility that they would be charged more money in attorneys' fees than they received and thus failed to meet the notice requirement of *Shutts*.[163] Third, and most important for our purposes, the Vermont court held that the absent class, at least the Vermont absentees, were not bound because class counsel did not adequately represent the absentees.[164] *Shutts* required adequate representation, as well as notice and an opportunity to opt out (at least in cases for money damages), before one state could exercise jurisdiction over absentees from another state.[165] The Vermont court had no trouble finding that lawyers who schemed to get more money from the absent class than they had delivered to it were inadequate.[166]

But what if the original class action had been handled by a Vermont court instead of one in Alabama? Would the Vermont Supreme Court have held that collateral attack based on inadequate representation (or inadequate notice, for that matter) was precluded? In other words, did the court's discussion of inadequacy hinge on the fact that Vermont citizens had been before a foreign state court?

That is one of the questions that places this case in the "these" category that I mentioned in the Introduction, i.e., maybe *these* Vermont absentees could collaterally attack, but maybe other absentees could not. But that is not the only "these" part of the opinion. The Vermont court explicitly recognized the debate over the availability of collateral attack that has recently developed.[167] Indeed, it cited *Ep-*

162 Alabama was chosen, either at random or, more likely and as the Vermont court suggests, because it was—at least at the time—known to be quick to please class counsel, apparently even at the expense of the absent class; Bank of Boston was not domiciled in Alabama.

163 State v. Homeside Lending, Inc., 826 A.2d 997, 1008–12 (Vt. 2003).

164 *Id.* at 1013–16.

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

166 *Homeside Lending*, 826 A.2d at 1016.

167 *Id.* at 1016–17.

stein III[168] and the Second Circuit's decision in *Stephenson*, which we turn to next, as emblematic of this debate.[169] (The Vermont court read *Stephenson* to hold that collateral attack for inadequacy was available, although I read *Stephenson* as another "these" opinion.) The Vermont court then said: "If we had to decide the case squarely on this issue, we would be inclined to follow . . . *Stephenson* because adequacy of representation is the 'quientessence of due process in class actions.'"[170] But, the court quickly added, it need not enter "that debate."[171]

What issue did the Vermont court not have to decide "squarely"? What debate could it avoid entering? The court's discussion thereafter shows that the issue it was avoiding was whether *some* collateral attacks based on adequacy *were barred*, although others were not. The court explains that it does not have to enter the "sometimes barred" debate because, according to the Vermont court, everyone agrees that collateral attack is not *always* barred.[172] The court goes through the leading "sometimes barred" theories and concludes that under any of them, the absentees in this case (*these* absentees) would be in the "not barred" category.[173]

Equally interesting and important, however, the court, in explaining why *these* absentees should be in everyone's not barred category, did not rely on the fact that the absentees from Vermont were out-of-staters in the Alabama action or that the original action had been in a state court, as opposed to a federal one. Instead, it proceeded as if it assumed that *Shutts*'s statements about due process and adequacy applied equally outside the context of state courts exercising jurisdiction over absentee out-of-state class members.[174] Was that just a judicial blunder? We will come back to that question later.[175]

D. Stephenson v. Dow

In *Stephenson v. Dow* the Supreme Court split 4-4, leaving the Second Circuit's decision in place.[176] Daniel Stephenson was exposed to

168 *Id.*

169 Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001).

170 *Id.* (quoting NEWBERG & CONTE, *supra* note 11, § 4.46, at 4-185).

171 *Id.*

172 *Id.*

173 *Id.* at 1016–18.

174 *See id.* at 1018 (noting that "[i]n the absence of jurisdiction, the State can collaterally attack aspects of the judgment").

175 *See infra* notes 275–76, 292–93 and accompanying text.

176 Dow Chem. Co. v. Stephenson, 539 U.S. 111 (2003).

Agent Orange during his tour as a helicopter pilot in Vietnam.[177] In 1998, Stephenson was diagnosed with multiple myeloma, a deadly cancer that some studies connect to Agent Orange exposure.[178] In 1999, he filed suit against the manufacturers of Agent Orange in federal district court in Louisiana.[179] The defendants claimed that his suit was barred by a prior class action settlement—one that had been concluded long before Stephenson realized that he was ill or that his cancer might be related to Agent Orange, but one in which Stephenson had nonetheless been included as a class member.[180] Stephenson argued, inter alia, that he was not bound by that long ago class settlement because his interests had not been adequately represented in that suit.

The long-ago class action was the mother of all mass tort class actions, *In re "Agent Orange" Products Liability Litigation.*[181] In the late 1970s, veterans had filed virtually identical suits to Stephenson's. Those claims were eventually bundled together into one class action. In 1983, a federal district court in New York certified that class under Rule 23(b)(3).[182] As certified, the class included all those who had served in the military "from 1961 to 1972 *who were injured while in or near Vietnam* by exposure to Agent Orange" and their families, including any children "born *before January 1, 1984.*"[183] As the words in ital-

177 Brief for Respondents at 1, *Stephenson* (No. 02-271).

178 *Id.* Stephenson argued that the evidence supporting this connection was significantly stronger than it was at the time, over a decade before, of the class action that supposedly barred his suit. *Id.* at 12.

179 *See* Stephenson v. Dow Chem. Co., 273 F.3d 249, 255–56 (2d Cir. 2001) (discussing the initial filings by the *Stephenson* plaintiffs and the subsequent MDL consolidation).

180 *Id.* at 256.

181 *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980). For a blow-by-blow description of the happenings before, during and immediately after this historic class action, see PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1986); and see also Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994). This remarkable article, written by the presiding judge in the Agent Orange litigation—who has become a legend in his own time for this groundbreaking class action decision and others that followed—gives the judge's perspective on the case. Among other remarkable positions taken by Judge Weinstein in his article is the explanation that he understood his job to be providing relief to people who believed they were harmed by exposure to Agent Orange whether or not they had viable claims for legal recovery, which he did not believe they had. *Id.* at 543. For an extended discussion of Judge Weinstein's views of the merits of the claims, see *infra* notes 212–14 and accompanying text.

182 *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983) (applying FED. R. CIV. P. 23(b)(3)).

183 *Id.* at 729 (emphasis added).

ics show, whether the class definition originally included people who were not yet ill is, at best, unclear. But, as we shall see, the settlement surely meant to include them.

Potential class members, i.e., Vietnam veterans, were notified of the pending class action by mail and radio, television and newspaper announcements.[184] People wishing to opt out of the class action had to do so by May 1, 1984.[185] Shortly after the opt-out period was over, class counsel and the defendants reached a settlement.[186] Under the settlement, the defendants would pay $180 million into a settlement fund.[187] Seventy-five percent of that money would be distributed directly "to exposed veterans who suffer from long-term total disabilities and to the surviving spouses or children of exposed veterans who have died."[188] The remaining money, with the exception of $10 million, would be used to establish the Agent Orange Class Assistance Program (AOCAP), which would make grants to agencies that serve Vietnam veterans and their families.[189]

The point of that program, according to Judge Weinstein, who presided over the fairness hearings on this settlement (and had played an important role in constructing the settlement as well),[190] was to ensure that veterans who did not qualify for cash payments nonethe-

184 *Id.* at 729–32. The notices suggested, however, that the class was limited to those "who claim injury, illness, disease, death or birth defect." *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 178 app. (2d Cir. 1987) (quoting a radio/television announcement). The newspaper and magazine notice stated: "If you . . . can claim injury, illness, disease, death or birth defect . . . ." *Id.* That notice was, at best, ambiguous on whether those who might get ill in the future were included in this class. Whether the inadequate notice provided an independent ground for allowing Stephenson to proceed with his collateral attack is a question beyond the scope of this Article. For an argument supporting such a basis for collateral attack, see Brief for Amicus Curiae Public Citizen in Support of Respondents at 26–29, *Stephenson* (No. 02-271).

185 *Agent Orange*, 100 F.R.D. at 729–32.

186 Stephenson v. Dow Chem. Co., 273 F.3d 249, 252 (2d Cir. 2001).

187 *Id.*

188 *Id.* at 253 (quoting *Agent Orange*, 818 F.2d at 158).

189 *Id.*

190 *See generally* SCHUCK, *supra* note 181, at 178 (noting that the settlement "was not an agreement that the lawyers had negotiated and drafted by themselves and brought to the court for its evaluation and approval"). Rather, Schuck explains, "[i]t was in fact Weinstein's own creation in every sense of the word." *Id.* I agree with Judge Smith of the Fifth Circuit that, at some point, the involvement of a judge in constructing a class settlement makes it a violation of due process for that judge to preside over the fairness hearing to determine the settlement's reasonableness, because the absent class is denied an impartial judge. *See, e.g.*, Flanagan v. Ahearn (*In re* Asbestos Litig.), 90 F.3d 963, 1013–15 (5th Cir. 1996) (Smith, J., dissenting).

less got some benefit from the settlement.[191] In other words, the AOCAP was there to "give" healthy veterans who had been exposed to Agent Orange "something." Of course, whether the AOCAP actually provided any benefit to a particular well veteran (or *any* well veteran) is a matter that is open to dispute, but its stated purpose was to give the well folks some part of the class recovery. The AOCAP was, as we shall see, what now-cancer-stricken Stephenson is supposed to have reaped from the settlement.

Three additional features of the settlement are particularly important to Stephenson's case. First, unlike the ambiguous class definition first articulated by the court, the settlement said: "The Class specifically includes persons who have not yet manifested injury."[192] That means the class included Stephenson. Second, cash payments to veterans would *not* be made after December 31, 1994. That means Stephenson, who was diagnosed after 1994, and any other veteran to get sick after 1994 was never intended to recover cash from this deal. Third, $10 million would be set aside to indemnify defendants against future court actions alleging injury from Agent Orange. The $10 million was long gone before Stephenson got sick or filed suit.[193] The $10 million reserve is, however, important. It is, I submit, clear evidence that at the time of settlement the defendants did not believe that the "global" class settlement was the end of their litigation woes.[194]

This seems a good place to outline the gist of Stephenson's inadequate representation claim. There were no subclasses in the Agent

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191 *Stephenson*, 273 F.3d at 253 (quoting Ryan v. Dow Chem. Co. (*In re* "Agent Orange" Prod. Liab. Litig.), 611 F. Supp. 1396, 1431 (E.D.N.Y. 1985)). To qualify for a cash payment a veteran did not have to show that Agent Orange had caused his illness but only that he had been exposed to Agent Orange and had become disabled or died in a manner not predominantly caused by trauma. Thus, it is fair to say that the AOCAP was there to provide "benefits" to those who were not injured at all.

192 *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 862–67 app. A (E.D.N.Y. 1984).

193 It did not get paid out in new state court judgments or settlements. Judge Weinstein ordered it transferred to the AOCAP after deciding it was not needed as a reserve for state court suits. He decided that after he dismissed a collateral attack (brought years before Stephenson's case) in state court that had been removed to federal court and transferred to him. *See Stephenson*, 273 F.3d at 255 (explaining what happened to the $10 million fund). The collateral attack to which I just referred is discussed *infra* at note 222 and accompanying text.

194 This is thus concrete evidence that some defendants settle mass tort class actions, although they understand that the finality of the settlement is open to some dispute. *But cf.* Kahan & Silberman, *supra* note 18, at 779 (arguing that without some guarantee on the finality of settlements, defendants may be unwilling to settle major class action suits).

Orange class action.[195] That means Stephenson, and all those like him,—i.e., those who would get sick after 1994—had the same lawyers to represent them as those who were sick in 1984. Those lawyers ensured that the latter group got money, but left Stephenson with none. If those like Stephenson had had a lawyer assigned to look after only their interests, would she ever have agreed to a deal that left her clients with no right to cash? Would she have agreed that similarly situated people, who got sick first, would, unlike her clients, get money? Would she have accepted allocating 25% of the settlement fund to "benefit" (through AOCAP) those who would never get ill when all or at least some of that money could have been set aside for her one-day-to-be-sick clients? Would she have bought the argument that people who might develop cancer after 1994 deserved no greater "benefit" than those who would live healthy to a ripe old age and die peacefully in bed? Finally, would she have agreed to set aside $10 million in the class settlement to reimburse the defendant for judgments for (or settlements made with) people who might not be bound by the settlement, people outside the class, while her "insiders" had no cash reserved for them?

In sum, if the post-1994s, the far-futures, had been adequately represented, this deal would have provided something of substance for them—or their lawyer would have insisted that they be left out of it altogether. Put another way, such blatant bias for the presents, the near-futures and the non-injured—at the expense of people like Stephenson—demonstrates that Stephenson was not adequately represented.[196] His group got nothing.

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195 *See Stephenson*, 273 F.3d at 259–60.

196 In their briefs before the Supreme Court, the petitioner-defendants argued that Stephenson and those like him did benefit from the class deal in that they received a form of insurance policy, which, of course, ran out absolutely in 1994. *See* Brief for the Petitioners at 37, *Stephenson* (No. 02-271). But that explanation only works if we imagine that the relevant subgroup to which Stephenson belongs as the group of those not sick at the time the settlement was made. One might say they all received an insurance policy of a limited term. But the problem with that neat, but superficial, reply is that the glaring disparity in the settlement is not between the presently ill and the near-futures, i.e., those who would get sick before 1994. They at least all get a promise of cash, albeit the money might have run out long before some of the "near-futures" got ill. Also, a lawyer assigned to the "near-futures"—as distinct from the "presents"—might have insisted on some method of guaranteeing that some money would be left for all the near-futures and insisted on inflation-protection. That being said, the big disparity in the settlement terms was between the treatment of the far-futures (like Stephenson) on the one hand, and the presents and the near-futures on the other hand. The ill far-futures got nothing and the others got payment or insurance worth something. Put another way, if the near-futures and the far-futures all paid for insurance by releasing their claims, the near-futures got a promise, how-

But would it have made sense to assign a lawyer to watch over the interests of a group (the post-1994 folks) who might have no one within it? As the district court said in the original proceeding: "The relevant latency periods and the age of the veterans ensure that *almost all* valid claims will be revealed before [the end of 1994]."[197] "Almost all" is not, however, the same as "all." If no one was in this subgroup, there would, of course, have been no need to include the subgroup in the class. Having been included, they had the right to be represented. It really is as simple as that.[198]

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ever contingent in return whereas the far-futures got nothing (putting aside the supposed benefit of AOCAP, which, insofar as it was a benefit, went to everyone alike).

