

SYNGENTA, STEPHENSON AND THE FEDERAL JUDICIAL INJUNCTIVE POWER

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INTRODUCTION

Over the last two terms, the United States Supreme Court has heard oral argument in two cases with important implications for complex litigation. The two cases—*Syngenta Crop Protection, Inc. v. Henson*¹ and *Dow Chemical Co. v. Stephenson*²—raised distinctive legal issues but both fundamentally concerned the problem of federal judicial power to enjoin litigants from pursuing state proceedings after a federal judgment has been rendered. In *Syngenta*, the Court resoundingly rejected use of the All Writs Act to enjoin an infringing state case by removing it to federal court. In so ruling, the Court reaffirmed that, in appropriate cases, an injunction may issue to enjoin prosecution of state suits after federal judgment.

By sharp contrast, *Stephenson*, which involved a collateral attack on a prior federal class action certification ruling, left the justices evenly divided (with Justice Stevens having recused himself) and the scope of federal judicial injunctive power in this class action context undefined. It would be a mistake, however, to treat the case lightly. Though technically a non-decision, *Stephenson* unmistakably signals a willingness by four justices to proscribe collateral attacks on a federal court's prior judgment in a case, even when the attack is brought by

* Assistant Professor of Law, University of Houston Law Center. I am grateful to Susan Koniak and Henry Monaghan for their feedback on an earlier draft of this article. Thanks also to Darci Deltorto and the rest of the editors of the Akron Law Review for organizing this symposium. The University of Houston Foundation provided financial support for this project. Finally, a note of full disclosure is in order. On behalf of the State of Texas, I filed, *pro bono*, an *amicus* brief in support of the respondent in the *Syngenta* case. My interest in the case originated with an article I had previously written several years earlier. See Lonny S. Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401 (1999).

1. 537 U.S. 28 (2002).
2. 539 U.S. 111 (2003).

persons who did not participate in the case and who argued that they were not adequately represented by those who did. The implications of this signal are profound: if the position of this plurality commands only one more member of the Court, it would mean for the class action context a vastly greater federal judicial authority to enjoin collateral attacks brought in the state forum.

This paper takes up the question of the limits of a federal court's authority post-*Syngenta* and -*Stephenson* to enjoin litigants from prosecuting state suits brought concurrently with an ongoing federal case or after a federal judgment has been handed down. In particular, my objectives are three-fold. As regards *Syngenta*, I will examine the case's background and procedural history to highlight the strategic decision-making and forum shopping decisions made by all of the parties and their lawyers in the contest. Also, by revisiting the Supreme Court's decision in the case, I hope to offer a better perspective on what the justices did decide and, correspondingly, also reflect on what they did not decide. Even as *Syngenta* nodded in recognition that some power exists to enjoin state proceedings, its ambit was left undefined. Recognizing the scope of the Court's decision is critical if any insight is to be gained into the import the decision bears on the limits of the federal judicial injunctive power.

My second objective concerns *Stephenson*. Like the earlier study of *Syngenta*, the examination of *Stephenson* will also consider the case's background and procedural history. Because there ultimately was no decision by a majority of the Court in the case, Part II of this paper more carefully parses the intermediate appellate court's opinion, along with the positions advanced by the parties and their *amici* before the United States Supreme Court. Examining the arguments in this manner helps to frame the parameters of the debate over federal injunctive power as it arose in the *Stephenson* context.

Finally, Part III considers, in the aftermath of *Syngenta* and *Stephenson*, the future battles we should expect over the use of the civil injunctive power by federal judges to restrain state litigants. In considering the legal questions likely on the near horizon, we will also discover the most important and revealing connection between these ostensibly unrelated cases. Read together, *Syngenta* and *Stephenson* suggest that what is at stake in articulating the limits of federal judicial injunctive power to enjoin coordinate state proceedings is not only the accommodation of competing sovereign interests but also the evaluation of strategic decision-making by litigants and its influence on judicial decision-making. If *Syngenta* reminds us that litigants may sometimes

invoke the state courts to try to game the system in inappropriate ways, *Stephenson* reflects that without proper safeguards and review even federal judgments may be called into doubt. Put another way, the cases indicate that the problem of legitimacy can be bilateral. A recent study by Thomas Willging and Shannon Wheatman for the Federal Judicial Center (FJC) bolsters this conclusion. They found that, on the whole, state and federal judges handle class litigation in approximately the same manner, in terms of how frequently certification is granted (whether for trial or for settlement) as well as in their rulings on dispositive pretrial motions.³ These findings suggest that there is no valid basis for presuming federal judges will be more fair or efficient in their treatment of complex case litigation than state judges. At the same time, the FJC's findings cut across all courts and should not be read to mask that particular judges—or multiple judges in a particular region—may fail to properly evaluate and manage cases that are before them. By directing sharper focus on this evaluative responsibility judges bear, our study of *Syngenta* and *Stephenson* may bring us closer to a better conception of preclusion law and a more unified framework for defining the limits of and appropriate tolerance for “jurisdictional redundancy,” as Bob Cover once put it, in our peculiar system of courts with overlapping jurisdiction.⁴

I. SYNGENTA

A. *In the Beginning*

The origins of the Court's decision in *Syngenta* may be traced to Iberville Parish, Louisiana. It was there that Hurley Henson and several other plaintiffs (the “*Henson* plaintiffs”) sought recovery from the chemical manufacturer Ciba-Geigy Corporation (renamed Syngenta Crop Protection, Inc. by the time *certiorari* was granted by the U.S. Supreme Court) for damages sustained as a result of their exposure to an insecticide manufactured and sold by the company. The only problem was that the *Henson* plaintiffs had previously been plaintiffs in a prior lawsuit filed against the same defendant in the United States District

3. Thomas E. Willging and Shannon R. Wheatman, ATTORNEY REPORTS ON THE IMPACT OF *AMCHEM* AND *ORTIZ* ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION: A REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES REGARDING A CASE-BASED SURVEY OF ATTORNEYS (April 2004). A copy of the full report may be accessed through the link www.fjc.gov.

4. See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest Ideology and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

Court for the Southern District of Alabama.⁵ Indeed, not only had the *Henson* plaintiffs been plaintiffs in the federal case, *Price v. Ciba-Geigy Corp.*, but they had even opted into a settlement where, in exchange for monetary payment by the company, they agreed to dismiss with prejudice their claims against the chemical company.⁶ Yet, after depositing their settlement checks and dutifully signing the settlement agreement, the *Henson* plaintiffs directed their counsel to assert new claims against the same defendant in a Louisiana state court.⁷

There are two sides to every story, of course, and the *Henson* plaintiffs' was that when they sought to litigate again in state court they were seeking relief for a different injury: namely, exposure to Atrazine, not the chlorodimeform-based insecticide known as Galecron that was at issue in the *Price* litigation. On this fine distinction, the *Henson* plaintiffs argued that they were asserting claims for relief which were not disposed of by the federal settlement. They insisted that the company did not negotiate a settlement of all claims but that resolution covered only claims relating to exposure to Galecron, the particular chemical that was the subject of the federal litigation.

The state court judge apparently was persuaded by the distinction, though it has been suggested that plaintiffs' counsel "successfully misled" the judge.⁸ Whether by guile or otherwise, the *Henson* plaintiffs received an invitation from the state judge to amend the state petition to make plain that the claims they were bringing arose solely from their exposure to Atrazine and, therefore, were not barred by the federal settlement.

5. To be precise, Henson was one of the named plaintiffs in the Iberville Parish suit that was filed as a class action on behalf of all individuals whom Ciba-Geigy employed at its St. Gabriel, Louisiana, facility. Filed on September 15, 1993, this suit preceded the filing of the case that was certified eventually by Judge Butler in the Southern District of Alabama. See Brief of Petitioner at *2, *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28 (2002) (No. 01-757), available at 2002 WL 956371 (noting that the federal case began as a separate state suit in Mobile County, Alabama, and was properly removed to federal district court on January 30, 1995). Before any class was certified by the Louisiana state judge, Henson and other Louisiana residents employed at the defendant's St. Gabriel facility decided to suspend their state court action and try, instead, to intervene in the federal litigation. It was only after the federal settlement that Henson and the other intervenors returned to state court and sought to reopen the state proceedings to seek further relief against Ciba-Geigy (n.k.a. Syngenta).

6. Judgment was then entered approving the settlement under Rule 23 by Judge Butler, the presiding judge in *Price*.

7. The *Henson* plaintiffs also named several individual defendants in their state court suit. It was the presence of these individual defendants that destroyed the diversity of citizenship that otherwise existed between plaintiffs and Syngenta and, thereby, necessitated the company's reliance on the All Writs Act to attempt to remove the otherwise unremovable case.

8. *Henson v. Ciba-Geigy Corp.*, 261 F.3d 1065, 1067 (11th Cir. 2001).

Rather unhappy with their luck before the state trial judge, the chemical company (and the three individual defendants also named in the suit) removed the state court case to the Middle District of Louisiana, relying principally on the All Writs Act and the assertion that the state court action threatened to interfere with the prior federal judgment which had approved the settlement and dismissed all claims against the company. Transfer was then immediately requested under 28 U.S.C. § 1404(a) to the Southern District of Alabama and, though the record is silent on how they accomplished this, the skillful lawyers for the chemical company also succeeded in getting the case back before Judge Butler.⁹ Once there, the defendants fared far better in their argument that the *Henson* plaintiffs' claims should be dismissed on the grounds that all such claims had *already* been settled and dismissed. Indeed, so incensed was Judge Butler by the actions taken in Iberville Parish after the settlement, that once the *Henson* plaintiffs were back before him he not only dismissed their case with prejudice but he also imposed a sanction of \$27,000 against counsel to cover the defendants' legal fees in enforcing the federal settlement.

Stymied from pursuing the state court action, the *Henson* plaintiffs and their counsel appealed the dismissal and the sanctions order, respectively, to the Eleventh Circuit. The appellate court began by readily affirming the sanctions order against plaintiffs' counsel. The *Henson* plaintiffs' lawyer had argued that the federal judge had no further jurisdiction to sanction him since the case was already dismissed. Not so, the Eleventh Circuit intoned, since he was counsel of record in the federal action and it was within the court's power to sanction him for interfering with carrying out the settlement terms, citing *Chambers v. NASCO, Inc.*¹⁰ It also bears noting that the *Henson* plaintiffs could not have argued that the federal district judge lacked power to enjoin them

9. Section 1404 authorizes transfer between districts but does not give defendants the authority to select a particular judge in the transferee federal district. See 28 U.S.C. § 1404(a) (stating "a district court may transfer any civil action to any other district or division where it might have been brought"). It is possible, of course, that by the luck of the draw the case ended up back in front of the federal judge who oversaw the federal class settlement. It is more likely, though, that defendants successfully brought the case before Judge Butler by asserting that the removed/transferred action was related to the *Price* case previously before him and that the governing local rules permitted assignment back to the presiding judge of that case. See S.D. ALA. LOCAL R 3.3, available at <http://www.als.uscourts.gov/district-court/forms/local-rules.pdf>. ("If the Civil Cover Sheet . . . indicates that the civil action in which it is filed is related to another action or actions pending in this district, the action shall be assigned to the district judge before whom the related action with the lowest file number is pending or as may be otherwise determined by the chief judge.")

10. See *Henson*, 261 F.3d. at 1068 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991)).

from filing suit in Louisiana because as intervenors into the federal litigation the court had *in personam* jurisdiction over them. Yet, as Henry Monaghan has noted, jurisdiction will often be an important barrier to the issuance of an anti-suit injunction, restricting a federal court's power to enjoin nonresident plaintiffs who lack the requisite contacts with the forum in which the federal court is located.¹¹ We will return to this issue again in Part III.

While the Eleventh Circuit affirmed the trial judge's authority to sanction the *Henson* plaintiffs' counsel, it found that the federal district judge lacked subject matter jurisdiction over the *Henson* plaintiffs' state case and that resorting to the All Writs Act did not cure the jurisdictional defect.¹² Central to the court's conclusion were two principles: first, that §1441(a) authorizes removal only of civil actions "of which the district courts of the United States have original jurisdiction;" and, second, that "the All Writs Act does not provide an independent basis of federal subject matter jurisdiction."¹³ Because the All Writs Act could not be relied upon to fill the absence of original jurisdiction, the Eleventh Circuit concluded that removal of the *Henson* plaintiff's state case was not authorized.

B. Before the Fall

When the Eleventh Circuit reversed the district judge and ordered the case remanded, it was only the second court of appeals to find a subject matter jurisdiction defect in basing removal on the All Writs Act.¹⁴ Every other circuit court and nearly all district courts to consider the question had concluded that the All Writs Act could be invoked as a residual basis for subject matter jurisdiction over the removed case which otherwise lacked an independent basis for remaining in federal

11. Henry Paul Monaghan, *Antisuit Injunction and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1148 (1998). See also *infra* note 14.

12. *Henson*, 261 F.3d at 1070-71.

13. *Id.* at 1070 (citing, *inter alia*, *Clinton v. Goldsmith*, 526 U.S. 529 (1999) (affirming All Writs Act does not contain independent grant of original jurisdiction); Lonny S. Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401, 433-39 (1999) (discussing history of All Writs Act)).

