THE PATH TO PRECLUSION: FEDERAL INJUNCTIVE RELIEF AGAINST NATIONWIDE CLASSES IN STATE COURT

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INTRODUCTION

Mass aggregation of claims intensifies the regulatory effect of adjudication,[1] multiplies defendants' potential liability,[2] and reaffirms

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1. *See, e.g.*, Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 192 (2002) (arguing that the class action device delegates substantive rights to private persons instead of "politically accountable government agencies"); Victor E. Schwartz & Leah Lorber, State Farm v. Avery*: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1215–18 (2001) (noting the desire of "entrepreneurial" plaintiffs' attorneys and "activist" judges to regulate through litigation); *see also* WALTER K. OLSON, THE RULE OF LAWYERS: HOW AMERICA'S NEW LITIGATION ELITE THREATENS DEMOCRACY 99–128 (2003) (describing how plaintiffs' lawyers attempted to regulate the gun industry through class action lawsuits). *See generally* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 49–134 (2000) (discussing the "virtues and vices" of class actions).

2. *See, e.g.*, *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir. 1997) (likening class certification to judicial "blackmail" because it forces defendants into large settlements, despite the merits of the case, out of fear that a plaintiff-friendly court or jury will return a devastating verdict (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973))); *see also* Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 TEX. L. REV. 1695, 1696–97 (1998) ("Even the question of the defendants' liability, which should be a critical matter in the fashioning of a just solution, becomes submerged beneath the overwhelming volume of claims and the huge transactional costs of defending them."); Judith Resnick et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 306 n.31 (1996) (arguing that aggregation "enables some plaintiffs' lawyers to bring weak if not false claims in sufficient quantity as to require defendants to choose between settlement and bankruptcy"); c*f.* Bruce L. Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1399–1404 (2000) (proposing multiple, averaged trials to avoid the blackmail problem). *But see* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1429 (2003) (rejecting the notion that class actions resemble blackmail and urging judges to refrain from using such "inflammatory rhetoric").

the redistributive goals of civil litigation.[3] Given the importance of certification decisions, it is not surprising that reformers have targeted not only the *substance* underlying certification, but also the *process* of deciding how and when to certify a class. For example, recent rule changes have expanded the availability of discovery prior to certification decisions[4] and made interlocutory appeal available.[5] In *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation* (*Bridgestone II*),[6] the Seventh Circuit undertook perhaps the most ambitious of these reforms. After ordering decertification of a nationwide class that a federal district court had certified, the Seventh Circuit issued an injunction to prevent certification of the same nationwide class in state court.[7] This decision broke new ground, diverging from the decisions of other courts of appeals and flouting traditional notions of injunctive relief, federalism, and preclusion.[8] In light of the quagmire that defendants face from dozens of putative nationwide classes,[9] it seems apparent that Judge Frank Easterbrook's

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3. *See, e.g.*, George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 522 (1997) (cataloguing criticism of class actions and noting how "[t]ogether, the combination of undemanding standards for class certification, loose pleading requirements, and expanded standards of tort liability has transformed the mass tort class action into a massive tool of redistribution").

4. Federal Rule of Civil Procedure 23(c), as amended in 2003, requires courts to decide whether to certify a class "at an early practicable time"—as opposed to "as soon as practicable," the requirement before the amendment. FED. R. CIV. P. 23(c)(1)(A). This expansion of discovery, as the Advisory Committee on Civil Rules explains, is to be used not to evaluate the merits of a claim, but rather to "identify the nature of the issues that actually will be presented at trial." *Id.* advisory committee's note. The rule amendment avoids "forcing an artificial and ultimately wasteful division between 'certification discovery' and 'merits discovery.'" *Id.*

5. FED. R. CIV. P. 23(f). The rule amendment was adopted in 1998, partly in response to Judge Richard Posner's scathing critique of lax class certification standards in *In re Rhone-Poulenc Rorer*, 51 F.3d at 1298–1300. Linda S. Mullenix, Essay, *Some Joy in Whoville: Rule 23(f), A Good Rulemaking*, 69 TENN. L. REV. 97, 101 (2001).

6. 333 F.3d 763 (7th Cir. 2003) [hereinafter *Bridgestone II*]. The Seventh Circuit's earlier decision to order decertification of the nationwide class, *In re Bridgestone/Firestone, Inc., Tire Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003), is *Bridgestone I*. This Note uses similar "I" and "II" labels for other cases, referring to the certification decision as "I" and the discussion of injunctive relief as "II."

7. 333 F.3d at 767.

8. *See infra* notes 68–75 and accompanying text (discussing the decisions of other courts).

9. This quagmire even led the Advisory Committee on Civil Rules to discuss amending Rule 23 to grant preclusive effect to denials of certification, a solution that largely would have paralleled the *Bridgestone II* solution. *See infra* notes 45–47 and accompanying text; *see also* Advisory Comm. on the Fed. Rules of Civil Procedure, Report of the Civil Rules Advisory Committee 348–51 (May 20, 2002), *at* http://www.uscourts.gov/rules/jc09-2002/CVRulesJC.pdf (on file with the *Duke Law Journal*) (discussing rule-based solutions to overlapping class actions); David F. Levi, Memorandum to the Civil Rules Advisory Committee: Perspectives on

opinion was a bold attempt to provide a much needed solution to the pervasive problem of overlapping putative nationwide classes[10]—notwithstanding criticism that this attempt was unwarranted.[11]

This Note analyzes the availability of injunctive relief, such as that that granted in *Bridgestone II*, to preclude putative class plaintiffs and their lawyers from pursuing a nationwide class action in state court after a federal court has already denied certification. Part I explains the problems and abuses inherent in class adjudication of claims and articulates why defendants are beginning to seek this type of injunctive relief. Part II then introduces the *Bridgestone II* decision and explores how other courts and commentators have largely ignored such a remedy. Finally, Part III critically assesses the doctrinal justifications for these injunctions by examining whether a denial of certification meets the requirements for issue preclusion. When a certification denial is interpreted in its proper constitutional context, it necessarily involves the same issues as any future certification decision—regardless of the liberality of any state court class action rule.[12] This constitutional context, combined with the availability of interlocutory appeal for certification decisions, enables federal courts to enjoin putative class members from relitigating the certification decision in state court.

I. THE PROBLEM WITH AGGREGATIVE CLASS ACTIONS

Class actions have drawn considerable praise: commentators explain that they "correct the systematic bias that favors defendants over plaintiffs in mass tort cases"[13] and make viable negative value

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Rule 23 Including the Problem of Overlapping Classes (May 7, 2002), *in* Advisory Comm. on the Fed. Rules of Civil Procedure, *supra*, at 302, 315 (proposing solutions to the problem of "overlapping class actions in state courts").

10. This Note uses the term "nationwide classes" to refer to any type of class action involving plaintiffs in a large number of states. For purposes of this Note, the distinction between a nationwide class and a multistate class, for example, stemming from the sale of gas leases in eleven states, *see* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 799 (1985), is negligible. The burdens on defendants and benefits for forum-shopping plaintiffs, *see infra* Part I, apply equally whether the actions are just multistate or fully nationwide.

11. *See* Gary Young, *Class Action 'Tort Reform' Ruling*, NAT'L L.J., July 7, 2003, at P5 (noting that the decision "bowled over attorneys with its sweeping—and, some say, wrongheaded—curtailment of state court authority to certify nationwide classes after a federal court has declined to do so").

12. *See infra* notes 114–37 and accompanying text.

13. David Rosenberg, *Mass Tort Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 414 (2000).

claims that otherwise would not be brought in court.[14] Nonetheless, class actions often do more harm than good. Aggregation of claims sacrifices procedural fairness,[15] whereas case-by-case adjudication of liability or damages gives litigants their proverbial day in court.[16] Further, class actions often do more than merely aggregate: "[S]ometimes they also distort the outcomes by imposing liabilities that are, when the transformations of substance and procedure are taken into account, far more onerous than a rule of simple multiplication will provide."[17] Finally, regulation through litigation neglects important democratic interests, as the "mini-legislation effected by class settlements must remain on a plane below that of duly enacted legislation precisely because class settlements do not entail anything approaching the degree of consensus demanded of legislation."[18] Fundamentally, the larger debate over class actions implicates the debate over the proper role of courts; if it is undemocratic for judges to expand law beyond the proper contours of

14. A negative value claim is one for which the cost of litigation would exceed the plaintiff's potential recovery. *See, e.g.*, *Shutts*, 472 U.S. at 809 (explaining that class actions allow plaintiffs to pool claims that are too expensive to bring individually).

15. *See* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 432 (2001) ("Class action lawsuits deprive individuals of their own day in court. They wrest from each class member her own freedom in undertaking, or avoiding, litigation.").

16. *See* Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 74 ("Underlying our tradition of individual claim autonomy in substantial tort cases is the natural law notion that this is an important personal right of the individual.").

17. Richard A. Epstein, *Class Actions: Aggregation, Amplification and Distortion*, 2003 U. CHI. LEGAL F. 475, 478. Professor Victor Schwartz and his coauthors also explain how aggregation often benefits plaintiffs:

> Evidence indicates that the aggregation of claims increases both the likelihood that a defendant will be found liable and the size of any damages award which may result. Defendants are far more likely to be found liable in cases with large numbers of plaintiffs than in cases involving one or just a few plaintiffs. In addition, juries tend to treat all plaintiffs alike, regardless of their individual circumstances, so that the presence of one severely injured plaintiff will likely increase the damages awarded to all.

Victor E. Schwartz et al., Essay, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 491–92 (2000) (footnotes omitted). Certification of a class has been said to turn a $20,000 case into a $200 million dispute, *see* Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 675 (7th Cir. 2001), and leave the fate of an entire industry in the hands of a single jury, *see In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995).

18. Nagareda, *supra* note 1, at 198.

a statute or constitution, it is even more undemocratic for a single court to dictate policy for the entire country.[19]

This uneasiness with aggregative litigation is magnified when the system is abused, as it often is.[20] The problems inherent in the current system are many, but this Note emphasizes those problems that underlie injunctions against the certification of nationwide classes, dividing them into two distinct but overlapping categories: problems with multiple putative classes and problems with state court adjudication of nationwide classes.

A. Multiple Putative Classes

Although duplicative litigation over issues of liability and damages is often warranted because it is procedurally more fair than aggregative litigation, having multiple courts decide the issue of whether aggregation is preferable offers no advantages. Multiple certification decisions merely waste already scarce judicial resources and cause needless friction between courts.[21] As one commentator notes, such duplicative litigation "is patently wasteful. . . . [and] smacks of an indefensible gamesmanship."[22]

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19. *Cf.* Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 32 (2003) (explaining how judges "strain the boundaries of their institutional abilities" when they ignore their traditional judicial role by, for example, approving a class action settlement).