197 Ryan v. Dow Chem. Co. (*In re* "Agent Orange" Prod. Liab. Litig.), 781 F. Supp. 902, 919 (E.D.N.Y. 1991) (emphasis added).

198 One of the problems with Nagareda's approach to adequacy is the importance he places on the line between class alignment pre- and post-judgment. He equates Stephenson's plight with an absent class member who has a change of heart about his own interests after a settlement is entered. *See* Nagareda, *supra* note 9, at 320. That analogy does not work. Veterans, like Stephenson, who were not ill when the Agent Orange case was settled had little reason to pay attention to the settlement when it was made. In what sense then can we imagine them as akin to one who changes her mind? Moreover, anyone who imagined that they might get sick after 1994 would presumably have rejected a settlement that provided nothing for her in the event she got sick after 1994. Class settlements are not akin to insurance contracts. If the defendant wanted to be released from all liability to those who might get sick after 1994, those claims were worth something—and that something belonged to anyone who got sick after 1994. To have one lawyer who represents everyone in the class agree to transfer the value of the post-1994 releases to those who got sick before 1994 is to accept a lawyer operating with a conflict that actually adversely affects a segment of the class. If the post-1994 claims were worthless, the defendant should have been willing to exempt those claims from the class settlement. A lawyer adequately representing the post-1994 interests would have demanded something for the release from liability or demanded any such claims be excised from the class settlement. Nagareda skips over this problem by pretending that those with future claims decide to bring their claims in the present when they have no idea of whether they will suffer injury or not, or how sick they will be. But in the real world, the "futures" are being forced to "bring" their claims now and in ignorance by the defendant whose desire is global peace. The analogy to insurance simply does not capture the dynamics of a class settlement or the bargaining position of the parties.

Nagareda's analysis makes a great deal of the difference between conflicts that he identifies as existing pre-judgment and those that develop post-judgment. *Id.* at 318–30. In doing so, he seems to be invoking a notion of alignment among class members—at least all those not yet injured by the defendant—that is similar to the alignment posited behind Rawls's veil of ignorance: we are the same in not knowing how sick we will become or whether we will ever be sick. All that, of course, ducks the very hard questions about whether "futures" of that type have a case or controversy that any court should be deciding or whether notice demanded by due process can ever be provided to such people. *See* Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 628 (1997) (discussing the serious issue of whether notice can ever be given to such

Or is it? Recall the sequence of events after class counsel and the defendants presented a proposal to the district court. The absent class was provided notice of the proposed class settlement through the same methods that had been used to notify them of the original action. This time the notices explained that there would be fairness hearings on the settlement throughout the country and that absent class members were welcome to come to object or otherwise comment on the settlement.[199] The notice did not provide class members with a second chance to opt out,[200] now that they had some information on what the settlement terms would be.[201]

Judge Weinstein held extensive fairness hearings on the Agent Orange settlement.[202] Due primarily to the highly charged nature of the claims in the case, but also perhaps a function of the broad-based notice and the number of hearings this judge held, objectors showed

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people in a manner consistent with the Constitution). Ignoring those problems is, however, consistent with Nagareda's insistence that we see class actions as administrative proceedings and not lawsuits. *See, e.g.*, Nagareda, *supra* note 9, at 380 (concluding that "in parsing the process due to absent class members, the law should draw upon the lessons that have emerged in the modern administrative state and the regulatory enterprises that it oversees"). In his latest piece, to support his views, he portrays *Amchem* (and, implicitly, *Ortiz*) as if the discussion of adequacy in that case was concerned only with the conflict between presents and futures. *Id.* at 319–20 (arguing that "the dividing line that doomed the classes in *Amchem* and *Ortiz* was of the line between manifestations of disease *pre-* and *post-class* judgment"). That is not true. For example, the *Amchem* Court was also concerned about the conflict between those who had or would get cancer as opposed to the interests of those who had or would have pleural plaques on their lungs and no more serious illness. *See Amchem*, 521 U.S. at 623–24. But that means the Court insisted on assessing the interests of class members based on the claims they had, or would have, in the future. It means the Court rejected Nagareda's approach of seeing class members as a group purchasing insurance behind a veil of ignorance. I believe the Court got that right.

199 Brief for Respondents at 5, *Stephenson* (No. 02-271).

200 *Id.*

201 It is impossible to provide all terms of a complex class settlement in any notice and hope to have that notice comprehensible and short enough for the average person to read. I do not, therefore, intend any criticism of the second notice in *Agent Orange* by pointing out that all terms were not elaborated therein.

202 *See* Weinstein, *supra* note 181, at 543 (noting that, as the presiding judge, he "held hearings all over the country" and "listened to some 600 people" and "received hundreds of telephone and written communications"); *see also In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 155–56 (2d Cir. 1997) (noting that Judge Weinstein conducted eleven days of hearings in New York, Atlanta, Houston, Chicago, and San Francisco, at which "nearly 500" witnesses testified, and reporting that the presiding judge "read a large part of the relevant literature, taking judicial notice of its substance").

up to challenge the settlement, represented by their own counsel.[203] In the vast majority of class actions, objectors do not appear, particularly not through counsel.[204]

The objectors presented arguments attacking many facets of the settlement process as well as the settlement itself.[205] Most important for present purposes, the objectors raised arguments challenging the adequacy of the representation that the class (or some parts of it) had been provided and made arguments similar to those I have made, albeit concentrating on the conflict between those ill at the time of the settlement versus all those not ill at that time, instead of that between the far-futures (the post-1994 folks) and everyone else.[206]

The district court, and then the Second Circuit on direct appeal, rejected the arguments alleging that conflicts within the class amounted to inadequate representation.[207] Moreover, in doing so, the courts used reasoning that would seem to apply with equal force to the conflict between the far-futures and the rest of the class. In short, the district court and the Second Circuit held that the strength

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203 *See* SCHUCK, *supra* note 181, at 173–78 (recounting Judge Weinstein's nationwide fairness hearings).

204 *See* Willging et al., *supra* note 50, at 140 (reporting that 42–64% of fairness hearings in the sample ended without objections). While the Willging study does not discuss the frequency of objectors appearing through counsel, the fact that objecting counsel are almost never awarded attorneys' fees for their efforts strongly supports the statement in the text that objectors are rarely represented by counsel. *See id.* at 155 (finding "no fee awards to, and few fee requests by, counsel other than plaintiffs' counsel"); *see also* Koniak & Cohen, *supra* note 9, at 1107 n.184 (noting that "[w]e have found no case in which a court has awarded attorneys' fees to objecting counsel for raising arguments that caused the court to disapprove a class action settlement").

> When a court rejects a settlement, there is by definition no common fund from which to award attorney's fees to objecting counsel. To award counsel fees to objecting counsel who exposed a settlement as the product of collusion and thus unworthy of approval, would require the courts to find some other source of funds from which to pay those fees.

Id. My years of research in this area also leave me quite confident that the presence of objecting counsel is quite rare.

205 *See In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 764–75 (E.D.N.Y. 1984) (detailing the objections).

206 *Id.* at 771 (detailing several veterans' adequacy concerns). One veteran remarked in a fairness hearing:

> [H]ow can the court award damages when there is inaccurate information on how many veterans and their family members have been adversely affected by exposure to Agent Orange; or how many veterans have already died; or identify those exposed veterans who are at risk of developing long term health problems?

Id.

207 *Id.* at 862; *Agent Orange*, 818 F.2d at 167.

of the defendants' military contractor defense was so great that it virtually leveled all differences that might otherwise have existed between strong and weak claims included in the class.[208] The fact that all the plaintiffs' claims were, according to the court, also very weak on causation, enhanced their similarity.[209] To summarize in blunt fashion, the courts said: Given that none of the claims are worth anything, what use would separate lawyers be? Why make matters more complicated than they need be by insisting on separate representation for subgroups within this basically bogus suit? Of course, a similar argument might justify dispensing with class counsel altogether. Or is that unfair? Maybe a little, but only a little.

If all the claims were equally worthless—or even nearly so—a valid argument might be made that one lawyer would suffice for all. *If*, that is, all those supposedly worthless claims had been treated equally by the settlement. But they were not. The Second Circuit acknowledged that this presented a potential problem: "It is . . . true that the difficulty in fashioning a distribution scheme that does not overcompensate weak claimants and undercompensate [relatively] strong[er] ones is not alleviated by limiting the class certification to the military contractor defense."[210] True enough. Too bad the court did not bother explaining in any depth what made this "difficulty" insufficient to warrant separate representation. All it said was: "However, on balance, we believe the use of the class action was appropriate, although many potential difficulties were avoided only because all plaintiffs had very weak cases on causation and the military contractor defense was so strong."[211] In other words, the judges thought the cases so weak that they could not take seriously the harm that might be done to any claimant by virtue of his getting less than he and others like him "deserve" in relation to anyone else.

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208 *Agent Orange*, 818 F.2d at 167 (affirming Judge Weinstein's approval of the settlement). The Second Circuit was fixated on the military contractor defense:

> Appellants argued that the diverse interests of the class make adequate representation virtually impossible. We disagree. If defendants had successfully interposed the military contractor defense, they would have precluded recovery by all plaintiffs, irrespective of the strengths, weaknesses, or idiosyncrasies of their claims. Similarly, the typicality issue disappears because of the virtual identity of all the plaintiffs' cases with respect to the military contractor defense.

Id.

209 *Id.*

210 *Id.*

211 *Id.*

Here, you must permit me an aside. Judge Weinstein thought the claims of all class members to be worthless as a matter of law.[212] Indeed, he dismissed the claims of all those who opted out of the deal on grounds that could have been applied to everyone within the class.[213] In the law review article on his role in the case, Judge Weinstein wrote that when faced with meritless claims that are pressed earnestly by a class of people who sincerely feel injured and entitled to relief, a judge should provide them with some relief, even if only token relief, legal merits notwithstanding, to help heal the claimants' perception of legally-cognizable injury.[214] Were it not for the fact that Judge Weinstein is a federal judge who apparently acts on such ideas, his position could be dismissed as mushy claptrap. Given his job and his actions in that job, the position is scary. I believe it an inexcusable abuse of judicial power for a judge[215] to afford relief to those who have no legal claims on the ground that this will make them feel better. Judge Weinstein's understanding of a federal judge's job does violence to the case or controversy limit imposed by Article III of the Constitution,[216] good intentions notwithstanding.[217]

The Second Circuit's analysis of adequacy in the direct appeal of the *Agent Orange* settlement provides an example of how the law suffers when judges find it impossible to take the claims in front of them seriously. If ill people and those who would someday get ill had claims worth, let us say, at least a hundred times more than the claims of never-to-be-injured people, and all claims had only a five percent chance of success because of the military contractor defense, it would still be true that the injured, including all the future-injured, had

212 *See* Weinstein, *supra* note 181, at 543.

213 *Agent Orange*, 597 F. Supp. at 862.

214 *See* Weinstein, *supra* note 181, at 550–52.

215 Please notice that the outrage lies in the exercise of official court power. Defendants, or anyone else for that matter, are free to give money or other benefits to people they have not legally injured and are even free to contract to do so. Class settlements are contracts too, but they are contracts based not on voluntary agreement, but on court acceptance of the deal on behalf of the class. The class is not legally empowered to contract without the judge. *See* FED. R. CIV. P. 23(e) (mandating that no class action be dismissed, settled or in any way compromised without judicial approval). Judicial approval, in turn, is constrained by law, i.e., a judge cannot accept a settlement that does not otherwise comport with Rule 23 and the decisions interpreting that rule. My point is simply that judicial approval is outside the law when there is no legally cognizable case or controversy before the judge.

216 U.S. CONST. art. III.

217 Judge Weinstein should have dismissed the entire class action as meritless on the same ground that he dismissed the claims of the opt-outs, given his legal assessment of the claims.

claims worth a hundred times more than the others. If the injured folks had causation problems, they were certainly no greater than the "causation" problems (or more accurately, the "damages") problems of the never-to-be injured. Put another way, if the court had taken the injured, near-futures' and far-futures' claims at all seriously, at least two troubling questions would have arisen: Would an adequate representative of the injured have given the never-to-be injured anything? And would an adequate representative of the far-futures have accepted that its group was treated no better than the never-to-be-injured and significantly worse than the injured and near-futures?

Those questions can only be avoided by an assertion that no one was "entitled" to anything, so that the law was properly indifferent to allocation questions. But then the law has no business in the matter at all. Either this is a fit subject for court resolution in which case it has to be subject to fair rules, or it is not in which case the court should not be resolving it.

But surely not every difference in claims within a class merits separate representation? True enough.[218] But the difference between claims for wrongful death or life-threatening illness caused by a product, on the one hand, and claims for fear of getting sick (presumably, the claim of the never-to-be-injured), on the other, is not de minimus, nor difficult to describe. And a defense common to all those claims does not somehow erase the large disparity between the position of

218 As noted earlier, Professor Nagareda emphasizes how amorphous the concept of "adequate" representation is. However much I disagree with his prescriptions and most of his analysis, I agree with him that the term should be filled out and that the concentration should be on class counsel's adequacy, not that of the named representatives. *See* Nagareda, *supra* note 9, at 292 (proposing that "adequate class representation should be much more about aligning the interests of agents and their principals than it currently is about aligning the interests of the principals themselves"). I do not want to minimize the difficulties inherent in deciding when intra-class differences demand subclasses represented by separate counsel. But the fact that line drawing is difficult does not excuse throwing one's hands up at the task, as some courts seem disposed to do. Many legal categories are difficult to define with precision. As courts struggle to describe legal categories in concrete situations, precedents are produced, which eventually allow judges and academics to abstract those characteristics that matter (define the category) and those that do not. This is how the common law worked for centuries and how law, statutory and common law, still works today.