14. The only other circuit court to do so was *Hillman v. Webley*, 115 F.3d 1461, 1469 (10th Cir. 1997) (holding that the All Writs Act does not allow a court to acquire jurisdiction over a party otherwise not subject to its jurisdiction). Indeed, for that matter, only two district courts had ever concluded that the All Writs Act could not be used to remove an otherwise unremovable case. See, e.g., *Fidelity Fin. v. Robinson*, 971 F. Supp. 244, 249 (S.D. Miss. 1997) (holding that the "All Writs Act is not a jurisdictional blank check" for removal, but can only be used for exceptional circumstances); *In re Successor Liab. Claims Against Bairnco Corp.*, 837 F. Supp. 176, 177 (S.D. W. Va. 1993) (holding that "the All Writs Act is not a source of federal question jurisdiction").

court.¹⁵ Yet, despite the widespread acceptance of using § 1651a as an independent basis of subject matter jurisdiction, the procedural maneuver was of relatively recent vintage. The All Writs Act dates back to the First Judiciary Act of 1789, but it was not until 1988 that the Second Circuit, in *Yonkers Racing Corp. v. City of Yonkers*,¹⁶ first approved the use of the All Writs Act to remove an otherwise unremovable case.

The next case to approve an All Writs Act removal—and, in fact, the decision that was cited by other courts far more often than *Yonkers* as supporting prior precedent¹⁷—was also a Second Circuit decision.¹⁸ Notably, this decision was part of the same sprawling *Agent Orange* litigation that produced the appeal in *Stephenson* a decade later. This marks the most patent connection between the *Syngenta* and *Stephenson* cases: it was the Second Circuit's decision in *Ivy/Hartman II* that blazed the precedential trail authorizing the expanded use of the All Writs Act as an independent basis of removal authority, a trail that ultimately was cut short by the Supreme Court's unanimous decision in *Syngenta*. It also bears noting that the All Writs Act removal question also arose directly in the appeal in *Stephenson*, insofar as one of the two cases consolidated in the *Stephenson* appeal (the *Issacson* case) was only removed to federal court—despite the absence of complete diversity or a

15. See *Bylinski v. City of Allen Park*, 169 F.3d 1001, 1003 (6th Cir. 1999) (holding that removal is proper under the All Writs Act), *cert. denied*, 527 U.S. 1037 (1999); *NAACP v. Metro. Council*, 144 F.3d 1168, 1171 (8th Cir. 1998) [hereinafter *Metropolitan Council II*] (same), *cert. denied*, 525 U.S. 826 (1998); *NAACP v. Metro. Council*, 125 F.3d 1171, 1174 (8th Cir. 1997) [hereinafter *Metropolitan Council I*] (same), *vacated by* 522 U.S. 1145, and *aff'd by Metropolitan Council II*, 144 F.3d 1168 (8th Cir. 1998); *In re VMS Sec. Litig.*, 103 F.3d 1317, 1323 (7th Cir. 1996) (same); *Sable v. Gen. Motors Corp.*, 90 F.3d 171, 175 (6th Cir. 1996) (same); *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d, 1425, 1431 (2d Cir. 1993) (same) [hereinafter *Agent Orange II*]; *United States v. City of New York*, 972 F.2d 464, 469 (2d Cir. 1992) (same); *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 865 (2d Cir. 1988) (same); *N.Y. State Laborers Political Action Comm. v. Mason Tenders Dist. Council*, No. 97-CV-1731, 1998 WL 146248, at *5 (N.D.N.Y. Mar. 24, 1998) (same); *Lucas v. Planning Bd.*, 7 F. Supp. 2d 310, 318-19 (S.D.N.Y. 1998) (same); *Chance v. Sullivan*, 993 F. Supp. 565, 568 (S.D. Tex. 1998) (same); *Atlantic Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders*, 988 F. Supp. 486, 492 (D.N.J. 1997) (same); *Harbor Venture, Inc. v. Nichols*, 934 F. Supp. 322, 324 (E.D. Mo. 1996) (same); *Holmes v. Trustmark Nat'l Bank*, No. CIV.A. 195CV 323 GR, 1996 WL 904513, at *2 (S.D. Miss. Jan. 11, 1996) (same); *Holland v. N.J. Dep't of Corr.*, Nos. 93-1683, 94-2391 & 94-3087, 1994 WL 507801, at *6 (D.N.J. Sept. 14, 1994) (same); *Neuman v. Goldberg*, 159 B.R. 681, 685 (S.D.N.Y. 1993) (same); *Ryan v. Dow Chem. Co.*, 781 F. Supp. 902, 918 (E.D.N.Y. 1991) (same); *Nowling v. Aero Servs. Int'l, Inc.*, 734 F. Supp. 733, 738 (E.D. La. 1990) (same).

16. 858 F.2d 855 (2d Cir. 1988).

17. See Hoffman, *supra* note 13 (listing cases that relied on the Second Circuit's decision in *Agent Orange*).

18. See *Agent Orange II*, 996 F.2d 1425 (2d Cir. 1993).

federal question appearing on the face of the plaintiffs' well-pleaded complaint—on the assertion that the federal district judge that approved the *Agent Orange* class action settlement retained residual authority under the All Writs Act to remove any case that threatened to interfere with the judgment approving that settlement. While the Court's terse *per curiam* opinion in *Stephenson* said nothing of substance on the issue for which *certiorari* was granted, it did remand the consolidated *Isaacson* case to state court in light of its previous decision in *Syngenta*.¹⁹

Prior to the Supreme Court's nullification of the practice in *Syngenta*, courts that had relied on the All Writs Act to uphold a defendant's removal of an otherwise unremovable case had done so either because a prior federal judgment was found to be preclusive of subsequently filed state claims or because a subsequently filed suit allegedly threatened to interfere with a prior federal judgment or ongoing federal proceedings.²⁰ *Henson* was an example of the former: the district court in the Southern District of Alabama upheld the removal of the state court action filed in Iberville Parish, Louisiana, after concluding that it was precluded by a settlement previously approved by the federal district court in related proceedings. To justify removal, proponents would argue that the All Writs Act provided the independent basis of subject matter jurisdiction.

The main difficulty with the argument that the All Writs Act, standing alone, could serve as an independent basis of subject matter jurisdiction is that it ran contrary to a well-established and long line of precedents that the All Writs Act could not serve as an independent basis of original subject matter jurisdiction.²¹ The lack of original jurisdiction

19. See *Dow Chem. Co. v. Stephenson*, 539 U.S. 111, 111 (2003) ("With respect to respondents Joe Isaacson and Phyllis Lisa Isaacson, the judgment of the Court of Appeals for the Second Circuit is vacated, and the case is remanded for further consideration in light of *Syngenta* . . .").

20. Hoffman, *supra* note 13, at 19.

21. See, e.g., *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999). "While the All Writs Act authorizes employment of extraordinary writs, . . . the express terms of the Act confine the power of the CAAF to issuing process 'in aid of' its existing statutory jurisdiction; the Act does not enlarge that jurisdiction." *Id.* Furthermore, § 1651(a) may be used only for "filling the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction." *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 41 (1985).

It has been too frequently decided in this court to require the citation of cases that the circuit courts of the United States have no jurisdiction in original cases of mandamus, and have only power to issue such writs in aid of their jurisdiction in cases already pending, wherein jurisdiction has been acquired by other means and by other process. *Covington & Cincinnati Bridge Co. v. Hager*, 203 U.S. 109, 110 (1906).

based solely on the All Writs Act was a significant problem for proponents of removal under the statute since in the general removal provision, 28 U.S.C. §1441, Congress has authorized removal only of civil actions of which the federal court would have had “original jurisdiction” had suit been initiated there.²² And while it is certainly true that Congress can decide to authorize removal without conferring original jurisdiction on the federal courts (indeed, it has done so on several occasions²³), there is no indication that Congress has done so in the All Writs Act. Ultimately, it was this absence of original jurisdiction and the Court’s willingness in its decision in *Syngenta* to defer to Congress to define the scope of removal authority that formed the principal ground on which the Court rejected reliance on the All Writs Act to justify removal of an otherwise unremovable case.²⁴

Unable to rely upon the statute as an independent source of original jurisdiction and sensing, perhaps, the futility of trying to do so, proponents of All Writs Act removal developed a second argument to justify removal. They argued that § 1651a could be invoked to remove a case even when an independent basis of original jurisdiction was lacking so long as the court had previously possessed original jurisdiction in a case and was now using the All Writs Act as an exercise of its “ancillary

22. See 28 U.S.C. § 1441(a). See also *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (“Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant.”); *Okla. Tax Comm’n v. Graham*, 489 U.S. 838, 840 (1989) (citing 28 U.S.C. § 1441(a) for the general proposition that “[e]xcept as otherwise expressly provided by Act of Congress, a case is not properly removed to federal court unless it might have been brought there originally”).

23. See, e.g., 28 U.S.C. § 1442 (allowing removal of civil or criminal suits and without regard to whether the claims arise under federal law within the meaning of 28 U.S.C. § 1331 or the diversity requirements of 28 U.S.C. § 1332 have been satisfied); 28 U.S.C. § 1442a (same); 28 U.S.C. § 1443 (allowing removal of an action seeking to enforce a right under any law providing for equal civil rights); see also *Okla. Tax Comm’n*, 489 U.S. at 841 (holding state tax case against Indian tribe was improperly removed where federal district court lacked original jurisdiction over the case and observing: “[t]he jurisdictional question in this case is not affected by the fact that tribal immunity is governed by federal law. . . . Congress has expressly provided by statute for removal when it desired federal courts to adjudicate defenses based on federal immunities.”).

24. See *Syngenta Crop Prod., Inc. v. Henson*, 537 U.S. 28, 29, 33 (2002) (noting that “[b]ecause the All Writs Act does not confer jurisdiction on the federal courts, it cannot confer the original jurisdiction required to support removal pursuant to § 1441”). The Eleventh Circuit similarly had rejected the defendants’ argument for relying exclusively on the All Writs Act to justify removal, characterizing it as using the statute as “jurisdictional caulk” used to plug “the cracks in federal jurisdiction through which crafty litigants can escape the effect of a federal order.” *Henson v. Ciba-Geigy Corp.*, 261 F.3d 1065, 1070 (11th Cir. 2001). Such an argument, even if “tempting,” “goes too far,” the Eleventh Circuit ruled. *Id.* at 1071. “Too elastic an interpretation of the All Writs Act perverts it from a tool for effectuating Congress’s intent in conferring jurisdiction on the lower federal courts into a device for judicially reequilibrating a state-federal balance that is Congress’s to strike.” *Id.*

jurisdiction” or “ancillary enforcement jurisdiction” to protect its jurisdiction or prior judgment. This, in fact, was the central argument on which Syngenta relied in its arguments before the United States Supreme Court. It argued that since the federal court had original jurisdiction (on the basis of diversity) to certify the class and approve the settlement reached, it retained ancillary jurisdiction to remove the infringing state case to protect and effectuate its judgment approving the class action settlement.²⁵ Syngenta noted that Judge Butler had included a clause in the judgment expressly retaining jurisdiction, satisfying the predicate from *Kokkonen v. Guardian Life Insurance Co.*²⁶ As a result, they argued, the district judge possessed jurisdiction ancillary to its original jurisdiction over the case sufficient to support removal of the *Henson* plaintiffs’ Louisiana case under the All Writs Act, even though there was neither diversity between the parties nor a federal question appearing on the face of the plaintiffs’ well-pleaded complaint.²⁷ Syngenta argued that as long as the trial court included a retained jurisdiction clause in the judgment, it possessed ancillary jurisdiction “to vindicate its authority and effectuate its decrees,” which jurisdiction included the right to remove the infringing state action pursuant to the All Writs Act.

C. Before the United States Supreme Court

While the ancillary jurisdiction argument Syngenta advanced at the Supreme Court enjoyed the concurrence of nearly every prior lower court to consider the question, the justices wasted little time in oral argument in expressing their skepticism for resort to the All Writs Act.²⁸

25. *Syngenta*, 537 U.S. at 34 (distinguishing *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994)).

26. 511 U.S. 375 (1994).

27. In *Kokkonen*, the Court had said that federal courts could exercise ancillary jurisdiction either “to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent,” or “to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.” *Id.* at 379-80. The first occasion for ancillary jurisdiction was inapplicable in *Kokkonen*, just as it was on the facts of the *Syngenta* case, since the subsequent claims were brought in a separate action.

28. Consider the initial exchange at oral argument:

Mr. Alsobrook (counsel for petitioner): Mr. Chief Justice, and may it please the Court: In *Kokkonen* [sic] v. *Guardian Life*, this Court hypothesized the very situation that we have before you this morning because here we have a nationwide class action settlement where the court specifically by judgment retained jurisdiction to manage the settlement as well as enforce it. A critical part of that settlement was the dismissal of this case. However, when class counsel went to dismiss the case, as the Eleventh Circuit pointed out and as the district court pointed out, his efforts were thwarted and the case was not dismissed.

QUESTION [Rehnquist, C.J.]: Mr. Alsobrook, I see you’ve changed the question

In the absence of original jurisdiction, the justices queried, how could the *Henson* case have been removed under the All Writs Act, since the All Writs Act does not, standing alone, provide an independent source of original jurisdiction.²⁹ Although Petitioner tried to argue that the federal court could borrow from the original jurisdiction it possessed in *Price*, the justices remained unconvinced that removal was appropriate where original jurisdiction was lacking.³⁰

The skepticism expressed at oral argument for allowing removal under the All Writs Act of a case otherwise not within the district court's original jurisdiction carried over to the written decision in the case. On behalf of a unanimous Court, Chief Justice Rehnquist rejected the attempt to justify removal under the All Writs Act. The All Writs Act does not, "by its specific terms, provide federal courts with an independent grant of jurisdiction," Rehnquist intoned.³¹ Thus, "[b]ecause the All Writs Act does not confer jurisdiction on the federal courts, it cannot confer the original jurisdiction required to support removal pursuant to § 1441."³² Moreover, the doctrine of ancillary enforcement jurisdiction was equally unavailing because, as Rehnquist noted, Defendants "fail to explain how the Alabama District Court's retention of jurisdiction over the *Price* settlement authorized removal of the *Henson* action."³³ Removal "is governed by statute" and because no statute authorized removal of the *Henson* plaintiffs' state case, neither invocation of the All Writs Act nor of a court's "ancillary jurisdiction"

presented from the time in your certiorari petition to your opening brief. And the question presented, when we granted, referred to 28 U.S.C., section 1441, and now you have dropped your reference to that. Does that mean you're abandoning reliance on 1441 or simply broadening the question?

