

FINALITY IN CLASS ACTION LITIGATION: LESSONS FROM HABEAS

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A class action can only bind class members who are “adequately represented,” and thus a class action court necessarily determines representational adequacy. But should class members who were not an active part of that proceeding be able to relitigate adequacy in a collateral forum at a later date so as to evade the binding effect of the class judgment? Courts and scholars have generated a bipolar response to that question, with one side arguing that full relitigation is required by the constitutional nature of the question and the other insisting that no relitigation is permitted because of the issue-preclusive effect of the class court’s holding. Despite the richness of this debate, myriad specific questions about the availability, substance, and procedural details of the relitigation opportunity remain unexamined. In this Article, Professor Rubenstein expands the conversation outward by comparing class action law’s approach to relitigation of adequacy of representation with habeas corpus’s approach to relitigation of ineffective assistance of counsel claims in criminal cases. Using two recent, seemingly unconnected Supreme Court cases—one from each field—as case studies, Professor Rubenstein explains how these cases in fact raise remarkably similar questions. Specifically, the comparison reveals that habeas provides a relatively clear, rule-based system that specifies when—and according to what procedural rules—relitigation is available. Professor Rubenstein concludes by arguing that there are lessons for class action law in habeas’s approach: a method for considering when relitigation is appropriate that avoids the extremes of either “always” or “never”; a rule system that helps identify issues (such as substantive standards, degrees of deference, burdens of proof, and defaults) that have yet to be carefully examined in class action law; and a template for balancing the competing policy concerns at issue. Without defending current habeas doctrine, and without pretending that habeas and class actions are overtly similar, the Article nonetheless demonstrates that class action law’s relitigation problem can learn something through a close look at criminal law’s relitigation solutions.

INTRODUCTION	792	R
I. CLASS ACTION PARADIGM: THE STEPHENSON CASE ...	801	R
A. Background	801	R
B. Supreme Court	804	R
C. Class Action Law’s Confusions	805	R
1. Adequacy in the Class Action Court [F1]	806	R
a. Content	806	R

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June 2007]

FINALITY IN CLASS ACTION LITIGATION

791

b.	Process	807	R
c.	Appeal.....	808	R
2.	<i>Adequacy on Collateral Review [F2]</i>	809	R
a.	Content.....	809	R
b.	Process	812	R
i.	Statute of Limitations	813	R
ii.	Nature and Standard of Review	813	R
iii.	Burden of Proof	815	R
iv.	Default	816	R
v.	Successive Collateral Attacks	818	R
II.	CONVENTIONAL APPROACHES TO CLASS ACTION RELITIGATION	820	R
A.	<i>Doctrinal Debate</i>	820	R
1.	<i>Preclusion Approach: No Relitigation</i>	821	R
2.	<i>Constitutional Approach: Complete Relitigation</i>	825	R
B.	<i>Policy Debate</i>	828	R
1.	<i>Preclusion Perspective: Repose, Consistency, and Class Action Goals</i>	830	R
2.	<i>Constitutional Perspective: Participation and Legitimacy Values</i>	834	R
3.	<i>Systemic Perspective: Accuracy</i>	837	R
III.	HABEAS CORPUS PARADIGM: THE <i>Cone</i> Case	841	R
A.	<i>Background</i>	841	R
B.	<i>Supreme Court</i>	844	R
C.	<i>Criminal Law's Certainty</i>	845	R
1.	<i>Effectiveness in the State Court [F1]</i>	845	R
a.	Content.....	845	R
b.	Process	847	R
c.	Appeal.....	850	R
2.	<i>Effectiveness on Collateral Review [F2]</i>	850	R
a.	Content.....	851	R
b.	Process	851	R
i.	Statute of Limitations	851	R
ii.	Nature and Standard of Review	851	R
iii.	Burden of Proof	853	R
iv.	Default	853	R
v.	Successive Petitions.....	854	R
IV.	COMPARING THE SYSTEMS	855	R
A.	<i>Theory</i>	855	R
B.	<i>F1</i>	855	R
C.	<i>F2</i>	856	R
D.	<i>F3</i>	857	R

E. <i>Bottom Line</i>	857	R
V. HABEAS’S LESSONS FOR CLASS ACTION FINALITY	858	R
A. <i>Habeas’s Lessons</i>	859	R
B. <i>Habeas’s Lessons Applied</i>	861	R
1. <i>Balancing the Interests</i>	861	R
2. <i>Defining the Rule System</i>	862	R
a. Substance of Adequacy Requirement	862	R
b. Statute of Limitations	864	R
c. Default	865	R
d. Nature of Review	866	R
e. Burden of Proof	867	R
f. Repeated Attacks	867	R
3. <i>Defending the Rule System</i>	867	R
CONCLUSION	868	R

INTRODUCTION

Mass tort class actions and death penalty cases seem to have little in common with one another, less still if attention is focused on the lawyers in each—entrepreneurial plaintiffs’ attorneys in the former case, court-appointed criminal defenders in the latter. Yet both sets of cases pose a similar question that lies at the heart of any system of litigation: Under what conditions are we prepared to say that a lawsuit is final—and to live with the consequences of that decision? This is a question that plagues criminal procedure, where declaring a lawsuit to be final can bring about a litigant’s death or incarceration, but it is a question that has recently begun to appear with greater frequency in class action law as well. The litigation finality question is also but one manifestation of an even more general, recurring, and nearly rhetorical inquiry: When are we prepared to accept that anything—a sentence, a law review article, our reading of a law review article—is done? In applying the general problem to the specific example of criminal law, Paul Bator posed the question emphasizing the past tense: “When *has* justice been done?”¹ though one might ask as well, “When is justice *done*?”

The answer cannot be “when it is done right,” or nothing would ever be final.² This is the familiar complaint about criminal procedure, particularly about death penalty cases which seem, to many, to be endless. It also underscores the fear of collateral attack on class

¹ Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 443 (1963).

² *Id.* at 447 (“[I]f the existence *vel non* of mistake determines the lawfulness of the judgment, there can be no escape from a literally endless relitigation of the merits because the possibility of mistake always exists.”).

action judgments: If every class member is entitled to her own attack, there will never be finality in class action law. Yet equally unsatisfying is the answer “when it is done once,” as this would relegate us to a world of first drafts, executions based on faulty trials, and binding class action judgments of questionable validity. Perhaps the only thing we know for sure is that the answer must vary by context. As applied to adjudication, the question of finality carries particular burdens: The decision we are asked to accept purports to resolve a dispute among competing parties; it is a decision by an agent supplied by the government and backed, when necessary, by its force; and it is a decision likely to deprive someone of life, liberty, or property. Our Constitution instructs that we will accept such a decision as final only in the presence of due process of law, but it then leaves to us the task of giving meaning to these words.³

In two recent, seemingly unrelated cases, the Supreme Court has been asked to do just that. One involved the finality of a class action lawsuit, the Agent Orange case, that had been litigated in federal court in Brooklyn, New York, in the early 1980s.⁴ The other involved the finality of a criminal conviction, a murder prosecution, that had been litigated in state court in Memphis, Tennessee, also in the early 1980s.⁵ Daniel Stephenson, a Vietnam veteran, did not want to be bound by the Agent Orange settlement because the settlement funds had run out before he became ill in 1998, and he wanted to file his own lawsuit, notwithstanding the old settlement. Gary Cone, also a Vietnam veteran, did not want to be bound by his criminal conviction because he did not believe he received a fair trial. Stephenson could escape the preclusive effect of the class action settlement by arguing that he was not adequately represented in the case. Cone could escape the death sentence he faced by arguing that he received ineffective assistance of counsel at his trial. Inadequate representation was Daniel Stephenson’s “get out of the class action settlement” card; ineffective assistance was Gary Cone’s “get out of jail” card.

In playing these cards, however, both men ran into the same problem: In each case, a court had already decided the question. The federal judge overseeing the Agent Orange case had held, in 1983, that the class was adequately represented,⁶ and a Tennessee state

³ See Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) (“Adjudication is the social process by which judges give meaning to our public values.”).

⁴ Stephenson v. Dow Chem. Co., 273 F.3d 249, 252 (2d Cir. 2001), *aff’d*, 539 U.S. 111 (2003).

⁵ Bell v. Cone, 535 U.S. 685, 689 (2002).

⁶ *In re* “Agent Orange” Prod. Liab. Litig., 100 F.R.D. 718, 721 (E.D.N.Y. 1983) (“Present as well as prior counsel for plaintiffs appear adequate to their complex task.”); *see also*

habeas corpus judge had held, in 1986, that Gary Cone's trial counsel was not ineffective.⁷ While neither man believed that justice had been done, both had to grapple with the fact that a legal proceeding had been concluded. Thus, when the two cases were argued in the Supreme Court in the early 2000s, each required the Justices to determine the same central question: Was the judicial determination of the adequacy or effectiveness of that veteran's lawyer open to relitigation in a collateral forum nearly twenty years later? Class action law provided not one but two answers to the question—yes or no—depending upon which court was asked.⁸ Criminal law had only one answer: maybe.⁹

Class action scholars and lawyers had hoped that *Stephenson* would settle the question of whether adequate representation findings could be relitigated collaterally,¹⁰ but it did not. With Justice Stevens recusing himself, the Court split 4–4 and thus simply affirmed the Second Circuit's outcome (permitting *Stephenson*'s case to go forward) without rendering a decision of its own.¹¹ By contrast, the Supreme Court did provide an answer in Cone's case, holding that the Tennessee state court's habeas decision was sufficiently correct that it could not be reversed by a federal court under the rules governing federal habeas corpus.¹²

In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 757 (E.D.N.Y. 1984) (rejecting argument that future claimants required independent counsel).

⁷ See Joint Appendix at 78a–85a, *Bell v. Cone*, 535 U.S. 685 (2002) (No. 01-400), 2002 WL 32102936 (rejecting postconviction relief).

⁸ Compare *Stephenson*, 273 F.3d at 259 (permitting relitigation of adequacy), with *Epstein v. MCA, Inc.*, 179 F.3d 641, 650 (9th Cir. 1999) (not permitting relitigation of adequacy), and *Thompson v. Edward D. Jones & Co.*, 992 F.2d 187, 192 (8th Cir. 1993) (same). See also *Hospitality Mgmt. Assocs. v. Shell Oil Co.*, 591 S.E.2d 611, 617, 618 & n.11 (S.C. 2004) (noting split in federal circuits, citing similar split among state courts, and concluding that issue "remains an open, and hotly litigated, question"); *State v. Homeside Lending, Inc.*, 826 A.2d 997, 1016 (Vt. 2003) ("[T]here is a disagreement in the . . . decisions whether adequacy of representation can be raised by collateral attack.").

⁹ See discussion *infra* Part III.C.2.

¹⁰ See, e.g., Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 316 (2003) (characterizing *Stephenson* as missed opportunity and stating that Court "left for another day its confrontation with the confusion that its own decisions have spawned in the law of adequate class representation"); Kevin R. Bernier, Note, *The Inadequacy of the Broad Collateral Attack: Stephenson v. Dow Chemical Company and Its Effect on Class Action Settlements*, 84 B.U. L. REV. 1023, 1023–24 (2004) (lamenting *Stephenson* as lost opportunity to "shed some light on the scope of collateral review" and as "missed [] opportunity to clarify the debate surrounding the collateral review standard of class actions"); Tony Mauro, *High Court Affirms 2nd Circuit in Agent Orange Case*, THE RECORDER, June 10, 2003 (quoting former Solicitor General Seth Waxman as saying it was "regrettable" that Court could not reach decision and that issue of finality "will be back").

¹¹ *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003).

¹² *Bell v. Cone*, 535 U.S. 685, 702 (2002).

For class action law, *Stephenson's* outcome may have been the worst possible resolution of the case, as it supplied a decision without reasoning to a field more in need of reasoning than decision. The Court's inability to render a majority opinion left unresolved a whole series of questions concerning the content of the adequate representation requirement and the procedures attending both its initial adjudication and its likely readjudication on collateral attack. Two schools of scholarship have developed around these questions. Preclusionists have argued that the issue of adequacy, having necessarily been decided by the class court, cannot be relitigated collaterally. The preclusionists' approach to relitigation is that it should never be permitted. By contrast, constitutionalists have argued that because the issue of adequacy is embedded in the Due Process Clause, it is always open to reevaluation at the demand of any aggrieved individual class member not yet heard by a court. The constitutionalists' approach to relitigation is that it should always be possible. Each side defends its position in terms of relitigation's consequences and in terms of the values that are at issue. Yet neither has convinced the other of the wisdom of its approach, nor has one emerged as prevalent in the courts.

My goal in this Article is to expand the conversation outward by considering whether Gary Cone's plight sheds any light on Daniel Stephenson's—that is, by considering whether habeas corpus law's handling of finality, in the context of ineffective assistance claims, contains any lessons for class action law. Because of the far greater quantity of criminal cases¹³ and the high stakes in many such lawsuits, habeas has been the subject of significant intellectual, political, and legal attention; as a consequence, its governing principles are sharply defined and its rules intricately laid out. What has emerged in the habeas context is a system that neither fully precludes nor in any way encourages relitigation, but one that uses a series of procedural rules to shape and cabin relitigation opportunities. The nature of these procedural rules changes over time, moving habeas's approach up or down the spectrum of possibilities that exist between pure preclusion and absolute relitigation, though never quite reaching either endpoint (current habeas rules place the present system quite close to the pre-

¹³ In the twelve-month period ending September 30, 2004, 23,344 habeas corpus petitions were filed in the federal courts, as compared to only 2693 class action cases. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS app. at 132 tbl.C-2, 404 tbl.X-5 (2004), available at <http://www.uscourts.gov/judbus2004/contents.html>. Moreover, many of the class suits may be duplicative filings whereas each habeas petition likely represents one prisoner's case.

clusion model).¹⁴ Habeas therefore can serve as a foil for the class action finality debate because it provides the example, at an abstract level, of a procedural approach distinct from the two models that have thus far surfaced in the class action debate.

While suggesting that class action law might learn something by considering the law of habeas corpus, I want to be clear that I am not arguing that class action cases are like criminal trials, or that relitigation of adequacy is like relitigation of effective assistance. Although the two sets of cases do share an uncanny similarity in that each requires a later court to look back at an earlier court's review of a lawyer's work, in several critical dimensions the situations fundamentally differ.¹⁵ First, on a purely formal level, the settings diverge because habeas involves relitigation of the lawyering issue by the same litigant, while class actions involve relitigation of the lawyering issue by different litigants. In the habeas setting, the criminal defendant will have litigated his ineffective assistance claim in state habeas proceedings. That adjudication would be given preclusive effect but for the fact that the habeas statute provides an exception to finality, permitting the defendant to relitigate collaterally.¹⁶ In the class action setting, if a class member has actually litigated adequacy of representation in the class court, she is precluded from relitigating it collaterally.¹⁷ Relitigation of adequacy occurs in class actions only because a new class member steps forward, one who did not appear and litigate adequacy in the class court; her desire is not to relitigate the issue but—at least from her perspective—to litigate it for the first time.¹⁸

¹⁴ See discussion *infra* Part III.

¹⁵ The situations also differ—though less fundamentally—in that the lawyering issue in each is somewhat distinct. Habeas law polices effective assistance by examining counsel's performance, while class action law has conventionally ensured adequate representation by guarding against conflicts of interest. Compare *infra* Part I.C.1.a (discussing content of "adequacy" in class action context), with *infra* Part III.C.1.a (discussing content of "effective assistance" in habeas context). It is increasingly the case, however, that at a class action settlement, class counsel's performance is also policed. See *infra* note 58. Thus, this distinction between the cases is less significant than it once might have been.

¹⁶ See *infra* notes 254–255 and accompanying text.

¹⁷ See *infra* note 105 (citing cases dismissing collateral attacks by litigants who argued adequacy in class court).

¹⁸ See Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787, 1854 (2004) [hereinafter Koniak, *How Like a Winter?*] (distinguishing habeas from class actions because in habeas "the person seeking collateral review was actually present and represented and thus had every chance to raise whatever constitutional infirmities he is now seeking to raise in a collateral attack," whereas in class actions, "the absent class member is not present and the question of the collateral attack is whether that person was adequately represented, so that cannot be presumed either"); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 439 (2000) (noting differences between habeas proceedings that "are not governed by the ordinary rules of res

Second, therefore, the policy concerns in the two settings arise out of opposing impulses. Habeas is a statutorily created right that overrides conventional preclusion doctrine so as to *permit* a prior litigant to relitigate ineffective assistance. By contrast, the issue confronting class action law is, arguably, whether to override conventional preclusion doctrine so as to *prohibit* a new litigant from litigating adequacy herself for the first time.¹⁹ Habeas slouches toward *contracting* preclusion so as to *authorize* more litigation because accuracy is critical given the high stakes and because state courts were, historically, not fully trusted to provide a fair forum.²⁰ We do not worry about finality in class action litigation because the stakes are high (although they might be), or because we distrust the rendering forum (although we might).²¹ Rather, class action law slouches toward *expanding* preclusion so as to *foreclose* litigation because the size of the class presents unique opportunities for numerous relitigations, upsetting the possibility of global peace, which, after all, is precisely the point of the class action. One might say that what class action law needs is not a safety valve permitting

judicata, thus allowing criminal defendants to relitigate federal issues fully and fairly litigated in state court,” and class actions where “only absent class members (who have not litigated the question of adequacy) may collaterally attack a judgment” (footnote omitted)).

¹⁹ I say “arguably,” because, as I contend in Part II, adequacy’s sui generis nature means that it does not fit neatly into conventional preclusion doctrine and hence cannot be so easily conceptualized as a break from it.

²⁰ This distrust was particularly strong in cases involving African American defendants. See, e.g., Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus to Abort State Court Trial*, 113 U. PA. L. REV. 793 *passim* (1965) (discussing problems African American defendants faced in state criminal processes).

²¹ For example, in *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996), the Delaware state court’s approval of a class action settlement that released securities claims within the exclusive subject matter jurisdiction of the federal courts raised questions about the competence of the state court to value such claims and about the problematic settlement dynamics that exist when state class counsel release claims that they cannot litigate themselves. See Marcel Kahan & Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 235–46 (examining problems arising from global state court settlements); Mollie A. Murphy, *The Intersystem Class Settlement: Of Comity, Consent, and Collusion*, 47 U. KAN. L. REV. 413, 467–72 (1999) (examining adequacy of representation concerns arising from state court settlements of exclusive federal claims). One commentator has therefore argued—in a habeas-like manner—that “state courts will give federal claims proper consideration only when federal courts are able to look over the shoulders of state court judges to assure that absent class members are adequately represented.” Alan B. Morrison, *The Inadequate Search for “Adequacy” in Class Actions: A Brief Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. REV. 1179, 1180 (1998).

relitigation in the face of preclusion but a damper barring infinite relitigation in the absence of preclusion.²²

These important differences likely account for the lack of interplay between the two inquiries,²³ and they appear to undermine the contention that class action law could learn something from habeas jurisprudence. Worse still, current habeas jurisprudence itself is so constricted, contentious, and opaque that it seems an odd body of law from which to seek insight. Despite these limitations, there are three reasons that placing the cases next to one another can shed light on class action's finality question. First, albeit for distinct reasons, both habeas and class action are sites at which the meaning of finality is socially contested. In habeas, finality is resisted because of distrust of the state adjudication in light of the stakes, yet permitting relitigation appears to enable criminal defendants to forestall their punishment

²² Arguably, reality supplies just that system: Adequacy is not regularly relitigated ad infinitum because the stakes are often low, the costs of relitigation are significant, and the likelihood of success is small. On why we should still worry, see *infra* Part II.B.1.

²³ Courts occasionally compare relitigation in habeas law to collateral challenges in civil adjudication. *E.g.*, *Teague v. Lane*, 489 U.S. 288, 308 (1989). The Agent Orange defendants made reference to the analogy in their Supreme Court briefs, using the limited opportunities for habeas review as support for their insistence on the finality of the Agent Orange class action. Brief for the Petitioners at 48, *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003) (No. 02-271), 2002 WL 31914663; Reply Brief for the Petitioners at 8, *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003) (No. 02-271), 2003 WL 470195. Nonetheless, there are but a few passing references to the analogy in the scholarly literature. *E.g.*, Geoffrey C. Hazard, Jr., John L. Gedid, & Stephen Soble, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1946 (1998); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 373; Kahan & Silberman, *supra* note 21, at 279 n.190; Koniak, *How Like a Winter?*, *supra* note 18, at 1853–55; Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1164 n.352 (1996); Morrison, *supra* note 21, at 1189; Woolley, *supra* note 18, at 439 (responding to Issacharoff, *supra*). My colleague Steve Yeazell and former colleague David Sklansky write more capaciously about the relationships between civil and criminal procedure in a superb recent publication. See generally David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683 (2006). While they do not discuss class action law, they do discuss aspects of finality in both systems, *id.* at 705–13, and they compare the standard for ineffective assistance of counsel in criminal law to civil malpractice rules, *id.* at 719–28. See also Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1 *passim* (1995) [hereinafter Koniak, *Through the Looking Glass*] (comparing substance of effective assistance in criminal law with that of adequate representation in class action law to demonstrate how both embody weak versions of lawyering obligations and yet are each then insulated from collateral malpractice attack); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837 *passim* (1984) (comparing relitigation across contexts); cf. John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 599–604 (1984) (contrasting constitutional law's impact on field of civil procedure with that of criminal procedure); Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 *passim* (2000) (comparing financing of civil and criminal lawyering).

indefinitely. In class actions, finality is urged because of the class's size and fear that repeated litigation will undermine the social purposes of the class suit, yet barring collateral attack seems to encourage collusive settlements and to deprive absent litigants of their own day in court. Both situations require a careful (re)crafting of standard finality.²⁴

Second, both effective assistance and adequacy are lawyering attributes that we insist upon for their public, as well as private, dimensions. Thus, while it is true that the criminal defendant is present at trial and can control her counsel, we nonetheless restrict the way in which she can do so because the effectiveness of that lawyer

²⁴ As David Shapiro explains:

[T]ry as we may to achieve simplicity and the fullest measure of predictability, there are too many possibilities for injustice in the application of absolute preclusion rules, and too many areas of continuing controversy, to give full effect to a bright line test. . . . Thus, the story of preclusion doctrine is, perhaps inescapably, one of the struggle to achieve a balance between the competing claims of repose, predictability, and the avoidance of inconsistency on the one hand, and on the other, the demands of substantive policy and of particular circumstances when those demands support the arguments for relitigation.

DAVID L. SHAPIRO, *CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS* 18 (2001). To conceptualize the class action problem as a focal point for contesting the conventional meaning of preclusion suggests habeas as an analogy, but not as the only analogy. Similar concerns arise, for example, in the application of nonmutual offensive issue preclusion, *see, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331–32 (1979) (identifying factors in which nonmutual offensive issue preclusion may appropriately be employed), in the question of what preclusive effect should be given to guilty pleas in subsequent civil matters, *see, e.g., RESTATEMENT (SECOND) OF JUDGMENTS* § 85 (1982) (listing circumstances in which criminal judgment in favor of prosecution is preclusive in subsequent civil litigation); David L. Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 *IOWA L. REV.* 27, 27–28 (1984) (discussing factors bearing on giving preclusive effect to guilty pleas in subsequent civil litigation), and in questions about the preclusive effect of other complex litigations such as bankruptcy or probate proceedings, *see, e.g., Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485–91 (1988) (discussing notice required to generate binding judgment under state nonclaim statute). I touch on some of these analogies throughout my analysis, though drawing them out in detail is beyond the scope of this Article.

If the problem under consideration is conceptualized even more abstractly as whether one court should yield to another so long as the other court's proceedings are fair, then another set of relevant analogies would be those situations in which one court must assess the fairness of the procedural opportunities in a collateral forum. *See, e.g., Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982) (stating that application of *Younger* doctrine against federal judicial interference in state court proceedings, *Younger v. Harris*, 401 U.S. 37, 44 (1971), is appropriate so long as “constitutional claims of respondents can be determined in the state proceedings”); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 505, 512–28 (1980) (interpreting Tax Injunction Act, 28 U.S.C. § 1341 (2000), which prohibits injunction of state tax collection proceedings “where a plain, speedy and efficient remedy may be had in the courts of such State”); *Trainor v. Hernandez*, 431 U.S. 434, 446 (1977) (applying *Younger* abstention doctrine because no showing that “state remedies were inadequate to litigate their federal due process claim”). At this level of abstraction, the endeavor at the heart of this Article could be expanded into a larger project examining how and when courts assess other courts' procedures.

serves to legitimate the verdict and resulting punishment.²⁵ Similarly, while civil litigants should have adequate counsel, the state does not provide them with this, and we generally worry little about its absence. Adequacy of representation appears in class actions only because such cases serve public functions²⁶ and adequate representation is the sine qua non for accomplishing those functions. The procedures we use to evaluate effectiveness and adequacy share an important public dimension that can be overlooked if the settings' distinctions are overemphasized.