Adequacy is ill defined, in part, because of the paucity of opinions in cases involving collateral attacks. But the scarcity of opinions also suggests that the disruption Kahan and Silberman (and, to a lesser extent, Nagareda) fear will arise from a flood of collateral attacks has not occurred in the sixty years since since *Hansberry* was decided. Hansberry v. Lee, 311 U.S. 32 (1940) (recognizing, for the first time, that adequacy could be collaterally challenged).

claimants in one or the other of these categories until, that is, the chance of winning is zero percent for everyone. None of this is to deny that there are many cases in which there is no clear answer to whether class conflicts demand separate representation. It is to say that *Agent Orange* was not such a case. My position is that, at a minimum, the far-futures were entitled to someone advocating for their interests because those interests were sufficiently distinct according to the settlement to merit very different treatment.[219] The settlement demonstrates how they were adversely affected by the lack of adequate representation. Had it been made with the agreement of independent counsel for the far-futures, the court (and we) would presumably have some explanation from unconflicted counsel on why this deal serves her clients' interests.[220] That explanation would either be suffi-

219 As mentioned earlier, Nagareda makes much of the difference between conflicts within a class that precede judgment and conflicts that arise post-settlement. *See supra* note 198 and accompanying text. I think the categories he describes are illusory, and his line thus radically indeterminate. To the extent Nagareda means to suggest that all differential treatment, no matter how great, that is created by a settlement should be irrelevant to whether counsel was adequate, the suggestion is ridiculous. What if the Agent Orange deal had provided tens of thousands of dollars to all those who got ill within two years of the settlement, and zero dollars for everyone who got sick thereafter? Would those lawyers have adequately represented the second group? Nagareda has no principled way of distinguishing that situation from the one he describes in *Stephenson*. His entire analysis also places enormous and unrealistic weight on the opportunity of futures to opt out of a deal. Consider that he equates those who do not opt out and who later complain about a deal as akin to those who "change their mind." *See supra* note 198. Nagareda's line is also inconsistent with *Amchem* and *Ortiz*.

220 Here my point should not be misread as an endorsement of Nagareda's proposal for a "reasoned explanation," of the settlement's terms, a requirement he borrows from administrative process. It is not "reasoned explanations" that are lacking. It is dedication to one's clients' interests. All major (and many minor) class action opinions are chock-full of "reasoned explanations," provided by counsel to justify the settlement they have put forth. Consider the lengthy decision by the district court that approved the *Amchem* settlement. *See* Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 266–67 (E.D. Pa. 1994). Such court opinions, among the longest court opinions in the Federal Reporter, are, indeed, often no more than a near-verbatim recitation of the findings of fact and conclusions of law submitted to the court by the settling "parties"—class counsel and defense counsel—a complete recitation of counsel's "reasoned explanations." *See* Koniak, *Feasting*, *supra* note 9, at 1115 (explaining that the district court's lengthy opinion in *Amchem* tracked the submissions of the settling parties with only a very small number of minor word changes). Put bluntly, Nagareda's "reasoned explanation" proposal is barely distinguishable from current practice. *See generally* Hazard, *supra* note 53, at 1266 (explaining that there are multiple "fair" settlements or trade-offs that might be made in a class action).

My words in the text are meant only to contrast the kind of "reasoned explanation" found in *Amchem*, i.e., an explanation by one set of lawyers of why the tradeoffs

cient to demonstrate the presence of adequate counsel or not.[221]

The district court and the Second Circuit did not address adequacy only in, respectively, the original case and on direct appeal. They both addressed adequacy again in a collateral attack launched years before Stephenson's.[222] And they again found that the representation had been adequate in the original case. Right or wrong, mustn't we have finality at some point? Is this a horror story for defendants more than for Stephenson, cancer-ridden or not? The defendants certainly say so, but their plight and the plight of all other defendants who insist on their right to closure, at some point, will have to await analysis.[223] First, we need to know more about the collateral attack that preceded Stephenson's.

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between sub-segments of the class were, overall, fair to everyone, with the very different kind of explanation that a lawyer representing only one subgroup—such as the post-1994 veterans in *Agent Orange*—would have to supply. A lawyer for such a subgroup could not "explain," for instance, that her clients got no relief, but that she thought that fair because that left more money for others, who were not her clients. To the extent I understand Nagareda's position, he seems to be imagining that all absent classes, which are at risk of future injury from exposure to a defendant's product, have similar interests in that they are, at the time of the class suit, all behind a veil of ignorance. Thus, in the *Agent Orange* case, at the time of the class settlement all veterans not yet sick, including Stephenson, had an equal chance of getting sick before 1994 and an equal chance (small) of getting sick after 1994. If the only claims being released were those for fear of injury, that argument would make sense. But once a "representative" (lawyer) is purporting to release claims for injuries, other than fear of getting sick or medical monitoring—i.e., purporting to release claims for injuries that will afflict some members of the group in the future and not others (claims which might be brought in the future were it not for the class settlement)—that representative must represent the interests of the set of people (identities unknowable now) who will actually be injured in the future (people who, but for the settlement being reached now, would have a cause of action). Of course, the law might sensibly preclude the present release of future claims in a class suit on the ground that there is no present case or controversy under Article III, or no method of providing adequate notice to such "futures," under due process analysis. *See Amchem*, 521 U.S. at 612–13, 628 (noting that both justiciability and notice problems raise serious constitutional questions). But, if the law is to allow such "futures" to be represented in the present, it seems plain to me that the representation they deserve is representation that concentrates on the future legal claims being released by the class settlement, not representation based on the shared ignorance of the not-yet-ill.

221 Again, I do not mean to suggest the presence of an explanation would suffice on its own. *See supra* note 220.

222 *See* Ryan v. Dow Chem. Co. (*In re* "Agent Orange" Prod. Liab. Litig.), 781 F. Supp. 902 (E.D.N.Y. 1991) (dismissing two consolidated collateral attacks on the *Agent Orange* settlement), *aff'd sub nom.* Ivy v. Diamond Shamrock Chem. Co. (*In re* "Agent Orange" Prod. Liab. Litig.), 996 F.2d 1425 (2d Cir. 1993).

223 *See infra* Part II.C.

A few years after the *Agent Orange* class settlement was affirmed on appeal, two new class actions were filed against the defendants claiming injuries due to Agent Orange exposure.[224] The defendants removed these actions, originally filed in Texas state courts, to federal court and then had them transferred to Judge Weinstein in New York.[225] The plaintiffs in these cases argued that because their injuries did not manifest until after the opt-out period in the first class action had ended (albeit before 1994, when the settlement provided that no money would be paid to anyone, making this a challenge by futures, but not far-futures, as I am using that term), they were not bound by the settlement in that case.[226]

First, they argued that they had been effectively denied notice and an opportunity to opt out of the settlement.[227] They attacked the notice both because many of them had not received any individual notice, and more generally as any notice would have been meaningless to them because at the time it was sent they were healthy.[228] For them, any notice would have been of minimal interest as it did not dispose of claims they had or believed they would have. Both the district court and the Second Circuit rejected the notice argument, as they had before.[229] Although I think those rulings are wrong, too, I leave that argument for another day.[230] Here, the important point is

224 *See Agent Orange*, 996 F.2d at 1430 (recounting the two cases' histories).

225 *Id.* The Second Circuit held that removal by the district court was appropriate under the All Writs Act to prevent frustration of the court's order. *Id.* at 1431. The recent Supreme Court decision in *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002), rejects that justification for removal. Stephenson's case, because filed originally in federal court and then transferred to the Eastern District of New York, was unaffected by *Syngenta*, but the Second Circuit had considered Stephenson's case along with a case brought in state court that had been removed to federal court. *See infra* note 241 (discussing the state court case decided alongside Stephenson's federal case).

226 *See Agent Orange*, 996 F.2d at 1433–39 (discussing plaintiffs' arguments that they are not bound by the *Agent Orange* settlement).

227 *Id.* at 1435.

228 *Id.*

229 *See id.* at 1436 (noting agreement with the district court that "designation of a subclass of future claimants and appointment of a guardian to represent their interests was unnecessary" because the settlement was structured to protect future claimants).

230 To explain in broad strokes why I believe that, I provide this brief summary of my position. Notice of a class action—however communicated—must, at a minimum, be capable of communicating (to the one to whom notice is directed) what interest of his is before the court. I do not think that is possible when the interest identified in the notice is one that the notified person does not understand as his own. If one is not sick and one receives a notice of a lawsuit that resolves the claims of sick people, I do not see why one would pay the slightest attention to it, i.e., would be notified by it

not what I think about the notice arguments in *Ivy/Hartman*[231] (the pre-*Stephenson* collateral attack), but what the Second Circuit said about them. It said:

> [P]roviding individual notice and opt-out rights to persons who are unaware of an injury would probably do little good. Their rights are better served, we think, by requiring that "fair and just recovery procedures be[ ] made available to these claimants," and by ensuring that they receive *vigorous and faithful vicarious representation.*[232]

The Second Circuit held that, in a suit involving "futures," due process—a "flexible" concept[233]—rested on adequate representation, rather than notice or the opportunity to opt out.[234] Conflicts of interest could mean that the representation was inadequate, but here the conflicts "never materialized." The alleged conflict between the interests of present and future claimants was imaginary, according to the court, in this case.

> These plaintiffs [near-futures], like all class members who suffer death or disability before the end of 1994, are eligible for compen-

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that one's interests are at stake. But, you might say, what if the notice clearly states that the suit will dispose of the claims that well folks might someday have, assuming they get sick? Isn't that "notice" enough? No. Notice of hypothetical involvement (if you get sick, then this affects you) is simply not the same as notice of involvement. In the real world, the first will often be ignored whereas that is not true of the second. If not ignored completely, the first will rarely, if ever, be taken as seriously as the second. For the law to assert that both types of notices nonetheless equally "notify" someone puts law at war with experience. Indeed, for the law to say that the second "notifies" someone in any meaningful way at all puts law at war with experience. The Second Circuit apparently shares that view. *See infra* note 232 and accompanying text. Notice, central as it is in our system, to due process and basic fairness, is simply too important a concept to tolerate so strained a relationship to the real world. In *Amchem*, the Supreme Court expressed serious doubt about whether notice to not-yet-injured folks was consistent with due process, although it did not decide the matter. It could have disposed of *Stephenson* on these grounds, but it did not. Why? First, it was not the question upon which certiorari was granted. But more important, to hold that "futures" (as those whose injuries have not manifested at the time of a class action are generally called) cannot constitutionally be given notice would effectively end futures class actions and I do not believe the Court is ready to take that step and close the door completely on a device (futures class actions) that defendants and plaintiffs' class action lawyers alike find so useful.

231 *In re* Agent Orange Prod. Liab. Litig. (*Ivy/Hartman*), 996 F.2d 1425 (2d Cir. 1993).

232 *Id.* at 1435 (citation omitted) (emphasis added).

233 *See id.* at 1435 (quoting *In re* A.H. Robins Co., 880 F.2d 709, 745 (4th Cir. 1989)).

234 *Id.* (holding that "[i]n the instant case, society's interest in the efficient and fair resolution of large scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are conjectural at best").

> sation from the Agent Orange Payment Fund. The relevant latency periods and the age of the veterans ensure that almost all valid claims will be revealed before that time.[235]

That argument does not, however, address the conflict between all the injured and the never-to-be-injured. It addresses the conflict between the near-futures and the far-futures only long enough to dismiss it on the ground that there are not likely to be many far-futures. What still united this class, according to the court, was the weakness of the claims.[236] The near-futures argued that in the years since the case was settled, their claims had grown stronger. Had they been independently represented in the original proceeding, they said, their lawyer would have anticipated that possibility and pushed for the settlement to take account of it.[237] The court acknowledged that in the intervening years the military contractor defense, previously the cornerstone of the court's conflict analysis, "had been somewhat limited by the Supreme Court."[238] But the defense would still present a problem for Agent Orange plaintiffs. Moreover, the claims had other serious weaknesses: establishing causation and the level of exposure to Agent Orange that any particular veteran had had.[239] For the Second Circuit, because the claims were as weak as ever, the collateral challenge to adequacy was no stronger than it had been when raised on direct review.

Did this mean the court was open to a new challenge on adequacy if and when the claims got stronger? The section of the opinion I have just discussed is open to that reading, but immediately following its holding that the representation "was more than adequate to protect" the plaintiffs in *Ivy/Hartman*, the court spoke in much more absolute terms. Quoting extensively from the settlement itself and an earlier opinion by the district court, both proclaiming that all class members are "forever barred" from suing the defendants in relation to Agent Orange, the Second Circuit went out of its way to state and emphasize that the plaintiffs before it, as members of the original class, were bound by those provisions and thus that their suits were properly dismissed.[240] Indeed, in this section of the opinion, the court's tone and language suggest that the "forever barred" language was sufficient on its own to dispose of the case. In other words, the opinion is somewhat ambiguous on whether the plaintiffs had a right

235 *Id.* at 1436.
236 *Id.* at 1434.
237 *Id.*
238 *Id.* at 1436.
239 *Id.* at 1436–37
240 *Id.* at 1437–38.

to raise adequacy collaterally or not. On the whole I think the court's discussion of the merits of the challengers claims suggests that they had a right to raise the collateral attack, but parts of the opinion create some doubt.

Five years after the Second Circuit dismissed the collateral attack in *Ivy/Hartman*, twelve years after the settlement was affirmed on appeal, and fifteen years after the fairness hearings on the settlement, Stephenson[241] sued the defendants, claiming he was not adequately represented in the original case and thus was not bound by that settlement. Did the courts really have to examine this issue yet again?