MR. ALSOBROOK: No, sir. We—we're saying that under 1441 that because the district court retained jurisdiction, that that was original jurisdiction to remove the matter, and that actually, Your Honor, when we removed this, they—the majority of circuit courts of appeals, namely the second, sixth, seventh, and eighth, had said that the proper vehicle to remove this was the All Writs Act. And that is what we are claiming today, as well as 28 U.S.C. 1367 ancillary jurisdiction, and we have set that out in our brief.

QUESTION [Rehnquist, C.J.]: But you have no right to remove under 1441 because there wasn't complete diversity in the Louisiana suit. Isn't that right?

MR. ALSOBROOK: That is correct.

QUESTION [Rehnquist, C.J.]: So you can't rely on 1441 and that's conceded.

See Transcript of Oral Argument at *3-4 (Oct. 15, 2002), *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28 (2002) (No. 01-757), available at 2002 WL 31414640.

29. See *id.* at *7.

30. See generally *id.*

31. *Syngenta*, 537 U.S. at 33.

32. *Id.*

33. *Id.* at 34.

could validate its removal.³⁴

Finally, and importantly, Rehnquist noted that the argument for ancillary jurisdiction assumed that removal was “necessary” and “appropriate,” as the language of § 1651a requires.³⁵ Yet, even if Judge Butler retained ancillary jurisdiction to enforce his judgment approving the class action settlement, it was neither necessary nor appropriate to invoke that power to remove the *Henson* case: “One in petitioners’ position may apply to the court that approved a settlement for an injunction requiring dismissal of a rival action. Petitioners could also have sought a determination from the Louisiana state court that respondent’s action was barred by the judgment of the Alabama District Court.”³⁶

Because injunctive relief or the assertion of a preclusion defense were two available alternatives to removal, and because Congress has insisted that a federal court have original jurisdiction over an action in order for it to be removed from a state court, the Court affirmed the order of the Eleventh Circuit remanding the *Henson* case to state court.

D. The Defense of Preclusion and the Availability of Injunctive Relief

Rehnquist’s observation on the availability of seeking an injunction or asserting a preclusion defense before the state court raises a provocative question. That question, starkly posed, is this: if these other options truly were available, why did the defendants choose, instead, to remove the case? That the defendants had little interest in asking the state judge to dismiss the case on *res judicata* is hardly surprising: they may well have concluded that the forum, having been selected by the plaintiff, may not have been the most receptive to its argument. Indeed, any concern by the defendants that their arguments would fall on deaf ears before the state judge certainly seems to have been validated by the state judge’s willingness to allow the *Henson* plaintiffs to proceed with the suit even after the federal settlement in *Price*. This does not explain, however, why the defendants did not run to the federal district judge to ask for an injunction instead of removing the case.

The likely answer is that once the option of All Writs Act removal appeared viable, following the Second Circuit’s decisions in *Yonkers* and *Agent Orange*, Syngenta’s lawyers, like many other defense counsel and their clients, preferred removal over seeking injunctive relief for a host

34. *Syngenta*, 537 U.S. at 34.

35. *Id.* at 34 n.*.

36. *Id.*

of strategic reasons. First, removal is automatic: you do not have to ask permission to remove, and the burden is on the plaintiff to ask to remand the case. In addition, the stay of state proceedings, following removal, is similarly automatic. Unless and until a remand is granted, the state proceedings remain in abeyance.³⁷ There is also the added complication of the papers to be filed in asking for an injunction and, on occasion, the necessity of posting a bond. The paper requirements for removal are comparatively less burdensome (and there is no statutory bond requirement, of course, for removal). Finally, there are doctrinal differences to consider, since the Anti-Injunction Act, 28 U.S.C. § 2283, has been interpreted as setting strict limitations on federal authority to enjoin state proceedings. In her comprehensive work on the subject,³⁸ Joan Steinman spoke with a number of the lawyers who had removed cases on the basis of the All Writs Act and her summary of their remarks confirms that these strategic considerations help explain the preference for removal over injunctive relief:

Because it is “automatic,” the stay that attends a removal is not proceeded by drama, contention and uncertainty over whether the court should enter an inter-system injunction in the particular case, and the parties avoid the effort and expense entailed by such contention. While a motion to remand may generate contention, such contention focuses on the propriety of the removal, rather than on the “softer” equitable considerations that go into the decision whether to enjoin other proceedings and on the notions of comity and federalism which make federal courts wary of enjoining state court proceedings. . . .³⁹

“So,” with all of these tactical advantages, Steinman summarized rhetorically, “why seek to enjoin when removal is available?”⁴⁰

Ultimately, of course, the Court in *Syngenta* rejected the proposition that a litigant has an equal choice between removal and seeking injunctive relief. Removal, entirely a creature of legislative prerogative, depends (at least as far as a removal under § 1441 is concerned) on the assumption that a basis of original jurisdiction exists such that the state case could have been initially brought in federal court. In the absence of a federal question on the face of the plaintiff’s well-pleaded complaint or diversity between the parties, the Southern District of Alabama lacked subject matter jurisdiction over the *Henson* case and,

37. 28 U.S.C. § 1446(d).

38. See Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. REV. 773, 812-13 (2000).

39. *Id.* at 813.

40. *Id.*

therefore, was not removable.

Rehnquist's opinion does recognize that Syngenta could choose between asserting a preclusion defense before the state judge or asking Judge Butler of the Southern District of Alabama to enjoin the Henson plaintiffs from going forward with their state court claims. What the opinion does not address, however, is whether injunctive relief or a defense of preclusion is to be preferred in these circumstances. No attempt was made to order that choice. Nor did the Court address whether better justification for injunctive relief would exist as a result of the practical problems (as seen from the defendant's perspective) with having to seek summary dismissal from the state court that had proven receptive to the *Henson* plaintiffs' claims. The most we can say is that the Court in *Syngenta* was agnostic as to the choice between injunctive relief or the assertion of a preclusion defense and unmindful of any of the practical problems that might prompt a party to prefer one choice over another.

* * *

So what did the defendants actually decide to do following the Court's decision in *Syngenta*? After the decision of the Court was handed down (though, oddly, not immediately upon notification of that decision), defendants petitioned Judge Butler for injunctive relief. For several months, however, no action was taken by the district court on that request.⁴¹ Equally inexplicable has been the lack of action taken by the *Henson* plaintiffs in the state court. Neither before nor even after injunctive relief was sought did plaintiffs seek to get the state judge to rule that their suit was not barred by the prior federal settlement.⁴² The failure to try to obtain a favorable ruling on the preclusive effect of the federal judgment is especially difficult to comprehend, given the Supreme Court's earlier decision in *Parsons Steel, Inc. v. First Alabama Bank*.⁴³ In *Parsons Steel*, the Court held that a state court's determination as to the preclusive effect of a prior federal judgment must, under 28 U.S.C. § 1738, be given full faith and credit by federal courts.⁴⁴ Thus, if the Louisiana state court judge had ruled that the *Henson* plaintiffs' claims were not barred by the federal settlement before an injunction issued, that determination would have been

41. See Civil Docket Sheet, *Price v. Ciba-Geigy*, Docket No. 94-cv-00647-CB .

42. See Civil Docket Sheet, *Henson v. Ciba-Geigy*, #43,620 (case filed 9/15/93) (reflecting no activity since November 1998); see also notes of telephone interview with Iberville County court clerk, December 3, 2003 (confirming same)(on file with author).

43. 474 U.S. 518 (1986).

44. *Id.* The state trial court's judgment remains subject to direct review, of course.

conclusive on the issue. On November 20, 2003, however, no such ruling by the state court had been sought or made and Judge Butler granted Syngenta's request for an injunction.⁴⁵

II. STEPHENSON

In one sense, it might be said that the Court in *Stephenson* picked up where the decision in *Syngenta* left off. The federal judicial authority to enjoin state collateral attacks on a prior federal judgment approving a class action settlement is one aspect of the post-*Syngenta* problem of defining, generally, the limits of federal injunctive power. Because a majority of justices could not agree in *Stephenson*, we still do not know where the Supreme Court will draw those boundaries. In the meantime, then, we may approach the question left unanswered by *Stephenson* by examining the Second Circuit's opinion, along with the positions of the parties and their *amici* before the Supreme Court. First, though, a quick summary of the facts of the dispute is in order.⁴⁶

A. *Factual Prelude: The Agent Orange Litigation*

Two Vietnam War veterans, Joe Isaacson and Daniel Stephenson, brought separate actions alleging exposure to Agent Orange during the Vietnam War. Their suits were filed, respectively, in August 1998 and February 1999. These filing dates immediately raise several problems. One might well ask, for instance, why veterans who fought during the 1960s only first brought suit more than a quarter century after their wartime exposure. As provocative as this question might be,⁴⁷

45. See Civil Docket Sheet, *Price v. Ciba-Geigy*, Docket No. 94-cv-00647-CB (injunctive relief granted November 20, 2003).

46. Those interested in a more complete factual record may consult the appellate court's decision. See *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001).

47. I do not mean to suggest that plaintiffs lack good arguments to account for why their claims are not time-barred. In this regard, the Second Circuit noted in its decision that Isaacson was not diagnosed with non-Hodgkins lymphoma until 1996 and that Stephenson's doctors first told him he had bone marrow cancer in February 1998. *Stephenson*, 273 F.3d at 255. Additionally, as respondents noted in their brief before the United States Supreme Court: "Under the law of their home states, neither Isaacson, a citizen of New Jersey, nor Stephenson, a citizen of Louisiana, could have brought a cancer claim against petitioners until he was actually diagnosed with cancer." See Brief for Respondents at *4, *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003) (No. 02-271), available at 2003 WL 193581. See also generally Geoffrey C. Hazard, *The Futures Problem*, 148 U. PA. L. REV. 1901, 1907 (2000) ("[A] futures claimant is one who cannot be specifically identified as being causally related to a specific potentially liable actor. Stated in epistemological terms, a "futures" therefore is a hypothetical person. A hypothetical person cannot have real legal rights or be owed real legal obligations. By the same token, a hypothetical person cannot be the subject of a binding determination except through the concept of an in rem proceeding."). The main

defendants never had to raise this argument because of a second aspect of the problem raised by these late filing dates, a problem, we may note, that is reminiscent of the procedural problem the *Henson* plaintiffs faced in *Syngenta*.

For those who are familiar with the long history of the Agent Orange litigation in the United States, the filing of any lawsuit after 1994 will bring to mind the settlement approved by United States District Judge Jack Weinstein purporting to bar recovery for any suits filed after December 31, 1994. As the Second Circuit noted in its decision, in 1984 “virtually identical claims against these defendants [were] brought by a class of military personnel who were exposed to Agent Orange while in Vietnam between 1961 and 1972.”⁴⁸ The class certified by Judge Weinstein in 1984 purported to include, *inter alia*, any persons in the United States Armed Forces “at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange,” and listed as members, all “spouses, parents and children of the veterans born before January 1, 1984” who were “directly or derivatively injured as a result of the exposure.”⁴⁹ Notice was sent advising that persons who wished to opt out must do so by May 1, 1984. Thereafter, the named plaintiffs, acting on behalf of all persons who had not opted out (and Stephenson and Isaacson had certainly not opted out), reached a settlement of all claims against the manufacturers of Agent Orange. The *Agent Orange* settlement, which disposed of these “virtually identical claims” that Stephenson and Isaacson subsequently brought fourteen years later, formed the basis for defendants’ assertion that Stephenson’s and Isaacson’s claims were barred.

B. Of Apples and Second Bites: Comparing Syngenta and Stephenson

On its face, these facts suggest an analogy between the attempt by the *Henson* plaintiffs to seek additional relief against Syngenta, following the global settlement reached in the federal class action proceeding in the *Price* litigation, and the attempt by Stephenson and Isaacson to seek recovery against the Agent Orange manufacturers years after the global settlement Judge Weinstein approved. Indeed, if passage of time were the only consideration, it would be much harder to justify

point I am making here is that the question of whether these claims were time-barred was never reached because defendants relied, instead, on a logically precedent preclusion defense, as discussed below.

48. *Stephenson*, 273 F.3d at 251.

49. *Id.* at 252.

allowing the *Stephenson* and *Isaacson* claims to be brought, nearly a decade and a half after the *Agent Orange* settlement, as compared with the relatively brief interval that passed between the time the *Price* settlement was concluded and the *Henson* plaintiffs reasserted their claims in Iberville Parish, Louisiana. These patent similarities mask important differences between the cases, however.

One key difference between the state plaintiffs in *Syngenta* and the *Stephenson* and *Isaacson* plaintiffs in *Stephenson* is that the former were parties to the global settlement reached and approved by the federal court (recall that they actually intervened into that litigation). They also voluntarily compromised their claims against the chemical company in exchange for some monetary payment that they actually received. Not so with Messrs. *Stephenson* and *Isaacson*. Neither had received any portion of the global *Agent Orange* settlement fund to compensate them for their injuries. And, while defendants argued that *Stephenson* and *Isaacson* were absent members of the certified class and, therefore, bound by that settlement where they did not opt out of the class, whether these absent class members were barred by the actions of the named plaintiffs was precisely the question on which the Court granted *certiorari* in *Stephenson*. That is, from the plaintiffs' perspective in *Stephenson*, the difference between *Henson* and the other plaintiffs who voluntarily intervened in *Syngenta* is that Messrs. *Stephenson* and *Isaacson* did not participate in the 1984 case in Judge Weinstein's court, likely received no notice that there even was a case against the manufacturers of *Agent Orange*, and would probably have not paid attention to the notice if they had received it since at the time they had not been diagnosed with any illness or condition.⁵⁰ In other words, *Stephenson* and *Isaacson* questioned how they could be bound to a judgment approving a settlement in which they did not participate and from which they were not to receive any share of the proceeds, based solely on the determination of the certifying court that they were adequately represented by those who did.