20. For a small sample of works criticizing the use of the class action device, see generally Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243 (2001); Resnick et al., *supra* note 2; and Schwartz & Lorber, *supra* note 1. For a good general bibliography of class action literature, see David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 915 n.2 (1998).

21. *See* James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1065 (1994) ("Such gross inefficiency is bound to cause friction, as one court finds itself the loser in a race to judgment, its resources squandered."); Advisory Comm. on the Fed. Rules of Civil Procedure, Report of the Civil Rules Advisory Committee 105 (May 14, 2001), *at* http://www.uscourts.gov/rules/Reports/CV5-2001.pdf (on file with the *Duke Law Journal*) ("The prospect that another court may certify the class may impel a federal court to grant a certification that otherwise would be withheld, believing that it is better to maintain control of a dubious class than to stand by helpless while another court pursues the same class to judgment."); Levi, *supra* note 9, at 311 (noting that as federal courts become more deliberate and managerial in certifying classes or approving settlements, "an ever growing number of cases will be filed in those state courts where this kind of supervision is perceived to be less demanding," often resulting in "multiple filings of multistate diversity class actions in both federal and state courts. . . . precisely the outcome that the class action device was designed to prevent").

22. Rehnquist, *supra* note 21, at 1064; *cf.* Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigation Unit*, 50 U. PITT. L. REV. 809, 832–33 (1989) (noting that because "[c]ourts are a public resource . . . .

An even greater harm of multiple certification decisions is the harm beset upon defendants forced to face litigation that they can lose but never win. Professor Martin Redish extends this certification "blackmail" argument to include even threats of certification:

> A defendant is aware that its success in opposing class certification in 1, 2, or even 50 different courts would not preclude a 51st court from granting certification. The defendant thus must face the possibility of a constant stream of harassing filings. Hence, defendants are effectively forced to "buy" litigation peace, even where such payments are wholly undeserved, by settling.[23]

In many cases, defendants and plaintiffs will spend two or three years battling over the initial certification decision in federal court. Fighting this same battle in multiple state courts, after it was fully and fairly litigated in the original federal forum, is fundamentally unfair.[24]

B. State Court Adjudication of Nationwide Class Actions

Although experimentation with rules, standards of liability, and even entire social schemes may demonstrate the beauty of federalism,[25] such rules, standards, and schemes in the nationwide

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we have a right to insist that their services not be squandered" and arguing that the "duplication of effort is a major cause of the protraction of time needed to resolve cases and cannot be justified by plaintiffs' selfish strategic desire").

23. Martin H. Redish, *The Need for Jurisdictional and Structural Class Action Reform*, 32 Envtl. L. Rep. (Envtl. L. Inst.) 10,984, 10,985 (2002); *cf.* David Hechler, *GC's Nightmare: EEOC Class Actions Are Up 43% Since 1997*, NAT'L L.J., Apr. 29, 2002, at A19 ("Consumer products companies that depend on public goodwill are particularly vulnerable to bad public relations and may settle even before classes are certified . . . .").

24. *See In re* Piper Aircraft Distribution Sys. Antitrust Litig., 551 F.2d 213, 219 (8th Cir. 1977):

> There are strong arguments that may be advanced for applying the rule of collateral estoppel to a class action determination when the plaintiff is engaging in multidistrict litigation. First, the evidence adduced in a fair hearing generally requires a substantial investment in discovery. A significant amount of judicial time is likely to be consumed in considering both the evidence amassed and the legal arguments arrayed in support of and in opposition to class action status. Second, assuming a fair hearing, a plaintiff ought not to have unlimited bites at the apple until he can convince a single district court that he qualifies as a class representative under Rule 23. This is wasteful and runs counter to the sound administration of multi-district cases. Third, the parties and the issues in the individual cases will normally be of sufficient similarity that a factual determination in a fair hearing should be conclusive in companion cases on principles of collateral estoppel.

Without the availability of the certification-blocking injunction, plaintiffs will continue to get unlimited bites at the certification apple.

25. *See* New State Ice Co. v. Leibmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its

class action context necessarily impose individual state values on the entire country. The purpose of federalism was never to allow a single local judge and jury to impose its decision on the rest of an unwilling nation. State court adjudication of class actions represents the worst of forum shopping with perverse effects: plaintiff-friendly jurisdictions result in easy certifications, big verdicts, and settlements larger than warranted.[26]

Despite these concerns, the Supreme Court has made clear that a state court can adjudicate a nationwide class action—even of exclusively federal claims—that will have binding effect on class members who do not opt out, as long as the court meets certain constitutional notice requirements.[27] Choice of law, however, provides an important constitutional limitation on the adjudication of nationwide classes.[28] Without significant aggregation of contacts to the class claims, the Due Process and Full Faith and Credit Clauses of the U.S. Constitution[29] prevent the forum state from applying its own law.[30]

This jurisprudence—allowing state court adjudication of nationwide classes—is ripe for abuse because of the slim chance that

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citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

26. *See* John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 HARV. J.L. & PUB. POL'Y 143, 153 (2001) ("What business does a state court judge elected by the several thousand residents of a small county in Alabama have in telling the state of Massachusetts what its laws mean?").

27. *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 369, 372–73 (1996) (confirming the "preclusive effect of a state-court judgment, entered in a class or derivative action, that provides for the release of exclusively federal claims"); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 806–14 (1986) (holding that a state court had personal jurisdiction over absent class members who had limited or no contacts with the forum as long as it had met procedural notice and opt-out requirements).

28. *See infra* notes 121–37 and accompanying text; *cf.* RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION 410 (3d ed. 1998) ("[T]he proper handling of choice-of-law issues in class actions remains somewhat unsettled. *Shutts* provides some outside constitutional limits, but there is limited choice-of-law doctrine to assist courts in navigating within those limits.").

29. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

30. *Shutts*, 472 U.S. at 818 (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981)).

the Supreme Court will review state court decisions.[31] For example, in *Avery v. State Farm Mutual Automobile Insurance Co.*,[32] an Illinois appellate court upheld a county court's application of Illinois law across a nationwide class certified against State Farm.[33] The *Avery* court held that an Illinois consumer fraud statute reached insurance transactions across the country.[34] The jury had found State Farm liable for using generic automobile replacement parts in forty-eight states,[35] even though several states had encouraged the practice to drive down consumer costs of insurance.[36] After business groups, consumer advocates, and regulatory agencies exerted enormous pressure, the Illinois Supreme Court granted appellate review.[37] As of this writing, however, it has failed to issue a decision,[38] leaving other Illinois courts with the precedent that the Illinois Consumer Fraud Act extends to "protect" consumers across the entire United States.[39]

Although it is questionable whether *Avery* could survive U.S. Supreme Court review,[40] its implications have already been felt across the country.[41] The *Avery* court's decision is but one of many examples of the perverse effects of state court adjudication of nationwide class actions. In the past several years, a single court in Madison County,

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31. *See, e.g.*, WILLIAM H. REHNQUIST, THE SUPREME COURT 224 (2001) (noting that the Court grants certiorari in about one hundred cases each year, chosen from more than seven thousand petitions).

32. 746 N.E.2d 1242 (Ill. App. Ct. 2001), *appeal granted*, 786 N.E.2d 180 (Ill. 2002). For a powerful critique of *Avery*, see generally Schwartz & Lorber, *supra* note 1.

33. *Avery*, 746 N.E.2d at 1257.

34. *Id.*

35. *Id*. at 1261.

36. See Schwartz & Lorber, *supra* note 1, at 1230 & nn. 59–61 for a listing of statutes that discuss insurance company use of generic parts.

37. *Avery*, 786 N.E.2d at 180.

38. The Illinois Supreme Court granted review in October 2002 and heard arguments in May 2003, Daniel C. Vock, *High Court Urged to Void $1 Billion Judgment*, CHI. DAILY L. BULL., May 14, 2003, at 1, but as of October 20, 2004, had yet to rule.

39. *See* Clark v. TAP Pharm. Prods., Inc., 798 N.E.2d 123, 129, 131 (Ill. App. Ct. 2003) (noting that *Avery* was "precedent to which [it was] bound" and determining that the Illinois Consumer Fraud Act applied, "abrogating the need to apply the laws of all 50 states").

40. *See infra* notes 128–33 and accompanying text.

41. *See, e.g.*, Joseph B. Treatser, *Generic Car Parts Makers Fighting Back*, N.Y. TIMES, July 31, 2000, at C8 (describing how sales of generic car parts dropped after the Illinois decision); *cf.* Joseph L. Bast, Editorial, *Three Cheers—And a Sigh of Relief—For Boeing*, CHI. SUN-TIMES, May 17, 2001, at 33 ("Allowing certification of national classes whenever an Illinois corporation is accused of violating an Illinois law sanctions jackpot justice, with lawyers flocking to Illinois courts to make a quick buck by threatening multibillion-dollar lawsuits over business practices that are perfectly legal, and sometimes even required, in other states.").

Illinois has certified dozens of class actions, many of them nationwide.[42]

Even conceding that class actions serve a useful regulatory function,[43] state courts with inherently local concerns should not force their regulatory preferences upon the entire United States, especially when a federal court has already decided that a class action is not appropriate.[44] The probable lack of Supreme Court review of these state court adjudications only exacerbates the problems inherent in allowing local courts to make policy for the country.

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42. *See, e.g.*, LESTER BRINKMAN, ANATOMY OF A MADISON COUNTY (ILLINOIS) CLASS ACTION: A STUDY OF PATHOLOGY 6–7 (Center for Legal Policy at the Manhattan Institute, Civil Justice Report No. 6, 2002) (using Madison County as indicative of how plaintiffs' lawyers have countered federal court class action scrutiny "by filing their would-be class actions in state court jurisdictions where judges are known or believed to be likely to act favorably toward plaintiffs' counsel and where juries have a high propensity for favoring claimants over out-of-state 'big business' defendants"), *available at* http://www.manhattan-institute.org/html/cjr_6.htm; Noam Neusner, *The Judges of Madison County*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 39 ("With a population of 258,941, Madison County has hosted 50 class action lawsuits so far this year, up from 39 the prior year."); *see also* Beisner & Miller, *supra* note 26, at 185 (reviewing class actions filed in Madison County to conclude that judges there have been asked "to set national policy on issues that could affect the daily lives of millions of Americans throughout the country—from what water they drink to how much they pay for their next insurance policy or telephone bill—all from a small courthouse in southwest Illinois"). Madison County has acquired celebrity status on the editorial page and in congressional hearings. *See, e.g.*, 149 CONG. REC. H5281 (daily ed. June 12, 2003) (statement of Rep. Sensenbrenner) (discussing how "the only explanation for this phenomenon [the explosion of litigation in Madison County] is aggressive forum shopping by trial lawyers to find courts and judges who will act as willing accomplices in a judicial power grab, hearing nationwide cases and setting policy for the entire country in a local court"); Editorial, *Mayhem in Madison County*, WALL ST. J., Dec. 6, 2002, at A14 (discussing filings in Madison County as indicative of how "forum-shopping for class actions now has damaging nationwide economic consequences").

43. This concession is quite debatable. *See* Advisory Comm. on the Fed. Rules of Civil Procedure, *supra* note 9, at 327 ("[N]o lawyer should be able to march into court on behalf of millions of clients and ask a judge down in Plaquemine in Louisiana to decide that some pharmaceutical ingredient is harmful. I mean, that's a job for the FDA." (reporting the comments of Lewis H. Goldfarb, Esq.)).

44. *See* Beisner & Miller, *supra* note 26, at 205 (arguing that many nationwide class actions "are being heard by locally elected county judges, . . . who are often viewed by plaintiffs' lawyers as willing to 'rubber stamp' class certification orders and 'coupon' settlements, and who are periodically forced to turn to the local bar to fund their efforts at re-election"); Levi, *supra* note 9, at 314 ("Individual state courts may properly apply the policy choices of the residents of that state to those residents. But local authorities ought not impose those local choices upon other states and certainly not on a nationwide basis.").

II. THE FIRST STEPS TOWARD ENJOINING NATIONWIDE CLASS ACTIONS

The Advisory Committee on Civil Rules long ago recognized the problems of overlapping putative class actions and considered a rule amendment that would have given preclusive effect to a refusal to certify so that no other court could certify a rejected class.[45] The Advisory Committee received many comments on the proposed amendment,[46] but it ultimately decided that the amendment would be too substantive and thus would violate the Rules Enabling Act.[47] Courts, however, do not face such limitations and should, under appropriate circumstances, use their statutory and inherent powers to enjoin plaintiffs from pursuing certification of nationwide classes.[48]

Although some courts have considered another court's denial of certification when analyzing whether a class is maintainable,[49] most courts have refused to grant preclusive effect to earlier denials of certification.[50] For example, Tennessee courts have certified

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45. *See* Advisory Comm. on the Fed. Rules of Civil Procedure, *supra* note 21, at 40:

> A court that refuses to certify—or decertifies—a class for failure to satisfy the prerequisites of Rule 23(a)(1) or (2), or for failure to satisfy the standards of Rule 23(b)(1), (2), or (3), may direct that no other court may certify a substantially similar class to pursue substantially similar claims, issues, or defenses unless a difference of law or change of fact creates a new certification issue.

(quoting proposed Rule 23(c)(1)(D)). The committee explains that the possibilities for "abuse presented by unfettered opportunities to present the same class action to a different court . . . support a procedural mechanism permitting a court denying certification to make that denial binding on a subsequent, sufficiently similar, proposed class." *Id.* at 34.

46. *See* Advisory Comm. on the Fed. Rules of Civil Procedure, *supra* note 9, at 320–37 (summarizing comments).

47. *See* Levi, *supra* note 9, at 315 (discussing the Rules Advisory Committee's desire to provide more than "modest benefits" by addressing "overlapping class actions in state court," but noting how "[t]here may be room to adopt valid rules provisions in the face of these [Enabling Act and other] objections, but to do so might test the limits of rulemaking authority thus inviting litigation over the rules themselves").

48. This power stems from the All Writs Act, 28 U.S.C. § 1651(a) (2000), which states that courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The Supreme Court's decision in *Syngenta Corp. v. Henson*, 537 U.S. 28, 33 (2002), does not affect a court's injunctive power, only its removal power.

49. *See* Lee v. Criterion Ins. Co., 659 F. Supp. 813, 822 (S.D. Ga. 1987) (giving preclusive effect to an earlier court's denial of certification of a substantially similar class); *In re* Dalkon Shield Punitive Damages Litig., 613 F. Supp. 1112, 1115 (E.D. Va. 1985) (giving preclusive effect to the decertification of a class).

50. *See, e.g.*, Cullen v. Margiotta, 811 F.2d 698, 732–33 (2d Cir. 1987); Morgan v. Deere Credit, Inc., 889 S.W.2d 360, 367 (Tex. App. 1994). The difficulties of overlapping classes illustrate this problem further. Even if a court did not expressly discuss the preclusion problem

nationwide classes without giving any notice to defendants;[51] a Louisiana trial court has approved a settlement for a class deemed unfair by both a federal court and another state court;[52] and a county court in western Illinois has certified classes deemed uncertifiable just about anywhere else.[53] Given the procertification bent of some state

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when certifying a class, it should be aware of earlier denials of certification or the existence of an outstanding certified class. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992), is representative of the worst of this phenomenon; the court actually noted that another court had denied a motion to certify a nationwide class action, but it failed to discuss the implications of this denial. *Id.* at 155 n.14.

51. Schwartz et al, *supra* note 17, describe one such certification:

> In a lawsuit filed against a major automobile manufacturer in a Tennessee state court, plaintiffs filed several inches of documents with their complaint. By the end of the same day the lawsuit was filed, the court certified a nationwide class of 23 million automobile owners—one of the largest class actions ever certified by any court. In its certification order, the court stated that it had conducted a "probing, rigorous review" of the matter, a practical impossibility given the few hours allotted the review and the utter lack of thoughtful response to the plaintiff's motion.

Id. at 501–02 (footnotes omitted). The authors further argue that this ex parte certification "offends notions of due process and fundamental fairness" because "it can be very much an uphill battle for the defendant to change the judge's mind after the fact." *Id*. at 502. Before a change in court composition, Alabama was also infamous for ex parte certifications. *See* Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1718 (2000) ("[I]n a forum that liberally granted class certification to almost every case in which it was requested, the Alabama Supreme Court has engaged, in the last eighteen months, in an astonishing reversal of class certification decisions."); Schwartz et al., *supra* note 17, at 499 ("[O]ver a recent two-year period, a state court in rural Alabama certified almost as many class actions (thirty-five cases) as all 900 federal district courts did in a year (thirty-eight cases)). *See generally* OLSON, *supra* note 1, at 231–32 (describing "drive-by" certifications in Alabama and Tennessee).

52. *See* White v. Gen. Motors Corp., 718 So. 2d 480, 491 (La. Ct. App. 1998) (reversing and remanding the trial court's decision to approve a settlement class); White v. Gen. Motors Corp., 835 So. 2d 892, 901–08 (La. Ct. App. 2002) (reviewing the trial court's decision to approve the settlement class on remand). The Third Circuit Court of Appeals, though refusing to enjoin the Louisiana settlement after having vacated a similar federal court settlement, criticized the settlement in a lengthy opinion, explaining that it "was inadequate and unreasonable, and may even have been a marketing boon" to the defendant. *In re* Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 819 (1995); *see also id.* at 803 (questioning whether the adequacy of representation requirement could be met when "class counsel effected a settlement that would yield very substantial rewards to them . . . [for] little work"); Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 465–71 (2000) (discussing the litigation in detail); *infra* notes 72–74 and accompanying text. A Texas appellate court also found a lower court's approval of a similar statewide settlement to constitute abuse of discretion because it was not "fair, adequate, and reasonable." *Bloyed v. Gen. Motors Corp.*, 881 S.W.2d 422, 426 (Tex. App. 1994).

53. *See* Neusner, *supra* note 42, at 39 ("Consider [one case that] alleges that [the defendant] uses a faulty database to decide appropriate medical treatment and payment for certain kinds of claims. Similar cases have been filed across the country, all seeking nationwide class action status. None succeeded before, but in Madison [County], one did."); *see also supra* note 42 and accompanying text.

courts, a system in which courts would honor (by giving preclusive effect to) other courts' denials of certification might be an improvement but seems unlikely to come about.[54]

Thus, given the unlikelihood of a rule amendment and courts' reluctance to give preclusive effects to denials of certification, the only nonlegislative way to prevent relitigation of a certification decision is by injunction. This Part discusses defendants' efforts to obtain such injunctions, culminating in *Bridgestone II*, in which the Seventh Circuit enjoined putative class plaintiffs from pursuing a nationwide class action in state court.

A. Avoiding the Anti-Injunction Act: Enjoining Competing Classes

Because an injunction is a "highly intrusive remedy," traditional principles of comity, federalism, and equity counsel that federal courts exercise hesitation before so intruding upon state court matters.[55] The Anti-Injunction Act (AIA) codifies this unwillingness to intrude into state matters by forbidding a federal court from issuing an injunction unless it falls within one of three exceptions.[56] Preventing "needless friction" between federal and state courts justifies the AIA and its presumption against injunctive relief.[57]

Much has been written concerning the availability of federal court injunctive relief in the class action context.[58] The problems of

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54. *See* Advisory Comm. on the Fed. Rules of Civil Procedure, *supra* note 9, at 326 ("Another approach would be to encourage the states to enact similar, parallel, or reciprocal rules; but there is reason to be concerned that not all states will go along—particularly the states that are more likely to permit improvident certification." (reporting the comments of Thomas Y. Allman, Esq.)); Levi, *supra* note 9, at 317 (noting the need for expanded federal subject matter jurisdiction because "[i]t is very difficult for any single state court to fairly resolve these problems, and nearly as difficult for state courts to act together in shifting ad hoc arrangements for cooperation").

55. Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 525 (1985).

56. 28 U.S.C. § 2283 (2000) ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.").

57. Mitchum v. Foster, 407 U.S. 225, 232 (1970) (quoting Okla. Packing Co. v. Gas & Elec. Co., 309 U.S. 4, 9 (1939)). This presumption is so strong that the Supreme Court has cautioned that the exceptions to the AIA should not be "enlarged by loose statutory construction," Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146 (1988). Further, "doubts as to the propriety of a federal injunction against state court proceedings" should be resolved against issuing the injunction. Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 297 (1970).

58. *See*, *e.g.*, Wasserman, *supra* note 52 (reviewing exhaustively the law and policy surrounding competing classes); Andrew S. Weinstein, Note, *Avoiding the Race to Res Judicata: Federal Antisuit Injunctions of Competing State Class Actions*, 75 N.Y.U. L. REV. 1085 (2000)

competing class actions are well known: they waste judicial resources, confuse class members receiving multiple notices of suit, and may create a "race to the bottom" favoring settlement.[59] These negative implications of overlapping class actions, particularly actions filed in what have been termed "drive-by" certification courts on the eve of a federal settlement,[60] necessitated an expansion of the use of injunctions to prevent these overlapping classes.[61] This type of injunctive relief—prohibiting another class action from proceeding when a federal court is close to settlement—typically falls under the "necessary in aid of its jurisdiction" exception to the AIA, and even this exception is not without criticism.[62]

Curiously, though, the commentary regarding this type of injunctive relief, what this Note calls the "settlement-protecting injunction," does not seriously consider the possibility of enjoining future class actions when no class action is or will be pending in the given federal forum. For example, a leading treatise discusses only whether the court can force litigants into a "particular federal class

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(arguing for an expansion of the use of antisuit injunctions against competing state class actions); *see also* Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514 (1996) (discussing the problems of duplicative filings in large-scale litigation); *cf.* 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 4425, at 531–33 & n.11 (2d ed. 2002) ("A good argument can be made that . . . it should be permissible for a federal court to enjoin state proceedings that would interfere with efficient disposition of a federal class action."). *See generally* Edward F. Sherman, *Antisuit Injunction and Notice of Intervention and Preclusion: Complementary Devices to Prevent Duplicative Litigation*, 1995 B.Y.U. L. REV. 925 (discussing an American Law Institute proposal for expanded use of antisuit injunctions in the "transfer-removal-consolidation scheme" and how it could be extended to class actions).

59. Weinstein, *supra* note 58, at 1085.

60. Schwartz et al., *supra* note 17, at 501.

61. *See, e.g.*, Carlough v. Amchem Prods., 10 F.3d 189, 204 (3d Cir. 1993) (upholding an injunction preventing the plaintiffs from prosecuting a putative class in state court "[g]iven the concerns of the district court to finalize the settlement and given the time invested in reaching that goal"); *In re* Baldwin-United Corp., 770 F.2d 328, 338 (2d Cir. 1985) (upholding a settlement-protecting injunction); *In re* Corrugated Container Antitrust Litig., 659 F.2d 1332, 1335 (5th Cir. 1981) (same). For a good overview of the subject, see *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation*, 282 F.3d 220, 233–40 (3d Cir. 2002), and the sources mentioned in note 58, *supra*.

62. *See, e.g.*, *In re* Fed. Skywalk Cases, 680 F.2d 1175, 1180–84 (8th Cir. 1982) (vacating a district court order that certified a mandatory class and prohibited the plaintiffs from litigating punitive damage claims in state courts, on the ground that the order violated the AIA); *see also* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 910 (1987) ("Although federal courts may try to limit the proliferation of parallel actions by enjoining plaintiffs from bringing suit in state court or by staying state discovery proceedings, the Anti-Injunction Act denies federal courts the power to stay preexisting state actions.").

action forum."[63] This view presumes that the court issuing an injunction (or other type of remedy for defendants) has already certified a class action. Professor Linda Wasserman's lengthy article on dueling class actions spends just two paragraphs on what this Note calls the "certification-blocking injunction,"[64] concluding that "the protections and limitations built into preclusion doctrine . . . provide litigants with opportunities to 'repackage' class actions rejected by one court and file them in another court."[65] Other scholarly works do not even mention certification-blocking injunctions, focusing instead on the settlement-protecting injunction.[66]

In the cases discussed in Sections B and C, however, defendants sought injunctions remarkably different from the settlement-protecting injunctions that courts typically grant: they sought to enjoin future class actions when no class action was currently proceeding in federal court. Instead of asking for protection from a *competing* class action in a different forum, defendants asked federal courts to help them avoid lengthy rounds of litigation in other forums over the certification decision already litigated. In *Bridgestone II*, for example, the defendants asked the Seventh Circuit to issue an injunction preventing certification of any class related to the litigation.[67]

B. Early Rejections

Nearly a decade ago, the Fifth Circuit declined to enjoin state courts from certifying a class that the district court had refused to certify.[68] The court remarked, "While we are sympathetic to [the defendant's] desire to avoid another protracted and costly round of

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63. 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1798.1, at 435 (2d ed. 1986).

64. The term "certification-blocking" encompasses both denials of certification and decertifications, although there may be a distinct analysis of the two. It is beyond the scope of this Note to discuss the circumstances, if any, under which a district court's decertification is entitled to less preclusive effect than an appellate court's decertification.

65. Wasserman, *supra* note 52, at 487–88. In discussing injunctions issued on the basis of the relitigation exception to the AIA, Professor Wasserman notes the apparent lack of finality of certification decisions before the addition of subsection (f)—providing for interlocutory appeal—to Rule 23 in 1998, *id.* at 516 n.289, but concludes that the "utility of such an injunction . . . is quite limited, and even when available, may be 'too little, too late,'" *id.* at 516–17.

66. None of the sources in note 58, *supra*, mentions the potential use of certification-blocking injunctions, except to the extent discussed above.

67. *Bridgestone II*, 333 F.3d 763, 765 (7th Cir. 2003).

68. J.R. Clearwater Inc. v. Ashland Chem. Co., 93 F.3d 176, 179 (5th Cir. 1996).

litigation over class certification . . . the Anti-Injunction Act requires a different result."[69] In a short discussion, the court concluded that an order denying certification lacked finality because it was not likely appealable and was therefore not a final judgment.[70] This lack of finality, the Fifth Circuit reasoned, placed the certification decision outside the scope of the relitigation exception to the AIA, which is grounded in principles of res judicata and collateral estoppel.[71]

On much the same reasoning, the Third Circuit refused to grant an injunction to prevent relitigation of a certification decision.[72] The Third Circuit had earlier vacated the district court's order to both certify a nationwide class and approve a proposed settlement.[73] In refusing to intervene in a state court's certification of a nearly identical class, the court noted that state courts were not bound by federal interpretations of Rule 23 and could certify nationwide classes according to state law standards.[74]

Both of these courts relied heavily on finality and appealibity considerations; before 1998, interlocutory appeal was not available for certification decisions. Yet even after certification decisions became appealable, a defendant's potential remedy of enjoining putative plaintiffs from pursuing certification in another forum after an earlier denial remained elusive until *Bridgestone II*.[75]

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69. *Id*.

70. *Id*.

71. *See id*. ("Because finality is central to the 'concepts of both *res judicata* and collateral estoppel,' which animate the Anti-Injunction Act, such a lack of finality is also fatal to a request for injunction under the Act." (quoting Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 147 (1988))).

72. *See In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 146 (3d Cir. 1998) [hereinafter *GM II*] ("[D]enial of class certification under these circumstances lacks sufficient finality to be entitled to preclusive effect.").

73. *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995) [hereinafter *GM I*].

74. *See GM II*, 134 F.3d at 146 ("[O]ur construction of Rule 23 and application to the provisional settlement class is not controlling on the Louisiana court.").

75. *See* Young, *supra* note 11 ("[*Bridgestone II*] is the first time a federal court has said that the denial of certification has a preclusive effect on state court proceedings." (quoting class action defense attorney John Beisner)). In 2000, the Eighth Circuit enjoined plaintiffs from bringing state court class claims premised on identical "factual allegations" and "the same issues as a case dismissed without prejudice in federal court." Canady v. Allstate Ins. Co., 282 F.3d 1005, 1011, 1015 (8th Cir. 2000). Although resulting in an injunction resembling the one issued in *Bridgestone II*, the Eighth Circuit's reasoning focused not on the finality of the certification decision but instead on the plaintiffs' lack of standing in the case. *Id.* at 1015. Indeed, the court cited in dictum the cases discussed in Part II.B of this Note and stated: "We recognize that denial of class certification alone does not constitute a final judgment on the merits sufficient to

C. Bridgestone II: *The Perfect Test Case?*

In May 2003, the Seventh Circuit issued the *Bridgestone II* opinion, surprising many commentators with its willingness to enjoin plaintiffs from pursuing any type of nationwide class action.[76] Yet the remedy was hardly shocking, given the startling facts surrounding the massive litigation. Regulators ordered the recall of more than ten million tires after tread separation on the tires was linked to accidents causing 271 deaths and more than 700 injuries.[77] Ford and Bridgestone/Firestone settled hundreds of personal injury lawsuits stemming from these rollovers and tire blowouts.[78] Groups of plaintiffs' attorneys also filed consumer actions in at least twenty-seven different federal districts on behalf of individuals whose tires had *not* malfunctioned.[79]

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satisfy the res judicata principles underlying the relitigation exception to the Anti-Injunction Act." *Id.* at 1018–19 n.9. This distinction can no longer be good law. The *Canady* court removed the lawsuits filed in state court pursuant to the All Writs Act, 28 U.S.C. § 1651(a) (2000), a practice that the Supreme Court later foreclosed in *Syngenta Corp. v. Henson*, 537 U.S. 28, 33 (2002). Now that such removal is improper, the *Canady* approach is not viable. Federal courts cannot enjoin state proceedings on the basis of standing alone because state courts can, without infringing upon the Constitution, "issue advisory opinions or . . . determine matters that would not satisfy the more stringent requirement in the federal courts that an actual 'case' or 'controversy' be presented for resolution." N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 8 n.2 (1988).

76. *See, e.g.*, Recent Case, 117 HARV. L. REV. 2031, 2038 (2004) ("Though perhaps well-intentioned, the Seventh Circuit's ruling diverges too far from fundamental legal and constitutional principles . . . ."); Young, *supra* note 11 (noting how the case "bowled over attorneys with its sweeping—and, some say, wrongheaded—curtailment of state court authority to certify nationwide classes after a federal court has declined to do so").

77. *E.g.*, Caroline E. Mayer & Carrie Johnson, *Firestone to Recall More Tires*, WASH. POST, Oct. 5, 2001, at E1; *cf.* ADAM PENENBERG, TRAGIC INDIFFERENCE: ONE MAN'S BATTLE WITH THE AUTO INDUSTRY OVER THE DANGERS OF SUVS (2003) (telling a story of the tire litigation from the perspective of one plaintiff's personal injury lawyer).

78. *E.g.*, Alison Gregor, *Tire Trial: Settlement in McAllen*, SAN ANTONIO EXPRESS-NEWS, Aug. 25, 2001, at A1. Ford and Bridgestone/Firestone chose to litigate other suits, such as a Nebraska wrongful death suit filed when a woman was abducted and killed after her Ford Explorer's Firestone tires failed, leaving her "alone and stranded." *See* Stahlecker v. Ford Motor Co., 667 N.W.2d 244, 249 (Neb. 2003); *id.* at 257 (upholding the dismissal of the lawsuit because the "criminal assault constituted an efficient intervening cause which precludes a determination that negligence on the part of Ford [or] Firestone was the proximate cause of the harm which occurred").

79. *In re* Bridgestone/Firestone, Inc., ATX, ATX II & Wilderness Tires Prods. Liab. Litig., No. 1373, 2000 WL 33416573, at *1 (J.P.M.L. Oct. 24, 2000). The MDL order noted that one of the purposes of federal court consolidation is to "prevent inconsistent pretrial rulings (particularly with respect to overlapping class certification requests)." *Id.*

After these actions were consolidated, the reviewing district court, sitting in Indiana, certified a nationwide class involving more than sixty million tires, three million vehicles, and sixty-seven tire design specifications,[80] concluding that Indiana choice-of-law analysis would apply a single state's law to the entire class.[81] The Seventh Circuit reversed and ordered the class decertified, holding it "so unwieldy . . . that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims."[82] The Supreme Court later denied certiorari, closing a two-year battle over certification in the MDL proceeding.[83]

Almost immediately after the Seventh Circuit ordered the class decertified, plaintiffs' attorneys filed similar lawsuits in a number of state courts. "One state judge certified a nationwide class on the day [that the] complaint was filed, without awaiting a response from the defendants and without giving reasons."[84] When the defendants petitioned the district court for injunctive relief, Judge Sarah Evans Barker dismissed the request on just the moving papers, calling such relief "extraordinary" and "unprecedented."[85] The Seventh Circuit

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80. The numbers concerning the scope of the class are drawn from the Seventh Circuit's opinion in *Bridgestone I*, 288 F.3d 1012, 1015 (7th Cir. 2002).

81. *In re* Bridgestone/Firestone Inc., ATX, ATX II and Wilderness Tires Prods. Liab. Litig., 205 F.R.D. 503, 513 (S.D. Ind. 2001).

82. *Bridgestone I*, 288 F.3d at 1016.

83. Gustafson v. Bridgestone/Firestone, Inc., 537 U.S. 1105 (2003). The Court denied certiorari on January 13, 2003. *Id.* Plaintiffs first sought class certification in the MDL proceeding on February 2, 2001. *In re* Bridgestone/Firestone Inc., ATX, ATX II and Wilderness Tires Prods. Liab. Litig., 205 F.R.D. at 516.

84. *Bridgestone II*, 333 F.3d 763, 765 (7th Cir. 2003). The district court later identified this case as *Davison v. Ford Motor Co*., No. 00-C2298 (8th Cir. Ct. of Tenn. 2000), and held it within the scope of the Seventh Circuit's certification-blocking injunction. *See In re* Bridgestone/Firestone, Inc. Tire Prods. Liab. Litig., No. IP 00-9374-C-B/S, MDL No. 1373, at 1 (S.D. Ind. July 18, 2003) (clarifying notice in aid of the injunction of July 18, 2003). This document and all of the district court's orders cited in this Note are available online at the Southern District of Indiana's website, http://www.insd.uscourts.gov/Firestone/default.htm, which features a searchable database of the MDL docket and other helpful information about the litigation.

85. *In re* Bridgestone/Firestone, Inc. Prods. Liab. Litig., No. IP 00-9374-C-B/S, MDL No. 1373, at 2 (S.D. Ind. Feb. 4, 2003) (order denying motion to enjoin class proceedings). The district judge commented that "the flaws in [the defendants'] position are obvious and many," *id.* at 3, noting that "it should have been perfectly obvious" that other class actions would be filed in state courts, *id.* at 7, and that the defendants relied on an "assertion that . . . plainly rest[ed] on a mischaracterization of the bounds of the Seventh Circuit's decision [in *Bridgestone I*]," *id.* at 4. The district judge refused the defendants' injunction on the moving papers alone, without briefing, promptly finding "no basis for granting this extraordinary" relief. *Id.* at 2.

then partially reversed Judge Barker, issuing an injunction to prevent putative plaintiffs and their lawyers from pursuing certification of a nationwide class.[86] The Seventh Circuit noted that litigants still could bring individual suits and statewide classes but just could not "represent a national class of others similarly situated."[87]

Focusing on the negative policy implications of multiple certification battles, Judge Frank Easterbrook noted that refusing to issue an injunction gave plaintiffs a "heads-I-win, tails-you-lose" advantage.[88] "A single positive [the one judge who will certify a nationwide class] trumps all the negatives [the many judges who refuse to certify]."[89] The Seventh Circuit justified its order to issue a certification-blocking injunction on the basis of the relitigation exception to the AIA, holding that its decertification in *Bridgestone I* was "sufficiently firm" to warrant the preclusive effect of an injunction.[90]

III. THE DOCTRINAL VALIDITY OF FEDERAL INJUNCTIONS AGAINST PUTATIVE CLASS ACTIONS IN STATE COURT

As an unprecedented decision, *Bridgestone II* may be an anomaly in class action jurisprudence.[91] This Note argues, however, that to prevent state courts from intruding into properly federal matters and unfairly burdening defendants, federal courts can and should issue certification-blocking injunctions in appropriate circumstances.

As discussed in Part II, courts have used the "necessary in aid of jurisdiction" exception to the AIA to enjoin *competing* class actions through the settlement-protecting injunction.[92] In these cases, a federal court already has certified a nationwide class or is close to approving a settlement, and then issues an injunction against state

86. *Bridgestone II*, 333 F.3d at 769.

87. *Id.*

88. *Id*. at 767.

89. *Id*.

90. *Id.* Barring a successful collateral attack, the *Bridgestone/Firestone* consumer claims class litigation concluded in July 2003 when a Texas state court approved and certified a nationwide settlement class at the defendants' request. *See, e.g.*, Myron Levin, *Tire Maker to Add Safety Features to Settle Suits*, L.A. TIMES, July 25, 2003, at A-26 (noting that the settlement included a $19 million payout to the plaintiffs' lawyers and a $15 million consumer education plan).

91. *See supra* Part II.B (discussing cases in which courts refused to issue such injunctions).

92. *See supra* notes 61–62 and accompanying text.

interference with that settlement. By contrast, the "necessary in aid of jurisdiction" exception would not cover the certification-blocking injunction. Because the court issuing the injunction does not wish to exercise jurisdiction over a nationwide class, the court has no jurisdiction in need of aid.

The relitigation exception to the AIA, by which a federal court may enjoin state court proceedings "to protect or effectuate its judgments," provided the basis for the Seventh Circuit's certification-blocking injunction in *Bridgestone II*.[93] The relitigation exception, which the Supreme Court has admonished federal courts to invoke with restraint, was "designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court" and "is founded in the well-recognized concepts of *res judicata* and collateral estoppel."[94] Therefore, if a decision is entitled to preclusive effect, a court can properly issue an injunction over the issue that it already decided.

Collateral estoppel, or issue preclusion, is established when a court actually and necessarily litigates an issue between parties to a final judgment.[95] Therefore, for a certification decision to qualify for preclusive effect, the decision must meet the following criteria: a) it must be sufficiently final, b) it must decide the same issue as the issue to be enjoined, and c) it must be actually and necessarily decided. Courts must also consider the timing of injunctions. This Part explains the circumstances under which a denial of certification will meet all of these requirements.

A. Finality of the Certification Denial

As mentioned in Part II.B, the earlier rejections of certification-blocking injunctions could be said to rest on lack of interlocutory appeal. When an order cannot be appealed, it can hardly be called a "sufficiently firm" judgment that warrants federal court protection. The recent adoption of Rule 23(f), however, made class certification an appealable order; thus, the certification decision seems "final" enough for purposes of the relitigation exception.

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93. *Bridgestone II*, 333 F.3d at 765 (quoting 28 U.S.C. § 2283 (2000)). For a good history of the relitigation exception to the AIA, see George A. Martinez, *The Anti-Injunction Act: Fending Off the New Attack on the Relitigation Exception*, 72 NEB. L. REV. 643 (1993).

94. Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 147 (1988).

95. *See, e.g.*, Brown v. Felsen, 442 U.S. 127, 139 n.10 (1979) ("[C]ollateral estoppel treats as final only those questions actually and necessarily decided in a prior suit.").

A leading treatise, however, cautions that "[t]he relitigation exception generally does not encompass procedural rulings."[96] Although generally true, this notion stems primarily from the practical aspects of seeking this type of injunction. Litigants who lose most procedural rulings will lack the incentive to start anew in a different state court because most procedural rulings do not change the face of litigation as drastically as the certification decision. The *Bridgestone II* court noted that the certification decision "determines the identity of the parties and the stakes of the case," thus concluding that "the permissible scope of litigation is as much substantive as it is procedural."[97] Although Rule 23 is classifiable as "procedural" for the purposes of which law a federal court applies when sitting in diversity, the Supreme Court recently noted that "the meaning of 'substance' and 'procedure' in a particular context is largely determined by the purposes for which the dichotomy is drawn."[98]

Even before *Bridgestone II*, a few courts had already enjoined parties from relitigating procedural issues in other contexts such as discovery. For example, one circuit court allowed a federal district court to enjoin plaintiffs from using evidence brought out in discovery in a state forum, so as "to prevent unnecessary or vexatious litigation."[99] Another court explained that "the Anti-Injunction Act does not bar courts with jurisdiction over complex multidistrict litigation from issuing injunctions to protect the integrity of their rulings, including pre-trial . . . discovery orders."[100] If decisions surrounding the proper scope of discovery are sufficiently final for the purposes of the AIA, by analogy certification decisions must be as well.

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96. 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 121.08[3], at 121-46 (3d ed. 2000).

97. *Bridgestone II*, 333 F.3d at 768.

98. Jinks v. Richland Co., 538 U.S. 456, 465 (2003) (quoting Sun Oil Co. v. Wortman, 486 U.S. 717, 726 (1988)).

99. Sperry Rand Corp. v. Rothlein, 288 F.2d 245, 249 (2d Cir. 1961); *see also In re* Prudential Ins. Co. of Am., 261 F.3d 355, 368 (3d Cir. 2001) (relying on *Sperry* to uphold an injunction preventing the plaintiffs from engaging in discovery).

100. Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1203 (7th Cir. 1996). The *Winkler* court actually reversed the injunction for abuse of discretion, because the district judge had not reviewed the allegedly privileged document in camera before enjoining the plaintiffs from pursuing discovery in state court. *Id.* at 1204. The court explicitly held, however, that the AIA permits the issuance of injunctions in multidistrict litigation to protect pretrial orders, *id.* at 1203, and allowed the parties to file for a narrower injunction, *id.* at 1206.

Similarly, numerous courts have upheld injunctions against state proceedings after the federal forum determined that the case should be submitted to arbitration.[101] At their most basic level, injunctions against both future class certifications and litigation in state forums after arbitration is ordered are fundamentally the same: a federal court enjoins a state court from litigating issues after a federal court determination that such litigation would be improper.

Furthermore, another court has ruled that questions surrounding the adequacy of representation in the class action context, when answered in the affirmative, are sufficiently final for the purposes of the relitigation exception to the AIA.[102] The court ruled that opt-out plaintiffs could be enjoined from pursuing a legal malpractice claim against class counsel because the court's decision to approve a class settlement necessarily entailed a determination that the class counsel adequately represented all interests.[103]

B. Issue Similarity

Assuming that a denial of certification is sufficiently final, the issues presented before a federal court deciding the certification question must be the same as the issues in any putative class action that the court plans to enjoin. In *Bridgestone II*, the Seventh Circuit did not discuss this "same issues" requirement, instead relying exclusively on section 13 of the Restatement (Second) of Judgments.[104] This section, entitled Requirement of Finality, states that "for purposes of issue preclusion (as distinguished from merger and bar), 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect."[105] The problem with the Seventh Circuit's

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101. *See, e.g.*, Great Earth Cos. v. Simons, 288 F.3d 878, 894 (6th Cir. 2002) (holding that the injunction at issue was necessary to protect the district court's judgment); Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 985 F.2d 1067, 1069 (11th Cir. 1993) (stating that federal courts have the authority to enjoin arbitration to prevent litigation); Samuel C. Ennis & Co. v. Woodmar Realty Co., 542 F.2d 45, 49 (7th Cir. 1976) (concluding that an injunction was appropriate to effectuate the district court's judgment).

102. Thomas v. Powell, 247 F.3d 260, 264 (D.C. Cir. 2001).

103. *Id*. The opt-out plaintiffs filed a complaint alleging that "the class action attorneys 'sold out' their clients" and "engaged in collusive secret negotiations to the detriment of their clients." *Id*. The district court's decision to approve the class settlement "squarely decided" these questions, and thus an injunction was appropriate. *Id*.

104. *See Bridgestone II*, 333 F.3d 763, 767 (7th Cir. 2003) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1978)).

105. RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1978).

analysis is that the finality requirement is a necessary, but not sufficient, requirement of issue preclusion. Also required is an actual and necessary determination of the same issues over which a party later seeks to assert preclusive effect.[106]

1. *"Semantic" Differences?* Most state class action rules are modeled after or are identical to Federal Rule 23, at least before its 1998 and 2003 amendments.[107] A state court may, however, interpret its rule differently, even when its rule is identical to Rule 23.[108] The existence of different standards of interpretation led the Second Circuit to refuse to give preclusive effect to a "state court's ruling that [an earlier suit] in that court could not be maintained as a class action."[109] In doing so, the court recognized that "issues are not identical when the standards governing them are significantly different."[110] The Second Circuit focused on the significant differences between New York's interpretation of its class action statute, which required that "the complaint allege a wrong against the class as a class," and Federal Rule 23, under which certification "is usually warranted when individual wrongs are alleged to have been pursuant to a common plan."[111]

This significant difference was the focus of the Second Circuit's decision; implicit in the court's analysis is that *minute* differences in interpretation do not destroy issue similarity. Another court

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106. *See, e.g.*, *id.* § 27 ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."); *cf.* Brown v. Felsen, 442 U.S. 127, 139 n.10 (1979) ("[C]ollateral estoppel treats as final only those questions actually and necessarily decided in a prior suit.").

107. See Rory Ryan, Note, *Uncertifiable?: The Current Status of Nationwide State-Law Class Actions*, 54 BAYLOR L. REV. 467, 469 n.3 (2002), for a listing of state class action rules and their similarities and differences to Rule 23.

108. *See, e.g.*, Morgan v. Deere Credit, 889 S.W.2d 360, 367–68 (Tex. Ct. App. 1994) (noting both the "difference in some of the rules, [and that] those rules that are identical sometimes have been applied differently by Texas courts" to reject giving preclusive effect to a federal court class action determination); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1114 n.206 (1996) ("[E]ven if one court rejects class certification, there is generally no collateral estoppel effect on the ability of a second court in a different jurisdiction to consider certifying the class."). *GM II*, *see supra* notes 72–74 and accompanying text, also notes that "our construction of Rule 23 and application to the provisional settlement class is not controlling on the Louisiana court, because it is not bound by our interpretation of Rule 23." 134 F.3d 133, 146 (3d Cir. 1998).

109. Cullen v. Margiotta, 811 F.2d 698, 732 (2d Cir. 1987).

110. *Id*.

111. *Id.* at 733.

recognized the importance of similarity in interpretations of class action procedural rules in holding that "a party cannot avoid the preclusive effect of a denial of class certification . . . [by] pointing to largely illusory differences between statutes that are designed for essentially identical purposes."[112] That court discussed how "semantic differences" in state and federal rules were not "considered" when courts, both state and federal, determine the preclusive effect of denials of certification.[113] When state class action rules are interpreted substantially similarly to the federal class action rule, a court may properly issue an injunction, but only to the narrow extent that the state rules are similar.

2. *Constitutional Implications.* Recognizing differences as merely semantic, however, cannot justify an injunction against *all* nationwide classes. Those forums that do offer substantial differences from Federal Rule 23 will quickly become visible and emerge as class action magnets. To alleviate the problems of competing putative classes, then, federal courts must issue injunctions following denials of certification that *are* based on an issue that stays the same, regardless of the forum. That issue is compliance with the United States Constitution.

Constitutional issues are often implicated in class adjudication, but courts usually do not undertake an explicit constitutional analysis when denying certification, relying instead exclusively on Rule 23.[114] Failure to mention explicitly the constitutional underpinnings of Rule

112. Lee v. Criterion Ins. Co., 659 F. Supp. 813, 823 (S.D. Ga. 1987).

113. *Id*.

114. Failing to decide explicitly the constitutional issue within the context of statutory review is the preferred method of appellate review. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841 (1986) ("'[F]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality.' Where such 'serious doubts' arise, a court should determine whether a construction of the statute is 'fairly possible' by which the constitutional question can be avoided." (citations omitted)). This method of relying on statutory interpretation to save an otherwise unconstitutional statute does not prevent constitutional issues from deciding the appropriateness of class action relief. Indeed, the Court's class action jurisprudence often centers around constitutional issues. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807, 822 (1985) (deciding personal jurisdiction and choice-of-law issues on constitutional grounds); Hansberry v. Lee, 311 U.S. 32, 43–44 (1940) (constitutionalizing the adequacy of representation determination). *But see* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 373 (2000) (describing the Court's adequacy of representation requirement as an "embryonic theory" because of the Court's issuance of "[f]act-sensitive and rule-dependent decisions that shrink from announcing any broad constitutional norms," suggesting that the Justices "effectively whisper 'Rule 23 does not authorize that,' rather than proclaim 'Due Process forbids that'").

23's requirements, however, should not prevent a federal court from enjoining putative class plaintiffs from relitigating those same constitutional issues. Implicit in many denials of certification is a recognition that any decision rendered by class adjudication would not be entitled to enforcement under the Full Faith and Credit and Due Process Clauses.[115] Professor Edward F. Sherman explains: "In evaluating case aggregation, perhaps the most compelling concern is whether the lack of individuation so affects the quality of decision-making that it denies fairness and due process. Clearly due process is denied if the aggregated case is unmanageable . . . ."[116] Professor Sherman then explains that the class action requirements are aimed at insuring that the case is manageable and that "the jury will be able to make discriminating judgments without being unduly confused."[117]

Aggregative litigation often quickens adjudication, but many times at the expense of individual concerns. If individualized justice is obscured by a class action, certifying the class violates the Supreme Court's admonition that "the Constitution recognizes higher values than speed and efficiency."[118] Even if a state court deems efficiency more important than processing individual defenses or claims, the Constitution may require otherwise. This basic principle has been constitutionalized by the Court's requirement that class representatives serve the interests of the class before unnamed class

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115. *See* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); U.S. CONST. amend. XIV, § 1, cl. 3 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

116. Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231, 251 (1991). Related to manageability is the idea that a class defendant must be able to defend the lawsuit against individual members of the class. *See*, *e.g.*, Lindsey v. Normet, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense."); W. Elec. v. Stern, 544 F.2d 1196, 1199 (3d Cir. 1976) (noting that denying the defendants the right to "present a full defense on the issues would violate due process"); S.W. Ref. Co. v. Bernal, 22 S.W.3d 425, 437 (Tex. 2000) (explaining that even within class actions, "basic to the right to a fair trial—indeed, basic to the very essence of the adversarial process—is that each party have the opportunity to adequately and vigorously present any material claims and defenses").

117. Sherman, *supra* note 116, at 251. Professor Sherman argues that "[p]laintiffs' interests in forum selection, or defendants' insistence on dealing individually with plaintiffs in a divide-and-conquer strategy, may be important to them, but are not fundamental to procedural justice." *Id.* at 253. Far more than just the loss of "strategic advantages," *id.*, the constitutional implications of class actions include choice-of-law constraints and the ability to present individual claims or defenses.

118. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

members are bound.[119] In short, adequacy of representation is a constitutional requirement. If a denial of certification is premised on fundamental conflicts that exist among class members,[120] that decision rests on not only Rule 23(a), but also the Constitution.

Constitutional guarantees of fairness to defendants may also mandate a denial of certification. For example, the Court has set constitutional limits on the choice of law used in class adjudication, requiring that the choice of law not be arbitrary or unfair.[121] The Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*[122] prevents a forum state from changing or altering its choice-of-law rules merely because a case is complex. One commentator explains why: "Because choice of law is part of the process of defining the parties' rights, it should not change simply because, as a matter of administrative convenience and efficiency, we have combined many claims in one proceeding . . . ."[123]

Shortly after the *Shutts* decision, Professors Arthur R. Miller and David Crump wrote an influential article explaining the importance of the constitutional analysis: "The persistence of the magnet forum problem, after *Shutts*, may depend upon whether the constitutional standards are loosely or tightly construed. Loose requirements will enable the forum to prefer its own policy in derogation of more significant interests in other states."[124] If a federal court indicates a desire to have *tighter* constitutional standards for choice of law and refuses to certify a class on that basis, the denial of certification is thus a constitutional one entitled to preclusive effect.

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119. *See Hansberry*, 311 U.S. at 45–46 (holding that a party whose interests were adverse to class representatives could not be bound by a class action judgment).

120. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) (decertifying a class under Rule 23 because of "conflicts of interests" among class members). For an overview of the adequacy requirement, see generally Debra Lyn Bassett, *When Reform Is Not Enough: Assuming More Than Merely "Adequate" Representation in Class Actions*, 38 GA. L. REV. 927 (2004).

121. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (requiring that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair").

122. 472 U.S. 797 (1985).

123. Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 549 (1996).

124. Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum v. Shutts, 96 YALE L.J. 1, 60 (1986).

With these constitutional choice-of-law constraints on using a single state's law to determine the rights and responsibilities of all parties, many putative class actions, such as the one involved in *Bridgestone II*, are too unmanageable to certify.[125] The potentially devastating effects of wide variances in state law are too significant for a court to ignore or leave to a "kind of Esperanto [jury] instruction."[126] These important manageability and choice-of-law concerns will often subsume the Rule 23 requirements, implicitly making certification a constitutional determination.

Further, these constitutional limits on choice of law include the requirement that a state court not render another state's law a nullity or "abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them."[127] Yet certifying a nationwide class action may indeed abrogate a defendant's rights. Take the *Avery*[128] case: holding an insurer liable for following the laws of other states nullifies those laws, not just in Illinois, but also in the forty-eight states that the certified class purports to serve.[129]

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125. *See Bridgestone I*, 288 F.3d 1012, 1018 (7th Cir. 2002) (noting that "[s]tate consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules," and decertifying a nationwide class because "a single nationwide class [was] not manageable"). A substantial body of scholarship has developed around the question of whether nationwide classes can ever be manageable and, if so, how to circumvent the conflict-of-laws problems. *See, e.g.*, Stephen R. Bough & Andrea G. Bough, *Conflict of Laws and Multi-State Class Actions: How Variations in State Law Affect the Predominance Requirement of Rule 23(b)(3)*, 68 UMKC L. REV. 1, 3 (1999); Scott Fruehwald, *Constitutional Constraints on State Choice of Law*, 24 DAYTON L. REV. 39, 43 (1998); John C. Anderson, Note, *Good "Brick" Walls Make Good Neighbors: Should a State Court Certify a Multistate or Nationwide Class of Indirect Purchasers?*, 70 FORDHAM L. REV. 2019, 2030 (2002); Ryan Patrick Phair, Comment, *Resolving the "Choice-of-Law Problem" in Rule 23(b)(3) Nationwide Class Actions*, 67 U. CHI. L. REV. 835, 842 (2000).

126. Castano v. Am. Tobacco Co., 84 F.3d 734, 750 (5th Cir. 1996); *see also* Walsh v. Ford Motor Co., 807 F.2d 1000, 1016 (D.C. Cir. 1986) ("Appellees see the 'which law' matter as academic. They say no variations in state warranty laws relevant to this case exist. A court cannot accept such an assertion 'on faith.'" (footnote omitted)). Justice (then Judge) Ruth Bader Ginsburg pointed to "the general, unstartling statement made in a leading treatise: 'The Uniform Commercial Code is not uniform.'" *Id.* (quoting J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 7 (2d ed. 1980)). Further, consumer fraud statutes are far from identical. *See, e.g.*, *In re* Ford Motor Co. Ignition Switch Prods. Liab. Litig., 194 F.R.D. 484, 489 (D.N.J. 2000) ("[T]here exist many legal variations between the states' consumer protection laws."); Lyon v. Caterpillar, Inc., 194 F.R.D. 206, 219–20 (E.D. Pa. 2000) (noting that "each state's consumer fraud act is unique" and "not uniform").

127. *Shutts*, 472 U.S. at 822 (quoting Home Ins. Co. v. Dick, 281 U.S. 397, 410 (1928)).

128. Avery v. State Farm Mut. Auto. Ins. Co., 786 N.E.2d 180 (Ill. App. Ct. 2002).

129. *See supra* notes 32–41 and accompanying text.

Professor Scott Fruehwald has argued further that even if class certification passes choice-of-law muster, it does not necessarily pass due process muster.[130] In the context of punitive damages, the Court has explained that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."[131] Although the use of due process to limit the size of punitive damages may be constitutionally questionable,[132] the principle underlying much of the Court's jurisprudence in this area—that individual states cannot or, perhaps more appropriately, should not dictate policy to other states[133]—applies equally well in the class action context. Again using *Avery* as an example, holding an insurer liable for using generic replacement parts does indeed violate due process because it forces insurers either to use nongeneric parts, an expensive practice that many states discourage, or face damages for the insurer's practices across the country.

This Note does not purport to define specifically when certifying a class violates the due process and full faith and credit requirements

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130. *See* Scott Fruehwald, *Individual Justice in Mass Tort Litigation: Judge Jack B. Weinstein on Choice of Law in Mass Tort Cases*, 31 HOFSTRA L. REV. 323, 358 (2002) (reviewing *Simon v. Phillip Morris, Inc.*, 124 F. Supp. 2d 46 (E.D.N.Y. 2000), to conclude that class certification was permissible under *Shutts* but not under economic substantive due process).

131. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 (1996); *see also* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003) (holding that a state does not "have a legitimate concern in imposing punitive damages to punish a defendant for unlawful conduct committed outside of the State's jurisdiction").

132. *See* Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 443 (2001) (Thomas, J., dissenting) ("I continue to believe that the Constitution does not constrain the size of punitive damages awards."); *BMW*, 517 U.S. at 599 (Scalia, J., dissenting) (explaining that the "Constitution provides no warrant for federalizing yet another aspect of our Nation's legal culture (no matter how much in need of correction it may be)" and arguing that the new rule is "constrained by no principle other than the Justices' subjective assessment of the 'reasonableness' of the award in relation to the conduct for which it was assessed"). Under a vision of private tort law—perhaps the more appropriate role of the court system—restraints on punitive damages under the Due Process Clause are "more comprehensible." *See* John C. P. Goldberg, *Tort Law for Federalists (And the Rest of Us): Private Law in Disguise*, HARV. J.L. & PUB. POL'Y (forthcoming 2004) (on file with the *Duke Law Journal*) (arguing that the debate over excessive punitive damages has been "misframed," and that once properly framed—"Whether a tolerably fair process of adjudication could generate the conclusion that the Campbells were entitled to extract $145 million from State Farm for what it did to them?"—the Court's conclusion that State Farm was denied "minimum standards of fairness [ ] becomes quite a bit more comprehensible").

133. *See Campbell*, 538 U.S. at 418 ("A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.").

of the Constitution. Rather, this argument rests on the fact that judges making certification decisions implicitly consider these constitutional requirements. For example, although the putative class was decertified in *Bridgestone I* because, *inter alia*, choice-of-law concerns made the class unmanageable under Rule 23(b)(3),[134] this determination was more than just a rule-based one.[135] The *Bridgestone I* court explained:

> No matter what one makes of the decentralized approach as an original matter, it is hard to adopt the central-planner model without violence not only to Rule 23 but also to principles of federalism. Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court.[136]

In the *Bridgestone* consumer fraud litigation, choice-of-law concerns made the putative class unconstitutional, and the court's determination to decertify the class was thus entitled to preclusive effect. A denial of certification with constitutional underpinnings necessarily involves the same issues as later certification decisions, making the denial proper for injunctive relief regardless of how liberally a state would interpret its own class action requirements.[137]

C. Necessarily Decided?

Courts often deny certification because plaintiffs have failed to prove a combination of several of the prerequisites to certification.[138] In the class action context, a judge is likely to decide the certification question on numerous fronts, thus implicating the debate on whether

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134. *See Bridgestone I*, 288 F.3d 1012, 1018 (7th Cir. 2002) ("Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable.").

135. *See id.* at 1020 (discussing how applying the "central planning model—one case, one court, one set of rules, one settlement price for all involved—suppresses information that is vital to accurate resolution").

136. *Id*.

137. *Cf.* Minutes of the Civil Rules Advisory Committee Meeting 13 (Mar. 12, 2001), *at* http://www.uscourts.gov/rules/Minutes/CRACMM01.pdf (on file with the *Duke Law Journal*):

> State-court certification of the same class, reaching people in many other states, may take on issues that no court should undertake to address in a class setting. The federal court, for example, may have been deterred by choice-of-law difficulties; should a state court be free to ignore the same difficulties, or to presume to resolve them?

138. *See, e.g.*, *In re* N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 851 (9th Cir. 1982) ("[T]he combined difficulties overlapping from each of the elements of Rule 23(a) preclude certification in this case.").

a court should grant preclusive effect to an earlier determination that rested on multiple, independent grounds.[139] Because the requirements of Rule 23 often merge, however,[140] a holding that certification is not proper for failing any, all, or some of the prerequisites should be treated as a single ground for the decision. One court has taken such an approach.[141]

However, some denials of certification may be based on one particular factor that is easily remediable in another forum. These denials—if based exclusively on failing that one requirement—should not have preclusive effect, because a later plaintiff could fix the certification defect. In such cases, the denial of certification is not "sufficiently firm."[142] If, however, the denial of certification rests on *both* a factor that can later change *and* one that will not, failing the latter is enough to warrant preclusive effect for the denial of the entire putative class.

1. *Rule 23(a) Requirements.* Rule 23(a) contains four basic requirements for class actions: numerosity, commonality, typicality, and adequacy of representation.[143] Of these, numerosity, typicality, and adequacy of representation are not sufficiently firm to warrant preclusive effect in every case. For example, a denial of certification may rest on the fact that "bare allegations," "unsupported

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139. The debate and circuit split is spelled out in Monica Renee Brownewell, Note, *Rethinking the Restatement View (AGAIN!): Multiple Independent Holdings and the Doctrine of Issue Preclusion*, 37 VAL. U. L. REV. 879 (2003).

140. *See, e.g.*, Amchem Prods. v. Windsor, 521 U.S. 591, 626 n.20 (1997):

> The adequacy-of-representation requirement "tend[s] to merge" with the commonality and typicality criteria of Rule 23(a), which "serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."

(alteration in original) (quoting Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982).

141. *In re* Dalkon Shield Punitive Damages Litig., 613 F. Supp. 1112, 1116 (E.D. Va. 1985) (giving preclusive effect to another court's denial of certification on the "cumulative effect" of 23(a) inadequacies without distinguishing among them).

142. RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1978).

143. *See* FED. R. CIV. P. 23(a):

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

conclusions,"[144] or "mere conjecture"—promises of more putative class members—will not satisfy the numerosity requirement of 23(a)(1).[145] Speculation, of course, may in time become reality; therefore, injunctive relief is not appropriate when a denial of certification is based solely on the fact that more plaintiffs have not materialized. Similarly, when certification is denied on a 23(a)(3) basis (the named plaintiff has a unique factual relationship with the defendant), another named plaintiff, without such a relationship, could be substituted in another forum where certification would be appropriate. Rule 23(a)(4) presents a trickier situation: the requirement of adequate counsel and representation can be remediable in another forum or even in the first court, especially given the court's numerous new options for appointing counsel per 23(g).[146] Sometimes, however, a class will fail Rule 23(a)(4) because the interests of the class are too divergent and no representative is adequate.[147] Such a decision would be final.

A decision denying certification on Rule 23(a)(2), which requires that there be "questions of law or fact common to the class,"[148] is always sufficiently final: no change in circumstances could create a new common question of law or fact for the *decertified* class. Common questions among class members may later arise, however, if plaintiffs make new claims. Nevertheless, if the other requirements are met, an injunction preventing class treatment for the first type of claims is still proper because the class would be enjoined only to the extent that the certification decision was actually and necessarily decided. Narrowly defining the scope of the injunction is key. As an example, plaintiffs may first define a class so broadly—as *x*—that it fails to meet the commonality requirement, then later narrow the class enough—to *y*—that certification is proper.[149] The injunction

144. Barlow v. Marion County Hosp. Dist., 88 F.R.D. 619, 625 (M.D. Fla. 1980).

145. Kinsey v. Legg, Mason & Co., 60 F.R.D. 91, 100 (D.D.C. 1973).

146. FED. R. CIV. P. 23 (g) (describing procedures for appointing class counsel and providing for the designation of "interim counsel to act on behalf of the putative class").

147. *See, e.g.*, Hansberry v. Lee, 311 U.S. 32, 45 (1940) (finding a constitutional violation when the plaintiffs' class purported to represent people "whose substantial interests [were] not necessarily or even probably the same as those whom they [were] deemed to represent").

148. FED. R. CIV. P. 23 (a)(2). For (b)(3) classes (i.e., classes seeking damages), the commonality requirement is essentially a nullity, because common issues must *predominate* over individual issues. *See id.* R. 23 (b)(3); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 609 (1997).

149. Some defendants have argued that a class is too broad to meet the commonality requirement but that, once the class is defined narrowly enough to possess common questions, it then fails the numerosity requirement. *Compare* Kendrick v. Sullivan, 784 F. Supp. 94, 104–06

would govern a class defined as *x*, not a class defined as *y*, and therefore it would be sufficiently final and would cover the same issues already decided in the first decision.

2. *Rule 23 (b)(3) Requirements: Predominance and Superiority.* Rule 23 (b)(3) damages classes are the most common—and controversial—classes.[150] In addition to requiring common questions of law or fact, damages classes require that these common questions "predominate over any questions affecting individual members."[151] Likewise, a class action must be "superior to other available methods for the fair and efficient adjudication of the controversy."[152] As with the analysis under the 23(a)(2) commonality requirement, the (b)(3) shortcomings of a putative class will not magically disappear if presented later. More importantly, no amount of new discovery or better counsel can cure the deficiencies inherent in (b)(3) pitfalls,

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(S.D.N.Y. 1992) (rejecting the position that, once sufficiently narrowed, the class would not possess common questions), *with* Kohn v. Mucia, 776 F. Supp. 348, 353 (N.D. Ill. 1991) (denying certification after having narrowed the class to meet the commonality requirement because it was "only speculation to claim" that the class was sufficiently numerous on the particular factual record). A denial of certification on this basis would be proper for injunctive relief, but only to the extent that the court enjoined certification of a class defined too broadly. For example, in *Kohn*, a federal court determined that given the commonality requirement any putative class should include *only* "those people whose cars were older than seven years and properly registered when destroyed; who received no notice whatsoever; and whose then current addresses were on file with the Secretary of State." *Id*. If the plaintiffs then filed a putative class action in a state court with a broader definition, the federal court could properly enjoin them. However, the *Kohn* court then determined that this narrow class was not sufficiently numerous to warrant certification. *Id*. If plaintiffs could later produce enough putative class members of this narrow definition to satisfy the numerosity requirement, they could properly pursue a class action in a different forum. *See id*. (implying that certification could be granted if the commonality and numerosity requirements were met).

150. 13 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 13:9 (4th ed. 2002) ("Most class actions are certified under Rule 23(b)(3)."); *cf.* Advisory Comm. on the Fed. Rules of Civil Procedure, *supra* note 21, at 28:

> It is safe to say that the eminent authors of [Rule 23(b)(3)] had little conception in 1966 that a mere rule of joinder . . . would become such a prominent feature in the landscape of modern litigation, dramatically altering the stakes, scale, and outcomes in certain kinds of class action lawsuits.

151. FED. R. CIV. P. 23(b)(3).

152. *Id*. In making the (b)(3) determination, a court may consider:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id.

because class-based issues will never predominate over claims with individualized concerns. Thus, a denial on (b)(3) grounds would be "sufficiently firm" for the purposes of the relitigation exception to the AIA.[153]

Furthermore, as discussed in Part III.B.2, manageability concerns and choice-of-law analysis factor heavily into the (b)(3) determination; certification denials on this basis thus implicate significant due process concerns.[154] These constitutional underpinnings create similar issues for each certification decision, regardless of whether a state court class action rule would require predominance or superiority to certify the class.[155]

D. Timing Issues

A final comment regarding the doctrinal validity of injunctive relief concerns the timing issues surrounding the federal injunction. Although rejecting the injunction before it, the Supreme Court in *Parsons Steel, Inc. v. First Alabama Bank*,[156] a case not cited by the Seventh Circuit in *Bridgestone II*, provided injunction-seeking litigants a strong foundation for arguments in favor of relief. The *Parsons Steel* Court held that an injunction was improper when a state court had already decided the preclusive effect of a federal court judgment;[157] implicit in this analysis is a recognition that federal courts may issue injunctions to protect their judgments under the relitigation exception to the AIA, absent a state court's determination of the preclusive effect of the federal decision.[158] This holding "creates a strong incentive" for successful federal litigants to seek a federal

153. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1978) ("'[F]inal judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.").

154. *See supra* notes 114–37 and accompanying text.

155. CONTE & NEWBERG, *supra* note 150, § 13:11 ("Not all states, however, require a showing that a class action be superior. Illinois and Pennsylvania will permit class actions on a mere showing of appropriateness.").

156. 474 U.S. 518, 519 (1986).

157. *See id.* (holding that a federal court may not enjoin state court proceedings when "the prevailing party in the federal suit had litigated in the state court and lost on the res judicata effect of the federal judgment").

158. The basic question of *Parsons Steel* was whether the AIA impliedly limits the Full Faith and Credit Act, 28 U.S.C. § 1738 (2000). The Court held that the AIA and Full Faith and Credit Act could be "construed consistently, simply by limiting the relitigation exception of the Anti-Injunction Act to those situations in which the state court has not yet ruled on the merits of the res judicata issue." *Id.* at 524.

injunction against repetitive state actions immediately to avoid litigation of the preclusion issue in state court.[159] *Parsons Steel* thus requires that any court issuing a certification-blocking injunction do so before a state court considers and rejects the preclusive effect of the federal court denial of certification.[160]

CONCLUSION

In appropriate circumstances, federal courts can and should issue injunctions to prevent nationwide class actions in state court. The effectiveness of these injunctions in solving the problems described, however, will be severely limited if defendants cannot get to federal court in the first place. Plaintiffs' lawyers are already adept at making class actions "removal-proof";[161] to avoid certification-blocking injunctions, plaintiffs' lawyers need only coordinate so that no one files a removable case. In massive litigation such as *Bridgestone II*, the temptation to file lawsuits quickly may result in quite a few "inartful" complaints that do wind up in federal court. In less obvious class actions, however, a coordinated plaintiffs' bar may get a class certified in state court before a single removable case is ever filed.

This ease of evasion suggests a legislative solution: federalizing most class actions by allowing removal with only a minimal level of diversity jurisdiction.[162] Such legislation offers a far better solution

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159. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 11.2, at 732 (4th ed. 2003); *see also id*. (explaining that if the preclusion issue is presented and lost in state court, "it will bar a subsequent federal injunction," and that "after *Parsons Steel*, the person subjected to a repetitive suit in state court should immediately seek a federal court injunction").

160. The *Bridgestone II* court discussed, but did not cite, how one state court, later identified as *Davison v. Ford Motor Co.*, No. 00-C2298 (8th Cir. Ct. of Tenn. 2000), certified a nationwide class "the day the complaint was filed, without awaiting a response from the defendants and without giving reasons," calling the state court's certification an "obvious violation of procedural requirements" that will "ultimately be vacated." *Bridgestone II*, 333 F.3d 763, 765–66 (7th Cir. 2003); *see also supra* note 84. Because the *Davison* court certified the class before the *Bridgestone I* decertification, it did not consider whether to give the federal decision preclusive effect. Therefore, although not bearing on the *Bridgestone II* injunction, the *Parsons Steel* limitation could prove important in future cases. Notable, though, is that neither the Seventh Circuit, nor the district court on remand issuing the injunction specifically to cover the *Davison* plaintiffs and their lawyers, undertook this analysis. *See In re* Bridgestone/Firestone, Inc. Tire Prods. Liab. Litig., No. IP 00-9374-C-B/S MDL No. 1373, at 1 (S.D. Ind. July 18, 2003) (clarifying notice in aid of the injunction of July 18, 2003).

161. *See* Thomas Merton Woods, Note, *Wielding the Sledgehammer: Legislative Solutions for Class Action Jurisdictional Reform*, 75 N.Y.U. L. REV. 507, 511–14 (2000) (discussing plaintiffs' tactics to defeat federal jurisdiction).

162. *See*, *e.g.*, Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. (2003); Class Action Fairness Act of 2003, S. 274, 108th Cong. (2003); Class Action Fairness Act of 2003,

than injunctive relief, given the limits of the Anti-Injunction Act, the need to rest denials of certification on constitutional grounds for the denial to be preclusive, and the difficult problems of establishing what is and can be precluded. As long as state courts have the power to adjudicate nationwide class actions, however, federal courts that have already found class relief inappropriate should, when the requirements for issue preclusion are met, enjoin putative class members from relitigating the certification question.

S. 1751, 108th Cong. (2003); *see also* Victor E. Schwartz et al., *supra* note 17, at 483 (advocating the federalization of nationwide class actions to alleviate state court bias against out-of-state defendants).