To the surprise of many—not just the defendants, I am sure—the Second Circuit thought so. The defendants argued, in effect, that Stephenson's tort claims were res judicata by virtue of the class settlement and that his claim of inadequate representation was res judicata by virtue of *any* prior determination of that question—and here there had been a plethora of prior cases, outlined above, all saying the representation had been adequate.[242]

The Second Circuit cited the longstanding rule of *Hansberry v. Lee*: whether the claims of an absent class member are res judicata depends on whether he was adequately represented.[243] Could earlier rulings on adequacy bind absent class members who had not themselves participated in the proceedings that produced those rulings? To that critical question, the Second Circuit had two answers. First, even if they could, no court had ever ruled on the precise adequacy question that Stephenson raised, i.e., the conflict between the far-futures and everyone else.[244] Second, the court said absent class members were not bound by adequacy rulings made in proceedings in which they had not participated. "A collateral attack to contest the application of res judicata [based on inadequate representation or defective notice, for that matter] is available."[245]

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241 The Second Circuit case involved another plaintiff, Joe Isaacson, but the Supreme Court vacated the Second Circuit's decision as it applied to him and directed that court to reconsider his case in light of *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002), decided a year earlier. *Syngenta* had held that federal courts were not to use the All Writs Act, 28 U.S.C. § 1651 (2000), to issue injunctions to stop collateral state court proceedings to prevent the frustration of previously issued federal court orders.

242 *See* Stephenson v. Dow Chem. Co., 273 F.3d 249, 157–58 (2d Cir. 2001).

243 *Id.* at 258 (citing Hansberry v. Lee, 311 U.S. 32, 41 (1940))

244 *Id.* at 258–59.

245 *Id.* at 259. Although the court's discussion of the general availability of collateral attack concentrates on challenging the res judicata effect of a settlement based only on inadequate representation, the court's discussion of the merits shows that its discussion was meant to apply equally to challenges based on defective notice.

The court then proceeded to the merits. This time, in my opinion, it got them right, even going so far as to jettison completely the core of its prior analysis: "The ultimate merits of the [Agent Orange] claims have no bearing on whether the class previously certified adequately represented these plaintiffs."[246] That amounts to a significant change of heart. What accounts for it? The opinion suggests two factors. First, the Supreme Court decisions in *Amchem*[247] and *Ortiz v. Fibreboard Corp.*[248] had been issued in the years since *Ivy/Hartman.*[249] Both Supreme Court decisions emphasized the real tension between the interests of those currently eligible to take from a settlement fund (the presents) and those who may be eligible to draw on the fund in years to come (the futures).[250] Both those decisions held that the two groups need separate counsel because the futures are interested in controlling current payouts to ensure money is available for them, while the presents are interested in getting big payouts now.[251] The Second Circuit rightly recognized that class counsel in the original proceedings (the counsel for the far-futures and everyone else in the class) did not just fail to insist on money being reserved for people like Stephenson; they supported a settlement that gave him nothing and their other clients (the remainder of the class) everything.[252] This surely was inconsistent with "the teaching"[253] of *Amchem* and *Ortiz.*

On the other hand, the court took pains to distinguish its holding in *Ivy/Hartman,* which had criticized the present/future distinction, from its holding in Stephenson's case.[254] It emphasized that in *Ivy/Hartman* it only addressed the alleged conflict between near-futures and presents (as opposed to that between far-futures and everybody else) and thus *Ivy/Hartman* could be read, according to the Second Circuit, as consistent with *Amchem* and *Ortiz.* Here, the Second Circuit asserted that *Amchem* and *Ortiz* said only that there *may* be a conflict

246 *Id.* at 261. *Stephenson* takes it further than I do. *See supra* text accompanying notes 210–12 (arguing that in some cases the weakness of the claims might obviate the need for separate representation, assuming it was obvious the claims were all equally worthless and the settlement treated them all the same way).

247 Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997).

248 527 U.S. 815 (1999).

249 *Stephenson,* 273 F.3d at 251, 259–61

250 *Id.* at 259–61.

251 *Id.* at 260 (quoting *Ortiz,* 527 U.S. at 856; *Amchem,* 521 U.S. at 626).

252 *Id.* at 260–61.

253 *Id.* at 261.

254 *Id.* at 257–58, 260 n.7.

between presents and futures, not that there *must* be one.[255] If that is all *Amchem* and *Ortiz* said about presents and futures (and I am not arguing here to the contrary), one can read those cases as consistent with *Ivy/Hartman.* That would, however, require more of an explanation than the Second Circuit provides as to why the conflict between presents and futures in the Supreme Court cases was significantly worse than that in the Agent Orange class settlement. Given that the Second Circuit in *Stephenson* undercuts its previous reason for dismissing the importance of the conflict (the Agent Orange cases were worthless on the merits), the opinion is not terribly persuasive in explaining why all the previous rulings on the conflict between presents and futures in the Agent Orange litigation are consistent with *Amchem* and *Ortiz.* The court's effort to distinguish *Ivy/Hartman* (and implicitly all the other rulings on the adequacy of representation in the Agent Orange litigation) from *Stephenson* succeed only in conveying that the court sees the conflict between far-futures and everyone else in the class as significant in a way that was not true of the conflict between near-futures and presents.[256] That conclusion, however, raises a problem, which is independent of the court's failure to explain in a convincing fashion just why one conflict matters and the other doesn't. The problem is that in *Ivy/Hartman* the court *did* mention the far-futures, although it seemed unconvinced that they would suffer any injury from having lacked independent representation.[257] Why not? Because the court then seemed unconvinced that there would be any far-futures with significant illnesses, even arguably related to Agent Orange.[258] Stephenson (and Isaacson)[259] made the judges think again.

The defendants were thinking, too, but my guess is that their thoughts, if honestly expressed, would be too full of invectives to print. All this solicitation for Stephenson's due process rights—what about theirs? Off to the Supreme Court they went only to be disappointed by the 4-4 split that left the Second Circuit ruling in place.

I too was disappointed, to put it mildly, but for very different reasons. Consider the three cases just described. They involve an absentee, Stephenson with cancer, whose lawyers negotiated no money for him to collect for his alleged injuries because he got sick a few years

255 *Id.* at 261 (noting that "[t]hose cases indicate that a class which purports to represent both present and future claimants may encounter internal conflicts.").

256 *Id.* at 257–59.

257 *Ivy/Hartman,* 996 F.2d 1425, 1434 (2d Cir. 1993).

258 *Id.* (quoting Uniroyal Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1389 (E.D.N.Y. 1988)).

259 *See supra* note 225 (explaining what happened to plaintiff Isaacson's claim).

too late; an absentee, Kamilewicz, who was charged 4155% of his "recovery" in attorneys' fees,[260] and Epstein and his fellow shareholders, who got two cents a share for claims the Ninth Circuit said were worth a whole lot more than that.[261]

The suggestion that absentees must monitor class action proceedings so that they can appear—flying cross country, if necessary—to protect themselves from representatives that portray their claims as worthless as in *Epstein,* that steal money from them as in *BancBoston* or that saves no relief for them at all as in *Stephenson,* on pain of being bound forever is an outrage. But the Supreme Court's indecision is not troubling solely or even primarily because of the injustice it suggests the Court might tolerate. The indecision suggests a willingness by some significant number of Justices to render procedural law incoherent in the name of expediency. It suggests a willingness to abandon principle based on the arguments of self-interested defendant corporations who grossly overstate the effects that the rights of absentees have on their willingness to settle class action claims.

It is time to analyze the legal arguments on the right of absentees to challenge adequacy—the right of Stephenson, the Vermont mortgagees, and the California investors.

II. THE ABUNDANT ISSUE:[262] DUE PROCESS

A. *Collateral Attack Is Constitutionally Guaranteed*

My position is simple—let me summarize it. Under the Constitution, adequacy of representation is what gives a court the power to affect the rights of absent class members. The Due Process Clauses of the Fifth and Fourteenth Amendments set limits on the jurisdiction that courts may exercise over persons. A court cannot conclusively determine its own jurisdiction, particularly not when the alleged defect to its jurisdiction is of constitutional significance. Thus, the rights of absent class members to attack collaterally class action judgments or settlements is constitutionally guaranteed, whether the class action was in federal or state court and whether, assuming it was in state court, the absent class members reside in the state or without. The court in which the challenge is brought must review adequacy de novo to avoid binding the challenger to any part of a judgment (or settlement) until that court determines that the first court had the power to

260 *See* Koniak & Cohen, *supra* note 9, at 1066–67.

261 *Epstein II,* 126 F.3d at 1253, 1255.

262 "Yet this abundant issue seem'd to me / But hope of orphans and unfathered fruit" SHAKESPEARE, supra note 1, at 9–10.

affect the rights of the challenger. Any lesser standard of review would be incoherent.

It all starts with *Hansberry v. Lee*.[263] *Hansberry* held that, as a matter of due process, absent class members cannot be bound to a class action judgment in which they have not been adequately represented.[264] Petitioner Hansberry and his colleagues were not challenging the adequacy of the representation they had received in the class proceeding in an appeal from the class action court's ruling. They were challenging adequacy in a "collateral"[265] proceeding in which they were defendants. The plaintiffs in the collateral action sought to bar Hansberry[266] from mounting a certain defense on the ground that it involved a matter that was res judicata for Hansberry by virtue of an earlier class action in which Hansberry and his fellow petitioners had been absent class members.[267] The Supreme Court holding meant

263 311 U.S. 32 (1940). In his recent article on *Stephenson*, Nagareda provides an interesting discussion of some overlooked facts in *Hansberry*. *See* Nagareda, *supra* note 9, at 298–99.

264 *Id.* at 45–46.

265 I put the word "collateral" in quotes here to make this point: although I have used throughout this Article the standard nomenclature, referring to actions to vindicate alleged wrongs as "collateral" whenever the defendant seeks to bar the action on the ground that the plaintiff was a member of a class in an action previously resolved and is properly bound by that action, the nomenclature suggests a bias. Collateral proceedings are disfavored in law. To call these actions collateral is to none-too-subtlely suggest that the plaintiff is presumptively bound. When the plaintiff was a named party, properly served, and especially when she was actually present for the proceedings, the presumption implicit in the word "collateral" is not troubling. But when we are speaking of absent class members, who did not appear in the original proceeding and may or may not have received any, or effective, notice, the implicit presumption strikes me as unwarranted. In *Hansberry*, the absentee being accused of a collateral attack was a defendant, which is not usually the case, as I have just explained. But what I have just said as to plaintiffs seems to apply with equal force to defendants, like Hansberry, who are alleged to be bound by a previous class resolution. Having explained my concern about the usual terminology, I will proceed to use the term "collateral" because that is the language commonly used in discussing these questions.

266 And Hansberry's co-defendants, as Nagareda rightly points out. Nagareda, *supra* note 9, at 297.

267 I do not mean to suggest that the facts in *Hansberry* are unimportant by my sanitized approach. The fact that underneath all this procedural wrangling were the ugly realities of restrictive covenants, barring African-Americans, like Hansberry, from buying land in certain neighborhoods is important to an underrstanding of this case's importance and the Supreme Court's ruling itself. The original suit, which the Illinois courts and thus the Supreme Court treated as a class action, is barely recognizable as one, but what is recognizable is the signs of collusion it bore. What does all that mean for how we should view the holding here? The first thing to notice is that all the "hot" facts have not rendered the case an oddity; it is considered a standard of

that Hansberry, as a defendant, could treat the prior action as if it were void as to him and mount a defense completely inconsistent with it. Finally, let us keep in mind that *Hansberry* did not involve absent class members from out of state, nor did it involve one state's courts deciding what effect, if any, to give another state's judgments. The class action proceeding at issue in *Hansberry* had been decided by an Illinois state court and the collateral attack on that judgment was also before an Illinois court. No one suggested that Hansberry or his fellow petitioners had not been subject to the territorial jurisdiction of the Illinois courts. For all one can discern from the Supreme Court's decision, they were all residents of Illinois at all relevant times.

But the question of collateral attack by absentees does not end with *Hansberry*, or, at least no one seems to think so anymore. Why not? First, the fact that *Hansberry* happened to raise the adequacy question in a collateral proceeding does not mean that the Constitution requires that one be able to raise it there. Justice Stone never said that. Indeed, he never considered the question whether Hansberry, entitled as he was to adequate representation, had lost his chance to raise that issue by having failed to raise it in the class action proceeding itself.[268] None of that, however, means that *Hansberry* has nothing to tell us about when adequacy must be open to challenge.

Everyone agrees that *Hansberry* is a due process case. Justice Stone says so in the majority opinion.[269] In what way, however, is due process offended by binding an absent class member to a judgment when he has been inadequately represented? Justice Stone did not use the word "jurisdiction" in *Hansberry*, but it is nonetheless beyond doubt that when he said "due process" he meant the limits of legitimate jurisdiction. To bind absent class members without adequate representation would offend due process because due process includes constraints on how any court may "dispose[ ] of an individual's situation."[270] Here are Justice Stone's words:

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civil procedure, a bedrock ruling that all law students are taught. Second and related, it seems to me that the Court found the least controversial method of entering the hot-button topic, at least then and for some even now, of restrictive covenants. It took a case on the issue when it could speak on solid ground. In short, for me the background of the case only bolsters the vision of *Hansberry* as foundational, assuming in anyone's eyes it needs any bolstering.

268 Given the facts of *Hansberry* that is no surprise. Whatever "notice" of the first class action proceeding there had been, it does not seem likely that any real attempt was made to apprise all reachable members of the absent class of the pendency of the class suit.

269 *Hansberry*, 311 U.S. at 37.