It should be noted that there had been attempts by other plaintiffs, after 1984, to bring additional claims against the *Agent Orange* manufacturers.⁵¹ All of these earlier cases, however, had been brought

50. *Cf. Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 628 (1997) (noting that giving effective notice is likely not possible to exposure-only class members).

51. The most prominent of these cases were the two class actions originally filed in Texas state court: *Ivy v. Diamond Shamrock Chemicals Co.* and *Hartman v. Diamond Shamrock Chemicals Co.* These were the cases subsequently removed under the All Writs Act that eventually led the Second Circuit to affirm the validity of invoking the All Writs Act to remove a case

by plaintiffs who had manifested injury before 1994. Consequently, all earlier claimants had been entitled to at least *some* share in the *Agent Orange* settlement, a fact that carried considerable significance in the Second Circuit's decision to uphold Judge Weinstein's adequacy determinations as to these plaintiffs.⁵² By contrast, the *Isaacson* and *Stephenson* cases, brought by and on behalf of claimants who alleged that their injuries manifested after 1994, directly posed the question of whether the named class members in *Agent Orange* had adequately represented those members of the class whose injuries did not become cognizable until after the settlement fund had been depleted.

C. *Stephenson and Isaacson in the Lower Courts*

1. Judge Weinstein Dismisses both Claims

Stephenson's and *Isaacson's* argument that they were not parties to the earlier proceeding and, therefore, not bound by that judgment fell on deaf ears at the district court level. Judge Weinstein, to whom both cases had been transferred,⁵³ dismissed their claims, concluding that the prior *Agent Orange* settlement proscribed them from seeking recovery since it barred recovery by any plaintiffs after 1994.

2. The Second Circuit's Reversal

On appeal, the Second Circuit reversed, finding that the prior settlement did not preclude *Stephenson* and *Isaacson* from asserting claims for injuries sustained by their exposure to Agent Orange. Several aspects of its opinion are worth highlighting.

a. All Writs Act Removal Upheld

First, the appellate court found that even though there was neither diversity between the parties nor a federal question in *Isaacson*, the case

otherwise not within the district court's original jurisdiction. *See Agent Orange II*, 996 F.2d 1425 (2d Cir 1993); *see also supra* text accompanying notes 18-19.

52. *See Agent Orange II*, 996 F.2d at 1435-36; *see also Stephenson*, 273 F.3d at 261 n.7 (noting that the *Agent Orange II* court's conclusion that pre-1994 claimants were adequately represented in the prior *Agent Orange* litigation "was based, at least in part, on those claimants' eligibility for compensation from the settlement fund").

53. *Isaacson*, begun in New Jersey state court, was removed to federal court (on the authority of the All Writs Act) and then transferred to Judge Weinstein by the MDL panel under 28 U.S.C. § 1407. *Stephenson* was filed in the Western District of Louisiana and subsequently transferred by the MDL panel to Judge Weinstein and consolidated with *Isaacson*. *See Stephenson*, 273 F.3d at 255-56.

was properly removed under the All Writs Act because the case raised the question of the preclusive effect of the previous *Agent Orange* settlement. After *Syngenta*, it is clear that this portion of the appellate court's decision is no longer good law. It is worth pausing to reflect, however, on the absence of any meaningful consideration by the Second Circuit of why alternatives to removal were not adequate to determine the preclusive effect of Judge Weinstein's 1984 *Agent Orange* judgment. The Second Circuit did not address why the preclusion question could not be handled by the New Jersey state court judge presiding over the *Isaacson* case and/or even by Judge Weinstein himself through consideration of whether to enjoin Isaacson from litigating his claims in New Jersey. Instead, the appellate court summarily noted that "the court 'best situated to make this determination' is the court that entered judgment."⁵⁴

One explanation, perhaps, for the approach taken by the circuit court may be simply that the court thought consideration of these alternatives unnecessary, given the availability of removal under the All Writs Act. Yet, given what was said earlier about Rehnquist's unwillingness in *Syngenta* to explicate the role of preclusion law and/or the availability of injunctive relief to deal with threatening state litigation, the Second Circuit's ready resort to All Writs Act removal probably also reflects the uncertainty felt among the lower courts (and, by extension, litigants) as to the proper mechanisms for protecting prior federal judgments or a federal judge's continuing jurisdiction in a case. Additionally, as I will argue in Part III, given the narrow scope of the Court's opinion in *Syngenta* and the lack of a majority opinion in *Stephenson*, it appears that the uncertainty over the scope of the federal judicial injunctive power will continue.

b. Right to Collateral Attack Upheld

After allowing removal of the *Isaacson* case under the All Writs Act, the Second Circuit turned to the central question on appeal: namely, whether the plaintiffs' state claims were barred by the prior *Agent Orange* judgment. The appellate court dissected the question into two steps. The court first considered whether plaintiffs could bring a collateral attack against that judgment or whether, as defendants argued, such an attack was barred because Judge Weinstein had already considered and "extensively litigated" their rights in the prior

54. *Stephenson*, 273 F.3d at 257 (quoting its earlier decision in *Agent Orange II*, 996 F.2d at 1431).

litigation.⁵⁵ Assuming a right to collaterally attack the judgment, the second step then was to consider whether the named plaintiffs in 1984 had been adequate representatives of futures plaintiffs.

The tricky part to the first step of the analysis was that whether Stephenson, Isaacson and all other post-1994 unnamed class claimants could collaterally attack the 1984 judgment depended on whether they were regarded as parties in that prior litigation. If the named plaintiffs were not adequate representatives of the future claimants, then Messrs. Stephenson and Isaacson and other similarly situated persons would not be bound by Judge Weinstein's prior judgment. As the Second Circuit succinctly put it: "If plaintiffs were not proper parties to that judgment . . . res judicata cannot defeat their claims."⁵⁶ In non-class litigation, the question of who is a party and, therefore, bound to a judgment is usually uncomplicated; typically, all that must be done is to consider whether the person (or entity) was properly served or otherwise appeared in the case. The class action context complicates the analysis, however: whether one is a "party" plaintiff to a class action proceeding turns on whether he or she is adequately represented by the named class plaintiffs. As the Supreme Court famously observed in *Hansberry v. Lee*, in a passage that is worth quoting at length:

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 these general rules 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 who were not made parties to it The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree.⁵⁷

In judging whether the interests of those not joined are of the same class as those who are, the Court subsequently ruled in *Phillips*

55. *Id.*

56. *Id.* at 259.

57. 311 U.S. 32, 40-42 (1940).

*Petroleum v. Shutts*⁵⁸ that “the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of absent class members.”⁵⁹

The “at all times” language of *Shutts* remains a source of debate among some commentators⁶⁰ and was squarely at issue in the *Stephenson* appeal.⁶¹ The Second Circuit in *Stephenson*, however, squarely accepted the notion that adequacy is not to be judged exclusively by the rendering court but may be questioned collaterally. In particular, the panel opinion noted that plaintiffs could bring a collateral attack on the 1984 judgment for two reasons. Judge Weinstein had made no determination about adequacy of representation as to claimants, such as these plaintiffs, who manifested injury after 1994.⁶² Moreover, the appellate court noted, citing several lower court opinions (though, somewhat curiously, neither *Hansberry* nor *Shutts*), whether class representatives adequately represent the class can only be determined by considering both the validity of the trial court’s determination at the certification stage *and* whether, after the lawsuit is over, the class representatives were, in fact, adequate representatives of the interests of

58. 472 U.S. 797 (1985).

59. *Id.* at 812.

60. Compare Marcel Kahan & Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 264 (rejecting the idea that the adequacy determination may be collaterally attacked and arguing that “as long as the court entertaining a proposed class action affords class members fair opportunity to raise the issue, adequacy of representation should be raised directly, and not be permitted to be raised collaterally”) with Monaghan, *supra* note 11, at 1197 (arguing that “adequate representation, not simply adequate procedures, must exist at all times” and critiquing Kahan and Silberman’s interpretation of the relevant authorities). See Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383 (2000). Richard Nagareda has recently entered the debate on the side of those seeking to limit collateral review of class judgments by arguing that “commentators have made too much of the reference to the adequacy of class representation ‘at all times.’” Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 315 (2003) (arguing that “a conception of class representation grounded in administrative law—specifically, its structures for accountability and its demand for reasoned explanation as a check upon arbitrariness—can generate the desperately needed supplement to conventional preclusion analysis for class judgments”).

61. Indeed, reflective of the leading work that these legal scholars have undertaken in this debate, the briefs of petitioners and respondents (and their respective *amici*) also divide in their treatment of the available academic commentary. See, e.g., Brief of Petitioners at 28, *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003) (No. 02-271), available at 2002 WL 31914663 (citing, *inter alia*, Kahan and Silberman, *supra* note 60); Brief of Respondents, *supra* note 47, at 26 (citing, *inter alia*, Woolley, *supra* note 60).

62. *Stephenson*, 273 F.3d at 257-58 (observing that “neither this Court nor the district court has addressed specifically the adequacy of representation for those members of the class whose injuries manifested after depletion of the settlement funds”).

the class.⁶³ This conclusion, the Second Circuit also noted, was consistent with the maxim that “a court adjudicating a dispute cannot predetermine the *res judicata* effect of its own judgment.”⁶⁴

c. Named Plaintiffs in 1984 were Inadequate Representatives of Futures Plaintiffs

Having disposed of the first line of defense offered by defendants—that plaintiffs had no right to collaterally attack the prior judgment—the appellate court then reached the second step which, specifically, required an evaluation of whether the named class members in 1984 were adequate representatives of post-1994 claimants such as Stephenson and Isaacson.

The Second Circuit found the named class members not to have been adequate representatives of the post-1994 claimants. The principal basis for the court’s conclusion that the named plaintiffs were not adequate representatives was the United States Supreme Court’s decision in *Amchem Products, Inc. v. Windsor*.⁶⁵ The Second Circuit reasoned that although Messrs. Stephenson and Isaacson both fell within the class definition in the *Agent Orange* litigation—both served in the United States military in Vietnam between 1961 and 1972 and allege to have been exposed to Agent Orange while on their tour of duty there—there was an inherent conflict between their interests (as futures plaintiffs) and those of the named class members who sought immediate recompense for their present injuries.⁶⁶ As a result of this inherent conflict, Stephenson and Isaacson could not have been adequately represented in the prior Agent Orange litigation under *Amchem*.

63. *Id.* at 258-59 (citing *Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973)). One possible explanation for the Second Circuit’s decision to cite neither *Hansberry* nor *Shutts* is that, strictly speaking, both decisions only addressed the due process limits under the Fourteenth Amendment to the exercise of jurisdiction by the Illinois and Kansas courts, respectively. The question before the Second Circuit in *Stephenson* concerned the preclusive effect of a *federal* judgment, namely the federal judgment by Weinstein approving the *Agent Orange* class certification and settlement in 1984, as limited by the Fifth Amendment. Compare *Gonzales*, 474 F.2d at 69 (noting that “[t]he question in this appeal is whether plaintiff-appellant Gonzales and the class he seeks to represent are bound by the *res judicata* effect of a prior class suit”). That prior class suit was brought in the United States District Court for the Western District of Texas.

64. *Id.* at 258 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985)).

65. 521 U.S. 591 (1997).

66. *Stephenson*, 273 F.3d at 260.

D. Before the United States Supreme Court

1. Petitioners Emphasized Policy Consequences of Allowing Collateral Attacks

Before the United States Supreme Court, petitioners focused their arguments for reversing the Second Circuit on the policy implications of a rule permitting collateral attacks. They argued that in allowing the plaintiffs' state suits to proceed the Second Circuit approved a broad collateral attack rule that threatened the finality of all class action determinations. The result sanctioned by the appellate court, they argued, would disrupt class actions in the future and, potentially, even those previously settled.⁶⁷ The specter petitioners painted was of absent class members rising up *en masse* to announce their dissatisfaction with class action settlements, without any time constraint as to when such attacks could be brought. Nor, they noted, would there be any limit to the number of attacks that could be brought: even if one attack is successfully resisted, nothing in the Second Circuit's broad rule would preclude another nonparticipating class member from asserting another challenge, in a different forum.⁶⁸ All of these policy considerations, petitioners and their *amici* urged, would "seriously interfere with litigants' incentives to settle class action disputes."⁶⁹ As one *amicus* brief for petitioners put it:

Why would any rational defendant agree to settle if it cannot achieve peace and repose with respect to the entire class? At the very least, the risk that a class settlement might be disturbed, years later, by a now-silent class member will substantially discourage defendants from entering into any class settlement.⁷⁰

As a secondary position, petitioners and their *amici* argued that if the Court were to allow some form of collateral attack, it should limit its scope. According to petitioners, the second court could retain a collateral review role without having the broad, *de novo* review contemplated by the Second Circuit. Where the Second Circuit regarded collateral review as appropriately allowing a second court to determine whether conditions exist that justify granting finality to the first

67. See Brief of Petitioners, *supra* note 61, at 39-40.

68. *Id.*

69. See Brief of the Products Liability Advisory Council as Amicus Curiae in Support of Petitioners at 11, *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003) (No. 02-271), available at 2002 WL 31886886 [hereinafter *Brief of amicus curiae PLAC*].