Third, what habeas and class actions have in common, most simply, is that both are embedded in the American adjudicatory system. The two problems share a language, a discourse, a mode of proceeding. Both raise issues about presumptions, burdens of proof, and methods of review that are familiar across disciplines. Indeed, both problems may be handled by the same judge, in the same courtroom, perhaps on the same day. To think that criminal procedures might shed light on civil ones seems incontrovertible.

That said, let me repeat that the goal of this Article is not to convince the reader that class actions are like habeas challenges or that class action law should breezily borrow from habeas law. Rather, the goal is simply to convince the reader that examining two case studies side by side can help illuminate a procedural method for class action law. Habeas's approach is a way in which class action law can avoid the absolutes of either prohibiting any collateral consideration of adequacy based on the precept that a full hearing was—or could have been—conducted by the class court, or affording every single class member her own right to relitigate adequacy based on the constitutional nature of the problem.

Finding the right set of rules for class action law requires nuance, as it entails consideration of a range of different normative concerns and design factors: the procedural values that are at stake in this particular context (finality, participation, and accuracy); the substantive

²⁵ See *Coleman v. Thompson*, 501 U.S. 722, 754 (1991) (explaining that ineffective assistance is problematic not because of gravity of error but because error is “imputed to the State” (citations omitted)); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (“The constitutional mandate [guaranteeing effective assistance of counsel] is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standard of due process of law.”); *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (“The Sixth Amendment . . . envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.”).

²⁶ See generally William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2146–54, 2167–71 (2004) (describing public functions served by “private attorneys general” in class action cases)

goals that representative litigation uniquely can fulfill; the incentives that any chosen rule system will create for the parties and lawyers involved; and the historical contexts out of which modern class actions grow. With so much to account for, both the preclusion and constitutional models are doomed to fail for the bluntness of their approaches.²⁷ The habeas approach enables greater subtlety, as it provides a proceduralist's toolbox—an array of rules, presumptions, and degrees of deference—that can be used to shape the structure of relitigation in class action law.

While at the end of the Article I use that toolbox to select a set of particular rules that I would employ based on my own weighing of the values and concerns at stake,²⁸ my goal is not to develop the precise parameters of a new class action approach, but rather to propose its general contours as an alternative to the polar models that currently dominate the discussion. It cannot be that we are willing to accept the outcome of a class action case as final under any conditions or under none. The difficult, uncharted task is to define a more subtle set of conditions suitable to the ideals of class actions and realities of representative litigation.

I

CLASS ACTION PARADIGM: THE *STEPHENSON* CASE

A. *Background*

In February 1998, doctors diagnosed Louisiana resident Daniel Stephenson with bone marrow cancer, and Stephenson underwent a bone marrow transplant. Believing that his illness was a consequence of exposure to Agent Orange in Vietnam,²⁹ Stephenson filed a complaint against a variety of chemical manufacturers in federal court in Louisiana in 1999. Stephenson's case encountered an immediate problem: The defendants claimed that it was precluded by a prior class action—presided over by federal district court judge Jack Weinstein³⁰—that settled all Agent Orange litigation.

²⁷ Cf. Hazard et al., *supra* note 23, at 1857 (arguing that “a robust formula of class suit ‘bindingness’ is a chimera—an alluring but unattainable goal”).

²⁸ See *infra* Part V.B.

²⁹ Agent Orange was a defoliant used by the U.S. military in Vietnam to clear jungles for easier fighting. Vietnam veterans alleged that they became ill from their exposure to Agent Orange. For an overview and history of the extensive Agent Orange litigation, see generally PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986).

³⁰ Judge George C. Pratt originally presided over the Agent Orange lawsuits when the Judicial Panel on Multidistrict Litigation sent them to the Eastern District of New York in 1979. In 1980, he conditionally certified a class consisting of “all persons exposed to Agent Orange and various members of their families.” *In re* “Agent Orange” Prod. Liab. Litig.,

In 1983, Judge Weinstein had entered a formal order certifying the case as a class action,³¹ and, in 1984, the case settled on the eve of trial. The defendants paid \$180 million into a settlement fund, with seventy-five percent of that money being distributed to disabled exposed veterans and surviving spouses, and the remaining amount being used to create an Agent Orange Class Assistance Program that would provide grants to agencies serving Vietnam veterans.³² The settlement agreement explicitly foreclosed the claims of all class members, including those who had not manifested illness at the time of agreement (“future claimants”).³³ Judge Weinstein held extensive fairness hearings throughout the United States concerning the adequacy of this settlement; in so doing, he considered—and rejected—the possibility of appointing separate counsel for future claimants, stating that he had taken account of their position and that no purpose would have been served by appointing separate counsel for them.³⁴ Judge Weinstein then entered a final order approving the settlement.³⁵ But for those who had opted out of the class, the final judgment provided that “[e]ach and every plaintiff and member of the Rule 23(b)(3) class is hereby forever barred from instituting or maintaining any action against any of the defendants . . . relating to, the subject matter of any of the complaints in this class action.”³⁶ When

506 F. Supp. 762, 787 (E.D.N.Y. 1980). Judge Pratt never made his order more than conditional, as he was promoted to the Second Circuit in 1983 and Judge Weinstein assumed control of the matter. Ralph Blumenthal, *Judge Withdraws from Suits over Agent Orange*, N.Y. TIMES, Oct. 14, 1983, at B7.

³¹ *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. 718, 729 (E.D.N.Y. 1983).

³² *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 253 (2d Cir. 2001), *aff’d*, 539 U.S. 111 (2003).

³³ The Agent Orange settlement agreement specified that “all members of the Class are forever barred from instituting or maintaining any action against any of the defendants . . . arising out of or relating to, or in the future arising out of or relating to, the subject matter of the Complaint.” *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740, 864 (E.D.N.Y. 1984). The settlement agreement also stated that the “class specifically includes persons who have not yet manifested injury.” *Id.* at 865.

³⁴ *Id.* at 757. Judge Weinstein wrote that:

In many cases the conflict between the interests of present and future claimants is more imagined than real. In the instant case, for example, the injustice wrought upon the plaintiffs is nonexistent. These plaintiffs, like all class members who suffer death or disability before the end of 1994, are eligible for compensation from the Agent Orange Payment Fund. The relevant latency periods and the age of the veterans ensure that almost all valid claims will be revealed before that time.

Ryan v. Dow Chem. Co. (In re “Agent Orange” Prod. Liab. Litig.), 781 F. Supp. 902, 919 (E.D.N.Y. 1991).

³⁵ *In re “Agent Orange” Prod. Liab. Litig.*, 611 F. Supp. 1296, 1347 (E.D.N.Y. 1985), *aff’d in relevant part*, 818 F.2d 226 (2d Cir. 1987).

³⁶ *Ryan v. Dow Chem. Co. (In re “Agent Orange” Prod. Liab. Litig.)*, 618 F. Supp. 623, 624 (E.D.N.Y. 1985). Those who did opt out fared worse: Judge Weinstein dismissed their

Stephenson, who had not opted out, filed his 1999 case in Louisiana, it was transferred (through the Judicial Panel on Multidistrict Litigation) to Judge Weinstein, who promptly dismissed it as an impermissible collateral attack on his class action judgment.³⁷

Judge Weinstein's ruling seemed to be supported by an earlier Second Circuit decision similarly rejecting two collateral attacks on the Agent Orange settlement.³⁸ In those cases, lawyers had filed claims in 1989 and 1990 on behalf of veterans whose alleged Agent Orange-related injuries did not manifest until after the 1984 settlement date of the Agent Orange case.³⁹ Judge Weinstein⁴⁰ and the Second Circuit⁴¹ nonetheless found these veterans bound because they could still collect from the class action judgment, which permitted recovery so long as claims were filed in the ten-year period (1984–1994) of fund availability. As noted, these future claimants were not independently represented in the Agent Orange class action.⁴² But because the class judgment enabled their recovery, both Judge Weinstein and the Second Circuit held that the single set of class representatives was not conflicted and was therefore adequate,⁴³ just as they had so held in initial challenges during the class action itself.⁴⁴

Stephenson's 1998 collateral attack had a novel twist, however. Stephenson did not fall ill until after depletion of the settlement fund, and thus he was unable to take from it. Judge Weinstein nonetheless found Stephenson bound (noting, *inter alia*, that Stephenson did receive other benefits from the class action, such as those government programs secured by advocacy organizations established and funded by the original settlement).⁴⁵ But this time, the Second Circuit dis-

claims on the merits. *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1264 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187, 190, 194 (2d Cir. 1987).

³⁷ *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 253 (2d Cir. 2001), *aff'd*, 539 U.S. 111 (2003).

³⁸ *Ivy v. Diamond Shamrock Chems. Co. (Ivy/Hartman II) (In re "Agent Orange" Prod. Liab. Litig.)*, 996 F.2d 1425, 1428 (2d Cir. 1993) (addressing both collateral attacks in same ruling).

³⁹ *Ryan*, 781 F. Supp. at 912–14.

⁴⁰ *Id.* at 918–19.

⁴¹ *Ivy/Hartman II*, 996 F.2d at 1439.

⁴² *See supra* note 34 and accompanying text.

⁴³ *Ivy/Hartman II*, 996 F.3d at 1436 (agreeing with Judge Weinstein that subclass of future claimants was unnecessary "because of the way [the settlement] was structured to cover future claimants" (quoting *Ryan*, 781 F. Supp. at 919)).

⁴⁴ *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 166–74 (2d Cir. 1987).

⁴⁵ The Agent Orange defendants characterized Judge Weinstein's unpublished ruling as follows:

Judge Weinstein also noted that respondents, like "[e]very veteran[.] . . . benefited" from the \$71.3 million distributed by the class assistance fund, even if

agreed. It held that the class judgment could not bar Stephenson because he had not been adequately represented:

Because the prior litigation purported to settle all future claims, but only provided for recovery for those whose death or disability was discovered prior to 1994, the conflict between Stephenson . . . and the class representatives becomes apparent. No provision was made for post-1994 claimants, and the settlement fund was permitted to terminate in 1994. *Amchem* and *Ortiz* suggest that Stephenson . . . [was] not adequately represented in the prior Agent Orange litigation. Those cases indicate that a class which purports to represent both present and future claimants may encounter internal conflicts.⁴⁶

B. Supreme Court

The Supreme Court granted certiorari on November 4, 2002⁴⁷ and heard oral argument on February 26, 2003.⁴⁸ Between those two dates, governments, lobbying organizations, law professors, and citizen groups filed nearly a dozen amicus briefs with the Court.⁴⁹ On one side, groups that are generally opposed to class certification, such as business lobbies, came out to support Rule 23, arguing in favor of

respondents were not among the relatively small proportion of class members who received direct cash death or disability payments. As Judge Weinstein explained, the class assistance fund financed a variety of programs that, among other things, contributed substantially to the passage of federal Agent Orange legislation, which continues to provide benefits to many class members

Brief for the Petitioners at 15, *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003) (No. 02-271), 2002 WL 31914663 (citation omitted); see also *Ryan v. Dow Chem. Co.* (*In re* "Agent Orange" Prod. Liab. Litig.), 611 F. Supp. 1396, 1437 (E.D.N.Y. 1985) (describing "class assistance foundation" run by veterans that would "fund projects to help meet the service needs of the class as a whole"). Some commentators have expressed doubt about the value of these benefits. See David A. Dana, *Adequacy of Representation After Stephenson: A Rawlsian/Behavioral Economics Approach to Class Action Settlements*, 55 EMORY L.J. 279, 282 n.11 (2006) (finding "no evidence of concrete benefits provided by the foundation to any class members"); Koniak, *How Like a Winter?*, *supra* note 18, at 1820 (arguing that fund's benefit to any particular veteran is open to debate).

⁴⁶ *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 260–61 (2d Cir. 2001) (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)), *aff'd*, 539 U.S. 111 (2003).

⁴⁷ *Dow Chem. Co. v. Stephenson*, 537 U.S. 999 (2002).

⁴⁸ *Dow Chem. Co. v. Stephenson*, 539 U.S. 111, 111 (2003).

⁴⁹ *Id.* at 111 n.* (listing briefs of amici curiae); see, e.g., Brief for the American Ins. Ass'n et al. as Amici Curiae Supporting Petitioners, *Stephenson*, 537 U.S. 999 (No. 02-271), 2002 WL 31886866 (lobbying groups); Brief for the American Legion & Veterans of Foreign Wars of the United States et al. as Amici Curiae Supporting Respondents, *Stephenson*, 537 U.S. 999 (No. 02-271), 2003 WL 193548 (citizens' groups); Brief of the Law Professors as Amici Curiae Supporting Respondents, *Stephenson*, 537 U.S. 999 (No. 02-271), 2003 WL 193562 (law professors); Brief of the State of La. Joined at the Cert. Stage: Ark., Md., Minn., Miss., and Mo. as Amici Curiae Supporting Respondents, *Stephenson*, 537 U.S. 999 (No. 02-271), 2003 WL 193575 (state governments).

the finality of global resolutions.⁵⁰ On the other side, consumer groups, health organizations, law professors, and, of course, trial lawyers⁵¹ all weighed in to support the injured individual's right to a day in court.

Stephenson got just that when the Supreme Court was unable to decide the issue. With Justice Stevens's recusal,⁵² the remaining eight Justices were evenly divided. Without issuing an opinion, the Court simply followed its practice in such situations of affirming the judgment of the lower court.⁵³

C. Class Action Law's Confusions

The Supreme Court's failure to provide an opinion in *Stephenson* leaves in place the Second Circuit's decision and essentially conflicting decisions from other circuits.⁵⁴ That these decisions, as a whole, raise as many questions as they answer underscores the opportunity for resolution that was lost by the Supreme Court's even split in *Stephenson*. The critical unanswered questions encompass issues of adequacy's content and the procedures surrounding its adjudication in both the class action court and the collateral forum.

⁵⁰ While corporate defendants generally oppose class certification, once a case has been certified, or liability is likely to be established, these same defendants tend to embrace certification as a means of globally resolving their liability. See, e.g., John C. Coffee Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 851 (1995) (“[I]t is increasingly the corporate defendant that wishes to be sued in a class action and—with the help of a friendly plaintiffs’ attorney—that often actively arranges for such a suit to be brought by a nominal plaintiff.”); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1155–56 (1998) (“When faced with large, independently viable individual claims, many defendants welcome class action suits as a vehicle for limiting overall liability, sometimes at bargain-basement prices.”).

⁵¹ Trial lawyers prefer individual lawsuits to class actions, as they can generate significant punitive damage awards—and hence attorney fees—on a case-by-case basis; the aggregate resolution achieved by a class action settlement puts them out of this business. See William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 421 (2001) (comparing transactional attorneys’ interest in class actions to trial attorneys’ opposition to such mass tort resolutions).

⁵² While the Justices do not explain their recusal decisions, the media reported that Justice Stevens’s “only son was a Vietnam Veteran who died of cancer at age 47.” David G. Savage, *Justices Deadlock over Lawsuits Against Agent Orange’s Maker*, L.A. TIMES, June 10, 2003, at A19.

⁵³ *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003).

⁵⁴ See Petition for a Writ of Certiorari, *Stephenson*, 539 U.S. 111 (No. 02-271), 2002 WL 32101123 (arguing that *Stephenson* “conflicts with the ruling of the Ninth Circuit in *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.), cert. denied, 528 U.S. 1004 (1999), and is in serious tension with the rulings of the First and Third Circuits in *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991), and *Grimes v. Vitalink Commc’ns Corp.*, 17 F.3d 1553 (3d Cir. 1994)”).

1. Adequacy in the Class Action Court [F1]⁵⁵

a. Content

For a class to be certified, Rule 23 requires both an adequate class representative⁵⁶ and adequate class counsel,⁵⁷ and for a class case to be resolved, Rule 23 requires an “adequate” settlement.⁵⁸ The Supreme Court captured the essence of adequacy’s content with regard to class representatives and class counsel in *Amchem*,⁵⁹ stating that “[t]he adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to

⁵⁵ Commentators on preclusion tend to refer to the initial rendering court, the first forum, with the shorthand notation “F1,” and then to the collateral forum in which preclusion is litigated as “F2.” *E.g.*, Patrick Woolley, *The Sources of Federal Preclusion Law After Semtek*, 72 U. CIN. L. REV. 527, 529–30 nn.17 & 22 (2003). In multiple-litigant situations, the initial issues might be relitigated repeatedly, with each subsequent forum being indicated by a later number—F3, F4 . . . F1000, and so on.

⁵⁶ FED. R. CIV. P. 23(a)(4). *See generally* Debra Lynn Bassett, *When Reform Is Not Enough: Assuring More Than Merely “Adequate” Representation in Class Actions*, 38 GA. L. REV. 927, 949–58 (2004) (identifying class representative as one of three “safeguards” of adequacy, along with class counsel and court oversight); Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687, 1703–12 (2004) (comparing adequacy’s formal legal requirements to practical approaches adopted by parties and judges).

⁵⁷ Rule 23(g) requires a court that certifies a class to appoint class counsel and provides guidance as to the qualifications that the court should look for in that counsel. FED. R. CIV. P. 23(g). This provision of Rule 23 was added in 2003. Prior to that time, courts did some of the same assessment of counsel through the lens of Rule 23(a)(4)’s adequacy requirement. *See* JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 16.2, at 765–66 (4th ed. 2005) (“The quality of the representation depends on both the named representatives and the competence of selected counsel.”); Mullenix, *supra* note 56, at 1698–1702 (discussing same point). Professor Bassett argues for locating regulation of class counsel in the rules of professional ethics as well. Bassett, *supra* note 56, at 958–82.

⁵⁸ FED. R. CIV. P. 23(e)(1)(C). While technically this fairness hearing determination of adequacy concerns the settlement, not the representative or counsel, the common law that has developed around the fairness hearing directs a judge to look, in particular, at the adequacy of class counsel’s work. *See, e.g.*, *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982) (stating that in fairness hearings courts pay attention to “the negotiating process by which the settlement was reached” and “have demanded that the compromise be the result of arm’s-length negotiations and that plaintiffs’ counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class’s interests”); *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800, 805 (8th Cir. 2004) (assessing adequacy at fairness hearing in response to objection). *See generally* 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1797.1 (3d ed. 2005) (identifying as factor at fairness hearing “how well informed the plaintiffs’ counsel were who negotiated the settlement and whether the settlement negotiations were conducted at arm’s length”); George M. Strickler, Jr., *Protecting the Class: The Search for the Adequate Representative in Class Action Litigation*, 34 DEPAUL L. REV. 73, 150 (1984) (stating that at conclusion of case, “the Rule 23 guideposts are properly superceded by an inquiry into the actual adequacy of a representative team’s accomplishments”).

⁵⁹ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

represent”⁶⁰ and “also factors in competency and conflicts of class counsel.”⁶¹ While conventionally the inquiry focused on *representatives* and *conflicts* (so as to ensure that the absent class members’ interests were consistent with those litigating their rights), increasingly the inquiry focuses on *attorneys* and *their performance* more generally (so as to ensure that class counsel adequately performed their job).⁶²

b. Process

At either the certification stage or the fairness hearing stage, adequacy can be contested, though the contests that are likely to take place are distinct and limited.⁶³ Defendants may oppose class certification early in the case and may develop a factual challenge to the representatives’ or counsel’s adequacy. It is unlikely that class members themselves will appear and oppose certification, since they either will not have received notice (in Rule 23(b)(1) or 23(b)(2) cases)⁶⁴ or will have ignored it if they did receive it. The fairness hearing, by contrast, is more likely to draw adversarial dispute from class members than it is from the defendant.⁶⁵ By definition, the defendant has settled the case at the moment of the fairness hearing and is hoping that the settlement will be approved quickly and without significant disruption. Class members must receive notice of the proposed settlement⁶⁶ and have the opportunity to object to it,⁶⁷ but in doing so, they are swimming upstream. First, before notice of the proposed settlement is sent to the class, the judge will have already approved it preliminarily⁶⁸ and therefore will have some investment in seeing it

⁶⁰ *Id.* at 625–26.

⁶¹ *Id.* at 626 n.20.

⁶² See William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1467–71 (2006) (discussing fairness hearing’s focus on performance of counsel).

⁶³ See Mullenix, *supra* note 56, at 1707–08 (identifying points at which defendants can challenge adequacy, as well as judicial inattention to issue).

⁶⁴ FED. R. CIV. P. 23(c)(2)(A) (providing that “[f]or any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class,” but is not required to do so).

⁶⁵ This is particularly true in cases where multiple class actions have been filed and attorneys pursuing parallel cases object to the settlement. See Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 482 (2000) (referring to representatives and counsel in dueling class actions as primary objectors during fairness hearings). The attorneys have incentive to do so because approval of a global settlement precludes their parallel class action and therefore forecloses their primary means of collecting a fee. See *id.* at 482–83 (noting that “objecting counsel will only be compensated if they succeed in the dueling class action” and global settlement will bar such suit).

⁶⁶ FED. R. CIV. P. 23(e)(1)(B).

⁶⁷ FED. R. CIV. P. 23(e)(4)(A).

⁶⁸ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.632 (2004).

finalized; this may shape the judge's subsequent rulings concerning absent class members' interests and litigation opportunities.⁶⁹ Second, as anyone who has ever read a class action notice is aware, a class member is at an information disadvantage in attempting to understand, much less upset, a settlement. Third, if a savvy class member finds her way to a lawyer, the lawyer attempting inquiry into the settlement must do so quickly, as the period between notice and the fairness hearing is typically short (e.g., ninety days). Fourth, if the lawyer wants to take discovery, courts are split on whether she has a right to do so.⁷⁰ Federal judges are instructed to discourage such discovery⁷¹ and class counsel is likely to be recalcitrant in cooperating. This makes it difficult for outsiders to develop the factual basis of objections, such as the common allegation that class counsel colluded with the defendants to sell out the class in return for a large fee.

Whether an adversarial hearing takes place or not, the class action judge is trusted with the responsibility of safeguarding the interests of absent class members and retains the power throughout the proceedings to ensure that the class is being adequately represented.⁷²

c. Appeal

On appeal, the question of whether representation was adequate is "a question of fact that depends on the circumstances of each case."⁷³ As such, the trial court's findings concerning the adequacy of

⁶⁹ Koniak & Cohen, *supra* note 23, at 1104–05, 1122–30.

⁷⁰ See *id.* at 1109 & n.191 (citing differing judicial approaches to scope of court discretion regarding discovery). Compare *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 833 (3d Cir. 1973) (stating that objectors are "entitled to an opportunity to develop a record in support of [their] contentions by means of cross-examination and argument to the court"), with *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 24, 26 (D.D.C. 2001) (holding that "class members who object to a class action settlement do not have an absolute right to discovery").

⁷¹ The *Manual for Complex Litigation* states the following:

Discovery should be minimal and conditioned on a showing of need, because it will delay settlement, introduce uncertainty, and might be undertaken primarily to justify an award of attorneys fees to the objector's counsel. . . . A court should not allow discovery into the settlement-negotiation process unless the objector makes a preliminary showing of collusion or other improper behavior.

MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.643 (2004) (citing *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 153 & n.10 (S.D. Ohio 1992)).

⁷² *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809–10 (1985); see also *Bassett*, *supra* note 56, at 982–88 (describing court oversight as crucial element in guaranteeing adequacy of representation).

⁷³ 7A WRIGHT ET AL., *supra* note 58, § 1765, at 322.

class counsel and class representatives “will not be disturbed . . . unless [they are] shown to be an abuse of . . . discretion.”⁷⁴

2. Adequacy on Collateral Review [F2]

a. Content

Stephenson’s collateral attack posed two questions about the content of adequate representation, neither of which was directly addressed by the Second Circuit nor resolved by the Supreme Court’s nondecision. First, Stephenson’s allegation that he was not adequately represented was based on the *constitutional* requirement of adequate representation traceable to *Hansberry v. Lee*⁷⁵—but everything outlined in the previous section about the content of adequate representation in F1 arises out of the *statutory* (rule-based) requirements for adequacy. Is adequacy’s constitutional content the same as its statutory content?⁷⁶ It is possible that it is, but if so, the constitutional definition has, like the Rules, embodied regularly changing and developing definitions over the past forty years.⁷⁷ Moreover, if the Constitution does track the criteria in Rule 23, this implies that each criterion is not only conveniently already a part of the Rule, but is also constitutionally required to be there in order to generate a binding judgment. The rulemakers who recast Rule 23 in 2003 likely did not understand that they were doing so to comport with the Constitution.⁷⁸

⁷⁴ *Id.* at 323 & n.29 (citing cases); *see also* Kahan & Silberman, *supra* note 21, at 269 n.168 (listing federal and state cases applying abuse of discretion standard to review of Rule 23 findings); Woolley, *supra* note 18, at 436 & n.235 (same).