270 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 10–12, at 713 (1988). Professor Tribe's words, which I have seriously truncated here, were not written about

> It is a 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 or to which he has not been made a party by service of process.
>
> . . . .
>
> To [that] general rule[ ] there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented when not made parties to it.[271]

Pennoyer, invoked by Stone, was one of the earliest and most famous cases to articulate the jurisdictional limits embedded in the concept of due process. Although the precise limit set forth in *Pennoyer* no longer stands, its affirmation that due process includes jurisdictional limits is still good law:

> [P]roceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving [due process] a definition . . . there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules

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Hansberry or class actions, but his words capture the jurisdiction aspect of due process that underlies *Hansberry*. Professor Tribe's statement is, as he explains, his restatement (and refinement) of Professor Van Alstyne's notion that central to due process is the "old liberty" to be free of arbitrary adjudicative procedures. *See* William Van Alstyne, *Cracks in the New Property: Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977). Both those professors were struggling with "newer" questions of procedural justice rather than when courts may legitimately bind class members to a judgment. Whether or not the "old liberty" is a powerful enough construct to answer the difficult procedural questions raised by the modern, expanded notion of property, and our modern administrative state with all its variety, is a question I am not prepared to answer, but I believe it captures well the animating principle of *Hansberry*.

I realize that invoking "liberty" here runs the risk of miring me in a debate that I find formalistic and unhelpful, on whether "adequacy" and "personal jurisdiction" are elements of procedural or substantive due process. Supposedly, they are not only in different categories, but never the twain shall meet, i.e., there is no overlap between these categories. To the degree it matters to any of you, my position is that there is overlap and that both concepts can be seen as expressing aspects of both categories. In short, my position is that the categories do not get us anywhere. With apologies to all those who see these categories as central, particularly to the problem before us, I have neither the space here nor the heart to provide any fuller justification of my disinterest in this debate.

271 311 U.S. at 40–41 (citing Pennoyer v. Neff, 95 U.S. 714 (1877)).

> and principles . . . of jurisprudence for the protection and enforcement of private rights.[272]

Pennoyer also contains a corollary to its pronouncement that due process contains some limits on jurisdiction, i.e., the limits that we consider foundational to basic notions of fairness in adjudication. The corollary, also still good law, is that an individual is free to treat a court order entered against him by a court with no constitutional power over him as a nullity.[273] If that order or judgment is later raised in a court of competent jurisdiction, a person may contest the first court's power to bind him by litigating there the question of the first court's jurisdiction. If the second court finds the first court had jurisdiction, it must honor its order. If not, not.

Thus, if adequacy of representation is the lynchpin to the constitutional exercise of jurisdiction over absent class members, as I read *Hansberry* to say, *Pennoyer*'s corollary principle—let us call it the nullity principle—supports the right to collateral attack. At least that is so if the nullity principle is also of constitutional dimension—and it is, as I will now proceed to show.

I am a supporter of the exclusionary rule, but I recognize that it is true, as the Court now contends and many scholars believe, that the constitutional wrong of, for example, illegal searches may be vindicated, at least in theory, without excluding the illegally seized evidence at trial.[274] But a similar argument cannot be made about vindicating the unconstitutional exercise of jurisdiction. Either the unconstitutional exercise of power changes the legal position of a person or it does not. To hold that upon notice of a court's attempt to exercise suspect jurisdiction, one must subject oneself to that court's jurisdiction, at least for the purpose of contesting jurisdiction, gives force to the exercise of jurisdiction that cannot be removed by a hold-

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272 *Pennoyer*, 95 U.S. at 733.

273 *Id.* at 722–23.

274 *See* Akhil Reed Amar, *Against Exclusion*, 20 HARV. J.L. & PUB. POLICY 457 (1997) (arguing for a significant narrowing or abandonment of the exclusionary doctrine). On the other hand, *Boyd v. United States*, 116 U.S. 616 (1886), one of the earliest, if not the earliest, cases to interpret the Fourth and Fifth Amendments as applied to the states, held that the evidence was obtained by the government unconstitutionally, and excluded the evidence without any discussion of whether the Constitution could be vindicated by some more modest approach. The specific holding of *Boyd*, like that of *Pennoyer*, has not stood the test of time. *See* Fisher v. United States, 425 U.S. 391, 407 (1975). Nonetheless, *Boyd* in the area of constitutional criminal procedure, like *Pennoyer* in the area of constitutional civil procedure, occupies a central place in the historical development of its area of law, and still has much to teach us. Most important here, *Pennoyer*'s nullity principle is still good law. *See supra* note 273 and accompanying text.

ing by that court that it has no power. The person was forced to show up to argue jurisdiction: the exercise of jurisdiction has had its effect. And that effect is one that a court's later ruling cannot eliminate—the person was forced by a court to do what the court had no power to force the person to do: show up and plead to it.[275]

Moreover, the same logic demands that in a collateral attack the second court must review the first court's exercise of jurisdiction de novo. Any requirement of deference to the first court's judgment, again, gives that judgment effect, whether it is constitutional or not. The nullity principle, as I'm calling it, thus (1) is a necessary corollary to any due process limit on the exercise of personal jurisdiction; (2) includes within it the right to collateral attack; and (3) demands that the matter subject to collateral attack be considered de novo.

Why isn't notice and opportunity to opt out a sufficient basis for jurisdiction?[276] Well, there's *Hansberry*. But more can be said. At least since the adoption of Rule 23's basic structure in 1966, only absent class members in (b)(3) classes, essentially those primarily for individual money damages, have a right to notice and an opportunity to opt out. Have courts lacked jurisdiction for all these years over other absentees? Could it be that in non-(b)(3)-type class actions jurisdiction is conferred by adequacy of representation, but in (b)(3) adequacy is not jurisdictional? Logically, I suppose that's possible, although it makes little sense. First, the line between the various types of class actions is permeable, not a barrier. Indeed, it is not much of a line at all.[277] Second, there is the problem of "futures." I believe that

275 *See* Woolley, *supra* note 9, at 392–410 (arguing that jurisdiction is the key to the debate on the right of absentees to attack a class judgment in a collateral proceeding); *see also* Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998) (arguing, based primarily on *Shutts*, that adequacy is necessary for state courts to take jurisdiction over out-of-state absentees). Professor Monaghan, however, signed the brief submitted by Shapiro, Dana, and I in *Stephenson*, which expands the jurisdiction argument to all absentees. *But see infra* text accompanying notes 337–39 (discussing a statutory exception to the nullity principle).

276 In his thorough and important contribution on this subject, Professor Woolley asserts (citing *Phillips Petroleum v. Shutts*, 487 U.S. 1223 (1998)) that absent class members who receive notice and the opportunity to opt out "consent" to the jurisdiction of the court, at least in class actions for individual money damages. *See* Wooley, *supra* note 9, at 396. I read *Shutts* to require adequacy in addition to notice and an opportunity to opt out as necessary for jurisdiction over out-of-staters. *See infra* at notes 292 and accompanying text (setting forth two plausible readings), 293 (rejecting Woolley's third alternative).

277 *See generally* Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177 (describing just how blurry the lines between these categories have become).

there is a good argument that they cannot be included in any class action under the Constitution,[278] but if they can be included in a (b)(3) class, it is surely adequacy and not notice or opt-out rights that perfect a court's jurisdiction over them, because those latter instruments are all but "meaningless" to the futures.[279]

Moreover, an opt-out right is completely dependent on notice. So the question is whether notice in any class action can bear on its own the weight of perfecting jurisdiction. I submit that it cannot because, as anyone who has ever received notice of a class action (or watched a television adverstisement purporting to give absentees notice) knows there is simply no equivalence between that notice and actual service of process in a lawsuit. The first is not an attention-riveting event that concentrates the mind on what is at stake, the latter is. But even real, i.e., attention-riveting, notice of an actual lawsuit by itself is not enough to confer jurisdiction on a defendant without minimum contacts with the state court that issues the notice.[280] Why not? One important reason is that without more evidence of actual "consent" to the jurisdiction of a court that might not be as concerned with one's interest (because foreign), we consider it necessary for there to be something more, as a protection against the injustice that might be visited by that foreign court (on one not its own). I put it to you that all absentees have at least as much reason to be protected from any court that proposes to adjudicate their rights outside their presence, if only because of the likelihood, explained earlier and recognized throughout class action law, that the person not at the negotiating table will be harmed. They, who receive less than attention-

278 If notice is a constitutional prerequisite in any class action, then as suggested above, *see supra* note 230, I do not see how they can be provided notice. Second, if, as the law now seems to be, notice is not always constitutionally required, there is a fairly strong argument that Article III's case or controversy requirement bars their inclusion. Brief for Amicus Curiae Public Citizen in Support of Respondents at 2, Dow Chem. Co. v. Stephenson, 539 U.S. 111 (2003) (No. 02-271). Third, there are real questions about whether they can ever be adequately represented, particularly if adequate representation includes a named representative who can fairly stand in for them (how does one know, if any one "future" will actually end up being a "future" affected by the settlement, i.e., will get sick, although one could certainly argue that's not necessary). But even assuming that is not a serious barrier, there is another, that I believe is serious. The lawyer fighting for their "interests" will never have a clear idea of what the future will bring: How many futures will there be—important to how much money to fight for? What will the law and science look like when they get sick? Is there sufficient homogeneity among the "futures," given they will get sick in different worlds of law and facts?

279 *See infra* note 293.

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

riveting notice, deserve something more, and at least as much as defendants notified of "foreign court" proceedings, to guarantee that their interests will be safeguarded. That something more is, and always has been, adequate representation.

Returning to my discussion of the nullity principle, what of the rule of *Walker v. Birmingham*[281] that unconstitutional court orders may not be challenged by disobedience, unlike unconstitutional statutes? One must, according to *Walker*, obey an unconstitutional court order until it is adjudged unconstitutional. Does that not defeat my argument about the nullity principle being of constitutional dimension, at least as to absentees? Indeed, Dow argued to the Second Circuit in *Stephenson* that *Walker* supported its position. But the Second Circuit rightly rejected that argument.[282] *Walker* presumes legitimate jurisdiction.[283] There is no Supreme Court authority for the proposition that an unconstitutional order issued by a court without jurisdiction to issue the order must be obeyed.

The idea that *Hansberry* states a due process limit on the exercise of personal jurisdiction along with its necessary corollary, the nullity principle, is supported not just by the language from *Hansberry* quoted above with its cite to *Pennoyer*, but by Justice Stone's more specific discussion of adequacy of representation. He said:

> It is familiar doctrine of the federal courts that members of the class not present as parties to the litigation 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 in which members of the class are present as parties.[284]

All the cases Stone cites for this proposition are collateral attacks based on lack of jurisdiction, not in class actions but in other types of proceedings—proceedings unquestionably subject to *Pennoyer's* nullity principle.[285] So too are the cases he cites for his next proposition:

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281 388 U.S. 307 (1967).

282 Stephenson v. Dow Chem. Co., 273 F.3d 249, 257 (2d. Cir. 2001).

283 *Walker*, 388 U.S. at 315 ("Without question the state court that issues the injunction had, as a court of equity, jurisdiction over the petitioners and over the subject matter of the controversy."). That is not to suggest I am a fan of the rule in *Walker*. I am not, *see* Susan P. Koniak, *When Courts Refuse to Frame the Law and Others Frame It to Their Will*, 66 S. CAL. L. REV. 1075, 1082 n.30 (1993), but my objections to that case are not relevant here.

284 Hansberry v. Lee, 311 U.S. 32, 42–43 (1940) (citations omitted).

285 *See* Christopher v. Brusselback, 302 U.S. 500 (1938); Plumb v. Goodnow's Adm'r, 123 U.S. 560 (1887); Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1854); Bryant Elec. Co. v. Marshall, 169 F. 426 (D. Mass. 1909); Confectioners' Mach. Co. v. Racine Engine & Mach. Co., 163 F. 914 (E.D. Wisc. 1908).

"[W]e may [thus] assume that . . . such procedure [vicarious participation in the suit through adequate representatives] . . . satisf[ies] the requirements of due process and full faith and credit."[286]

The reading I have given to *Hansberry*, that it sets forth a constitutional limit on the exercise of jurisdiction over absentees and that that limit, like all constitutional limits on jurisdiction, necessarily implies a nullity principle that guarantees de novo collateral review, is supported by a series of other Supreme Court cases: *Phillips Petroleum v. Shutts*,[287] *Martin v. Wilks*,[288] *Richards v. Jefferson County*,[289] and most recently *Devlin v. Scardelletti*.[290] Given the limits of space and the fact that my argument does not depend on those cases, I will not discuss all of them. But I do want to spend some time on *Shutts* because some have suggested that the right of absentees to launch collateral attacks based on inadequate representation depends on whether *Shutts* demands such a right.[291] As my argument thus far shows, I reject that notion, finding the right implicit in *Hansberry* and *Pennoyer*'s nullity principle and seeing *Shutts* and the other Supreme Court cases just cited as support for, rather than the source of, the right I claim. Nonetheless, the centrality of *Shutts* for scholars like Kahan and Silberman requires me to say something more about it.

In *Shutts*, the Supreme Court said: "[t]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of absent class members."[292] Now, before we go any further, I understand perfectly well that the question presented in *Shutts* was what are the constitutional limits on the exercise of jurisdiction by *a state court* over absent class members *from another state*. But all that demonstrates is that *Shutts* did not expressly rule on whether adequacy of representation (or notice or the opportunity to be heard, for that matter—*Shutts*'s other two requirements for legitimate jurisdiction over out-of-state absentees) were also required for the constitutional exercise of jurisdiction over in-staters or those otherwise within the territorial reach of state or federal courts. Consider this

286 *Hansberry*, 311 U.S. at 43; *see* Chandler v. Peketz, 297 U.S. 609 (1936); Marin v. Augedahl, 247 U.S. 142 (1918); Bernheimer v. Converse, 206 U.S. 516 (1907). The sentence I just quoted has become a favorite with those who would deny or limit the right of absent class members to attack the adequacy of their representation in the class suit collaterally. It is the words, "such procedure," that these folks embrace. I will take up that argument later. *See infra* notes 304–07 and accompanying text.

287 472 U.S. 797 (1985).

288 490 U.S. 755 (1989).

289 517 U.S. 793 (1996).

290 536 U.S. 1 (2002).