70. *Id.*

judgment, petitioners and their *amici* argued that any collateral review allowed should be limited so that the second court would only review the adequacy of the procedures taken by the certifying court. Under this view, so long as the certifying court “ensure[s] that class counsel diligently represents the class, and that the representative’s interests do not substantially conflict with those of other class members,” there would be no grounds for collaterally attacking the adequacy determination.⁷¹ Undergirding their position was an assumption, of course, that a federal court’s obligation to oversee the procedures in certifying a class under Rule 23 is sufficiently protective of the interests of absent class members so as to justify according finality to its judgment when the court properly carries out its obligations.⁷²

Most broadly, petitioners and their *amici* argued that while according the right to collateral attack may be a worthwhile goal in the abstract, a larger and more pressing value is the social interest in resolving complex litigation. The broad collateral attack right authorized by the Second Circuit would be inconsistent with *res judicata* principles, petitioners argued, as they pertain to finality of judgments. As a result, the social interest in resolving complex litigation would be stymied. Instead, according to petitioners and their *amici*, finality should be given to the certifying court so long as class members received adequate notice and the court provided a full and fair opportunity for class members to raise objections to the adequacy of representation by the class representatives.⁷³

2. Respondents Focused on Specific Facts of the Two Cases

In their brief and in oral argument before the high court, respondents emphasized most centrally the specific facts of the *Stephenson* and *Isaacson* cases.⁷⁴ This strategy was clearly driven by a belief that the specific facts of the two cases were egregious enough that the Court would be likely to permit these collateral attacks, even if there was unwillingness to approve a broader right to maintain collateral attacks in other cases. Of course, respondents also urged the Court to affirm the Second Circuit’s decision insofar as it recognized a broad

71. *Id.* at 23.

72. *See id.* at 25 (asserting that “[a] broad collateral attack rule is not necessary to provide adequate protection for absent class members interests”).

73. *See id.* at 12 (arguing that the “certifying court’s adequacy of representation determination should be final and conclusive as to all class members” assuming notice and a full and fair opportunity to raise objections is given).

74. *See* Brief of Respondents, *supra* note 47, at 1.

right of collateral attack where named class representatives were inadequate representatives,⁷⁵ but their written brief contains an unusually large portion of the allotted pages devoted to highlighting the specific factual background involved in the *Stephenson* and *Isaacson* suits and why these facts warranted allowing these particular plaintiffs to proceed with their claims.⁷⁶

3. *Amici* for Respondent Focused on Broader Policy Implications

While respondents tethered most of their arguments to the facts of the two cases, *amici* for respondents argued more broadly for the Court to affirm the Second Circuit's decision allowing collateral attacks. Arguments made by several *amici* focused more heavily on the practical realities of class litigation where collateral attacks are a rare but important deterrent to collusive conduct in the class action arena. Several briefs noted that the availability of collateral review better ensures the nonparticipating class members are treated fairly.⁷⁷

Furthermore, other *amici* argued that in questioning the right to bring a collateral attack it was petitioners who were seeking to unsettle established law.⁷⁸ The traditional and well-established rule, they observed, is that persons who do not participate in a legal proceeding may challenge through collateral attack in a subsequent proceeding the power of the initial court to bind it to judgment. This traditional rule is based on principles of due process the Court had recognized for well over a century. Several briefs noted, for instance, that the Court had ruled on numerous occasions—including seminal decisions like *Pennoyer v. Neff* and *Hansberry v. Lee*—that one is not bound to a

75. The argument portion of their brief followed the basic two-step structure employed by the Second Circuit, arguing, first, that nonparticipating class members may always raise due process objections in actions brought subsequent to the judgment of the certifying court; and, secondly, that they received neither adequate notice nor representation in the 1984 *Agent Orange* settlement. It was on the latter point, however, that respondents focused the majority of their written argument.

76. Also, it would be incorrect to say that respondents gave no attention to broader policy considerations in the case. For instance, respondents concluded their brief by reminding the Court that the philosophical debate between respecting an individual litigant's right to adjudicate their claims and the systemic need for finality has been addressed in the class action context by the Court on several prior occasions and that on each occasion the Court has recognized that however compelling "finality" may be, necessary exceptions must be carved out and protected. *See* Brief of Respondents, *supra* note 47, at 43.

77. *See, e.g.*, Brief of *amicus curiae* Public Citizen at 16, *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003) (No. 02-271), available at 2003 WL 193571 (arguing that "collateral review is necessary to prevent the abuse of class members' rights").

78. *See* Brief of *amicus curiae* Law Professors at 1, 6-7, *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003) (No. 02-271), available at 2003 WL 193562.

judgment unless they have either been properly served with process or have consented to suit in the forum.⁷⁹ Thus, under the traditional rule, persons not formally made parties to a proceeding are not bound by it.⁸⁰ Yet, these *amici* argued, whether absent class members are parties to a class proceeding depends on whether the named class plaintiffs are adequate representatives of their interests and whether named representatives are in fact adequate representatives can only be ensured if *de novo* collateral reviews are allowed. By contrast, petitioners' rule assumes that absent class members are justified in relying on the certifying court and on defendants to ensure that their interests are protected. As a practical matter, however, this is unlikely to occur. Neither the presence of objectors, nor the named defendants can cure defects of inadequate class representatives, respondents' *amici* argued.⁸¹

Additionally and relatedly, *amici* for respondents parried petitioners' assertion that affirming the Second Circuit would create disincentives to settling class litigation and would be disruptive of class action procedure by noting that class actions are routinely brought and settled today, even as a right to collateral attack is broadly recognized.⁸²

Furthermore, the policy costs of disallowing collateral attack favor rejecting petitioners' position, *amici* for respondents argued. If petitioners' position were adopted, they argued that absent class members would have to monitor every class action filed and decide whether the amount they have at stake justifies intervention.⁸³ Since most of the time individual class members will have only a very small personal stake in the litigation, the occasions which will warrant intervention into the case will be infrequent. Additionally, disallowing *de novo* collateral review of the certifying court's adequacy determination would create incentives for collusion between counsel for the named plaintiffs and defendants.⁸⁴

Finally, several *amici* concluded by reminding the Court that while petitioners tried to suggest that the need for finality is what prompted the rule makers to allow for class procedures that will bind nonparticipating

79. See *id.* at 8; see also Brief of *amicus curiae* Public Citizen, *supra* note 77, at 13-14.

80. See Brief of *amicus curiae* Law Professors, *supra* note 78, at 8.

81. *Id.* at 14-15.

82. *Id.* at 16. Even in the Ninth Circuit, where *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999) (*Epstein III*), is regarded as the lone circuit court decision restricting collateral attacks on a certifying court's judgment, subsequent cases call into question the *Epstein III* court's view of collateral attack. See *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000), *cert. denied*, 532 U.S. 914 (2001). For more on *Epstein III*, see *infra* text accompanying notes 88-90.

83. See Brief of *amicus curiae* Law Professors, *supra* note 78, at 16.

84. See Brief of *amicus curiae* Public Citizen, *supra* note 77, at 18.

and unnamed class members, Rule 23 does not demand that the principle of finality be accepted, unconditionally, as the paramount goal. Where due process rights have been abridged, they urged, finality must yield.

III. IN THE AFTERMATH

In the aftermath of the decision in *Syngenta* and the non-decision in *Stephenson*, there are a number of questions that remain to be addressed concerning the scope of the federal judicial injunctive power.

A. *Looking Beyond Stephenson*

In the class action arena, the four-four split in *Stephenson* leaves the question on which the Court granted *certiorari* ripe for reconsideration. The Court previously skirted the collateral attack issue in *Matsushita Electrical Industries Co. v. Epstein*.⁸⁵ While some commentators regard the Court's decision in *Matsushita* as implicitly restrictive of the right to collaterally attack the certifying court's adequacy determination,⁸⁶ most seem to recognize the Court did not address the point.⁸⁷ While the non-decision in *Stephenson* lacks precedential value, the case advances the debate beyond *Matsushita*: that a plurality of justices were apparently

85. 516 U.S. 367 (1996).

[R]espondents contend that the settlement proceedings did not satisfy due process because the class was inadequately represented. Respondents make this claim in spite of the Chancery Court's express ruling, following argument on the issue, that the class representatives fairly and adequately protected the interests of the class. We need not address the due process claim, however, because it is outside the scope of the question presented in this Court.

Id. at 379 n.5 (citations omitted).

86. Two of the leading expositors of this view are Professors Silberman and Kahan, who argue that "the Supreme Court's rejection of an exception to the Full Faith and Credit Statute for the federal claims at issue 'must be read, at least in part, as a rejection of the Epstein plaintiffs' argument . . . that because class counsel could not litigate the exclusive federal claims, they could not adequately represent the class for the purposes of settling those claims.'" See Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 790 (1998). See also Geoffrey P. Miller, *Full Faith and Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. REV. 1167, 1174 (1998).

87. See, e.g., Graham C. Lilly, *Modeling Class Actions: The Representative Suit as an Analytic Tool*, 81 NEB. L. REV. 1008, 1051 (2003) ("The Supreme Court's affirmance of claim preclusion following the steps taken by the trial judge may be taken as an endorsement of strong judicial management in the class context, but it should not be read as approving the principle that a hearing by the class judge on the issue of adequacy forecloses challenges in F2."); Woolley, *supra* note 60, at 416-18 and esp. n.137. Even Richard Nagareda, an opponent of collateral challenges to adequacy, recognizes that in *Matsushita* "the Court itself explicitly declined to address the adequate representation issue on the ground that it lay outside the question presented on appeal." Nagareda, *supra* note 60, at 344.

willing to reverse the Second Circuit, even on the extreme facts on this particular case, suggests that it would be a mistake in the aftermath of *Stephenson* to ignore the very real possibility that the right to collateral attack may itself be under attack.

I certainly do not mean to overstate the point. The traditional rule recognizing the right of absent class members to collaterally attack the judgment of the certifying court on due process grounds is accepted, virtually without dissent⁸⁸ among courts and commentators.⁸⁹ Nonetheless, one suspects that the willingness of four justices in *Stephenson* to reverse the Second Circuit is likely to encourage arguments similar to those advanced by petitioners in the case, for either no review or only a minimal level of review. The Ninth Circuit's panel decision in *Epstein III*, which is regarded—perhaps dubiously⁹⁰—as restricting an absent class member's right to collaterally attack a certifying court's adequacy determination, is likely to be a more closely considered precedent in future class action litigation as it is invoked by those seeking to narrow the scope of collateral review of class judgments. No doubt the continued expansion of class action dockets in state and federal court will provide plenty of opportunities for reconsideration of the collateral review question.

Consider one prominent, recent example. In 2002, a federal district judge in Indianapolis certified a nationwide class covering multiple

88. The leading judicial dissent is the second panel opinion in *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999). Several prominent academic commentators have similarly argued against a de novo collateral attack rule. See Kahan & Silberman, *supra* note 86; Linda Silberman, *The Vicissitudes of the American Class Action – With A Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201 (1999).

89. See generally WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4455, at 484-87 (2002). Traditional acceptance of the right to collateral attack was not only recognized by respondents and their *amici* in *Stephenson*, it was also even acknowledged, at least in part, by one *amicus* brief for petitioners. See Brief of *amicus curiae* PLAC, *supra* note 69, at 18 n.13 (conceding that “application of the ‘jurisdiction to determine jurisdiction’ concept ordinarily presupposes the actual presence of the party to be bound in the initial proceeding—an element obviously lacking when applied to absent class members who make no appearance before the certifying court” (citation omitted)).

90. In its initial opinion, the panel ruled 2-1, per Judges Norris and Wiggins, that plaintiffs were inadequately represented in the original class proceeding and could collaterally attack the judgment on that basis. Judge O'Scannlain dissented. After Norris retired (days later), defendants filed a motion for rehearing and, on rehearing, the new panel ruled, again, 2-1, that no collateral attack could be brought. The new opinion was written by Judge O'Scannlain and he was joined by Judge Wiggins, who did an about face. Judge Thomas, who replaced Norris, dissented. Thus, the Law Professors' Amicus Brief in *Stephenson* notes, “putting aside Judge Wiggins' two votes as cancelling themselves out, one judge, Judge O'Scannlain, voted for the no collateral attack of adequacy rule, and two judges of the Ninth Circuit voted against it.” See Law Professors' Brief, *supra* note 78, at 6 n.6.

models of Ford vehicles and Firestone tires sold between 1990 and 2001. The class was made up of owners of more than 60 million tires and three million cars.⁹¹ On appeal, the Seventh Circuit found that the district court had abused its discretion in certifying a nationwide class, finding, *inter alia*, that too many different state laws would have to be applied in the case.⁹² Unhappy with the decision by the intermediate court of appeals, the same lawyers filed new suits in a number of different state courts, seeking nationwide class certification in at least five of these cases. Ford and Firestone then returned to the federal district judge in Indianapolis and asked her to enforce the Seventh Circuit's ruling by enjoining the plaintiffs and their counsel from filing any other class actions. Notably, the relief Ford and Firestone sought was an order foreclosing the filing of any further class litigation in state court, including even any attempt at statewide class certification. The district judge denied the motion and the defendants again appealed to the Seventh Circuit.⁹³

This is where the story takes an interesting twist. On the second go-round, the Seventh Circuit ruled partially in favor of plaintiffs and partially in favor of the defendants. Judge Easterbrook first concluded that plaintiffs and their counsel were free to attempt to certify plaintiff classes on a statewide basis, as the Seventh Circuit's earlier opinion spoke only to the impropriety of certifying a nationwide class.⁹⁴ The panel ultimately held, however, that Ford and Firestone were entitled to an injunction precluding all members of the putative national class and their lawyers from seeking nationwide class certification in any other state court.⁹⁵ While recognizing that "[n]ormally" the preclusive effect of a judgment is to be determined by a second court, not by the court rendering the judgment, the Eleventh Circuit emphasized that exceptional circumstances may warrant the issuance of injunctive relief to prevent multiple state courts from opining on the preclusive effect of the appellate court's earlier opinion reversing the district judge's nationwide certification order. Describing the efforts of plaintiffs and

91. *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 205 F.R.D. 503 (S.D. Ind. 2001).

92. *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003).

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

94. *Id.* at 766, 769.

95. *Id.* at 769 (ruling that the district judge must enforce its earlier judgment "by issuing an injunction that prevents all members of the putative national classes, and their lawyers, from again attempting to have nationwide classes certified over defendants' opposition with respect to the same claims").

their counsel as fomenting redundant litigation, Judge Easterbrook observed that “when federal litigation is followed by many duplicative state suits, it is sensible to handle the preclusive issue once and for all in the original case, rather than put the parties and state judges through an unproductive exercise.”⁹⁶

Had he stopped there, Judge Easterbrook’s opinion would be entirely defensible and sound. That duplicative or vexatious litigation may readily warrant federal injunctive relief rather than reliance on the state courts to dismiss each and every new suit commenced is a well recognized and unremarkable proposition. In *Wood v. Santa Barbara Chamber of Commerce, Inc.*,⁹⁷ for instance, a photographer had initiated an action ten years earlier, alleging misappropriation of photographs he had taken. After several of his earlier actions were consolidated, the plaintiff commenced a new action in the Federal District Court of Nevada against 253 defendants. While that case was pending, however, the plaintiff brought 35 additional, separate actions in 30 different jurisdictions. The district court then dismissed all claims against all defendants and entered a permanent injunction against the plaintiff from filing similar litigation. The Ninth Circuit affirmed the issuance of the permanent injunction, finding that the district court possessed authority under the All Writs Act to issue “an injunction against repetitive litigation.”⁹⁸ The court of appeals observed that the plaintiff “has shown his intention continually to relitigate claims that have been previously dismissed.”⁹⁹ Following reasoning similar to that employed by Judge Easterbrook in *Bridgestone/Firestone II*, the Ninth Circuit in *Wood* recognized the many advantages to the judicial system of employing injunctive relief to thwart a vexatious litigant:

One advantage of dispensing injunctive relief against relitigation is that it is an easy way to articulate forcefully the principles of collateral estoppel and res judicata. For the judicial system, this means a preservation of judicial resources. By describing the principles of collateral estoppel in mandatory terms and by reinforcing those principles with the threat of holding a vexatious litigant in contempt of court, a district judge may deter the filing of frivolous and repetitive lawsuits.¹⁰⁰

The difficulty with *Bridgestone/Firestone II*, however, is that in

96. *Bridgestone/Firestone II*, 333 F.3d at 766.

97. 705 F.2d 1515 (9th Cir. 1983).

98. *Id.* at 1524.

99. *Id.*

100. *Id.*

approving the issuance of an injunction against any effort to certify a nationwide class in any other state court, the opinion sweeps with an extremely broad brush. Thus, instead of saying only that injunctive relief was necessary to thwart vexatious litigants from continued refile until they find some state court that would certify a nationwide class, Judge Easterbrook's opinion goes on to observe that absent class members will always be bound by the actions of the named representatives and their lawyers, provided that the non-participants were adequately represented in the contest.¹⁰¹ Yet, on what basis does Judge Easterbrook conclude that the named plaintiffs in the federal *Bridgestone/Firestone* litigation before Judge Barker adequately represented those who did not participate in the case? The court's conclusion, for which no supporting authorities were cited, rests solely on the observation that the district court judge had found that "both the named plaintiffs and their lawyers furnished adequate representation to the other members of the putative classes" and that her decision "was not challenged on the first appeal and is not contested now."¹⁰²

In concluding that the absent class members were adequately represented in the federal litigation merely because that is what the district judge found and because that finding was not challenged on direct appeal, Easterbrook's opinion seems to track the petitioners' position in *Stephenson*—whether intentionally or otherwise—that collateral challenges to a district court's judgment on due process grounds need not be permitted. It is enough, under this view, for a district court judge to decide the question of adequacy in the first instance and then to require any persons disagreeing with that decision to lodge their disagreement before the same court that rendered the adequacy determination, or on direct appeal.

Now, perhaps it is appropriate to limit the scope of Easterbrook's sweeping opinion by recognizing what it does not say: namely, that the reason no collateral challenges to adequacy were brought by the absent class members is that these plaintiffs were represented by the same lawyers who represented the named class representatives in the federal litigation. Consequently, they (or at least their lawyers) had no incentive to and did not lodge any due process adequacy objections in the subsequent state cases. While it may be sensible to enjoin *these* absent class members and their counsel from relitigating the very same issue that the named class representatives argued and lost in the Seventh

101. *Bridgestone/Firestone II*, 333 F.3d at 769.

102. *Id.*

Circuit, it is unfortunate that *Bridestone/Firestone II* may be read as broadly proscribing any collateral challenges on due process grounds to the certifying court's adequacy determination.

As litigants continue to parry over the scope of collateral review, the battles will be waged against a rich backdrop of contemporary debate over class action policy and procedure. That debate, broadly stated, pits an individual litigant's right to sue against the systemic value of finality and resolution. The debate is certainly not new,¹⁰³ but recent legislative and judicial developments—of which *Stephenson* is one illustration—reflect renewed interest in the balance between these competing principles.

In recent years, a number of state legislatures have enacted class action reform;¹⁰⁴ the federal Congress has been working toward compromise on the Class Action Fairness Act (which, as of this writing, has passed in the House but supporters have not yet been able to bring it to a full vote in the Senate);¹⁰⁵ in September 2003, the U.S. Judicial Conference approved changes to Federal Rule of Civil Procedure 23; and, of course, the United States Supreme Court has weighed in several times in the last few years, most notably in *Amchem* and *Ortiz v. Fibreboard Corp.*,¹⁰⁶ on some of the essential problems with representative litigation. These developments do not all point in one direction but, collectively, they implicate the same thematic struggle witnessed in *Stephenson* over competing judicial priorities: an individual litigant's right to sue balanced against collective resolution and finality; fairness against efficiency; and "principle" versus "pragmatism," to reference Francis McGovern's characterization.¹⁰⁷ At least for the

103. See, e.g., ZECHARIAH CHAFFEE, JR., SOME PROBLEMS OF EQUITY 203 (1950) ("However convenient class suits may be, it is obvious that they do not comply with some well-recognized general principles of law. The incongruity which startles us today is the disregard of the requirement that a man ought to have his day in court—his rights and duties should not be adjudicated in his absence.").

104. For instance, effective September 1, 2003, the Texas legislature enacted reforms to class action procedure under state law which, *inter alia*, place more stringent limits on obtaining class certification under Texas law. All of the reforms were prompted by concerns over the perceived abuses in class litigation. See generally Alistair Dawson, *House Bill 4 and the Future of Class Action Litigation*, 24 THE ADVOCATE (Fall 2003), at 60.

105. The Class Action Fairness Act passed the House as H.R. 1115 and is still pending in the Senate as S. 1751. The last attempt, on October 22, 2003, to bring the bill before the Senate narrowly fell short. See *Class Actions Motion to Bring Class Action Bill to Senate Floor Fails by One Vote*, 72 U.S.L.W. 2233 (Oct. 28, 2003).

106. 527 U.S. 815 (1999).

107. Francis E. McGovern, *Toward a Cooperative Strategy for State and Federal Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1870 (2000) (citing *Amchem*, *Ortiz* and other judicial decisions and arguing that they reflect that "certain fundamental principles of our system of

foreseeable future, the arguments of proponents and opponents of collateral review will be played out against this dynamic judicial and legislative canvas. As the political climate changes over class action policy generally, it will undoubtedly also influence the shape of the debate over the right to collaterally attack a certifying court's judgment.

Whatever consequences *Stephenson* may hold for representative litigation, the case may well carry even more significant implications outside of the class context. As an empirical matter, we know that litigants rarely bring due process collateral attacks on a certifying court's adequacy determination.¹⁰⁸ Patrick Woolley reports that on only forty-four occasions in the last thirty years have absent class members collaterally attacked a judgment based on inadequate representation.¹⁰⁹ While collateral attacks in the class context are an infinitesimal percentage of state and federal dockets, collateral attacks are far more frequently brought by absent defendants challenging the jurisdictional authority of a court to enter binding judgment against them. David Shapiro and his co-authors of the *amicus* brief in support of respondents in *Stephenson* argued that if adequacy of representation is the theoretical basis for binding absent class members to a judgment brought by others on their behalf, minimum contacts is the theoretically equivalent basis for justifying a court's jurisdiction over any absent defendant.¹¹⁰ Any restriction, then, on the right to collaterally attack the certifying court's adequacy determination would also invite restrictions on the right to collaterally attack other bases for binding absent parties to judgment, they argued. Consider the likely consequences, the Law Professors' Brief urged the Court, of adopting petitioners' argument that the certifying court alone would determine adequacy:

Is this Court then prepared to rule, as it almost certainly would be asked to do, that a procedure for determining minimum contacts (when the defendant is absent) should end all later inquiry into that jurisdictional question? With respect to petitioners' fall-back position—that the second court should not review adequacy de novo—would not the logical next step be that, to the extent a second court can still review a first court's finding of minimum contacts, that review must not proceed de novo?¹¹¹

Having framed the issue in the *Stephenson* case as fundamentally

litigation have triumphed over pragmatism”).

108. Woolley, *supra* note 60, at 443.

109. *Id.* at n.268.

110. Brief of *amicus curiae* Law Professors, *supra* note 78, at 17.

111. *Id.* at 17-18.

jurisdictional in nature, the Law Professors' Brief concluded that the argument for retaining the traditional rule allowing collateral attacks is compelling:

Adequacy of representation is the bedrock guarantee provided all absent class members in every form of class action in every court, federal and state But once one accepts that adequacy is the lynchpin of the constitutional exercise of jurisdiction—a reading consistent with all the provisions of Rule 23 as well as that rule's historical foundations and the arguments made at the time it was adopted, the adoption of any one of Petitioner's positions might well amount to an unintended earthquake in procedural law.¹¹²

If Shapiro and his co-authors are right, then the shock waves from a restriction on *de novo* collateral review in the class action context could reverberate throughout the judicial system. It is this kind of “unintended earthquake” that should encourage lawyers—on both sides of the bar—to take the non-decision in *Stephenson* very seriously indeed.

B. *Looking Beyond Syngenta*

We have spoken, thus far, of the possible legal implications from the debate over collateral review in *Stephenson* and suggested that the willingness of four justices to reverse the Second Circuit may encourage reconsideration of heretofore settled rules of law both in and out of the class action context. It should be clear, though, that what is not ripe for reconsideration, in any context, is the argument the Court resoundingly rejected in *Syngenta* for invoking the residual power embodied in the All Writs Act to remove a state case not within the federal district court's original jurisdiction. But if *Syngenta* closed the door to that procedural mechanism for protecting a federal court's judgment or its ongoing jurisdiction, it left unresolved several much harder issues. Most centrally, the Chief Justice's passing recitation in *Syngenta* that a prior federal judgment may be enforced either by an anti-suit injunction or through assertion of a preclusion defense in the state court, raises several key questions. On what occasions is a federal court authorized to enjoin litigants from pursuing a parallel or subsequent state suit? Does the scope of this authority depend on whether it is sought before¹¹³ or

112. *Id.* at 19-20.

113. *Cf. In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d 133, 145 (3d Cir. 1998). The Third Circuit affirmed the denial of a request to enjoin parallel state litigation, noting that “[t]here is no classwide settlement pending before the district court (indeed, the conditional class certification by the district court no longer subsists) and no stipulation of

after¹¹⁴ the federal court enters judgment following the jury's verdict or pursuant to a class settlement? If so, in what respects? Even if an injunction is authorized—either before or after judgment—on what occasions should a federal court stay its hand and not interfere with the state proceedings? This latter question, in turn, raises a corollary set of inquires concerning the competence by state courts to enforce federal rights and obligations, a subject that also bears relevance in the application of recognized federal common law abstention doctrines.

These questions are not easily answered. As a general proposition, parallel proceedings (whether they be in different state courts or in federal and state court) addressing the same *in personam* cause of action are permissible in our federal system. As the Third Circuit observed in *Carlough v. Amchem Products, Inc.*,¹¹⁵ “simultaneous federal and state adjudications of the same in personam cause of action do not of themselves trigger the necessary in aid exception [of the Anti-Injunction Act], and the letter and spirit of the Anti-Injunction Act and All-Writs Act counsel a restrictive application of that exception.”¹¹⁶

In *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*,¹¹⁷ the Supreme Court emphasized the key role that federalism principles play in the presumption for deference:

settlement or prospect of settlement in that court is imminent.” *Id.*

114. Where settlement of the class litigation has been approved by the court under Rule 23(e), use of the injunctive power has been approved to enjoin absent class members from bringing subsequent state actions. *See, e.g., In re Corrugated Container Antitrust Litig.*, 80 F.R.D. 244 (S.D. Tex. 1978), *aff'd* 659 F.2d 1332 (5th Cir. 1981) (Fifth Circuit upheld injunction proscribing the filing of state court suits issued by district court after its certification of the consolidated lawsuits as a mandatory class action, reasoning that the “in aid of its jurisdiction” and “to protect and effectuate its judgments” exceptions to the Anti-Injunction Act applied where the district court had already approved settlement, as to most defendants, at the time the injunction issued). Injunctions have even issued where a settlement was close but not yet finalized. *See, e.g., In re Baldwin-United Corp.*, 770 F.2d 328, 333, 337 (2d Cir. 1985) (injunction upheld where imminent settlement was regarded as “the virtual equivalent of a res” under the “in aid of its jurisdiction” exception to § 2283 and where it was found that “the potential for an onslaught of state actions threatened to seriously impair the federal court’s flexibility and authority to approve settlements in the multi-district litigation”); *In re Asbestos School Litig.*, No. 83-0268, 1991 WL 61156, at *2 (E.D. Pa. April 16, 1991), *aff'd mem.* 950 F.2d 723 (3d Cir. 1991) (observing that “this court’s ability to oversee a possible settlement would be seriously impaired by a continuing litigation of parallel actions”); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189 (3d Cir. 1993) (anti-suit injunction approved, citing *Asbestos School Litigation* and *Baldwin-United*, where class action settlement was “imminent”). For additional authorities and an excellent, comprehensive description of the case law, *see* Georgene M. Vairo, *Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction*, *et al*, ALI-ABA, CIVIL PRACTICE AND LITIGATION IN FEDERAL AND STATE COURTS, available at SHO63 ALI-ABA, pt. 3-4, at 221, 350-66 (Jan. 2003).

115. 10 F.3d 189 (3d Cir. 1993).

116. *Id.* at 202.

117. 398 U.S. 281 (1970).

Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of [§] 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.¹¹⁸

Yet, even with a presumption in favor of deference based on “the fundamental principle of a dual system of courts,” friction between coordinate judiciaries is inevitable and the costs of such friction will often be too substantial to ignore. The Anti-Injunction Act, with its narrow but vital exceptions, simultaneously recognizes the virtue of reducing jurisdictional conflicts between coordinate courts as well as the need for preempting threats to the integrity of a state court’s judgment.¹¹⁹ The effort to accommodate these competing values in a single statute has proved a nettlesome problem, however. Then-Professor Diane Wood once observed, drawing on David Currie’s earlier work, that the Anti-Injunction Act “is badly in need of attention The Act still suffers from ‘dense clouds of ambiguity,’ and still might fairly be called the ‘most obscure of jurisdictional statutes.’”¹²⁰ As a result of all of this ambiguity and the inherent tensions at play in the statute, it is not always clear when a federal injunction may issue, even if it is abundantly clear from experience there will be occasions that warrant the enjoining of concurrent or subsequent state proceedings.

One reflection of this uncertainty in the law is the effort by the Board of Editors of the Manual for Complex Litigation to summarize the relevant doctrinal rules. Thus, the current Draft Copy of the Fourth Edition of the Manual for Complex Litigation begins the section on *Jurisdictional Conflicts* with this advice: “An injunction against pending state proceedings, even if authorized by federal statutes and case law can have a detrimental effect on future efforts to work cooperatively and should be used only as a last resort, if at all.”¹²¹ The Manual then notes that exceptional circumstances may justify departure from the general presumption, and proceeds to list some occasions when enjoining litigants from prosecuting concurrent state actions may be warranted.

118. *Id.* at 297.

119. *See generally*, Hoffman, *supra* note 13, at 459-61.

120. Diane P. Wood, *Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act*, 1990 BYU L. REV. 289, 320 (quoting David P. Currie, *The Federal Courts and the American Law Institute*, pt. 2, 36 U. CHI. L. REV. 268, 322 (1969)).

121. Draft Copy, Manual for Complex Litigation § 20.32 at 237 (4th ed. 2003) [hereafter MANUAL].

For instance the Manual notes that the Anti-Injunction Act and All Writs Act have been used to enjoin state litigation “that would require relitigation in state court of a matter finally decided in federal court” or to “stay orders that would otherwise prevent a federal court from proceeding with pretrial aspects of the litigation.”¹²² These observations are empirically correct, of course, but necessarily incomplete. Even if the relitigation exception to § 2283 would allow an injunction to issue when the matter previously has been decided, why does deference to the state court not counsel discretion against interference absent a showing that the state judge is incapable or unwilling to properly apply preclusion law to protect the federal judgment? As noted above, the Chief Justice’s opinion in *Syngenta* certainly leaves this question unresolved.¹²³

Another occasion the Manual references which may warrant the issuance of a federal judicial injunction to stay state proceedings is “where a class has been certified under Federal Rule of Civil Procedure 23(b)(3), and where class members have failed to avail themselves of their right to opt out and litigate their claims independently in state or federal court.”¹²⁴ No exception is listed or cross reference made, however, to occasions where the absent class members’ subsequent state suit also involves a collateral attack on the adequacy determination in the judgment of the certifying court; in other words, the question implicated by the ambiguous outcome in *Stephenson*. On still other points, the Manual is not up to date with current law,¹²⁵ a problem the authors concede is inevitable with the project and one about which they wisely remind lawyers to be cautious.¹²⁶

My point is not to identify shortcomings of the Manual. It is a masterful work of enormous value to the bench and bar. Instead, the critique goes to the difficulties inherent in marking the boundaries between deference to state courts and the unavoidable need for some authority to stay litigation that threatens a court’s continuing jurisdiction or prior judgment. The challenge of identifying these boundaries—of

122. *Id.*

123. *See supra* text accompanying notes 28-36.

124. MANUAL, *supra* note 121, § 20.32 at 239.

125. *See, e.g., id.* (noting that the Anti-Injunction Act and All Writs Act have been used “to effectuate global settlements in large scale litigation by enjoining *or removing* to federal court parallel state court litigation that would otherwise frustrate the adoption or implementation of comprehensive class settlements approved by the federal court as binding on the parties to the state court litigation” but failing to cite the Court’s recent decision in *Syngenta* as foreclosing the removal option).

126. *See id.* at 2 (“[I]t should go without saying that changes in statutes, case law, regulations, and technology will quickly date some specific references in the *Manual* and users need to exercise standard research practices.”).

finding the right balance—has not escaped the Supreme Court. In this regard, I have said that the problem of *Syngenta* is that while the Court rejected a residual authority permitting removal of state cases to protect federal judgments and jurisdiction, it gave no guidance to order the choice of alternatives. Of course, *Syngenta* was certainly not the first time the Court has failed to clarify the ordering of options for protecting federal judgments.

*Rivet v. Regions Bank*¹²⁷ concerned the power of a federal bankruptcy court to remove a case from Louisiana state court on the ground that the plaintiff's state cause of action was completely precluded by the bankruptcy court's prior judgment on a federal question. The Fifth Circuit had affirmed the denial of remand, citing *Federated Department Stores, Inc. v. Moitie*¹²⁸ for the proposition that a defendant could remove a case "where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law."¹²⁹ The Supreme Court in *Rivet* reversed the appellate court, emphasizing that "*Moitie* did not create a preclusion exception to the rule, fundamental under currently governing legislation, that a defendant cannot remove on the basis of a federal defense."¹³⁰ Moreover, the Court observed:

In sum, claim preclusion by reason of a prior federal judgment is a defensive plea that provides no basis for removal under § 1441(b). Such a defense is properly made in the state proceedings, and the state courts' disposition of it is subject to this Court's ultimate review.¹³¹

Had the Court stopped there, it would have brought some clarity to the law. Unfortunately, Justice Ginsburg then proceeded to add an accompanying footnote to the sentence emphasizing the importance of deference to the state court in federal claim preclusion cases. "We note also," she said, seemingly in passing, that under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, a federal court may enjoin state-court proceedings "where necessary . . . to protect or effectuate its judgments."¹³²

The footnote has proved pernicious. Before *Syngenta*, the Eighth Circuit cited the *Rivet* footnote as some support for invoking the All

127. 522 U.S. 470 (1998).

128. 452 U.S. 394 (1981).

129. *Rivet v. Regions Bank*, 108 F.3d 576, 586 (5th Cir. 1997).

130. *Rivet*, 522 U.S. at 478.

131. *Id.*

132. *Id.* at 478 n.3.

Writs Act to remove a case otherwise subject to being enjoined under the relitigation exception to § 2283.¹³³ Ginsburg's footnote in *Rivet*, the Eighth Circuit opined, merely "points out another procedural option, but we do not read footnote three to rule out the one we approved."¹³⁴ By suggesting that deference to the state court is one—but not the only—option available to a federal court in a federal claim preclusion case, the *Rivet* footnote adds uncertainty to the law, just as the Chief Justice Rehnquist's opinion in *Syngenta* similarly clouds the water. All of this is to say that we must wait for another day to learn how the Court balances the competing priorities of minimizing interference with state judicial proceedings against the felt need on some occasions for federal judicial authority to restrain the prosecution of coordinate state proceedings.

C. *Lessons from Syngenta and Stephenson*

I have not endeavored to suggest a complete framework to guide the Court in balancing these competing priorities. Still, by closely examining the strategic decision-making by litigants and their lawyers in *Syngenta* and *Stephenson* and assessing how that behavior exerted an influence on judicial decision-making in the cases, this study suggests some insights relevant to defining reasonable parameters for the federal judicial injunctive authority. While federalism interests are one important aspect of the problem, *Syngenta* and *Stephenson* stand as testimony that there are other considerations that bear important relevance on how those limits are defined. Given the fact specific character of all litigation, complex or otherwise, no comprehensive list is possible of all relevant variables but several significant factors are worth emphasizing.

One important consideration in the class action context is the power of the federal district court to enjoin nonresident absent class members. While the failure of a class member to opt out of (at least some) Rule 23(b)(3) actions is a *necessary* condition if she otherwise lacks minimum contacts with the forum where the class certification order was entered,¹³⁵ a failure to opt-out is not a *sufficient* condition for exercising territorial jurisdiction over her if the minimum procedural due process requirements of *Shutts* are not satisfied. Where a nonresident class

133. NAACP v. Metro. Council, 144 F.3d 1168, 1172 (8th Cir.), cert. denied, 525 U.S. 826 (1998).

134. *Id.*

135. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

member is beyond the territorial reach of the forum, her right to collaterally attack the certifying court's judgment on procedural due process grounds is protected by constitutional limits on personal jurisdiction, just as any nonresident defendant may challenge a judgment entered without proper jurisdiction.¹³⁶ Consequently, an injunction by a federal district judge against a nonresident class member's collateral attack in a distant forum should not succeed unless the absent class member otherwise possesses sufficient minimum contacts with the forum state. To permit an injunction without sufficient minimum contacts would, in effect, read into the All Writs Act (the source of the district court's injunctive authority) nationwide territorial jurisdictional authority to bind all persons from challenging the court's judgment, without regard to their lack of minimum contacts with the forum. Yet, as Professor Monaghan has argued:

[T]he All Writs Act cannot properly be read to side-step standard tests governing in personam jurisdiction. . . . [None of the Court's prior precedents provide a basis] for believing that the Act should be construed as a general 'emergency all purpose' nationwide long-arm statute used to relax the requirements of Rule 4(k)(1)(A) whenever a court deems that result desirable.¹³⁷

A second important consideration in addressing the scope of the federal judicial injunctive authority is to distinguish between occasions where the state suit is brought before judgment has been rendered in the federal forum, from cases where the jurisdiction is concurrent and overlapping with ongoing proceedings. While the case law already recognizes this distinction, as noted earlier,¹³⁸ we would do well to provide a more complete account to explain why the two circumstances pose different challenges and issues.

When the second suit is brought after judgment, we are squarely faced with the question left unanswered from *Syngenta*: issuance of an injunction before the state court rules on the preclusive effect of a prior federal judgment *or* deference to the state court to make that determination without interference. Although Chief Justice Rehnquist's

136. See, e.g., *Richards v. Jefferson County*, 517 U.S. 793 (1996). A person "is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process" *Id.* at 798 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). "The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger" *Id.* at 800 n.5 (quoting *Chase Nat. Bank v. Norwalk*, 291 U.S. 431, 441 (1934)).

137. Monaghan, *supra* note 11, at 1190-91.

138. See *supra* notes 21-22.

opinion offers no express guidance on this choice, in considering the propriety of injunctive relief it is important to keep in mind the strenuous assertions made by defendants—ultimately accepted by the district judge and Eleventh Circuit, and not contradicted by the Supreme Court—that the *Henson* plaintiffs’ state suit in Iberville Parish was a direct threat to the prior settlement in *Price*.¹³⁹ Moreover, with the state suit having been brought by the *same* lawyer against the *same* defendant for the *same* injuries for which the *same* plaintiffs were compensated by the federal settlement, it hardly seems surprising that the Supreme Court suggested an anti-suit injunction would have been warranted. Recognition of this point might lead us in future cases, where less baggage accompanies the state suit, to ask whether there are credible reasons to doubt that the state court can correctly interpret the preclusive effect of the prior federal judgment. Lacking any such credible basis, I suggest that the presumption ought to be that the state judge is competent to get it right.¹⁴⁰

Additionally, when suit is brought after judgment it is important to distinguish a single state case being brought from instances where the state suit is one of several or many other suits filed. In this latter circumstance there may be sound reasons for being concerned, as the Seventh Circuit was in *Bridgestone/Firestone II*, that “[r]elitigation can turn even an unlikely outcome into reality”¹⁴¹ and thereby justify on efficiency and fairness grounds the imposition of an injunction precluding multiple efforts at relitigation.

When the second suit is brought before final judgment in another forum, other considerations are involved. Usually, the assertion made to justify an anti-suit injunction is that the parallel state case threatens the federal court’s ability to do its job.¹⁴² In these circumstances, it is important to keep in mind the judge’s role in carefully scrutinizing the

139. See *supra* text accompanying notes 10-11. See also *Syngenta Crop Prot., Inc. v. Henson*, 527 U.S. 28, 32 (2002) (petitioners arguing that the *Henson* state suit “frustrated the express terms of the [federal] settlement”).

140. The Court’s oft-cited preference for avoiding interfering with state judicial proceedings, see *supra* notes 117-18, supports application of a high presumption of competency before intervention is justified, even if the Court’s decision in *Parsons Steel* does incentivize litigants to secure injunctive relief from the federal court before the state court has ruled. See Wood, *supra* note 120, at 306 (observing that “[t]he first consequence [of *Parsons Steel*] totally ignores the comity and federalism basis of the Anti-Injunction Act, and the second comes close to violating principles underlying the *Rooker-Feldman* doctrine”); see also Hoffman, *supra* note 13, at 454 (commenting that “the decision in *Parsons Steel* is anomalous because it permits—indeed, even encourages—litigants to seek injunctive relief before exhausting all other available remedies”).

141. *Bridgestone/Firestone II*, 333 F.3d 763, 766 (7th Cir. 2003).

142. See *supra* authorities cited in notes 113-14.

threat that the state suit allegedly poses to the ongoing proceedings. For instance, the court can compare the pleadings: are the claims identical or only overlapping? It may also compare the parties in the different suits: are the same parties involved or are the plaintiffs and the injuries for which they seek recovery distinct? What about the lawyers? Are the same counsel involved in all of the cases?¹⁴³ The need for close scrutiny of the relatedness of claims and parties and why these considerations are so critical to the evaluation of the scope of the federal judicial injunctive authority may be illustrated by a personal story.

When I was in private practice, I represented a couple who brought suit in state court in Texas against a life insurance company for recovery of gift taxes they had incurred in reliance on the company's representations in connection with the sale of a life insurance policy. The policy was owned by a legal trust that the insurance company advised my clients to set up. The gift taxes were the result of annual payments made to the trust to cover the costs of the premiums for the policy. Prior to the filing of this suit, claims were already being asserted in the United States District Court for the Central District of California on behalf of all owners of insurance policies, one of whom was the legal trust my clients had set up. Not unexpectedly, the defendant removed the Texas state suit to the Southern District of Texas and then moved to have it transferred to the federal court in California, asserting that the claims brought by my clients were identical to and redundant of those being litigated in that class action. Before the federal judge in California, defendant sought dismissal of my client's claims and to enjoin them from seeking recovery outside of the class proceedings.

Ultimately, we prevailed in convincing the court that my clients did not come within the class definition and that their claims were distinct from and not covered by the claims being asserted in that case. The point of this story, however, is not that we were ultimately right (we were, of course); rather it is to emphasize how high the stakes were in these pretrial battles. Everything turned on how the court interpreted the relatedness of the claims being asserted. Had we lost and been consolidated into the class litigation, it is unlikely that my clients would have received the same (or perhaps *any* of the) relief that they sought out of the class litigation.

This anecdotal evidence is consistent with the broader empirical

143. For a critical look at the policy debates that underlie aggregation of related cases, see Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231 (1991).

evidence we have regarding mass litigation. From both the plaintiff's and defendant's perspective, relatedness of claims and of parties marks the decisive pretrial struggle in many complex litigation cases. Figures from the Judicial Panel on Multidistrict Litigation, as reported by the Administrative Office of the United States Courts, reflect that from October 1, 2001, through September 30, 2002, a request to the Panel for transfer was made, pursuant to 28 U.S.C. § 1407, in 7,258 civil actions and that in 7,063 of these cases transfer was ordered. Transfer was not ordered in only 195 actions (or less than three percent).¹⁴⁴ These striking figures reflect no short term trend.¹⁴⁵ Furthermore, we also know from the federal experience that after a case is assigned to a pretrial court for consolidated or coordinated pretrial purposes it almost never is remanded to the trial court. From its inception in 1968 through September 30, 2002, there were 179,071 civil action cases consolidated for pretrial purposes under § 1407 (or originally filed in the transferee court and thereby became part of the MDL proceedings). Of these 179,071 cases, 129,594 were terminated by the transferee court; only 10,381 actions were ever remanded to the trial court for further proceedings (or "reassigned," if the case was sent back to a court within the same district), resulting in a remand to pretrial termination ratio of less than six percent.¹⁴⁶

144. See REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 26 (2002). Even these figures probably overstate the grant to denial rate on transfer motions since the Administrative Office's figure of 195 reflects those cases where the Panel "did not order transfer" and does not distinguish between those instances in which transfer was denied and those in which the motion for transfer was withdrawn by the parties, following settlement or other voluntary disposition.

145. In his discussion of the federal MDL practice, Earle Kyle has noted that "in 1995 the Panel transferred 12,768 cases . . . for inclusion in coordinated or consolidated pretrial proceedings, and declined to transfer only 84 actions." See Earle F. Kyle, IV, *The Mechanics of Motion Practice Before the Judicial Panel on Multidistrict Litigation*, 175 F.R.D. 589, 590 (1998) (citing REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 31-32 & tables S-21 and S-22 (1995)).

146. See REPORT OF THE DIRECTOR, *supra* note 144, at S-19 and S-20. One might object that these figures are somewhat misleading since most cases generally in the civil system never reach trial. This ignores, however, that once a case is consolidated into a MDL proceeding the pretrial dynamic of a case is dramatically altered. Although good data does not exist to compare MDL and non-MDL cases, we do know from other empirical work that when plaintiff's case is moved from the forum of its choosing to another, plaintiff's win rate drops significantly. See Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum Shopping*, 80 CORNELL L. REV. 1507, 1507 (1995) (the plaintiffs' win rate drops from 58% to 29% after successful transfer under 28 U.S.C. § 1404(a)); see also Kevin M. Clermont and Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 581 (1998) (empirical study demonstrates that removal significantly improves defendant's win rate at trial as compared with cases where removal was unsuccessful).

In sum, this data regarding the federal multidistrict litigation experience with 28 U.S.C. § 1407 underscores how critical is a court's determination concerning relatedness of claims and parties. By recognizing the evaluative responsibility courts bear in making these determinations, we are reminded of the need not only for adequate procedures to be applied in particular cases but also for appropriate doctrinal rules governing coordinate litigation. If the parties are not properly incentivized to present all relevant information to the court and to adequately represent those they purport to represent, then there is a need for rules to ensure due process protections are afforded. After all, even the most capable of jurists on our state and federal benches cannot be expected to reach the right conclusions if the information presented to them is incomplete or otherwise inadequate.

When the trial judge fails to carry out his evaluative responsibilities in overseeing the conduct of the litigation, we can expect unfortunate outcomes. In *Reynolds v. Beneficial National Bank*,¹⁴⁷ the Seventh Circuit heard an appeal from a district court's order approving a settlement of consumer-finance class action litigation. Taxpayers entitled to a refund from the federal government must usually wait several weeks before receiving it. Recognizing that some do not want to wait this long, H & R Block and Beneficial offered to lend customers the amount of the refund. In exchange for lending this money, the customer was charged a significant interest rate, even on loans as short as a couple of days. The most serious charge plaintiffs leveled at the defendants, according to the Seventh Circuit, was that H & R Block led customers to believe that they were acting as the customer's agent or fiduciary when, in fact and without disclosure, H & R Block shared in the loan proceeds.¹⁴⁸

Numerous suits were filed, starting in 1990, against Beneficial and H & R Block and while many were dismissed several remained pending by the late 1990s. Though none had yet gone to trial, one class action in Texas had been certified and was fast approaching its trial date. In that suit, plaintiffs sought damages of nearly \$2 billion. While the case was still pending, two lawyers who had previously brought unsuccessful cases against Beneficial and H & R Block had lunch with Beneficial's lead counsel. At this lunch, they apparently began to discuss (though no formal negotiations took place) a global settlement of all claims, including claims against H & R Block. Adding a few reinforcements,

147. 288 F.3d 277 (7th Cir. 2002).

148. *Id.* at 280.

the same lawyers thereafter filed several new class action suits, including one in United States District Court for the Northern District of Illinois. After a brief period of negotiation and procedural maneuvering, a settlement was reached and submitted to the federal district judge to approve.

The settlement contemplated that Beneficial and H & R Block would create a \$25 million fund to pay all claims. Several objectors strenuously opposed the settlement, arguing that the agreement was a sham, a kind of “reverse auction” whereby “the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant.”¹⁴⁹ Despite obvious conflicts of interest within the class, the district judge approved the settlement and, in the process, also encouraged the plaintiffs’ lawyers not to file their fee applications publicly. The district judge also enjoined the Texas suit on the theory that the suit might derail the federal settlement. The Seventh Circuit reversed.

Writing for the panel, Judge Posner described the factual background that led to the settlement. While he observed that “there is no proof that the settlement was actually collusive in the reverse-auction sense,” he also concluded:

[T]he circumstances demanded closer scrutiny than the district judge gave it. He painted with too broad a brush, substituting intuition for the evidence and careful analysis that a case of this magnitude, and settlement proposal of such questionable antecedents and circumstances, required.¹⁵⁰

Further, the appellate court found it remarkable, “in view of the progress and promise of the Texas suit relative to the half-hearted efforts of the settlement class counsel,” that the district judge enjoined prosecution of the Texas case.¹⁵¹ Posner continued:

The effect of the injunction is that the settlement release, if upheld, would release the claims in the Texas suit. For this release of potentially substantial claims against H & R Block, the settlement class received no consideration. In fact the settlement class received no consideration for the release of any claims against Block The lawyers for the settlement class were richly rewarded for negotiations

149. *Id.* at 282 (citing, *inter alia*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 392 (2000)).

150. *Id.* at 283.

151. *Id.*

that greatly diminished the cost of settlement to Beneficial from the level that it had considered to be in the ballpark years earlier when the cases were running more in its favor than when the settlement agreement was negotiated. In effect, the settlement values the Texas and all other claims against Block at zero.¹⁵²

In *Beneficial*, as it has done in several other cases,¹⁵³ the Seventh Circuit described the role of the district judge in reviewing the fairness of any proposed settlement in class litigation as “a fiduciary to the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.”¹⁵⁴ Other circuits have similarly emphasized the fiduciary obligations owed by the district judge to the class members.¹⁵⁵

Sensible opinions, like Posner’s in *Beneficial*, stress the evaluative responsibility courts bear in overseeing litigant behavior. The story of the *Beneficial* litigation helps make the point that doctrinal safeguards are important but, standing alone, are also insufficient. We know from empirical evidence that the influence of objectors in reducing collusive behavior is limited since objectors are rather infrequent participants in class litigation;¹⁵⁶ and even when they are involved, there is often no alignment between the interests of objectors (who often will settle for a quick payoff) and those of the absent class.¹⁵⁷ Even the right to collateral attack itself has a marginal policing effect since, as noted earlier, such challenges are rarely brought and even less often are successful.¹⁵⁸ At the end of the day, all of the debate over doctrinal law will amount to little if the fiduciary obligations of trial judges in monitoring litigants and the litigation before them are not taken seriously.

152. *Id.* at 283-84.

153. *Culver v. City of Milwaukee*, 277 F.3d 908, 915 (7th Cir. 2002); *Stewart v. Gen. Motors Corp.*, 756 F.2d 1285, 1293 (7th Cir. 1985).

154. *Reynolds*, 288 F.3d at 280.

155. *See, e.g., In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001); *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 22 (2d Cir. 1987).

156. *See* Thomas E. Willging, et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 140 (1996) (in examination of fairness hearings in four federal judicial districts, there were no objectors in 42-64% of the cases).

157. The Advisory Committee Notes to the most recent amendments to Rule 23 of the Federal Rule of Civil Procedure emphasize the not infrequent disconnect between the objectors’ interests and those of absent class members. *See* FED. R. CIV. P. 23, Advisory Committee Notes (“Such objections [by objectors that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass], which purport to represent class-wide interests, may augment the opportunity for obstruction or delay.”); *see also* Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1104-12 (1996).

158. *See* Woolley, *supra* note 60, at 443.

IV. CONCLUSION

In closing, we may reflect on how remarkable it is that the Supreme Court over these last two terms has wrestled with the problem of defining the scope of the federal power to enjoin state proceedings. Outside observers might be excused for thinking that the boundaries would have been decided long ago. After all, more than two centuries have elapsed since the establishment of our dual system of state and federal courts and one need hardly doubt that “our fractured jurisdictional mosaic,” to use Bob Cover’s apt description,¹⁵⁹ has offered myriad occasions for the Court to address the parameters of federal judicial injunctive power over state courts. Certainly those early legislators who enacted the Anti-Injunction Act in 1793 must have expected that their tightly-drawn statute would have helped to squarely set boundaries between state and federal courts. Yet, while the Court has taken up the proper application of 28 U.S.C. § 2283 on many occasions and some clear boundaries have been drawn, it is beyond cavil that the scope of federal judicial power to enjoin parallel state proceedings or a subsequently filed state suit has remained a subject of much uncertainty for the better part of two centuries.

In the foreseeable future we will continue to face difficult and important questions about how to handle jurisdictional conflicts between state and federal courts. When may—or, for that matter, when *must*—state judges be relied upon to vindicate prior federal orders and/or to protect the integrity of ongoing proceedings? Alternatively, when is it appropriate not to rely on the state court to adequately protect federal jurisdiction and, instead, to issue injunctive relief to enjoin litigants from pursuing parallel or subsequent state litigation?

While the Court has emphasized the role that federalism principles play in defining the limits of the federal judicial injunctive power, these doctrinal guideposts should not cause us to overlook the important role of strategic decision-making by litigants and their lawyers and how that behavior, in turn, influences judicial decision-making. Taken together, *Syngenta* and *Stephenson* suggest that we must be more conscious of the incentives and disincentives that guide the decision to bring parallel or subsequent litigation. The assumptions we make that support the trust we ascribe to judgments are relevant if we ever hope to reach principled answers to the important questions that remain, unanswered and provocatively, in the uncertain aftermath of *Syngenta* and *Stephenson*.

159. Cover, *supra* note 4, at 640-41.