⁷⁵ 311 U.S. 32 (1940).

⁷⁶ In *Hansberry*, the Supreme Court acknowledged that rule-based adequacy and constitutional adequacy may be distinct notions, writing that:

[T]he considerations which may induce a court . . . to proceed, despite a technical defect of parties, may differ from those which must be taken into account in determining whether the absent parties are bound by the decree or, if it is adjudged that they are, in ascertaining whether such an adjudication satisfies the requirements of due process and of full faith and credit.

Id. at 42. The Court’s decision established that, regardless of local rules enabling representative litigation, the U.S. Constitution’s Due Process Clause forbids providing preclusive effect to a class suit in which an absent party is not adequately represented. *Id.* at 45 (“[A] selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.”).

⁷⁷ *See, e.g.*, FED. R. CIV. P. 23 (identifying changes to Rule 23 in 1966, 1987, 1998, and 2003).

⁷⁸ For example, Edward Cooper, former Reporter to the Advisory Committee on Civil Rules, reviewed proposed changes to Rule 23 without substantial discussion of constitutional motivations. *See* Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 24 (1996) (discussing Rules Enabling Act limitations on advisory committee rulemaking power).

It is worth at least a moment's reflection on whether the Constitution's demand for adequacy is, in fact, the same as Rule 23's. Obviously, the latter could not demand *less* than the former, but it just as obviously can demand *more*. Given that, are all of the aspects of Rule 23—including (a)(4) and (g) and all of their subparts, interpretations, and subsequent fairness hearing assessments—necessarily a part of the Constitution's demand for adequacy? Remarkably, the answer is that there is no answer. No court or commentator has ever scrutinized the question; all just assume an equivalence.⁷⁹ In *Stephenson*, the Second Circuit simply concluded that the class had not been adequately represented without ever stating the precise standard it was using, much less the source, content, or even subject of that standard.⁸⁰ Due process law is flexible, to be sure, but it should not be invisible.

A second, even more fundamental, confusion about the content of adequacy arises in the context of collateral review. At the time the Agent Orange case was originally decided, class members had not been exposed to Agent Orange for more than a decade. The medical evidence that Agent Orange caused injury was inconclusive, at best.⁸¹ In light of that, the decision to create a ten-year settlement horizon meant that relief would be available for twenty years beyond the time any veteran had been exposed to Agent Orange. This seemed a reasonable approach,⁸² particularly in light of the fact that the agreement also provided some other mechanisms that could yield relief for post-

⁷⁹ Indeed, I have found only one passing reference to it in the legal literature. See Issacharoff, *supra* note 23, at 353 (“There is no reason to believe . . . that the concept of adequate representation present in the rules is anything other than the level of constitutional protection of absent class member interests necessary to deem their virtual participation in litigation fundamentally fair.”).

⁸⁰ *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 260–61 (2d Cir. 2001), *aff'd*, 539 U.S. 111 (2003).

⁸¹ See *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 145, 149 (2d Cir. 1987) (“[T]he clear weight of scientific evidence casts grave doubt on the capacity of Agent Orange to injure human beings. Epidemiological studies of Vietnam veterans . . . demonstrate no greater incidence of relevant ailments among veterans or their families than among any other group.”).

⁸² Judge Weinstein stated:

This litigation concerned the exposure of young servicepersons to dioxin-contaminated Agent Orange in Vietnam. In a young population, the background incidence of disease-connected disability and death is relatively low. Consequently, the disabilities and deaths of young veterans occurring relatively soon after their return from Vietnam are more likely to be perceived as associated with Agent Orange exposure. In contrast, disabilities or deaths occurring many years after service in Vietnam, or among older veterans for whom the background incidence is higher, have a relatively diminished connection with Agent Orange exposure in terms of both public perception and the likelihood of intervening or contributing causes.

1994 claimants should there be such persons.⁸³ Assuming Stephenson's injuries were truly connected to Agent Orange and that they did in fact manifest only after 1994,⁸⁴ one could conclude, as did the Second Circuit, that the class court's prediction of the future injury time horizon was wrong and thus find that Stephenson was inadequately represented therein. But to say that someone in 1984 predicted the future incorrectly is quite different than saying that he did not do his job adequately. There would be few employable meteorologists were this the standard of competence.

Therefore, the fundamental problem concerns how we define adequacy as a concept. If adequacy means competent and loyal lawyering and a representative without conflicts, all of these could well be present and yet some claimants could nonetheless get a bum deal.⁸⁵ But if adequacy demands that every single claimant get what she wants, then any individual's shortfall logically compels the conclusion that adequacy was lacking.⁸⁶ Like a moth to a flame, F2 will always be drawn toward this latter meaning, both because F2 is looking at the case solely through the prism of one person, as opposed to an entire class, and because F2 knows something F1 could not have known—what the future had in store.

A brief thought experiment can bring the point into sharper focus. Assume that, *pace Stephenson*, Judge Weinstein had subdi-

In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1396, 1418 (E.D.N.Y. 1985); *see also* Nagareda, *supra* note 10, at 322 ("The ten-year term for cash benefits . . . appears far from arbitrary . . . [in] that any veteran would have had an exceedingly weak scientific case on the causation element, at least as of 1984, and that the ten-year term for cash benefits extended to more than two decades after the last alleged exposure . . .").

⁸³ *See supra* note 45.

⁸⁴ Stephenson was aided in this allegation by later-developed medical evidence suggesting the possibility that Agent Orange could in fact be linked to certain illnesses. *See* Nagareda, *supra* note 10, at 322–23 (describing new scientific studies suggesting links between Agent Orange and latent diseases).

⁸⁵ In fact, in aggregate settlements, claimants with the largest damages will likely get less than they would have received had they litigated individually; by contrast, those with the smallest injuries will likely get something, whereas without aggregate treatment, they would not have had claims significant enough to litigate and would have received nothing. Rubenstein, *supra* note 51, at 393–403 (explaining trade-offs in classes with large and small claims); John C. Coffee Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 *IND. L.J.* 625, 653 (1987) ("[P]laintiffs with high value legal claims will be forced to make wealth transfers to those having lower value claims."); *see also* Nagareda, *supra* note 10, at 321 ("[T]he essence of any settlement is to strike a Solomonic compromise—to draw lines . . . in order to afford each side something less than everything it has demanded. The mere drawing of lines as a vehicle of compromise cannot constitute inadequacy in class representation.").

⁸⁶ *But see* Quigley v. Braniff Airways, Inc., 85 F.R.D. 74, 76 (N.D. Tex. 1979) ("[A]dequacy of representation does not revolve around whether the various class members receive the relief they seek.").

vided the 1984 class action into three separate subclasses, each with its own representative and counsel: (1) those with current or past injuries; (2) those likely to manifest injury within a reasonable, twenty-year time period after 1974, when the last service members were exposed; and (3) those who hypothetically could fall ill more than twenty years after exposure. Assume that, following extensive negotiation among all of these actors, a settlement similar to the Agent Orange settlement was developed, but with one distinction: subclass (3)'s representative, fighting as hard as she could given the weak scientific basis for her claims, was able to secure a "hypothetical futures fund" of \$100,000, to be established in 1984 and bear interest until claims could be made against it starting in 1994. If Stephenson had brought a \$5 million cause of action in 1998, collaterally attacking the settlement because of the paucity of his fund, neither of the Second Circuit's concerns in *Stephenson* would any longer be valid: The subclass would have been separately represented *and* provision would have been made for it. The class representative was adequate, as she had no conflicting interest and performed her task loyally and vigorously. Yet it is unlikely that the Second Circuit would have so held because collateral attack creates an irresistible urge both to take account of subsequent developments unknowable in 1984 and to hold F1 to a standard of perfection rather than adequacy.⁸⁷

b. Process

The confusions surrounding the content of adequacy of representation elide into those concerning the processes by which adequacy is ascertained collaterally.

⁸⁷ Susan Koniak presents a version of the subclass thought experiment based more or less on the actual facts of *Stephenson* to show how the actual settlement would have remained objectionable even if the post-1994 injured had been separately represented. Koniak, *How Like a Winter?*, *supra* note 18, at 1821. David Dana's experiments with a Rawlsian/original position approach to settlement acceptance, Dana, *supra* note 45, at 305–21, support the hypothesis that my hypothetical settlement would be more acceptable than the actual *Stephenson* settlement, though perhaps not all that close to the ideal. Specifically, Dana argues that "a rule allowing subsequent challenges to class action settlements is compelled by our basic intuitions of fairness and justice when class members could not conceivably have agreed to the arrangement had they been present but not known their precise position in the class." *Id.* at 282–83. I am perhaps less convinced than he is that the settlement I propose in the text would fail the veil of ignorance test if those undertaking the assignment were informed of the weak case for significantly dormant injuries (whether that case proved true or not later is immaterial initially). In such a situation, the division leaving little on the table for these later filers might well be initially acceptable to all.

i. Statute of Limitations

As *Stephenson* demonstrates, there does not appear to be any time bar on the ability of a class member to attack the class judgment collaterally.

ii. Nature and Standard of Review

A more fundamental question concerns the nature of the collateral inquiry: Is it a *de novo* analysis of adequacy or is it a review of what happened in the class action court, with deference to that forum, particularly to its findings of fact? While collateral courts tend not to address this question directly, the answer is implicit in their approach to the job. F2 might inquire whether, *knowing what we knew at the moment of settlement*, was F1 correct that the class was adequately represented? But of course, F2 is tempted to ask something quite different. Since time has passed—fifteen years in *Stephenson*—F2 is enticed to pose the question, *knowing what we know now*, was the class adequately represented? When F2 asks this question, it is not truly revisiting the wisdom of F1's adequacy determination. It is remaking that decision in light of subsequent developments and/or changed circumstances.⁸⁸

The Second Circuit's decision in *Stephenson* engages in two such time warps. First, it assumes that the trial court could have known in 1984 that Agent Orange claims would arise more than twenty years after Vietnam, although medical science in 1984 suggested otherwise. Second, it assumes that the trial court could have known in 1984, in some back-to-the-future way, that the Supreme Court would tighten the strictures of the adequate representation requirement in its 1997 *Amchem*⁸⁹ and 1999 *Ortiz*⁹⁰ decisions. Even Judge Weinstein, however, lacks such prescience.

⁸⁸ See Mullenix, *supra* note 56, at 1719 (dubbing this "Monday-morning quarterback" question). Case law warns against this approach. See, e.g., *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1981) ("We do not, of course, judge the propriety of a class certification by hindsight."); *Uhl v. Thoroughbred Tech. & Telecomm., Inc.*, 309 F.3d 978, 985–86 (7th Cir. 2002) (emphasizing that adequacy must be determined "at the time of the settlement," not from "*ex post* perspective"). This point takes on greater significance the more likely it is that the class representatives' and/or counsel's interests will diverge over time from those of the class members. Richard Nagareda argues, for example, that adequacy is unlikely to be sustained over time, writing that "the interests of class members may be aligned, if at all, only prejudgment, not postjudgment." Nagareda, *supra* note 10, at 297; see also *id.* at 290 ("With the passage of time after the class judgment—especially one enforcing a class settlement—the interests of any collection of class members can become misaligned, for the passage of time inevitably brings to light new, more accurate information about what the future holds."). Professor Nagareda's contention underscores the tension that will arise in most collateral attacks concerning whether to view adequacy *ex ante* or *ex post*.

⁸⁹ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). *Amchem* rejected certification of a single class that consisted of asbestos victims with differing types of injuries. *Id.* at

The Second Circuit's approach to collateral review is not really collateral review at all:⁹¹ It is review of subsequent developments. It would be more precise to characterize such an attack as a motion for relief from judgment⁹² than as a collateral attack on the class adequacy finding. But a motion for relief from judgment based on mistake or newly discovered evidence can only be made within a year of the judgment,⁹³ a decision by the rule framers to value finality over accuracy. Styling the motion as a collateral attack on adequacy enables the later-filing class member to ground her objections in the Constitution, not in Rule 60, and hence to skirt the Rule's preference for finality.⁹⁴

In sum, *Stephenson* demonstrates that by taking account of developments subsequent to F1's ruling, F2 is engaging in de novo review⁹⁵

625–28. The Court noted that “[a]lthough the named parties alleged a range of complaints, each served generally as a representative for the whole, not for the separate constituency.” *Id.* at 627. The Court concluded that such a class could not be adequately represented because “the interests of those within the single class are not aligned.” *Id.* at 626. The Court's conclusions suggest that the Agent Orange settlement—which had precisely this “no-subclass” structure—would not be acceptable post-*Amchem*.

⁹⁰ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). In *Ortiz*, the Court reaffirmed the need for subclassing heterogeneous classes, writing that “it is obvious after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires division into homogeneous subclasses . . . with separate representation to eliminate conflicting interests of counsel.” *Id.* at 856. This, again, undermines the legitimacy of the single-class settlement structure in the Agent Orange case.

⁹¹ A civil judgment remains preclusive even if the law upon which it is based subsequently changes. *See Teague v. Lane*, 489 U.S. 288, 308 (1989) (“[I]t has long been established that a final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule.”).

⁹² *See* FED. R. CIV. P. 60(b) (providing for relief from final judgment in certain circumstances).

⁹³ *Id.*

⁹⁴ Because the attack is really one of changed circumstances, procedural rules could be formulated to address it as such and hence alleviate the current artificial need to frame these as challenges to adequacy. I take up this task in Part V.

⁹⁵ Professor Woolley writes that “adequacy of representation is reviewed de novo on collateral attack.” Woolley, *supra* note 18, at 436 (citing *Garcia v. Bd. of Educ.*, 573 F.2d 676, 680 (10th Cir. 1978); *Gonzales v. Cassidy*, 474 F.2d 67, 74 (5th Cir. 1973); *Fraternal Order of Police, Sheriff's Lodge No. 28 v. Brescher*, 579 F. Supp. 1517 (S.D. Fla. 1984); *Keene v. United States*, 81 F.R.D. 653 (S.D. W. Va. 1979)). But none of the cases he cites for this proposition actually say that this is the governing standard—they just use it. *See* Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589, 594 (1974) [hereinafter Note, *Collateral Attack*] (discussing two cases that “suggest that it is appropriate for the reviewing court to make a de novo determination of whether due process requirements” were met in underlying class suit). In a more prescriptive than descriptive passage, Professor Koniak argues that “[t]he court in which [a collateral] challenge is brought *must* review adequacy de novo to avoid binding the challenger to any part of a judgment (or settlement) until that court determines that the first court had the power to affect the rights of the challenger.” Koniak, *How Like a Winter?*, *supra* note 18, at

and showing no deference to F1, not even to its findings of fact.⁹⁶ This means that the “original district court’s adequacy determination . . . get[s] less deference on collateral review than on direct appeal, where it is reviewed for abuse of discretion.”⁹⁷

iii. Burden of Proof

Even if the collateral court employs de novo review and redetermines adequacy from scratch, there still remains the question of where the burden of proof lies in that analysis. Dow Chemical triggered the adequacy analysis by raising an affirmative defense of preclusion; Dow clearly had the burden of proving that defense.⁹⁸ But given that Stephenson attempted to upset the judgment by alleging that he was not adequately represented, perhaps the burden of proving inadequacy should have been his.⁹⁹ This seems especially true as Stephenson’s argument is constitutional in nature—“to bind me to

1836–37 (emphasis added). While Professor Koniak’s is surely a defensible position, I am less confident than she is that “[a]ny lesser standard of review would be incoherent.” *Id.* at 1837; *see infra* Part V.

⁹⁶ Professor Mullenix observes that there may be scant fact-finding in F1 to which a later court could defer and, relatedly, that with the passage of time, F1’s adequacy analysis becomes obscure. *See Mullenix, supra* note 56, at 1732 (“[By the time of *Stephenson*, there existed] an almost twenty-year trail of district court orders and appellate decisions that recited conclusory findings of adequacy. What was missing was any knowledge, understanding, or factual record of how those adequacy inquiries were conducted, what evidence was proffered and challenged, and how probing those inquiries were.”).

⁹⁷ Reply Brief for the Petitioners at 8 n.4, *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003) (No. 02-271), 2003 WL 470195; *see also* *Fine v. Am. Online, Inc.*, 743 N.E.2d 416, 423 n.8 (Ohio App. 2000) (stating in context of collateral attack that “it would be inconceivable to expand our review of another jurisdiction’s determination beyond that which it would be subject to on direct appeal”); Note, *Collateral Attack, supra* note 95, at 604 (stating that “[i]t would be extraordinary if the scope of collateral review were to exceed that of direct appellate review,” while noting that initial class court findings are “matters of judicial discretion which will not be disturbed on appeal unless shown to be an abuse of that discretion” (footnotes omitted)). On the premise that Rule 23 determinations are reviewed solely for an abuse of discretion, *see supra* notes 73–74 and accompanying text. As to the standard of review on legal issues, Dow also argued that if *Amchem* and *Ortiz* were not new law being applied retroactively (which is forbidden in civil collateral attacks), the burden would have been on the collateral attackers to “demonstrate that ‘reasonable jurists’ ‘would have felt compelled by existing precedent’” to rule in their favor (i.e., to have held class representation inadequate) in 1983 and 1984.” Reply Brief for the Petitioners, *supra*, at 8 n.4, (quoting *Graham v. Collins*, 506 U.S. 461, 467 (1993)).

⁹⁸ FED. R. CIV. P. 8(c); 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4405 (2d ed. 2002) (“Whatever the method by which the question is raised, the burden of establishing preclusion is placed on the party claiming it.”).

⁹⁹ Typically, the parties moving for certification bear the burden of proving adequacy in the class court, though a minority of courts have held that a party *challenging* class certification bears the burden of demonstrating that the named representative is inadequate. 5 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 23.25[8] (3d ed. 2006). While placing the burden of showing adequate representation on the party moving for certifica-

this judgment would violate my right to due process”—and constitutional claimants typically have the burden of proof as to their constitutional claims.¹⁰⁰ *Stephenson*—like the law in this area generally—never addresses this question. By avoiding it, the court evades not only the task of assigning the burden to one side or the other, but also the related effort of actually identifying the level of that burden (preponderance, clear and convincing evidence, etc.).

iv. Default

May a class member who did not object to adequacy in F1 nonetheless attempt, in F2, to evade the binding effect of the class judgment on the grounds that she was not adequately represented in F1? Without explicitly addressing this question, the Second Circuit permitted *Stephenson* to do just this. This implies that a class member mounting a collateral attack on the judgment has not defaulted by failing to raise adequacy concerns in F1. Such an outcome would seem factually fair in a case like *Stephenson*, in that *Stephenson*'s health in 1984 likely made him entirely disinterested in the Agent Orange class action at that time.

However, the combination of his health and the fact that the notices he was provided of the settlement allowed for relief only for another ten years arguably should have concerned *Stephenson*: He could have imagined, if not foreseen, that he might get sick in the future and have no recovery from the class fund. Perhaps he should have sought out a lawyer to raise this concern with the class action court on his behalf. Why not hold his failure to have done so against him? The easiest answer to that question is that the Supreme Court's decision in *Martin v. Wilks*,¹⁰¹ if not *Phillips Petroleum Co. v.*

tion in the initial forum makes sense, the sense it makes is less potent once the adequacy determination has been made and the objection is being raised collaterally.

¹⁰⁰ FRIEDENTHAL ET AL., *supra* note 57, § 5.15, at 294 (“Usually the party who seeks redress must establish those factors at the heart of the claim that are considered vital if recovery is to be allowed.”).

¹⁰¹ 490 U.S. 755 (1989). In *Martin*, white firefighters in Birmingham, Alabama—impacted by a consent decree in a race discrimination action brought by African American firefighters and firefighter applicants—brought a subsequent case alleging that the consent decree in the initial case itself constituted (reverse) race discrimination. *Id.* at 760. The government defended on the grounds that the white firefighters should have intervened in the black firefighters' class action and that their failure to do so precluded the new lawsuit, as it was, essentially, a collateral attack on that lawsuit. *Id.* at 762. The Supreme Court rejected this defense, ruling 5–4 that a person not a party to litigation has no obligation to intervene in it; if the present parties want to bind the outsiders, it is their obligation to add them as parties. *Id.* at 761–63 (“[A] party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined.”). *Martin* does not precisely address the question posed by *Stephenson*, in that *Stephenson* himself, unlike the white firefighters in Birmingham, was not an outsider to the initial class action—he was a member of the

Shutts,¹⁰² suggests that potentially affected civil litigants may simply sit on the sidelines without relinquishing any rights.¹⁰³ Neither case is directly on point, but together they imply limits on a default theory.

Arguably, it would be fairest to permit collateral attack only by someone who raised the issue in the trial forum because, by doing so,

class as the class action court defined it. Arguably, the white firefighters were not outsiders either in that they tried to intervene in the initial suit and their interests were somewhat represented by the defendants in that case. *Id.* at 760. The argument for forcing them to voice their concerns in the class court in *Martin* was not, therefore, a complete stretch—but it is, nonetheless, more of a stretch than forcing Stephenson, a class member, would be. Surely it would be less audacious to suggest that a *class member* come forward with her objections in the class case or forever hold her peace. *But see* Woolley, *supra* note 18, at 402–03 (arguing that “Rule 23 neither obliges nor authorizes a court to require absent class members to raise adequacy objections in the class suit itself”).

¹⁰² 472 U.S. 797 (1985). In *Shutts*, the Supreme Court stated: “[A]n absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.” *Id.* at 810. In saying this, however, the *Shutts* Court was also not ruling directly on the question of default. Rather, it was ruling on whether a Kansas court could bind plaintiffs who had no contacts with the State of Kansas to the outcome of a Kansas class action. In finding that Kansas could do so, the Court emphasized the distinction between a defendant compelled to come in and defend a case in a foreign forum and a class member “compelled” to be a part of a plaintiff class action; while the former was required to do a lot, the latter was required to do nothing. *Id.* at 810–14. Such a conclusion could be read to forgive a collateral attacker like Stephenson for not having raised his objections in F1, *see, e.g.*, Woolley, *supra* note 18, at 397–99 (“The Rule does not contemplate that class members will be required to assert objections to . . . adequacy . . . at the certification hearing.”), but that was not precisely what the *Shutts* case involved nor therefore what *Shutts* holds.

The *Shutts* Court’s focus on personal jurisdiction adds, of course, yet another wrinkle to this particular puzzle. It is arguable that if class members are to be compelled to appear or else default, only those over whom the class court has personal jurisdiction could legally suffer such a deprivation. Henry Monaghan pursues this point in an insightful article about *Shutts*. *See generally* Monaghan, *supra* note 50. Professor Monaghan’s general thesis is that there are territorial limitations on a court’s capacity to steer constitutional challenges to its own processes back into its own forum. *Id.* at 1153. He reaches this conclusion by reading the Supreme Court’s decision in *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 226 (1998) (limiting territorial scope of anti-suit injunctions), in conjunction with *Shutts*, thus rendering *Shutts*, “at bottom” to be a case “about the scope of F1’s authority to preclude challenges to its decision in F2.” Monaghan, *supra* note 50, at 1187. This reading leads him to conclude that while a class action court might be able to adjudicate the substantive rights of a plaintiff over whom it has no personal jurisdiction, it nonetheless cannot compel that plaintiff to pursue due process challenges to the class action judgment (e.g., those based on inadequate representation) in its own forum. *Id.* at 1179 (“*Shutts* permits the exercise of personal jurisdiction over such parties for the purpose of precluding underlying substantive claims. But its reasoning, focusing as it does on due process concerns, does not extend to enjoining or precluding collateral due process challenges brought in F2.”). Professor Monaghan’s argument thus adds a layer of nuance to this discussion of procedural default, a subject to which I return below. *See infra* Part V.B.2.c.