291 Kahan & Silberman, *supra* note 9, at 264 n.193.

292 472 U.S. at 812.

statement of the issue in *Shutts*: May a state court exercise legitimate jurisdiction over out-of-staters who lack minimum contacts with the state? To that question the court said, yes, provided certain conditions are met. Now it could have meant yes, so long as the state meets some special hurdle or hurdles that it is not required to meet as to its own absentees. Or, it could have meant (or later decided it meant), yes, as long as the state meets the constitutional minimum for the exercise of jurisdiction over absent class members of any variety, it can then exercise jurisdiction over out-of-state absentees on those same terms, minimum contacts or not. Those who carry on about how *Shutts* only treats adequacy as a constitutional prerequisite for jurisdiction when it comes to out-of-staters are denying the possibility of that second reading. But the text of *Shutts* says nothing to foreclose that reading. Indeed, the Court's discussion of due process in *Shutts* is written without constant reference to the special situation of out-of-staters. Instead, it speaks of the due process rights of absentees largely without explicitly limiting this part of its holding to out-of-staters—perhaps because of sloppy drafting, perhaps not. My point is that it is no stretch to say *Shutts* is not clear on the breadth of its ruling on adequacy. The fact that the question presented was about out-of-staters does not preclude the second reading I described above. Moreover, if you read *Hansberry*, as I do, then the second reading of *Shutts* makes perfect sense.[293]

I am apparently not alone in thinking so. Courts consistently cite *Shutts* as setting forth what due process requires for the exercise of jurisdiction over *any* absentees.[294] The explanation I have just provided supports this common use of *Shutts*. Does *Shutts* then add anything to my argument, that is not already present in *Hansberry*? Yes,

293 Professor Woolley suggests a third reading: *Shutts* says that out-of-staters in state court class actions are entitled to notice and an opportunity to opt out before a foreign state court takes jurisdiction over them. Woolley, *supra* note 9, at 392. He emphasizes that *Shutts* says notice and a failure to opt out demonstrate "consent" to jurisdiction, and that's enough. *Id.* at 396. I think that is a strained reading of *Shutts*. Of course, as should be obvious by now, I believe there is always more than one way to read a case, and the reading most in accord with other law and sense should be picked whenever possible. Given my argument about *Hansberry* and *Pennoyer*, not to mention the sophistry that it would entail for the law to place so much weight on the fiction that class notices actually notify anyone of much, I do not think Woolley's reading meets that test. Moreover, nothing in *Shutts* dictates that we understand "consent" to be sufficient when one doesn't show up, particularly given that absentees must act to get out of an action, i.e., they are in by default. Requiring one to take action to avoid the jurisdiction of a court that otherwise lacks jurisdiction is not consistent with *Pennoyer*'s nullity principle.

294 *See, e.g., Ivy/Hartman*, 996 F.2d 1425, 1435 (2d Cir. 1993).

Shutts calls our attention to the scope of the adequacy requirement: it must be present at *all times*—throughout the proceeding.[295] The notion of "adequacy at all times" is consistent with collateral review and entirely inconsistent with the proposition that absentees must challenge adequacy in the original proceedings or find themselves bound. This argument was well expressed by the Ninth Circuit in the now-withdrawn *Epstein II.* Relying primarily on *Gonzales v. Cassidy*,[296] which the court called a precursor to *Shutts*,[297] the Ninth Circuit used the "adequacy at all times" requirement to counter what it called Matsushita's intervene-or-be-estopped argument: adequacy at all times necessarily implies a "hindsight approach."[298]

Indeed, as the *BancBoston* settlement demonstrates the inadequacy of counsel may not be apparent until after the fairness hearing is over.[299] Or, as *Stephenson* demonstrates, the inadequacy of counsel may not be understood by the absent class member as affecting him until the time for appeal is long past. Is the adequacy that *Hansberry* requires lost in situations like those? If not, collateral attack must be permitted.

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295 Nagareda singles out these words "at all times" as the cause of mischief because people like Woolley and Monaghan (and now me) have made more of these words than they should in their effort to support a broad right of collateral attack based on inadequate representation. Nagareda, *supra* note 9, at 315. His critique, however, is only important if the line he tries to draw between pre- and post-judgment conflicts is sensible. I have already explained, *see supra* text accompanying note 279, that I do not think it is sensible, coherent or consistent with Supreme Court precedent. Having said that, my argument is in no way dependent on *Shutts*'s "at all times" language. Indeed, my argument is not dependent on *Shutts* at all, except insofar as I need to demonstrate that *Shutts* is not inconsistent with my reading of *Hansberry* and the nullity principle.

296 474 F.2d 67 (5th Cir. 1973).

297 *Gonzales* involved a collateral attack to a federal class action. Thus, the Ninth Circuit calling it a precursor to *Shutts* and using it to give meaning to the adequacy required under *Shutts* (recall that *Matsushita* did involve the exercise of jurisdiction over absent out-of-staters, and thus was a *Shutts* case under either reading one or two of *Shutts*) is just an example of the implicit assumption made by most courts that *Shutts*'s adequacy requirement is implicit in due process apart from the foreign court issue.

298 *Epstein II*, 126 F.3d 1235, 1243 (9th Cir. 1997) (quoting *Gonzales*, 474 F.2d at 73 n.11).

299 The formula that allowed a certain percentage of each class member's escrow account to be taken to pay attorneys' fees, whether or not the class member had been forced to keep excess money in her account, could not have been imagined by any class member until the fairness hearing was over in that it was not explained in any paper the class received prior to the fairness hearing. *See* Koniak & Cohen, *supra* note 9, at 1057–68.

B. The Other Side's Best Arguments

The discussion of *Shutts* above is my answer to one of the main arguments made by those who would restrict the intervene-or-be-estopped argument, i.e., that *Shutts* does not hold there is a right to collateral attack.[300] In sum, I reply, yes, but nothing about it is inconsistent with such a right, and some of it is quite supportive of such a right. All in all, I do not, however, see *Shutts* as one of the stronger arguments against my position. There are, however, other arguments. And I want to address next those that some find quite persuasive.

First, is the argument that all due process requires of a state (or any) class action court is fair procedures for determining adequacy, not adequacy itself.[301] *Hansberry*, it is said, supports (or at least is consistent with) this view. The Ninth Circuit used *Hansberry* to support this idea in *Epstein III*:

> As the court stated in Hansberry . . . "there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of the absent parties who are to be bound by it."

The Ninth Circuit continued:

> Due process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations [on direct appeal]; due process does not require collateral second-guessing of those determinations and review.[302]

I have already explained, first in discussing the nullity principle and then in discussing the requirement that representation be adequate at all times, why I believe that due process requires just such second-guessing. I will not repeat that here. But what about that *Hansberry* quote? It does seem to support the procedures-are-enough approach adopted in *Epstein III*.

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300 The argument is set forth most thoroughly in a widely-cited article by Professors Kahan & Silberman, *supra* note 9, at 266–71. As suggested in the text, I do not find the *Shutts* argument persuasive at all. For those who do and find my reply to it too simple, Professor Woolley, *supra* note 9, at 439–45, provides a much more detailed rebuttal to Kahan and Silberman on *Shutts* as well as to the rest of their quite thorough piece. I encourage all those interested in this topic to read the work of those three scholars.

301 Kahan & Silberman, *supra* note 9, at 264. It was also made by the briefs submitted to the Supreme Court by and in support of Dow. *See, e.g.*, Brief of the Law Professors as Amicus Curiae in Support of Respondents at 9, Dow Chem. Co. v. Stephenson, 539 U.S. 111 (2003) (No. 02-271).

302 *Epstein III*, 179 F.3d 641, 648 (9th Cir. 1999).

Not really. First, notice that the beginning of the quote is lopped off in *Epstein III*. There is something missing before the word "there." The beginning of the sentence is: "With a proper regard for divergent local institutions and interests, this Court is justified in saying that . . . ." Restoring the beginning of the quote helps to show that the sentence is an introductory caveat, a reminder by the Court to itself and others, that it will not disrupt state institutions any more than is necessary. It is not, as the Ninth Circuit and others insist, an endorsement of an open-ended approach to the methods that states might use to bind absentees. At least, I submit it is hardly a required reading of that language and not the best reading either. Consider the pinpoint cite that Justice Stone provides at the end of that sentence, not with a "*cf.*" or a "*but see*," but as direct support for the point of the sentence: "*Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 235 (1897)." That page gives no support for the "any procedures will do" reading in *Epstein III*. It says:

> In determining what is due process of law regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: "Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States [the Fourteenth Amendment's Due Process Clause] is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation." *Davidson v. New Orleans*, 96 U.S. 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that amendment.[303]

More important, the "procedure adopted" quote from *Hansberry* used in *Epstein III* precedes the Court's statement that adequacy "in fact" has long been accepted as allowing federal courts to bind absent class members, and the conclusion the Court draws from that, i.e., that the Court may thus safely assume that "such procedure" would satisfy due process and full faith and credit when provided absentees by a state.[304] The other side would read the words "such procedure"[305] to support their procedure-for-finding-adequacy, not ade-

303 Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 235 (1897)
304 Hansberry v. Lee, 311 U.S. 32, 43 (1940).
305 *Id.*

quacy itself, position. But the simplest reading of that sentence is that "such procedure" refers to the presence of adequate representation in fact. *Hansberry*, after all, does not say that given that the state procedure for finding adequacy was nonexistent in the original proceeding, Hansberry is not bound. Moreover, if it meant that (but didn't quite say it) then there would have been no need for the Court to explain why the representation provided Hansberry was inadequate, which it did. To be clear: the Court examined the representation in *Hansberry* itself and found that it was inadequate.[306] The inadequacy of that representation would have been beside the point, if the key was the lack of adequate state procedures to find adequacy.[307]

The Ninth Circuit, as mentioned earlier, also relied on *Kremer v. Chemical Construction Corp.*[308] to support its view. *Kremer* had held that a state's administrative proceeding was entitled to full faith and credit because it had provided the "minimum procedural requirements of [due process]."[309] Judgments about which "there is reason to doubt the quality, extensiveness or fairness of the procedures"[310] are entitled to review, according to *Kremer*. Thus, *Epstein III* says: "Limited collateral review [of one state's class action judgment] would be appropriate, therefore, to consider whether the procedures . . . afforded the party [now collaterally attacking the judgment] a 'full and fair opportunity' to litigate the claim or issue."[311] That would not, however, allow for reconsideration of whether the absent class member had actually been adequately represented.

In *Epstein II*, the Ninth Circuit had, as mentioned earlier, rejected this "simplistic application of *Kremer*." *Kremer* had nothing to do with absentees; it contemplated a traditional model of process where the party is actually present before the court to contest the merits of the issue under the process provided, as *Epstein II* pointed out.[312] To say that due process is satisfied by any process that allows someone actually present before a court a full and fair chance to litigate an issue is quite different from saying that due process is satisfied by any process

306 *Id.* at 45.

307 Moreover, Justice Stone's "we may assume for present purposes [that adequacy suffices to satisfy due process]" sentence, *id.* at 43, can as easily be read to say that maybe more than adequacy of representation is required for due process, as to suggest that adequacy or maybe some substitute for adequacy (like a procedure for finding adequacy) would suffice.

308 456 U.S. 461 (1981).

309 *Id.* at 481.

310 *Id.* (quoting Montana v. United States, 440 U.S. 147, 164 n.11 (1979)).

311 *Epstein III*, 179 F.3d 641, 648–49 (9th Cir. 1999).

312 *Epstein II*, 126 F.3d 1235, 1245 (9th Cir. 1997).

that invites absentees to participate in the action, if they so choose. And it is miles apart from a process that tells absentees that they need not bother attending because class counsel is bound to represent them, which is what absentees are told.[313]

Absentees are intended to be absent, as I said at the start of this Article. Otherwise the class device is unnecessary. Absence is, indeed, central to orderly class action procedure. If all absentees actually showed up in massive class actions and demanded to be heard, the class action could not proceed. Given that absence is assumed, the "procedure-that-affords-an-opportunity-to-litigate" model simply has no place in the discussion. It cannot be taken seriously. If all absentees were actually guaranteed such procedures, adequately informed about them and about the effects of foregoing them, many class actions would come to a grinding halt—a far more realistic threat than those harped on by the opponents of collateral attack.[314] Neither the class action device itself nor any court's class action procedure is designed to afford every absent class member a full and fair opportunity to contest whatever matter they choose.

Consider, for example, the limitations routinely and understandably placed on objectors, no less those on the absent class: no right to discovery; no right to produce witnesses; no right to cross-examine.[315] All of those matters are left to the sound discretion of the trial court.[316] If the *Kremer* model was taken seriously, every collateral attack would succeed because absent class members are not each, and cannot each, be given the full and fair opportunity to participate in the proceedings.[317] The class action device would come undone.

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313 MANUAL FOR COMPLEX LITIGATION (THIRD) § 41.41, at 472 (1995).

314 *See infra* text accompanying notes 352–53 (discussing the threats to class actions that opponents of collateral attack insist will accompany an affirmation of a right that many assume has been around since *Hansberry* was decided in 1940).

315 Koniak, *supra* note 35, at 294–98.

316 *Id.*

317 Kahan and Silberman make a valiant effort to suggest revisions to class action practice to make the "full and fair opportunity" mantra less embarrassing to speak aloud. *See Kahan* & Silberman, *supra* note 9, at 251–52. I support many of their suggestions, but not as a substitute for collateral attack. To name one of the biggest problems with any proposal to substitute for collateral review fairer procedures in the original action: inadequacy that is not visible in time for it to be raised at the fairness hearing cannot by definition be raised in those proceedings. Here, Kahan and Silberman reach for the malpractice solution, noting that they agree with Professor Cohen and I that class counsel should be subject to such suit. *Id.* at 253 n.122. Yes, but as Professor Cohen and I explain in painstaking detail, courts have proven completely resistant to such suits, holding in most cases that court approval of the class settlement magically precludes any malpractice action against class counsel. Koniak & Cohen, *supra* note 9, at 1171. We argue that that approach is nonsensical as a matter of

The procedures-only argument is at its core a form of waiver argument. You chose not to object; you have waived your chance to contest adequacy. And for that reason it is disingenuous at its core: absent class members are not supposed to all show up and contest matters. Notices, in fact, make clear that staying away is a perfectly appropriate response.[318] Having invited passivity, indeed depending upon just such passivity, what kind of legal system would then penalize it? Not one committed to "due process."

An argument that is often made in conjunction with the procedures-only argument is one that would substitute objectors for collateral attack.[319] The idea would be to bar collateral attack at least in those cases when objectors actually appeared and challenged adequacy. This is really a milder version of the procedures-only argument, which in pure form holds that a process that allows for objectors, whether they show up or not, bars collateral attack. The "objectors" variant is, however, if anything even more incoherent. As the *Epstein II* court said: "Objectors are objectors, not named representatives."[320] No precedent supports the proposition that absentees may be bound by those no one even pretended to find adequate to stand in their shoes, i.e., objectors, who are not subjected to any "adequacy" test.[321]

Perhaps the strongest argument for the position I oppose is the defendants' interest in finality, if only because finality has become a near-sure-fire argument in the last few decades of constitutional law.[322] This argument was pressed vigorously by the petitioners before the Supreme Court in *Stephenson*, and is relied on by Kahan and Silberman as well. The long years between the settlement in *Agent Orange* and Stephenson's challenge as well as the many previous court rulings on the adequacy of the representation in the original class action make this argument concrete and compelling.

It is no secret and no sin that the aim of defendants in mass tort class actions, particularly those involving products that produce inju-

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preclusion law and unsound as a matter of policy. But the courts have yet to change their view of such suits.

318 *See supra* note 313 and accompanying text.

319 Although as noted earlier, Kahan and Silberman, to their credit, reject this argument, *see* Kahan & Silberman, *supra* note 9, at 244, and Judge O'Scannlain abandoned it sometime between his dissent in *Epstein II* and his majority opinion in *Epstein III*. *See supra* notes 104–06 and accompanying text.

320 *Epstein II*, 126 F.3d 1235, 1241 (9th Cir. 1997).

321 Kahan and Silberman critique this approach on the same ground. *See* Kahan & Silberman, *supra* note 9, at 264–74.

322 Most notably this is true in the law of habeas corpus. *See* Teague v. Lane, 489 U.S. 288, 306 (1988).

ries that take years to manifest, like asbestos, tobacco, and Agent Orange, is "global peace," an end to litigation on the matter. That is why these class actions are continually stretching the boundaries on who may be included in the class, i.e., people not yet ill, not yet born, not yet conceived, etc.

Defendants argue that they have no incentive to settle class actions without some guarantee of finality. I will take up that argument before we are through, but first I want to address the doctrinal arguments used to bolster this search for finality. In its *Stephenson* brief to the Supreme Court, Dow argued that the Court should assess what process is due the absent class using the balancing test set out in *Mathews v. Eldridge*.[323] According to Dow, that test would require the Court (or each court faced with a collateral attack—the brief is unclear on that matter) to balance the interests that would be protected by more process (and the degree to which they would be protected), against the private interests that might be harmed or burdened by that additional process, and, finally, against the interest of the courts in the efficient and nonduplicative administration of justice.[324] Of course, the last two factors, at least according to Dow, come out clearly in favor of no collateral review of adequacy, which always disturbs the defendant's interest in finality, costs it money, and eats up court time and resources. What about factor one? The interest of absent class members differs widely from one class action to another. What could be at stake is compensation for a life threatening injury or back interest on small sums held in escrow accounts. In short, the *Mathews* test cannot be applied to the question at hand at the level of generality needed to justify the defendants' preferred outcome—no collateral attack of adequacy—or even its next best outcome—no de novo review of adequacy.

That explains why the *Mathews* argument in Dow's brief was, all apologies to the drafters, nearly incoherent. Dow argued that its finality interests, among other of its interests, should weigh heavily in the *Mathews* calculus, whereas what Stephenson stood to gain was minimal.[325] Separate representation in *Agent Orange* would have done his subgroup little good, as no veteran got much under the settlement, and, according to *Stephenson* and *Ivy/Hartman*, not much was justified. Stephenson had an all-but-meritless claim in 1984, assuming he had any claim at all in 1984, and he's got a worthless claim now.

323 424 U.S. 319 (1976).

324 *See* Brief for Petitioners at 34–40, Dow Chem. Co. v. Stephenson, 539 U.S. 111 (2003) (No. 02-271).

325 *Id.* at 37–38.

Here is the problem: if *Mathews* demands the kind of case-by-case determination of what an absent class member has at stake in his bid for "more process"—which here means the right to collateral attack based on inadequacy of representation—that the Dow brief suggests, then all of the supposed savings of costs for the defendant and the courts to be considered under *Mathews*'s other two prongs disappear. The kind of inquiry Dow seems to suggest should proceed a determination on whether collateral attack is available would be just as costly as providing collateral review in the first place. Moreover, I do not see any sensible way, giving the wide range of interests that might be at stake in class actions, to apply *Mathews* to class actions without this costly case by case approach.[326]

But there is a second doctrinal argument about finality. The interests in finality are, the Court has said, greater in civil cases than in criminal ones. Thus, the right of absent class members to attack adequacy should be no greater (and probably less) than the due process right of those convicted of crimes who seek habeas corpus (collateral) review of the constitutionality of their convictions. Dow made that argument too,[327] and it has a certain surface plausibility. If correct, this argument would have the following implications and maybe more. One, as in habeas cases, the absent class member should be precluded from collateral attack if he has not first exhausted his other remedies, i.e., if he has failed to intervene and object. Two, if collateral attack of any sort is allowed, the absent class member should not be entitled to any "new law" on adequacy, i.e., the court should assess whether the representation was adequate under the law of adequacy

326 Given that the test in *Mathews* demands attention to the interests of the parties that are actually at stake, it is thus no wonder that Dow ends up arguing about Stephenson's interests. *Mathews* thus cannot do much to promote the finality interest of defendants without, that is, doing violence to the test articulated in that case. Another problem with the *Mathews* argument deserves mention. In *Dusenbery v. United States*, 534 U.S. 161, 167 (2002), the Court specifically stated that *Mathews* is not designed to replace all other procedural law to become some general balancing test for what procedure is due in every situation. Where there is extant procedural law, it is that law that governs, not *Mathews*. *Id.* *But cf.* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2646–49 (2004) (using *Mathews* to analyze process due a foreign citizen labeled an enemy combatant by the executive branch). It is, of course, my position that *Hansberry* and *Pennoyer*'s nullity principle are extant law. In any event, given that little in added finality or efficiency would be gained by applying *Mathews* to each instance in which an absentee sought to collaterally attack a settlement or judgment based on inadequate representation, if the Court thinks there is not extant law governing the right of absentees to bring such a challenge, it should state a rule, not leave the matter to *Mathews*-type balancing.

327 *See* Brief for Petitioners at 42–44, *Stephenson* (No. 02-271).

as it existed at the time of the first court's judgment. This second proposition relies on *Teague v. Lane*[328] and its progeny.[329] *Teague* held that a person convicted of a crime could not claim in a habeas petition that her conviction was unconstitutional based on Supreme Court precedent announcing "new law" after direct review of the conviction was completed unless the alleged constitutional violation denied a right so fundamental to basic fairness as to warrant its retroactive application to all convictions.[330] Transferring that doctrine here would mean that Stephenson would not get the benefit of *Amchem* or *Ortiz*, assuming that either decision announced new law, unless either decision articulated a new rule that was at the core of fair process.[331]

The problem with the entire line of argument is this: absent class members and convicted criminal defendants are not in remotely analogous procedural positions. The limits on habeas review all presume that the defendant was present throughout the proceedings and represented by reasonably competent counsel (unless that right was knowingly and specifically waived). It is in other words premised on the notion that the person seeking collateral review was actually present and represented and thus had every chance to raise whatever constitutional infirmities he is now seeking to raise in a collateral attack. Again, by definition, the absent class member is not present and the question of the collateral attack is whether that person was adequately represented, so that cannot be presumed either. Indeed, the two civil cases relied on by the petitioners in *Stephenson* for the proposition that collateral attacks may be barred even when they speak to

328 489 U.S. 288 (1989).

329 *See, e.g.*, Horn v. Banks, 536 U.S. 266 (2002); Williams v. Taylor, 529 U.S. 362 (2000); O'Dell v. Netherlands, 521 U.S. 151 (1997); Goeke v. Branch, 514 U.S. 115 (1995); Caspari v. Bohlen, 510 U.S. 383 (1994); Gilmore v. Taylor, 508 U.S. 333 (1993); Graham v. Collins, 506 U.S. 461 (1993); Stringer v. Black, 503 U.S. 222 (1992); Sawyer v. Smith, 497 U.S. 227 (1990); Saffle v. Parks, 494 U.S. 484 (1990); Penry v. Lynaugh, 492 U.S. 302 (1989).

330 Teague v. Lane, 489 U.S. 288, 310 (1988).

331 This argument is pressed in *Stephenson* to deny Stephenson the benefit of *Amchem* and *Ortiz*, which are fatal to the claim that Stephenson was adequately represented in the original class action. Brief for Petitioners at 46–50, *Stephenson* (No. 02-271). However, neither *Amchem* nor *Ortiz* announced new law. Even accepting that *Amchem* or *Ortiz* are new law, Stephenson should still win without the holdings of *Amchem* or *Ortiz*. *See* Koniak, *Feasting*, *supra* note 9, at 1086–95 (arguing prior to the Supreme Court decisions of *Amchem* and *Ortiz* that those not knowing they have been injured cannot be members of a class action because of basic unfairness, lack of an Article III case or controversy, and lack of notice of an ability to opt out). Prior to *Agent Orange*, no case had suggested that those parties not having injuries could be adequately represented in a class along with those presently injured. *Id.* at 1087.

jurisdiction, *Durfee v. Duke*[332] and *Chicot County Drainage District v. Baxter State Bank*,[333] both involved civil parties who were actually present before the court (as criminal defendants would be) and who had had every opportunity to raise all jurisdictional issues with the court. And both cases emphasize those facts.[334]

Finally, let me now just say a few words about the Supreme Court cases I mentioned with *Shutts* and did not discuss. *Richards v. Jefferson County*[335] and *Martin v. Wilks*[336] are two relatively recent cases that demonstrate the continued vitality of *Hansberry*.[337] Moreover, both involve collateral attacks as did *Hansberry*, and neither supports the intervene-or-be-estopped approach. But *Wilks* was substantially modified by statute.[338] If I am right about *Hansberry*, the constitutionality of that statute is doubtful, but I am not the first to make that point.

There is, however, a difference between my approach and the language of *Wilks*. *Wilks* describes the rule on adequacy as grounded in our commitment to each person's entitlement to "a day in court."[339] Please notice that nothing in my argument is dependent on giving each person a day in court.[340] And I fail to understand how "adequate representation" somehow vindicates that notion. Virtual representation in a class action, along with others similarly situated, is simply not equivalent to one's day in court. That's fine with me.[341]

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332 375 U.S. 105 (1963).

333 308 U.S. 371 (1940).

334 *See Durfee*, 375 U.S. at 115; *Chicot*, 308 U.S. at 378.

335 517 U.S. 793 (1996).

336 490 U.S. 755 (1989).

337 *See Richards*, 517 U.S. at 794; *Wilks*, 490 U.S. at 762.

338 Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1076 (amending 42 U.S.C. § 2000e-2 (2000)); *see also* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994) ("[Section] 108 responds to *Martin v. Wilks* . . . by prohibiting certain challenges to employment practices implementing consent decrees . . . ."). The constitutionality of this law remains unclear.

339 *Wilks*, 490 U.S. at 762.

340 *See* David Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 923 (1998) (arguing that the "day in court" model distorts the analysis of class action problems).

341 The strong position I have taken elsewhere against collusion and for fairer class action procedures has sometimes been mistaken as representing some commitment by me to the "day in court" model of litigation. I have no such commitment and never had one. Indeed, I see it as demeaning the class action device, a device I believe in. I agree with Professor Shapiro that the "day in court" model only distorts analysis in this area.

Class actions are old instruments of equity.[342] Group adjudication is neither novel nor, in my opinion, in any way at odds with fundamental notions of procedural fairness. My entire argument is based on the notion that adequacy of representation, as the Court said in *Hansberry*, is what brings group adjudication within traditional concepts of procedural fairness. To the extent *Wilks* suggests another reason to treat adequacy as central, I disagree.

Lastly, *Devlin v. Scardelletti*[343] must be considered. In *Devlin*, the Court held that class members who are not named in the complaint may appeal only if they objected to the proposed judgment, and even then only to the extent their appeal relates to their objections.[344] All other class members not named in the complaint are regarded as nonparties for purposes of appeal and cannot appeal as of right.[345]

Now, consider *Devlin* in light of the "at all times" requirement. In *BancBoston*, the notice of the fairness hearing did not reveal the attorneys' fee plan.[346] Indeed, according to the record[347] the plan or scheme had not been finalized at the time the notice went out. The fairness hearing was held. Imagine now that a smart newspaper reporter had been present. He puts together what he heard, asks a few questions, gets a few folks to talk and pieces together the plan. He writes a story. Absent class members are now alerted to the inadequate representation, but because they did not know earlier, they would have failed to object. Thus they could not appeal the determination of adequacy, according to the simplest reading of *Devlin*.[348] Would they be estopped forever from raising adequacy because collateral attack too is barred? Is that consistent with a "requirement" of

342 *See* Yeazell, *supra* note 7, at 692–96 (tracing the history of the class action from the chancery courts to the Federal Rules of Civil Procedure).

343 536 U.S. 1 (2002).

344 *Id.* at 11.