¹⁰³ Some circuit court decisions are not as forgiving, embodying something closer to the default concept. *See, e.g.*, *Thompson v. Edward D. Jones & Co.*, 992 F.2d 187, 191–92 (8th Cir. 1993) (denying collateral litigation in part because plaintiff “did not voice any objection to the terms of the settlement”).

that objector gives the trial court an opportunity to hear her objection, while simultaneously preserving her right to raise it on appeal and in F2.¹⁰⁴ On the other hand, because this objector has had her day in court, there is good reason to deny her another one.¹⁰⁵ *Stephenson* provides no answer to the question of a class member's obligation to bring objections before the class action court, though the Second Circuit's silence on the subject suggests that a class member suffers no consequences from initial passivity.

v. Successive Collateral Attacks

The final procedural confusion presented by *Stephenson* is significant: What is the effect, if any, of the prior Agent Orange collateral attacks on Stephenson's new attack (and, in turn, the effect of *Stephenson* on future attackers)? Is a class action judgment open to repeated collateral attacks on grounds that a class member was not adequately represented? Or if one such attack fails, should that outcome bind future attackers? If one such attack succeeds, should that release all class members from the judgment, essentially giving the advantage of nonmutual offensive issue preclusion to all future attackers? Does it matter that the substance of the attack on adequacy is the same as—or different from—earlier challenges?

The Second Circuit's decision in *Stephenson* provides something of a partial answer to one of these questions. Prior to Stephenson's collateral attack, the trial court and Second Circuit had entertained a collateral attack by other future claimants in the *Ivy/Hartman II*

¹⁰⁴ See Kahan & Silberman, *supra* note 21, at 279 & n.190 (arguing that appearance in F1 should be "a prerequisite for collateral attack" by analogizing to exhaustion of remedies (and default) in habeas law); 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, 788 & n.97 (1998) [hereinafter Kahan & Silberman, *Search*] (arguing in favor of exhaustion/default rule on policy grounds); Marcel Kahan & Linda Silberman, *The Proper Role for Collateral Attack in Class Actions: A Reply to Allen, Miller, and Morrison*, 73 N.Y.U. L. REV. 1193, 1202–03 (1998) [hereinafter Kahan & Silberman, *Reply*] ("[A]pppearance should ordinarily be a prerequisite to making a collateral attack so that class members do not strategically withhold information from the state court that could be used to correct a deficiency in the settlement in order to avail themselves of that deficiency in a collateral attack."). *But see* Morrison, *supra* note 21, at 1189 (comparing this idea unfavorably to exhaustion requirement in habeas law).

¹⁰⁵ See *Grimes v. Vitalink Commc'ns Corp.*, 17 F.3d 1553, 1558 (3d Cir. 1994) (finding that party who objected to adequacy in initial forum had received "all the process that was due"); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 33 (1st Cir. 1991) (declining to revisit adequacy objection made in initial forum); Woolley, *supra* note 18, at 389 ("[A] classmember who litigates the adequacy issue in the class suit itself is bound by the court's finding on the issue."); Note, *Collateral Attack*, *supra* note 95, at 603–05 ("[A] finding of adequacy by the trial court should be res judicata as to the quality of representation . . .").

cases.¹⁰⁶ Those courts rejected both sets of attacks, finding that the plaintiffs in those cases—who manifested injury before 1994 and were therefore able to take from the settlement fund—had been adequately represented.¹⁰⁷ The Second Circuit could therefore have ruled in *Stephenson* that these earlier collateral attacks barred Stephenson's successive attack, as Dow urged it to do. But the Second Circuit sidestepped the issue, stating 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 settlements funds.”¹⁰⁸ In so holding, the Second Circuit neither embraced nor rejected the underlying premise that Stephenson's attack would have been precluded had it been more similar to those in *Ivy/Hartman II*; the court stated only that “even accepting [Dow's] argument” to that effect, nonetheless Stephenson's attack was factually distinct and thus not precluded.¹⁰⁹

The collateral attack in *Stephenson* raised not only new grounds, it was also made by a person who had not himself brought an earlier collateral attack. This enabled the Second Circuit to sidestep not only the “issue” question (what if the substance of Stephenson's attack had been litigated collaterally already?) but also the “party” question (what if Stephenson himself had litigated the question collaterally already?), thus leaving unresolved a series of questions about successive collateral attacks.

In sum, *Stephenson* demonstrates that both the concept of adequate representation and the procedures by which F2 may collaterally review F1's determination of adequacy are unsettled. The content problems arise out of the fact that there is no specific definition of adequacy for constitutional purposes, and that given the benefit of hindsight, F2 tends to demand that the representative have been perfect, not just adequate, in F1. A series of procedural issues also remain unresolved after *Stephenson*—specifically, the nature of collateral review, the level of the standard of proof and with whom it lies, the question of default, and the question of successive attacks. Most of these particular issues have received scant attention in the legal literature. While scholars have discussed the broader concerns that

¹⁰⁶ *Ivy v. Diamond Shamrock Chems. Co. (Ivy/Hartman II) (In re “Agent Orange” Prod. Liab. Litig.)*, 996 F.2d 1425, 1428–30 (2d Cir. 1993).

¹⁰⁷ *Id.* at 1435–36.

¹⁰⁸ *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 257–58 (2d Cir. 2001), *aff'd*, 539 U.S. 111 (2003).

¹⁰⁹ *Id.* at 258.

these issues raise, their debate, which I will now review, provides no clear answers to those broad concerns, much less to the specific issues I have identified in this Part.

II

CONVENTIONAL APPROACHES TO CLASS ACTION RELITIGATION

The class action literature has generated a rich debate about relitigating adequacy, pitting “preclusionists,” who believe that the class action court’s adequacy findings preclude relitigation, against “constitutionalists,” who believe that adequacy’s constitutional nature demands relitigation. In this Part, I review the doctrinal and policy debates between these competing schools of thought. This review demonstrates that conventional approaches to the adequacy problem have been unsuccessful. The problem does not fit easily into either the preclusion or constitutional doctrinal approach, and no single set of policies or principles provides a good way out of the doctrinal puzzle.

A. Doctrinal Debate

A court entertaining a collateral attack on a prior judgment necessarily considers two factors: (1) What claims or issues were litigated in the initial action? (the “issue” question), and (2) Who did the litigating? (the “party” question). Those who would bar collateral attacks on adequacy determinations focus on the issue question. They emphasize that the issue of adequacy was determined by the class action court, and they submerge the knotty problem that the collateral attacker was probably not a formal party to that initial evaluation. Conversely, those who would permit collateral attacks on determinations of adequacy focus on the party question. They emphasize that the collateral attacker did not participate in the class litigation, and they submerge the perplexing fact that the class action court nonetheless decided the issue. The issue-centered preclusionists stress finality, while the party-centered constitutionalists focus on due process.

In fact, little is resolved by appealing to the conventional doctrines of preclusion or due process. Neither preclusion nor due process leads to results that are as certain—either in general, or as applied to the problem at hand—as their proponents insist. Moreover, the problem of collateral attack on adequacy of representation does not fit neatly into either of these doctrinal boxes. The issue-centered preclusionists are correct in asserting that the constitutionalists ignore the unique fact of a prior determination, but the party-centered

constitutionalists are also correct that the preclusionists obscure the unique party problem. Adequacy's singular nature makes both the preclusion and due process approaches each somewhat inapposite and hence ultimately unhelpful.

1. *Preclusion Approach: No Relitigation*

The leading scholarly proponents of the preclusion approach, Marcel Kahan and Linda Silberman, state their case in simple terms:

[A] court entertaining a proposed class action is charged with the responsibility of assuring "adequacy" before a class action is permitted. In a contested case, the issue of adequacy will usually be litigated, and the court will have the arguments of counsel to aid it in deciding the matter. In a settlement, where there may be no adversarial litigation of adequacy, the court itself has the obligation to make the finding of adequate representation. The court's determination, *like other issues litigated by class representatives*, is binding on absent class members. These arguments suggest 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.¹¹⁰

Kahan and Silberman could be arguing that the class action court's determination of adequacy binds either through *claim* preclusion or *issue* preclusion. But a careful analysis of the procedural steps in a collateral attack weakens their argument under either framing. A collateral attack arises when a disgruntled class member (like Stephenson) attempts to evade a class action judgment¹¹¹ by subsequently filing, or continuing to pursue, her own individual action. Initially, such a complaint need not mention the prior class action judgment, as preclusion is an affirmative defense.¹¹² Having litigated a class action to its conclusion, though, the defendant surely will answer (or move to dismiss) the individual complaint by interposing a defense of *claim* preclusion: The defendant will argue that the individual plaintiff, as a member of the earlier class, is bound by the class action judgment, and the plaintiff's individual claim is thus barred by it.¹¹³ The plaintiff's primary means of escaping the effect of claim pre-

¹¹⁰ Kahan & Silberman, *supra* note 21, at 264 (emphasis added) (footnotes omitted).

¹¹¹ The class action could end with a settlement or a judgment, though even the former is ultimately entered by the court as a judgment in a class suit. I will therefore use the term "class action judgment" to encompass both adjudicated and settled class action cases.

¹¹² FED. R. CIV. P. 8(c).

¹¹³ See FRIEDENTHAL ET AL., *supra* note 57, § 16.8, at 793 ("If all the requirements and prerequisites for a class action have been satisfied, the resulting decree will be binding on all class members whether they actually participated in the case or not."). *But see* Hazard

clusion is to respond that the class judgment is not entitled to respect because the plaintiff class was not adequately represented.¹¹⁴ To this, the defendant has a second reply: The *issue* of adequacy of representation was litigated in the class case and thus the plaintiff is precluded from relitigating it by the doctrine of *issue* preclusion.¹¹⁵

Thus, Kahan and Silberman do not rest their argument on the contention that the *claim*-preclusive effect of the class judgment, simpliciter, bars relitigation of the adequacy requirement. Rather, they more specifically contend that the adequacy assessment cannot be relitigated because of the *issue*-preclusive effect of the class action court's determination of the question.¹¹⁶ There is, however, a core problem with their argument: The adequacy determination is not "like other issues litigated by class representatives."¹¹⁷ Technically, adequacy is unlike other issues litigated by class representatives because its litigation comes before formal class certification. As a prerequisite to certification, the determination of adequacy temporally precedes the representative's assuming her official role. In the adequacy analysis, the absent class members are, formally speaking, not yet represented.

More importantly, though, the adequacy determination is not "like other issues litigated by class representatives" because it is the very determination that evaluates the merits of the proposed class

et al., *supra* note 23, at 1857 (suggesting that binding effect of class actions is less well established than presumed); Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 726 (2005) (same).

¹¹⁴ See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 395–99 (1996) (Ginsburg, J., concurring in part and dissenting in part) (discussing adequate representation requirement); *Hansberry v. Lee*, 311 U.S. 32, 44–45 (1940) (holding that inadequate representation in class actions raises due process concerns); FRIEDENTHAL ET AL., *supra* note 57, § 16.8, at 794 n.6 (listing class action cases in which adequacy of representation was challenged).

¹¹⁵ See FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE § 11.3, at 676 (5th ed. 2001) ("[A]n issue determined in a first action may not be relitigated when the same issue arises in a later action based on a different claim or demand.").

¹¹⁶ See *supra* text accompanying note 110 (arguing that because "issue" of adequacy will have been decided by class court, it should not be relitigated collaterally). Before final judgment, the determination of adequacy necessary for class certification remains open to reevaluation. FED. R. CIV. P. 23(c)(1). For this reason, it lacks the quality of finality that is a prerequisite to giving the finding preclusive effect. See RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982) (stating that rules of *res judicata* are applicable only when final judgment is rendered). However, once the adequacy finding is embodied in a final judgment, this concern dissipates. *Id.* The issue-preclusive effect of the class action court's ruling depends on the premise that adequacy under Rule 23 and constitutional adequacy are the same; if they are not the same, the application of issue preclusion becomes more problematic. See *supra* text accompanying notes 75–79.

¹¹⁷ Kahan & Silberman, *supra* note 21, at 264.

representatives' claimed ability to speak for the absent class members. The judge is assessing whether the agent *is* representative of the class. In so doing, the judge must consider ways in which the class might object to the representative; she cannot simply assume that the representative is adequate. At this adjudicatory moment, the class remains, at least theoretically, adverse to the proposed representative as the court examines their relationship to one another. The court is essentially considering whether the lawyers and class representatives proposing to guard the chicken coop are in fact foxes, and it would be perverse to pretend that these potential foxes "represent" the chickens in their quest to speak for them.

To see that the proposed class representatives cannot speak for the class in the adequacy determination is not, however, to foreclose all arguments in support of the issue-preclusive effect of such a determination. One line of argument says that because class members *could* appear and argue about adequacy, this procedural *opportunity* is sufficient to bind them and bar collateral attack.¹¹⁸ A second approach focuses on the class members who did appear and object (assuming any did so) and argues that these objectors *virtually represented* the absent class members, thus binding them to the court's determination.¹¹⁹ A third approach identifies the judge herself as the

¹¹⁸ *Id.* (“[A]s long as the court entertaining a proposed class action affords class members fair opportunity to raise the issue, adequacy of representation should be raised directly, and not be permitted to be raised collaterally.”); *id.* at 268 (“When class members have an opportunity to object to the settlement and to opt out of it, there is little reason to allow a party who refuses to avail itself of these opportunities to attack the settlement collaterally.”); *see also* Epstein v. MCA, Inc., 179 F.3d 641, 648 (9th Cir. 1999) (“Due process requires that an absent class member’s right to adequate representation be protected by the adoption of the appropriate *procedures* by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review.” (emphasis added)); Hospitality Mgmt. Assocs. v. Shell Oil Co., 591 S.E.2d 611, 623 (S.C. 2004) (same); Fine v. Am. Online, Inc., 743 N.E.2d 416, 420–21 (Ohio Ct. App. 2000) (same). This “procedures-only” approach can be traced to the Supreme Court’s decision in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). *Kremer* held that 28 U.S.C. § 1738 requires federal courts to give full faith and credit to state court judgments so long as those proceedings “satisfy the minimum procedural requirements of the Fourteenth Amendment’s Due Process Clause,” *id.* at 481, but not “if there is reason to doubt the quality, extensiveness, or fairness of *procedures* followed in prior litigation,” *id.* (emphasis added) (quoting *Montana v. United States*, 440 U.S. 147, 164 n.11 (1979)). Of course, the fact that procedures are in place to enable challenges to adequacy in the initial forum may not alone guarantee that there is a full and fair opportunity to litigate the issue. *See* Koniak & Cohen, *supra* note 23, at 1165–71 (arguing that class action fairness hearings “are intrinsically incapable of providing” class members “a full and fair opportunity to litigate”); *supra* Part I.C.1.b.

¹¹⁹ *See, e.g.*, Epstein v. MCA, Inc., 126 F.3d 1235, 1259 (9th Cir. 1997) (O’Scannlain, J., dissenting) (stating that although collateral plaintiffs did not appear and object in class action court, “their grievances were ably litigated through their surrogates,” objectors who did appear), *withdrawn and superseded by* 179 F.3d 641 (9th Cir. 1999); Note, *Collateral*

operative player: The fact that a class action court is charged with protecting absent class members is sufficient to overcome the party-based objection to issue preclusion.¹²⁰

Each of these alternative approaches to conventional issue preclusion has virtues (as well as problems).¹²¹ My point here is not to select among them, but rather to indicate that the preclusion approach to the adequacy conundrum is less simple and less convincing than its advocates suggest. It has a “party” problem and can only achieve its goal by reference to one of the aforementioned methods of eluding that problem. To see that the preclusion approach has a core problem does not, however, demonstrate that the ready alternative—the constitutional approach—is any more convincing.

Attack, *supra* note 95, at 604 (arguing against collateral attack where adequacy was litigated in class court partly because “the interests of the absentees will be represented . . . by [those] contesting the propriety of the class action or by an intervenor seeking to control the conduct of the suit”). Those articulating this position do not invariably invoke the term “virtual representation,” but that is the idea. See generally 18A WRIGHT ET AL., *supra* note 98, § 4457 (discussing “virtual representation” as theory of nonparty preclusion).

¹²⁰ See Kahan & Silberman, *supra* note 21, at 268 (arguing for “restrictive approach” to collateral attack on grounds that “class action procedures in effect appoint the court as guardian of the interests of absent class members to ensure adequate representation and the fairness of any settlement”); Kahan & Silberman, *Search*, *supra* note 104, at 771 (reading *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), as imposing “independent obligation . . . on the court in the initial forum to determine ‘adequacy of representation’”). That the judge has such a duty is a well-established principle of class action law. See, e.g., *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983) (finding district court obligated to “make an independent evaluation of whether the named plaintiffs were adequate representatives of the class”). As Judge Posner has stated, “We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class” *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 279–80 (7th Cir. 2002) (citations omitted); accord *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975) (“Under Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members.”). See generally 7A WRIGHT ET AL., *supra* note 58, § 1765 (discussing judicial assessment of whether representatives protect class interests). Of course, scholars have long argued that judges are not well-situated to perform this task. E.g., *Koniak & Cohen*, *supra* note 23, at 1122–30 (discussing mismatch between court’s interests and class members’ interests).

¹²¹ These approaches, whose virtues are noted by the authors cited in notes 118–120, *supra*, are not mutually exclusive and in fact may be mutually reinforcing. Indeed, Kahan and Silberman rely on a combination of the first (“procedural opportunity” argument) and the third (“judicial guardian” argument), stating that:

Shutts contemplates that the initial forum should make a finding of “adequate representation,” and *Kremer* requires that the initial forum employ fair procedures in making this finding. So long as this finding is made and the procedures for making it are fair, the substance of the finding itself is not subject to collateral attack.

Kahan & Silberman, *Search*, *supra* note 104, at 771. These authors disclaim reliance on the second theory (the “virtual representation” argument) calling it “flawed.” *Id.* at 788. The problems of the “virtual representation” argument—as well as those of the “judicial guardian” approach—are discussed by Professor Woolley, *supra* note 18, at 410–15.

2. *Constitutional Approach: Complete Relitigation*

Proponents of the constitutional approach state their position with elegant simplicity. Henry Monaghan writes: “Traditional understanding holds . . . that the class action judgment (the F1 judgment . . .) bars subsequent litigation only if the judgment satisfies due process. Thus, F2 *must inquire* into such matters as adequacy of class representation *before* it can afford full faith and credit to the F1 judgment.”¹²²

The key to the constitutional approach is the presumed link between these two sentences, which Professor Monaghan renders with the word “thus”: Because adequacy is a *due process* requirement of a class action, *thus* F2 must inquire into whether it was present.

There are several problems with accepting this formulation too quickly. First, F2 has no affirmative obligation to make a due process inquiry: The issue generally must be raised by a litigant. Second, if F2 does make that inquiry, it will likely only examine defects going to the question of whether the F1 proceeding was procedurally fair, while other defects, even constitutional ones, will not be examined. It is not clear whether adequacy presents a fundamental, reviewable issue or a constitutional, but nonfundamental, nonreviewable one: Much turns on how it is conceptualized. Third, even if it is conceded that, as Monaghan argues, F2 “must inquire” into adequacy, this concession still begs the question of what processes will be utilized to do so.¹²³ If F1 already undertook the analysis necessary to assess adequacy, should F2 do it again? Should F1’s findings be accorded any deference? Should F2 necessarily hold a new factual hearing? Since F2 is determining whether F1’s hearing was *fair*, it would seem odd to defer

¹²² Monaghan, *supra* note 50, at 1149–50 (emphasis added). A leading procedural treatise similarly states that:

The principle that divergent interests disqualify a putative representative from conducting a class action ordinarily is applied in determining whether to certify the action and in defining any class that is certified. *The question remains open to redetermination in a subsequent action, however, since nonparties can be bound only if some party adequately represented their interests.*

18A WRIGHT ET AL., *supra* note 98, § 4455, at 473 (emphasis added). See also Koniak, *How Like a Winter?*, *supra* note 18, at 1836–46 (arguing that “[t]he court in which the challenge is brought must review adequacy de novo”); Koniak & Cohen, *supra* note 23, at 1170 (noting “general rule that absent class members are entitled to have a second court rule on whether they were adequately represented in the class suit”).

¹²³ See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”); *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (“[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring) (internal quotation marks omitted))).

at all to F1 on that question. But what if multiple litigants have already collaterally tested F1's fairness or adequacy's presence?

These problems can be brought into focus by returning to and, starting from, the premise that constitutional issues are not *always* open to collateral attack.¹²⁴ Generally, reviewable constitutional issues are those that speak to the question of whether the first proceeding was indeed a fair legal proceeding;¹²⁵ these types of issues raise doubts about the wisdom of enforcing F1's judgment in F2. For this reason, constitutionalists pursue their due process argument against preclusion through analogy to jurisdiction.¹²⁶ Yet neither personal nor subject matter jurisdiction is *inevitably* open to collateral review. Indeed, subject matter jurisdiction is generally *not* open to collateral review, except in certain circumstances.¹²⁷ More pertinently, personal jurisdiction—a due process requisite, like adequacy—is open to collateral attack only by those who defaulted in the original forum.¹²⁸ If personal jurisdiction is litigated in F1, that court's decision concerning the issue is binding and generally cannot be challenged in a second forum by the party who litigated it initially.¹²⁹ Those who insist on the availability of collateral attack for adequacy determinations acknowledge this principle and limit their positions accordingly. Professor Woolley, for example, states that if a class member appears, contests adequacy, and loses, then she is foreclosed

¹²⁴ This is particularly true with criminal proceedings. The fact that a federal constitutional claim has been litigated in a state criminal proceeding engenders no automatic right to collateral review, and indeed even erroneous constitutional rulings are regularly permitted to stand. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 375 (2000) (“It is, of course, well settled that the fact that constitutional error occurred in the proceedings that led to a state-court conviction may not alone be sufficient reason for concluding that a prisoner is entitled to the remedy of habeas.”).

¹²⁵ FRIEDENTHAL ET AL., *supra* note 57, § 14.7, at 679 (“[F]ull res judicata effect will be given to judgments . . . , so long as there was a fair opportunity to raise the issue of their validity in the first proceeding or on appeal.”).

¹²⁶ Professor Woolley, for example, notes that adequate representation in a class action “has been deemed a substitute for notice and an opportunity to be heard” in simple litigation. From there, he argues, “[i]t follows that adequate representation in these circumstances takes on *the same jurisdictional significance* as notice and an opportunity to be heard does.” Woolley, *supra* note 18, at 392–93 (emphasis added).

¹²⁷ *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 12, 69 (1982) (listing limited circumstances that justify collateral attack on subject matter jurisdiction); FRIEDENTHAL ET AL., *supra* note 57, § 14.7, at 679 (“In general, a prior judgment will be given full res-judicata effect even though it later appears that the judgment-rendering court acted beyond its subject-matter jurisdiction if that court made a determination that it had jurisdiction.”).

¹²⁸ *See* FRIEDENTHAL ET AL., *supra* note 57, § 14.7, at 683 (“Only a defendant who defaults in the original proceeding can raise the question of personal jurisdiction subsequently as a means of avoiding the judgment.”).

¹²⁹ *Id.* (citing *Durfee v. Duke*, 375 U.S. 106 (1963); *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931)).

from attacking that finding collaterally.¹³⁰ What these scholars oppose, however, is the extension of this bar to class members who did *not* appear in F1 to contest adequacy. In their view, these class members' relation to F1 is conceptually analogous to that of a party who chooses to default and not contest personal jurisdiction in F1.¹³¹ That party is not required to appear in F1 because forcing her to do so would be to undermine the very right that she seeks to assert—the right not to be dragged into that foreign forum. Similarly, it is argued, to compel the absent class member to appear and contest adequacy—particularly in a distant forum and in a small claims matter—undermines the *Shutts*-based “right to do nothing.”¹³²

The personal jurisdiction and adequacy scenarios are not, however, completely analogous. With personal jurisdiction, when an individual litigant defaults, F1 makes no evaluation of its jurisdiction. F2's determination of F1's jurisdiction is not *de novo*, it is simply *novo*. In the class scenario, F1 necessarily has made a determination of adequacy of representation. Thus, the issue has been decided. The constitutionalists are correct that the particular objector in F2, or F22, or F222, will not have been a formal party to that determination in F1 and that the objector's position thus appears similar to the personal jurisdiction objector who did not appear in F1. But there remains a difference: In the case of adequacy, there is, notwithstanding this particular objector's absence, a judicial finding on the issue. To disregard this finding completely, as the constitutional approach does, is no more satisfying than to treat it as conclusive, as the preclusion approach does. It seems wisest neither to invest too much in the decision nor to ignore it.

The constitutionalists might reply that we do ignore F1's findings quite often in scenarios involving multiple litigants. If a plane crashes, triggering many individual tort cases, a defendant's victory in one case cannot preclude a later plaintiff from (re)litigating liability if that plaintiff has not yet had her day in court. While preclusion can be nonmutual, it can never be run against a litigant who has not yet

¹³⁰ Woolley, *supra* note 18, at 389 (“[A] class member who litigates the adequacy issue in the class suit itself is bound by the court's finding on the issue.” (citing *Dosier v. Miami Valley Broad. Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981) (holding that class member who participates in settlement hearing cannot collaterally attack adequacy of representation))); *Taylor v. Shiley Inc.*, 714 A.2d 1064, 1067 (Pa. Super. Ct. 1998) (“Class members . . . are bound by the judgment if they were represented by their own counsel during a class action settlement hearing and did not opt out.”).

¹³¹ Woolley, *supra* note 18, at 392–410 (explaining why argument that “the court hearing a class action has jurisdiction to determine whether absent class members received adequate representation” is one that “cannot withstand scrutiny”).

¹³² See *supra* note 102 and accompanying text.

appeared. By analogy, even if every other class member has individually been heard on the issue of adequacy, the last class member still cannot be precluded by those determinations since each was individual in nature and none joined her as a party. This argument, though potent, strikes me as inapposite precisely because of the distinction between determinations of liability and determinations of adequacy. The latter occur only in the context of class litigation, a context which already suggests that some problem involving the externalities of individual litigation has compelled a turn to representative litigation.¹³³ And representative litigation is of course the exception to the basic rule of preclusion: Once liability itself is properly adjudicated in the class case, class members will be foreclosed despite having not appeared. Because adequacy arises in this context—albeit, as discussed above, before the representative is literally appointed—the nature of the class case must play some role in determining the preclusive effect to be given to the finding of adequacy.

To say this, though, is to suggest that the policies at issue play an important role in divining the proper doctrinal approach. It is therefore necessary to consider these policies in more depth.

B. Policy Debate

Judges and scholars in the adequacy debate buttress their doctrinal positions with reference to the various policy goals and legal principles that are at stake.¹³⁴ Preclusionists tend to bolster their

¹³³ See William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 726–27 (2006) (explaining various types of class actions as responses to various types of externality problems created by individual litigation).

¹³⁴ The Supreme Court's three-part due process test arguably provides a framework for organizing these arguments:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976). Where the government is not itself a party to the proceeding, the Court has utilized a modified version of the three-part test that similarly requires balancing the private parties' interests against one another and considering the accuracy-producing effects of more procedures. *Connecticut v. Doehr*, 501 U.S. 1, 10–11 (1991). The collateral attack debate can be fit into either framework, though as Professor Woolley has perceptively argued, the *Mathews* test “arguably applies primarily to the timing and form of an adjudicative hearing. It is not intended to determine whether an individual entitled to an adjudication of his rights must be given a hearing in the first place.” Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L.

argument by relying on the policy consequences that will follow from permitting relitigation: They contend that unchecked collateral attack opportunities will disrupt finality and undermine the social purposes that class actions are meant to serve.¹³⁵ Constitutionalist tend to bolster their argument by relying on the principles of participation and legitimacy: They insist that class members have rights that must be safeguarded and that class actions can only produce legitimate adjudicatory outcomes within the confines of these rights.¹³⁶ Both sides of the debate have arguments about how their approach is most likely to produce an accurate assessment of adequacy.

While each of these arguments has some merit, no one of them alone is so convincing that a resort to policy easily resolves the adequacy question in either direction. Review of the policy arguments only deepens the desire for a nuanced, middle-ground approach.

REV. 571, 594 (1997). For a broader critique of how the *Mathews* framework undervalues normative procedural values, see generally Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

¹³⁵ While the preclusionists' arguments are generally consequential in nature, see, e.g., Kahan & Silberman, *Search*, *supra* note 104, at 779 (arguing "[f]rom the perspective of efficiency" and "from a policy perspective"); Kahan & Silberman, *supra* note 21, at 268–71 (evaluating policy concerns regarding collateral attacks on class actions), they are not exclusively so. Thus, Kahan and Silberman explicitly acknowledge "the need to accommodate federal interests that carry with them important due process implications," *id.* at 274, implying a normative concern, and they later write that unchecked collateral attack not only creates negative consequences but leads as well to a "disregard of principles of federalism and finality," Kahan & Silberman, *Search*, *supra* note 104, at 791.

¹³⁶ While the constitutionalists' arguments generally take a normative approach—they argue that the due process rights at stake foreclose the possibility of F1's adequacy analysis being preclusive, see, e.g., Monaghan, *supra* note 50, at 1171–73, without concern for the consequences that such a position may have on either accuracy or social policy—they are not exclusively so. Thus, Professor Monaghan occasionally grounds his argument in consequential terms as well, insisting, for example, that "giving the F1 court the authority to bar due process challenges in F2 significantly increases the risks of class action abuse." *Id.* at 1161; see also *id.* at 1202 (concluding on instrumental grounds that "[g]iven the present class action landscape, absent class members should be allowed to make their collateral due process challenges in a forum of their own choosing") (emphasis added). Similarly, Professor Woolley, who rests his constitutional arguments on "the values underlying the Due Process Clause," Woolley, *supra* note 134, at 573, including "basic respect for the individual," *id.* at 597, also argues that his proposed approach "has the potential to significantly improve the quality of representation afforded . . . to absent class members." *Id.* at 573. Professor Woolley's work therefore engages in instrumental analysis, see *id.* at 590–93 (discussing relationship between adequate representation and systemic accuracy), even though he largely concludes that the answer to questions concerning adequate representation "must be derived from the values underlying the Due Process Clause," *id.* at 595, and that "[t]he right to be heard on the merits is simply too fundamental an aspect of due process to be subjected to the vagaries of the *Mathews* test." *Id.* at 613.

1. *Preclusion Perspective: Repose, Consistency, and Class Action Goals*

The preclusion approach curtails collateral attack in order to produce a final judgment that is, indeed, final. As a result, the approach furthers repose, guards against inconsistent outcomes, and ensures that the social purposes of the class suit will not be undermined by successive collateral attacks.¹³⁷

Repose is an important product of litigation,¹³⁸ arguably even its purpose.¹³⁹ Foreclosing collateral attack provides absolute finality to the class outcome and enables the parties—and society—to realize the values that follow from completion.¹⁴⁰ First, finality provides certainty to the parties.¹⁴¹ The defendant knows the extent of its liability, if any, and the distraction of litigation ends. The defendant may now proceed with its underlying business affairs more clearly. The plaintiffs may have been compensated for their loss, and they, too, may proceed with their lives. Second, finality reduces costs.¹⁴² The parties' litigation expenses end, society is finished with the matter, and the judge is freed to move on to the next case.¹⁴³ Third, finality

¹³⁷ See *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (recognizing that finality “relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication”); *Montana v. United States*, 440 U.S. 147, 153–54 (1979) (“To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.”).

¹³⁸ See *Baldwin v. Iowa State Traveling Men’s Ass’n*, 283 U.S. 522, 525 (1931) (“Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.”).

¹³⁹ See *S. Pac. R.R. Co. v. United States*, 168 U.S. 1, 49 (1897) (stating that “the very object for which civil courts have been established” is “to secure the peace and repose of society by the settlement of matters capable of judicial determination”); see also Rubenstein, *supra* note 51, at 372–73 (conceptualizing class actions as business deals meant to buy and sell finality).

¹⁴⁰ See FRIEDENTHAL ET AL., *supra* note 57, § 14.3, at 653–54 (discussing private and public interests served by *res judicata*).

¹⁴¹ See *Schmieder v. Hall*, 545 F.2d 768, 771 (2d Cir. 1976) (“We cannot underestimate the importance of repose to parties . . .”).

¹⁴² *James v. Gerber Prods. Co.*, 587 F.2d 324, 327 (6th Cir. 1978) (“[I]f parties are allowed to raise the same matters in subsequent litigation, both the courts and the opposing parties will be burdened with unnecessary costs.”).

¹⁴³ See *Brown v. Felsen*, 442 U.S. 127, 131 (1979) (stating that *res judicata* “frees the courts to resolve other disputes”); FRIEDENTHAL ET AL., *supra* note 57, § 14.3, at 653 (stating that preventing relitigation “conserves scarce judicial resources and promotes efficiency in the interest of the public at large” because “judicial resources are finite and the number of cases that can be heard . . . is limited”).

ensures against inconsistent outcomes.¹⁴⁴ If the collateral forum finds that the class was not adequately represented, it has, by definition, contradicted the finding of the class court. It may also open the floodgates to additional challenges to the underlying judgment, thereby enhancing the possibility of additional disparate results. Given that numerosity is a necessary basis for class certification,¹⁴⁵ class actions are peculiarly situated to produce many inconsistent outcomes if collateral attack is not discouraged. Repose has a business-like quality to it that may seem insubstantial when juxtaposed with the constitutional rights simultaneously at issue; yet the state's interest in repose in civil matters regularly outweighs individual interests in all sorts of situations.¹⁴⁶ Indeed, finality typically trumps accuracy.¹⁴⁷

Perhaps most importantly, though, the opportunities for collateral attack threaten to undermine class action litigation altogether.¹⁴⁸ The social goals of the particular cases themselves—the goals of anti-trust, securities, consumer, or civil rights law—are generally furthered

¹⁴⁴ *Montana v. United States*, 440 U.S. 147, 154 (1979) (stating that res judicata “fosters reliance on judicial action by minimizing the possibility of inconsistent decisions”). See generally 18 WRIGHT ET AL., *supra* note 98, § 4403 (“The most purely public purpose served by res judicata lies in preserving the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results.”).

¹⁴⁵ FED. R. CIV. P. 23(a).

¹⁴⁶ For example, after one year, a judgment cannot be attacked on the bases of mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation, or other misconduct. FED. R. CIV. P. 60.

¹⁴⁷ *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398 (1981) (“Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.”); *Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs*, 125 F.3d 18, 22 (1st Cir. 1997) (“[T]he point of collateral estoppel is that the first determination is binding not because it is right but because it is first—and was reached after a full and fair opportunity between the parties to litigate the issue.”).

¹⁴⁸ See *Fine v. Am. Online, Inc.*, 743 N.E.2d 416, 421–22 (Ohio Ct. App. 2000) (discussing how collateral attack undermines purposes of class suit and noting that “grounds that may be invoked to advance collateral attacks are much more limited than those that may be sustained as error on direct appeal. To hold otherwise would create a form of collateral review that is inconsistent with . . . the spirit of the class-action mechanism.”); *Hospitality Mgmt. Assocs. v. Shell Oil Co.*, 591 S.E.2d 611, 619 (S.C. 2004) (“[I]n the specialized context of class action litigation, the significant interests in efficiency and finality favor limited review.”); *id.* (“It would run counter to the class action goals of efficiency and finality to allow successive reviews of issues that were, in fact, fully and fairly litigated in the rendering court.”); Note, *Collateral Attack*, *supra* note 95, at 601–02 n.68 (stating that “the fact that a prior litigation was a class action ‘weighs in favor of, not against, applying res judicata: an obvious purpose of permitting class action is to bind the members of the class’” (quoting *Jamerson v. Lennox*, 356 F. Supp. 1164, 1169 (E.D. Pa. 1973))); *id.* at 606 (concluding that “[a]n unlimited and ill-defined scope of collateral review threatens the finality of class action judgments and the usefulness of the class action device, reversing a century-long trend in the development of the class action rule”).

by the availability of aggregate litigation. Most such cases involve small claims (or present other collective action problems) such that they would not be litigated absent class actions or government enforcement; since the latter is circumscribed, the former is practically necessary.¹⁴⁹ Without representative litigation, wrongdoers will escape liability so long as they can spread harm in small quantities among large groups of people.¹⁵⁰ For representative litigation to succeed, however, it must be able to produce binding final judgments that are not forever open to collateral attack by each class member. Defendants will pay less—or perhaps nothing—for settlements that do not produce global resolution.¹⁵¹ Incentives must exist to enable plaintiffs' attorneys to pursue class cases as well, so as to capture the collective goods of such litigation. If unlimited collateral attacks were permitted and defendants were therefore less willing to settle, plaintiffs' firms would in turn be less likely to invest resources in class cases, as they would face a greater risk of not securing a fee at the end of the case, or of securing a far lower one.¹⁵²

For this reason—the risk that the global resolution suit would fracture into many inconsistent individual outcomes and undermine the public functions of the class action suit—the need for repose between defendants and a class of plaintiffs is more pressing than repose in individual lawsuits. In short, to make class actions perform their useful function, they must be able to preclude, but to do so, they

¹⁴⁹ See *Deposit Guar. Nat'l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980) (“The aggregation of individual claims in . . . a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of the government.”); FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* 643–44 (5th ed. 2001) (“The rise of the class action starting in the 1960s reflected the . . . view that government agencies cannot adequately enforce certain rights . . .”). See generally Rubenstein, *supra* note 26, at 2146–54 (explaining how class actions supplement public law enforcement).

¹⁵⁰ Rubenstein, *supra* note 133, at 715–20.

¹⁵¹ Judge Weinstein so opined in the Agent Orange case. *Ryan v. Dow Chem. Co. (In re “Agent Orange” Prod. Liab. Litig.)*, 781 F. Supp. 902, 919–20 (E.D.N.Y. 1991) (“Class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability.”); see also Kahan & Silberman, *supra* note 21, at 268 (characterizing collateral attack on adequacy as “post-settlement opt-out that undermines the ability to settle a class action altogether”); *id.* at 271 (arguing that collateral attack will create “a significantly reduced incentive for defendants to enter into a global state class settlement because there will always be the threat of additional litigation to challenge the settlement, even if the attack does not ultimately succeed on the merits,” and concluding that “[t]o grant state courts authority to enter global settlements releasing exclusive federal claims but subjecting such settlements to collateral review is the worst of all worlds”).

¹⁵² Cf. John C. Coffee Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 686–90 (1986) (“The key point is that the litigation stakes are asymmetric, with the defendant focusing on the judgment or settlement and the plaintiff's attorney focusing on the fee . . .”).

must be able to preclude even the relitigation of adequate representation.¹⁵³

These are all powerful arguments in favor of the preclusion approach, but they suffer from one central problem: There is little empirical evidence that there is much to fear.¹⁵⁴ Constitutionalists insist that collateral attack has long been the “rule” in class action adjudication, yet class action practice has nonetheless exploded in the past quarter century.¹⁵⁵ Moreover, there are but a small number of reported cases challenging class action settlements, particularly small when juxtaposed with the thousands of such actions filed annually.¹⁵⁶ It is possible, as some have argued, that cases like *Stephenson* will encourage an increase in collateral attacks.¹⁵⁷ It is also plausible that such attacks will increasingly be collateral class action attacks—attacks, that is, where the attorneys mounting them have much to gain.¹⁵⁸ If so, a niche class action practice—basically an extension of the professional objector practice—could develop. Only time will tell whether these feared consequences will emerge. Meanwhile, it seems a stronger defense of the preclusionists’ anxiety to concede that the risk is small but to insist that the harm is great.¹⁵⁹ As with any risk-

¹⁵³ I am indebted to Dan Meltzer for his help in simplifying this formulation.

¹⁵⁴ See Dana, *supra* note 45, at 322–23 (noting lack of evidence “support[ing] the prediction that class action settlements will be fewer and/or take more time to achieve if subsequent challenges based on inadequacy of representation are allowed”); Morrison, *supra* note 21, at 1191 (“[W]hen the statute of limitations and the practicalities of litigation (including the enormous risk of sideline sitting) are considered, the opportunities for collateral attacks are quite limited and the possibility of abuses very small, if not nonexistent.”); Murphy, *supra* note 21, at 469 (“Collateral attack has been used relatively sparingly to attack the adequacy of representation.”); Woolley, *supra* note 18, at 446 (“Despite the vigor with which critics assert that permitting collateral attack will undermine finality by leading to excessive post-judgment challenges, the record appears remarkably devoid of evidence supporting that assertion.”).

¹⁵⁵ See, e.g., Koniak, *How Like a Winter?*, *supra* note 18, at 1857–61 (criticizing arguments for absolute bar on collateral attack and describing “plethora of bogus collateral attack suits” as “a problem that does not exist”).

¹⁵⁶ See Woolley, *supra* note 18, at 443 n.268 (reporting that author found forty-four federal and state cases from 1966 to 2000 in which collateral attacks based on inadequate representation were made against class action judgments or settlements).

¹⁵⁷ See Bernier, *supra* note 10, at 1023 (“[T]he incentive to settle class action cases has decreased as courts have moved towards a broad collateral review standard.”); *id.* at 1024 (“One thing that has almost certainly happened since [*Stephenson*] is a decreased incentive for mass-tort defendants to settle.”). See also John C. Coffee Jr., “*Epstein II*: Adequacy v. Finality,” N.Y.L.J., Jan. 29, 1998, at 5, 7 (stating, after Ninth Circuit permitted collateral attack in later-reversed decision, that “collateral attacks on the adequacy of representation will become a recurring phenomenon—neither rare nor common”).

¹⁵⁸ Thus after *Stephenson* was decided, one commentator reported that “multiple websites sprung up on the Internet looking to gather absent members of the class to collaterally attack the [Agent Orange] settlement.” Bernier, *supra* note 10, at 1031 n.54.

¹⁵⁹ See *Hospitality Mgmt. Assocs. v. Shell Oil Co.*, 591 S.E.2d 611, 619 (S.C. 2004) (“Without limited review, a nationwide class action could be vulnerable to collateral

benefit analysis, there may be reason to guard against a minute risk if the outcomes it would produce are significant. This would be especially true if procedural rules could be tailored so as to permit collateral attack in appropriate circumstances while insisting upon preclusion in others, in other words, if our approach were more nuanced than on/off.

In sum, while the preclusionists present a strong case of the hazards of collateral attack, it is not a fully convincing one.

2. *Constitutional Perspective: Participation and Legitimacy Values*

From the constitutional perspective, each individual is entitled to her own hearing, by constitutional command, regardless of whether that hearing is likely to produce benefits in terms of ensuring adequate representation.¹⁶⁰ The constitutional perspective has at least three formulations,¹⁶¹ two of which are familiar from the class action literature. The straightforward one widely written about is that adequate representation is the right of each individual class member, and hence each individual class member is entitled to litigate it individually.¹⁶² A narrower, though related, formulation is Professor Monaghan's insistence that the class court's adequacy analysis cannot be binding on individual class members over whom the class court lacks personal jurisdiction.¹⁶³ The due process "right" to a territorial connection to the forum supplements the due process "right" to individual adjudication of adequate representation.¹⁶⁴ A third normative

actions in the 49 other states in which it was not litigated initially."); Bernier, *supra* note 10, at 1023 ("The broad collateral attack standard will have *grave* implications for the future of class actions, and even more so for class action settlements.") (emphasis added).

¹⁶⁰ See Morrison, *supra* note 21, at 1186 ("[A]s a general matter, every person has a right to a day in court, no matter how many others have already litigated and lost the same claim.").

¹⁶¹ Professor Dana's "Rawlsian/economics" approach is a related normative approach to the adequacy issue that relies on "basic intuitions of fairness and justice." Dana, *supra* note 45, at 282; see also *id.* at 289 (characterizing his social contract approach as both normative and positive or empirical).

¹⁶² See Woolley, *supra* note 18, at 414 ("[C]lass members have an *individual* right to challenge the representation they have received in a class action."); Woolley, *supra* note 134, at 596 (supporting view, on intuitive and social science grounds, that individual participation promotes both "fairness and the appearance of fairness").

¹⁶³ Monaghan, *supra* note 50, *passim*. Cf. *Grimes v. Vitalink Commc'ns Corp.*, 17 F.3d 1553, 1560 (3d Cir. 1994) (resting preclusive effect of class action judgment and adequacy finding on fact that Delaware court had in personam jurisdiction over collateral plaintiff).

¹⁶⁴ The two do not necessarily go hand-in-hand. A class court could have "representative" hearings in each jurisdiction in which class members reside; it would thereby satisfy the territorial, but not individuality, component of the due process position. Conversely, one court (the class action court or a collateral forum) could grant individual adequacy hearings to anyone who wanted one—but it would not be doing so in a territorially appropriate fashion for all class members.

argument that has not appeared in the class action literature, though it pervades the habeas literature, is that because adequacy of representation is a *federal* constitutional concern, a litigant has a right to litigate the question in a *federal* court before a *federal* judge.¹⁶⁵ This version of the right would apply to state court class actions, making them especially vulnerable to collateral attack in federal court.¹⁶⁶

As noted above,¹⁶⁷ the pure framing of any of these components is too bold, as it implies that a due process right always triggers an individual hearing. The *Mathews* test, however, requires that the individual's interest in such a hearing be measured against the state's interests, which are, in this case, those of finality and repose, consistency, and the substantive goals served by representative litigation just discussed.¹⁶⁸ Where the state's interests outweigh the litigant's, less process is due.¹⁶⁹ The constitutionalists' case for individualized adequacy hearings is therefore not so clear-cut: It involves a balancing.

That balancing is also less lopsided than the constitutional position acknowledges. The primary value¹⁷⁰ served through relitigation is participation:¹⁷¹ Collateral attack can promote participation

¹⁶⁵ See *Fay v. Noia*, 372 U.S. 391, 424 (1963) (describing "manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review"). This argument is sometimes couched in more consequentialist terms, such as when it is premised on the quality of the judges in federal as opposed to state courts. See, e.g., Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1121–24 (1977) (arguing that federal judges are more technically proficient than their state counterparts). This argument should be distinguished from the debate in the class action literature about *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), a debate that focused on whether exclusive federal substantive claims—securities claims—could be released by a global state court settlement. That debate was about whether the underlying federal (security) *claims* deserved a federal forum, not about whether the (federal constitutional) *adequacy determination* is entitled to a federal forum. It is true, however, that the former problem (state court settlements of exclusive federal claims) may well give rise to the latter concern about inadequate representation. See *supra* note 21.

¹⁶⁶ Indeed, it is arguable that Congress could have achieved the aims of the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1711–1715 (2005), much more efficiently than that legislation does simply by creating a statutory right to relitigate state court adequacy determinations in federal court.

¹⁶⁷ See *supra* Part II.A.2.

¹⁶⁸ See *supra* Part II.B.1.

¹⁶⁹ For example, although the Supreme Court has held that prejudgment seizures cannot be based on one-sided declarations of "probable cause" in the civil setting, but instead require a hearing, *Connecticut v. Doebr*, 501 U.S. 1, 5, 18 (1991), it fully permits one-sided declarations of "probable cause" in the criminal setting as a predicate for issuance of a search warrant because of the importance of the state's interest and because a fully noticed hearing prior to issuing the search warrant would completely undermine that interest.

¹⁷⁰ In the next section, I turn to the question of whether relitigation has the consequence of producing more accuracy. See *infra* Part II.B.3.

¹⁷¹ See Woolley, *supra* note 18, at 415 ("Participation values are implemented through procedures that afford individuals an opportunity to safeguard their interests in a *particular case* by placing before the court information that may affect the outcome.").

because it makes participation more convenient and more autonomous. The defector can litigate her claim where and when she wants. Participation precipitated by collateral attack is also different in kind, not just degree. In F2, an individual generally seeks to pursue her own lawsuit rather than to remain an absent class member or an independently represented litigant within an ongoing class suit. In her own suit, she not only participates, she controls. The extent of the distinction is easily exaggerated—even in her own suit, after all, the plaintiff is still primarily represented by her attorney and participates relatively little—yet it is, nonetheless, a distinction that the availability of collateral attack arguably safeguards.¹⁷²

But if empirical evidence is the Achilles heel of the preclusion argument, the participation argument has one as well: The participation value arguably cuts in favor of preclusion, not against it. Preclusion helps secure the class action form, and that form promotes participation. Class cases produce more—not less—participation because they tend to provide compensation for injuries and harms that would otherwise be too minor to litigate. The small claims class action is specifically justified on this ground: Absent the class form, there would be no litigation at all because each class member's claim is so small that the costs of pursuing it individually outweigh any benefit she would reap. Only because of representative litigation does this person get to participate. This same dynamic works in heterogeneous classes as well. In mass tort cases, for example, class actions tend to provide a triaged range of compensations where those with large injuries get less than they would have received through individual litigation, but those with minor injuries—who otherwise would have had no lawsuit and no participation—get something. Both large and small claim cases therefore augment some forms of individual participation (i.e., compensation) by curtailing others (i.e., control of the litigation). Thus, although there is less personal participation in a class suit, a greater quantity of claims is resolved with a greater number of individuals likely to receive relief, and greater deterrence is achieved. Moreover, the extent to which individuals are interested in participating in cases involving small claims, in particular, is minimal (though of course, this calculus changes as the claims become larger and the injuries more personal).

In short, the value of participation does not, as unambiguously as the constitutionalists insist, support broad rights of collateral attack.

¹⁷² See *id.* (“The right to *individually* challenge the adequacy of the class representative is part of what makes tolerable the cost that adequate representation imposes on participation and accuracy values.”).

Participation may be furthered by collateral attack, but it may be undermined by the availability of such attacks if they in turn weaken the possibility of class action litigation.¹⁷³ Participation, like finality, is likely best produced by a rule structure that can pinpoint the value more specifically than by an either/or solution.

3. *Systemic Perspective: Accuracy*

Both preclusionists and constitutionalists claim that their approach achieves accuracy. The preclusionists argue that because the class court has overseen the class proceedings, the class judge has firsthand knowledge of class counsel's and the class representatives' performances and intimate knowledge of the adequacy of that performance, whereas everyone else opining on adequacy—specifically, the appellate and collateral courts—is necessarily doing so second-hand. When trial courts see witnesses, review evidence, and find facts, appellate review is limited to ensuring that there has been no abuse of discretion; this division of authority is premised on the notion that the trial judge's firsthand knowledge makes her better situated to provide an accurate outcome. So too, preclusionists argue, should collateral review of adequate representation findings be limited.

Constitutionalists might rebut the “better situated” argument in two ways: one temporal and one more fundamental. The temporal argument would be that collateral attack ensures greater accuracy in cases where things happen after the initial judgment has been entered. The paradigmatic example is *Gonzales v. Cassidy*,¹⁷⁴ a case in which the class representative did not appeal an issue that did not affect him, although it negatively affected other class members. Because this decision postdated the trial court's adequacy determination, only a later court could catch it. It was not so much that the class court got it wrong, but rather that the class court lacked the temporal horizon to get it right. In such instances, collateral attack performs a necessary corrective function. *Stephenson*, too, has the appearance of fitting this description, but it is actually distinct. In *Gonzales*, the class representative himself failed to take an action after the trial judge had deemed him adequate: The fact that changed spoke directly to adequacy. In *Stephenson*, by contrast, the fact that may have changed (whether all Agent Orange injuries would manifest in twenty years or not) had nothing to do with adequacy per se: It was a postjudgment change in an underlying scientific assumption concerning the claims in the litigation. Adequacy was simply the tool that could reopen the judgment

¹⁷³ See *supra* Part II.B.1.

¹⁷⁴ 474 F.2d 67 (5th Cir. 1973).

because the appropriate rule,¹⁷⁵ was no longer available to do so. Neither of these two situations, it should be noted, actually suggests the trial judge erred initially; they simply demonstrate one minor shortcoming with the trial judge's adequacy timeline and one large shortcoming with any court's temporal horizon.¹⁷⁶

The fundamental challenge to the class action court's claim to accuracy is that the class forum may be structurally biased in favor of the class suit and hence predisposed to downplay adequacy concerns. Patrick Woolley, for example, contends that "judges presiding over a class may be unduly reluctant to find inadequate representation."¹⁷⁷ This is so, Professor Woolley argues, both because finding inadequacy often will "make management of the suit more difficult,"¹⁷⁸ and because the information upon which the class judge makes the adequacy determination may be incomplete and biased in favor of settlement.¹⁷⁹ Thus, Woolley concludes that an individual collateral attack (or, in certain circumstances, a collateral class action attack) "counteracts this structural bias."¹⁸⁰ The problem with this position is that even if a collateral court could make a more accurate assessment, it would be doing so at a later moment in time, faced with but one individual litigant. Its assessment would therefore have little effect on ensuring adequacy initially or in the class suit itself. From a design perspective, if a collateral view is a better view, it ought to be built into the initial design of class action procedures—perhaps by having a different judge than that overseeing the class case decide the adequacy question contemporaneously—and not left to the caprice of the individual defector.¹⁸¹

What is more problematic, though, is that it is entirely unclear whether the collateral view of adequacy is truly a better vantage point. While it could be so if the class action judge has skewed

¹⁷⁵ FED. R. CIV. P. 60 (providing relief from final judgment under certain circumstances).

¹⁷⁶ See generally Nagareda, *supra* note 10, at 298–324 (discussing temporal issues in class actions, as reflected in scholarship and Supreme Court jurisprudence).

¹⁷⁷ Woolley, *supra* note 18, at 433.

¹⁷⁸ *Id.*

¹⁷⁹ See *id.* at 412 (“[T]rial courts may simply lack information to make an informed evaluation.” (quoting Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 45–47 (1991))).

¹⁸⁰ Woolley, *supra* note 18, at 434.

¹⁸¹ Cf. Kahan & Silberman, *Reply*, *supra* note 104, at 1200–01 (arguing that if class action court cannot be trusted to assess adequacy, “the preferred solution would be to deprive state courts of settlement jurisdiction at the outset . . . rather than to subject their factual findings of adequacy to review by way of collateral attack in an absent class member’s forum of choice”).

incentives toward affirming adequacy, the collateral court's view is itself compromised by its lack of a full context in which to assess adequacy, the dissipation of information over time,¹⁸² and the collateral court's tendency to fall victim to "hindsight bias."¹⁸³ Moreover, the collateral forum views adequacy through the lens of bringing justice to the defector, rather than by looking at the entire situation in toto. This perspective is likely to lead to an inaccurate assessment of aggregate adequacy.¹⁸⁴ For these reasons, collateral

¹⁸² In the habeas context, the Supreme Court has referred to "the 'erosion of memory' and 'dispersion of witnesses' that accompany the passage of time." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *United States v. Mechanik*, 475 U.S. 66, 72 (1986)). Professor Mullenix makes the same point about the fairness hearing information in the *Stephenson* case. See Mullenix, *supra* note 56, at 1732 ("[By the time of *Stephenson*, there existed] an almost twenty-year trail of district court orders and appellate decisions that recited conclusory findings of adequacy. What was missing was any knowledge, understanding, or factual record of how those adequacy inquiries were conducted, what evidence was proffered and challenged, and how probing those inquiries were.") (footnote omitted). But she views this as a reason that a collateral forum should not defer to the findings of fact of the initial forum, not as a reason to bar relitigation altogether. *Id.*

¹⁸³ Hindsight bias "occurs when a person who knows how a risk actually played out is asked to 'go back in time' and estimate the *ex ante* likelihood that the observed outcome would occur." Charles M. Silver, *Dissent from Recommendation to Set Fees Ex Post*, 25 REV. LITIG. 497, 498 n.3 (2006). From the later, knowledgeable perspective, "[e]vents that have actually occurred can seem, through the lens of hindsight, to have been almost inevitable." Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1096 (2000). *Stephenson* provides a textbook example: Assuming *Stephenson's* illness was in fact attributable to Agent Orange, we might then conclude that exposure to Agent Orange can lay dormant for more than twenty years. Knowing that outcome, it is easy to fault Judge Weinstein's 1984 assessment, based as it was on contemporaneous assumptions that the last Agent Orange injuries would have been manifest by 1994. If in fact this assessment proved inaccurate from an *ex post* perspective, the judge in F2 is likely to find Judge Weinstein's *ex ante* adequacy decision to be in error.

¹⁸⁴ Group dynamics are almost invariably unfair when scrutinized on the individual level. Group membership entails individual sacrifice, though often that sacrifice is rewarded in other ways. Collateral attack highlights individual loss while obscuring the collective action advantages of the class suit. From the perspective of a judge confronted by a single litigant who desires to relitigate—and who typically wants to do so because she appears to have received less from the class case than she wished—there is little downside in enabling the new case by finding that inadequacy existed in the class suit. To be sure, this means that F2 will now have to entertain the new case, but given settlement dynamics in American adjudication, that is hardly a daunting prospect. The fact that F2 is unraveling a large class action settlement from F1 has little direct impact on F2—it is unlikely to produce more work for F2, for example, nor impose other burdens on the collateral forum. With so little cost, and the significant reward of recognizing individual inequity, collateral attack runs the risk of overemphasizing the individual just as certification runs the risk of overemphasizing the group.

Of course, a collateral attack may itself be a class suit. This lessens the concerns identified in the last paragraph, as it creates disincentives for the collateral judge—who, if she finds inadequacy, must then handle the resulting collateral class case—to allow the case to proceed. For opposing arguments as to both situations, see Woolley, *supra* note 18, at 432–38.

review is not necessarily likely to produce greater adequacy directly.¹⁸⁵

It is true that collateral review could *indirectly* contribute to ensuring accuracy if its availability altered the incentives of the class action litigants so as to make the initial assessment of adequacy more accurate. Conceivably, the ready availability of collateral review could act like a sword of Damocles hanging over the initial proceedings, forcing the participants in those proceedings to act in accord with the requirements of adequate representation. This indirect effect only makes sense, though, if collateral attack is available in appropriate, but not all, circumstances. If full collateral attack is always available in any circumstance to anyone not yet heard, its presence will have no connection to the functional goal of ensuring adequacy, and its repeated de novo quality will contribute to discouraging class action settlements altogether. From a design perspective, it makes more sense to make collateral attack available selectively, utilizing its potential in the presence of warning signs concerning the initial proceeding. How to so sculpt the opportunity is a task to which I return below.¹⁸⁶

A review of class action scholarship suggests that the problem of adequate representation has generated significant attention but no definitive solution. The problem is not easily resolved by reference to either preclusion or due process, as it defies conventional definitions. A turn to policy proves equally frustrating because a variety of important, conflicting concerns are in play. I have argued that the social function of the class suit is sufficiently important that the repeated relitigation problem must be addressed, even if it is more theoretical than real at this point. This contention does not seem outweighed by the fact that collateral courts could provide more individual participation or more accuracy. Although collateral fora might do either of those things in particular cases, in the vast majority of cases, general participation is furthered by class actions, and accuracy is as, if not more, likely to emerge from the class forum than it is later in time.¹⁸⁷

¹⁸⁵ See Kahan & Silberman, *Search*, *supra* note 104, at 779 (“[T]here is no a priori reason to believe that the determination of (a lack of) adequate representation in a collateral attack is more likely to be correct than the determination of (the presence of) adequate representation in the initial action.”).

¹⁸⁶ See *infra* Part V.B.

¹⁸⁷ Of course, if interests diverge over time, then only a later court will be able to perceive that. See generally Nagareda, *supra* note 10, *passim*. But this is generally an issue only in cases involving future claimants. For a proposed solution, see *infra* Part V.B.

These conclusions support an approach that enables some, but not too much, relitigation of the lawyering issue. Habeas law concerning effective assistance provides a ready example of just such an approach, one worth examining to see what lessons—if any—might be learned, as class action law strives to craft its own middle ground.

III

HABEAS CORPUS PARADIGM: THE *CONE* CASE

Finality is, of course, a central issue in the administration of criminal as well as civil law. Collateral attacks on criminal judgments happen with great regularity, as individuals convicted of crimes—particularly those facing long prison terms or the death penalty—have significant incentives to challenge the binding effect of their convictions. They also have an important legal tool at their disposal: the Great Writ of habeas corpus.¹⁸⁸ Habeas enables a federal court to ascertain whether a person in custody is being held in violation of the Constitution, laws, or treaties of the United States and, if so, to order that the individual be released.¹⁸⁹ Habeas corpus—in particular, the claim of ineffective assistance of counsel—provides an interesting, yet unexplored, comparative viewpoint on finality in class action law.

A. Background

In August 1980, Gary Cone engaged in a two-day crime rampage, robbing a Memphis jewelry store, shooting several people including a police officer in his escape, and then breaking into the home of an elderly couple and beating them to death before fleeing to Florida,

¹⁸⁸ Although the Constitution prohibits the suspension of the writ except in extraordinary circumstances, U.S. CONST. art. I, § 9, cl. 2, it does not itself appear to create federal court jurisdiction to issue the writ. In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93–94 (1807), the Supreme Court held that the power to issue the writ was not inherent but conferred by statute. Despite scholarly debate, “the Supreme Court has not departed from the view that the federal courts have only that habeas jurisdiction given them by Congress.” RICHARD H. FALLON, JR. ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1287 (5th ed. 2003). Federal statutes enacted since the Civil War provided a general basis for—and limits to—federal jurisdiction in habeas cases involving prisoners in state custody. *Id.* at 1288; ERWIN CHEMERINSKY, FEDERAL JURISDICTION 864 (2004). Congress enacted a comprehensive habeas statute, the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. §§ 2244, 2253–2255 (1994) and adding 28 U.S.C. §§ 2261–66 (2000)), “to restrict the availability of the writ in postconviction cases.” FALLON ET AL., *supra*, at 1288.

¹⁸⁹ 28 U.S.C. §§ 2254(a), 2255 (2000). Typically, the order provides the state time to retry rather than release the successful habeas applicant. 17B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, FEDERAL PRACTICE AND PROCEDURE § 4268.4 (3d ed. 2007).

where he was soon arrested for robbing a drugstore.¹⁹⁰ In 1982, a Memphis jury convicted Cone and sentenced him to death, rejecting his insanity defense.¹⁹¹ The initial criminal prosecution unfolded in two stages, the first establishing Cone's guilt, the second setting the sentence. At the conclusion of the sentencing phase of the lawsuit, a junior prosecuting attorney gave an initial closing argument.¹⁹² Cone's counsel chose not to give a closing argument on Cone's behalf; consequently, the lead prosecutor did not get to give a rebuttal argument before the jury retired.¹⁹³ After the jury sentenced Cone to death, he appealed to the Tennessee Supreme Court, which affirmed the convictions and sentence.¹⁹⁴ The U.S. Supreme Court denied certiorari.¹⁹⁵

In 1984, Cone then began the process of postconviction litigation. He first sought relief via state habeas by challenging the constitutionality of his conviction in the Tennessee courts.¹⁹⁶ Among other contentions,¹⁹⁷ Cone argued that his court-appointed counsel had rendered ineffective assistance both by waiving final argument at the sentencing hearing and by failing to present mitigating evidence on his behalf.¹⁹⁸ The Tennessee criminal court held a hearing at which Cone's trial counsel testified.¹⁹⁹ Trial counsel's testimony at that hearing suggested that perhaps his decision to forgo a closing argument was more misguided than inspired, as his comments on the trial strategy were "rambling and often incoherent."²⁰⁰ Nonetheless, the

¹⁹⁰ *Bell v. Cone*, 535 U.S. 685, 689–90 (2002).

¹⁹¹ *Id.* at 690.

¹⁹² *Id.* at 691–92.

¹⁹³ *Id.* at 692.

¹⁹⁴ *State v. Cone*, 665 S.W.2d 87, 89 (Tenn. 1984).

¹⁹⁵ *Cone v. Tennessee*, 467 U.S. 1210, 1210 (1984). Justices Brennan and Marshall dissented from the denial of certiorari based on their view that the death penalty was unconstitutional. *Id.* at 1211 (Brennan, J., dissenting).

¹⁹⁶ *Cone v. Tennessee*, 747 S.W.2d 353, 354 (Tenn. Crim. App. 1987).

¹⁹⁷ See *Cone v. Bell*, 243 F.3d 961, 966 (6th Cir. 2001) (stating that Cone alleged violations of First, Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments, as well as prosecutorial misconduct, in his state habeas petition).

¹⁹⁸ *Cone*, 747 S.W.2d at 355–56. The full panoply of Cone's allegations included charges that his trial counsel rendered ineffective assistance in the following areas:

- (1) failing to interview the State's rebuttal witness, Ilene Blankman, prior to trial;
- (2) in failing to object to the improper argument of General Strother implying that the petitioner was a drug dealer;
- (3) inadequate cross-examining [sic] the State's expert witnesses;
- (4) failing to introduce mitigating evidence at the sentencing phase of the trial; and,
- (5) failing to make a final argument at the sentencing phase.

Id.

¹⁹⁹ *Bell v. Cone*, 535 U.S. 685, 692 (2002).

²⁰⁰ *Id.* at 715 (Stevens, J., dissenting). Justice Stevens appended the transcript of the lawyer's testimony to his dissent in the case. *Id.* at 719–21.

Tennessee court rejected Cone's ineffective assistance argument, a decision affirmed by the Tennessee Court of Criminal Appeals.²⁰¹ The Tennessee Supreme Court and the U.S. Supreme Court²⁰² both declined to review the matter, bringing the state phases of Cone's case to a conclusion in 1988, six years after his conviction.

Nine years later, in 1997,²⁰³ Cone commenced habeas proceedings in the federal district court in Tennessee, alleging numerous grounds for relief, including the ineffective assistance claim.²⁰⁴ The federal courts' analysis of the case was structured by Congress's Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996.²⁰⁵ AEDPA prohibits the federal courts from issuing a writ of habeas corpus unless the state court's adjudication of the federal constitutional issue "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."²⁰⁶

Cone argued that the state court's analysis was *both* "contrary to" and "an unreasonable application of" the clearly established federal law concerning ineffective assistance of counsel.²⁰⁷ That law is governed by two cases decided on the same day in 1984: (1) *Strickland v. Washington*,²⁰⁸ which requires a petitioner to demonstrate both that his counsel performed poorly and that the poor performance likely changed the outcome of the case;²⁰⁹ and (2) *United States v. Cronin*,²¹⁰

²⁰¹ *Cone*, 747 S.W.2d at 357–58.

²⁰² *Cone v. Tennessee*, 488 U.S. 871, 871–72 (1988). Once again, Justices Brennan and Marshall dissented from the denial of review based on their view that the death penalty was unconstitutional. *Id.* at 872 (Brennan, J., dissenting).

²⁰³ Between the end of his first state habeas case in 1988 and the filing of his federal habeas papers in 1997, Cone filed a series of amended state habeas petitions, all of which were rejected on the grounds that they were either repetitive or defaulted. *Cone v. Bell*, 243 F.3d 961, 966 (6th Cir. 2001), *rev'd* 535 U.S. 685 (2002). In considering the extent to which Cone, then unrepresented, had knowingly waived some of his rights during these proceedings, the Tennessee courts emphasized that Cone had "graduated with honors from the University of Arkansas and had been accepted for admission into law school after scoring in the ninety-sixth percentile on his law school admission test." *Cone v. State*, 927 S.W.2d 579, 582 (Tenn. Crim. App. 1995).

²⁰⁴ The current federal habeas statute contains a one-year statute of limitations on federal filings, with a series of rules about when that period starts running. 28 U.S.C. § 2244(d) (2000).

²⁰⁵ Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (amending 28 U.S.C. §§ 2244, 2253–55 (1994) and adding 28 U.S.C. §§ 2261–66 (2000)).

²⁰⁶ 28 U.S.C. § 2254(d)(1) (2000).

²⁰⁷ *Cone*, 243 F.3d at 972–73.

²⁰⁸ 466 U.S. 668 (1984).

²⁰⁹ Only with proof of both poor performance and prejudice, *Strickland* held, could it be said that the state court's outcome "resulted from a breakdown in the adversary process that renders the result of the proceeding unreliable." *Id.* at 687.

²¹⁰ 466 U.S. 648 (1984).

which permits *Strickland*'s prejudice prong to be established by inference in three situations suggesting a breakdown in the adversary process at trial.²¹¹ The district court rejected Cone's plea,²¹² but the Sixth Circuit reversed.²¹³ It held that counsel's failure to present a closing argument at Cone's sentencing hearing was both substandard performance and prejudice per se under *Cronic* because it failed to put the prosecution's case to meaningful adversarial testing.²¹⁴ The state habeas court's rejection of Cone's petition, relying as it did on *Strickland* but not on *Cronic*, was therefore "contrary to" clearly established federal law, the Sixth Circuit concluded.²¹⁵

B. Supreme Court

The Supreme Court granted certiorari and reversed, 8–1. Writing for the majority, Chief Justice Rehnquist held that *Cronic*'s second exception applies only where defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing."²¹⁶ Here, the Court concluded, Cone's counsel had indeed engaged in some adversarial testing so the case could not fit within *Cronic*'s insistence on a complete failure of the adversarial process.²¹⁷ Hence the Court held that the state court postconviction proceedings, applying *Strickland* to deny Cone's claim of ineffective assistance, were not contrary to clearly established law and that no writ would issue on this ground.²¹⁸

Having found that the Tennessee habeas court had applied the correct law, the Supreme Court next considered whether that court's application of *Strickland* to the facts of Cone's case was done in "an objectively unreasonable manner,"²¹⁹ which, the Court explained, is a higher standard than merely showing that the state court "applied *Strickland* incorrectly."²²⁰ The Court began this rather opaque task

²¹¹ *Cronic*'s three exceptional situations are those (1) in which there is no counsel; (2) in which counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing;" and (3) in which counsel is unable to provide competent representation in the circumstances of the case. *Id.* at 658–60.

²¹² *Cone*, 243 F.3d at 966.

²¹³ *Id.* at 975–79.

²¹⁴ *Id.*

²¹⁵ *Id.* at 979 (quoting 28 U.S.C. § 2254(d)(1) (2000)).

²¹⁶ *Bell v. Cone*, 535 U.S. 685, 697 (2002) (quoting *Cronic*, 466 U.S. at 659).

²¹⁷ This is the point from which Justice Stevens dissented. He agreed with the Sixth Circuit that prejudice could be presumed from the bewildering performance of Cone's counsel in a number of regards, all of which suggested a complete lack of adversarial adjudication. *Id.* at 715–17 (Stevens, J., dissenting). Justice Stevens especially noted that Cone's counsel suffered from severe mental illness and committed suicide shortly after Cone's postconviction proceedings were completed. *Id.* at 715–16.

²¹⁸ *Id.* at 698 (majority opinion).

²¹⁹ *Id.* at 699.

²²⁰ *Id.* at 698–99.

by reiterating its *Strickland* admonition that “[j]udicial scrutiny of a counsel’s performance must be highly deferential’ and that ‘every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.’”²²¹ The Court further engaged a “‘strong presumption’ that counsel’s conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight.”²²²

So reviewed, Cone’s arguments did not stand a chance. The Court canvassed various tactical choices made by Cone’s counsel and at each turn supplied a justification for counsel’s decision that—while not necessarily accurate²²³ or convincing—made the decision seem not unreasonable. It therefore concluded that, “[g]iven the choices available to respondent’s counsel and the reasons we have identified, we cannot say that the state court’s application of *Strickland*’s attorney-performance standard was objectively unreasonable.”²²⁴

C. Criminal Law’s Certainty

While the particular details of habeas corpus law are complex, *Cone* helps decipher habeas’s general procedural approach to ineffectiveness claims.

1. Effectiveness in the State Court [F1]

a. Content

Federal law provides a clear standard for adjudication of effectiveness claims and a theory upon which the standard is based. *Strickland* requires that counsel’s assistance have been subpar and

²²¹ *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

²²² *Bell v. Cone*, 535 U.S. 685, 702 (2002) (quoting *Strickland*, 466 U.S. at 689).

²²³ *Id.* at 698–702. In these four pages of the Supreme Court’s opinion, the Court does not cite to specific passages of Cone’s counsel’s testimony. It instead punctuates its own presentation of counsel’s tactical decisions with the conclusion that “we think” these choices not unreasonable: “we think counsel reasonably could have concluded,” *id.* at 699; “we think counsel had sound tactical reasons for deciding against it,” *id.* at 700; “we think at the very least that the state court’s contrary assessment was not ‘unreasonable,’” *id.* at 701; “[n]either option, it seems to us, so clearly outweighs the other that it was objectively unreasonable,” *id.* at 702. The Court’s review here seems to bear out Stephanos Bibas’s statement that “[w]hen courts start out presuming that attorney actions are tactics rather than errors, the confirmatory bias leads them to interpret almost any action as tactical.” Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 5–6; see also *id.* at 6 (“*Strickland* degenerates into a game of concocting hypothetical justifications after the fact”).

²²⁴ *Cone*, 535 U.S. at 702.

that the petitioner show that prejudice resulted from the poor performance.²²⁵ *Strickland* also comes prepackaged with a procedural approach to adjudicating its standard; specifically, a thumb on the scale against the petitioner: It establishes a presumption that the attorney performed effectively,²²⁶ and it requires deference to the decisions of defense counsel.²²⁷ *Strickland* premises this standard on the idea that effective assistance is provided to ensure adversarial testing of the underlying issues.²²⁸ It states that “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”²²⁹

Yet because the adversarial system embodies the idea of competing *private* parties zealously presenting the case they developed to the court, *Strickland* limits review of the lawyer’s decisions accordingly: “Intensive scrutiny of counsel and rigid requirements for

²²⁵ *Strickland* specifically states:

A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

²²⁶ *Id.* at 689 (“[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”).

²²⁷ *Id.* (“Judicial scrutiny of counsel’s performance must be highly deferential.”).

²²⁸ The Court wrote that:

[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the “ample opportunity to meet the case of the prosecution” to which they are entitled.

Id. at 685 (citation omitted); *see also id.* (“The Sixth Amendment . . . envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.”); *id.* at 689 (“[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.”); *id.* at 691–92 (“The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.”).

²²⁹ *Id.* at 686.

acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.”²³⁰ Therefore, the reviewing court is instructed to be “highly deferential”²³¹ to counsel’s decisions, and counsel is “strongly presumed” to have performed effectively.²³² Specifically, *Strickland* directs that “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”²³³

Strickland also provides a clear definition of the meaning of prejudice.²³⁴ Prejudice will be presumed in certain circumstances where, for example, counsel is not provided for a criminal defendant or where counsel has a serious conflict of interest.²³⁵ In the absence of these per se situations, however, *Strickland* again counsels against jumping to conclusions of prejudice, instead insisting that the reviewing court “presume” that the trial judge and jury “acted according to law.”²³⁶

b. Process

Cone did not raise his ineffective assistance claim at his trial, as his trial counsel was unlikely to make such a motion himself. But Cone also did not raise the claim in his direct criminal appeal for the same reason: He was there represented by his trial counsel as well. Typically, issues not raised in the initial criminal proceedings cannot be raised for the first time in postconviction relief proceedings unless the petitioner is able to show cause (for defaulting) and prejudice (from not now being heard).²³⁷ But ineffective assistance claims are an exception. In *Massaro v. United States*,²³⁸ the Supreme Court unanimously ruled that ineffective assistance of counsel claims could

²³⁰ *Id.* at 690.

²³¹ *Id.* at 689.

²³² *Id.* at 690.

²³³ *Id.* at 689.

²³⁴ *Id.* at 694 (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”).

²³⁵ *Id.* at 692–94.

²³⁶ *Id.* at 694.

²³⁷ *Bousley v. United States*, 523 U.S. 614, 622 (1998); *United States v. Frady*, 456 U.S. 152, 167–68 (1982).

²³⁸ 538 U.S. 500 (2002).

be brought in a collateral proceeding “whether or not the petitioner could have raised them on direct appeal.”²³⁹

The Court’s holding in *Massaro* is more than technical: It reinforces the idea that “[r]ules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time.”²⁴⁰ The Court held that the postconviction proceeding—not direct appeal—was the right tribunal to hear ineffective assistance claims for two reasons. First, collateral review enables facts to be developed. Appeals, the Court observed, turn primarily on guilt and innocence and lack a “trial record . . . developed precisely for the object of litigating or preserving the claim [of ineffective assistance] and thus [are] often incomplete or inadequate for this purpose.”²⁴¹ A collateral trial court, by contrast, is “the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial. The court may take testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient performance.”²⁴² Second, collateral review of federal trials would likely be done by the trial judge himself who, the Court stated, “having observed the earlier trial, should have an advantageous perspective for determining the effectiveness of counsel’s conduct and whether any deficiencies were prejudicial.”²⁴³

²³⁹ *Id.* at 504. While *Massaro* concerned the procedures for petitions brought by federal prisoners convicted at federal trials, the principles the case establishes are generally applicable. *Id.* at 508 (noting that most states follow this approach). *But see* Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1128 (1999) (stating, prior to *Massaro*, that in “a growing number of cases, state courts are finding procedural defaults based on failure to raise ineffective assistance of counsel claims on direct appeal”).

²⁴⁰ *Massaro*, 538 U.S. at 504 (quoting *Guinan v. United States*, 6 F.3d 468, 474 (7th Cir. 1993) (Easterbrook, J., concurring) (internal quotation marks omitted)).

²⁴¹ *Id.* at 505.

²⁴² *Id.* Among the testimony that may only be capable of development in a collateral proceeding is “evidence of alleged conflicts of interest,” which might be found “only in attorney-client correspondence or other documents that, in the typical criminal trial, are not introduced.” *Id.*

²⁴³ *Id.* at 506. While this is characteristic of federal habeas petitions under 28 U.S.C. § 2255 (2000), it is generally not the case that in state habeas petitions the habeas judge will be the same judge that oversaw the trial.

It is also debatable whether having the same judge review the habeas petition is procedurally advantageous. If a federal judge has presided over a federal trial, she is unlikely to change her mind about her own procedural rulings on a habeas petition (absent new evidence coming to light), nor is she likely to find that trial counsel was ineffective, as she would likely have done something during the trial were this the case. The idea that it is advantageous to have the trial judge conduct the habeas proceeding appears to conflict with Professor Monaghan’s concerns about rules that have the effect of steering all due process challenges back to the rendering court, *see* Monaghan, *supra* note 50, at 1159–61,

The Court's expressed preference for factual development in the collateral proceeding²⁴⁴ is tempered by its concurrent precedent declining to hold explicitly that there is a right to counsel in postconviction proceedings.²⁴⁵ Nonetheless, most states make such assistance available by statute.²⁴⁶ Tennessee, for example, has a statutory guarantee of postconviction counsel for indigent prisoners,²⁴⁷ but its courts have also held that this counsel's representation need not comport with the constitutional guarantee of effectiveness.²⁴⁸ Cone thus did

as well as with the belief that a collateral review of adequacy is a preferable vantage point for assessing the question. See *supra* Part II.B.3.

²⁴⁴ See *McFarland v. Scott*, 512 U.S. 849, 855 (1994) ("The services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified.").

²⁴⁵ Generally speaking: "There is no constitutional right to an attorney in state post-conviction proceedings." *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (citing *Murray v. Giarratano*, 492 U.S. 1, 12 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)). However, the Court's holdings to this effect are premised in part on the fact that there is a constitutional right to an attorney in the underlying criminal case and thus defendants have at least one opportunity to have a lawyer present their claims. In this sense, ineffective assistance claims are unique in that they can generally be raised for the first time only in collateral proceedings. For this reason, in *Coleman*, the Court entertained the argument that "there must be an exception to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." *Id.* at 755. However, in that case, the petitioner actually had counsel at his state habeas proceeding, just not on appeal of that proceeding. Thus, the Court declined to answer the broader question of whether there is a right to counsel in habeas proceedings regarding ineffective assistance claims, holding only that there is no right to such counsel to appeal those proceedings. *Id.* at 755–56. Although the Court has never therefore ruled definitively that counsel need not be appointed in state habeas proceedings, it has also never ruled definitively that counsel must be appointed. Even if postconviction counsel is made available, AEDPA prohibits habeas corpus petitions based on such counsel's ineffective assistance. See 28 U.S.C. § 2254(i) (2000) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief."). Some states have nonetheless held that postconviction counsel's performance must comport with *Strickland*. See, e.g., *Menzies v. Galetka*, 150 P.3d 480, 510–11 (Utah 2006) (recognizing Utah statutory right to effective postconviction counsel). For a development of the argument that the absence of effective habeas counsel undermines enforcement of *Strickland*, see generally Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable Reflections on Massaro v. United States*, 42 BRANDEIS L.J. 793 (2004).

²⁴⁶ See Eric M. Freedman, *Giarratano Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1086–87 (2006) (stating that thirty-three of thirty-seven death penalty states "automatically appoint[] defense counsel in capital postconviction proceedings," though acknowledging that "only fourteen of those thirty-three states recognize a state statutory or constitutional right to have the appointed counsel be effective").

²⁴⁷ TENN. CODE ANN. § 8-14-205(b) (2002); § 40-30-107(a)–(b)(1) (2003).

²⁴⁸ See *Stokes v. State*, 146 S.W.3d 56, 61 (Tenn. 2004) ("It has been well established that petitioners do not have a constitutional right to effective assistance of counsel, and that all due process requires during post-convictions procedures is a meaningful opportunity to be heard."); *McCullough v. State*, 144 S.W.3d 382, 385 (Tenn. Crim. App. 2003) ("Although petitioners for post-conviction relief are not constitutionally entitled to the

have counsel assist in the factual development of his ineffective assistance claim. Under Tennessee law, a petitioner whose complaint passes a frivolousness test²⁴⁹ is able to take very limited discovery²⁵⁰ and then is given a recorded evidentiary hearing.²⁵¹ These provisions made it possible for Cone's habeas counsel to call witnesses and develop a factual record concerning what happened at trial, all within a time period relatively contemporaneous to his criminal trial. It was this record that the Sixth Circuit relied upon in granting Cone relief, and this record that Justice Stevens used, in his Supreme Court dissent, to reproduce the transcript of Cone's counsel's testimony. While the Justices disagreed on the meaning of that testimony, the postconviction hearing was the proceeding at which it was developed and preserved.

c. Appeal

The habeas petitioner must exhaust state court remedies by appealing the state habeas decision. Cone pursued these appeals, unsuccessfully, through the Tennessee court system and to the U.S. Supreme Court.²⁵² On appeal, the Tennessee appeals court yielded to the trial court's factual findings concerning the effective assistance issue, writing that these "factual findings are binding . . . unless the evidence preponderates against them."²⁵³

2. *Effectiveness on Collateral Review [F2]*

Because state habeas (F1) is conceptualized as providing a full and fair opportunity to litigate the ineffective assistance claim, access to federal habeas (F2) is constrained and its work is limited. That said, the starting point for federal habeas is that the federal habeas statute creates an exception to the otherwise final—and hence preclusive—underlying judgment of the state courts. Thus, while the default position remains preclusion, the statute overrides that default, creating jurisdiction in federal court for relitigation in one circumstance:

effective assistance of counsel, they do have a statutory right to counsel." (quoting *Leslie v. State*, 36 S.W.3d 34, 38 (Tenn. 2000)).

²⁴⁹ See TENN. CODE ANN. § 40-30-109(a) (2003) (requiring court to determine "conclusively" that petitioner is not entitled to relief in order to dismiss petition).

²⁵⁰ TENN. CODE ANN. § 40-30-109(b) ("Discovery is not available in a proceeding under this section except as provided under Rule 16 of the Tennessee Rules of Criminal Procedure."). Rule 16 authorizes limited discovery of documents held by the government but does not authorize depositions. TENN. R. CRIM. P. 16(a).

²⁵¹ TENN. CODE ANN. § 40-30-110(a), (d) (2003).

²⁵² See *supra* text accompanying notes 196–202.

²⁵³ *Cone v. State*, 747 S.W.2d 353, 357 (Tenn. Crim. App. 1987) (citing *Graves v. State*, 512 S.W.2d 603, 604 (Tenn. Crim. App. 1973)).

“on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States.”²⁵⁴ The statute, 28 U.S.C. § 2254, coupled with U.S. Supreme Court decisions spanning several centuries, then provides a framework for the relitigation opportunity.²⁵⁵

a. Content

The meaning of effective assistance on collateral review in federal court is precisely the same as in the state court habeas proceeding—the *Strickland* test. This equivalent investigation is what gives rise to the issue preclusion problem that the federal statute overrides. It is also why the federal action is easily conceptualized as being like appellate review. The case is not now starting anew in federal court, in what once would have been, and possibly still would be, considered to present a *Rooker-Feldman* problem;²⁵⁶ rather, the federal court is explicitly authorized to provide some oversight of what happened previously in state court on the same substantive question.

b. Process

Habeas law embodies a series of rules that structure the statutorily created relitigation opportunity.

i. Statute of Limitations

The federal habeas statute requires that the petition for review be filed within a year of a triggering event,²⁵⁷ typically the conclusion of state habeas proceedings.

ii. Nature and Standard of Review

The federal habeas court’s review is not de novo: It is a review of the state habeas court’s determination of counsel’s effectiveness. It is akin to a narrow appellate review because it generally discourages the relitigation of facts, instead accepting those found by the habeas court, and because it employs a very strict standard of review.

²⁵⁴ 28 U.S.C. § 2254(a) (2000).

²⁵⁵ The same concepts, more or less, govern federal habeas review of federal court convictions under 28 U.S.C. § 2255 (2000). The textual examples I use, however, emerge from federal habeas review of state court convictions under 28 U.S.C. § 2254.

²⁵⁶ In *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005), the Supreme Court ruled that the *Rooker-Feldman* doctrine barred federal jurisdiction only in “cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.” *Id.* (construing *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923)).

²⁵⁷ 28 U.S.C. § 2244(d) (2000).

In the federal habeas proceedings, factual findings are carried over from the state habeas proceedings. Specifically, the habeas statute provides that “a determination of a factual issue made by a State court shall be presumed to be correct.”²⁵⁸ The statute identifies two circumstances in which a factual record might not have been developed in the state proceedings: when new law has been established (and made retroactively applicable) and when new facts have emerged.²⁵⁹ In those narrow circumstances, new fact-finding is permitted, but only after the petitioner demonstrates that the new facts show “by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.”²⁶⁰ Absent such extraordinary proof, the federal habeas review is of the factual record brought over from the state proceedings.

Further evidence of the backward-looking and appellate-like nature of federal habeas review is contained in the standard that the habeas statute employs. In the state proceedings, *Strickland* requires a showing of poor performance and prejudice, with a thumb on the scale against a finding of ineffectiveness: The reviewing forum is directed to undertake review deferentially and without the benefit of hindsight.²⁶¹ Another thumb is placed on the scale upon federal review: The habeas statute permits displacement of the state outcome only if it is “contrary to, or involved an unreasonable application of, clearly established Federal law,”²⁶² or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”²⁶³ The Court has stated that “the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law.”²⁶⁴ This means that F2 could conclude that F1 wrongly applied the law of ineffective assistance to the facts of the case—or erroneously found the facts—but nonetheless would be forced to affirm F1’s outcome if F1’s conclusion was within the bounds of reasonableness.

The petitioner’s claim of ineffective assistance of counsel therefore faces something of a trifecta of procedural hurdles surrounding the very high substantive standard (i.e., prejudice) on which it must be based: (1) an initial set of presumptions cutting against a finding of

²⁵⁸ 28 U.S.C. § 2254(e)(1) (2000).

²⁵⁹ 28 U.S.C. § 2254(e)(2) (2000).

²⁶⁰ *Id.*

²⁶¹ See *supra* Part III.C.1.a.

²⁶² 28 U.S.C. § 2254(d)(1) (2000).

²⁶³ 28 U.S.C. § 2254(d)(2) (2000).

²⁶⁴ *Williams v. Taylor*, 529 U.S. 362, 410 (2000).

prejudice; (2) a bar against renewed fact-finding; and (3) a standard of review permitting an outcome in the petitioner's favor only in unreasonable situations, not merely incorrect ones.²⁶⁵

iii. Burden of Proof

In making the case against this trifecta, the habeas petitioner also confronts a clearly articulated burden of proof. Findings of fact are presumed to be correct and the "applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."²⁶⁶ Similarly, the burden of proof also lies with the petitioner to demonstrate that the state court misapplied the law, and again the original legal findings must be shown to have been unreasonable.²⁶⁷

iv. Default

Habeas law limits what can be heard in federal court in two related ways: a petitioner must exhaust available state court remedies before turning to federal court,²⁶⁸ and a petitioner is foreclosed from raising in federal court those issues not raised in prior state court proceedings.²⁶⁹ The requirement that the federal petitioner have raised and exhausted available state court remedies reflects the current

²⁶⁵ Professor Koniak nicely captures the strength of the *Strickland* presumptions as follows:

According to *Strickland*, "[j]udicial scrutiny of counsel's performance must be highly deferential." The Supreme Court continued, "a court *must indulge a strong presumption* that counsel's conduct falls within the *wide* range of reasonable professional assistance; that is, the defendant *must overcome the presumption* that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" On the off chance that some lower court might miss the import of these words, the Court emphasized the point yet again: "[T]he court should recognize that counsel *is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.*" . . .

Similarly, the prejudice finding in *Strickland* is weighted against the defendant through the imposition of a presumption. In assessing whether there is a reasonable probability that the outcome of the proceeding would have been different but for the errors of counsel, the prejudice inquiry under *Strickland*, the court is to indulge a "*strong presumption*" that the outcome is reliable. In other words, that it was not affected by the errors.

Koniak *Through the Looking Glass*, *supra* note 23, at 8–9 (alteration in original) (footnotes omitted).

²⁶⁶ 28 U.S.C. § 2254(e)(1) (2000).

²⁶⁷ 28 U.S.C. § 2254(d)(1) (2000).

²⁶⁸ 28 U.S.C. § 2254(b)(1) (2000). A failure to exhaust, however, does not preclude the federal court from denying the petition on the merits. § 2254(b)(2).

²⁶⁹ Specifically:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of

assumption that state courts should be the primary site for initial adjudication of conviction challenges, even those based on federal law. It also further establishes the idea that the federal court acts as something of an appellate tribunal, reviewing what was done in state court, rather than an initial tribunal creating collateral opportunities for fact findings and factual hearings.²⁷⁰

v. Successive Petitions

Once heard on a federal habeas claim, the petitioner is barred from raising a successive petition on the same point.²⁷¹ Claims that have previously been adjudicated must be dismissed, unless a U.S. Court of Appeals approves the later filing.²⁷² The federal habeas statute also embraces claim preclusion's merger principle by deeming that once a petition is ruled upon, anything that could have been brought in that initial petition, whether it was or not, is also barred from future petitions.²⁷³

In sum, what emerges from a review of *Cone* is the picture of a system that contains a clear (albeit very difficult to prove) standard of ineffectiveness, commits review of the question to state postconviction proceedings, and yet permits certain relitigation opportunities in federal court. Those opportunities are significantly hemmed in by a vast web of procedural rules, presumptions of deference, and burdens of proof,²⁷⁴ but a federal forum remains available to enable relitigation of federal constitutional claims despite their prior litigation in state court.²⁷⁵

federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991).

²⁷⁰ See 1 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 7.1a (5th ed. 2005) (“[S]tate postconviction proceedings serve the essentially appellate function of reviewing prior criminal judgments . . .”).

²⁷¹ 28 U.S.C. § 2244(b)(1) (2000).

²⁷² 28 U.S.C. § 2244(b)(2)–(3) (2000).

²⁷³ § 2244(b)(2).

²⁷⁴ See FALLON ET AL., *supra* note 188, at 1296 (stating that habeas doctrine and statutory provisions “are complex, erecting a maze of requirements through which few petitions successfully emerge”).

²⁷⁵ See 17B WRIGHT ET AL., *supra* note 189, § 4261.1 (stating that Congress’s 1996 amendments to habeas law “restrict habeas corpus but they do not virtually eliminate it, as some critics would have preferred”); John H. Blume, *AEDPA: The “Hype” and the “Bite”*, 91 CORNELL L. REV. 259, 260–61 (2006) (“[T]he Supreme Court has been just as involved in reviewing—and overturning—state court convictions and death sentences in the nine post-AEDPA years than it was in the same period of time prior to AEDPA.”).

IV COMPARING THE SYSTEMS

The case studies now enable a side-by-side comparison of the adequacy and effectiveness litigation rules.

A. Theory

Effective assistance of counsel is the means by which the criminal justice system attempts to ensure that the criminal defendant receives a fair trial. Effective counsel helps achieve this end by enabling adversarial testing of the state's charges, thus guaranteeing, as much as is possible, an accurate outcome. Civil cases employ adversarial procedures to ensure accuracy, but there is no guarantee of counsel in civil cases, and the adequate representation requirement in class action law did not grow out of such an impulse. Rather, adequate representation is a test for ensuring that the interests of the litigant and lawyers actually before the court align with those of the absent class members who will be bound by the case's judgment. Moreover, adequacy has taken on a performative element, as well, since at the moment of settlement a judge will assess counsel's work to ensure they were sufficiently vigorous in their representation of the class. Effective assistance in criminal law guards against the public harm of wrongful conviction, and the attendant private consequences, while adequate representation in class action law polices the public compromise of private property rights by conflicted agents.

B. FI

Two adequacy determinations occur within the class case itself (often simultaneously)—the certification decision and the fairness hearing analysis. Each may be adversarial: Defendants may oppose certification in an *ex ante* attack on the adequacy of representation, and objectors may appear at the fairness hearing to mount an *ex post* challenge to the settlement's adequacy. Objectors have a right to discovery, and counsel mounting a successful objection may be entitled to fees; but objectors' opportunities to develop factual information about the class representatives' and class counsels' performances are significantly restricted by time, complexity, and momentum. The fairness hearing is typically formalistic and rarely involves serious presentation of direct evidence. The system does, however, place a burden on the judge herself to protect class members' interests by independently ensuring adequacy, even if no objectors appear. Rule 23 and cases interpreting it provide the standard for this assessment. Although the judgment may later be tested to ensure constitutional

adequacy, that concept has no specific content independent of Rule 23. Rule 23 provides no particular procedural burdens or presumptions about the adjudication of adequacy in the class court.

Effectiveness of counsel is typically first adjudicated in state habeas corpus proceedings. The prisoner is given limited opportunities to develop and present factual evidence. The inquiry is backward-looking and attempts to reconstruct the decisions made by trial counsel before and during the criminal trial to see if these were below par and resulted in prejudice. The key witness is trial counsel. The hearing is relatively contemporaneous to the trial. The factual record developed here carries throughout all subsequent proceedings (state habeas appeals and federal habeas) and likely will not be augmented. Nonetheless, there is no guarantee of effective counsel in producing the record, little authority to take discovery, and only a short time frame in which to develop facts. *Strickland* provides the standard for that adjudication, requiring that the lawyer's performance be presumed effective and that prejudice be demonstrated. *Strickland* further directs that the reviewing court assess the lawyer's work with deference to her performance and that it guard against hindsight bias.

C. F2

Collateral attack on a class action settlement occurs when a class member brings an independent civil action on the underlying claim and attempts to escape the preclusive effect of the class judgment by arguing that she was not adequately represented. It is unclear whether such attacks are permissible or are barred by the issue-preclusive effect of the class court's adequacy findings. Because there is no clear guidance on this issue, it is unclear whether an attacker should have appeared and contested adequacy in F1 in order to bring a collateral attack or whether such an appearance would actually foreclose collateral attack by that individual. There is no known statute of limitations. If an attack is permitted, the collateral court ascertains whether the defector was adequately represented in the class court according to a constitutional standard that has never been articulated, but that appears to be similar to the norms embodied in Rule 23. It is unclear who has the burden of proof in the F2 proceeding and what exactly that burden is. It is also not clear what deference—if any—should be given to the class court's findings, but courts that permit attacks tend to engage in de novo review of the issue.

The federal habeas statute overrides conventional preclusion doctrine to permit relitigation of constitutional issues in federal court. However, federal habeas law establishes a series of procedural road-

blocks making reversal of the state court outcome nearly—though not entirely—impossible: The petitioner must have raised his claims in state court, or they are defaulted; he must have exhausted his state court remedies; he must pursue his federal remedy within one year; he may not create a *de novo* factual record in federal court; and the federal court can reverse state court findings only according to a very high standard of review. Although federal habeas is technically an independent civil action in federal court,²⁷⁶ the procedural burdens and presumptions have the practical effect of turning the federal court into an appellate tribunal meant only to ensure that F1 did not do something wildly unreasonable.

D. F3

Once one court has heard a collateral attack on the class action court's adequacy findings, it is unclear what effect this will have on subsequent collateral attacks. It is likely that the same attacker could not get a second bite at the apple, but it is possible that different parties could relitigate the same substantive attacks on adequacy *ad infinitum*. *Stephenson* also implies, without so holding, that attacks brought by new parties on new grounds are not foreclosed by earlier unsuccessful attacks by different parties on different grounds.

A habeas petitioner, once unsuccessful in federal court, is foreclosed from refiling.

E. Bottom Line

The finality of judgments in both criminal law and class action law turn on a retrospective assessment of the lawyering undertaken in the initial forum. Both systems claim to utilize an adversarial hearing to make that assessment, though the claim is not fully borne out in either. Nonetheless, this supposed “full and fair opportunity” to litigate operates to foreclose further investigation. In criminal law, the outcome of the initial hearing can be reversed by a collateral court only according to very intricate procedural rules, but it can be reversed. In class action law, the outcome of the initial hearing will either be fully obeyed (if considered from a preclusion perspective) or fully ignored (if considered from a constitutional perspective).

²⁷⁶ *Riddle v. Dyche*, 262 U.S. 333, 335–36 (1923) (“The writ of *habeas corpus* is not a proceeding in the original criminal prosecution but an independent civil suit.”).

TABLE: COMPARISON OF CURRENT APPROACHES TO RELITIGATION IN CLASS ACTION AND HABEAS LAW

	HABEAS LAW	CLASS ACTION LAW
FIRST FORUM (F1)	State habeas court	Class action court
Issue Litigated	Ineffective assistance	Adequate representation
Substantive Standard	Strickland: Substandard performance of counsel resulting in prejudice to petitioner.	Unclear: Rule 23 sets forth adequacy rules for certification and settlement, but it is unclear whether these also constitute the standard of constitutional adequacy.
Interpretative Approach	Strickland: Heavy presumption of effective assistance.	Unclear: No known presumption one way or other.
SECOND FORUM (F2)	Federal habeas court	Collateral court
Availability of Relitigation	Maybe: Requirements of AEDPA, 28 U.S.C. § 2254, must be met.	Unclear: No (<i>Epstein</i>). Yes (<i>Stephenson</i>).
Conditions Required for Relitigation	AEDPA: Required conditions: 1) Relitigant raised issue in F1. 2) Relitigant exhausted remedies in F1. 3) One-year time bar.	Unclear: Probably the following: 1) Litigant did <i>not</i> raise issue in F1. 2) Litigant did <i>not</i> exhaust remedies in F1. 3) <i>No</i> obvious time bar.
Procedural Opportunities Available in Relitigation	AEDPA: Factual findings taken from F1; new fact-finding available only in rare circumstances.	Unclear: If relitigation is permitted, F2 appears to find facts anew.
Standard of Review	AEDPA: State court outcome affirmed unless “contrary to, or an unreasonable application of, clearly established law.”	Unclear: Assumed <i>de novo</i> .
ADDITIONAL FORA (F3)		
Possibility of Successive Petitions	AEDPA: Only in very limited circumstances.	Unclear: Probably not allowed for the same litigant for the same issue, but perhaps by different litigants and/or for different issues.

V

HABEAS’S LESSONS FOR CLASS ACTION FINALITY

Habeas presents a system that overrides conventional preclusion so as to permit federal courts to engage in limited collateral review of findings of effective assistance of counsel. The framework for the

relitigation opportunity is constructed by a set of statutory and common law procedural rules. This Part attempts to sketch a similar system meant to override the presumed absence of conventional preclusion in class action law by limiting courts to partial collateral review of findings of adequate representation in class action cases.

A. *Habeas's Lessons*

Review of the habeas cases demonstrates three key aspects of habeas's approach to finality: It is (1) a middle-ground approach (2) achieved through a mix of procedural rules and standards that are (3) based on a balancing of the principles and consequences at issue.

First, and most simply, habeas takes neither an absolute preclusion position nor an absolute relitigation position. It forges a middle ground, permitting relitigation in certain circumstances and according to certain conditions. In this sense, it provides an example of an approach to finality that has escaped the narrow confines of either/or solutions. In fairness to participants in the class action debate, most also do not appear to insist absolutely upon one solution or the other. Thus, preclusionists, apparently in favor of finality, concede that it is premised on the initial forum having provided a full and fair opportunity to litigate.²⁷⁷ This concept is derivative of habeas's approach. Yet in practice, courts adopting this approach will simply view the fact that a class action cannot be certified or settled without findings of adequacy as proof that procedures existed and that finality can be afforded. Thus, this middle-looking approach turns out invariably to yield preclusion. Similarly, constitutionalists concede that a petitioner who has objected to adequacy in the class court and lost is precluded from mounting a collateral attack.²⁷⁸ But this, too, is less of a middle ground than it might appear, in that this situation rarely, if ever, arises in class action practice: It is something of a straw concession. Thus, no actual middle approaches have emerged in the class action literature.

Habeas's detractors would be correct to point out that the opportunities it produces for relitigation are so severely restricted as to make this exception to preclusion more chimera than reality, as well. While this observation is potent, it is a commentary on the ways that the current habeas rules are set, not on their presence alone. A similar rule system in place under the prior statute and earlier Supreme Court decisions yielded a more balanced set of case outcomes, providing broader relitigation opportunities. For example, under Warren

²⁷⁷ See *supra* note 105.

²⁷⁸ *Id.*

Court precedents, claims that were not raised in state courts could nonetheless be raised in federal habeas petitions unless the petitioner deliberately bypassed state procedures.²⁷⁹ Under current precedent, a petitioner can raise claims not litigated in state court only if there is proof of good “cause” for the omission and “prejudice” from not being able to raise the claim collaterally.²⁸⁰ Both precedents are cognizant of the concept of default (and the related idea of exhausting state court remedies), but each takes a different approach to the issue. The problem with class action law is not that it has chosen the wrong rule but that it has not yet even developed a set of middle-ground rules with which to tinker.

A second lesson that habeas teaches is that review of its statute and case law helps identify the specific procedural concerns not yet fully considered in the debate about finality in the class action context. In this sense, the *Cone* case study provides an “issue spotter” for class action law. It illuminates a series of procedural rules—presumptions, burdens of proof, defaults, exhaustion requirements, statutes of limitations, standards of review—that have simply not been carefully considered in the adequacy debate. This is peculiar, in that the adequacy conundrum presents a lovely puzzle to proceduralists and one that has attracted significant attention. Yet both judges and scholars who have written in the area have, understandably, focused their initial attention on the broad strokes of the debate and not on the more particularized issues that are raised.²⁸¹ Habeas law developed in this fashion as well, with its intricate rule structure emerging only over time. Because it has so developed, though, it is a transparent model that enables identification of, and more careful attention to, a range of procedural issues.

The third lesson to be learned from habeas is that its middle-ground approach reflects a balancing of the various principles and policies at issue in the criminal law context. Similarly, class action’s finality system must be grounded in the particular principles and policies at stake in the representative litigation context. Class action law must balance the need for global resolution of mass controversies with the Constitution’s promise of due process of law—and the procedures developed to achieve this balance must ensure a level of accuracy

²⁷⁹ See *Fay v. Noia*, 372 U.S. 391, 438 (1963) (holding that federal courts have jurisdiction in cases where petitioner incurred procedural defaults, but have discretion to deny relief based on petitioner’s conduct).

²⁸⁰ *Wainwright v. Sykes*, 433 U.S. 72, 84, 90–91 (1977).

²⁸¹ For a commentary attentive to burdens of proof, presumptions, and the like, though one that does not fully develop the concepts, see generally Note, *Collateral Attack*, *supra* note 95.

acceptable to our adjudicatory system. What habeas law helps demonstrate is that insisting on preclusion and finality alone, or on relitigation and repetition ad infinitum, are both unsatisfying polarizations. The habeas law example underscores the dangers both of foreclosing all collateral attack and of encouraging endless relitigation. Neither the preclusion solution nor the constitutional solution has it just right. Class action law needs to guarantee some degree of finality to achieve global peace, but it also needs to guarantee some level of participation and process to make that peace legitimate.

The lessons I draw from habeas are, as is now evident, at a high level of generality. They are about the possibilities of developing middle-ground approaches, about the procedural issues to consider in doing so, and about the interest balance that guides the analysis.

B. Habeas's Lessons Applied

Taking habeas lessons in reverse order, I begin by providing my own weighing of the interests that must be balanced, then develop a rule structure for doing so, and conclude by describing and defending this middle-ground system.

*1. Balancing the Interests*²⁸²

Class actions perform an important social function by enabling litigation in situations where individual litigation is burdened by problematic externalities. Absent the class form, there would be significant underenforcement of a variety of public norms and the risk that serious mass harms could not be efficiently and adequately redressed. This is not to say that all class actions are ideal in all circumstances, but simply that the class suit can perform an invaluable function.

Relitigation threatens to undermine that function by disrupting the possibility of global peace. As discussed above,²⁸³ that risk may be more theoretical than practical at this point, but that is not a reason for leaving it unaddressed. The social goods class actions produce are important enough that it is worthwhile to consider rules proactively, developing solutions for problems that currently may be more potential than real. These social concerns support an approach that restricts relitigation.

Further, it is arguable—if not absolutely convincing in all circumstances—that adequacy is best determined by the class court, not a collateral one. The class action judge is most schooled in the context

²⁸² The arguments in this subsection are supported by the earlier discussion. *See supra* Part II.B (discussing policy considerations in class actions).

²⁸³ *See supra* Part II.B.1.

of the case and the attorneys' work, and hence is best situated to evaluate whether the class has or has not been sold out by the attorney. While it is true that the class action judge may have a vested interest in finding adequacy, it is even more likely that a collateral court would suffer from the lack of context, the pull of the defector's individual situation, and hindsight bias. There are, to be sure, situations in which the collateral forum may better assess adequacy, such as those in which the class representative ceases to adequately represent the class after the class court's assessment has concluded. But collateral review of adequacy is likely more accurate in only limited situations, so the accuracy interest provides little support for broad relitigation opportunities.

The right to relitigate is strongest where individual participation rights are truly foreclosed by the class approach. Small-claims class actions rarely present such a case: The interest of each individual litigant pales in comparison to the importance of deterring wrongdoing through the class action. A class member's right to insist upon her own adequacy hearing in this circumstance is at its weakest. By contrast, in cases grouping larger individual claims—mass torts and some securities or antitrust cases involving large losses—the individual interest is stronger. Interestingly, as the individual's stake in the controversy increases, the relevance of her distance from or lack of connection to the class forum actually may recede. A New York resident bound to the outcome of a small claims consumer case adjudicated in California surely cannot be expected to fly to California to protest adequacy nor hire an attorney there to do so for her; but a New York resident facing the preclusion of a significant claim will more easily be able to find counsel to do precisely this task for her, or may be more willing to invest her own assets in making the effort. What this means is that the territorial jurisdiction concern may be more hypothetical than real (except to those who insist upon it as a matter of pure principle), while the participation interest grows with the size of the claims at issue.

The following rules attempt to strike the middle ground, foreclosing attacks that are likely useless and undermining, while permitting those necessary to respect certain rights, ensure legitimacy, and provide some safeguards against class action abuse.

2. *Defining the Rule System*

a. Substance of Adequacy Requirement

Strickland defines ineffective assistance of counsel in terms of both performance and prejudice. Neither *Hansberry* nor its progeny

generate a constitutional definition of adequate representation in the class action context; courts and commentators have simply assumed that it is the same as the definition contained in Rule 23(a)(4) and/or in the case law that has developed to govern whether a class action settlement is adequate. If class action law were to adopt a *Strickland*-like test it could simultaneously accomplish two important goals. First, it would focus adequate representation issues on counsel, not class representatives.²⁸⁴ Second, it would define adequacy for constitutional purposes in narrower terms than it is defined for rule purposes, requiring a defector to demonstrate both that class counsel's performance was subpar and that this performance was prejudicial to the defector's interests.²⁸⁵ Such an approach is defensible both because not every rule and doctrinal change ought to have constitutional implications and because it provides space for error in the initial determination of adequacy without automatically turning that error into a constitutional error rendering the initial judgment escapable. By insulating the class action judgment from being ignored simply because *harmless* error has occurred, the rule would serve the social purposes underlying such lawsuits and protect their outcome with a presumption of repose.²⁸⁶

That said, a *Strickland* approach to constitutional adequacy in class action law should not fully upset constitutionalists for it contains one central precept that lies at the core of concern in class action practice: *Strickland* recognizes that a conflict of interest between counsel and client permits some presumption of prejudice.²⁸⁷ If a class action

²⁸⁴ For an insightful explanation of why adequacy should be focused on counsel not representatives, see Nagareda, *supra* note 10, at 335–42.

²⁸⁵ The habeas statute demands that this showing be made by clear and convincing evidence, further insulating the state court's conclusion from review. 28 U.S.C. § 2254(e)(1) (2000).

²⁸⁶ See Note, *Collateral Attack*, *supra* note 95, at 603–04 (arguing for performance and prejudice test).

²⁸⁷ The Court's position on this is nuanced. In *Strickland*, it stated that conflicts of interest warrant a presumption of prejudice similar to those that exist when, for example, counsel is not provided at all; however, it labeled the conflict presumption "more limited," explaining:

In *Cuyler v. Sullivan*, 446 U.S. [335, 345–50 (1980)], the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts . . . it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demon-

defector can demonstrate that class action counsel was conflicted in some manner—for instance, if the members of the class she represented had significantly differing goals with respect to the remedies sought—this would make out a case of inadequacy of constitutional dimension.²⁸⁸

b. Statute of Limitations

A time bar to collateral challenges could help distinguish those cases in which the need for relief is ongoing, from those in which the case has terminated. In class actions involving no future claimants, collateral challenges to adequacy of representation could be limited to one year from the date of the conclusion of the claims period, thus modeling the opportunities to reopen such a judgment after those available in non-class action cases.²⁸⁹ Without the problem of future claimants, the statute of limitations on the underlying action is likely to have run in such a period anyway. Moreover, if the class representatives fail in some postjudgment action (for example, taking an appeal, as in *Gonzales*) this would likely manifest during the one-year period following resolution of the claims.

The real time-bar problem arises in cases involving future claimants. It is arguably preferable to conceptualize the initial settlement in such a case as an ongoing injunction against future suits.²⁹⁰ As such, the prospective injunction could be modified in light of changed circumstances under Rule 60(b)(5).²⁹¹ As noted earlier,²⁹² such an

strates that counsel “actively represented conflicting interests” and that “an actual conflict of interest adversely affected his lawyer’s performance.”

Strickland v. Washington, 466 U.S. 668, 692 (1984) (citations omitted).

²⁸⁸ Alan Morrison, in discussing the *Epstein* case and the federal/state scenario presented by it, offers a similar approach. He argues that nothing in *Epstein* stands for the proposition that “simply alleging a bad result in a prior action is enough to allow the collateral attack to go forward.” Morrison, *supra* note 21, at 1186. Rather, he writes:

[W]hat is needed before the inadequacy allegation will even be considered is the kind of structural deficiency, principally the absence of any power of the state court to litigate the federal issue, that was so prominent in [*Epstein*]. To the extent that objections to collateral attacks are based on the concern over retrying issues that were litigated in the prior action, that concern is answered by refusing to entertain a collateral attack unless some such structural impediment is found. It is only after that threshold is satisfied that there is any need to examine the record closely and decide whether, despite any structural impediment, the state court plaintiffs and their counsel adequately, even if not perfectly, represented the class.

Id.

²⁸⁹ FED. R. CIV. P. 60.

²⁹⁰ See Monaghan, *supra* note 50, *passim* (comparing preclusionary effect of class action judgments to antisuit injunctions).

²⁹¹ See *Miller v. French*, 530 U.S. 327, 344–45 (2000) (“Prospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying

approach would remove the current artificial need to frame changed circumstances in terms of adequacy-based collateral attacks.²⁹³

c. Default

Habeas law forecloses a significant amount of collateral attack by enforcing default rules that have the effect of requiring that a habeas petitioner first give the trial court or state habeas court an opportunity to assess his claim. Default is not absolute: It can be overcome by a showing of cause and prejudice.²⁹⁴ Class action law ought to embody a similar soft presumption of default with regard to the certification and fairness hearings. Class members generally receive notice of these hearings and have an opportunity to appear and present any objections to the class action court while the case is pending. Moreover, class members can simply opt out of (most) class actions if they are unsatisfied.²⁹⁵ Class action law should adopt a presumption that a class member who fails either to appear or to opt out cannot collaterally attack the judgment. This would pressure class members to voice their objections to the class court, or to exit the class, and it would discourage them from displaying apparent loyalty which is then proven untrue when they defect after the case ends.²⁹⁶ To the extent it encourages objection, this default rule would have the virtue of enabling the class action judge to consider more fully all concerns about the settlement and thus to reach a more accurate assessment of the settlement terms. It would also enhance efficiency by centering litigation in the court already familiar with the issues at hand.

The default presumption could be overcome if the class member could show cause and prejudice. Recognition of two types of causes would balance the severity of the default requirement. First, a class

law.”); *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (“[I]t is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show a ‘significant change either in factual conditions or in law.’” (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992))).

²⁹² See *supra* note 94 and accompanying text.

²⁹³ Conceptualizing the adequacy problem as one involving changed circumstances also means that *Stephenson* might profitably be analogized to another set of cases: those in which “changed circumstances” raised particular finality concerns. These include not only public law injunctions like the prison condition cases, but also issues such as child custody decrees and criminal convictions challenged by new DNA evidence. I am indebted to both John Leubsdorf and Judith Resnik for, independently, suggesting some of the ideas in this paragraph.

²⁹⁴ *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

²⁹⁵ FED. R. CIV. P. 23(c)(2)(B).

²⁹⁶ For application of the exit-voice-loyalty concepts to class action practice, see John C. Coffee Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 399–428 (2000), and Issacharoff, *supra* note 23, at 367–80.

member who could show that she had not received notice of the settlement could be excused of her default.²⁹⁷ Second, a class member with no territorial connection to the class court (that is, over whom the court would have had no personal jurisdiction had she been a defendant) could be excused for not appearing there.²⁹⁸

d. Nature of Review

Habeas purports to be an independent civil action, but its presumptions turn the habeas forum into something of an appellate court by focusing attention on the wisdom of the state court's decision.²⁹⁹ This approach clarifies the class action problem that arises when F2 views adequacy from its current perch, rather than from that of F1. The class action defector should have to show that the class action court made a mistake, not simply that the collateral forum would have decided the adequacy issue a different way today. What this means is that the collateral forum's assessment of adequacy would be based on the factual record developed in the class action forum, and the second court would typically not hold an independent factual hearing. Habeas embodies an exception to the "no new hearing" requirement in the face of either new, retroactive constitutional law *or* facts that "could not have been previously discovered through the exercise of due diligence."³⁰⁰ Arguably, these types of safety valves are precisely what is needed to account for situations like that presented in *Stephenson*. From Stephenson's viewpoint, a new factual predicate (the onset of Agent Orange-induced illness after 1994) and new constitutional law (*Amchem* and *Ortiz*)³⁰¹ each—or at least in conjunction—weighed in favor of a new hearing.

²⁹⁷ Since this showing is easy to allege, it may only work if supported by a "clear and convincing" evidence standard.

²⁹⁸ This addresses Professor Monaghan's concerns that, although a class member can be bound by the outcome of a class action adjudicated in a forum that would not have personal jurisdiction over her as a defendant, she nonetheless cannot be compelled to go to that forum to argue adequacy there and hence must be given the opportunity to do so on collateral attack. See Monaghan, *supra* note 50, *passim*. Assuming the validity of this debatable premise, this proposed default rule solves the problem. However, because the defector would still have to show that the class court's decision was erroneous and prejudicial, she would not fully escape its effect, though she would not be fully precluded by it either. I concede that giving the earlier finding any effect—even the procedural one of creating a presumption in its favor—may violate Professor Monaghan's core point, but the intrusion on the absent individual's rights is nonetheless far smaller than holding her to be fully bound by the prior determination.

²⁹⁹ 28 U.S.C. § 2254(d) (2000).

³⁰⁰ § 2254(e)(2).

³⁰¹ For a short analysis of whether these new class action cases would comport with habeas's "new law" standard, see Koniak, *How Like a Winter?*, *supra* note 18, at 1854–55.

e. Burden of Proof

Class action law, like habeas law, should more clearly place a burden of proof on the class action defector attempting to upset the class action judgment. Her argument that she was not adequately represented is one of a constitutional nature and she should shoulder the burden of proving it. A straightforward “preponderance of the evidence” standard would be appropriate given the difficult substantive burden that the two-part *Strickland* standard would place upon her. The findings of the original class action judge should receive deference and be upset only upon a showing that they constituted an abuse of discretion.³⁰²

f. Repeated Attacks

The habeas approach to class action law would indirectly solve the problem of successive attacks by discouraging any attacks in the first place. The system need not adopt a rule that one person’s attack forecloses another’s through some doctrine like virtual representation. Rather, the combination of the substantive standard and procedural rule system will sufficiently construct the collateral attack opportunity so that each individual who wants to try can be given that opportunity without risk that the system will be flooded with objectors and the finality of all class actions threatened.

Applying habeas’s approach to the field of class action law would entail designing a set of procedures that neither bluntly foreclose nor wantonly permit relitigation of the adequacy question. The content of that rule system should consider the substantive meaning of adequacy for constitutional purposes, the procedural meaning of default, the nature of the review that should take place, with whom the burden of proof should lie and what it should entail, and in what circumstances successive attacks should occur. The foregoing set of proposals is an initial sketch of one such rule system.

3. *Defending the Rule System*

What would these proposed rules, pulled together, create? The general approach would be one that assumes that the class action court assessed adequacy with sufficient accuracy that, given the stakes of global peace, warrants restricting relitigation accordingly. A class

³⁰² See Note, *Collateral Attack*, *supra* note 95, at 604 (“It would be extraordinary if the scope of collateral review were to exceed that of direct appellate review.”).

member could attempt to mount a collateral challenge to the class outcome, but she would need to do so within one year of the conclusion of the claims period (unless she is a future claimant). She would be foreclosed if she did not appear and protest adequacy in the class action forum (unless she can demonstrate lack of notice or is territorially unrelated). She would shoulder the burden of proving that the class court got it wrong—so wrong that it abused its discretion—on the facts that were before it (unless undiscoverable new facts or retroactive constitutional law have appeared). Finally, she would have to demonstrate that counsel's performance was both subpar and prejudicial (unless she could demonstrate a debilitating conflict of interest between counsel and the class, notwithstanding the class court's findings to the contrary).

Careful readers will note that the rule system I propose is likely to produce results that will resemble, rather closely, those generated by the preclusion position described above. While that might be the case, the manner in which I reach this outcome is distinct in critical ways. My position is not based on the argument that conventional issue preclusion applies. That argument is unconvincing.³⁰³ My position instead is embodied in the specific rule structure that I develop having used habeas as a muse to help me imagine it. I imagine that others may balance the interests differently, and hence would create a rule system different than mine. If they do so—even to the extent of encouraging complete relitigation—I will have succeeded in the task that I engage in here: namely, moving this debate from one about which analogy to conventional preclusion works best, to one that appreciates the *sui generis* nature of adequacy and attempts to develop appropriate rules for its unique setting.

CONCLUSION

The State of Tennessee scheduled Gary Cone's execution for March 3, 1997.³⁰⁴ A Louisiana oncologist informed Daniel Stephenson that he had bone marrow cancer in February 1998.

Both men are still alive today.

One is still litigating.

The Supreme Court remanded Daniel Stephenson's Agent Orange case for adjudication. Judge Weinstein consolidated it with other "new" Agent Orange cases—and then dismissed all of them on

³⁰³ See *supra* Part II.A.1 (revealing preclusion model's inherent weaknesses).

³⁰⁴ Cone v. Bell, 956 F. Supp. 1401, 1405 (W.D. Tenn. 1997).

the merits following a motion to dismiss in 2004.³⁰⁵ Stephenson got his much sought-after day in court, but it was far shorter than he had hoped.

The Supreme Court remanded Gary Cone's case for termination. The Sixth Circuit then found for Cone again, on new grounds, once more staying his execution.³⁰⁶ The case went back up to the Supreme Court, which again reversed—this time in a 9–0 per curiam decision—and again remanded with instructions that the case move toward execution.³⁰⁷ Cone has never received a new trial, but his case still lives—and therefore so does he.

Perhaps the last clause should have been the end of this Article, but it is not. The inquiry at its heart (though maybe not the case studies themselves) raises one final question: Is it possible that we have the procedural approaches to adequacy and ineffective assistance precisely backwards? I have argued that habeas's "safety valve" approach makes sense in the context of class action law. Much habeas scholarship argues that the cleaner, all-or-nothing approaches found in class action law would better fit the needs of the criminal justice system, though of course scholars divide on whether "all" or "nothing" is the right approach.³⁰⁸ Out of this has grown a procedural system that satisfies few observers that it is either doing justice or getting things done.

³⁰⁵ *Isaacson v. Dow Chem. Co. (In re "Agent Orange" Prod. Liab. Litig.)*, 304 F. Supp. 2d 404 (E.D.N.Y. 2004), *stay lifted*, 344 F. Supp. 2d 873 (E.D.N.Y. 2004).

³⁰⁶ *Cone v. Bell*, 359 F.3d 785, 799 (6th Cir. 2004) (vacating Cone's death sentence due to jury's "weighing of an unconstitutionally vague aggravating factor at sentencing").

³⁰⁷ *Bell v. Cone*, 543 U.S. 447 (2005) (per curiam), *reh'g denied*, 544 U.S. 944 (2005).

³⁰⁸ The central debate in criminal law is between those who argue that a criminal issue (even one of federal constitutional dimension) is final once a state court has provided a full and fair opportunity to litigate the issue, and those who contend that de novo collateral review in a federal court is required by the nature of the stakes. See Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 577 (1993) (describing debate between supporters of "institutional competence" model that precludes reconsideration where there has been "full and fair" opportunity to litigate in state court, and supporters of "full review" model advocating de novo review in federal court).