345 *See id.* Justice Scalia's dissent, joined by Justices Kennedy and Thomas, adopts an even narrower view of what constitutes a party for purpose of appeal in a class action: "[O]nly members of a class who are . . . named in the complaint are the class representatives; . . . it is only these members of the class, and those who intervene or otherwise enter through third-party practice, who are parties to the class judgment." *Id.* at 15 (Scalia, J., dissenting).

346 *See* State v. Homeside Lending, Inc., 826 A.2d 997, 1009–10 (Vt. 2003).

347 *Id.* at 1000.

348 Admittedly *Devlin* might be read to say that, if one objects, one can appeal, and we do not decide whether those who fail to object may ever appeal. Moreover, I would hope that someday it is read that way, but, for now, it seems that *Devlin* is taken to stand for the proposition that objectors may appeal and not every absent class member. *See, e.g.*, Ballard v. Garrett, 78 S.W. 3d 73, 74 n.2 (Ark. 2002).

adequacy of representation at all times? With anyone's notion of fair process?

Although *Devlin* eschews formalistic reasoning about who counts as a party and who does not, its holding does treat absentees who fail to object as something significantly less than "parties."[349] To hold after *Devlin* that absentees who fail to object are nonetheless "parties" enough to be precluded from collateral attack would be grossly unfair. Moreover, it might wreak havoc in the real world. And that is where I want to leave you, back in the real world. So let me conclude by examining the real world implications of the legal position I have presented.

C. Will the Sky Fall?

Proponents of barring or seriously restricting collateral attack by absent class members claim the sky will fall if collateral attack with de novo review is permitted.[350] Class actions will not settle or will settle much more rarely than they now do. The courts will be clogged with absent class members re-litigating every issue in every settlement. Life as we know it will all but come to an end.

But all of that is demonstrably false because, with the exception of *Epstein III*, no federal circuit and no state court has moved to limit the traditional rule allowing collateral attack that many, if not most, people assumed was the law, at least since *Hansberry*. Almost every class action settles. And there is no evidence whatsoever that absent class members are clogging the courts with collateral attacks anywhere.[351] And they never have. The argument that the sky will fall unless collateral attacks are barred is specious.

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349 Here once again, Nagareda and I see matters quite differently. Professor Nagareda reads *Devlin* as inconsistent (or potentially inconsistent) with *Hansberry* because *Devlin* acknowledges that for purposes of appeal absentees are the equivalent of parties. Nagareda, *supra* note 9, at 331 ("[T]he Court cast uncertainty over *Hansberry*'s understanding of absent class members as nonparties."). He then laments that the 4-4 split in *Stephenson* prevented the Court from writing an opinion that would have cleared up the seeming inconsistency between *Hansberry* and *Devlin*. *Id.* at 332. Given that *Devlin* did not hold that absentees were parties for all purposes and, indeed, that it went out of its way to discourage a formalistic approach to the question of whether absentees are parties, I do not think Nagareda has a point here.

350 *See* Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioners at 19–20, Dow Chem. Co. v. Stephenson, 539 U.S. 111 (2003) (No. 02-271); Reply Brief for Petitioners at 20, *Stephenson* (No. 02-271).

351 *See* Woolley, *supra* note 9, at 443 n.268 (noting the rarity of collateral attacks and describing his own informal survey on Westlaw of the cases). Between the years 1966 and 2000, Woolley could find only forty-four cases (state and federal) that were

What then accounts for the alarm raised by the many corporations and business associations appearing before the Supreme Court in *Stephenson* as amici? Perhaps they fear that the Second Circuit's opinion, or an opinion by the Supreme Court affirming settled law, would change the status quo by making plain a right that absent class members might now not be aware they possess. Petitioners in *Stephenson* admit, and indeed try to use to their advantage, the fact that the settlement there contained explicit language purporting to negate the availability of collateral attack. Until and unless the Supreme Court rules otherwise, such statements are misleading, at best, but perhaps defendants believe that they account for the rarity of collateral attacks.

But I do not believe the defendants think that. Many collateral challenges to class action judgments or settlements—and certainly all challenges involving small individual claims—would take the form of a second class action that would be driven, for all practical purposes, by plaintiffs' lawyers who are familiar with the state of class action law and would be extremely unlikely to be deceived by such language.

Why then do we not see many collateral attacks? The chance of persuading the second court (not an appeals court, but another trial-level court) to say that the first court erred is exceedingly slim, even when the second court is proceeding de novo. Trial judges are naturally, and in most cases appropriately, reluctant to hold that another trial judge made such an error. More to the point, lawyers know that. Thus, there is little incentive for a plaintiff's lawyer (working almost always for a contingent fee) to bring a collateral attack. Moreover, to the extent that some plaintiffs' lawyers are interested only in seeking a quick payoff from class counsel and defense counsel as a quid pro quo for dropping nuisance or "strike suit"-type claims, those lawyers have simpler and more lucrative means of extracting such payoffs, i.e., presenting or threatening to present objections in the class action proceeding itself.[352]

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collateral attacks on class action judgments or settlements based on inadequate representation. *Id.*

352 As the Advisory Committee's Comments to its latest proposals for amending Rule 23 stress, some objectors' primary purpose is to induce class counsel and defendants to reach a separate accord with them to make them go away. Even though objections to a class settlement are unlikely to scuttle the settlement altogether, the risk is too great for class counsel and the defendants to take: if the settlement is rejected by the court, every class member will be free immediately to sue individually (in a large stakes case), and every plaintiff's lawyer will be free immediately to file new class actions (in cases where the stakes are too small for individual suits). See FED. R. CIV. P. 23(g) advisory committee's notes.

But that just leaves us with my earlier question: Why are so many defendants and potential defendants pushing so hard for a rule that would "cure" a problem that does not exist—namely, a plethora of bogus collateral attack suits? There are two plausible answers. First, litigants pursue finality as an end in itself. Indeed, the reason defendants have embraced class action settlements as a means of resolving "mass tort" cases is that they provide a path around one-way preclusion, a legal precept that prevents defendants from using a victory in one individual law suit to bar suits by all those similarly injured.[353] Class actions function as an important escape route, albeit a non-absolute one, from the effects of nonmutual preclusion. Petitioners and their amici want that escape route to be absolute. The Supreme Court does not seem inclined to change the rule on nonmutual preclusion. But if the Court adopted any significant bar on collateral attack by absent class members, the law in sum would be this: although (in the absence of a relationship of privity) one individual pursuing a case with vigor can never bind another,[354] no matter how similar their two cases, a class action plaintiff and her lawyer—even with every incentive to settle on the cheap—can bind an entire group of people, even if, *in fact*, as *Hansberry* puts it, adequate representation was lacking. The Court's 4-4 split suggests that it might endorse just such a ludicrous result. One can only hope that it realizes that before rendering procedural law so nonsensical.

The second plausible reason for the defendants' quest for an absolute bar on collateral attack is less attractive, but all too real: a bar would facilitate egregious collusion between class counsel and defendants. Consider what happens in those rare cases when a trial or appellate court rejects a settlement on the basis of collusion or any other ground. The parties can go to another trial court, change a term or two—although that is not technically necessary—and ask the second court to accept the deal.[355] One important, though hardly perfect, deterrent to such behavior is the prospect of de novo review by a sec-

353 *See* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 716–18 (5th ed. 2001).

354 South Central Bell Tel. Co. v. Alabama, 526 U.S. 160, 167–68 (1999); *see* Richards v. Jefferson County, 517 U.S. 793, 798 (1996).

355 In *Zografros v. Qwest Communications*, 225 F. Supp. 2d 1217 (D. Ore. 2002), for example, the court concluded that class counsel and defendants "at some point, became unhappy that the court would not rush approval of their proposed settlement, but instead intended to carefully consider and thoroughly scrutinize it" and hence "abruptly remov[ed] themselves from the Chicago District Court's jurisdiction to start anew in Portland." *Id.* at 1223–24. Similarly, in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 134 F.3d 133 (3d Cir. 1998), after the Third Circuit set aside a class action settlement, "the parties to the settlement repaired to the 18th Judicial District for the Parish of Iberville, Louisiana, where a similar suit had

ond court in a collateral attack. De novo review avoids the unacceptable result that the last court's "adequacy of representation" finding will supersede the findings of inadequacy by the earlier courts. Thus, the availability of de novo review of adequacy of representation makes it less worthwhile for litigants to shop collusive settlements.

Moreover, settlement shopping is not the only way to obtain court approval for a collusive deal.[356] If, for example, counsel for an objecting member of the class succeeds in persuading the court to reject a settlement on grounds of inadequate representation (or indeed, on any grounds), there will be no fund from which that counsel can recover fees. Thus, most objectors are careful to avoid pushing too hard any argument that might completely scuttle the settlement. This is yet another reason it makes no sense to hold that the presence of objectors somehow suffices to eliminate the rights of all absentees to attack the settlement collaterally. More to the point, objectors are rare.[357] In sum then, the first court's decision on adequacy is highly unlikely to be based on clashing presentations by true adversaries. Indeed, even those objectors dedicated to the presentation of serious objections—even those willing, if necessary, to scuttle the entire deal—are severely limited in their effectiveness because most courts either deny them discovery altogether or sharply restrict it.[358]

What about the *Brown v. Ticor Title Insurance Co.*[359] compromise position, i.e., that the absentees' right to attack adequacy collaterally should depend on whether the defendant had "notice" during the original proceeding that the representation was less than adequate?[360]

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been pending, restructured their deal, and submitted it to the Louisiana court, which ultimately approved it." *Id.* at 137.

This problem recently prompted the Seventh Circuit to issue a ruling as disruptive to the coherence of procedural law. In *In re Bridgestone/Firestone*, 333 F.3d 763 (7th Cir. 2003), the court held that its previous decision that a class could not be certified bound the "class" (here in quotes because the prior decision said there was and could be no class) because the "class" (or non-class) had been adequately represented. How members of an entity that the law does not recognize (a class that may not be certified) can be bound by any judgment escapes me, but that problem is beyond the scope of this Article. Here, what is important is that in every other circuit, the problem of shopping settlements continues.

356 For a fuller discussion of practices discussed in this paragraph, see Koniak & Cohen, *supra* note 9, at 1104–12 (1996); and Katherine Ikeda, Note, *Silencing The Objectors*, 15 GEO. J. LEGAL ETHICS 177, 180 (2001).

357 *See* Thomas E. Willging et al., *supra* note 50, at 140 (concluding that there were no objectors in forty-two to sixty-four percent of the fairness hearings in four federal judicial districts).

358 *See supra* note 316 and accompanying text.

359 982 F.2d 386 (9th Cir. 1992).

360 *Id.* at 390–91; State v. Homeside Lending, Inc., 826 A.2d 997, 1017 (Vt. 2003).

As Professor Woolley notes, *Ticor*'s compromise is not generally used by courts;[361] it is just talked about.[362] Good thing too, given that it makes little sense. If adequacy is jurisdictional, as I maintain, what relevance is the defendant's state of mind or anyone else's state of mind for that matter? The opposing parties' perception of jurisdictional problems has never been thought relevant to whether jurisdiction exists. Moreover, *Ticor* is incoherent whether or not adequacy is necessary for the constitutional exercise of jurisdiction over absentees. Adequacy is a protection for the absent class. It makes no sense to say that that protection is unnecessary when the harm from its absence was not apparent to the defendant (or the court). There is no reason to think that inadequate representation that is hidden (often perhaps by the actions of the inadequate representatives who have an interest in hiding it) is any less detrimental to the absent class than inadequacy that is blatant. Indeed, there is reason to think it is more harmful in that presumably if the defendant could not see it, neither could any absentees or the court, which means no steps to mitigate it could have been taken. *Ticor* is based, obviously, on some misguided attempt to split the baby, i.e., take into account not just the absent class members' interests but also the defendants' interest in finality. It fails.

But can class action practice really continue with no guarantee that settlements are final? That question pressed with such earnestness by opponents of collateral attack is, in truth, absurd.

As Professor Geoffrey Hazard, writing with Professors John L. Gedid and Stephen Sowle, put it:

> It is probably impossible to guarantee prospectively the conclusive effect of a class suit judgment. However, that is not really a serious objection to the class suit procedure, or to there being valid class suit judgments. It is impossible to "guarantee" the conclusive effect of any judgment. A litigant always remains free to say that there was no actual service of process, or that the process was invalid in some respect, or that the proceeding was invalidated by fraud, and so on.[363]

I rest my case.

CONCLUSION: SUMMER AND HIS PLEASURES, WAIT ON THEE[364]

In the real world de novo review has done nothing to interfere with settlements in class action cases. And, I have tried to show, it

361 Woolley, *supra* note 9, at 422 n.170.
362 *Homeside Lending*, 826 A.2d at 1017.
363 Hazard et al., *supra* note 9, at 1946.
364 SHAKESPEARE, *supra* note 1, at 11.

makes sense as a check on collusion. The second court cannot be confident that the first court had the necessary information before it in rendering its findings on adequacy. It is the second court, not the first, that is more likely to hear that clash of positions deemed central in our system to reliable court rulings. A fairness hearing on a proposed class settlement may consist of nothing more than a rehearsed joint presentation by class counsel and defense counsel. In Judge Easterbrook's words, "[r]epresentative plaintiffs and their lawyers may be imperfect agents of other class members—may even put one over on the court, in a staged performance. . . . [T]he court can't vindicate the class's rights because the friendly presentation means that it lacks essential information."[365]

Given the realities of class action practice, de novo review by the second court is essential if absent class members are to receive adequate representation in fact. To change existing law and adopt a standard of high deference to the first court, or to restrict review to the procedures used by the first court, or to bar collateral attack altogether would rest law upon fiction: that the first court is likely to have had all the information it needed or that any procedure can ensure that the first court gets that information, or that absentees can actually have a full and fair opportunity to challenge adequacy at the fairness hearing.

Law that is to command respect should not be so at odds with reality. Maybe the Supreme Court will see that the next time it decides to review this question.

365 Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc).