The Newest Frontier of Judicial Activism: Removal Under the All Writs Act

Joan E. Steinman, Chicago-Kent College of Law
THE NEWEST FRONTIER OF JUDICIAL ACTIVISM: REMOVAL UNDER THE ALL WRITS ACT

JOAN STEINMAN

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* Distinguished Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology. A.B. 1969, University of Rochester; J.D. 1973, Harvard University. I would like to thank Michael Decker and Dan Marko, graduates of Chicago-Kent, for their research assistance, my colleagues Nancy Marder and Margaret Stewart for their valuable comments on drafts of this Article and in discussions of its subject matter, and the Marshall Ewell Research Fund for financial support.
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PART I: PERVERSIVE ISSUES

INTRODUCTION

Despite a dearth of precedent, in recent years some federal courts have permitted defendants to remove cases from state to federal court by virtue of authority found in the All Writs Act.1 At first blush, this seems a questionable development. Federal statutes that expressly authorize removal seem to be the exclusive grants of authority to federal courts to obtain jurisdiction over cases commenced in state court, and federalism and harmonious relations between the federal and state courts seem to militate against judicial creation of additional vehicles for removal. The commentators who have mentioned this new development have found it remarkable, usually in a pejorative sense,2 but

courts have continued to embrace these removals. Their reach for such an innovation makes one wonder whether established mechanisms governing federal-state judicial relations are insufficient. When is there a need for proceedings to be adjudicated in federal court? When there is such a need, do traditional vehicles and generally accepted doctrines not suffice to get the cases there, if they originally were filed in state court? Do the ordinary provisions for removal, federal injunctions of state court proceedings under the circumstances authorized by the Anti-Injunction Act ("AIA"), and notions of supplemental or ancillary jurisdiction, even cumulatively, sometimes fail to sufficiently protect the interests of parties to proceedings in federal courts and of the federal courts themselves? If so, is interpreting the All Writs Act to authorize removal the solution or would a new and clear statutory authorization of removal be preferable? This Article examines these issues.

Part I, Section I of this Article provides background on the All Writs Act and the Anti-Injunction Act. Section II discusses the cases in which courts have either upheld removal pursuant to the All Writs Act or have expressly refused to do so. Section III addresses two threshold questions: why parties have sought All Writs removal, rather than anti-suit injunctions, and why we should be concerned if the "wrong" vehicle is used to bring cases into federal court.

Section IV then elaborates a multi-faceted argument that interpreting the All Writs Act to authorize removal is erroneous and undesirable. This section explains why considerations of both comity and federalism caution against loose interpretation of the All Writs Act, and argues that removal is more disruptive of federal-state judicial relations than are injunctions against state

Judge Weinstein's and the Second Circuit's handling of the Agent Orange case, In re Agent Orange Prods. Liab. Litig., 475 F. Supp. 928 (E.D.N.Y. 1979), aff'd, 996 F.2d 1425, 1431-32 (2d Cir. 1993). Professor Minow notes that subsequent claims filed in state court were moved "through extraordinary procedural maneuvers" to Judge Weinstein's court, and that the reviewing court approved "the remarkable use of the All Writs Act" to remove a state case to federal court, despite the absence of independent grounds for federal jurisdiction. Id. at 2031. See generally Thomas D. Rowe, Jr., Beyond the Class Action Rule: An Inventory of Statutory Possibilities to Improve the Federal Class Action, 71 N.Y.U. L. REV. 186, 197 (1996) (describing Judge Weinstein's and the Second Circuit's handling of the Agent Orange case as a "judicial tour de force... best regarded as an extraordinary remedy for truly extraordinary circumstances"); Geoffrey P. Miller, Overlapping Class Actions, 71 N.Y.U. L. REV. 514, 539 (1996) (stating that Judge Weinstein's opinion "might be considered a judicial mugging of parallel state-court proceedings," despite its possible merit as a matter of public policy); Richard H. Fallon, Jr., et al., Hart and Wechsler's The Federal Courts and The Federal System at 1617 (1996) [hereinafter Hart & Wechsler] (asking whether a federal judge ever has power to remove a case from state court sua sponte and, if so, what the source of such authority is, and concluding that "[i]n an extraordinary move... Judge Weinstein asserted such power under the All Writs Act" in the Agent Orange cases).

court proceedings. The section concludes that, because removal necessarily encompasses the injunction of state court proceedings, All Writs removal should be permissible, if at all, only when an injunction of those proceedings would be proper under the Anti-Injunction Act. The propriety of such an injunction, however, would not alone suffice to justify All Writs removal.

With this larger perspective in mind, Section IV then approaches the issue of All Writs removal from the perspective of proper statutory interpretation. It articulates why courts should eschew All Writs removal and base removal on ordinary removal statutes such as 28 U.S.C. § 1441 et seq., where that course is available. The section invokes evidence that Congress did not intend the All Writs Act to authorize or legitimate removal under any circumstances.

Section V supplements the foregoing arguments by showing that no need for removal under the All Writs Act has been demonstrated. When a federal injunction against state court proceedings is entered, one can expect the parties seeking adjudication to file suit in federal court, provided there is proper subject matter and personal jurisdiction, venue, and the ability to join necessary parties. Because one or more of those limitations on federal judicial authority sometimes will preclude commencement of a new action in federal court, Section V considers whether the doctrines of ancillary and supplemental jurisdiction may enable the federal courts to hear a dispute that the federal courts have enjoined the state courts from adjudicating. It explains how Article III and statutory jurisdictional problems may exist when those doctrines are inapplicable.

Focusing on the cases in which federal courts of appeals have upheld All Writs removal, Section V discusses whether an injunction of the state court proceedings would have been authorized by the Anti-Injunction Act, and if so, whether such an injunction, followed by the exercise of ancillary jurisdiction over proceedings then commenced in federal court, would sufficiently have protected the interests of the federal courts and of the parties. Finding overwhelmingly that the combination of these mechanisms would have protected the relevant interests, Section V concludes that none of the decided cases demonstrates a genuine need for removal under the All Writs Act.

Finally, Section VI of Part I of the Article reviews and proposes possible amendments to the Anti-Injunction Act that are intended to ratify the decisional law authorizing injunction of state court proceedings that would

4 Although the Article repeatedly speaks of the injunction "of state court proceedings" (or words to that effect), when injunctions are permitted by the Anti-Injunction Act, federal courts may enjoin state proceedings directly, by enjoining state courts, or more commonly, indirectly, by enjoining parties. See, e.g., Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 286 (1970); ERWIN C. CHEMERINSKY, FEDERAL JURISDICTION § 11.1, at 692-93 (3d ed. 1999); but see HERBERT B. NEWBERG & ALBA CONTE, 2 NEWBERG ON CLASS ACTIONS [hereinafter 2 NEWBERG ON CLASS ACTIONS] § 9.25, at 9-67 (3d ed. 1992) (stating that, "[A]ny injunction against other pending or future suits does not run against other courts of coordinate jurisdiction. Rather, a litigating party before the enjoining court is precluded from litigating in the enjoined court.").
interfere with federal disposition of some multi-district and class actions. With those amendments (or even without them, assuming the correctness of the referenced case law), Part I of the Article concludes that some combination of independent bases of federal jurisdiction, ordinary removal, injunctions of state proceedings, and ancillary or supplemental jurisdiction always will furnish a basis for federal adjudication of matters that it is important be adjudicated in federal court. As a result, removal pursuant to the All Writs Act is unnecessary and never should be permitted. For the same reasons, there is no need for a new, clearer, statutory authorization of removal for the kinds of situations in which courts have removed under the All Writs Act. The Article nonetheless suggests some language that Congress could use if it desired to expand removal authority to help ensure the effectiveness of federal jurisdiction over pending federal actions or to ensure the effectiveness of federal judgments and consent decrees.

Part II of the Article analyzes the special considerations that apply to anti-suit injunctions issued to protect federal class actions. It focuses, first, on the need for personal jurisdiction over the persons enjoined. It considers what is required for a class action court to exercise personal jurisdiction to enjoin absent members of opt out and mandatory classes from commencing or prosecuting related litigation. It then focuses on personal jurisdiction to enjoin absent class members who collaterally attack class action judgments, applying the principles thus far discussed to the class actions that have been removed pursuant to the All Writs Act. Part II of the Article then concentrates on the “right” of class members to collaterally attack a class action judgment, and on policies favoring and disfavoring the injunction of such collateral attacks. It illustrates the murky distinction between collateral attacks and other litigation that is transactionally related to class actions, through reference to the class action cases in which All Writs removal was purportedly effectuated. Having made these explorations, Part II concludes that if injunctions are available against litigation related to federal class actions and collateral attacks on class action judgments, then All Writs removal is wholly unnecessary. While legislative expansion of federal courts’ powers to exercise personal jurisdiction in class actions might be helpful, the courts’ ability to interpret the scope of their jurisdiction over persons is adequate. With that ability, augmented by the independent bases of federal jurisdiction, ordinary removal, injunctions of state proceedings, and ancillary jurisdiction, courts are adequately equipped to protect the interests of the federal court system and class litigants. Even in complex class actions that straddle federal and state court systems, there is no need for All Writs removal among the procedural tools available to the courts. Part II further concludes that if, for various policy reasons, injunctions against collateral attacks should not be available, All Writs removal of such suits would be equally inappropriate.
I. A BRIEF INTRODUCTION TO THE ALL WRITS ACT, THE ANTI-INJUNCTION ACT, AND THEIR RELATIONSHIP

The All Writs Act\(^5\) provides in part that, "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." It has been said that "the language of this statute, with lineage tracing back to the Judiciary Act of 1789, is both obscure and anachronistic."\(^6\) Generally, the Supreme Court has construed the Act to authorize a federal court to "issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained."\(^7\) The various writs contemplated by the Act include writs of coram nobis, injunction, mandamus and prohibition.\(^8\) Under appropriate circumstances, the Act empowers federal courts to issue anti-suit injunctions directed to either federal or state courts or the parties thereto, unless those injunctions are elsewhere prohibited.\(^9\) The writs issued may extend to persons who are "in a position to frustrate the implementation of a court order or the proper administration of justice," regardless of whether they were parties to the action in which the order was entered.\(^10\)

On occasion, the Court has spoken expansively of the judicial action permissible under the All Writs Act. For example, in a 1977 case, the Court

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\(^6\) In re County Collector, 96 F.3d 890, 899-900 (7th Cir. 1996).


\(^8\) A writ of coram nobis brings before the court that rendered a judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. The less common writs include writs of audita querela (the initial process in an action by a judgment defendant to obtain relief from the judgment, typically by virtue of some matter arising since rendition of the judgment), certiorari (a writ issued by a superior court to an inferior court, requiring a certified record of a case, to enable the issuing court to determine whether there have been any irregularities), habeas corpus ad prosequendum and testificandum (process to bring a prisoner before the court for trial or to testify), and ne exeat (writ forbidding its addressee from leaving, or from removing property from, the jurisdiction of the court). See generally 28 U.S.C.A. § 1651 (1994) (annotations 621 - end); BLACK’S LAW DICTIONARY (6th ed. 1990).

\(^9\) See, e.g., In re Johns-Manville Corp., 27 F.3d 48, 48-49 (2d Cir. 1994) (affirming a stay of all litigation against a personal injury settlement trust); Wesch v. Folsom, 6 F.3d 1465, 1470-74 (11th Cir. 1993), cert. denied, 510 U.S. 1046 (1994) (affirming, "in aid of jurisdiction and to effectuate [the] prior final judgment," an injunction of the prosecution of a state court action in which plaintiffs sought to have congressional districts redrawn. A federal court had imposed redistricting that was to remain in effect until the state legislature adopted a valid redistricting plan); United States v. BNS, Inc., 858 F.2d 456, 461-62 (9th Cir. 1988) (upholding, as modified, a preliminary injunction to preserve the federal court's jurisdiction under the Antitrust Procedure and Penalties Act).

quoted 1940s decisions for the propositions that the statute is a "legislatively approved source of procedural instruments designed to achieve the rational ends of law,"11 and that, "[u]nless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it."12

Nonetheless, the power conferred by the All Writs Act has limits. It is clear, in theory, that the Act does not authorize a court to issue writs as a means of acquiring jurisdiction when the court previously had none.13 Thus, the Act cannot be used to legitimize the filing of original actions in federal court.14 Similarly, it cannot be used to create appellate jurisdiction that otherwise would not exist.15 In general, when matters of jurisdiction have been at issue, the Court has confined the Act to "filling the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of

11 Id. at 172 (quoting Price v. Johnston, 334 U.S. 266, 282 (1948)).


13 See, e.g., Clinton v. Goldsmith, 526 U.S. 529 (1999) (addressing an injunction issued by the Court of Appeals for the Armed Services to prevent Goldsmith from being dropped from the rolls of the Air Force, finding the injunction to have been neither in aid of its jurisdiction to review court martial sentences nor necessary in light of the service member's alternative opportunities to seek relief, and stating that the All Writs Act does not enlarge a court's statutory jurisdiction); Pennsylvania Bur. of Correction v. United States Marshals Serv., 474 U.S. 34, 41 (1985) (citation omitted) (rejecting the use of the All Writs Act to enable the Court to review a lower court's determination where jurisdiction did not lie under an express statutory authorization of appeal); Rosenbaum v. Bauer, 120 U.S. 450, 453-56 (1887) (holding that a statutory predecessor of the All Writs Act did not permit the issuance of a writ of mandamus compelling payment of interest or principal of bonds, absent prior satisfaction of the federal courts' jurisdictional requirements); Brittingham v. Commissioner, 451 F.2d 315, 317 (5th Cir. 1971) (finding no independent basis of jurisdiction on which the district court could premise an All Writs order to prevent the IRS from introducing into tax court proceedings documents allegedly obtained in violation of the attorney-client privilege).

14 See, e.g., McIntire v. Wood, 11 U.S. (7 Cranch) 504, 506 (1813) (holding that federal trial court lacked power to issue mandamus to a land office register because mandamus was not necessary to the exercise of a pre-existing federal jurisdiction); United States v. Tablie, 166 F.3d 505, 506-07 (2d Cir. 1999) (finding that the All Writs Act was not an independent source of jurisdiction to equitably undo a valid judgment of conviction); Malone v. Calderon, 165 F.3d 1234, 1237 (9th Cir. 1999) (holding that neither the All Writs Act nor the AIA provided a jurisdictional basis for the issuance of a stay of execution because neither statute supported jurisdiction over the out-of-circuit prison officials who held petitioner in custody).

federal courts’ jurisdiction.”16 The Court also has stated that the All Writs Act does not authorize the courts to issue ad hoc writs whenever compliance with statutory procedures is inconvenient. When another statute specifically addresses a particular issue, that other authority, rather than the All Writs Act, controls.17 This limitation may be less clear than first appears, however, because a court may hold that the other statute does not specifically address a particular issue, although it initially appears otherwise.18

The Anti-Injunction Act provides:

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.19

The AIA, like the All Writs Act, has its roots in a federal statute adopted in 1793.20 That early statute enacted an apparently absolute ban on federal court

16 Pennsylvania Bur. of Correction, 474 U.S. at 41 (describing the Court’s early view of the scope of the provision).

17 Id. at 43. Accord United States v. FMC Corp., 84 S. Ct. 4 (1963) (stating that the All Writs Act could not be employed to evade specific restrictions of the Expediting Act of 1903, 15 U.S.C. § 29, or to subvert its purposes, and refusing to issue a common law writ of certiorari following denial of an injunction by the district judge where no appeal lay from an interlocutory order in an antitrust case before a single district judge); Florida Med. Ass’n v. United States Dep’t of HEW, 601 F.2d 199, 202 (5th Cir. 1979) (holding that the All Writs Act does not free a court from the requirements established by Rule 65 of the Federal Rules of Civil Procedure, governing the issuance of temporary restraining orders and preliminary injunctions).

18 See, e.g., United States Alkali Export Ass’n v. United States, 325 U.S. 196, 203-04 (1945) (stating that “where [a] statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews,” but nonetheless granting certiorari to review a district court’s order denying a motion to dismiss predicated on lack of jurisdiction). Cf. Walker v. Armco Steel Co., 446 U.S. 740, 750 (1980) (holding that Rule 3 of the Federal Rules of Civil Procedure governs the date from which various timing requirements begin to run, but does not determine the manner in which an action is commenced for purposes of determining whether a state statute of limitations has been tolled).


With respect to the history of the AIA, see generally CHEMERINSKY, supra note 4, §§ 11.2.1, at 690-92; David P. Currie, The Federal Courts and the American Law Institute, Part II, 36 U. CHI. L. REV. 268, 321-22 (1968) (discussing the history leading to the 1948 revisions); Mayton, Ersatz Federalism Under the Anti-Injunction Statute, 78 COLUM. L. REV. 330, 332-38, 338-46, 349-51 (1978) (discussing the predecessor Act’s legislative history, the early federal court practice under the pre-1948 form of the Act, and the developments under the 1948 revision); Martin H. Redish, The Anti-Injunction Statute Reconsidered, 44 U. CHI. L. REV. 717, 719-22 (1977); Comment, Federal Court Stays of State Court Proceedings: A Re-examination of
injunctions of state court proceedings, predicated on Congress’s desire to “avoid friction between the federal government and the states resulting from the intrusion of federal authority into the orderly functioning of a state’s judicial process.”\textsuperscript{21} Later, Congress authorized certain anti-suit injunctions and the courts recognized the propriety of others.\textsuperscript{22} The Court’s repudiation (in 1941) of the rather lax interpretation of the predecessor provision that had been the law since 1874\textsuperscript{23} led Congress in 1948 to amend the statute to its current form, to better enable federal courts to protect federal judgments and more generally to “work out lines of demarcation between the two systems.”\textsuperscript{24}

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\textit{Original Congressional Intent}, 38 U. Chi. L. Rev. 612, 624 (1971) (hereinafter \textit{Federal Court Stays}) (arguing that the Act was not intended to prevent federal stays of state proceedings by writs other than injunction).


\textsuperscript{22} Congress authorized anti-suit injunctions in some legislation, including the bankruptcy laws, the Interpleader Act, ch. 273, § 2, 44 Stat. 416 (1926), and legislation conferring federal jurisdiction over farm mortgages, while the courts indicated that some other statutes, including a limitation of liability act for ship-owners and recodified removal statutes, expressly or impliedly authorized other anti-suit injunctions. \textit{See}, e.g., Mitchum v. Foster, 407 U.S. 225, 234-36 (1972).

\textsuperscript{23} A predecessor provision to the AIA stated that, “The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.” Ch. 12, § 720, 18 Stat. 137 (1874) (codified at 28 U.S.C. § 279) (repealed). The Court in \textit{Toucey} observed that the relitigation doctrine “patently violates the expressed prohibition of Congress,” and narrowly construed the Act to limit federal court injunctions of state court litigation in which parties sought to relitigate issues previously resolved in federal court, despite precedent that had created numerous exceptions to its prohibition. \textit{See Toucey}, 314 U.S. at 139.


\textsuperscript{24} Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng’rs, 398 U.S. 281, 286 (1970); \textit{see also} H.R. Rep. No. 80-308, at A81-82 (1947) (stating that the revision “restores the basic law as generally understood and interpreted prior to the \textit{Toucey} decision”). Congress’s intent was to overrule \textit{Toucey} and, among other things, “permit federal courts to enjoin state court proceedings that threaten to undermine earlier federal court judgments.” CHEMERNISKY, supra note 4, § 11.2, at 692.

Thirty years ago, Professor David Currie succinctly summarized the changes, saying,

The "expressly authorized" provision is a substitute for the earlier bankruptcy exception broadened "to cover all exceptions"; "in aid of its jurisdiction" provides symmetry, for unexplained reasons, with the All Writs section and preserves the power to enjoin after removal from state courts; "to protect or effectuate its judgments" overrules *Toucey*.25

The courts commonly look to cases decided under the All Writs Act when interpreting the AIA, and vice versa,26 because of the close parallels in the statutes' language and their common purposes of preventing friction, conflict, resentment, and hostility between state and federal courts27 and especially of preventing interference with the judgments of federal courts.28 As the Court recently observed in a different legal context, "[F]ederal and state courts are

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25 Currie, supra note 20, at 322. For a related discussion of *Toucey*, see supra note 23 and accompanying text.

26 See, e.g., *In re County Collector*, 96 F.3d 890, 901-02 (7th Cir. 1996) (observing that cases under the AIA "can be extremely helpful" in interpreting the All Writs Act, and that the two Acts have been similarly interpreted to allow federal courts to issue commands appropriate to effectuate and prevent frustration of previously issued federal orders and judgments) (citing United States v. New York Tel. Co., 43 U.S. 159, 172 (1977) for the latter proposition); *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985) (stating that cases interpreting the "necessary in aid of jurisdiction" exception to the AIA are "helpful in understanding the meaning of the All-Writs Act"); United States v. District of Columbia, 654 F.2d 802, 809 n.16 (D.C. Cir. 1981), cert. denied, 454 U.S. 1082 (1981) (same as Baldwin-United).

27 See *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977) (stating that purpose of AIA is to forestall the friction that ensues from federal injunction of state judicial proceedings); *Atlantic Coast*, 398 U.S. at 286 (finding that AIA was at least in part a response to pressures to avoid needless friction between the state and federal courts); Leiter Minerals v. United States, 352 U.S. 220, 225 (1957) (holding that, because the AIA's purpose is to prevent conflict between federal and state courts and that policy is much more compelling in litigation between private parties than when the United States seeks a stay, the Act is not applicable to stays sought by the United States). Commentators are less certain about the Act's purposes and have differed some in the purposes they have discerned. See, e.g., Currie, supra note 20, at 322 (finding "dense clouds of ambiguity" and calling the AIA the "most obscure of all jurisdictional statutes"); Werner, supra note 24, at 1963-64 (describing the policies served by the AIA as judicial comity, i.e. non-interference, and judicial federalism, i.e. independent operation of the federal and state court systems, protecting the independent authority of each); *Federal Court Stays*, supra note 20, at 614 n.16 (looking to the legislative history of the original all-writs and anti-injunction statutes).

28 See *County Collector*, 96 F.3d at 902 (finding that both Acts seek to prevent interference with federal court judgments); see also supra text accompanying note 26.
complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design."29

Certain aspects of the judicial interpretation of the AIA are particularly relevant to this Article. For example, the “necessary in aid of its jurisdiction” clause has been construed to apply primarily to two circumstances. First, when a case is removed to federal court pursuant to one of the removal statutes, if the state court fails to properly relinquish jurisdiction, the “necessary in aid” clause authorizes a federal court to enjoin further state judicial proceedings.30 The removal statutes also are regarded as express authorizations by Congress to stay removed state proceedings.31

30 See 28 U.S.C. § 1446(d) (1994) (stating that filing a copy of the notice of removal with the clerk of the state court effects removal and “the State court shall proceed no further unless and until the case is remanded”); 28 U.S.C. § 2283 (Reviser’s Note) (stating that the phrase “in aid of its jurisdiction” was added to conform to the All Wris statute and “to make clear the recognized power of the Federal courts to stay proceedings in State cases removed to the district courts”); French v. Hay, 89 U.S. (22 Wall.) 250 (1874) (holding inapplicable the prohibition of the anti-injunction act, as it then existed, where a case had been properly removed, and stating that the prior jurisdiction of the federal court took the case out of the operation of the anti-injunction provision). See also Chemerinsky, supra note 4, ¶ 11.2; Diane P. Wood, Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act, 1990 BYU L. Rev. 289, 299 (stating that most of the value of removal would be lost if a state court could continue adjudicating a case after removal, both because this would waste resources and because the result of the state court litigation would be binding if the state case reached judgment first); Federal Court Says, supra note 20, at 615 (arguing inter alia that Congress must have expected federal courts to stay proceedings in state court that violated the explicit statutory duty of states to proceed no further when an action had been removed pursuant to the Judiciary Act of 1789).
31 See Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 640 (1977) (citing § 1446(d), then codified as § 1446(e), among the express authorizations of injunctions referred to by the AIA); Mitchum v. Foster, 407 U.S. 225, 234, 237 (1972) (stating that a statute may authorize injunctions if it “create[s] a specific and uniquely federal right or remedy, enforceable in a federal court of equity, which could be frustrated if the federal proceeding were not empowered to enjoin same court proceeding”). Other federal statutes explicitly authorizing federal injunctions of state court proceedings are: the Interpleader Act, 28 U.S.C. § 2361 (1994), which authorizes a federal court to issue “its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court,” and bankruptcy law, 11 U.S.C. § 362 (1993 & Supp. 1999), which authorizes an automatic stay of creditor actions in bankruptcy proceedings. These injunctive provisions are intended to permit all claims to a limited fund that have been made the subject of a statutory interpleader action or a bankruptcy proceeding, respectively, to be decided in one action, thus preventing inconsistent determinations or inequitable distribution of the limited fund. When a federal court is faced with determining whether a federal statute does expressly authorize an injunction of state court proceedings, Mitchum described the test to be applied as “whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.” Mitchum, 407 U.S. at 238. 42 U.S.C. § 1983 is the only statute that the Court has interpreted to imply a power to enjoin state
Second, the "necessary in aid" exception permits federal courts to enjoin state judicial proceedings when the federal court has first acquired jurisdiction over real property that is the subject of a case.\textsuperscript{32} By extension, this exception also applies in litigation to marshal assets, administer trusts or liquidate estates, or otherwise control particular property.\textsuperscript{33} The Court has quite consistently insisted that this exception applies only in instances where a federal court has \textit{in rem} jurisdiction, and does not apply where the court has \textit{in personam} jurisdiction over the parties.\textsuperscript{34} In practice, however, the Court has not been

court proceedings. \textit{See} CHEMERINSKY, \textit{supra} note 4, at 698. Professor Currie has written that,

Apparently the Reviser hoped to emphasize that authorization for an injunction against suit was not to be lightly inferred, but the result has been nothing but confusion . . . . Thus the second category of cases in which state suits may be enjoined, like the first, is framed in language so vague as to defy construction except by reference to the pre-existing law that it was intended to codify; and it conforms but poorly to the policies that ought to determine the availability of such injunctions.

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\textsuperscript{32} "The Supreme Court has yet to uphold an injunction against state proceedings on this basis." HART \& WECHSLER, \textit{supra} note 2, at 1201 (citation omitted).

\textsuperscript{33} \textit{See} Princess Lida v. Thompson, 305 U.S. 456, 466 (1939) (holding that the filing of trust accounts gave a state court quasi \textit{in rem} jurisdiction which empowered it to enjoin a later federal action against the trustees for an accounting and other relief). The holding in \textit{Princess Lida} is an exception to the general rule that "state courts are completely without power to restrain federal-court proceedings in \textit{in personam} actions." Donovan v. City of Dallas, 377 U.S. 408 (1964); \textit{see also} General Atomic Co. v. Felter, 434 U.S. 12, 17 (1977) (holding it beyond the power of state courts and in conflict with the Supremacy Clause for state courts to enjoin litigants from filing or prosecuting \textit{in personam} actions in federal courts, and stating that rights conferred by Congress "are not subject to abridgement by state-court injunctions"). \textit{See generally} Alan D. Hornstein \& P. Michael Nagle, \textit{State Court Power to Enjoin Federal Judicial Proceedings: Donovan v. City of Dallas Revisited}, 60 WASH. U. L.Q. 1 (1982).

\textsuperscript{34} \textit{See Vendo}, 433 U.S. at 642 (1977) (plurality opinion) (noting that the Court never has viewed parallel \textit{in personam} actions as interfering with the jurisdiction of either the state or the federal court and that no decision of the Court ever has held an injunction to preserve an \textit{in personam} case or controversy to fit within the "necessary in aid of its jurisdiction" exception); Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 295 (1970); Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511, 514, 517 (1955).

In \textit{Capital Services, Inc. v. N.L.R.B.}, 347 U.S. 501 (1954), the Court had affirmed a preliminary injunction against enforcement of an anti-picketing injunction issued by a state court. \textit{See Capital Serv.}, 347 U.S. at 505. In \textit{Amalgamated Clothing Workers}, the Court construed \textit{Capital Services} as having been decided under the "expressly authorized" exception and offered reasons why it should not be read to be inconsistent with the principle discussed in the text. \textit{See Amalgamated Clothing Workers}, 348 U.S. at 516-17. \textit{Capital Services} also can be understood as falling within the later announced rule that anti-suit injunctions may be entered in actions by the United States or its agencies; in \textit{Capital Services}, it was the NLRB that obtained the federal injunction. \textit{See HART \& WECHSLER, \textit{supra} note 2, at 1205 n.8; see also} Mandeville v. Canterbury, 318 U.S. 47, 49 (1943) (stating that this exception is necessary "to prevent the impasse that would arise if the federal court were unable to maintain its possession and control of the property, which are indispensable to the exercise of the jurisdiction it has assumed");
entirely consistent in so limiting its application of the “necessary in aid” section of the statute. In particular, it has held the AIA to permit injunctions of vexatious state court litigation involving *in personam* actions for damages.35

The *in rem* application of the “necessary in aid” exception pertains to the problems addressed in this Article insofar as courts now stretch the notion to treat some cases as falling within the *in rem* “rule” and regard others as tantamount to falling within *in rem* jurisdiction.36 Some commentators have

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Kline v. Burke Constr. Co., 260 U.S. 226, 229-35 (1922) (stating that, “Where the action is *in rem* . . . the exercise by the state court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the federal court already attached . . . . But a controversy is not a thing, and an action brought to enforce . . . a [personal] liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending”); *but see* Transouth Fin. Corp. v. Bell, 149 F.3d 1292, 1296 (11th Cir. 1998) (emphasizing that the *Vendo* opinion commanded only a plurality of the Court, and that the concurrence did not adopt the position that the “in aid of jurisdiction” exception applies exclusively to *in rem* proceedings). The only *in personam* cases in which the Eleventh Circuit approved application of the “in aid of jurisdiction” exception, however, were actions that had been removed from state court. *See Transouth*, 149 F.3d at 1297. The *Transouth* court mentioned that some district courts have relied upon the “necessary in aid” exception to stay state court proceedings after granting a motion to compel arbitration, in order to ensure that the federal court would have the opportunity to pass on the validity of the arbitration award. The court did not explicitly approve this practice, however. *See id.; see generally*, Chemerinsky, *supra* note 4, § 11.2, at 699-703.

For criticism of the *in rem* limitation, see Wood, *supra* note 30, at 302, who criticizes the *in personam*/*in rem* distinction inter alia on the ground that it is exceedingly artificial, as recognized by the Court in the context of decisions concerning personal jurisdiction. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 205 (1977) (rejecting the distinction between *in personam* and *in rem* jurisdiction for purposes of applying minimum contacts analysis to determine the constitutionality of an assertion of quasi-*in rem* jurisdiction over a person by seizure of his stock); Mullane v. Central Hanover Bank, 339 U.S. 306, 312 (1950) (describing the standards of the *in personam*/*in rem* classification as “elusive and confused”); Mayton, *supra* note 20, at 357-63 (criticizing the limitation on the utility of the “in aid of jurisdiction” exception imposed by application only to protect a “*res*,” and arguing that the exception reflects Congress’s adoption of a federal court practice limiting the *in rem*/*in personam* distinction to instances of concurrent jurisdiction where an injunction is sought merely to protect a choice of forum in diversity cases); Redish, *supra* note 20, at 746-48 (regarding the distinction between *in rem* and *in personam* actions, for suit injunction purposes, as dubious, because the cases have not persuasively explained why the impairment of a federal court’s jurisdiction is greater when concurrent actions are *in rem* and the binding effects of *res judicata* and collateral estoppel seem equally to confine or impair federal jurisdiction in the two contexts).


36 See, e.g., Battle v. Liberty Nat’l Life Ins. Co., 877 F.2d 877, 881-82 (11th Cir. 1989) (finding lengthy litigation that had generated “mountains of paperwork . . . similar to a *res* to be administered”); *In re* Baldwin-United Corp., 770 F.2d 328, 337-38 (2d Cir. 1985) (finding lengthy litigation to have become the virtual equivalent of a *res*, where state court actions threatened to impair the federal court’s authority to approve settlements in multi-district class litigation, and analogizing the jurisdiction of a multi-district court to courts acting *in rem*). Both these cases rejected, as unsupported by case law holdings, the contention that this exception to
straightforwardly urged that the “necessary in aid of jurisdiction” exception be read more broadly than the Court has read it. Further, a substantial number of lower federal courts have so construed it in order to enjoin state proceedings that would interfere with continuing federal court jurisdiction over and management of protracted and complex litigation. These federal litigations often involve ongoing equitable relief and sometimes involve class actions or multi-district litigation. In some of these instances, the federal court had

the AIA applies only to “true” in rem proceedings; see also In re Joint E. & S. Dist. Asbestos Litig., 120 B.R. 648, 657-8 (E.D.N.Y. & S.D.N.Y. 1990) (enjoining all proceedings against a personal injury settlement trust created in a bankruptcy proceeding and also relying upon the district court’s continuing jurisdiction over the settlement trust’s reorganization). See generally, 17 WRIGHT, ET AL., supra note 24, § 4225, at 528-32.

37 See, e.g., Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1202-03 (7th Cir. 1996) (concluding in dicta that courts in multidistrict litigation could issue an injunction to protect the integrity of pretrial discovery orders, so long as the injunction was narrowly tailored to prevent specific abuses that threatened the court’s ability to effectively manage the litigation); Wesch v. Folsom, 6 F.3d 1465, 1470-71 (11th Cir. 1993) (holding that exception permitted federal court to enjoin state suit that sought congressional redistricting where federal court had issued a redistricting order to remain in effect until state legislature replaced it with a valid plan); In re Corrugated Container Antitrust Action Litig., 659 F.2d 1332, 1334-35 (5th Cir. 1981) (approving injunction of state proceedings by plaintiffs who were parties to consolidated federal multi-district litigation and were asserting state law claims substantially similar to the claims that already had been settled and approved, although no final judgment had yet been entered in the federal litigation); Valley v. Rapides Parish Sch. Bd., 646 F.2d 925, 942-43 (5th Cir. 1981), rev’d on other grounds, 653 F.2d 941 (5th Cir. 1981), (approving an injunction against state proceedings that sought to undermine a federally ordered desegregation plan); Swann v. Charlotte-Mecklenburg Bd. of Educ., 501 F.2d 383, 383-84 (4th Cir. 1974) (approving injunction as necessary in aid of a district court’s jurisdiction in a desegregation suit where issues in the state court suit could not be separated from issues and relief involved in the federal court suit). See generally, Steven M. Larimore, Exploring the Interface Between Rule 23 Class Actions and the Anti-Injunction Act, 18 GA. L. REV. 259, 292-94 (1984) (arguing that, because injunctions of state court proceedings issued in relation to properly certified mandatory class actions usually will be necessary to aid a federal court’s jurisdiction, courts should strongly presume that injunctions in such cases are proper, but courts also should consider case-by-case the extent of federal and state interests in the respective litigations, the litigants’ interests, and systemic and policy concerns such as efficiently providing adequate relief to the greatest number of injured parties); Redish, supra note 20, at 748-60 (describing departures from the in rem limitation upon the “in aid of jurisdiction” clause and arguing for a liberalized interpretation to give federal courts power to enjoin any concurrent state proceeding that threatens the effective exercise of federal jurisdiction but that would constrain exercises of that power by the sound use of discretion).

It should be noted, however, that many of the cases cited above involved post-judgment federal injunctions of state court litigation, defensible under the relitigation exception to the AIA. As such, the courts’ conclusions concerning the “necessary in aid of jurisdiction” exception were, at most, alternative holdings, and have less authoritative effect than they would have if the “necessary in aid” exception were the sole basis for the decisions. See Lovilia Coal Co. v. Harvey, 109 F.3d 445, 453 (8th Cir. 1997), cert. denied, 523 U.S. 1059 (1998) (stating
approved a settlement, or was close to doing so, and the court regarded
the injunction of state court proceedings as necessary to protect and effectuate the
judgments resulting from these actual or imminent settlements.\textsuperscript{38} The Supreme
Court has not yet addressed the applicability of the exception to duplicative
complex litigation.\textsuperscript{39}

In contrast to the situations in which the Court has held the “necessary in
aid” exception to apply, it has said that federal courts are not empowered to

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\item that, under federal preclusion principles, holdings in the alternative, either of which would
independently suffice to support the result of a case, are not conclusive with respect to either
issue standing alone, since neither determination is essential to the judgment); Peabody Coal Co.
v. Spese, 117 F.3d 1001, 1008 (7th Cir. 1997) (same); Ritter v. Mount St. Mary’s College, 814
F.2d 986, 993 (4th Cir. 1987) (same); RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. i
(1982) (explaining that “a determination in the alternative may not have been as carefully or
rigorously considered as it would have been if it had been necessary to the result”); \textit{but see}
(finding through empirical study that, notwithstanding the view taken by the Restatement, many
and perhaps most federal courts give issue preclusive effect to each alternative holding).

\textsuperscript{38} See, e.g., Hanlon v. Chrysler Corp., 150 F.3d 1011, 1024-25 (9th Cir. 1998)
(holding court empowered by the All Writs Act, the AIA, and Fed. R. Civ. P. 23(d) to stay a state class
action that directly contravened a prior injunction against such a proceeding, entered in a nationwide
class action, and further holding the temporary approval of a nationwide settlement in the
federal class action to have stayed the state class action); Carrough v. Amchem Prods., Inc., 10
F.3d 189, 202-04 (3d Cir. 1993) (holding that district court could preliminarily enjoin plaintiff
class members from prosecuting similar state class action in light of imminent settlement
of federal action after years of negotiation, plaintiffs’ effort to challenge propriety of federal suit
in state court, and plaintiffs’ right to opt out of the federal suit); Standard Microsystems Corp. v.
Texas Instr. Inc., 916 F.2d 58, 60 (2d Cir. 1990) (indicating that a stay of state court proceedings
may be appropriate under the necessary in aid of jurisdiction exception “where a federal court is
on the verge of settling a complex matter, and state court proceedings may undermine its ability
to achieve that objective”); \textit{see also} James v. Bellotti, 733 F.2d 989, 993 (1st Cir. 1984)
(concluding that a federal court properly could enjoin a state court action in which parties sought
an injunction against the signing of a proposed federal court settlement of land claims). \textit{But see In re}
Federal Skywalk Cases, 680 F.2d 1175, 1181-83 (8th Cir. 1982) (reversing, as in violation
of the AIA, a mandatory class certification which prohibited class members from settling
punitive damages claims and effectively enjoined state plaintiffs from pursuing pending state
court actions on issues of liability); Broussard v. Meineke Discount Muffler Shops, Inc., 903 F.
Supp. 16, 18 (W.D.N.C. 1995) (holding that AIA prohibited federal court from enjoining federal
class members from continuing \textit{in personam} state actions concerning same issues, although it
permitted an injunction against the institution of new state proceedings). In general, however,
the \textit{relietiation exception} of the AIA does not permit a federal court to enjoin state proceedings
to protect a judgment that the court contemplates but has not yet entered. \textit{See} 17 WRIGHT, ET
AL., supra note 24, § 4226, at 548-49.

\textsuperscript{39} The Court’s interpretation of the “necessary in aid” exception thus has been under attack
as too narrow. At the same time, it sometimes has been criticized as overbroad in those
situations where federal judgments have been issued. Then, traditional principles of preclusion
should ensure that state courts will not act in a manner inconsistent with or undermining of the
federal judgments. \textit{See} CHEMERINSKY, supra note 4, § 11.2.4, at 654-55.
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enjoin state court proceedings "merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law [and that any injunction that a federal court enters] must be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case to as seriously impair the federal court's flexibility and authority to decide that case."40 Like the "necessary in aid" exception, the third exception to the AIA, the authorization of injunctions to protect or effectuate federal judgments, is intended to ensure the effectiveness and supremacy of federal law.41 At the same time, the third exception enables courts to prevent parties from engaging in harassing relitigation tactics.42 It allows federal courts to enjoin state proceedings if, but only insofar as, necessary to ensure the preclusive effect of earlier federal decisions on the merits.43 Founded upon res judicata and collateral estoppel, this exception


41 Choo v. Exxon Corp., 486 U.S. 140, 146 (1988) (citing the need to ensure supremacy of federal law as a reason for the "necessary in aid" exception).

42 See Sternlight, supra note 24, at 127. The exception also serves interests in efficiency. Id. at 124.

43 See 28 U.S.C. § 2283 (Reviser's Note) (1999); Choo, 486 U.S. at 146 (rejecting an injunction against state court proceedings insofar as it was broader than necessary to protect or effectuate the federal court's forum non conveniens dismissal but permitting the injunction insofar as it effectuated the federal court's choice of law decision regarding another of plaintiff's claims); Atlantic Coast Line, 398 U.S. at 290 (overturning an injunction against the enforcement of a state court injunction where the prior district court order had not addressed the propriety of a state court injunction); see also Steans v. Combined Ins. Co. of America, 148 F.3d 1266, 1271 (11th Cir. 1998) (holding improper a district court's judgment purporting to bind nonparties over whom it lacked jurisdiction and enjoining those persons from seeking punitive damages from the defendant in state court, based on a need to protect its prior judgment). See generally, Chemerinsky, supra note 4, § 11.2.4 at 703-05.

The lower federal courts are split as to whether the relitigation exception applies to only those matters that were actually litigated or to all litigation that is precluded; res judicata may bar matters that could have been litigated but were not. Cf. e.g., Hatcher v. Avis Rent-A-Car System, Inc., 152 F.3d 540, 543 (6th Cir. 1998) (stating that the "relitigation exception does not encompass the full parameters of res judicata"); Texas Commerce Bank Nat'l Ass'n v. Florida, 138 F.3d 179, 182 (5th Cir. 1998) (interpreting Chick Kam Choo to require that an issue have been actually litigated in federal court before an injunction properly can issue under the relitigation exception), Nationwide Mutual Ins. Co. v. Burke, 897 F.2d 734, 737 (4th Cir. 1990) (stating that an injunction to protect a federal judgment had to be limited to claims and issues actually decided by the federal court); Staffer v. Bouchard Transp. Co., Inc., 878 F.2d 638, 643 (2d Cir. 1989) (concluding that, for AIA purposes, only relitigation can be enjoined, not the litigation of matters encompassed within a "claim" that might have been raised, but were not) with Western Systems, Inc. v. Ulloa, 958 F.2d 864, 871 (9th Cir. 1992), cert. denied, 506 U.S. 1050 (1993) (opining that the majority interpretation of Chick Kam Choo would read res judicata out of the AIA because any issue actually litigated would be barred by collateral
“was designed to permit a federal court to prevent state litigation of an issue . . . previously . . . decided by the federal court” and to limit harassment, by repetitious litigation, of successful federal litigants. Although in general a federal court does not have power to enjoin state court proceedings simply because the federal court fears that a state court has made, or will make, an error in interpreting federal law, an injunction entered under this third exception must be obtained before a state court rules on a res judicata defense. Thus, litigants and federal courts cannot wait to see whether a state court will respect a prior federal judgment, and seek (or enter) an injunction to prevent enforcement of a state judgment only if the state judiciary has improperly undermined a federal judgment; the litigants and federal courts must strike preemptively. This doctrine seems inconsistent with the desire to avoid federal injunctions of state court proceedings, but the Court thought it to be dictated by the Full Faith and Credit Act.

estoppel); In re G.S.F. Corp., 938 F.2d 1467, 1478-79 (1st Cir. 1991) (holding that bankruptcy court’s stay of a state court environmental cleanup action was properly entered to protect a judgment that was based upon a release of all claims related to dealings between G.S.F.’s landlord and one of its secured creditors). See generally CHEMERINSKY, supra note 4, § 11.2.4, at 656 (noting the present confusion among the lower federal courts); 17 WRIGHT, ET AL., supra note 24, § 4226, at 541-46 (commenting on lower federal courts’ diverse application of the relitigation exception); Richard P. Cusick, Procedural Impediments to the Resolution of Mass Tort Cases: The Anti-Injunction Act and the Due Process Clause, 12 OHIO ST. J. ON DISP. RESOL. 485, 498 (1997) (characterizing Chick Kam Choo as crafting a hybrid standard on issue and claim preclusion to restrict federal courts’ power to predetermine the effect of their decisions); George A. Martinez, The Anti-Injunction Act: Fending Off the New Attack on the Relitigation Exception, 72 NEB. L. REV. 643, 659-63 (1993) (arguing that the AIA should be construed to allow protection of the full claim-preclusion effect of federal judgments and that Chick Kam Choo is not inconsistent with this view). The Court in Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986), declined to address this issue. See Parsons Steel, 474 U.S. at 526 n.4. The authors of HART & WECHSLER question whether “one sentence in an opinion that involved only the question of issue preclusion [should] be read as having such significance,” that is, limiting the AIA exception to issue preclusion and excluding claim preclusion. HART & WECHSLER, supra note 2, at 1206-07 n.10.

44 Choo, 486 U.S. at 147.


46 Parsons Steel, 474 U.S. at 524. A federal court does not have power “to enjoin state court proceedings merely because [they] interfere with a protected federal right or invade an area preempted by federal law.” Atlantic Coast Line, 398 U.S. at 294.

47 In addition to being supported by Full Faith & Credit, Parsons Steel also may be bolstered by the principle that federal courts should not operate so as to, in effect, review state court decisions. For criticism of Parsons Steel, see CHEMERINSKY, supra note 4, § 11.2.4, at 656-57.

48 See 28 U.S.C. § 1738 (1994) ("The Acts of the legislature of any State, Territory or Possession of the United States shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of
Finally, although the Court has found that the three statutory exceptions to the AIA are exclusive, it has held injunctions to be permissible when the AIA is inapplicable.\textsuperscript{49} The Court has held the AIA to be inapplicable in some suits brought by the United States or federal agencies and when the party requesting injunctive relief was not a party, nor in privity with a party, to the state court proceeding sought to be enjoined.\textsuperscript{50} Certain other parties and proceedings also have been held to lie beyond the scope of the AIA.\textsuperscript{51}

Of course, even when an injunction \textit{may} issue under the All Writs Act and AIA, that permissibility “does not mean that [an injunction] \textbf{must} issue.”\textsuperscript{52} As is true of the exercise of any power under the All Writs Act, traditional equity doctrines, such as those requiring irreparable injury if an injunction did not issue and requiring the lack of an adequate remedy at law,\textsuperscript{53} constrain the federal courts’ issuance of anti-suit injunctions.\textsuperscript{54} Thus, the decision whether to grant an anti-suit injunction may be influenced by factors such as: whether the state suit is vexatious; whether there is the need for speedier or surer relief than a state court plea of res judicata or collateral estoppel is likely to afford; whether the party seeking an injunction has delayed in seeking relief so as to have waived the right to seek an injunction; or whether the party has delayed in seeking relief so as to be estopped from obtaining an injunction.\textsuperscript{55} When an

\textsuperscript{49} See, e.g., \textit{Atlantic Coast Line}, 398 U.S. at 297-98 (1970).

\textsuperscript{50} See County of Imperial v. Munoz, 449 U.S. 54, 59-60 (1980) (implying that the AIA does not bar injunctions sought by strangers to the state court proceedings proposed to be enjoined); NLRB v. Nash-Finch Co., 404 U.S. 138, 144-47 (1971) (holding that an injunction sought by the NLRB against state court action preempted by the National Labor Relations Act falls within the exception to the Anti-Injunction Act for suits brought by the United States); Leiter Minerals, Inc. v. United States, 352 U.S. 220, 225-26 (1957) (concluding that the Act does not prohibit the U.S. from obtaining an injunction of state proceedings to prevent threatened irreparable injury to a national interest).

\textsuperscript{51} See \textit{Linda Mullenix, et al.}, supra note 24, \S 12.02[5].


\textsuperscript{53} Clinton v. Goldsmith, 526 U.S. 529, 537 (1999) (“The All Writs Act invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law.”).

\textsuperscript{54} See, e.g., Merle Norman Cosmetics, Inc., 936 F.2d 466, 468 (9th Cir. 1991) (observing that the issuance of an injunction is discretionary and that general principles of equity, comity and federalism should guide a court empowered by the All Writs Act and the AIA to grant an injunction); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927 (D.C. Cir. 1984) (stating that the equitable circumstances surrounding each request for an injunction should be carefully examined to determine whether the injunction is required to prevent an irreparable miscarriage of justice).

\textsuperscript{55} See, e.g., Quintero v. Klaveness Ship Lines, 914 F.2d 717, 720-21 (5th Cir. 1990), \textit{cert. denied sub nom.} Quintero v. Torvald Klaveness & Co. A/S, 499 U.S. 925 (1991) (upholding exercise of discretion to enjoin relitigation of choice of law issue, made pursuant to a forum non conveniens dismissal, where cost of relitigation would have irreparably injured the defendant); Harrelson v. United States, 613 F.2d 114, 116 (5th Cir. 1980) (affirming exercise of discretion
anti-suit injunction does issue from a federal court, states are theoretically obligated to honor it under the Constitution’s Supremacy Clause and full faith and credit principles, although the enforcement of such an injunction to enjoin litigants who are harassing their opponents from undertaking any future litigation on any claims arising from the facts at issue); Northwest Airlines, Inc. v. Astraea Aviation Serv., Inc., 930 F. Supp. 1317, 1330 (D. Minn. 1996) (declining to enjoin state court proceeding where federal court had certified for immediate appeal under Rule 54(b) of the Federal Rules of Civil Procedure decisions concerning claims which were identical to claims pending in state court, and where there was no indication that the state court would not follow principles of res judicata in ruling on motion for summary judgment); see generally HART & WECHSLER, supra note 2, at 1207 (suggesting the relevance of these factors); 17 WRIGHT, ET AL., supra note 24, § 4226, at 548, 552-53 (noting relevance of bad faith, multiplicity of suits, or other evidence of harassment, as well as the possibility of waiver or estoppel).

56 U.S. Const. art. VI ("[T]he Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."); see HART & WECHSLER, supra note 2, at 1203-04 (stating that the Supremacy Clause obliges state courts to stay their proceedings if federal law so dictates); see also Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians, 94 F.3d 747, 754 (2d Cir. 1996) (stating that federal law determines whether, and to what extent, federal judgments have preclusive effects in subsequent state court litigation); Withrow v. Concannon, 942 F.2d 1385, 1388 (9th Cir. 1991) (indicating that a federal injunction requiring adherence to the federal law imposes no inappropriate burden on a state); Haskins v. Stanton 794 F.2d 1273, 1277 (7th Cir. 1986) (stating that where a federal statute imposes a burden on a State, an injunction requiring the State to comply with the statute "merely seeks to prevent the defendants from shirking their responsibilities under it"). See generally, Ericson, supra note 37, at 984-89 & n.213-14 (supporting the obligation of state courts to give preclusive effect to federal court judgments by citing the fact that state courts "take it as axiomatic that they must accord preclusive effect to federal court judgments," that the Supreme Court has made clear that "a state court's failure to give preclusive effect to a federal judgment [i]s reviewable by [that Court] and would result in reversal," the argument that "Article III of the U.S. Constitution obligates state courts to respect federal judgments, because the judicial power over cases and controversies implies the power to render a judgment that carries binding effect," and, to a lesser extent, the stare decisis value of early cases that erroneously pointed to the Full Faith and Credit Clause and its implementing statute as mandating state respect for federal judgments); JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE § 14.15, at 695 (2d ed. 1993) (stating that, "Although neither the statute [28 U.S.C. § 1789 (1994)] nor the Constitution mentions what obligations exist for state courts confronting federal court judgments, it is well recognized that the same compulsion controls and thus state courts must treat federal judgments as those judgments would be treated by the federal courts themselves" and citing, inter alia, Stoll v. Gottlieb 305 U.S. 165 (1938)). But see LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 715-17 (1991) (questioning the use of federal preclusion law to govern at least some aspects of the preclusive effects to be accorded federal judgments in diversity cases); Stephen B. Burbank, Interjurisdictional Preclusion, Full Faith and Credit and the Federal Common Law: A General Approach, 71 CORNELL L. REV. 733, 741-47, 791-97, 829 (1986) (finding that the obligation to respect federal judgments derives from federal common law, but also arguing that "[a] grant of jurisdiction to the federal courts would be an empty gesture if their determinations of right and duty could be reexamined without restraint by the state courts," id. at 742, suggesting that the obligation of respect flows from the
typically is left to the court that entered it.57

It should be noted that the abstention doctrine of Younger v. Harris,58 as extended to pending state civil proceedings,59 creates a separate and independent bar to federal court injunctions of pending state court proceedings. The Younger doctrine basically “teaches that federal courts must refrain from hearing constitutional challenges to state action under certain circumstances in which federal action is regarded as an improper intrusion on the right of a state to enforce its laws in its own courts.”60 Consequently, a federal court may enjoin a pending state court proceeding only if the case fits within an exception

federal statutes that vest the lower federal courts with jurisdiction, and arguing that the obligation to respect a federal judgment “neither inexcusably nor obviously requires that federal preclusion law govern all questions concerning the scope and effect of that judgment,” id. at 829; Ronald E. Degnan, Federalized Res Judicata, 85 YALE L.J. 741, 773 (1976) (proposing the rule that, “A valid judgment rendered in any judicial system within the United States must be recognized by all other judicial systems within the United States, and the claims and issues precluded by that judgment, and the parties bound thereby, are determined by the law of the system which rendered the judgment”); Allan D. Vestal, Protecting a Federal Court Judgment, 42 TENN. L. REV. 635, 639-45 (1975) (arguing that statutory full faith and credit, supremacy, and comity all suggest that federal judgments should be protected when an attempt is made in state court to relitigate a claim or issue previously adjudicated by a federal court). On the question of which law should determine the preclusion law to be applied, Erickson argues that, even in the Erie context, where “F1”, the forum of the initial suit in which the potentially preclusive judgment was rendered had diversity jurisdiction, the forum in which preclusion is asserted should apply F1’s federal preclusion law. Commentators and courts are split on this issue. See Erickson, supra note 37, at 1005-08 & nn.302-03.

57 See Baker v. General Motors Corp., 522 U.S. 222, 236 (1998). By contrast, the applicability of full faith and credit obligations as to anti-suit injunctions issued by the courts of one state against proceedings in another state are less clear. In Baker, Justice Ginsburg, writing for the Court, observed that, “antisuit injunctions regarding litigation elsewhere, even if compatible with due process as a direction constraining parties to the decree . . . in fact have not controlled the second court’s actions,” id. at 236, since courts have viewed such injunctions as outside the ambit of full faith and credit, see id. at 236 n.9, and further that the Court “has not yet ruled on the credit due to a state court injunction barring a party from maintaining litigation in another State,” id. at 236 n.9. Justice Kennedy, concurring, was critical of these pronouncements, opining that, “[s]ubjects which are at once so fundamental and so delicate . . . ought to be addressed only in a case necessarily requiring their discussion.” Id. at 245 (Kennedy, J., concurring).


59 See Trainor v. Hernandez, 431 U.S. 434 (1977) (applying Younger abstention to a civil proceeding in which a State was a party); Judice v. Vail, 430 U.S. 327 (1977) (applying Younger abstention to a civil proceeding in which the government was not a party); see also Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) (same as Judice), but see New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989) (rejecting an expansive interpretation of Pennzoil that would apply Younger to all civil litigation, regardless of the degree of State interest involved).

to the AIA, or lies outside the scope of that Act, but falls within an exception to, or outside the scope of, the Younger abstention doctrine. Although the underpinnings of the Younger doctrine, the AIA and the All Writs Act share some commonalities, the fact that a case is beyond the prohibition of the AIA does not guarantee that Younger abstention would be inappropriate.

The Younger issue, however, typically does not arise in cases where All Writs removal is at issue, and when it has been raised, the courts have rejected its applicability. There are several reasons for this, among which are that the federal judiciary, not the state court, typically is the first involved in the controversy, the litigation is often between wholly private parties, no constitutional challenge to state action is being made, and an insufficient state interest is involved. The Court has said that, although it has extended Younger abstention to the civil context, it never has “applied the notions of comity so critical to Younger’s ‘Our Federalism’ when . . . [no] assertion of important state interests [was] made.” While it is clear that the importance to the states of enforcing their orders and judgments can suffice, in general it remains unclear what state interests may justify Younger abstention. Moreover, as observed by the Second Circuit when faced with a Younger-based objection to

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61 Justice Black’s opinion in Younger found support for the decision in, inter alia, the notion of comity, that is, proper respect for state functions, “a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government . . . always endeavors to [vindicate and protect federal rights and interests] in ways that will not unduly interfere with the legitimate activities of the States,” and in a “belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.” Younger v. Harris, 401 U.S. 37, 44-45 (1971).

As to the policies underlying the AIA and All Writs Act, see supra notes 5-29 and accompanying text.

62 See generally, Chemerinsky, supra note 4, §§ 11.2.1, 13.2, at 694-95, 775-76 (discussing how the Younger abstention doctrine creates a separate and independent barrier to federal court injunctions from that of the AIA).


65 The Court in Pennzoil Co. cites Juidice, 430 U.S. at 334 (finding a state’s interest in the contempt process through which it vindicates the operation of its judicial system to be sufficiently important to require application of Younger abstention), and describes Juidice as resting on the “importance to the States of enforcing the orders and judgments of their courts.” Pennzoil Co., 481 U.S. 1, 13-14 & n.12 (1971).

66 One treatise comments, however, that “[I]t is hard to think of in rem litigation that will involve the kind of interests that bring the Younger rules into play, [though] there is no apparent reason why there should be a per se rule that Younger does not apply to in rem proceedings.” 17A Wright, ET AL., supra note 60, § 4254, at 250-51. This comment is relevant to this Article in view of the occasions on which the litigation or the subject of the litigation in which All Writs removal has been sought (and may in the future be sought) has been categorized or analogized to cases in which the courts’ jurisdiction is in rem.
an injunction in a case where All Writs removal also was sought, the invocation of Younger stood that doctrine "on its head" because, while "Younger teaches us to recognize the interest of the states in protecting the authority of their judicial system . . . [t]he application of Younger [here] . . . would threaten the authority of the federal judicial system and potentially nullify the federal courts' orders and judgments. This result is not the sort of federal-state comity envisioned in Younger and Pennzoil." 67

II. REMOVAL PURSUANT TO THE ALL WRITS ACT: THE CASES

At this writing, eight federal courts of appeals have been asked to consider whether a removal pursuant to the All Writs Act was proper. The Second, Third, Sixth, Seventh and Eighth Circuits have opined that a removal pursuant to the All Writs Act is proper in some circumstances. 68 The First, Fourth, Fifth, D.C. and Federal Circuits have not addressed the issue, but district courts in the Fourth and Fifth circuits have approved such removal. 69 The Ninth and Eleventh Circuits declined to approve All Writs removal in the cases in which they addressed the issue but, so far as appears, only because they believed that the facts before them did not present appropriate cases for such removal. 70 The Tenth Circuit has taken the strongest position that the Act does not permit removal of claims otherwise outside federal subject matter jurisdiction. 71 These decisions are described below. My evaluations of those that permitted All Writs removal appear in a later section of the Article; 72 my observations on those that refused All Writs removal appear along with the descriptions that follow.

In Yonkers Racing Corp. v. City of Yonkers, the Second Circuit provided the first court of appeals holding in support of an All Writs Act removal. 73 The

67 In re Agent Orange Prods. Liab. Litig., 996 F.2d 1425, 1432 (2d Cir. 1993), cert. denied, Ivy v. Diamond Shamrock Chem. Co., 510 U.S. 1140 (1994). The reference is to Pennzoil Co., 481 U.S. at 3-18 (vacating a federal injunction that had restrained Pennzoil from enforcing an $11 billion judgment against Texaco pending appeal, although Texas law allowed a stay of enforcement pending appeal only upon the posting of a $13 billion bond that Texaco could not have obtained). Pennzoil illustrated that a sufficiently important state interest could exist even in a proceeding entirely between private parties.

68 See infra notes 73-151 and accompanying text.

69 I found no district court decision in the First, D.C. or Federal Circuits that spoke to the matter.

70 See infra notes 152-55, 172-76, and accompanying text.

71 See infra notes 156-71 and accompanying text.

72 See infra Section V.

case was decided against the backdrop of a federal consent decree reached among the City of Yonkers, the United States and the Yonkers chapter of the N.A.A.C.P. The decree had designated particular sites for public housing, two of which were owned by the Raceway and a seminary, respectively. The federal district judge had ordered the City to remove to federal court the state court actions filed by these owners to enjoin the condemnation of their properties, which the City had sought, under pain of contempt. The district court then had held, *inter alia*, that the removal was authorized under the federal removal statutes 28 U.S.C. §§ 1441 and 1443 and by the All Writs Act.\(^{75}\)

The Second Circuit, after expressing doubt about, but not resolving, whether the ordinary removal statutes authorized the removal,\(^{76}\) concluded that those statutes were not the exclusive sources of removal power.\(^{77}\) In support of this conclusion, the Second Circuit invoked the Supreme Court's recognition of "the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained."\(^{78}\) The court of appeals also observed that the Supreme Court has

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\(^{75}\) *Yonkers Racing*, 858 F.2d at 857-58.

\(^{76}\) *Id.* at 862-63. The court decided that it needn't resolve the "difficult question" whether the district court had correctly deemed the City a defendant for removal purposes, since the district court had asserted an independent basis for removal under the All Writs Act.

\(^{77}\) *Id.* at 863 (disagreeing with the petitioner that federal removal statutes are the exclusive source of removal jurisdiction). *Accord* Nowling v. Aero Servs. Int'l, Inc., 734 F. Supp. 733, 737 (E.D. La. 1990) (relying on *Yonkers* and agreeing that the removal statutes do not exclude the All Writs Act from being a source of removal power).

\(^{78}\) United States v. New York Tel. Co., 434 U.S. 159, 172 (1977) (holding that, under appropriate circumstances, All Writs Power extends to persons who are in a position to frustrate the implementation of a court order or the proper administration of justice, even though the persons were not parties to the original action). In this case, the Court found that the All Writs Act could be used to compel a telephone company to assist in the installation of pen registers on
expressly left open “the availability of the All Writs Act in exceptional circumstances [to authorize issuance of writs] when traditional statutory procedures clearly are inadequate.” The court then decided that the circumstances of the case warranted All Writs removal: the need to vindicate the constitutional rights of those who had been denied fair housing; the fact that the condemnation proceedings had been brought at the behest of the federal court; the ability of the property owners to frustrate implementation of the consent decree; the “very real possibility” that the City would be subjected to inconsistent orders from the state and federal courts if the owners’ injunctive actions were adjudicated in state court; the facts that the issues raised by the injunctive action went to the very essence of the federal consent decree and could not be separated from the relief provided by the consent decree; and the appeals court’s doubt that the reluctant condemnor could be counted on to adequately protect the integrity of the consent decree in state court, all militated in favor of removal under the All Writs Act.

The Second Circuit previously had held that the All Writs Act empowers federal courts to issue orders against non-parties to vindicate the constitutional rights of litigants, so the fact that the owners had not been parties to the underlying discrimination suit did not disable the court. The court also noted that, had the district court known that the owners would challenge the taking of their properties, the original decree would have required the condemnation proceedings to be commenced in federal court, with the owners included as parties necessary to implementation of the decree. Although the Second Circuit would have found such an order less troubling than the All Writs removal, it saw no reason why invocation of the Act was any “less necessary or appropriate” under the circumstances actually presented. Finally, the court viewed removal as less drastic than an injunction against an order of the state court that was inconsistent with the federal decree, and hence preferable to

telephones of two persons suspected of conducting an illegal gambling enterprise.

79 See Yonkers, 858 F.2d at 855, 863 (citing Pennsylvania Bur. of Correction v. United States Marshals Serv., 474 U.S. 34, 43 (1985)); but see Gehm v. New York Life Ins. Co., 992 F. Supp. 209, 211 (E.D.N.Y. 1998) (emphasizing that the All Writs Act does not contemplate the disregard of clear statutory requirements such as those set forth in the removal statutes and quoting Pennsylvania Bur. of Correction, for the proposition that, “[w]here a statute specifically addresses a particular issue . . . that authority and not the All Writs Act . . . is controlling”).

80 Yonkers, 858 F.2d at 863.

81 See id. at 863-65 (finding the facts to be “just the sort of extraordinary circumstance envisioned by the All Writs Act”).

82 See id. at 864 (citing Benjamin v. Malcolm, 803 F.2d 46 (2d Cir. 1986), in which the court affirmed an order, pursuant to the All Writs Act, enjoining state officials who were in a position to “frustrate the implementation of a court order” designed to alleviate overcrowding in a detention center).

83 See id. at 864 (adding that the proceeding would be in federal court “presumably under the ‘residual jurisdictional authority’ of the All Writs Act”).

84 Id.
such an injunction.\textsuperscript{85}

The Second Circuit next decided \textit{United States v. City of New York}.\textsuperscript{86} It followed \textit{Yonkers} in upholding an All Writs removal as necessary to safeguard a federal consent decree because the issues posed by the removed case were “inextricably linked” with the relief previously ordered.\textsuperscript{87} Specifically, where the City had entered into a consent decree establishing a schedule for terminating the ocean dumping of sludge, the court upheld the All Writs removal (by the federal judge who had entered the consent decree) of an individual taxpayer’s tax law based suit seeking to void contracts entered into by the City, arranging for an interim land-based sludge management system.\textsuperscript{88} The court found that a decision canceling the contracts would jeopardize the City’s ability to comply with the decreed timetables and that, because an interim land-based plan was a central goal of the decree and the state case raised issues relating to the validity of the City’s plan, the issues could not be separated from the decree.\textsuperscript{89} On these grounds, the court affirmed orders both

\textsuperscript{85} See \textit{id}. The Second Circuit also commented that, “If the power exists to issue extraordinary orders . . . to prevent the prosecution of state proceedings, surely . . . it also exists to effectuate removal notwithstanding the availability of an independent basis for the exercise of jurisdiction under the federal removal statutes.” \textit{id} at 865. The last clause is puzzling since the court had declined to decide the removability of the state proceedings under the ordinary removal statutes, finding it a “difficult question,” and had affirmed the denial of the motions to remand solely on the authority of the All Writs Act. \textit{id} at 858, 863. The above reasoning nonetheless reflects that the court did recognize that the propriety of an All Writs removal was related to the propriety of an anti-suit injunction. For further discussion and evaluation of \textit{Yonkers Racing}, see \textit{infra} text accompanying notes 257-68.

Judge Mahoney, dissenting, viewed removal as unavailable under 28 U.S.C. §§ 1441 and 1443. In Judge Mahoney’s view, it was clear that the City was the plaintiff, not a defendant, for purposes of the removal statutes and therefore had no right to remove. \textit{See Yonkers Racing}, 858 F.2d at 874 (Mahoney, J., dissenting) (“[T]he Supreme Court has twice held that whatever labels state law may apply, a condemnee is a defendant for purposes of federal removal statutes.”). While not absolutely ruling out use of the extraordinary residual authority provided by the All Writs Act to remove a case, he saw its use here as premature, improper, in disregard of principles of equity and federalism and “a novel and unwarranted application . . . which [was] abusive . . . of the most elementary principles of . . . comity” because the state court “was entitled to a presumption . . . that it would proceed with sensitivity to and awareness of the legal and social context in which the condemnations [were] occurring.” \textit{id} at 875-76 & n.3. The fact that the condemnees were not parties to the federal civil rights litigation, suing in state court to undermine the federal court’s orders, but rather were strangers to the federal proceedings invoking the normal rights of owners of property designated for condemnation, also were important from Judge Mahoney’s perspective. \textit{See id} at 876.

\textsuperscript{86} 972 F.2d 464 (2d Cir. 1992).

\textsuperscript{87} \textit{id} at 469.

\textsuperscript{88} \textit{See id} at 469. Plaintiff contended that the City had failed to submit the contracts for competitive bidding as required by state law. \textit{id} at 467.

\textsuperscript{89} There apparently had been no proof that the City easily could find alternatives that would enable it to cease ocean dumping according to the timetable required by the decree. \textit{See id} at
enjoining the state proceeding and removing it to federal court.90

Most recently, in In re Agent Orange Product Liability Litigation,91 after holding removal unavailable under the general removal statute, 28 U.S.C. § 1441,92 the Second Circuit again approved an All Writs removal, based on the reasoning of Yonkers and United States v. City of New York. It reasoned that suits in state court, brought by alleged victims of Agent Orange who were asserting tort claims against its manufacturers, would require the state court to decide the scope of the In re Agent Orange federal class action, of its settlement and of the judgment enforcing that settlement.93 While cautioning that “the All Writs Act is not a jurisdictional blank check which district courts may use whenever they deem it advisable,”94 and recognizing that it “does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate,”95 such removal was a proper exercise of discretion here. The district court was not merely best situated to make the necessary determinations, and “[t]he district court was not determining simply the preclusive effect of a prior final judgment . . . ; it was enforcing an explicit, ongoing order against relitigation of matters it already had decided, and guarding the integrity of its rulings in complex multidistrict litigation over which it had retained jurisdiction.”96

469.

90 See id. For further discussion and evaluation of United States v. City of New York, see infra Section V.C.1.


92 Id. at 1430-31 (finding § 1441 unavailable because there was neither complete diversity nor a federal issue apparent in the complaint, nor removability under the artful pleading doctrine).

93 See id. at 1431. The court used the title “Agent Orange” to refer to a group of actions that arose from the U.S. Armed Services’ use of Agent Orange during the Vietnam War. See id. at 1428.

94 Id. at 1431.


96 In re Agent Orange, 996 F.2d at 1431 (asserting that the court that approved the settlement of Agent Orange is the court best situated to decide the scope of the settlement and judgment therein); see also Ryan v. Dow Chem. Co., 781 F. Supp. 902, 914-18 (E.D.N.Y. 1991), aff’d, In re Agent Orange Prods. Liab. Litig., 996 F.2d 1425 (2d Cir. 1993), cert. denied sub nom. Ivy v. Diamond Shamrock Chem. Co., 510 U.S. 1140 (1994) (holding removal to be proper on several grounds, including the court’s retention of jurisdiction over the settlement agreement and its enforcement, the “artful pleading” doctrine, plaintiff’s violation of a court order prohibiting the filing of new actions in different fora, and the All Writs Act). The court viewed the All Writs Act as applicable because the new suits directly threatened the judgment that settled the class action by potentially consuming the monies on which the settlement depended. See Ryan, 781 F. Supp. at 914. Additionally, removal afforded greater comity to state courts and was less burdensome to the parties than either an injunction against state court rulings inconsistent with federal orders or a contempt citation would have been. Id. at 914-18.
Assuming, without deciding, that removal is within the AIA, the court also stated that the instant case fell squarely within the exceptions to the AIA. Removal was necessary in aid of the court’s jurisdiction, in view of its continuing jurisdiction to ensure the settlement agreement’s enforcement. Removal also was needed to protect or effectuate the prior federal judgment. The relitigation exception authorizes a federal court to proscribe state litigation of an issue previously decided by the federal court, and the district court already had determined the central issue of class membership that was raised by the removed case.\(^{97}\) Younger v. Harris and its progeny did not require abstention,\(^{98}\) nor did the removal interfere with plaintiffs’ right to collaterally attack the Agent Orange judgment in the forum of their choice.\(^{99}\) The Second Circuit declined to reach the question whether the case was removable as of right under 28 U.S.C. § 1442(a).\(^{100}\)

Several district courts within the Second Circuit have followed the lead of these appeals court decisions, or declined to do so in cases they viewed as distinguishable.\(^{101}\)

\(^{97}\) See In re Agent Orange, 996 F.2d at 1432, citing Choo v. Exxon Corp., 486 U.S. 140, 147 (1988). One peculiar aspect of In re Agent Orange, however, is the actions that were removed actually had been begun in the Texas state courts, and were removed and transferred to the class action court by the Judicial Panel on Multidistrict Litigation. The Second Circuit approved the removal under the authority of the All Writs Act even though the removal did not vindicate any interests of the writ issuing Texas district court, to which the actions had been removed. Cf. United States v. New York Tel. Co., 434 U.S. 159, 199 (1977) (Stevens, J., dissenting) (emphasizing that the All Writs Act must be utilized in aid of the issuing court’s duties and its jurisdiction); see also Henry Paul Monaghan, Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members, 98 COLUM. L. REV. 1148, 1160 n.51 (1998).

\(^{98}\) Younger v. Harris, 401 U.S. 37, 43 (1971).

\(^{99}\) See In re Agent Orange, 996 F.2d at 1432-33.

\(^{100}\) See id. at 1431. See also 28 U.S.C. § 1442(a) (1994) (allowing for the removal, inter alia, of actions against any officer or agency of the United States or person acting under them, for any act under color of their office). For further discussion and evaluation of the Agent Orange litigation, see infra text at notes 316-37, 417-21, 456-59.

\(^{101}\) See Lucas v. Planning Bd., 7 F. Supp.2d 310, 318-19 (S.D.N.Y. 1998) (upholding removal, under both 28 U.S.C. § 1441(a) and the All Writs Act, of a suit by residents and owners of property located close to a proposed telecommunications tower, where plaintiffs sought to nullify a consent judgment entered by the court in a case to which the present plaintiffs were not parties, the court stating that, ‘their suit inherently seeks to frustrate implementation of the Consent Judgment . . . Accordingly, if plaintiffs’ suit is to be continued . . . plaintiffs must continue in the federal forum’); New York State Laborers Political Action Comm. v. Mason Tenders Dist. Council, 1998 U.S. Dist. LEXIS 3839, at *1-4, *16 (N.D.N.Y. March 23, 1998) (upholding removal under the removal statutes and alternatively under the All Writs Act where, pursuant to a federal consent decree, a federal court had exclusive jurisdiction over any suit that related to the acts, omissions or authority of a monitor appointed by the court to root out corruption and organized crime ties of the defendant union and the suit in question challenged the monitor’s authority to direct withholding of union members’ employee contributions); Neuman v. Goldberg, 159 B.R. 681, 685-86 (S.D.N.Y. 1993) (upholding removal under the All
In the sole decision of the Third Circuit to address All Writs removal, *Davis v. Glanton*, that court concluded that a district court *may* use the All Writs Act to remove an otherwise unremovable state court action, if the court seeks to prevent the frustration of previously issued orders. The court nonetheless concluded that the defendant Trustees of the Barnes Foundation had not demonstrated how removal supported the court’s already existing jurisdiction, nor had the defendant identified extraordinary circumstances that justified All Writs removal. The action sought to be removed was a defamation action filed against the Trustees by township commissioners who alleged that the Trustees had falsely accused them of racist conduct. Removal was sought under both 28 U.S.C. §§ 1441, 1443(1) and § 1651. After holding removal

Writs Act of a suit alleging breach of fiduciary duty that was brought on behalf of a class identical to that over which the federal court had had jurisdiction and asserted very similar claims; *see also* United States v. American Soc’y of Composers, Authors & Publishers, 832 F. Supp. 82, 87-88 (S.D.N.Y. 1993) (noting authority to enjoin and remove, under the All Writs Act, a proceeding that poses a significant risk of subjecting a consent decree to inconsistent interpretations, in an opinion upholding the court’s jurisdiction over an application to vacate an arbitrators’ decision which fell within the ambit of a consent decree). Cf. *Gein v. New York Life Ins. Co.*, 992 F. Supp. 209, 211-12 (E.D.N.Y. 1998) (refusing to order removal under the All Writs Act, requested by plaintiff, where the court had not issued any orders in the exercise of a previously acquired jurisdiction that required protection from the state court suit and where the court found that it lacked jurisdiction over the parties); *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 692 (S.D.N.Y. 1996) (refusing to order removal under the All Writs Act where this court had not issued any orders that were threatened with frustration nor was there a case within its jurisdiction threatened by this suit; finding, moreover, that the case did not involve complex class litigation, a threat to a consent decree, or any analogously extraordinary situation; and concluding that there was no reason to assume that the state court would not apply res judicata or collateral estoppel and thereby frustrate a different federal court’s orders); *Pan Atlantic Group, Inc. v. Republic Ins. Co.*, 878 F. Supp. 630, 644 (S.D.N.Y. 1995) (rejecting All Writs removal for lack of exceptional circumstances where experience in the cases demonstrated that the realistic likelihood of inconsistent or conflicting judgments from the state and federal court actions was small and the issues remaining before the federal court were narrow); *Mongelli v. Mongelli*, 849 F. Supp. 215, 220 (S.D.N.Y. 1994) (declining to rely on the All Writs Act to sustain removal of a divorce action where the court saw no danger of interference with a contempt order or plea agreement).


103 *See id.* at 1047, n.4. The court cited *United States v. New York Tel. Co.*, 434 U.S. 159, 174-75 (1977), which stated that the power conferred by the All Writs Act extends to non-parties who were not engaged in wrongdoing, but are able to frustrate implementation of a court order or the proper administration of justice, and applied that principle to uphold an order directing the telephone company to assist the FBI in the installation of pen registers, where the burden imposed was reasonable, the assistance was necessary, and the company had no substantial interest in not providing it. *See Davis*, 107 F.3d at 1047.

104 *See Davis*, 107 F.3d at 1047. The court also held that it was without appellate jurisdiction to review the district court’s remand order insofar as it was based on 28 U.S.C. § 1441, and affirmed the lower court’s rejection of removal pursuant to 28 U.S.C. § 1443. *Id.* at 1047-52.

105 *See Davis* at 1045-46 (explaining that the theory supporting removal under 28 U.S.C. §§
unavailable under the statutes explicitly governing removal, the district court rejected the argument that the All Writs Act was a source of removal authority where government officials allegedly were “attempting [by their defamation suit] to frustrate the proper administration of justice . . . and [where] there . . . [allegedly was] the potential for conflicting judgments with respect to whether . . . the government officials ha[d] taken action against Barnes for illegitimate motives.” 106 The court did not see how remanding the defamation suit would interfere with the orderly administration of federal jurisdiction, nor how a state court ruling on whether plaintiffs were defamed would conflict with a federal ruling on the Barnes Foundation’s 42 U.S.C. § 1983 claims. 107 The appeals court accepted these conclusions, without extended discussion. 108

Since the federal § 1983 suit had not yet reached judgment, the court correctly decided Davis. These two litigations exemplified the classic situation in which state and federal courts may exercise concurrent jurisdiction over in personam suits that pose some overlapping factual issues. 109 The first valid, final judgment on the merits is preclusive, against parties and those in privity with parties, on the common issues actually litigated and necessarily decided in order to reach that first judgment. The state defamation suit was not enjoinable because an injunction was not necessary to aid the federal court’s jurisdiction over the § 1983 action, nor was an injunction necessary to protect or effectuate any existing federal judgment. Only if and when the federal § 1983 suit would result in a judgment for the Barnes Foundation Trustees might the Commissioners appropriately seek an injunction against the state court defamation suit. Even after such a federal judgment, collateral estoppel might adequately protect the Trustees’ interests. 110 For reasons elaborated below, the very reasons why an injunction of the state defamation suit would not have fallen within an exception to the AIA also make an All Writs removal of that state court suit inappropriate. 111

Decisions of district courts within the Third Circuit all accept All Writs removal in principle. They differ as to the propriety of All Writs removal in particular cases, depending on each case’s facts. 112

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1441 and 1443(1) was that the defamation action retaliated for the Trustees’ filing of a federal lawsuit claiming racial discrimination by the commissioners).

106 Id. at 1425.

107 See id.

108 Id.

109 The cases appear to have posed some common factual issues. If they did not, there would be even less reason to consolidate them.

110 See supra notes 40-47.

111 See infra text at notes 189, 199-202, 206.

112 See Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders, 988 F. Supp. 486, 487-88, 490-92 (D.N.J. 1997) (holding All Writs removal appropriate to protect and effectuate an injunction where (1) a state court action was filed seeking a declaration of the validity of a contract, and that suit required resolution of federal law questions, (2) state court decision of the federal issues would threaten the federal court’s jurisdiction and the effectuation
In *Sable v. General Motors*, the Sixth Circuit relied on two Second Circuit cases, *Yonkers* and *United States v. New York Telephone Co.*, in upholding an All Writs removal of a trespass suit for money damages, effected in order to protect an EPA-negotiated consent agreement from conflicting state court orders.\(^{113}\) The trespass suit was based upon defendants’ placement of hazardous chemicals on plaintiff’s property.\(^{114}\) The court believed that plaintiff’s request for damages for loss of use of the land would “seriously interfere with” a prior federal consent agreement that plaintiff would not use the land for 10,000 years. The court found that plaintiff’s request for damages for non-removal of the chemicals would similarly interfere with a prior consent agreement that defendants would pay an agreed upon amount to contain, but not remove, the hazardous waste on the property.\(^{115}\) Thus, the Sixth Circuit

of its injunction, and (3) state law issues would need to be resolved only if federal law did not invalidate the contract; *Holland v. New Jersey Dep’t of Corrections*, 1994 U.S. Dist. LEXIS 13239, at *18-*19 (D.N.J. Sept. 14, 1994) (upholding All Writs removal because of danger of conflicting decisions, potential frustration of past orders and interference with federal jurisdiction and mediation efforts, but only after upholding removal under 28 U.S.C. § 1443). In *Holland*, the claims in the removed case (asserted by a white sergeant, Lutz) alleged defamation and other state law violations (against a black corrections officer, Gregg) that arose from charges that defendant previously had made against the plaintiff and that formed part of the basis for a discrimination class action pending in federal court. Because of the factual and legal overlap between the suits, the court saw the potential for conflicting judgments. The court also concluded that if Lutz’s suit was retaliatory, as alleged, its prosecution in state court might frustrate the implementation of or even violate an anti-retaliation order the court had entered and that Lutz’s suit would hinder imminent efforts to mediate all issues in the federal class action. See id. at *18-*19. Cf. 35 Acres Assoc. v. Adams, 962 F. Supp. 687, 689, 691-92 (D.V.I. 1997) (disallowing removal upon finding that All Writs removal had been permitted only in cases involving consent decrees or complex class litigation that would be undermined if actions in other courts were permitted).

\(^{113}\) See *Sable v. General Motors Corp.*, 90 F.3d 171, 175 (6th Cir. 1996).

\(^{114}\) See id. at 175.

\(^{115}\) Id. Accord *Bylinski v. City of Allen Park*, 169 F.3d 1001, 1002-03 (6th Cir. 1999), cert. denied, 119 S. Ct. 2396 (1999) (upholding All Writs removal of a citizen taxpayers suit for a refund of taxes and an injunction against further taxation by defendant municipalities, where the taxes had been, and were being, levied pursuant to a federal consent decree and implementing financing agreements which the federal district court had continuing jurisdiction to enforce and where the suit threatened the federal court’s orders).

An attorney for the defendants informed me that the primary basis for removal was federal question jurisdiction, with the All Writs argument being secondary. Telephone interview with Charles Raimi, Bodman, Longley & Dahlings, LLP (Aug. 4, 1999). The opinion of the Sixth Circuit is less than transparent on this point. The defendants had removed on the ground that the taxes in question had been levied pursuant to a federal consent decree. *Bylinski*, 169 F.3d at 1002. Although the Sixth Circuit agreed that the district court had continuing jurisdiction over the financing agreements that were an integral part of the consent decree and that the instant suit posed an imminent threat to those orders, that observation, in the “Jurisdiction” section of its opinion, was the only ambiguous intimation that it thought the case removable as posing a federal question. It explicitly invoked only the All Writs Act as making proper the denial of
held that the district court was well within its discretion in denying remand, in
the exercise of power under the All Writs Act, to protect federal consent
agreements from conflicting state court orders.\textsuperscript{116} The court also upheld
the removal under 28 U.S.C. § 1441, however, finding that the plaintiff’s
ostensibly state law trespass claim actually arose under federal law since the
relief the plaintiff sought conflicted with a federal consent decree and because
the plaintiff complained of circumstances created by the federal consent
agreement.\textsuperscript{117}

The Court of Appeals for the Seventh Circuit initially adopted a very
cautious attitude toward All Writs removal. Noting the well-settled principles
that the All Writs Act “‘does not provide federal courts with an independent
grant of jurisdiction’”\textsuperscript{118} and that “‘[t]he writ cannot be used to confer a
jurisdiction which the . . . court would not have without it,’”\textsuperscript{119} the court, in a
scholarly opinion by Judge Flaum in In re County Collector, declined to
resolve what it characterized as “the difficult issue” whether the All Writs Act
ever can authorize removal of a case.\textsuperscript{120} Relying on circuit precedent under the
AIA, as well as on comity and the inherently limited jurisdiction of the federal
courts, the court held that where a consent decree had been entered without
prior or contemporaneous findings of liability or of necessity to remedy the
violation of a legal wrong, the All Writs Act did not permit the removal of a
third-party action alleging that a party to the consent decree had acted without
authority, under state law, in assenting to the decree.\textsuperscript{121} The state courts were
fully competent to decide that matter.\textsuperscript{122} The court reasoned, in part, that if a
party to a consent decree lacked authority to agree to it, its terms would be
without legal effect; hence, there would be no decree for a federal court to
protect or effectuate by injunction of state court proceedings.\textsuperscript{123} Given the
parallels between the AIA and the All Writs Act in their “in aid of jurisdiction”
language and goals of preventing interference with federal judgments, the court
concluded that where the AIA would not permit the injunction of a state court

\textsuperscript{116} See Sable, 90 F.3d at 175.

\textsuperscript{117} Id. at 174-75. The Sixth Circuit’s holding as to removability under 28 U.S.C. § 1441 is
questionable; cf. In re County Collector, 96 F.3d 890, 895-97 (7th Cir. 1996) (concluding that a
state law claim does not present a federal question merely because it adversely impacts the
terms of a federal consent decree). For further discussion and evaluation of Sable, see infra text
at 279-87, 369.

\textsuperscript{118} In re County Collector, 96 F.3d 890, 903 n.20 (7th Cir. 1996) (quoting United States v.

\textsuperscript{119} Id. (quoting Rosenbaum v. Bauer, 120 U.S. 450, 455 (1887)).

\textsuperscript{120} Id. at 903 n.20.

\textsuperscript{121} Id. at 900-02 (noting that circuit precedent under the AIA refused to allow injunction of
third parties’ state court challenges to the authority of parties to enter into federal consent
decrees). The court relied particularly on Dunn v. Carey, 808 F.2d 555, 558-59 (7th Cir. 1986).

\textsuperscript{122} In re County Collector, 96 F.3d at 902.

\textsuperscript{123} Id. at 901.
action, it would be inconsistent to permit removal of that action under the All Writs Act;\(^{124}\) there was no more reason to remove such an action than there was reason to enjoin it.

The court hinted that differences between consent decrees and fully adjudicated judgments might affect a court's ability to remove a case under the All Writs Act, but it did not attempt to answer that question.\(^{125}\) Assuming *arguendo* that the All Writs Act sometimes would authorize removals, the court added that removal would have been unwarranted on the facts of this case.\(^{126}\) The state suit challenged a tax levied by a school district to finance compliance with its obligations under a federal consent decree. The federal decree gave the school district discretion to determine the source of funding to enable it to comply with the consent decree. The school district contended that this decree would be frustrated by the state court suit. With no basis to conclude that, absent the tax levy, the school district would be unable to implement the remedial measures that had been ordered, the court found that the state court proceedings were collateral to the relief provided for, and that All Writs removal was not warranted.\(^{127}\)

One final noteworthy aspect of the opinion in *In re County Collector* is the court's observation that the school district was attempting to use the writ to confer a jurisdiction that the district court would not have had without it, but

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\(^{124}\) *Id.* at 902 ("We can discern no reason why these actions contesting the authority of officials under state law should be treated differently under the two Acts.").

\(^{125}\) *Id.* at 902 n.19; see also Steans v. Combined Ins. Co. of America, 148 F.3d 1266, 1271 (11th Cir. 1998), *cert. denied*, Combined Ins. Co. of America v. Aldridge, 119 S. Ct. 1463 (1999) (vacating, as an abuse of discretion, orders that enjoined insureds from prosecuting their punitive damages claims in state court, where the insureds had not been party to the federal suit in which a court order had been entered prohibiting future punitive damages awards against an insurer, in the state, and opining that a district court cannot belatedly join nonparties and enjoin those parties based on a need to protect its earlier judgment); Association for Retarded Citizens, Inc. v. Thorne, 30 F.3d 367, 370-71 (2d Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995) (finding power under the All Writs Act to require non-parties not to frustrate remedial orders deriving from judgments predicated upon adjudication of issues but no such power when the judgments derived from consent decrees; holding that All Writs Act does not permit district courts to join third parties and bind them to previously entered consent decrees).

\(^{126}\) *In re County Collector*, 96 F.3d at 903.

\(^{127}\) *Id.* The *In re County Collector* court also rejected the arguments (1) that the plaintiffs' complaint arose under federal law, making the case removable under 28 U.S.C. § 1441, concluding in particular that "a state law claim does not present a federal question merely because it adversely impacts the terms of a federal consent decree," *id.* at 895-97, and (2) that the case could not be removed under 28 U.S.C. § 1443(2), which authorizes a defendant to remove civil actions for acts under color of authority derived from any law providing for equal rights, *id.* at 897-99. The dissent argued that removal was permissible under the civil rights removal statute, 28 U.S.C. § 1443(2). *Id.* at 904-06. Believing, as I do, that an All Writs removal could be proper only if an injunction against the state court suit would be proper, I agree with the Seventh Circuit's decision here since such an injunction would not have been proper, for the reasons articulated by the court.
that the writ also was ancillary to a jurisdiction already acquired. Judge Flaum wrote that “[n]o court has yet to consider the issue of whether the All Writs Act can be interpreted, consistent with . . . Supreme Court precedent [in McIntire v. Wood128] to create this limited form of ancillary removal jurisdiction.”129

Just two months later, in In re VMS Limited Partnership Securities Litigation,130 a panel of the Seventh Circuit131 upheld an All Writs removal, pronouncing that:

[I]n the context of complex class action litigation, a federal district court may appropriately use the All Writs Act to remove and enjoin the prosecution of subsequent state court claims in order to enforce its ongoing orders against relitigation and to guard the integrity of its prior rulings over which it had expressly retained jurisdiction.132

In In re VMS, a federal securities fraud class action had been concluded by a court-approved settlement. The district court had retained jurisdiction to evaluate claims within the scope of the settlement agreement, to prevent circumvention of the agreement, and generally to implement and enforce the settlement agreement and final judgment.133 Thereafter, class members had brought suit in state court, alleging that they had been fraudulently induced not to opt out of the federal class action.134 The state court suit was enjoined and removed. Following Agent Orange,135 and finding that the state suit would have a substantially deleterious effect on the federal settlement and that the state plaintiffs were attempting an “end run” around the class action settlement, the Seventh Circuit upheld the exercise of discretion to remove under the All Writs Act.136

Invoking waiver, the Seventh Circuit purported to refuse to consider the class members’ belated argument that the AIA prohibited the district court from enjoining the state class action.137 In so doing, the court failed to link the propriety of the All Writs removal with the suitability of injunction of the state court proceeding. Nonetheless, it then assumed arguendo that the class members had preserved an AIA argument by raising it below, and opined that,

128 11 U.S. (7 Cranch) 504, 506 (1813).
129 In re County Collector, 96 F.3d at 903 n.20. For further discussion of related issues, see infra Section V.
130 In re VMS Ltd. Partnership Sec. Litig. ("In re VMS"), 103 F.3d 1317 (7th Cir. 1996).
131 The panel included Judge Lay of the Court of Appeals for the Eighth Circuit, sitting by designation, Judge Cudahy and Judge Kanne. The In re County Collector panel was comprised of Chief Judge Posner, and Judges Flaum and Ripple.
132 Id. at 1324.
133 Id. at 1322-25.
134 Id. at 1321.
135 Id. at 1323-24.
136 Id. at 1324-25.
137 Id. at 1326.
“either the All Writs Act or the ‘in aid of jurisdiction’ exception to the Anti- 
Injunction Act would provide the judges with the power to enforce their prior 
judgments via injunctions.”

The In re VMS court did not discuss the similarities or differences between 
court-approved class action settlements for money damages and consent 
decrees, nor whether the trial court’s approval of the settlement had been 
predicated upon findings of liability or of necessity to remedy the violation of a 
legal wrong, matters that the County Collector panel had thought perhaps 
relevant to the propriety of All Writs removal. However, in In re VMS, unlike 
In re County Collector, the plaintiffs whose suit had been removed had been 
parties to the original class action and apparently had not challenged the 
adequacy of the representation they received or otherwise challenged the class 
representatives’ authority to enter into the settlement of the class action.

The cases were clearly distinguishable.

The Eighth Circuit upheld All Writs removal in N.A.A.C.P. v. 
Metropolitan Council, a case presenting elements of both In re County 
Collector and In re VMS. In this case, plaintiffs filed a state court class action 
on behalf of all Minneapolis public school students, asserting claims under the 
Minnesota Constitution. The district court upheld removal of the claims 
against one of the defendants, the Met Council, under the All Writs Act. The 
court found that the removed claims focused exclusively on Met Council 
housing policies and practices that were the subject of a prior federal class 
action that had been settled by a consent decree, the enforcement of which was 
within the retained jurisdiction of the federal court. The Eighth Circuit held 
that All Writs removal was proper to prevent relitigation of settled and released 
claims and to protect the integrity of the federal consent decree. The 
removal remained proper even though it brought into federal court persons 
who were not, as well as persons who were, within the scope of the federal 
plaintiff class. Noting that any state court order inconsistent with the federal 

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138 Id. at 1326 n.4.

139 See infra text at notes 462-64, for discussion regarding whether the state court suit here 
constituted a collateral attack upon the federal class action judgment.

140 For further discussion and evaluation of the In re VMS case, see infra text accompanying 
notes 338-44, 426-29.

141 125 F.3d 1171 (8th Cir. 1997), vacated without op., remanded, 522 U.S. 1145 (1998), 
reinstated, 144 F.3d 1168 (8th Cir. 1998), and cert. denied, 525 U.S. 826 (1998).

142 See N.A.A.C.P., 125 F.3d at 1172-73. The court also upheld removal of the claims against 
Met Council under an interpretation of 28 U.S.C. §1441 found in Federated Dep’t Stores v. 

143 Id. at 1173-74. The court was contradictory in its remarks concerning the availability of 
ordinary removal: it concluded that the state suit was not removable under the general 
removal statutes but then said it need not determine whether removal was warranted under 
the artful pleading doctrine, which it apparently (but incorrectly) regarded as allowing 
removal under something other than the general removal statutes. Id.

144 Id. at 1173.
decree would be enjoinable under the AIA, the appeals court thought that removal better served state-federal judicial relations because it would spare the state court from expending resources to no avail.\textsuperscript{145} In another part of its opinion, the court affirmed the district court’s res judicata dismissal of the removed claims.\textsuperscript{146}

The Supreme Court vacated and remanded this decision “for further consideration in light of \textit{Rivet v. Regions Bank of Louisiana}.”\textsuperscript{147} \textit{Rivet} held that “claim preclusion by . . . a prior federal judgment is a defensive plea that provides no basis for removal under § 1441(b).”\textsuperscript{148} On remand, the Eighth Circuit concluded that its “decision [i]s \textit{not} at odds with the . . . holding in \textit{Rivet}” and reinstated and affirmed its earlier decision.\textsuperscript{149} It had not upheld removal in \textit{N.A.A.C.P.} on \textit{Moitie} or claim preclusion grounds; rather it had upheld removal based on the All Writs Act and the district court’s ongoing supervisory jurisdiction over a consent decree.\textsuperscript{150} The court distinguished removal predicated upon a threat to the integrity of a consent decree under federal supervision from removal predicated on the preclusion of a state law

\textsuperscript{145} \textit{Id.} at 1174.
\textsuperscript{146} \textit{Id.} at 1174-75.
\textsuperscript{147} \textit{N.A.A.C.P. v. Metropolitan Council}, 522 U.S. 1145 (1998); see also \textit{Rivet v. Regions Bank of La.}, 522 U.S. 470, 478 (1998) (distinguishing between removal where a federal statute completely preempts a state law claim and claim preclusion by a federal judgment raised as an affirmative defense).

The Supreme Court has said that it will issue a “GVR” (grant, vacate, remand) order “where intervening developments, or recent developments that [it] has reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.” \textit{Lawrence v. Chater}, 516 U.S. 163, 167 (1996) (per curiam); see also \textit{Lords Landing Village Condo. Council of Unit Owners v. Continental Ins. Co.}, 520 U.S. 893, 896 (1997) (per curiam). Vacatur and remand by the Court does not imply, however, that the lower court should change its prior determination. See \textit{Hughes Aircraft Co. v. United States}, 140 F.3d 1470 (Fed. Cir. 1998); \textit{United States v. M.C.C. of Fla., Inc.}, 967 F.2d 1559, 1562 (11th Cir. 1992).

\textsuperscript{148} \textit{Rivet}, 522 U.S. at 478.
\textsuperscript{149} \textit{N.A.A.C.P.}, 144 F.3d at 1169 (8th Cir. 1998). In a decision rendered in November, 1999, \textit{Xiong v. Minnesota}, 195 F.3d 424 (8th Cir. 1999), the court again approved All Writs removal. Plaintiffs sought injunctive relief against the Metropolitan Council concerning matters governed by the federal decree involved in both \textit{N.A.A.C.P.} and \textit{Xiong}. The court found grounds to review the district court’s remand order, despite 28 U.S.C. § 1447(d), and excoriated the district court for disregarding controlling precedent. It concluded that, “federal court control of the current case was necessary to effectuate and prevent the frustration of the earlier federal consent decree.” \textit{Id.} at 427.

\textsuperscript{150} \textit{N.A.A.C.P.}, 144 F.3d at 1169 (explaining that the court’s earlier opinion held that (1) “the district court properly used its power under the All Writs Act to take jurisdiction over state-law claims . . . that threatened the integrity of an earlier federal consent decree” and (2) an earlier federal judgment precluded those state claims).
claim by a prior federal judgment on a question of federal law.\textsuperscript{151}

The Ninth Circuit rejected All Writs removal in \textit{Westinghouse Electric Corp. v. Newman & Hotzinger, P.C.}, the one case in which it addressed the issue.\textsuperscript{152} The \textit{Westinghouse} holding, however, does not represent an outright rejection of All Writs removal. The court reasoned that the facts before it did not present an appropriate case for such removal. According to the court, the district court’s jurisdiction depended upon whether the state court complaint alleged a claim of breach of a non-disclosure agreement that was “independent of the [previously entered] protective order.”\textsuperscript{153} Because the complaint alleged an independent breach of contract, state court adjudication of the breach action would “not affect the interpretation or enforcement of the protective order and [would] not frustrate that order.”\textsuperscript{154} Thus, the case failed to provide grounds for All Writs removal in aid of the previously obtained federal jurisdiction.\textsuperscript{155}

\textit{Hillman v. Webley}, a Tenth Circuit decision, takes the strongest stand against All Writs removal of any of the courts of appeals decisions thus far.\textsuperscript{156} \textit{Hillman} involved a complex procedural history. Investors had brought several securities lawsuits after a corporation and related limited partnerships filed for bankruptcy.\textsuperscript{157} A plaintiff class and some of the defendants had reached a

\textsuperscript{151} \textit{Id.} at 1171. In a still subtler refinement, the court concluded that because the district court had followed “the Second Circuit’s forum-election approach to \textit{Moite}, not the claim preclusion approach [that] the . . . Court rejected in \textit{Rivet[,] . . . our opinion . . . affirming that ruling is not contrary to the Court’s holding in \textit{Rivet}}.” \textit{Id.} at 1171. The Eighth Circuit also did not interpret footnote three in \textit{Rivet}, 118 U.S. at 926 n.3, referring to the relitigation exception to the AIA, to rule out the route it had followed. \textit{Id.} at 1172. \textit{See also} Harbor Venture v. Nichols, 934 F. Supp. 322, 323-24 (E.D. Mo. 1996). Alternatively under the general removal statute or the All Writs Act, the court upheld removal of a case which required interpretation and enforcement of a federal consent decree. \textit{Id.} at 324. Although the court had not expressly retained jurisdiction over the settlement agreement, it had incorporated the settlement terms into the decree and consequently “ha[d] ancillary jurisdiction to interpret and enforce the . . . decree.” \textit{Id.} at 323-24. Alternatively, the court upheld removal based on 28 U.S.C. § 1442 because the decree affected the interests of the United States, a party to the litigation culminating in the decree. \textit{Id.} at 324.

For further discussion and evaluation of the \textit{N.A.A.C.P.} case, see infra text at notes 345-56, 422-25, 460-61.

\textsuperscript{152} 992 F.2d 932, 937 (9th Cir. 1993).

\textsuperscript{153} \textit{Id.} at 937.

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{See id.; see also} Bewley v. Cigna Fin. Advisors, 1997 U.S. Dist. LEXIS 14761, at *4-*5 (N.D. Cal. Sept. 23, 1997) (where defendant’s removal of plaintiffs’ state law suit was untimely under 28 U.S.C. § 1446(b), holding that All Writs removal was unavailable because of that untimeliness and because there was no independent basis of jurisdiction over the action). The court was not persuaded by the argument that such removal was permissible to protect the resolution of common issues pending in federal class actions in other districts.

\textsuperscript{156} Hillman v. Webley, 115 F.3d 1461 (10th Cir. 1997).

\textsuperscript{157} \textit{See Hillman}, 115 F.3d at 1462-63. The Judicial Panel on Multidistrict Litigation had consolidated these cases for pretrial. \textit{See id.} at 1463.
settlement which the bankruptcy court had approved.\textsuperscript{158} That settlement barred and enjoined “non-settling defendants (including one Barnard) from filing [most] contribution and indemnity claims” against any of the settling defendants.\textsuperscript{159} In the meantime, a state court action was filed against Barnard.\textsuperscript{160} After judicial approval of the above-described settlement, Barnard filed cross- and third-party claims against some of the settling defendants, in the context of the state lawsuit.\textsuperscript{161} The district court held some of these claims to be subject to its bar order, reserving judgment as to the others,\textsuperscript{162} and the state court dismissed the former and stayed the latter.\textsuperscript{163} Barnard asked the federal transferee court to assert jurisdiction over the state court plaintiff’s claims, as part of the multi-district litigation,\textsuperscript{164} and the court ordered the “transfer” of the entire state case into the multi-district consolidation.\textsuperscript{165} It refused to remand Barnard’s cross- and third-party claims to state court and granted summary judgment against Barnard on those claims.\textsuperscript{166}

As described by the Tenth Circuit, the district court assumed jurisdiction over the state court action by purportedly removing it under the All Writs Act, the AIA, the supplemental jurisdiction statute,\textsuperscript{167} and the multidistrict litigation statute.\textsuperscript{168} The district court removed the case because of the substantial federal claims in multidistrict litigation, the common nucleus of facts between the state and federal cases, and because the district court was best positioned to determine whether the federal bar order applied to the claims asserted by Barnard in the state action, so as to protect the federal court’s jurisdiction and guard the integrity of its prior rulings.\textsuperscript{169}

The Tenth Circuit concluded that, notwithstanding these considerations, an earlier circuit decision disapproving the use of the All Writs Act to assert jurisdiction over a \textit{party} who was not otherwise before the court, foreclosed it from interpreting the All Writs Act to authorize federal jurisdiction over the

\begin{itemize}
\item \textsuperscript{158} See \textit{id.} at 1463-64.
\item \textsuperscript{159} \textit{Id.} at 1464. The agreement excepted “claims based upon a specific written agreement of indemnity” from the injunction.
\item \textsuperscript{160} See \textit{id.}
\item \textsuperscript{161} See \textit{id.}
\item \textsuperscript{162} See \textit{id.} at 1464-65 (finding that Barnard’s “first two causes of action . . . were claims for indemnification” and that the court “was unable to determine whether [the remaining claims] were ‘independent claims or disguised requests for indemnification and contribution’”).
\item \textsuperscript{163} See \textit{id.} at 1465.
\item \textsuperscript{164} See \textit{id.}
\item \textsuperscript{165} See \textit{id.}
\item \textsuperscript{166} \textit{Id.} at 1465-67.
\item \textsuperscript{167} 28 U.S.C. § 1367 (1993).
\item \textsuperscript{168} 28 U.S.C. § 1407 (1993).
\item \textsuperscript{169} \textit{Hillman}, 115 F.3d 1461, 1467, 1469.
\end{itemize}
state law case. While agreeing that the district court had All Writs authority to enjoin parties before it from pursuing conflicting litigation in the state court, the Tenth Circuit held that the All Writs Act did not permit removal of claims otherwise outside federal subject matter jurisdiction.

Finally, the Eleventh Circuit considered but rejected All Writs removal in *De Perez v. AT&T Co.* after having rejected alternative theories of removal. The court steered clear of ruling on the propriety of such removals in other circumstances, and found that defendants in the case at hand had not shown the necessary exceptional circumstances required to justify All Writs removal. The court did not see how plaintiffs’ state tort action (arising out of a gas pipeline explosion in Venezuela) would have interfered with discovery orders made in a similar federal case, even if plaintiffs, who included persons also suing in that federal case, had filed suit in state court to avoid federal discovery orders. Furthermore, it did not see how allowing the state case to proceed would “thwart the ... forum non conveniens” dismissal of that federal case. Even the possible preclusion of some of the state plaintiffs’ claims did not justify the exercise of supplemental jurisdiction over the entire case under the

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170 *Hillman*, 115 F.3d at 1469 & n.5. (relying on Commercial Sec. Bank v. Walker Bank & Trust Co., 456 F.2d 1352, 1355 (10th Cir. 1977), where the court held that the All Writs Act “does not allow a court to ‘acquire jurisdiction over an individual or property not otherwise subject to its jurisdiction’ and ‘does not operate to confer jurisdiction’”) (internal citations omitted). The *Hillman* opinion is somewhat ambiguous in whether it criticizes the assumption of jurisdiction over “AC,” the plaintiff in the state case, or over the AC case itself. See, e.g., *Hillman*, 115 F.3d at 1469 & n.6. But the ordered remand of Barnard’s cross- and third-party claims indicates that the court intended to criticize the assumption of jurisdiction over any and all claims asserted in the case initiated by AC, despite the federal court having personal jurisdiction over Barnard and the settling defendants against whom he was asserting claims.

Although in relying on the earlier Circuit case described in the text the court seemed to view personal and subject matter jurisdiction as comparable, elsewhere it acknowledged the difference. *See id.* at 1469 n.5 (finding in United States v. New York Tel. Co., 434 U.S. 159, 172 (1977), a suggestion that “the All Writs Act may be a basis for personal jurisdiction when subject matter jurisdiction is ‘otherwise obtained’”). Here, it found no independent source of subject matter jurisdiction over Barnard’s state law claims. *See Hillman*, 115 F.3d at 1469 n.5.

171 *Id.* at 1469-70. The court added that no other statute relied upon provided a basis for federal jurisdiction over the state case, that the time for removal set by § 1446(b) had expired, and that proper venue upon removal would have been elsewhere. Judge Paul Kelly, Jr., concurring in the result, viewed the *Commercial Securities Bank* case as distinguishable and opined that a district court does have authority to remove an otherwise removable case in appropriate and narrow circumstances, in aid of its jurisdiction. *Hillman*, 115 F.3d at 1470 n.6.

172 *See De Perez v. AT&T Co.*, 139 F.3d 1368, 1379-80 (11th Cir. 1998). The court addressed one of those alternatives, removal based on diversity jurisdiction, *after* discussing the possibility of All Writs removal, however. *See id.* at 1380-81. The others, based on proposed theories of federal question jurisdiction, it addressed first. *See id.* at 1373-78.

173 *See id.* at 1379.

174 *See id.* at 1380.

175 *Id.*
All Writs Act.\textsuperscript{176} Thus, the Eleventh Circuit reversed the \textit{forum non
conveniens} dismissal of the improperly removed claims.

Currently, the Court of Appeals for the Fifth Circuit has not decided any
cases concerning All Writs removal, although district courts there have ruled
on the issue. Some district courts have followed or distinguished the seminal
cases. For example, in \textit{Chance v. Sullivan}, the Southern District of Texas held
that it had federal question jurisdiction supporting removal of the claims, and
alternatively, jurisdiction under the All Writs Act to protect the integrity of a
prior order of the court.\textsuperscript{177} The resolution of state law claims arising out of an
attorney's alleged malfeasance while representing plaintiffs in a federal class
litigation entailed an analysis "inextricably intertwined . . . [with the] propriety
of the [court-approved] settlement agreement" and would "affect the scope and
validity of the settlement [o]rder."\textsuperscript{178} In \textit{Fidelity Financial v. Robinson}, a bank
commenced a collection action in state court, in which borrowers filed a
compulsory counterclaim alleging that the bank had wrongfully purchased
collateral protection insurance in connection with borrowers' loans.\textsuperscript{179} In a
federal class action challenging such insurance purchases, a federal court had
issued a temporary certification of a settlement class and a temporary
injunction prohibiting class members from commencing new actions relating to
the same allegations. The borrowers, however, had no notice of the federal
proceedings. The Southern District of Mississippi held that All Writs removal
to give effect to the injunction would be \textit{inappropriate} because the class action
might not culminate in a judgment binding these borrowers, and because the
injunction might be dissolved, leaving "the former 'class' members . . . free to
pursue their claims . . . in any appropriate forum."\textsuperscript{180} The court also noted that
it could enjoin the borrowers' pursuit of their claim in state court without the
necessity of removing their case.\textsuperscript{181} In \textit{Nowling v. Aero Services Int'l, Inc.}, the
Eastern District of Louisiana upheld removal under \textit{Moitte}, and alternatively
under the All Writs Act, where the state suit was an effort to avoid and
collaterally attack orders entered in a prior federal litigation.\textsuperscript{182}

Other district courts in the Fifth Circuit have found no exceptional
circumstances warranting All Writs removal,\textsuperscript{183} and one found no federal

\textsuperscript{176} See id. at 1379-80.


\textsuperscript{178} Id. at 567. Under these circumstances, the \textit{Chance} court found the federal court
"most qualified to review the settlement and any claims arising from the handling of the
litigation." Id. at 568.

\textsuperscript{179} See Fidelity Fin. v. Robinson, 971 F. Supp. 244, 245 (S.D. Miss. 1997).

\textsuperscript{180} Id. at 250.

\textsuperscript{181} See id. at 250 ("[I]f it would be proper under the All Writs Act and/or the Anti-
Injunction Act to enjoin the [co-defendants] from pursuing their counterclaim, the
court could enter such an injunction without the necessity of removing the case to do so.").


\textsuperscript{183} See Lange v. The Orleans Levee Dist., 1997 U.S. Dist. LEXIS 9358, at *7-*8 (E.D. La.
jurisdiction over the litigation to which litigants sought to tie an All Writs or supplemental jurisdiction removal.\textsuperscript{184}

\section*{III. Two Threshold Questions}

Before addressing the propriety of and the need for All Writs removal, two threshold issues should be introduced. First, why have parties sought all writs removal? Second, why should anyone care what vehicle brings a case into federal court?

\subsection*{A. Why Have Parties Sought All Writs Removal, Rather Than Injunction of State Court Proceedings?}

Telephone conversations with attorneys who litigated some of the cases in which All Writs removal was sought revealed a number of reasons why they sought such removal, rather than suing in federal court for an injunction of the state court proceedings.\textsuperscript{185} First, the attorneys believed that litigating in federal court would better serve their clients’ interests. Who better to deal with efforts to disturb a federal consent decree, for example, than the judge who entered that decree? Once precedents existed for All Writs removal, attorneys often cited those precedents because they aided their clients’ cause, without giving much thought to the novelty or propriety of the procedure. This failure to seriously examine the propriety of All Writs removal was especially easy for lawyers to justify when their argument for All Writs removal was made in the alternative, subordinate to arguments for removal under the ordinary removal statutes.

Seeking removal rather than an injunction of state proceedings has some tactical advantages. Of the lawyers who had given the matter further thought, some noted that preparing and filing a notice of removal is quicker, easier, and far less expensive than drafting papers and presenting oral arguments seeking


\textsuperscript{185} I thank all of these attorneys for their time and consideration in speaking with me about these matters. Several of the ideas presented in the text also were expressed in a February 5, 1999, exchange of views among Professors Salamanca, Sherry, Tidmarsh and Oakley on the Federal Courts “listserv” (printouts on file with the author).
an injunction of state court proceedings. Moreover, the injunction obtained through removal is immediate and automatic, and may well be greater in scope than the injunction that one might persuade a federal court to grant under the AIA. Because it is "automatic," the stay that attends a removal is not proceeded by drama, contention and uncertainty over whether the court should enter an inter-system injunction in the particular case, and the parties avoid the effort and expense entailed by such contention.

While a motion to remand may generate contention, such contention focuses on the propriety of the removal, rather than on the "softer" equitable considerations that go into the decision whether to enjoin other proceedings and on the notions of comity and federalism which make federal courts wary of enjoining state court proceedings. If the district court should deny removal, a party then can seek to enjoin the state court proceedings. Additionally, in some instances attorneys expected the removal to lead to a federal court dismissal of the claims originally brought in state court, rather than to the mere stay of those claims that a federal injunction would effect. In some instances, the removing defendants desired this more definitive resolution.186 So, why seek to enjoin when removal is available?

It should be noted that some of these reasons assume, first, that a party can effectuate an All Writs removal by following the same simple procedures that apply to a removal under 28 U.S.C. § 1441,187 and second that, if the effort to remove succeeds, an injunction of the state court proceedings will follow as a matter of course, enabling the removing parties to avoid making the showing normally necessary to obtain an injunction of state court proceedings. The first assumption may or may not be correct.188 The second fails to recognize that federal courts should not remove a case under the All Writs Act unless the removing party makes the same kind of showing that the AIA requires for enjoining a state court proceeding, and perhaps not even then.189

B. Why Should Anyone Care by What Means a Case is Brought to Federal Court?

One might wonder why anyone should care by what means a case is brought to federal court and, in particular, which removal mechanism is invoked. Posing the question in that way, however, presupposes that multiple routes do

186 Telephone interviews with Paul Winick, Thelen, Reid & Priest, LLP, Lewis S. Finkelman, City of New York Law Department, Commercial and Real Estate Litigation Division, Charles N. Raimi, Bodman, Longley & Dahling, and Jay Kelly Wright, Arnold & Porter (Aug. 3-4, 1999).
188 If All Writs removal is to be permitted (inter alia to avoid the delay and costs attendant upon a subsequent filing in federal court of the proceedings brought in state court and enjoined from proceeding there), the proper procedures for both such removal and any appropriate remands will have to be ironed out. See infra text at notes 220-25.
189 For further discussion of these issues, see infra text at notes 199-203, 206.
exist, when in fact they may not. Some cases may not fall within the traditional removal authorized by Congress, so use of the All Writs Act may not be merely an alternative road to a destination, but the exclusive road. Conversely, if the All Writs Act does not authorize removal, it may matter a great deal whether the ordinary removal statutes authorize removal. Moreover, very practically speaking, one may care which of two possible removal mechanisms litigants invoke if the route influences the particular requirements for removal. In my view, if traditional removal is available, the parties should be governed by its particulars concerning such matters as who may remove, who must join in the removal, the scope of what is removed, when the removal must be effected, to which federal court an action may be removed, and under what circumstances a removed action or portion thereof may be remanded. Since these procedural details may not govern a removal effected under the All Writs Act, they may be evaded if the removal is effected under that Act.\footnote{See infra notes 220-25 and accompanying text. For example, in Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d Cir. 1988), the Second Circuit apparently believed that it did not matter whether the City was the defendant in deciding whether an All Writs removal was legal. That decision could be an undesirable evasion of the usual requirements for removal.}

The policies that undergird the traditional removal requirements may thereby be undermined as well. Considering these implications, the route a case takes to federal court does matter.

Formalists are interested in assuring that cases arrive in federal court through a route that is proper under statutes and accepted judicial doctrines, rather than through unjustified judicial innovation. More fundamentally, one may be concerned that cases are being removed under the All Writs Act if one believes that, because such removals are not authorized by the statute, they are inconsistent with the allocation of power between Congress and the courts. Similar concerns would arise if one believes that such removals constitute overreaching that adversely affects federal-state judicial relations. To the extent that removals are effected under the All Writs Act without observance of the boundaries between the federal and state judicial systems that are captured in the AIA, federal intrusion into the proper sphere of state judiciaries is a matter of concern, even if state courts themselves are not rising up in rebellion. The All Writs removal that courts have designed also varies across circuits, so that in some incarnations it is more threatening to state judicial power than in others. These inconsistencies, in what should be a uniform relationship between federal and state courts, are yet another reason one might be concerned about the use of the All Writs Act to take cases out of the hands of state courts.
IV. THE ERRONEOUS INTERPRETATION OF THE ALL WRITS ACT TO AUTHORIZE REMOVAL

A. The Influence of Considerations of Comity and Federalism

Basic tenets of federalism are relevant to whether federal courts ought to read a power to remove into the All Writs Act. The Court wrote long ago that,

[T]he constitution . . . recognizes and preserves the autonomy and independence of the States . . . in their judicial departments. Supervision over . . . the judicial action of the States is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference . . ., except as thus permitted, is an invasion of the authority of the State, and, to that extent, a denial of its independence.\(^{191}\)

In the wake of the Court's decisions in 1999 constitutionalizing state sovereign immunity and emphasizing the independence of the states as sovereigns,\(^{192}\) one must take very seriously the language quoted above.

The Court also has said that "the exceptions [to the AIA] should not be enlarged by loose statutory construction" because the AIA "in part rests on the fundamental constitutional independence of the States and their courts."\(^{193}\) The same considerations of comity, requiring courts of one jurisdiction to forbear from interfering with courts of another jurisdiction, and of federalism, premised on the notion that federal courts must respect the independent sovereignty of state courts,\(^{194}\) dictate that the federal courts should not loosely

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\(^{192}\) See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999) (reaffirming that the Eleventh Amendment of the Constitution repudiated the interpretation of the jurisdictional heads of Article III to supersede the sovereign immunity that the States possessed before entering the Union, and concluding that State sovereign immunity is constitutionally protected and may not be waived by implication); Alden v. Maine, 119 S. Ct. 2240, 2243, 2246-47, 2263 (1999) (holding that the States' constitutional immunity from private suits for damages in their own courts is beyond Congress' power to abrogate by legislation passed pursuant to Article I of the Constitution, and concluding that "the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment," but rather is a fundamental aspect of pre-Constitutional sovereignty which the States retain, "except as altered by the plan of the Convention or certain constitutional Amendments").


\(^{194}\) See Younger v. Harris, 401 U.S. 37, 44-45 (1971) (describing comity as a proper respect for state functions and avoidance of undue interference with the legitimate activities of the States, which implies that "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions"); Kline v. Burke Constr. Co., 260 U.S. 226, 229 (1922) (stating that comity requires courts to forbear from interfering with the process of courts of another jurisdiction); see also David L. Shapiro, Jurisdiction and
interpret the All Writs Act to permit removal of actions from state court. 195 "Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts," 196 unless their injunction is warranted under the AIA and, in that circumstance, injunction rather than removal usually, if not always, should be ordered. 197

B. The Mistaken View That Injunctions Against State Court Proceedings are More Disruptive of Federal-State Relations Than is Removal

Some of the cases that have approved removal pursuant to the All Writs Act have done so in part because the judges believed that removal was less disturbing to federal-state judicial relations than federal injunction of the state court proceedings or orders would have been. 198 I believe that this view is incorrect. Moreover, if the relative preferability of these tools is a matter on which reasonable minds can differ, I believe that Congress chose the tool, rather than leaving the choice to the courts on a case-by-case basis. Congress decided in favor of injunctions by explicitly authorizing federal injunction of state court proceedings in specified circumstances, but not expressly providing for removal in the All Writs Act or elsewhere under the circumstances in which the AIA authorizes the injunction of state court proceedings.

Removal typically entails both removal and a prohibition against the state court proceeding any further, unless and until a case is remanded. 199 That prohibition has been legislated by Congress in the general removal statutes,

Discretion, 60 N.Y.U. L. REV. 543, 580-85 (1985) (tracing the development of the principle of comity in our jurisprudence; describing both federalism and comity as conveying a sense of the need for mutual respect between two entities that are, at least to some degree, independent of one another); Sternlight, supra note 24, at 93 nn.13 & 14, 117 (defining and discussing comity and federalism in these terms).

195 Professor Sternlight recently commented that,

[A]n argument can be made that federalism concerns more strongly favor federal courts' non-interference with state courts than they favor striking down intrusive federal legislation . . . [because] where a federal court oversteps its bounds and interferes with a state court, the political process cannot step in to make a correction. Relief can be obtained only through appeal within the federal system, and the odds of getting to the Supreme Court are always extremely low.

Sternlight, supra note 24, at 121 n.135.

196 Atlantic Coast Line, 398 U.S. at 287.

197 See infra text at notes 198-206; see also Gamble v. General Foods Corp., 846 F.2d 51, 52 (9th Cir. 1988) (stating that even if jurisdiction would exist to enjoin a state proceeding to protect the res judicata effect of a federal judgment, the AIA does not provide jurisdiction over a removed proceeding).

198 See, e.g., Yonkers Racing Corp. v. Yonkers, 858 F.2d 855, 864 (2d Cir. 1988); N.A.A.C.P. v. Metropolitan Council, 125 F.3d 1171, 1174 (8th Cir. 1997), vacated without op., remanded, 522 U.S. 1145 (1998), reinstated, 144 F.3d 1168 (8th Cir. 1998), and cert. denied, 525 U.S. 826 (1998). These cases are discussed at length in Section II, supra.

and was so legislated as far back as 1789, but the federal courts too have long recognized that, in order to deal with situations in which state courts fail in their duty to cease acting upon removed cases, federal courts must have power to stay the state proceedings. Without that power, state courts would be able to undermine the protections that the removal provisions were intended to afford. Thus, the authority to enjoin state court proceedings is a lesser-included concomitant of removal. State court proceedings can be enjoined without removal but, as a practical matter, one cannot have removal without a cessation of activity in the state court and without federal judicial authority (which usually need not be exercised) to enjoin further state court proceedings in the removed matter.

One could argue that less friction is created between the state and federal judiciaries when the stoppage of state court proceedings is directed by Congress in a removal statute than when it is directed by a federal court through injunction. Since the legislatively imposed duty to discontinue the state proceeding must be backed by the federal judicial power to enjoin that proceeding, however, this argument does not persuasively demonstrate that removal is less disturbing to federal-state judicial relations than are injunctions. In my view, removal, by not merely stopping a case in state court but also whisking that case into federal court, is theoretically more intrusive and more generative of state-federal judicial friction than is the simple injunction of state court proceedings or orders. Consequently, an injunction of state court

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200 The Judiciary Act of 1789, § 12, 1 Stat. 79, provided for removal of some diversity of citizenship cases and that, when a case was removed, “it shall then be the duty of the state court to . . . proceed no further in the cause.”

201 See supra text at notes 30-31; see generally, Federal Court Stays, supra note 20, at 615.

202 One might argue that although the cessation of state proceedings is mandated for cases that are removed pursuant to the removal statutes in 28 U.S.C. § 1441 et seq., it may not be mandated for cases that are removed pursuant to the All Writs Act. This position seems wrong both because the power to enjoin removed state court proceedings is necessary, for the reasons stated in the text, regardless of the source of the power to remove, and because the parallels between the All Writs Act and the AIA make clear that whenever removal is proper under the former, if it ever is, the requirements for an injunction of the state proceedings would be satisfied. See infra text at Part V.C; see also supra text at note 31, with respect to Congress having expressly authorized the injunction of state court proceedings upon (at least traditional) removal and injunctions upon removal being recognized as necessary in aid of the federal courts’ jurisdiction.

203 The litigants will be bound by the injunction if the court that ordered it had jurisdiction over the parties and over the case in which the injunction was entered. The state court has no authority to respond by enjoining the federal proceedings. See General Atomic Co. v. Felter, 434 U.S. 12, 15-17 (1977) (per curiam) (holding that Supremacy Clause of the Constitution prohibits state courts from barring litigants from filing or prosecuting in personam actions in the federal courts, whether the federal litigation is pending or prospective); Donovan v. City of Dallas, 377 U.S. 408, 411-13 & n.11 (1964) (declaring that state courts are completely without power to restrain federal court proceedings in in personam actions); see also Miller, supra note 2, at 531-33 & n.82.
proceedings, without removal, is preferable to removal, at least where the injunction alone, or the injunction taken together with other mechanisms for allowing, but not commanding, claims to be heard in federal court, will adequately protect the interests of the federal courts and litigants.

Similarly, the idea that removal is preferable to injunction because it saves state resources\textsuperscript{204} is ill-conceived. Federal courts do not have to await, indeed they must not await, a state court judgment that undermines federal jurisdiction or that fails to afford due respect to a federal judgment before they enjoin state court proceedings that threaten those harms.\textsuperscript{205} Thus, federal courts can preserve state judicial resources just as effectively through injunctions as they can through removal.

Because removal encompasses but goes beyond the injunction of state court proceedings, All Writs removal should be permissible, if at all, only when an injunction of those proceedings would be proper under the AIA\textsuperscript{206}—although the propriety of such an injunction would be necessary but not sufficient to justify All Writs removal. Thus, when an AIA injunction would be impermissible, an All Writs removal should likewise be impermissible, even if such removals are authorized in some circumstances.

C. Statutory Construction in the Context of These Broader Policies

1. The “Removal as of Right” Alternative

A number of courts have avoided deciding “difficult” questions concerning removal as of right, opting to rest on the All Writs Act instead.\textsuperscript{207} It is beyond the scope of this Article to closely examine whether, in the various cases in which All Writs removal was approved, ordinary removal as of right was an available alternative. However, it is appropriate to say here that I believe it to be error for courts to approve All Writs removal while failing to determine whether removal as of right is an available alternative. Furthermore, it is error to rest removal on the All Writs Act if it could be premised on the statutes explicitly governing removal. One reason is simply that where a means to an end is available as of legal right, courts should utilize it rather than rely on a

\textsuperscript{204} See N.A.A.C.P., 125 F.3d at 1174.

\textsuperscript{205} Indeed, if the federal court waits to enter an injunction until after a state court has rendered a judgment that is predicated upon disallowance of res judicata effect to a federal judgment, it is too late. The Full Faith and Credit Act requires the federal court to give the state court’s resolution of the res judicata issue and its judgment the same preclusive effect that the rendering state’s court would give them. See Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 519 (1986).

\textsuperscript{206} As previously noted, because the explicit removal statutes expressly authorize the injunction and because injunction of the state court proceedings is necessary in aid of the federal court’s jurisdiction, this requirement of allowing All Writs removal only when an injunction is proper under the AIA is satisfied in the context of removal under those statutes.

\textsuperscript{207} See, e.g., Yonkers Racing Corp v. City of Yonkers, 858 F.2d 855, 862-63 (2d Cir. 1988).
dubious mechanism, All Writs removal power, whose use is appropriate, if at all, only in extraordinary circumstances.\textsuperscript{208} The Court has recently emphasized that the All Writs Act "invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law."\textsuperscript{209} Consequently, where removal as of right is an available alternative, All Writs removal should not be made available. It follows that the court has a duty to determine whether removal as of right is available. Moreover, if the court finds such removal to be available, it is error to rest removal on the All Writs Act.

I am inclined to add that difficulty does not excuse a court from addressing a threshold question (whether removal as of right is available) in favor of resolving instead a question that the court perceives to be more easily answered (whether to allow removal under the All Writs Act). I concede, however, that that principle is not iron-clad. The Supreme Court has made clear that courts may not avoid difficult questions of federal subject matter jurisdiction and assume "hypothetical jurisdiction" in order to dismiss cases on merits grounds that are more readily decided, even when the prevailing party also would prevail if jurisdiction were denied.\textsuperscript{210} The Court also has indicated, however, that, in general, there is no unyielding hierarchy in the sequence in which courts must address issues.\textsuperscript{211} Accepting the latter proposition does not, however, negate the need to address the availability of remedies at law before

\textsuperscript{208} The reservation of the writ of mandamus for extraordinary situations in which meaningful appeal is not otherwise available (see, e.g., Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 8 n.6 (1983) (stating that a court of appeals has no occasion to utilize mandamus when it can afford review by a contemporaneous appeal); Kerr v. United States Dist. Ct., 426 U.S. 394, 402 (1976) (stating that mandamus is a drastic remedy, to be invoked only in extraordinary situations, and that the party seeking the writ must have no other adequate means to attain the relief he desires); Roche v. Evaporated Milk Ass’n, 319 U.S. 21, 30 (1943) (stating that, “[w]here the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions . . . .”), is comparable to the reservation of injunctions for situations in which no adequate remedy exists at law. All the common law writs authorized by the All Writs Act are to be reserved for extraordinary situations. Indeed, “[t]he purpose of mandamus is to enable a court to require a public officer to perform a legal duty or to refrain from an unlawful act.”\textsuperscript{209} Clinton v. Goldsmith, 526 U.S. 529, 537 (1999).


\textsuperscript{211} See Ruhrags AG v. Marathon Oil Co., 526 U.S. 574, 585-87 (1999) (concluding that while a federal court usually should first resolve questions concerning its subject matter jurisdiction, there are circumstances in which the court may first decide personal jurisdiction issues, and the relative difficulty of the questions is a permissible consideration).
turning to equitable remedies. Moreover, following the approach I advocate is not necessarily more onerous. It does entail grappling with whatever difficulties inhere in determining whether removal as of right is available, but when such removal is available a court avoids reaching potentially difficult questions under the All Writs Act that it otherwise would have had to confront. For example, a court in this situation avoids evaluating a purported showing of need to be in federal court; it avoids resolving whether the removal would be in aid of a federal jurisdiction previously acquired, and it avoids any weighing of the equities.

Most importantly and fundamentally, courts should base removal on ordinary removal statutes such as 28 U.S.C. § 1441 et seq. where that course is available because Congress has addressed the federalism issues raised by regular removal and, by expressly authorizing both removal and an implementing injunction of the state court proceedings in limited circumstances, has decided the federalism issues in favor of allowing removal in those limited circumstances. By contrast, removal under the All Writs Act has not been expressly authorized by Congress. The absence of Congressional imprimatur is important because, as elaborated above, removal typically entails a prohibition against the state court proceeding any further, unless and until a case is remanded. Such an injunction is a lesser included facet. Hence, federalism concerns dictate that actions be removable under the All Writs Act, if at all, only if the federalism interests reflected in the AIA are satisfied.

2. Additional Circumstantial Evidence: The Breadth of the Express Removal Statutes, the Novelty of Implied Authorization of Removal, and the Absence of Procedural Detail

Other factors that militate against construing the All Writs Act ever to authorize removal are the breadth of the removal statutes that exist, the absence of other statutes held to implicitly authorize removal, and the absence of detail governing the procedural specifics of All Writs removal. In addition to miscellaneous specialized removal statutes scattered through the U.S. Code, except as otherwise expressly provided by Congress, 28 U.S.C. § 1441(a)

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212 See supra notes 198-203 and accompanying text.
213 See supra text at notes 191-97.
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authorizes removal from state to federal court of any civil action over which the district courts have original jurisdiction. \(^{215}\) Section 1441(c) authorizes removal of cases that contain within them a "separate and independent claim . . . within the jurisdiction conferred by section 1331" plus one or more otherwise non-removable claims. \(^{216}\) Section 1442 authorizes removal of civil and criminal actions commenced against federal officers and agencies. \(^{217}\) Section § 1443 authorizes removal of any action against a person who is denied or cannot enforce in the state court a right under any law providing for equal civil rights. \(^{218}\) While policy arguments can be made for the removability of some actions that are not encompassed within the broad sweep of these statutes, \(^{219}\) the very breadth of the explicit legislative authorizations of removal may suggest that Congress did not believe (or would not have believed, had it considered it) that a rather open-ended authority to remove still other actions under the All Writs Act would be either necessary or appropriate.

In confronting whether the All Writs Act should be construed ever to authorize removal, it seems also pertinent that I was unable to locate any other statute that the courts have held to impliedly authorize removal. This seems to bespeak a long-held judicial view that removal must be explicitly authorized by Congress. Moreover, when Congress authorizes removal of actions from state to federal court, it typically prescribes in considerable detail some or all of the following: who may remove, the scope of that which may be removed, when the removal may be effected, the venue to which the removal must be made, the procedures governing how the removal shall be effected, the circumstances under which all or a portion of an action may be remanded, and various other details. \(^{220}\) Congress did not explicitly legislate any of these


\(^{216}\) 28 U.S.C. § 1441(c).


\(^{218}\) 28 U.S.C. § 1443; see also 28 U.S.C. § 1443(2) (allowing removal for "any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the grounds that it would be inconsistent with such law").

\(^{219}\) See, e.g., AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURT 25-26 (1969) (proposal to allow removal of actions (1) in which an amount in controversy requirement is satisfied and there is properly asserted a substantial defense arising under the Constitution, laws or treaties of the United States that, if sustained, would dispose of the action or of all counterclaims therein and (2) by any party against whom a counterclaim is asserted which sets forth a substantial claim arising under the Constitution, law or treaties of the United States).

matters in connection with the All Writs Act. This suggests that it did not intend that statute to authorize removal.

Alternatively, Congress might have contemplated that the statutes governing removal generally would apply if and when courts allowed removal under the All Writs Act. Statutes such as 28 U.S.C. §§ 1446-50,221 which govern procedures before and after removal, speak generally to removal of civil actions and criminal prosecutions, without regard to the source of the authority to remove. They easily could be held to govern All Writs removals. It is noteworthy, however, that courts that have purported to effect All Writs removals have not always assumed the applicability of these procedural statutes and have not always abided by their prescriptions.222 If those courts are correct that these procedures do not govern All Writs removal, and indeed that no existing statutes govern the who, what, when, where, and how of such removals, a raft of questions arise. For example, will only defendants be permitted to remove, and will all defendants in one case have to join in the removal notice, as is the case under 28 U.S.C. § 1446? Should the federal court that is handling or has already entered judgment in the action that is threatened by the state court suit also be authorized to initiate an All Writs removal? Within what time frame should any such removal be authorized, particularly if the federal court itself may initiate the removal? Should the time

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221 These statutes govern procedures before and after removal.
222 In Yonkers Racing Corp. v. Yonkers, 858 F.2d 855, 861-63 (2d Cir. 1988), for example, the City’s removal of the Article 78 proceedings was ordered by the federal court rather than being instigated by the City. While the federal court did not decide whether the proceedings were removable pursuant to 28 U.S.C. §§ 1441 or 1443 because of the difficulty of deciding whether Yonkers was a defendant for purposes of the removal statutes (and therefore eligible to remove), it did not regard the question whether Yonkers was a defendant as important to the propriety of an All Writs removal. See also United States v. City of New York, 972 F.2d 464, 468 (2d Cir. 1992) (sua sponte removal under 28 U.S.C. § 1651); Fidelity Fin. v. Robinson, 971 F. Supp. 244, 249 (S.D. Miss. 1997) (assuming that the procedural requisites for removal prescribed by the general removal statutes would be irrelevant for an All Writs removal). Cf. Bewley v. Cigna Fin. Advisors, 1997 U.S. Dist. LEXIS 14761, at *4-*5 (N.D. Cal. Sept. 23, 1997) (holding All Writs removal unavailable because untimely under 28 U.S.C. § 1446(b) and because there was no independent basis of jurisdiction over the action); In re Baldwin-United Corp., 770 F.2d 328, 338-39 (2d Cir. 1985) (concluding that injunctions issued pursuant to the All Writs Act need not comply with the requirements of Rule 65 of the Federal Rules of Civil Procedure, which governs the issuance of preliminary injunctions).
frame be different than that prescribed in 28 U.S.C. § 1446(b)? Should the
venue for removal be different from the one provided in 28 U.S.C. § 1446(a) on
the ground that only the district court that is handling or already entered
judgment in the action threatened by the state court suit can properly entertain
a case pursuant to All Writs removal? Alternatively, may the § 1446(a) venue
rule remain unchanged and the task of placing the removed case before the
pertinent federal district court be handled by existing mechanisms for transfer?
Should the provisions of 28 U.S.C. § 1447 concerning motions to remand,
grounds for remand, and non-reviewability of remand orders apply, or should
they be modified for All Writs removals? I again submit that Congress’s
failure to answer any of these questions is evidence that Congress did not
contemplate removal under the authority of the All Writs Act.

Admittedly, none of this reasoning is determinative. Taken together with
the constraints that federalism suggests and with the absence of demonstrated
need for All Writs removal, however, the case against interpreting the All
Writs Act to authorize removal is far stronger than the case favoring such
interpretation.

This Article will examine whether in cases in which a federal court of
appeals approved an All Writs removal, an injunction against the state court
proceedings would have been proper and effective to protect the interests of
the federal courts and litigants. First, however, Section V.A introduces
ancillary and supplemental jurisdiction as bases for the federal courts to hear
claims initially brought in state court and discusses the Article III and statutory
problems that may exist when those doctrines are inapplicable. Introducing
this material lays the groundwork for a re-examination of the appellate cases in
which courts permitted All Writs removal to be effectuated. That reprise
will focus upon whether ancillary jurisdiction, when coupled with an

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223 28 U.S.C. § 1446(b) (1994) requires defendants to file a notice of removal within thirty
days after receiving the initial pleading, or within thirty days after service of summons if the
initial pleading already has been filed in court and is not required to be served on the defendant,
whichever period is shorter.

If the case stated by the initial pleading is not removable, the defendant may file a notice of
removal within thirty days after receiving an amended pleading, motion, order, or other paper
making the case removable, although a case may be removed on the basis of diversity
jurisdiction only within one year of commencement of the action.

224 28 U.S.C. § 1446(a) (1994) requires the notice of removal to be filed in the district court
of the United States for the district and division within which such action is pending.

removal; providing, inter alia, that cases may be remanded for lack of subject matter jurisdiction
or for other defects; that motions to remand on the basis of other defects have to be made within
30 days after the filing of the notice of removal; and that remand orders generally are not
reviewable on appeal or otherwise).

226 See supra text at notes 191-97 and infra Part V.C.

227 The cases in which appellate courts have granted All Writs removal are discussed
supra Section II.
injunction of the state court proceedings, would have provided an adequate alternative to All Writs removal.

V. THE ABSENCE OF DEMONSTRATED NEED FOR ALL WRITS REMOVAL

A. Introduction to Ancillary and Supplemental Jurisdiction

There are two varieties of ancillary jurisdiction, the basis of both of which, the Court has said, is the practical need “to protect legal rights or effectively to resolve an entire, logically entwined lawsuit.”228 One variety is the sort codified in 28 U.S.C. § 1367,229 which, subject to specified exceptions, authorizes federal courts to exercise “supplemental” jurisdiction over claims lacking an independent basis of federal subject matter jurisdiction but forming part of the same case or controversy under Article III as claims for which an independent basis of federal subject matter jurisdiction exists. Following United Mine Workers v. Gibbs,230 claims usually are viewed as forming part of the same “case” only if they share a “common nucleus of operative fact.”231 From a temporal perspective, these supplemental claims typically are asserted before the court enters judgment on the “freestanding”232 claims in a case.

The second variety of ancillary jurisdiction enables a federal court to “manage its proceedings, vindicate its authority, and effectuate its decrees.”233 The Court in Peacock v. Thomas234 explained that, because a federal court sitting in a lawsuit presenting no freestanding claims lacks the jurisdiction that exists when supplemental claims are asserted in the same proceeding with freestanding claims, factual interdependence with freestanding claims asserted in a prior federal lawsuit does not support federal jurisdiction over a later suit.235 And, of course, “neither the convenience of litigants nor considerations

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231 Id. at 725.
232 This is the term used in the current American Law Institute Federal Judicial Code Revision Project to refer to claims for relief that are within the original jurisdiction of the district courts independently of the section governing supplemental jurisdiction. See AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, TENTATIVE DRAFT NO. 2, at 1 (Apr. 14, 1998) (proposed 28 U.S.C. § 1367(a)(1)).
235 See id. at 353. A consolidation of lawsuits, one of which is supported by an independent basis of federal subject matter jurisdiction and another of which is not but contains claims all of which arise from a common nucleus of operative fact with the freestanding claims in the first suit, might well be constitutional. See Joan Steinman, The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be, Part 1: Justiciability and
of judicial economy''\textsuperscript{236} can justify ancillary jurisdiction. Courts have held this second variety of ancillary jurisdiction to legitimate jurisdiction over supplementary proceedings including attachment, garnishment,\textsuperscript{237} the pre-judgment avoidance of fraudulent conveyances, and some mandamus actions, when appropriate to assure that federal courts could protect and enforce their judgments.\textsuperscript{238}

In \textit{Peacock}, the Court concluded that federal courts do not possess ancillary jurisdiction over a new action in which a judgment creditor seeks to impose liability for an existing money judgment on a person other than the original judgment debtor.\textsuperscript{239} The Court invoked early warnings against the exercise of ancillary jurisdiction over proceedings that are entirely new and original, or where the relief sought is of a different kind or is predicated on a different principle than that of the anchoring suit. The Court then rejected plaintiff's effort to invoke ancillary jurisdiction over a suit alleging fraudulent conveyances, civil conspiracy to siphon assets, and "veil-piercing," all theories of liability not asserted in the allegedly anchoring ERISA suit. These theories were not and could not have been asserted at the time of the original judgment, and were aimed at establishing liability of an additional defendant.\textsuperscript{240}

\textit{Jurisdiction (Original and Appellate),} 42 UCLA L. REV. 717, 741-61 (1995). Nonetheless, consistent with the thinking outlined in the text above, courts generally reject efforts to consolidate such suits, with one being regarded as ancillary to the other. See, e.g., Ahearn v. Charter Township, 100 F.3d 451, 456 (6th Cir. 1996) (holding that state law challenging special assessment could not be removed pursuant to the supplemental jurisdiction statute even if factually related to another action of which the district court had jurisdiction); Brown v. Francis, 75 F.3d 860, 866 (3d Cir. 1996) (stating that consolidation could not cure the jurisdictional deficiencies of a case); McKenzie v. U.S., 678 F.2d 571, 574 (5th Cir. 1982) (reaching the same conclusion as Brown); Steinman, supra, at 751 n. 116 (citing additional cases exemplifying this proposition). Occasionally, however, courts bend or make exceptions to the rule that each component action in a consolidation must be considered independently in determining subject matter jurisdiction. See Steinman, supra, at 753-56.


\textsuperscript{237} \textit{But see} Berry v. McLemore, 795 F.2d 452, 455 (5th Cir. 1986) (holding that there was no ancillary jurisdiction over a garnishment action against someone not a party to the primary action establishing a debt, particularly where the basis of the garnishment was different from the basis of the original claim).

\textsuperscript{238} See \textit{Peacock}, 516 U.S. at 356. See, e.g., Minnesota Co. v. St. Paul Co., 69 U.S. (2 Wall.) 609, 631-34 (1864) (holding that where a bill in equity is necessary to obtain an interpretation of the order or decree of a federal court and to enforce the rights established by that court, the federal court has ancillary jurisdiction over the proceeding).

\textsuperscript{239} 516 U.S. at 357-59.

\textsuperscript{240} See id. at 358 (citing, in support of its conclusion, \textit{Dugas v. American Surety Co.}, 300 U.S. 414, 428 (1937), \textit{Krippendorf v. Hyde}, 110 U.S. 276, 285 (1884), and \textit{Minnesota Co. v. St. Paul Co.}, 69 U.S. (2 Wall.) 609, 633 (1864), for their cautions against the exercise of ancillary jurisdiction over proceedings that are entirely new and original or where the relief sought is of a different kind or on a different principle than that on which the prior decree was based). Justice Stevens dissented, arguing that the continuation of a federal court's jurisdiction until a judgment
Earlier, in *Kokkonen v. Guardian Life Insurance Company of America*, the Court had rejected overbroad and overly narrow formulations of ancillary jurisdiction doctrine and provided useful dicta to guide litigants and courts. It rejected as too broad the description of an ancillary suit as:

A bill filed to continue a former litigation in the same court ... to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties ... or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court.

It rejected as too limited its own prior dicta that, "[N]o controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit."

Faced with having to decide whether a federal court may assert ancillary jurisdiction over an action for breach of a promise given in exchange for dismissal of an earlier federal suit, the Court held that ancillary jurisdiction was not available, citing the great differences between the facts to be determined in the breach action and the factual disputes in the dismissed litigation, the lack of need for jurisdiction over such contract disputes in order for the federal courts to conduct their business, the absence of any reference to the settlement agreement in the Rule 41(a)(1)(ii) "Stipulation and Order of Dismissal with Prejudice" that had ended the prior litigation, and the absence of any district court reservation of jurisdiction to enforce the settlement agreement. The Court advised, however, that if a case is dismissed pursuant to Rule 41(a)(2), the court may make the parties' compliance with the terms of their settlement contract a term or condition of its dismissal order or may retain jurisdiction over the settlement contract and that, if a dismissal is pursuant to Rule 41(a)(1)(ii), the court may, with the parties' consent, embody the settlement contract in its dismissal order or retain jurisdiction over the

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is satisfied should extend to a claim by a judgment creditor that a person in control of the judgment debtor has fraudulently exercised that control to defeat satisfaction of the judgment, and rejecting the majority's view of the case as an effort to establish an independent liability, rather than to collect on a prior federal judgment. See *Peacock*, 516 U.S. at 360-62.


242 *Id.* at 379 (quoting *Julian v. Central Trust Co.*, 193 U.S. 93, 113-14 (1904), in turn citing 1 C. BATES, FEDERAL EQUITY PROCEDURE § 97 (1901)).


244 FED. R. CIV. P. 41(a)(1)(ii) (permitting a plaintiff to dismiss an action without court order by filing a stipulation of dismissal signed by all parties who have appeared in the action).

245 *Kokkonen*, 511 U.S. at 380-82.

246 FED. R. CIV. P. 41(a)(2) (providing for dismissal at a plaintiff's instance, but upon order of the Court).
settlement contract. In either event, a breach of the agreement would violate the court’s order, with the consequence that ancillary jurisdiction to enforce the agreement would exist.

B. The Potential Article III and Statutory Problems When Ancillary and Supplemental Jurisdiction are Inapplicable

The federal courts have also regarded an application to enjoin relitigation in state court as within their ancillary jurisdiction: “[T]he jurisdiction that the federal court had when it entered its original judgment is enough to support its issuance of an injunction.” A few courts have explicitly posited that the jurisdiction over a case brought to federal court through All Writs removal could be ancillary. Moreover, as the discussion below will show, in many of the civil cases in which All Writs removal was authorized by the courts of appeals, federal jurisdiction over the claims asserted could have been obtained by the exercise of ancillary or supplemental jurisdiction, with far less stretching of the law than All Writs removal entails. However, where an exercise of jurisdiction is impermissible under the ordinary removal statutes,

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247 See Kokkonen, 511 U.S. 381-82.
248 See id., cited with approval in Flanagan v. Armaiz, 143 F.3d 540, 544-46 (9th Cir. 1998) (holding court to have jurisdiction to enforce settlement agreement where it had retained jurisdiction to resolve disputes arising under the settlement agreement, and upholding injunction prohibiting party from seeking to have state court consider claims previously dismissed by the federal court).
249 17 Wright, ET AL., supra note 24, § 4226, at 548. See, e.g., Local Loan Co. v. Hunt, 292 U.S. 234, 239 (1934) (holding bankruptcy court to have ancillary jurisdiction over proceedings to enforce a discharge order by enjoining prosecution of suits against the debtor); Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 367 (1921) (holding that federal court has ancillary jurisdiction to restrain state court litigation of issues determined by federal court in a class action); Royal Ins. Co. of America v. Quinn-L Capital Corp., 960 F.2d 1286, 1292 (5th Cir. 1992) (holding that federal district court that had granted declaratory judgment had ancillary jurisdiction over suit seeking declaratory judgment that insurer had no duty to defend or indemnify insured in state court litigation which had potential to effectively nullify previous declaratory judgment); In re G.S.F. Corp., 938 F.2d 1467, 1475 (1st Cir. 1991) (stating that, “[a] valid original judgment provides the federal court with the power to issue the relitigation injunction”); Southwest Airlines Co. v. Texas Int’l Airlines, Inc., 546 F.2d 84, 89-90 (5th Cir. 1977) (stating that an action for an injunction to enforce a federal judgment is supplemental or ancillary to the original case).
250 See, e.g., De Perez v. AT&T Co., 139 F.3d 1368, 1379-80 (11th Cir. 1998) (concluding that an exercise of supplemental jurisdiction over the case in question, under the All Writs Act, was not justified); In re County Collector, 96 F.3d 890, 903 n.20 (7th Cir. 1996) (noting that the school district was attempting to use the All Writs Act to confer a jurisdiction that the district court would not have without it, but that the writ also was ancillary to a jurisdiction already acquired; observing that no court had yet considered whether the All Writs Act could be interpreted, consistent with Supreme Court precedent (particularly McInire v. Wood, 11 U.S. (7 Cranch) 504, 506 (1813)), to create this limited form of ancillary removal jurisdiction).
251 The exercise of jurisdiction might be impermissible because the state court action is
and cannot be legitimated by reference to ancillary or supplemental jurisdiction, an assertion of jurisdiction via a removal power teased out of the All Writs Act could pose a significant Article III problem. It is possible, of course, that a constitutional problem would not be posed because of minimal diversity between the plaintiffs and defendants in the removed action or because a federal issue lurks in the removed case although it is not an essential element of the plaintiff’s well-pleaded complaint. But where those circumstances do not exist and where ancillary jurisdiction is not available, the assertion of jurisdiction over a case via All Writs removal would not merely stretch that statute; it would violate Article III. Remarkably, the courts that have authorized All Writs removals have not considered this problem. Even when Article III would be satisfied, in the absence of ancillary jurisdiction the question would remain whether the All Writs Act properly can be interpreted to “tap into” the constitutional power to confer jurisdiction where only minimal diversity or an Osborn-type federal issue can be found. In other words, the question would remain whether the All Writs Act constitutes a statutory grant of jurisdiction over cases within the judicial power of the United States but that could not otherwise be removed to federal court.

outside the original jurisdiction of the federal courts, or because the action fails, or the defendants have failed, to satisfy other statutory requirements for removal.


253 Cf. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (stating that, for purposes of Article III of the Constitution, a case arises under federal law if federal law forms an ingredient of the cause of action, even if the federal issue bears only a tangential connection to the actual dispute) with Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) (stating that, for purposes of federal question jurisdiction, a case arises under federal law only if it appears on the face of a well-pleaded complaint).

254 A similar point was made by Professor Akhil Amar in his article, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. Chi. L. Rev. 443, 456-59 (1989). In discussing § 13 of the Judiciary Act of 1789, which addressed the original and appellate jurisdiction of the Supreme Court, Amar argued that § 13’s language empowering the Court to issue writs of mandamus to certain courts and persons is best read as giving the Court remedial authority after jurisdiction (whether original or appellate) was independently established. Amar found that, in a number of contexts, including the section (§ 14) that is the precursor of the All Writs Act, the Judiciary Act used the terms “jurisdiction” and “power” differently and in such a way that jurisdiction first had to be established, and particular powers would then follow. Thus, §§ 13 and 14 did not confer jurisdiction; they specified possible consequences of jurisdiction. Amar then continued, “[A]ny other reading would be pure bootstrap. This bootstrap would not only distort the purpose of § 14; it would obviously violate Article III by giving federal courts jurisdiction whenever certain writs were sought, whether or not the underlying lawsuit fell within one of the nine categories of cases and controversies set forth in the jurisdictional menu of Article III, § 2.” Id. at 459.
C. Would an Injunction Against the State Court Proceedings Have Been Proper and Effective to Protect the Interests of the Federal Courts and Litigants in the Appellate Cases Where All Writs Removal was Effectuated? Was Ancillary Jurisdiction an Alternative to All Writs Removal?

1. Yonkers Racing Corp. v. City of Yonkers, United States v. City of New York, and Sable v. General Motors Corp.

In Yonkers Racing Corp. v. City of Yonkers,255 had the court fully grappled with whether the state court actions were removable as of right, it might have concluded that they were. Instead, it avoided deciding whether § 1441(a) or § 1443(2) provided a basis for removal, a matter that turned on whether the City of Yonkers was a defendant for purposes of the removal statutes when it was the defendant in “Article 78” proceedings256 in which property owners challenged the condemnation of their properties, although the City was the plaintiff in the condemnation proceedings.257 Had the court concluded that the “Article 78” proceedings were removable under § 1441(a) or § 1443(2), the court would not have needed to address whether those actions were removable under the All Writs Act nor reached what I view as a predicate question: whether they were enjoinable under the AIA in the absence of such an ordinary removal.

Assuming that the court would have held against ordinary removal, for all of the reasons that the Second Circuit cited in support of its approval of All Writs removal of the state court actions, it appears that an injunction of those actions would have been proper to protect and effectuate the federal judgment . . . at least if (a) the federal consent decree that provided the backdrop would “count” as a federal judgment within the meaning of the AIA, and (b) the property owners were not challenging the right of the parties to the consent decree to have entered into it.258

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255 Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989); see also supra text accompanying notes 73-85.
256 The reference is to Article 78 of the New York Civil Practice Law and Rules.
257 Yonkers Racing, 858 F.2d at 861-63.
258 Cf. In re County Collector, 96 F.3d 890 (7th Cir. 1996). The City of Yonkers had been found liable for a long-term pattern and practice of deliberately concentrating federally subsidized low income housing in certain areas of Yonkers in order to maintain racial segregation, and had been ordered to provide sites for 200 units of public housing in non-minority areas of the City. The consent decree designated particular sites. This was not a situation in which the basic question of the City’s liability had been finessed or the relief that was afforded was merely agreed upon by the parties, and rubber-stamped by the court. See Yonkers Racing, 858 F.2d at 857-59; see also United States v. Yonkers Bd. of Educ., 837 F.2d 1181 (2d Cir. 1988).
The latter is clear. Whether a consent decree constitutes a federal judgment within the meaning of the AIA is not much more controversial. The courts generally agree that federal consent decrees are judgments entitled to res judicata effect and that they are enforceable by injunctions issued pursuant to the All Writs Act. Because consent decrees may impose obligations greater than, or different from, those that the law would impose, however, a number of courts draw the line at entering orders enforcing consent decrees against persons who were not parties to the litigation that culminated in the decrees and who never agreed to the terms of the decrees. I have argued above that

In light of the fact that the court's original judgment ordered Yonkers to provide sites for public housing in nonminority areas of the city but did not dictate specific sites, see Yonkers Racing, 858 F.2d at 857, it is unlikely that one could view the Article 78 proceedings as threatening the original court order, although they did threaten the ultimate consent decree. See id. at 864-65.

259 The opinion indicates that the issues in the removed Article 78 proceedings had nothing to do with the validity of the consent decree. See Yonkers Racing, 858 F.2d at 862-63.

260 See, e.g., Huguley v. General Motors Corp., 999 F.2d 142, 146-47 (6th Cir. 1993) (stating that consent decree has preclusive effect upon issues fully and fairly addressed in prior proceedings; holding that because settlement agreement in previous federal class action precluded employee from bringing race discrimination in employment claim in state court, federal court was correct to enjoin the latter litigation); Amalgamated Sugar Co. v. NL Industries, Inc., 825 F.2d 634, 639 (2d Cir. 1987), cert. denied, 484 U.S. 992 (1987) (stating that, "The general rule is that a final consent decree is entitled to res judicata effect . . . because the entry of a consent judgment is an exercise of judicial power . . . entitled to appropriate respect and because of the policy of favoring finality of judgments" (citations omitted); holding that court properly enjoined shareholder's relitigation in state court of validity of a "poison pill" purchase rights plan where a prior final federal consent judgment had established the invalidity of that plan); Dunn v. Carey, 808 F.2d 555, 559 (7th Cir. 1986) (stating that, "consent decrees are judgments [which] . . . may be enforced by contempt of court. The quality of this contract as judgment would allow the court to invoke the relitigation exception to § 2283 to bar further disputation between the parties to the case"); see also id. at 561 (Swygert, J., concurring) (stating that, "[f]or purposes of section 2283, courts have treated consent decrees as judgments entitled to protection from inconsistent state court orders (citations omitted)"); United States v. American Soc'y of Composers, Authors and Publishers, 442 F.2d 601, 603-05 (2d Cir. 1971) (holding that district court properly enjoined ASCAP member's prosecution of state court action seeking to enjoin the distribution of licensing fees because injunction was necessary in aid of federal jurisdiction and to protect consent judgment under which district court was empowered to fix licensing fees under specified circumstances and had approved an agreement on such fees). Rule 54(a) of the Federal Rules of Civil Procedure describes a judgment, as used in the Rules, as including "a decree and any order from which an appeal lies."

261 See, e.g., Association for Retarded Citizens v. Thorne, 30 F.3d 367, 370-71 (2d Cir. 1994) (for the reasons stated in the text, stating that a district court that enforces a consent decree against a nonparty acts beyond the scope of the All Writs Act); Dunn v. Carey, 808 F.2d 555, 558-60 (7th Cir. 1986) (holding that AIA barred injunction of state suit seeking to prevent assessment of taxes for purposes provided for in settlement of federal class action that ended by consent decree, where the state court plaintiffs had not been parties to the federal case and were not otherwise directly bound by the judgment therein); see also infra Part II, section I (regarding
if a federal injunction of the state court proceeding in controversy in Yonkers Racing would not have been proper, the All Wrts removal could not have been proper. 262 But if a federal injunction of that state court proceeding would have been proper, one should ask whether it would adequately or effectively have protected the interests of the federal court system and of the litigants in both the underlying federal litigation and the state condemnation proceedings.

If the injunction had issued, presumably the property holders would have brought their injunctive action in federal court, if they could do so, rather than forego their claim altogether. Here it is unclear whether there would have been an independent basis of subject matter jurisdiction (diversity or federal question) over their claims. The Second Circuit opinion does not mention the citizenship of the parties. One or both of the plaintiffs in the Article 78 proceedings (Yonkers Racing Corporation and St. Joseph’s Seminary and College) may have been citizens of New York, as was their adversary, the City. 263 Even if diversity jurisdiction would have been unavailable, it is possible that a federal issue would appear on the face of the well-pleaded complaint that the Seminary could file, since the Seminary (but not the Raceway) argued that the First and Fourteenth Amendments provided grounds to enjoin the condemnation of its property.

If the property holders could not have commenced such an independent action in federal court, could the federal court have asserted supplemental or ancillary jurisdiction over their claims? While supplemental jurisdiction under § 1367 probably would have been unavailable because the earlier federal litigation had gone to judgment, the federal court could have exercised ancillary jurisdiction to enable the federal court to vindicate its authority and effectuate its decree. The consent decree had designated these owners’ properties as public housing sites, and it had required the City to initiate eminent domain proceedings if necessary. 264 The federal court had prompted the condemnation proceedings by threatening the City with contempt; litigation whose purpose was to defeat the necessary condemnation could have prevented effectuation of the decree. 265 If the property owners’ contest properly could have been heard under the federal court’s ancillary jurisdiction, then All Wrts removal, even if sometimes proper, was not necessary on these facts. 266

262 See supra text at notes 198-206.

263 If the Article 78 proceedings were separate, there might have been diversity of citizenship jurisdiction over one but not the other.

264 See Yonkers Racing, 858 F.2d. at 858.

265 The other factors cited by the Second Circuit in support of All Wrts removal, see id. at 863-65, also might be pertinent in deciding whether an injunction of the state proceeding properly falls within the court’s ancillary jurisdiction.

266 That is, an injunction of the state court proceedings would have put the property owners to the choice of foregoing their proceedings or bringing suit in federal court, seeking a hearing
Only if ancillary jurisdiction would not have been available (and their suit
could not otherwise be removed or commenced in federal court) would one
have to be concerned that the property owners would be deprived of their day
in court if their state court action were enjoined but not removed under the All
Writs Act. Under Martin v. Wilks, even persons with notice that the
disposition of a federal action might as a practical matter impair or impede
their ability to protect their interests do not have a duty to intervene in the
action on pain of being precluded by the judgment rendered therein. One
therefore might argue that it would be unfair to deny the property owners their
day in court to fight the condemnation proceedings.

If All Writs removal of a proceeding otherwise beyond federal jurisdiction
and not subject to ancillary jurisdiction is left as the last resort, however, the
questions whether removing the proceeding into federal court is constitutional
under Article III and is statutorily authorized by the All Writs Act become
critical, rather than merely hypothetical. Absent minimal diversity or any
federal issue, the removal would be unconstitutional. In this particular case,
because one of the issues in one of the Article 78 proceedings (that concerning
the Seminary site) was whether the condemnation violated the First
Amendment, the removal of that proceeding would have been permissible

on the basis of jurisdiction ancillary to the original federal suit. Presumably they would have
taken the second of these options. A third alternative might have been to raise their defenses to
the condemnation in the context of the condemnation proceedings and seek to remove that case.
The questions would then have arisen whether that action would have been removable under
either the ordinary removal statutes or the All Writs Act.

267 Martin v. Wilks, 490 U.S. 755, 761-62 (1989) (to bind a person by a judgment, one must
join him to an action; third parties have no obligation to intervene).

268 See Martin, 490 U.S. at 755. Alternatively, one might conclude that Martin v. Wilks does
not go that far. Under Martin, federal courts may not disallow persons who were not parties to,
and refrained from intervening in, federal litigation from challenging consequences of the
judgment rendered in that action, merely because they forewent the opportunity to intervene,
with knowledge that their interests could be adversely affected by the litigation. Arguably,
nothing in that decision makes it "unfair" to enjoin subsequent state court litigation by those
same persons when the injunction is grounded in reasons recognized in the exceptions to the
AIA and having nothing directly to do with the parties to that state court litigation having
foregone the opportunity to intervene in the federal suit or judgment being protected by the
injunction.

If it became clear during the initial litigation against the City of Yonkers that property of the
Raceway and the Seminary were likely to be taken as part of the remedy for the City's history of
race discrimination, they could have moved to intervene as of right as persons who claimed an
interest relating to property that was a subject of the action and so situated that the disposition
of the action might as a practical matter impair or impede their ability to protect their interest, since
the existing parties would not have adequately represented their interests. See Fed. R. Civ. P.
24(a). Although, under Martin, they had no duty to seek to intervene, intuitively their choice
not to do so (if they in fact made such a choice) puts them in a less sympathetic position when
considering whether their state court litigation properly could be enjoined.

269 Yonkers Racing, 858 F.2d at 862-63. The Seminary had argued that inclusion of its
under Article III. It is not clear how removal of the other Article 78 proceeding could be squared with Article III. The Second Circuit did not address this problem.

The policies behind the AIA might have warranted injunction of the state court proceedings even if that injunction left the property owners with no remedy because of the limits on federal subject matter jurisdiction. This situation would have been avoidable here, however, because the federal court could have exercised ancillary jurisdiction over the property holders' suit.\(^{270}\)

In *United States v. City of New York*,\(^{271}\) the state court action that was removed could not have been removed under the ordinary removal statutes; it presented a wholly state law claim and there apparently was no diversity of citizenship between the parties.\(^{272}\) As in *Yonkers Racing*, for the reasons that the Second Circuit cited in support of its approval of All Writs removal, it appears that an injunction of the state court action\(^{273}\) was necessary to protect and effectuate the federal consent decree. A state court order canceling the contracts would have jeopardized the City's ability to comply with the decreed timetables and, because an interim land-based plan was a central goal of the decree and the state case raised issues relating to the validity of the City's plan under state law, the issues could not be separated from the decree.\(^{274}\) Indeed, on these grounds, the court affirmed orders both enjoining the state proceeding and removing it to federal court.\(^{275}\)

If ancillary jurisdiction would have been lacking over the state law claim had it been commenced in federal court and was lacking over the All Writs removed claim, did All Writs removal introduce a case outside the bounds of federal jurisdiction? There apparently was no diversity, but a federal issue

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\(^{270}\) If the City of Yonkers refiled its condemnation complaints in federal court after a hypothesized injunction of the state court proceedings, in all likelihood no federal issue would appear on their well-pledaced faces, despite the condemnations having been undertaken to remedy racial discrimination that had been held to violate both federal statutory law and the Fourteenth Amendment. However, the Second Circuit made clear that the assertion of ancillary jurisdiction over those proceedings would have been fine. *See Yonkers Racing*, 858 F.2d at 864.

\(^{271}\) *United States v. City of New York*, 972 F.2d 464 (2d Cir. 1992).

\(^{272}\) *See City of New York*, 972 F.2d at 468.

\(^{273}\) The state court action sought to void contracts necessary to fulfill the City’s obligation under a federal consent decree. *See City of New York*, 972 F.2d at 467.

\(^{274}\) *See id.* at 469.

\(^{275}\) *See supra* text at notes 260-61 regarding consent decrees as judgments within the meaning of the AIA. There apparently was no challenge to the authority of the parties to have entered into the consent decree. *See City of New York*, 972 F.2d at 467.
may have been present. Although no federal issue was pleaded on the face of the plaintiff’s well-pleaded complaint, a federal issue may have lurked on the defense side of the case because the consent decree (whose effectuation was to occur in part through the contracts challenged here) was entered into with the federal EPA, whose enforcement of the Ocean Dumping Ban Act\textsuperscript{277} prompted the decree. Even though plaintiff’s challenge was predicated on alleged illegality of the City’s contracts under state law, the backdrop of the federal ODBA might have made it constitutional for Congress to authorize federal judicial authority over this case. Whether Congress did so in the All Writs Act is quite unclear. In approving the All Writs removal, the Second Circuit did not address this problem.\textsuperscript{278}

Even if federal jurisdiction over this suit would have been lacking (for lack of constitutional or statutory authority, or both), the policies behind the AIA might have warranted injunction of the state court proceedings, even though that would have left the plaintiff with no remedy. As in Yonkers, however, this problem is avoided if (as I believe) the federal court could have exercised ancillary jurisdiction over the taxpayer plaintifff’s suit, had it been commenced in federal court after pursuit of the claim in state court was enjoined.

\textit{Sable v. General Motors Corp.}\textsuperscript{279} also involved efforts to protect an EPA-negotiated consent agreement. In that case, the Sixth Circuit did first address whether the case was removable under the ordinary removal statutes,\textsuperscript{280} holding, however dubiously, that the suit was removable because plaintiff’s claim, although facially stating merely a state law trespass claim for money damages, actually arose under federal law.\textsuperscript{281} The court’s conclusion that the

\textsuperscript{276} See City of New York, 972 F.2d at 468.

\textsuperscript{277} 33 U.S.C. §§ 1412-16 (1994) (establishing a permit system for the dumping of certain approved types of waste into the ocean).

\textsuperscript{278} See generally United States v. City of New York, 972 F.2d 464 (2d Cir. 1992). However, the court did discuss whether the case constituted a “case or controversy,” given the uncertainties about the plaintiff’s standing to bring the suit. See id. at 469-71 (addressing this issue even though it was not raised by the parties).

\textsuperscript{279} Sable v. General Motors Corp., 90 F.3d 171 (6th Cir. 1996). See also supra notes 113-17 for a discussion of the case.

\textsuperscript{280} See id. at 174-75 (discussing whether the plaintiff’s complaint arose under federal law).

\textsuperscript{281} See Sable, 90 F.3d at 174 (stating that “[s]ince [the] plaintiff seeks relief that conflicts with the consent decree, plaintiff’s claim arises under federal law”). This is a dubious inference: The fact that the resolution of state law claims could conflict with a federal court’s consent decree never has transformed state law claims into claims that arise under federal law for jurisdictional purposes. Moreover, the perceived “conflict” was based on the court’s conclusions that asking for damages for non-removal of chemicals, measured by the cost of removal, was tantamount to asking for removal of the chemicals themselves, and that the latter remedy would have conflicted with the consent decree, which required the chemicals to be “contained” on the property. See id. at 174. The court’s equation of a request for damages with a request for removal of chemicals seems questionable, regardless of how the damages are
case also was removable under the All Writs Act was an alternative ground of decision.\footnote{See id. at 175.}

If the court was correct in its first holding, that is the end of the matter; removal was a matter of right. But if, for the reasons stated in the margin,\footnote{See supra note 281.} the case "really" was not removable as of right, the propriety of the All Writs removal is all the more critical. The need for this dispute to be adjudicated in federal court seems to me weaker than in the other cases where appeals courts upheld All Writs removal.

In light of the consent agreements, it seems likely that the state court (at the trial or appellate level) would have held that defendants had valid defenses to the trespass action and that plaintiff was not entitled to damages for loss of use of the property. Had the court held otherwise, defendants would have been held liable for conduct that was permissible under the consent agreements that arose out of the EPA’s enforcement activities. However, the defendants would not have been subjected to obligations that are inconsistent in the sense that one cannot fulfill both. One can contain chemicals on a site and pay money damages for doing so; one can be a party to deed restrictions limiting plaintiff’s access to and use of a site and yet pay damages for plaintiff’s resulting loss of use of the land. It is not even clear from the Sixth Circuit’s opinion that the consent agreements were embodied in a court order, or that the federal court retained jurisdiction to enforce the agreements.\footnote{See Sable, 90 F.3d at 171.} In these circumstances, it is far from clear that an injunction of the state court proceedings was necessary in aid of the federal court’s jurisdiction or to protect or effectuate its judgments. The AIA exceptions do not apply merely to protect federal rights.\footnote{See Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng’rs, 398 U.S. 281, 294 (1970); see also supra text accompanying note 40.} For reasons elaborated above, if an injunction of the state proceedings was not authorized, in my view their All Writs removal could not have been warranted.

If an injunction were warranted to prevent the state court from entering orders in some sense inconsistent with the federal consent agreements, it would have sufficed to protect the federal interests and the interested litigants. Taking the court’s view, because the plaintiff’s complaint arose under federal law, the plaintiff could have recommenced its action in federal court, absent statute of limitations problems.\footnote{In fact, the Sixth Circuit held the removed action to be barred by the statute of limitations. See Sable, 90 F.3d at 176-77.} There was no need to approve the extraordinary step of an All Writs removal. If the complaint “really” did not arise under federal law and there was no diversity (none is indicated), the state court suit could have remained in federal court only if that court had measured.
jurisdiction ancillary to the jurisdiction over the case that had culminated in the consent agreements referred to above. Whatever reasons we might imagine to justify injunction of the state court suit presumably also would support ancillary jurisdiction over that claim, if the plaintiff later asserted it in federal court.\textsuperscript{287}

In general then it appears that if a federal court \textit{properly} can enjoin a state court proceeding because of the threat it poses to continuing or completed federal litigation, the federal court has power to exercise ancillary jurisdiction over that same proceeding if it is re-commenced in federal court. If, on occasion, that generalization fails, circumstances may nonetheless render it "fair" that the state court action be enjoined.

2. The Class Actions: \textit{Agent Orange}, VMS, N.A.A.C.P.

a. Prefatory Comments

Some prefatory comments are in order before discussing the remaining federal appeals court cases approving All Writs removal. The propriety of injunctions against state cases is often controversial. In the class action context, strong arguments have been made in favor of injunctions to protect mandatory class actions:\textsuperscript{288} those certified under Rule 23(b)(1)(A) to prevent "inconsistent or varying adjudications with respect to individual members . . .

\textsuperscript{287} Because I do not actually believe that injunction of the state suit was warranted, I have difficulty making the argument that the state court claim would have been within the federal court's ancillary jurisdiction. For essentially the reasons stated above—that the trespass suit for money damages would not have prevented effectuation of the consent agreements, and because it is not clear that those agreements even were incorporated into the court's decree—I do not believe that ancillary jurisdiction would have been appropriate.

Even if one can imagine reaching the combination of conclusions that plaintiff's state action would have been properly enjoined but ancillary jurisdiction over plaintiff's claims would not have been available and plaintiff would not have been able to pursue its claims in federal court based on an independent basis of jurisdiction, on the facts of this case, that does not appear unfair. Plaintiff seems to have had a full and fair opportunity to litigate all the issues in the federal proceedings. The claims against defendants appear to be claims over which the federal court could have exercised jurisdiction, under either 28 U.S.C. § 1331 or 28 U.S.C. § 1367, in the original suit by the United States—to which the state court plaintiff was a party, had plaintiff asserted them at that time.

If the plaintiff's action could not be brought in federal court, nor properly be removed there under 28 U.S.C. § 1441, the question of the constitutionality of an All Writs removal (assuming that that statute would authorize the removal) recurs. However, the role of the EPA and of federal environmental law in the consent agreements that would provide possible defenses to the defendants would seem to make the case one arising under federal law for purposes of Article III.

\textsuperscript{288} Mandatory class actions are those in which absent class members are not entitled to notice or to exclude themselves as a matter of right under Rule 23. \textit{See} Ortiz v. Fibreboard Corp., 119 S. Ct. 2295, 2308 n.13 (1999).
which would establish incompatible standards of conduct for the party opposing the class,\(^{289}\) those certified under Rule 23(b)(1)(B) to protect a limited fund,\(^{290}\) and those certified under Rule 23(b)(2) to obtain injunctive relief for the benefit of all members of a class. Strong arguments also have been made in favor of injunctions to protect certain non-mandatory class actions certified under Rule 23(b)(3), after the time to opt out has expired.\(^{291}\)

The arguments in support of injunctions against potentially interfering state suits often are made under the “necessary in aid of jurisdiction” exception to the AIA. They include the ideas that, absent the ability to enjoin previously commenced state court litigation, mandatory classes are not truly mandatory;\(^{292}\) an anti-suit injunction sometimes is necessary to protect the court’s jurisdiction to implement a proposed settlement;\(^{293}\) anti-suit injunctions

\(^{289}\) **Fed. R. Civ. P. 23(b)(1)(A).**

\(^{290}\) See **Fed. R. Civ. P. 23(b)(1)(B)** (allowing a class action if the prosecution of separate actions by or against class members would create a risk of “adjudications with respect to individual members . . . which would as a practical matter be dispositive of the interests of the other members not parties . . . or substantially impair or impede their ability to protect their interests”). The Advisory Committee Notes on this section opine that the requirements of the Rule are satisfied “when claims are made by numerous persons against a fund insufficient to satisfy all claims.” **Fed. R. Civ. P. 23** (Advisory Committee notes for 1966 amendments).

A recent examination by the Supreme Court of the varieties of suits traditionally encompassed by Rule 23(b)(1)B) led it to discern three characteristics that typify “limited fund” class actions. The Court stated that the presence of these characteristics suffices to justify Rule 23(b)(1)B) certification, as understood by the drafters of Rule 23. These traits are:

- a fund with a definitely ascertained limit which, at its maximum, is demonstrated to be exceeded by aggregate liquidated claims, set at their maxima;
- all of which (fund) is to be distributed to those with liquidated claims that are based on a common theory of liability (The precedents did not permit the defendant to hold back on the amount distributed to the class; they ensured that the defendant was not permitted a better deal than serial litigation would have produced.); and
- all claimants sharing a common theory of recovery to be treated equitably among themselves, typically (historically) by a pro rata distribution of the fund.

See **Oritiz,** 119 S. Ct. at 2311-12.

The Court then concluded that these characteristics are presumptively necessary, as well as sufficient, for limited fund Rule 23(b)(1)(B) certification. See id. at 2312. A proponent of any departure from these norms would have the burden of justifying that departure. See id. at 2295.

\(^{291}\) See **Fed. R. Civ. P. 23(b)(3)** (authorizing class actions when the prerequisites of Rule 23(a) have been met and when questions of law or fact common to the class members “predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy”). Rule 23(c)(2)(A) affords such class members a right to exclude themselves from the class by a date specified by the court. See **Fed. R. Civ. P. 23** (c)(2)(A).

\(^{292}\) See **In re** Federal Skywalk Cases, 680 F.2d 1175, 1191-93 (8th Cir.) (Heaney, J., dissenting).

\(^{293}\) See **Carlough v. Amchem Prods., Inc.,** 10 F.3d 189, 202-04 (3d Cir. 1993) (approving an anti-suit injunction as necessary to protect the court’s jurisdiction to implement a proposed
may be necessary in "structural class litigation, usually under Rule 23(b)(2), when complex settlements and institutional arrangements can be thrown into chaos by side-litigation"; and anti-suit injunctions may be necessary to prevent persons who chose not to opt out from filing independent state proceedings.\textsuperscript{294} Where mandatory classes have been certified, one also can argue that, by making the certified classes mandatory, Congress expressly authorized an injunction of other suits by class members asserting the same claims.\textsuperscript{295}

Arguments also run to the contrary, however. Nothing in the Federal Rules of Civil Procedure governing class actions explicitly permits district courts to enjoin overlapping state court actions.\textsuperscript{296} Similarly, nothing in the AIA expressly treats class actions any differently than other litigation.\textsuperscript{297}

Furthermore, although the "necessary in aid of its jurisdiction" exception might be very useful in situations where mandatory class actions are appropriate, the long-standing (if dubious) principle that \textit{in personam} actions may proceed concurrently\textsuperscript{298} has posed a substantial obstacle to federal injunctions of most state court suits that arguably would interfere with federal jurisdiction over class actions.\textsuperscript{299} Federal Rule 82's prohibition against

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\textsuperscript{294} See Wood, supra note 30, at 315 (also proposing that federal courts be permitted to enjoin pending state court proceedings when necessary to prevent irreparable harm to the parties or to federal interests, including when necessary to ensure the effectiveness of a certified class action or multidistrict litigation ordered pursuant to 28 U.S.C. § 1407); see also Rowe, supra note 2, at 203-05 (opining that the need for power to enjoin proceedings in other courts is clear in at least some mandatory class actions, particularly concerning Rule 23(b)(1)(A) classes, that such power could be useful to protect limited funds in Rule 23(b)(1)(B) actions, and would be properly exercised in some circumstances even in nonmandatory class actions); Edward F. Sherman, Class Actions and Duplicative Litigation, 62 IND. L.J. 507, 559 (1987) (opining that for Rule 23(b)(1) and (2) to achieve their objectives, it may be necessary to enjoin duplicative litigation; and finding that rigid applications of the AIA have failed to accord adequate respect to the efficiency and fairness policies underlying the federal class action).

\textsuperscript{295} See Mitchell v. Foster, 407 U.S. 225, 238 (1972) (describing the test to be applied to determine whether a federal statute expressly authorizes an injunction of state court proceedings as "whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding").

\textsuperscript{296} See FED. R. CIV. P. 23. In contrast, statutory interpleader provides that a district court may restrain all claimants "from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action." 28 U.S.C. § 2361 (1994).


\textsuperscript{298} See supra notes 32-34 and accompanying text.

\textsuperscript{299} See, e.g., \textit{In re} Federal Skywalk Cases, 680 F.2d 1175, 1182-83 (8th Cir. 1982). In this
construction of the Federal Rules to extend the jurisdiction of the district courts also has been argued to preclude an expansive reading of the AIA’s “in aid of jurisdiction” exception that would allow injunctions of in personam state suits where the jurisdiction to be protected is made possible by Rule 23. I find this argument unpersuasive, however. While Rule 23 authorizes class actions, it does not expand the jurisdiction of the federal courts. Only those class actions that satisfy the requirements for federal question or diversity jurisdiction can be pursued. Thus, the jurisdiction to be protected when federal courts are adjudicating class actions is made possible by the usual jurisdictional statutes, although the scope of the action to be protected is made possible by Rule 23.

With respect to the argument that Rules 23(b)(1) and (2) are express Congressional authorizations of injunctions, additional hurdles are posed; namely, whether Rule 23 constitutes an Act of Congress for purposes of the AIA except allowing injunctions expressly authorized by Act of Congress, and whether reading Rule 23 as the basis of an exception to the AIA would “abridge, enlarge, or modify” a substantive right, in violation of the Rules Enabling Act.

Once a federal judgment has been entered, a new basis for injunctive relief case, in order to avoid exhaustion of the defendant’s available assets and avoid legal restrictions that might curtail the ability of some class members to recover punitive damages, the district court had enjoined class members from settling punitive damages claims they had asserted in other litigation until the class action trial was concluded. See id. at 1177-80. The appeals court vacated the injunction, rejecting the arguments that the injunction was necessary in aid of the court’s jurisdiction, relying in part on the principle cited in the text. See id. at 1182-83.


301 See Wood, supra note 30, at 315.

302 See Hart & Wechsler, supra note 2, at 1206 n.9 (posing these questions); In re Temple, 851 F.2d 1269, 1272 & n.3 (11th Cir. 1988) (issuing mandamus to vacate a district court order certifying a Rule 23(b)(1)(B) class action and staying all related litigation, and concluding in dicta that these orders did not seem to be authorized by Act of Congress, or necessary in aid of the court’s jurisdiction); cf. Piambino v. Bailey, 610 F.2d 1306, 1331-32 (5th Cir. 1980), cert. denied, 449 U.S. 1011 (1980) (refusing to construe Rule 23(d), authorizing trial courts to make whatever orders are appropriate to manage a class action, as an express exception to the AIA, on the grounds that the Rule fails the test laid down in Mitchum v. Foster); In re Baldwin-United Corp., 770 F.2d 328, 335 (2d Cir. 1985) (same). See also Larimore, supra note 37, at 278-84 (discussing the argument of express authorization by Congress and possible difficulties with it, including the fact that the Federal Rules of Civil Procedure are not literally an act or acts of Congress although Congress can prevent any proposed Rule from being promulgated, see 28 U.S.C. § 2074(a) (1994)); In re Halkin, 598 F.2d 176, 185 n.17 (1979) (explaining that the Federal Rules of Civil Procedure bear Congressional imprimatur to some extent because, although not affirmatively enacted by Congress, they are subject to a mandatory “layover period” before their effective date, to permit legislative scrutiny and veto). This aspect of the procedure for promulgating Federal Rules of Civil Procedure has not changed.
comes to exist. An injunction entered then may not only be necessary in aid of the court's jurisdiction but may be necessary to protect or effectuate its judgment. Thus, as the Agent Orange, the VMS, and the N.A.A.C.P. cases illustrate, strong arguments may support injunctions to protect federal judgments predicated on adjudications or settlements of even nonmandatory federal class actions.

As reported by Professors Marcus and Sherman, "a modest expansion of federal courts' anti-suit injunctive powers through application and interpretation of the Anti-Injunction Act and of the All Writs Act... [has occurred in] [t]wo situations:... when cases that were consolidated... by the Judicial Panel on Multidistrict Litigation have progressed to the stage of imminent settlement"\textsuperscript{303} and when, in the context of bankruptcy, class certification was necessitated by the "limited fund" of defendant's assets and injunction of competing litigation was necessary to allow the federal court to preserve the assets available for settlement.\textsuperscript{304} As noted earlier, at this point in time, a substantial number of lower federal courts have broadly construed the "necessary in aid of jurisdiction" exception to permit injunction of state proceedings that would interfere with federal jurisdiction over and

\textsuperscript{303} See, e.g., Carrough v. Amchem Prods., Inc., 10 F.3d 189 (3d Cir. 1993); In re School Asbestos Litig., 1991 WL 61156 (E.D. Pa. 1991), aff'd mem. 950 F.2d 723 (3d Cir. 1991) (upholding an injunction against duplicative litigation pending the district court's ruling on a proposed settlement); In re Baldwin-United Corp., 770 F.2d 328 (2d Cir. 1985) (finding injunction justified to protect the imminent settlement of consolidated cases); In re Corrugated Container Antitrust Litig., 80 F.R.D. 244 (S.D. Tex. 1978), aff'd, 659 F.2d 1332 (5th Cir. 1981) (emphasizing that the district court had approved settlements with most of the defendants when the court issued the injunction); In re Orthopedic Bone Screws Prods. Liab. Litig., 176 F.R.D. 158, 178 (E.D. Pa. 1997) (enjoining prosecution of state court actions against manufacturer pending certification of limited fund federal class action, as necessary in aid of the court's jurisdiction and to protect and effectuate the judgment certifying a class action and approving a settlement). See generally, 7B CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE, § 1798.1, at 437 (1986 & Supp. 1999) (concluding that, "it may be that although a federal district court in a class action that is not part of multidistrict litigation cannot enjoin state court litigation at the outset of the federal suit, if that action proceeds to the settlement stage, then an injunction to protect the court's power to effectuate a settlement may be upheld.

For observations on the Carrough case, see Sherman, supra note 24, at 942-43; Monaghan, supra note 97, at 1160 n.51 (citing Carrough in support of the proposition that the AIA has not proved a barrier when the federal court action was near final disposition).

\textsuperscript{304} RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION, CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 369-71 (3d ed. 1998); see also In re Joint E. & S. Dist. Asbestos Litig., 120 B.R. 648 (E.D.N.Y. 1990). Cf. Monaghan, supra note 97, at 1160 n.49 (the AIA "has not so far proved a barrier... when the F1 court [the class action court] was seeking to protect a final judgment that had erected a private administrative 'agency' for the payment of claims"). See also Sherman, supra note 24, at 517-59 (discussing case law and the factors influencing injunctions against prosecution of existing suits and against filing of future suits when both actions are in federal court and when a federal court proposes to enjoin a proposed or existing suit in state court).
management of complex and protracted class action and multi-district litigation.\textsuperscript{305} In some of these instances, the federal court had approved a settlement, or was close to doing so, and the court regarded the injunction of state court proceedings as necessary to protect and effectuate the judgments resulting from these actual or imminent settlements.\textsuperscript{306} In others, the courts have analogized the subject matter of the action or even the litigation itself to a "res,"\textsuperscript{307} and/or to situations subject to the federal interpleader statute, which has been held to be an expressly authorized exception to the AIA.\textsuperscript{308} They

\textsuperscript{305} See supra text accompanying notes 36-38.

\textsuperscript{306} See, e.g., Hanlon v. Chrysler Corp., 150 F.3d 1011, 1024-25 (9th Cir. 1998) (holding court empowered by the All Writs Act, the AIA, and Fed. R. Civ. P. 23(d) to stay a state class action that directly contravened a prior injunction against such a proceeding, entered in a nationwide class action, and further holding the temporary approval of a nationwide settlement in the federal class action to have stayed the state class action); Carlough v. Amerchem Prods., Inc., 10 F.3d 189, 202-04 (3d Cir. 1993) (holding that district court could preliminarily enjoin plaintiff class members from prosecuting similar state court class action in light of imminent settlement of federal action after years of negotiation, plaintiffs' effort to challenge propriety of federal suit in state court, and plaintiffs' right to opt out of the federal suit); Standard Microsystems Corp. v. Texas Instr. Inc., 916 F.2d 58, 60 (2d Cir. 1990) (indicating that a stay of state court proceedings may be appropriate under the necessary in aid of jurisdiction exception "where a federal court is on the verge of settling a complex matter, and state court proceedings may undermine its ability to achieve that objective"). Cf. James v. Bellotti, 733 F.2d 989, 994 (1st Cir. 1984) (concluding that a federal court properly could enjoin a state court action in which parties sought an injunction against the signing of a proposed federal court settlement of land claims) with In re Federal Skywalk Cases, 680 F.2d 1175, 1181-83 (8th Cir. 1982) (reversing, as in violation of the AIA, a mandatory class certification which prohibited class members from settling punitive damages claims and effectively enjoined state plaintiffs from pursuing pending state court actions on issues of liability); Broussard v. Meineke Discount Muffler Shops, Inc., 903 F. Supp. 16 (W.D.N.C. 1995) (holding that AIA prohibited federal court from enjoining federal class members from continuing in personam state actions concerning same issues, although it permitted an injunction against the institution of new state proceedings). In general, however, the retagitation exception of the AIA does not permit a federal court to enjoin state proceedings to protect a judgment that the court contemplates but has not yet entered. See 17 WRIGHT, ET AL., supra note 24, § 4226, at 548-49.

\textsuperscript{307} See supra text at notes 36-38.

\textsuperscript{308} In re School Asbestos Litig., 789 F.2d 996, 1006 (3d Cir. 1986), cert. denied sub nom. Celotex Corp. v. School Dist., 479 U.S. 852 (1986) (reasoning to the conclusion that a Rule 23(b)(1)(B) class for punitive damages should not have been certified because the class did not include all potential claimants for property damage resulting from the presence of asbestos products in buildings and structures nor claimants for personal injury from the same cause, and commenting that, "The situation here is somewhat analogous to the problem presented by an interpleader action in which all claimants to the fund have not been made parties"); In re Joint E. & S. Dist. Asbestos Litig., 134 F.R.D. 32, 38 (E.D.N.Y. 1990) (concluding that limited fund class actions closely resemble interpleader actions and that consequently a stay of state proceedings would be warranted under the "necessary in aid of jurisdiction" exception to the AIA). But see In re Federal Skywalk Cases, 680 F.2d at 1182 (rejecting the argument that the action was akin to interpleader where the law might limit plaintiffs to recovery of one punitive
have relied in part on the Supreme Court’s language in *Atlantic Coast Line*, permitting an injunction, as necessary in aid of the court’s jurisdiction, to prevent a state court from “so interfering with a federal court’s consideration or disposition of a case as to seriously impair the federal court’s flexibility and authority to decide that case.”

The Supreme Court has not yet addressed the applicability of the “necessary in aid” exception to duplicative complex litigation. Assuming that the “in personam problem” can be circumvented, at least in limited fund class actions and perhaps in others as well, whether a federal court may enjoin state court actions that threaten to interfere with federal judicial control over a pending federal action will likely depend on such factors as:

(i) whether the federal action has been certified as a class action when the injunction is sought;

(ii) whether the federal class action allows an opt out right;

(iii) whether the time to opt out, if any, has expired;

(iv) whether a settlement proposal has been formulated or a judgment entered; and

(v) whether the state court action sought to be enjoined was brought by members of the federal class.

The queries related to the stage of the federal proceedings at the time when the injunction is sought are relevant in varying ways. There is little or no possibility of conflict or inconsistency between the federal action and the individual suits if the federal action has not been certified as a class action, or if class members still may opt out. Conversely, there is more possibility of such conflict or inconsistency if the class action has been certified and if the time to opt out has expired or never existed.

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309 *Atlantic Coast Line* R.R. Co. v. Brotherhood of Locomotive Eng’rs, 398 U.S. 281, 295 (1970), *but see* Monaghan, *supra* note 97, at 1160 n. 49 (questioning this reliance because of the Court’s view that parallel *in personam* cases do not interfere with one another or with either court’s exercise of jurisdiction).

310 That “problem” is the Court’s view that parallel *in personam* cases do not interfere with one another or with either court’s exercise of jurisdiction.

311 See HART & WECHSLER, *supra* note 2, at 1205 (posing these questions).

312 Thus, the second listed factor also is important because the right to opt out indicates a lack of conflict or inconsistency between the class action and individual suits.
The questions relating to settlement and judgment are relevant because, if a settlement has been proposed, and a fortiori if a judgment has been rendered, there is greater federal judicial and party investment to protect, and the courts are more likely to find a "res" or a judgment to act as the predicate for an injunction under the second or third exceptions to the AIA.\textsuperscript{313} The last factor is important because federal courts more clearly have authority to enjoin persons who are or were parties to pertinent federal litigation than they do strangers thereto, although the Supreme Court has held that the courts can enjoin others who are in a position to frustrate federal court orders.\textsuperscript{314}

b. The Cases: A Demonstration that All Writs Removal is Not Needed

I return now to consideration of the actions in which All Writs removal was sought based upon federal class action litigation, applying the perspectives developed earlier in this Article.\textsuperscript{315}

In the Agent Orange case, the Second Circuit declined to fully grapple with whether the state court actions were removable as of right. Although the parties were not completely diverse and no federal issue appeared on the face of the complaints, defendants argued that the actions were removable under the "artful pleading" doctrine\textsuperscript{316} and under 28 U.S.C. § 1442(a).\textsuperscript{317} The Second

\textsuperscript{313} For other formulations of relevant considerations, see Werner, supra note 24, at 1072-77, who argues that courts asked to enter anti-suit injunctions should harmonize efficiency with federalism by considering whether continuation of non-consolidated actions would substantially impair or interfere with disposition of the consolidated actions (which would depend on the stages of the proceedings, issue commonality, and size of the non-consolidated actions), as well as whether and how much an injunction would promote efficiency and fairness in light of, inter alia, the burden an injunction would impose and comity and federalism constraints. See also Larimore, supra note 37, at 290-303 (arguing that some conflicts between Rule 23 and the AIA can be avoided by limiting class certifications to appropriate circumstances, and that the interpretation of the necessary in aid exception be revised to eschew the division between in rem and in personam jurisdiction and to embrace consideration of whether the class action sought to be protected is mandatory, the degree of federal interest in a litigation, the degree of state interest in a litigation, the strength of the litigants' interests in choosing their forum, and systemic and policy factors including efficiency, flexibility, the effect than an injunction may have upon litigation strategy, and what steps might alleviate intercourt conflict).

\textsuperscript{314} See supra text accompanying note 9; see also infra text at notes 366-75.

\textsuperscript{315} I have reserved for Part II of the Article, however, consideration of whether the class action courts had personal jurisdiction to enjoin the absent members of the federal classes from bringing or pursuing related litigation, including collateral attacks, and whether it is wise to enjoin such litigation, even if personal jurisdiction is no obstacle and the AIA would permit it.

\textsuperscript{316} If a plaintiff's claim is governed exclusively by federal law and the only available remedy is federal, the plaintiff necessarily is stating a federal cause of action whether he characterizes it that way or not, and courts will not allow a plaintiff to use "artful pleading" to deprive a defendant of its right to remove the action to federal court. See generally 14B C. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE, § 3722.1, at 266-75 (3d ed. 1998 & 1999 Pocket Part).

\textsuperscript{317} 28 U.S.C. § 1442(a) (1994 & Supp. 1998). In pertinent part, it allows removal of actions against any "officer of the United States or any agency thereof, or person acting under him, for
Circuit rejected the former argument but chose not to reach the latter because it found other grounds (namely the All Writs Act) for its decision upholding removal. \(^{318}\) Had the court concluded that the state tort suits were removable under § 1442(a), it would not have needed to address whether the actions were removable under the All Writs Act nor reached what I view as a predicate question: whether they were enjoinable under the AIA in the absence of such an ordinary removal. For reasons articulated earlier, it would have been preferable for the court to address the removability of the suits under § 1442(a), and to address their removability under the All Writs Act only if no removal as of right was available but All Writs removal sometimes is possible.

Assuming that the court would have held against § 1442(a) removal, for all the reasons that the Second Circuit cited in support of its approval of All Writs removal of the state court tort actions, it appears that an injunction of the state court actions would have been proper to protect and effectuate the federal judgment that approved a settlement of the federal class action. \(^{319}\) Indeed, in dicta, responding to a contention that removal is sufficiently akin to an injunction to come within the ambit of the AIA and would violate that Act, the court found that the facts of the case brought it squarely within the exceptions an act under color of such office.” The argument for removal based on § 1442(a) presumably harkened back to defendants’ argument (which the court had accepted in dealing with plaintiffs who had opted-out of the federal class action) that defendant chemical companies were protected from liability by a “military contractor defense” that protected them from liability to Vietnam veterans and their families where the government knew as much or more than the defendants about the possible adverse effects of Agent Orange, as it was used in Vietnam, and the government would have concluded that saving American soldiers by defoliating Vietnamese jungles outweighed the risks to U.S. or allied troops—a decision within the discretionary function exception to liability under the FTCA. See In re Agent Orange Prods. Liab. Litig., 611 F. Supp. 1223 (E.D.N.Y. 1985), aff’d, 818 F.2d 187 (2d Cir. 1987), cert. denied, 487 U.S. 1234 (1988); see also Boyle v. United Tech. Corp., 487 U.S. 500, 512 (1988) (explaining that liability for design defects in military equipment cannot be imposed on government contractors when the United States approved reasonably precise specifications, the equipment conformed to them, and the supplier warned of the known dangers in the use of the equipment); Amess v. Boeing North Amer., Inc., 997 F. Supp. 1268, 1272 (C.D. Cal. 1998) (opining that the test laid down in Boyle may apply to government contracts performed according to government specifications).


\(^{319}\) See supra text at notes 93, 96-97, 99; see also Huguley v. General Motors Corp., 999 F.2d 142 (6th Cir. 1993) (stating that consent decree has preclusive effect upon issues fully and fairly addressed in prior proceedings; holding that because settlement agreement in previous federal class action precluded employee from bringing race discrimination in employment claim in state court, federal court was correct to enjoin the latter litigation and such injunction was permissible under the AIA); Gross v. Barnett Banks, Inc., 934 F. Supp. 1340, 1345-46 (M.D. Fla. 1995) (holding that, in order to prevent state court from interfering with settlement and injunction entered in federal class action involving substantially similar claims, Anti-Injunction Act permitted injunction of state court actions challenging bank’s ability to force place insurance).
to the Act. Specifically, the district court judge had continuing jurisdiction over the class action, *inter alia*, to ensure that the settlement agreement was enforced according to its terms. The injunction (or removal, according to the court) was necessary in aid of its jurisdiction because the district court had explicitly barred class members from instituting or maintaining future actions arising from Agent Orange exposure and had retained jurisdiction over the administration of the settlement fund. The injunction (or removal, according to the court) also was needed to protect or effectuate the federal judgment because that judgment determined the central issue of class membership raised by the state litigation, namely that persons who had not yet manifested injury were class members. The relitigation exception allows a federal court to proscribe state litigation of an issue previously decided by the federal court.

Would the injunction, without removal, have effectively protected the interests of the federal system and of the litigants? The plaintiffs presumably would have brought their action in federal court, if they could do so. Here, plaintiffs were veterans and their families, individually and on behalf of others similarly situated, suing seven chemical companies. Some of these plaintiffs were diverse from all defendants and could have sued in federal court (either individually or as representatives of a plaintiff class) if their individual claims satisfied the statutory amount in controversy requirement. In light of

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320 *Agent Orange*, 996 F.2d at 1432.
321 *Id.* at 1429.
322 *Id.* at 1432.
323 *See id.* at 1428.
324 In class actions, the requirements for diversity jurisdiction are satisfied if, without regard to the citizenship of the absent plaintiff class members, all named representative plaintiffs are diverse from the named defendants. *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366 (1921) (holding that federal courts have jurisdiction over non-diverse absent class members if all named representatives of the class are diverse from the named defendants). The fact that complete diversity was lacking in the state court suit brought by these Agent Orange victims undoubtedly was the result of a strategic choice made by the plaintiffs, in an effort to prevent removal. Naming a non-diverse plaintiff class representative was all they needed to do to render the case unremovable as a diversity case under 28 U.S.C. § 1441. *See* 28 U.S.C. § 1441 (1994) (requiring that the federal court have original jurisdiction for an action to be removable).
325 In class actions, each class member’s claim must meet the amount in controversy requirement, unless the claims arise out of a common undivided interest, single title or right. *See* Zahn v. International Paper Co., 414 U.S. 291, 301 (1973) (no ancillary jurisdiction over the claims of class members where the claims of each named plaintiff exceeded the jurisdictional minimum); Snyder v. Harris, 394 U.S. 332, 335-36 (1969) (disallowing aggregation of class members’ claims unless plaintiffs seek to enforce a single title or right in which they have a common and undivided interest). The claims asserted in the *Agent Orange* litigation would not have been joint.

As of this writing, at least two Courts of Appeals have held that the supplemental jurisdiction statute, 28 U.S.C. § 1367 (1994), has undermined *Zahn* for suits brought after the effective date of that statute in 1990. *See* Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928, 931 (7th Cir. 1996) (holding that, if a federal court has jurisdiction over the claims of one co-
the previous federal certification of a plaintiff class in Agent Orange I, of which these plaintiffs were members, the court apparently found that they did have claims sufficient to meet the amount in controversy requirement. If forced to do so, these plaintiffs could have brought their action in federal court, supported by an independent basis of jurisdiction. The All Writs removal therefore was unnecessary, and injunctions of the state court actions, authorized by the AIA, would have sufficed to protect the federal court's jurisdiction and its judgment. For the reasons articulated earlier, I believe that this course would have been preferable.

plaintiff, § 1367 authorizes supplemental jurisdiction over a co-plaintiff's claims against the same defendants when the latter claims are below the jurisdictional minimum; In re Abbott Labs., 51 F.3d 524, 529 (5th Cir. 1995) (holding that the federal court had supplemental jurisdiction over absent class members' claims that did not meet the amount in controversy requirement where the court had diversity jurisdiction over the claims asserted by the named plaintiffs). At least two other Courts of Appeals have held that Zahn survives. See Mericicare, Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 221-22 (3d Cir. 1999); Leonhardt v. Western Sugar Co., 160 F.3d 631, 639-41 (10th Cir. 1998). Because § 1367 applies only to actions commenced on or after December 1, 1990, see 28 U.S.C. § 1367, the Agent Orange case, commenced earlier than that, was decided under the authority of Zahn. See Ryan v. Dow Chem. Co., 781 F. Supp. 902, 913 (E.D.N.Y. 1991) (noting that by January 31, 1990, the two state court actions involved in Agent Orange already had been removed to federal court); In re Agent Orange Prods. Liab. Litig., 100 F.R.D. 718, 729 (E.D.N.Y. 1983) (certifying the class in Agent Orange I in December 1983).

The Second Circuit even now has not squarely addressed the issue of the effect of § 1367 on Zahn, see E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 160 F.3d 925, 934 (2d Cir. 1998)), so when it penned the Agent Orange opinion examined here, the law of the Second Circuit was as described in the preceding paragraph. The Supreme Court granted certiorari to resolve the split in the Circuits. See Free v. Abbott Labs., Inc., 176 F.3d 298 (5th Cir. 1999) (affirming dismissal of the plaintiffs' claims on the merits after the court held in In re Abbott Labs. that the federal court had jurisdiction over the class), cert. granted, 120 S. Ct. 525 (1999). An equally divided Court affirmed the judgment without an opinion addressing the issues. See Free v. Abbott Labs., Inc., 68 U.S.L.W. 4254 (2000).

326 See In re Agent Orange, 100 F.R.D. at 729 (certifying a Rule 23(b)(3) and a Rule 23(b)(1)(B) class); In re Agent Orange Prods. Liab. Litig., 506 F. Supp. 762, 782 n.30, 786, 798 (E.D.N.Y. 1980) (deciding to proceed with the case under diversity of citizenship jurisdiction and conditionally certifying a class). A fortiori it would have been constitutional under Article III for the federal courts to hear the case. Even minimal diversity between plaintiffs and defendants would have sufficed from a constitutional standpoint. See supra note 252.

327 See supra Part IV; see also Rowe, supra note 2, at 197 ("[T]he problem [of state-court interference with federal class proceedings] may lend itself better to treatment not by removal but by an injunction against the state-court proceedings, which appears to have been permissible in the Agent Orange case under the 'necessary in aid of its jurisdiction' and 'to protect or effectuate its judgments' exceptions to the Anti-Injunction Act. [footnote omitted] If legislation is in order to improve the federal courts' capacity to deal with such parallel-litigation problems, amending the Anti-Injunction Act would address the area more squarely than reliance upon judicial or legislative creation of exotic removal varieties for situations that seem likely to remain highly unusual.")
Moreover, if, for some reason, there would not have been an independent basis of subject matter jurisdiction over plaintiffs’ action, the federal court could have asserted ancillary jurisdiction over their claims, to vindicate its authority and protect its judgment. The factors that were cited in support of All Writs removal and which would have supported an injunction also would have supported ancillary jurisdiction. In particular, the court order here did what was necessary under Kokkonen (that is, embody the settlement agreement in its dismissal order and retain jurisdiction to enforce the settlement contract)\(^{328}\) to render a breach of the settlement agreement a violation of the court’s order. Consequently, the court would have had ancillary jurisdiction to enforce the agreement, as well as to enforce terms of the order that might not have been part of the settlement agreement.\(^{329}\) If plaintiffs’ suit could have been heard under the federal court’s ancillary jurisdiction (or via an independent basis of jurisdiction), then All Writs removal was not necessary on these facts.

If, for some reason, plaintiffs’ suit could not have been heard in federal court, there might have been some unfairness. As persons who were within the class certified in the prior federal action, plaintiffs had notice and an opportunity to opt out,\(^{330}\) and theoretically the opportunity to be heard through class counsel. Class members who had not manifested or discovered injury until after the Agent Orange settlement,\(^{331}\) however, may not have been sufficiently identifiable to have received mailed notice and may not have had reason to pay attention to the advertisements placed in print and broadcast media concerning the case.\(^{332}\) Consequently, their opportunities to be heard through class counsel (or through their own counsel, if permitted by the court), or to opt out of the class action may have been rather illusory. In addition, the propriety of class certification covering such “exposure only” plaintiffs, as a matter of constitutional due process, is at least questionable.\(^{333}\)

These matters would be of significant concern if an injunction of the state


\(^{329}\) See supra text at notes 246-48.

\(^{330}\) See In re Agent Orange Prods. Liab. Litig., 996 F.2d 1425, 1428-29 (2d Cir. 1993) (noting that plaintiffs could opt out of the Rule 23(b)(3) class but not out of the Rule 23(b)(1)(B) “limited fund” class that was certified only for punitive damages claims).

\(^{331}\) See id. at 1430.

\(^{332}\) See id. at 1429, 1435.

\(^{333}\) See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612, 624-626, 628 (1997) (noting that exposure-only plaintiffs share little in common with each other or with presently injured class members, that the interest of exposure-only plaintiffs in ensuring an ample fund for the future is in tension with the interest of the currently injured in generous immediate payments, that it is difficult to provide constitutionally adequate notice to those with no perceptible injury when notice is given, and that the parties had raised a number of arguments concerning the justiciability of claims of persons who have not yet manifested any disease).
court proceedings would have left some plaintiffs nowhere to go with their claims. As explained earlier, however, it appears that plaintiffs would have been able to pursue their claims in federal court. Having said that, plaintiffs may have felt that they could not get "a fair shake" in federal court. In light of the prior deep involvement of Judge Weinstein in the Agent Orange I class action, the enormous pressures to settle that he brought to bear on the attorneys,\textsuperscript{334} and the Second Circuit's affirmance of his decisions, which some commentators have criticized as "rubber-stamping,"\textsuperscript{335} arguably the absence of "fresh [state court] eyes"\textsuperscript{336} to look at plaintiffs' contentions was problematic. Part II of the Article looks again at the Agent Orange case, focusing \textit{inter alia} on the pros and cons of allowing a collateral attack on the federal class action judgment as compared with allowing the injunction of the state court proceeding and redirecting all the challenges back into the class action court.\textsuperscript{337}

\textit{In re VMS}\textsuperscript{338} presented facts in some respects very like those in \textit{In re Agent Orange}. Both involved efforts by members of a federally certified plaintiff class to escape the preclusive effects of final judgments predicated upon settlements approved by the federal courts, where the courts had explicitly retained jurisdiction over enforcement of the settlements\textsuperscript{339} and the judgments had enjoined the plaintiffs from prosecuting claims, including these, in state court.\textsuperscript{340} The Seventh Circuit Court of Appeals did not discuss whether the state suit was removable as a matter of right. Since the later suit alleged only state law claims (fraud, breach of fiduciary duty and negligent misrepresentation),\textsuperscript{341} diversity of citizenship, plus the requisite amount in controversy, would have been necessary, and the opinion does not reveal whether they were present. Nonetheless, despite the possibility that no independent basis of subject matter jurisdiction would have existed over plaintiffs' suit had they sought to bring it to federal court, ample reason existed

\begin{footnotesize}
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\item \textsuperscript{334} See Peter H. Schuck, \textit{Agent Orange on Trial}, Mass Toxic Disasters in the Courts 162-66 (Enlarged ed. 1987) ("Weinstein exploited whatever leverage he could muster over the lawyers. While not actually threatening retribution if they refused to settle, he did use the ambiguity of his roles—as mediator and as ultimate decision maker—to play upon their fears, magnify the risks, and whittle down their resistance.").
\item \textsuperscript{335} See Minow, supra note 2, at 2031 (commenting upon Judge Weinstein's and the Second Circuit's handling of the \textit{Agent Orange} case; noting that subsequent claims filed in state court were merged by Judge Weinstein into a settlement that the Second Circuit "rubber stamp[ed]"").
\item \textsuperscript{336} See id. (observing that the All Writs removal ensured "that no fresh judicial eyes would deal with the merits of the newly filed claims").
\item \textsuperscript{337} See infra Part II, section II, and text at notes 456-59.
\item \textsuperscript{338} In re VMS, 103 F.3d 1317 (7th Cir. 1996).
\item \textsuperscript{339} See id. at 1319-20, 1322 (noting that the clear language of the final settlement orders compelled finding that the district court maintained jurisdiction to enforce the settlements).
\item \textsuperscript{340} See id. at 1323, 1325 (concluding that the final judgments properly enjoined the plaintiffs from prosecuting claims in state court that indirectly sought to circumvent the final federal order approving settlement).
\item \textsuperscript{341} See id. at 1320-21.
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to enjoin the state action: only in that way could the federal district courts prevent circumvention of the settlement agreements and enforce the courts' ongoing orders against relitigation. Thus, injunction of the state court action would have been proper under the "in aid of jurisdiction" exception, as well as under the "relitigation" exception to the AIA.

Although these factors led the court to approve All Writs removal of the action, that was unnecessary. An injunction would have led the plaintiffs to forego their claims or, more likely, to file their suit in federal court, where ancillary jurisdiction, as authorized by *Kokkonen*, would have permitted the court to hear the case and evaluate the plaintiffs' state law claims. In that circumstance, no Article III problem would have existed with the federal court hearing plaintiffs' state law claims, despite the lack of diversity jurisdiction.

Finally, the *N.A.A.C.P.* case warrants examination. As noted earlier, the Eighth Circuit was contradictory in its remarks concerning the availability of ordinary removal. It concluded that the state suit (a class action, seeking injunctive relief, on behalf of all Minneapolis public school students, asserting claims under the Minnesota Constitution) was not removable under the general removal statutes, while leaving undetermined whether removal was warranted under the artful pleading doctrine. The court apparently regarded that doctrine as allowing removal under something other than the general removal statutes although, actually, when the artful pleading doctrine applies, plaintiff's complaint arises under federal law so as to permit removal under 28 U.S.C. § 1441(a). The Eighth Circuit thought it unnecessary to resolve the "artful pleading" question because it had concluded that All Writs removal was

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342 See id. at 1324-25.
343 See id. at 1326 n.4 (addressing the applicability of the AIA exceptions).
344 See id. at 1322 (applying *Kokkonen*'s reasoning to find jurisdiction to enforce settlement agreements, and, in so doing, enjoin prosecution of plaintiff's state law claims). *Kokkonen* and its requirements are discussed supra text accompanying notes 241-248. Before *Kokkonen*, the Seventh Circuit had adopted the same principles of ancillary jurisdiction in *McCall-Bey v. Franzen*, 777 F.2d 1178, 1187-90 (7th Cir. 1985) (stating that district judge may dismiss a suit conditionally, retaining jurisdiction to effectuate settlement terms).

Thus, it would not have mattered to the court's jurisdiction if plaintiffs had been correct in contending that their claims could not have been litigated within the context of the federal class action because they arose after the period covered by the class action settlement. See *In re VMS*, 103 F.3d at 1322-23. In fact, the plaintiffs could have raised their complaints in the federal courts adjudicating the class actions because the final judgments approving the settlements were not entered until after the complained-of conduct had occurred. See id.

345 *N.A.A.C.P.* v. Metropolitan Council, 125 F.3d 1171 (8th Cir. 1997), vacated without op., remanded, 522 U.S. 1145, reinstated, 144 F.3d 1168 (8th Cir. 1998), and cert. denied, 525 U.S. 826 (1998).

346 See *N.A.A.C.P.*, 125 F.3d at 1173-74 (stating initially that the cases were unremovable under the general removal statutes but later declining to address removability pursuant to the artful pleading doctrine); see also supra note 143.
347 See id. at 1173-74.
proper.\textsuperscript{348} In my view, the court should first have decided whether the defendant Met Council could remove as of right, by virtue of the artful pleading doctrine or otherwise, and only if the court concluded that such removal were not available should it have reached the issue of All Writs removal, assuming again that All Writs removal ever is permissible.\textsuperscript{349}

Assuming that the court would have held against ordinary removal,\textsuperscript{350} the next question should be whether the state court action properly could have been enjoined. For the reasons the court cited in support of All Writs removal, such an injunction would have been proper insofar as the plaintiffs in the state court suit also had been party to the earlier federal litigation that had culminated in a consent decree.\textsuperscript{351} The state claims focused exclusively on Met Council housing policies and practices that were the subject of a prior federal class action that had been settled by consent decree over which the court had retained enforcement jurisdiction.\textsuperscript{352} The plaintiffs sought injunctive relief concerning the very matters that the prior federal decree governed.\textsuperscript{353} An injunction of that suit would have been proper to prevent relitigation of the settled and released claims and to protect the integrity of the federal consent

\textsuperscript{348} See id.

\textsuperscript{349} See supra text accompanying notes 208-13.

\textsuperscript{350} The Eighth Circuit's opinion upon reconsideration of the case, after vacation of its opinion and remand to reconsider in light of Rivet v. Regions Bank of La., 522 U.S. 470 (1998), indicates to the contrary: that it might uphold ordinary removal, even now. See N.A.A.C.P., 144 F.3d at 1168 (8th Cir. 1998). It viewed Rivet as having rejected the idea, based on Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 397 n.2 (1981), that where a plaintiff files a state law claim that is completely precluded by a prior federal judgment on a question of federal law, the claim arises under federal law for jurisdictional purposes, so as to be removable as such, see N.A.A.C.P., 144 F.3d at 1170-71, but not as having rejected the idea, also based on Moitie, that a defendant may remove where "a plaintiff first elects to bring a federal claim in federal court, and then files in state court a state-law claim whose elements are virtually identical to those of the earlier federal claim." Id. at 1170-71, quoting Travelers Indem. Co. v. Sarkisian, 794 F.2d 754, 760-61 (2d Cir.), cert. denied, 479 U.S. 885 (1986). In the view of the Eighth Circuit, the district court upheld removal here on the basis of the latter reading of Moitie. See N.A.A.C.P., 144 F.3d at 1171. The two readings of Moitie seem to me a distinction without a difference, but the views of the Eighth Circuit indicate that, if forced to confront the question, the court might well uphold the removal on the "forum-election" approach to Moitie.

\textsuperscript{351} See infra Part II, Section I, regarding personal jurisdiction to enjoin those who had been absent class members in the federal class action. In N.A.A.C.P., some of the plaintiffs in the state class had not been members of the previous federal class, but the court did not treat this as an obstacle to removing the state case to the federal court under the All Writs Act. See N.A.A.C.P., 125 F.3d at 1173.

\textsuperscript{352} See id. at 1172-73 (noting that, although the state class action complaint alleged denial of adequate education, the plaintiffs linked this issue to defendant’s housing policies). Insofar as the plaintiffs in the state court suit had not been party to the earlier federal litigation that had culminated in a consent decree, the court’s authority to enjoin them from pursuing the state court litigation is less clear. See infra text accompanying notes 370-75, 422-25.

\textsuperscript{353} See N.A.A.C.P., 125 F.3d at 1173.
No more was necessary. Had the state suit been enjoined, the plaintiffs would have had to file in federal court or forego assertion of their claims. Had they filed, the court could have asserted ancillary jurisdiction over that litigation under Kokkonen, if it lacked federal question jurisdiction over the claims. From the perspective of personal jurisdiction over the parties in this imagined, newly-filed case, the fact that these plaintiffs included persons who were outside the scope of the earlier federal plaintiff class would have made no difference: all the plaintiffs, by suing, would have consented to the court’s assertion of personal jurisdiction over them.

However, having obtained jurisdiction over the suit initially brought in state court and personal jurisdiction over the parties thereto, the court still would have had to confront the propriety of binding, by the consent decree, those present plaintiffs who had not been represented in the federal class action. If it would not have been proper to hold them bound, the court would have had to reach the merits of their claims, rather than being able to rely on res judicata or collateral estoppel.

VI. POSSIBLE LEGISLATIVE APPROACHES AND CONCLUSION

Part I of this Article has sought to establish that All Writs removal is not necessary, and that the tools the courts have through the independent bases of federal jurisdiction, ordinary removal, injunctions of state proceedings, and ancillary jurisdiction are adequate to protect the interests of the federal court system and litigants.

If, by virtue of a narrow interpretation of the AIA or other statutory law, federal litigation and judgments sometimes need protection that cannot properly be afforded by ordinary removal or injunctions against state proceedings coupled with ancillary jurisdiction (or an independent basis of jurisdiction) over suits brought in federal court, then amendment of the statutory law to expand the occasions on which some or all of the foregoing devices may be utilized would be desirable, and preferable to judicial invention under the All Writs Act.

Some suggestions along these lines already have been made. A proposal by now-Judge Diane Wood, endorsed by Professor Thomas Rowe, would amend 28 U.S.C. § 2283 to allow injunctions “when necessary to ensure the effectiveness of a class action certified under federal statutes or rules, or multidistrict litigation ordered pursuant to 28 U.S.C. § 1407, or court-ordered arbitration, or in aid of a claim for interpleader.”

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354 See id. at 1174.
355 The court’s belief that All Writs removal was preferable because it spared the state court from expending resources seems to be based on an erroneous predicate—that the injunction could not save the same state judicial resources. See supra text at notes 204-05.
356 See supra text at note 144.
357 See Wood, supra note 30, at 320; see also I FEDERAL COURT STUDY COMMITTEE,
The American Law Institute, in its Complex Litigation Project, proposed that when actions are transferred and consolidated in either state or federal court, "the transferee court may enjoin transactionally related proceedings, or portions thereof, pending in any state or federal court whenever it determines that the continuation of those actions substantially impairs or interferes with the consolidated actions and that an injunction would promote the just, efficient, and fair resolution of the actions before it." This proposal would not help with class actions that are not subject to multidistricting procedures, but it could be useful in combination with a proposal such as that made by Judge Wood.

Without offering specific proposals, Professor Monaghan recently urged comprehensive congressional action, possibly including express authorization of anti-suit injunctions to deal with plaintiffs who seek to use the state courts to challenge federal class actions in which settlement is imminent, and "migratory settlers," who seek state court approval of a class action settlement that was rejected by a federal court. With respect to the latter, Professor Geoffrey Miller earlier had advocated interpretation of the AIA to authorize anti-suit injunctions against state class actions that threaten to moot overlapping federal litigation through settlement, "at least when the federal court concludes that there is a substantial probability that the federal litigation [would] result in a fair and adequate settlement or judgment [for] the plaintiff.

WORKING PAPERS 600-01 (1990) (recommending that anti-suit injunctions be authorized, inter alia, (i) when necessary to ensure the effectiveness of a judgment or consent decree entered by the federal court, but only if relief had first been sought in state court; (ii) when necessary to ensure the effectiveness of a class action, multidistrict litigation, or of court-ordered arbitration; or (iii) to prevent duplicative state court proceedings when federal court proceedings are far advanced and no special circumstances favor state court litigation).

358 AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT: STATUTORY RECOMMENDATIONS AND ANALYSIS § 5.04(a) (1994). Section 4.01(a) authorized a Complex Litigation Panel to designate a state court as the transferee court. See id. at § 4.01(a); see also id. at 542, 548 (Appendix A) (proposed 28 U.S.C. §§ 1407(e)(4), 1407(f)) (providing respectively that a designated state transferee court would have the same powers as a designated federal transferee court under various statutory subsections, and reciting the power to enjoin that is quoted in the text at this footnote).

359 This was the situation in Carlugh v. Amchem Prods., Inc., 10 F.3d 189, 202-04 (3d Cir. 1993) (noting that plaintiff class members sought to pursue simultaneous class actions to challenge the propriety of the federal suit when settlement of the federal litigation was imminent); see also supra notes 38, 306.

360 See, e.g., In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig (GM Trucks II), 134 F.3d 133, 136-40 (3d Cir. 1998) (holding that the Full Faith and Credit Act and the Rooker-Feldman doctrine barred lower federal courts from enjoining a state class action proceeding in which the state court entered final judgment upon a settlement agreement after a provisional federal settlement class had been decertified); Monaghan, supra note 97, at 1200-02. But cf. In re Lease Oil Antitrust Litig., 200 F.3d 317, 319 (5th Cir. 2000) (affirming denial of motion to dismiss federal class action, where motion was predicated on a plea of res judicata based in state court judgment).
He also urged broad construction of removal powers to authorize federal courts to take over overlapping state class actions when federal court litigation offers the opportunity for complete and adequate resolution of the claims asserted in state court.\textsuperscript{362}

Of course, the expansion of removal authority could be an alternative to expansion of the federal courts’ powers to enjoin state court litigation. Playing off Judge Wood’s, the American Law Institute’s, and the Federal Courts Study Committee’s work, Congress could pass a statute authorizing removal:

1) of state court actions when necessary to ensure the effectiveness of a class action certified under federal statutes or rules, or of multidistrict litigation ordered pursuant to 28 U.S.C. § 1407; or more broadly

2) when necessary to prevent state court actions from substantially impairing or interfering with

(a) federal jurisdiction over pending federal actions, including those in which the court’s jurisdiction over the parties is in personam, or

(b) effectuation of federal judgments and consent decrees,

perhaps, in either event, upon a further finding by the federal court that removal would promote the just, efficient, and fair resolution of the removed action; or even

3) to take over duplicative state court proceedings when federal court proceedings are far advanced and no special circumstances favor state court litigation.

Any such legislation would, of course, change the balance of power between federal and state courts, in the direction of further empowering the federal judicial system and increasing interference with the activities of state courts. For the reasons elaborated in this Article, I do not think that such an expansion of removal power is necessary to protect federal proceedings or federal judgments, so long as there is adequate power to enjoin state court litigation. Recent congressional proposals to expand removal (while they might be justified on other grounds) would allow removal in far more cases than is necessary to protect federal proceedings or federal judgments.\textsuperscript{363}

\textsuperscript{361} Miller, supra note 2, at 543.

\textsuperscript{362} See id. at 542 (noting that “federal litigation would often provide class members the opportunity for full and adequate relief on the state-court claims because those claims would usually be cognizable in federal courts under rules of supplemental jurisdiction”). An extreme expansion of the “artful pleading” doctrine is the mechanism that Professor Miller proposed to enhance removal power. See id. at 542-43. He also proposed that, “In the special context of overlapping class actions, the federal courts should interpret the phrase ‘where necessary in aid of its jurisdiction’ to confer authority . . . to enjoin . . . parallel state litigation until the conclusion of settlement discussions or other activity in the federal court that offers the chance for a prompt and adequate disposition of the merits of the class action claims.” Id. at 543.

\textsuperscript{363} For example, H.R. 3789, 105th Cong., § 3 (1998), would have made any state class action
The primary thesis of this Part of the Article has been that All Writs removal is neither necessary nor authorized. Legislative expansion of the federal courts' powers to enjoin state court litigation would be useful but, with that caveat, the tools the courts have through the independent bases of federal jurisdiction, ordinary removal, injunctions of state proceedings, and ancillary jurisdiction are adequate to protect the interests of the federal court system and litigants.

involving parties from different states removable to federal court. It failed to pass. Proposals to allow removal of state class actions in most circumstances were also made. See Class Action Fairness Act of 1999, S. 353, 106th Cong. (1999); Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong. (1999). Congress did pass the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998), which allows removal of a variety of securities claims alleging violations of state law, so long as the litigation is brought by, or on behalf of, more than 50 persons.
PART II: SPECIAL CONSIDERATIONS APPLICABLE TO ANTI-SUIT INJUNCTIONS IN CLASS ACTIONS

Part I of this Article argued that removal under the All Writs Act is neither needed nor authorized, and that federal courts could more legitimately assert jurisdiction over cases of the kinds that courts have so removed through injunction of the state court cases, followed by the exercise of either original or ancillary jurisdiction when plaintiffs then brought their cases to federal court. Because I advocate this course, it is incumbent on me to address the special issues and considerations that arise when federal class actions constitute the litigation backdrop for anti-suit injunctions.

Two matters are of particular concern: personal jurisdiction to enjoin members of federal class actions and collateral attacks on federal class action judgments.

I. THE NEED FOR PERSONAL JURISDICTION TO ENJOIN, IN GENERAL

The courts that have entered anti-suit injunctions often have not addressed personal jurisdiction over those whom they enjoined.364 Part I of the Article similarly postponed close examination of the authority of the courts to exercise personal jurisdiction over all the relevant persons in each of the instances in which the federal courts removed actions under the All Writs Act and in which I have argued that the courts ought instead to have simply enjoined the state court cases. I turn to that matter now.

When cases are removed pursuant to the All Writs Act, one might argue that, as in situations of ordinary removal, the federal court's personal jurisdiction over the plaintiffs is "derivative" of the state court's personal jurisdiction. Plaintiffs' consent, manifested by their having commenced the action in state court, undergirds the jurisdiction.365 One might further argue

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365 See, e.g., In re Agent Orange Prods. Liab. Litig. (Agent Orange II), 996 F.2d 1425, 1432
that the personal jurisdiction or consent so obtained extends to any injunction that might be necessary to prevent plaintiffs from proceeding with the state court action, after the removal. However, if there is to be no All Writs removal but only an injunction of the state court suit, the foregoing argument will not provide a basis for personal jurisdiction over the persons proposed to be enjoined.

It appears to be well accepted that a federal court may exercise personal jurisdiction over persons who are, or were, full-fledged parties to federal court litigation, for the purpose of enjoining those individuals from commencing or prosecuting state court litigation\(^{366}\) that would interfere with the exercise of federal court jurisdiction, or with a federal court judgment, if one has been entered.\(^{367}\) The personal jurisdiction exercised over defendants pursuant to

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\(^{366}\) The AIA does not apply until state proceedings have begun, but the consequence is that a federal court may restrain a party from instituting state proceedings—with no interference by the AIA. See 17 WRIGHT, ET AL., supra note 24, § 4222, at 506-07.

\(^{367}\) See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110-12 (1969) (injunction is ineffective insofar as it is directed at persons over whom the court lacks personal jurisdiction); Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832 (2d Cir. 1930) ("[N]o court can make a decree which will bind anyone but a party . . . . If [a court of equity or of law] purports to [enjoin the world at large], . . . the decree is pro tanto brutum fulmen and the persons enjoined are free to ignore it."); Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1202-03 (7th Cir. 1996) (holding an anti-suit injunction of a parallel state court suit to be appropriate to protect a 28 U.S.C. § 1407 transferee court’s discovery order as to, but only as to, those persons and counsel whose cases were or had been part of the multidistrict litigation). See generally Monaghan, supra note 97, at 1179 (referring to the principle that a court may lawfully enjoin litigants and those parties who have sufficient minimum contacts with the forum) (emphasis in original). Rule 65 of the Federal Rules of Civil Procedure purports to allow federal courts to enjoin not only parties but also those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. Fed. R. Civ. P. 65(d). On occasion, that provision may be invoked in cases involving anti-suit injunctions against the absent members of plaintiff classes. See, e.g., In re Bolar Pharm., Inc., Generic Drug Consumer Litig., MDL No. 849, 1994 WL 326522, at *3 (E.D. Pa. July 5, 1994).

If no state proceeding exists when the federal court is asked to enter an injunction, but a state action is commenced before the federal court enters the injunction, the circuits are split on whether the court may enter the injunction only if an exception to the AIA applies. The First, Seventh, and Eighth Circuits have held the AIA to be inapplicable in the circumstances described. See Barancik v. Investors Funding Corp., 489 F.2d 933, 937-38 (7th Cir. 1973) (Stevens, J.) (reasoning that if the AIA applied upon the mere commencement of a state action, then "a federal court [taking] time for fair consideration of the merits of a request for an injunction [would] deliberate at its peril; its authority to rule on the pending motion could be
applicable long-arm statutes and the U.S. Constitution, and over plaintiffs by virtue of their consensual submission to the court's jurisdiction, in the initial federal litigation, is viewed as encompassing jurisdiction to enjoin those same parties from commencing or pursuing state court litigation that would interfere with the federal court's jurisdiction or judgment.\textsuperscript{368} This reasoning would have supported the entry of the anti-suit injunction entered in \textit{Sable v. General Motors Corp.}\textsuperscript{369}

When a federal court enters an anti-suit injunction that purports to enjoin persons who were strangers to the federal litigation, or who were among the absent members of a class on whose behalf, or against whom, the federal suit was litigated, the court's jurisdiction to enjoin those persons from commencing or pursuing state court litigation is far less clear, particularly if those individuals lack minimum contacts with the relevant sovereign.

Although the Supreme Court in \textit{United States v. New York Telephone Co.}, over four dissents, held that the All Writs Act authorizes federal courts to enjoin even strangers to the initial federal litigation if they are "in a position to frustrate the implementation of a court order or the proper administration of justice,"\textsuperscript{370} the source of the authority to do so is unclear. The Court's opinion may suggest that the All Writs Act can provide a basis for \textit{in personam} jurisdiction to enjoin non-parties when subject matter jurisdiction exists and the court has personal jurisdiction over the parties to the underlying litigation sought to be protected.\textsuperscript{371} Professor Monaghan has argued, however, that,

\textsuperscript{368} I do not believe that the requirement of personal jurisdiction over enjoined parties could be circumvented by an ostensible injunction of proceedings rather than parties, notwithstanding that it sometimes is said that state court proceedings can be directly enjoined, rather than the parties thereto being enjoined from proceeding. \textit{See supra} note 4; \textit{but see 2 Newberg on Class Actions, supra} note 4, § 9.25, at 264 ("Any injunction against other pending or future suits does not run against other courts of coordinate jurisdiction. Rather, a litigating party before the enjoining court is precluded from litigating in the enjoined court.").

\textsuperscript{369} 90 F.3d 171 (6th Cir. 1996). For further discussion of the case, see \textit{supra} notes 113-17 and accompanying text.

\textsuperscript{370} 434 U.S. 159, 174 (1977) (citation omitted); \textit{but cf. id. at 186-90} (Stevens, J., dissenting in part) (focusing not on personal jurisdiction, however, but on lack of support for the proposition that a writ was necessary or appropriate here to aid the district court's jurisdiction and on the writ issued here not being "agreeable to the usages and principles of law").

\textsuperscript{371} \textit{See New York Tel.}, 434 U.S. at 172, 174; \textit{Monaghan, supra} note 97, at 1190. \textit{See supra}
"[n]o evidence exists that the All Writs Act was intended to be a bottomless reservoir of such [in personam] jurisdiction available when everything else fails. Surely, as a general matter, the All Writs Act cannot properly be read to side-step standard tests governing in personam jurisdiction." 372 The fact that in New York Telephone the commanded third party was the only party capable of giving effect to the court's pen register order may have created a situation of "jurisdiction by necessity" 373 that could be used to distinguish that case from most other cases that raise the question of federal court authority to assert personal jurisdiction, for injunctive purposes, over persons who were not parties to federal litigation. And the fact that, in New York Telephone, the court's coercive process was directed to a third party who was clearly within the territorial jurisdiction of the district court also could serve to distinguish

note 103.

372 Monaghan, supra note 97, at 1190. Professor Monaghan notes that the purpose of the Act is "to preserve jurisdiction that the court has acquired from some other independent source of law," citing Taiwan v. United States Dist. Ct., 128 F.3d 712, 717 (9th Cir. 1997) (quoting Jackson v. Vasquez, 1 F.3d 885, 889 (9th Cir. 1993)). Monaghan, supra note 97, at 1190 n.196; see also United States v. International Brotherhood of Teamsters, 907 F.2d 277, 281 (2d Cir. 1990) (holding the All Writs Act to authorize injunctions against persons who were not party to the federal litigation and judgment sought to be protected but only so long as the persons enjoined have the minimum contacts that are constitutionally required as a matter of due process); In re Baldwin-United Corp., 770 F.2d 328, 334, 340 (2d Cir. 1985) (finding an important feature of the All Writs Act to be its grant of authority to enjoin non-parties to an action when needed to preserve a court's ability to reach or enforce a decision, but only so long as those persons had threatened or engaged in conduct that frustrated a federal court order or the proper administration of justice, with actual notice of the terms of the injunction; holding that, so far as notice is concerned, the requirements of the All Writs Act are satisfied if the parties whose conduct is enjoined have actual notice of the injunction and an opportunity to seek relief from it in the district court; while acknowledging the desirability of service made in advance of any proposed injunction on all non-parties whose conduct would be restricted, refusing to impose such a condition on use of the All Writs Act because circumstances might render such notice impractical).

373 I use the phrase "jurisdiction by necessity" to refer to a situation in which the only way the court can provide the relief that it believes ought to be granted is to assert jurisdiction over (i.e., to enjoin) a particular party. The phrase, as it has been used by others, is of somewhat ambiguous scope. It has been described as based on the idea that "there must be at least one forum somewhere with power to adjudicate every case." Teplly & Whitten, supra note 56, at 254. It may apply in situations where there are multiple defendants and conflicting claims to property or assets located within a state. See, e.g., Mullaney v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (concluding that "the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident"). However, it is not clear in what, if any, other situations jurisdiction by necessity properly can be applied. See Teplly & Whitten, supra note 56, at 254-57 (concluding that "the Court's skimpy references to the doctrine have provided little guidance on this and other questions about the doctrine").
that case from some other cases that raise the foregoing question.\textsuperscript{374} Professor Monaghan has concluded that "New York Telephone provides no basis for believing that the All Writs Act should be construed as a general, 'emergency all purpose' nationwide long-arm statute used to relax the requirements of Rule 4(k)(1)(A) whenever a court deems that result desirable."\textsuperscript{375}

Where would that analysis leave the propriety of an injunction against the litigation brought by the Raceway and the Seminary in Yonkers Racing Corp. v. City of Yonkers? It may well be that those parties can be brought within the rule of New York Telephone, even as it is narrowly interpreted above. That is, it may well be that the court’s desegregation order could not have been implemented without the condemnation of the properties of the Raceway and the Seminary, and it is clear that they had minimum contacts with New York and hence could have been brought within the personal jurisdiction of the federal court sitting in New York. Similarly, in United States v. City of New York, the enjoined state court suit was brought by a taxpayer who sought to void contracts entered into by the City to fulfill obligations under a federal consent decree. Injunction of the suit apparently was necessary in order to effectuate the federal judgment, and the plaintiff had minimum contacts with New York and hence could have been brought within the personal jurisdiction of the federal court sitting in New York.

A. Personal Jurisdiction Over Absent Class Members

While absent class members are not full-fledged parties to the class litigation, with all the rights and obligations that normally attend party status, they certainly have some of the qualities of parties. If a class is properly certified, class members are subject to the court’s orders governing the conduct of the federal class action and will be bound by its judgment.\textsuperscript{376} Thus, if

\textsuperscript{374} See Monaghan, supra note 97, at 1190.

\textsuperscript{375} Id. at 1190 & n. 20 (citing Additive Controls & Measurement Sys., Inc. v. Flowdata, 96 F.3d 1390, 1396 (Fed. Cir. 1996)) (stating that "[n]othing . . . suggests that the All Writs Act can be employed as a general license for district courts to grant relief against non-parties whenever such measures seem useful or efficient," and citing with approval the proposition that injunction of non-parties must be reserved for extraordinary cases in which the activities of third parties threaten to undermine a court's ability to render or effectuate a binding judgment). Professor Monaghan also cites the Supreme Court’s characterization of the All Writs Act as providing extraordinary remedies when the need arises, but not authorizing federal courts to issue “ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.” Id. (quoting Pennsylvania Bur. of Correction v. United States, 474 U.S. 34, 43 (1985)); see also Carlough v. Amchem Prods., Inc., 10 F.3d 189, 198 (3d Cir. 1993) (noting that neither the AIA nor the All Writs Act "dispels the federal court’s jurisdictional requisite").

federal courts are authorized to enjoin complete strangers to the initial federal litigation in appropriate circumstances, it would follow a fortiori that, in appropriate circumstances, they can enjoin the absent members of a class on whose behalf, or against whom, a federal action was litigated.\textsuperscript{377} If (or when) the federal courts lack personal jurisdiction to enjoin strangers to the initial federal litigation from commencing or pursuing state court litigation, however, the question whether the federal courts may exercise personal jurisdiction to so enjoin absent members of a class becomes far more acute.

B. Personal Jurisdiction to Enjoin Class Members in Opt Out Class Actions

No Supreme Court case makes clear that the consent to jurisdiction that may be inferred from a failure to opt out of a class action encompasses consent to be enjoined from prosecuting related litigation. In Phillips Petroleum Co. v. Shutts, the Court held that in a Rule 23(b)(3) class action for money damages, due process is satisfied, and thus the absent members of a plaintiff class will be bound by the judgment, if they were adequately represented and given adequate notice, an opportunity to be heard, and the right to opt out.\textsuperscript{378} The Court concluded that minimum contacts with the forum are not necessary because, \textit{inter alia}, absent class plaintiffs, unlike defendants, are not haled anywhere to defend themselves on pain of suffering a default judgment.\textsuperscript{379} Failure to opt out of such a class action is a sufficient manifestation of consent to the court's jurisdiction where plaintiffs risk only their own claims, not liability or other action adverse to their interests.\textsuperscript{380}

However, absent class members who are threatened with an anti-suit injunction are in a defensive posture. They are similarly situated with traditional defendants in that they are at risk of having coercive judicial action taken against them (at risk, that is, of being enjoined from engaging in otherwise permissible conduct), and presumably are unable to opt out of the proceedings to enjoin them. From this perspective, it seems inappropriate to infer, from a mere failure to opt out, consent to the class action court’s

\textsuperscript{377} See, e.g., Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 367 (1921) (approving ancillary jurisdiction over a bill, filed in the class action court, to restrain class members from prosecuting state court suits that would re-open questions settled in the class action); The Prudential Ins. Co. of America Sales Prac. Litig., 177 F.R.D. 216, 229 (D.N.J. 1997) (holding court to have personal jurisdiction to enjoin class members from violating the court’s permanent injunction prohibiting class members from pursuing separate lawsuits involving claims covered by a settlement agreement, where the notice of settlement comported with due process and Rule 23 of the Federal Rules of Civil Procedure); cf. Generic Drug Consumer Litig., MDL No. 849, 1994 WL 326522, at *2, 1994 U.S. Dist. LEXIS 9236, at *4 (E.D. Pa. July 5, 1994) (concluding that the class action court had a sufficient basis for exercising jurisdiction over class members for purposes of entering judgment, but not distinguishing between that and personal jurisdiction to enjoin later litigation brought by the class members).

\textsuperscript{378} See 472 U.S. 797, 812 (1985).

\textsuperscript{379} See id. at 808.

\textsuperscript{380} See id.
jurisdiction for the purpose of entering an anti-suit injunction against absent class members.

Without absent class members’ consent to be enjoined from prosecuting related litigation, the court would have to determine whether an applicable statute permits the assertion of personal jurisdiction over these individuals and whether such an assertion of jurisdiction would violate their due process rights under the federal Constitution.\textsuperscript{381} Absent class members who wish to pursue state court litigation are very likely \textit{not} adequately represented by the class representatives and attorneys for the class; indeed, it may be just those representatives and attorneys who have sought to enjoin the state court proceedings. Consequently, on this analysis, a court could legally take action against the absent class members only upon satisfaction of the due process requirements of notice, an opportunity to be heard, \textit{and} “minimum contacts” with the relevant sovereign.\textsuperscript{382}

In order to reach a conclusion as to whether a constitutional obstacle exists, the federal court would first have to determine whether the relevant sovereign is the State in which it sits or the United States. If the court can and does employ the All Writs Act as its long-arm statute, the United States will be the sovereign with whom the absent class members must have minimum contacts.\textsuperscript{383} While that requirement often would be met, there could be situations in which it would not be met by all plaintiff class members.

Moreover, if \textit{no} federal long-arm statute (including the All Writs Act) applies, the court would have to see whether the forum State’s long-arm statute would allow it to exercise jurisdiction over the absent plaintiffs for a purpose beyond any to which their consent might fairly be implied.\textsuperscript{384} Then, the federal court would have to look to contacts with the forum State to determine the constitutionality of an assertion of jurisdiction over absent class plaintiffs in

\textsuperscript{381} This approach is analogous to courts’ analyses in determining the legality of assertions of personal jurisdiction over defendants.

\textsuperscript{382} Fifth Amendment due process requirements will apply if the United States is the relevant sovereign; Fourteenth Amendment due process requirements will apply if the State in which the federal court is sitting is the relevant sovereign. In either event, International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), requires that, in order to satisfy due process, defendants who are not personally served while present in the forum state must have minimum contacts with the forum sufficient that maintenance of the suit satisfies our traditional notions of fair play and substantial justice. \textit{See also} FRIEDENTHAL, ET AL., \textit{supra} note 56, \S 3.18 (discussing when the Fifth Amendment’s due process clause applies and stating the presumption that the doctrine of nationwide minimum contacts includes a requirement of fair play and substantial justice).

\textsuperscript{383} \textit{But see} Monaghan, \textit{supra} note 97, at 1190 & n.20.

\textsuperscript{384} As previously observed, “consent” to the court’s determination of the absent plaintiffs’ substantive rights—or, at least, personal jurisdiction to determine their substantive rights—will be present if the absent plaintiffs forewent a right to opt out, having been given notice and an opportunity to be heard. If the absent class members also are adequately represented in their capacity as seekers of relief, they can be bound by the judgment. \textit{See} Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808-14 (1985); \textit{supra} note 378-80 and accompanying text.
their capacity as persons to be enjoined.

In a number of instances in which federal courts have enjoined parallel state court litigation by absent class members, the persons enjoined apparently were within the territorial jurisdiction of the district court, gauged as above—although the court still had to exercise its jurisdiction over them by service of process or in some other constitutionally acceptable fashion. But, on the theory being spun out here, if the absent class members were not within the territorial jurisdiction of the district court, gauged as above, then the court would lack personal jurisdiction to enjoin them from pursuing parallel state litigation, unless they had engaged in additional conduct in the litigation sufficient to infer submission to the court for all purposes related to the litigation or, at least, sufficient to infer submission for purposes of the court’s entry of an anti-suit injunction against them.

A few cases have grappled with the complexities indicated here. Perhaps most directly on point is In re Real Estate Title and Settlement Services Antitrust Litigation. There, the Third Circuit vacated a federal district court injunction against state court litigation. The district court had approved the settlement of a multidistrict hybrid Rule 23(b)(1) and (2) class action in which the persons who later commenced the state court proceedings (certain Arizona school boards) had been absent plaintiff class members. The Third Circuit held that the injunction violated the Fifth Amendment due process rights of the enjoined school boards where their request to opt out of the federal suit had been denied; they did not have minimum contacts with the multidistrict transferee court forum state in which they were being compelled to litigate their contention that they had not been adequately represented in the class action; and they had not consented to the class action court’s “full” jurisdiction. The court explicitly declined to address the due process

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385 See Monaghan, supra note 97, at 1191 n.201 (citing In re VMS Sec. Litig., 103 F.3d 1317, 1324 (7th Cir. 1996) and White v. National Football League, 41 F.3d 402, 409 (8th Cir. 1994), as cases in which there was no serious question about the enjoining court being able to exercise personal jurisdiction over the enjoined absent plaintiff class members).


387 See id. at 771.


389 The action was a “hybrid” in the sense that it involved not only requests for injunctive relief but also substantial claims for money damages. See In re Real Estate Title, 869 F.2d at 767-68.

390 See id. at 762.

391 See id. at 767-69; cf. DeBoer v. Mellon Mortgage Co., 64 F.3d 1171, 1176 (8th Cir. 1995) (holding that where class members not only took issue with their inclusion in a settlement class but also with the terms of the settlement, submitting extensive memoranda and arguing on appeal regarding the latter, they had waived any potential due process requirement that they be allowed to pursue their contentions in another forum; also concluding that a release intended to prevent further litigation on the matters in controversy here was therefore consistent with due
requirements for enjoining a separate suit by: (1) a member of a class certified under Rule 23(b)(1) because of the existence of a limited fund that is the only source from which the plaintiffs can obtain relief, or (2) a member of a class in an action seeking purely equitable relief. However, in the case presented, where the Arizona school boards had been kept in the hybrid class action against their wishes, the court concluded that they either had to have minimum contacts with the forum or have consented to its jurisdiction, to be subject to an anti-suit injunction entered by the class action court. Because neither was true, the injunction had to be set aside. The state court in which the school boards had sued could then decide whether the school boards were bound by the class action judgment and whether their state suit was prohibited by the terms of the class settlement.

The Third Circuit expressly rejected the argument that a court’s “power to render a judgment against class members would be largely illusory if the court could not enjoin all plaintiffs who seek to attack the judgment collaterally in other fora”—an argument, I would add, that could be the basis for a broad reading of the scope of consent to be implied from a failure to opt out when the right to do so is afforded but not exercised. Seeing the right to collaterally attack in other fora as a necessary part of the class action scheme, “integral to the constitutionality of the class action procedure,” and the funneling of all

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392 See In re Real Estate Title, 869 F.2d at 768 & n.8.

393 See id. at 768-69. The court rejected the argument that by moving to opt out, by appealing the denial of that motion, or by challenging on appeal the adequacy of the notice given to the plaintiff class, the school boards had submitted themselves to the jurisdiction of the class action court so as to empower it to enjoin their state court suit. See id. at 770-71.

394 See id. at 769.

395 Id.

396 Id.
collateral challenges to the class action court as not necessarily efficient, the

court refused to reach a holding as to the due process rights of absent class

members that would freely allow injunction of their collateral suits challenging

class action judgments where the class members had not been permitted to opt

out. The court suggested that if an opt out right were afforded, defendants

might well be able to avoid defending against due process challenges to the

class action judgment in multiple fora, but that was not the situation at hand.

My own views are these: subject to the discussion below concerning

collateral attacks, in a class action from which unnamed members can opt out

(typically one certified under Rule 23(b)(3)), class members who do not opt

out and are bound by the judgment also should be held to be subject to the

personal jurisdiction of the court for purposes of being enjoined from

commencing or prosecuting state court litigation, injunction of which is

otherwise proper under the AIA. Despite arguments to the contrary presented

above, this should be the result in order to give meaning to the notion that

the class members are bound by the judgment. By definition, an injunction

against their separate suits will be appropriate only when necessary in aid of

the federal court's jurisdiction or to protect or effectuate its judgment. If these

class members are bound by the judgment, it logically and practically must be

within the court's power to bind them to it by enjoining litigation activity of

theirs that would undermine the federal court's jurisdiction or its judgment.

That is not to say that class members need not be given notice and an

opportunity to be heard on the question whether their litigation should be

enjoined. They should, particularly since (as noted above) on this matter they

will not be adequately represented by the class representative parties or the

class attorney. But it is appropriate for the consent to jurisdiction that is

implied by their failure to opt out to be taken to encompass consent to be

enjoined from litigation that would undermine the federal court's jurisdiction

or judgment, so long as the additional safeguards required as a matter of due

process also are afforded them.

This conclusion is defensible in the face of the reasoning of Shatts in part

because the injunctions at issue here are more like mandatory or prohibitory

orders entered as a matter of case management (to which non-opting out class

members certainly are subject) than they are to injunctions of non-litigation

activity, the propriety of which rests on a determination of the merits. It is

397 See id. at 770.

398 See supra text accompanying notes 380-85.

399 See supra text at notes 378-80 regarding what Shatts held due process to require. Courts

could attempt to make clear in the initial notice to the class that a failure to opt out would be

deemed consent, inter alia, to the court's jurisdiction for purposes of entry of an injunction

against the filing or prosecution of related litigation, should such an injunction otherwise be

proper, although class notices have little meaning to many recipients.

400 Compare the definition of an injunction within the meaning of 28 U.S.C. § 1292(a)(1)

(1993) as an order directed to a party, enforceable by contempt, and designed to afford some or
likely that anti-suit injunctions are not the sort of coercive judicial action to which defendants are subject as a remedy for wrongdoing, and vulnerability to which requires such procedural protections as the minimum contacts requirement.

Finally, I appreciate that the giving of notice to class members proposed to be enjoined from litigating may be expensive or cumbersome. But it may not be, in part because only those who actually commence other litigation need to be enjoined in a way that binds them. Even if there is a need to enjoin large numbers of class members, it may be possible to give the kind of notice that due process would require, without undue burden or expense, through the inclusion of the necessary information in other class notices or in some other manner.

C. Personal Jurisdiction to Enjoin Class Members in Mandatory Class Actions

In considering personal jurisdiction to enjoin the absent members of mandatory class actions from bringing related litigation, one recent case of tangential relevance is R.M.S. Titanic, Inc. v. Haver. Although not involving a class action, Titanic involved a situation in which the district court had exercised “constructive in rem jurisdiction” over the wreck and wreck site of the R.M.S. Titanic. To protect the salvage rights it had awarded, the court enjoined any person with notice of its order (and later, specifically, Deep Ocean Expeditions (“DOE”)) from, among other things, searching, photographing or entering the area of ocean surrounding the wreck. Upon DOE’s appeal, the Fourth Circuit concluded that, “[t]he court’s authority to exercise in rem jurisdiction does not carry with it a concomitant, derivative

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all of the substantive relief sought by a complainant. See 16 Wright, et al., supra note 15, § 3922, at 65; see also id. § 3922.2, at 95 (stating that final judgment doctrine regularly denies appeal from orders designed to control the conduct of litigation as a matter of procedure). Ironically, however, anti-suit injunctions are generally held to be appealable as injunctions. See id. §§ 3922.2, 3923, at 113, 123-25, citing cases; but see Hershey Foods Corp. v. Hershey Creamery Co., 945 F.2d 1272, 1278-79 (3d Cir. 1991) (rejecting an appeal from an injunction against prosecution of another proceeding because the order did not grant any part of the relief requested on the merits and was better viewed as relating primarily to venue). In their treatise, Wright, et al., compliment the reasoning but disapprove the Hershey decision because of the severity of the intrusion on the court whose proceedings are enjoined, because of the particular intolerability of that intrusion when a federal court restrains proceedings in the courts of a state, and because this approach would require case-by-case determination of whether anti-suit injunctions involved relief on the merits. See 16 Wright, et al., supra note 15, § 3923, at 123-24 n.1. The first two of these factors also might influence how stringently one determines personal jurisdiction to enjoin, but I think that the analysis proposed in the text is sufficiently stringent.

171 F.3d 943 (4th Cir. 1999).

402 Id. at 951.
power to enter ancillary in personam orders." Thus, injunctive relief could not be obtained against another without the court first having obtained in personam jurisdiction over that person, even when the court was seeking to give effect to rights previously declared in an in rem proceeding. Here, the district court never had obtained in personam jurisdiction over DOE. DOE's actual notice of the motion for an injunction was not enough. Therefore, the Fourth Circuit vacated the injunction against DOE for lack of personal jurisdiction.

Class actions certified under Rule 23(b)(1)(B) on the grounds of a limited fund have been analogized to situations in which the courts' jurisdiction is in rem, so the Titanic case is important for its insistence upon the availability and the exercise of in personam jurisdiction over proposed enjoiners even when the proposed injunctions would be entered to enforce rights declared in in rem-type proceedings. Titanic does not speak, however, to the circumstance in which a court would have personal jurisdiction over members of a class such that the court could enjoin them from commencing or pursuing state court litigation.

It typically is said that the members of mandatory classes are bound by the judgment so long as their due process rights are not violated, but the Supreme Court has not definitively determined what due process requires here. The class members must be adequately represented but, under Rule 23, such class members are not entitled to notice of the action or the concomitant opportunities to be heard or to opt out; and the Court never has held that they must have minimum contacts with the forum. Rule 23 contemplates that the judgment will bind Rule 23(b)(1) and (2) class members without their having manifested any consent to the court's jurisdiction. There is uncertainty as to the circumstances under which a judgment in a Rule 23(b)(1) and/or (b)(2) class action will satisfy due process and bind the members of the class.

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403 Id. at 957.
404 Id. at 957-58.
405 It was unclear from the record whether the Federal Rules of Civil Procedure would have authorized service upon Doe, but Doe had not been served, a complaint had not been filed against it and it never had been made a party, nor had Doe voluntarily subjected itself to the court's jurisdiction.
406 See supra notes 36-38 and accompanying text.
407 See generally 7B Wright, et al., supra note 303, §1789, at 39 (Supp. 1999) (noting that whether there is a constitutional right to opt out is acute when actions involving money damages are certified under Rule 23(b)(1) or (2), and that, over a dissent joined by four Justices, the Supreme Court recently dismissed certiorari as improvidently granted in a case—Ticor Title Ins. Co. v. Brown, 111 U.S. 117 (1994) (O'Connor, J., dissenting)—that could have posed that question); Arthur R. Miller & David Crump, Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1 (1986) (proposing a four factor analysis for determining the propriety of mandatory class certifications); Mark C. Weber, Preclusion and Due Process in Rule 23(b)(2) Class Actions, 21 U. Mich. J.L. Reform 347, 394 (1988) (arguing that binding Rule 23(b)(2) class members without giving them notice and the
When those circumstances are present, however, they should suffice to subject the class members to the personal jurisdiction of the class court for purposes of being enjoined from commencing or prosecuting state court litigation.

As was true for Rule 23(b)(3) class members, this should be the result in order to give meaning to the notion that these members are bound by the judgment. If these class members are bound by the judgment, it logically and practically must be within the court's power to bind them to it by enjoining litigation activity of theirs that would undermine the federal court's jurisdiction or its judgment. Again, that is not to say that they need not be given notice and an opportunity to be heard on the question whether their litigation should be enjoined; they should, particularly since on this matter they will not be adequately represented by the class representative parties or the class attorney. Finally, everything that was said above concerning notice and concerning the special situation of collateral attacks on judgments for failure of due process equally applies here.\footnote{408}

D. \textit{Personal Jurisdiction to Enjoin Absent Class Members Who Collaterally Attack a Class Action Judgment}

In this part, I consider but ultimately reject the idea that the requirements for personal jurisdiction to enjoin class members from collaterally attacking class action judgments should be more stringent than the requirements applicable when class members bring related litigation that does not constitute a collateral attack.

One could argue (1) that \textit{Shutt's} relaxation of the requirements for personal jurisdiction over Rule 23(b)(3) class members was predicated upon class members' adequate representation by parties before the court, and (2) that where that adequate representation (or another requisite of due process) is alleged to be absent, the usual requirements for personal jurisdiction cannot be relaxed. In that circumstance, one cannot rely on the representative nature of the class suit to reduce the usual requirements for exercising jurisdiction over a person.\footnote{409} It would seem to follow that personal jurisdiction to enjoin class

right to opt out violates due process).

One argument that at least sometimes could be made in support of jurisdiction absent minimum contacts, although not without constitutionally adequate notice and opportunity to be heard, would be based on an analogy to \textit{Mullane v. Central Hanover Bank}, 339 U.S. 306, 313 (1950) (upholding jurisdiction, concluding that "the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistently rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident.") In cases certified under Rule 23(b)(1) and (2), there often is a practical necessity that there be one forum that can decide the controversy and bind all interested parties.

\footnote{408} \textit{See supra} text accompanying note 398 and following note 400; \textit{see infra} Part II, Section I.D.

\footnote{409} Still another theory may support the exercise of personal jurisdiction to enjoin litigation that is transactionally related to a prior federal class action suit, particularly if it collaterally

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members who seek to collaterally attack a class judgment should be limited to situations in which the challengers have minimum contacts with the class action forum state, have submitted generally to the court’s jurisdiction either explicitly or by action beyond a mere failure to opt out (as by intervening in the action), or have been personally served when present in the forum state; and receive constitutionally adequate notice and opportunity to be heard concerning the proposed injunction.

This analysis may not be correct, however. Shutt concludes that due process requires class members to be adequately represented if they are to be bound by a judgment. Adequate representation may not enter into what is necessary to assert personal jurisdiction over absent members of a Rule 23(b)(3) class, however. If what is necessary for personal jurisdiction to bind such absent class members is notice, the opportunity to be heard and the opportunity to opt out, then the very same requirements, without more, may give the class action court personal jurisdiction to enjoin those (b)(3) class members who would collaterally attack the class judgment.

attacks the class action judgment—but it will “work” only after that other litigation has been commenced and only if those who commenced it were aware of the federal judgment. The theory would be based upon the Supreme Court’s decision in Calder v. Jones, 465 U.S. 783, 788-90 (1984), and would posit that, by filing and pursuing such a suit, the plaintiffs were intentionally causing an injurious impact in the forum state: “injurious” because it seeks to undo the binding effect of a federal judgment and “in the forum state” because the injury is, at least to a significant degree, to the court system of that state, and may also be to citizens of that state who were benefited by the judgment.


Professor Monaghan’s views are consistent with this analysis. He argues that, without minimum contacts between absent class members and the class action forum, a class action court may not, consistent with due process and the personal jurisdiction doctrine developed thereunder, enjoin a due process challenge outside of the class action court. See Monaghan, supra note 97, at 1153, 1183 (arguing that “Shutt’s ‘implied consent’ fiction . . . does not sanction in personam jurisdiction in F1 sufficient to prohibit . . . due process challenges to in personam jurisdiction in F2”). On this view, a decision predicated personal jurisdiction to enter an anti-suit injunction on the mere failure of class members to opt out would be erroneous as applied to a situation in which the class members sought to collaterally attack the federal class proceedings. Carlough v. Amchem Prods., Inc., 10 F.3d 189, 204 (3d Cir. 1993), is probably such a case since it sought a declaration that the proposed federal class settlement was unenforceable, not entitled to full faith and credit, and not binding. See id. at 195-96. This ground suggests an underlying due process complaint. Insofar as plaintiffs also sought a declaration that the state court representatives had authority to opt the entire West Virginia class out of the federal suit, it seems to me that the suit was inappropriate, but not a collateral attack.

A class member’s true, affirmative, consent to the jurisdiction of the class action court for all purposes, or at least to the court’s entry of an anti-suit injunction, also should suffice. Active participation in the federal class actions sufficient to justify the inference of general submission should suffice too, as should personal service within the forum state. See supra text following note 385 and at note 391.

I believe this latter reading of Shutt to be entirely consistent with the Court’s opinion,
Where the requisites, whether they be minimum contacts, in-state service or submission, or mere failure to opt out upon proper notice, are present, personal jurisdiction will not be an obstacle to an anti-suit injunction. The propriety of the injunction may be questionable, however, on other policy grounds discussed below.\footnote{413}

E. Another View on Personal Jurisdiction to Enjoin Absent Class Members

For still further comparative purposes, I set forth below the position of a leading treatise on class actions concerning personal jurisdiction to enjoin absent class members. My position is the same on some points and very different on others. With all due respect, precedent does not support the pertinent text from Newberg's treatise on class actions. The treatise states:

\[\text{[I]}t\text{ is axiomatic in traditional nonclass actions that a court cannot grant an injunction against a person who is not served with process under due process standards, in order that the court must obtain personal jurisdiction over the party to be enjoined \ldots. Restrictions on court powers to issue an antisuit injunction are not relaxed because of the presence of a class action in the court contemplating such an injunction \ldots. For class suits certified under Rule 23(b)(1) or (b)(2) which afford no right of exclusion for class members, or in connection with classes certified under Rule 23(b)(3) after the exclusion period has expired, the class action court lacks personal jurisdiction over absent class members on which to base any antisuit injunction against suits pending or filed in the future in other forums \ldots. [A]n injunction will not lie against absent members to enjoin other litigation, except to the extent that the court \ldots obtains personal jurisdiction over specific class members by individual service of process. The class action device will not serve to provide the court with personal jurisdiction over absent class members who are otherwise outside the court's jurisdiction, in order to issue a valid injunction against other litigation. Rule 23 is silent about enlarging the personal jurisdiction of}\]

and in particular with the reasoning that, "Any plaintiff may consent to jurisdiction. The essential question, then, is how stringent the requirement for a showing of consent will be. We think that the procedure followed by Kansas, where a fully descriptive notice is sent first-class mail to each class member, with an explanation of the right to 'opt out,' satisfies due process." See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

\footnote{413 See infra Part II, Section II.B. By analogy, if, while transiently present in Illinois, a citizen of Indiana were served with a summons and complaint seeking to enjoin him from pursuing, in Indiana, a collateral attack on a default judgment entered in Illinois, the personal jurisdiction of the Illinois court would be unquestionable, but the propriety of the proposed injunction would be quite questionable. Conversely, if the policies that support collateral attacks preclude injunctions of such attacks, the questions whether and when class action courts have personal jurisdiction to enjoin absent class members from making such attacks will be moot. If class action courts sometimes may enjoin collateral attacks on their judgments, however, the personal jurisdiction question remains.}
the court, and even if the rule served to enlarge geographical scope of personal jurisdiction, the court still could not act against absent class members individually unless the court exercised jurisdiction over them by individual service of process. Furthermore, the power of the court to issue a [binding] judgment on common issues ... does not serve to extend the court’s power to enjoin individual absent class members, over whom the court has not obtained personal jurisdiction, from engaging in litigation in other forums ... Jurisdiction to issue a binding judgment [on common issues] ... does not provide the court with personal jurisdiction to issue orders against absent class members ... relating to noncommon questions on which absent class members have not been adequately represented ... An antisuit injunction involves neither common issues nor representational adequacy ... [T]he subject of the injunction is not related to the common issues to be litigated on the merits of the class suit ... [and] an absent class member who opposes the injunction becomes the adversary of the class representative. The enjoined absent member obviously cannot be adequately represented by that party with respect to issues challenging the propriety of the injunction; nor is the objecting class member who is otherwise outside the personal jurisdiction of the court able to be served by a subpoena to compel attendance in any subsequent contempt proceedings which may be brought to enforce an antisuit injunction; nor is the failure of an absent class member to opt out of the class properly construed as a knowing waiver of personal jurisdiction requirements. Thus, even in class actions under Rule 23(b)(1) or (b)(2), courts generally lack power to enjoin absent members over whom the court has not obtained jurisdiction from engaging in outside, related litigation.414

On this view, absent minimum contacts between the class members and the class action forum, federal courts lack personal jurisdiction to enjoin the inactive, absent, members of certified classes from initiating or pursuing related litigation in other fora. Because most absent class members do not engage in litigation activity from which general consent fairly can be inferred, the courts would be hard pressed to find a personal jurisdictional basis to enjoin most class members unless they happened to have minimum contacts with the forum. Moreover, on the view taken by the Newberg treatise, even those who would be subject to the court’s jurisdiction would have to be served with process in order to subject them to the court’s orders. This could be expensive and otherwise impracticable but, for reasons discussed above,415 this need not be the case.

I would add here that if federal courts need heightened power to exercise personal jurisdiction to enable them to enjoin some litigation, either Congress or the federal judiciary can provide that power. Judicial clarification of what is

414 2 NEWBERG ON CLASS ACTIONS, supra note 4, §§ 9.25 - 9.26 (citations omitted).
415 See supra text following note 400.
necessary to assert personal jurisdiction to enjoin absent class members could provide all that the courts need.  

F. Application to the Class Actions Removed under the All Writs Act

If one applies these principles to the class actions that were removed under the All Writs Act, what does one find? On the views of Professor Monaghan and the Newberg treatise, the Second Circuit would have had personal jurisdiction to enjoin the absent members of the Rule 23(b)(3) Agent Orange plaintiff class from bringing a collateral attack in another forum only if, or insofar as, they either had submitted to the court's jurisdiction for that purpose, had been personally served in the forum state, or had minimum contacts with the forum state, and the court had exercised its authority over them while affording them notice and an opportunity to be heard with respect to the injunction. There is no evidence that the class members had given the necessary consent or been served in New York, although they probably had been given the necessary notice and opportunity to be heard. The tentative settlement, of which they had to have received notice, forever barred class members from instituting or maintaining actions against the defendants based on exposure to Agent Orange. Moreover, since the plaintiffs came from all over the nation, many of them probably did not have minimum contacts with

416 See Monaghan, supra note 97, at 1200-02 (noting that comprehensive congressional action could include expanded federal personal jurisdictional powers).

The American Law Institute Complex Litigation Project had similarly proposed to expand the jurisdictional power of transferee courts by authorizing them to serve persons nationwide in order to allow those courts the authority to enjoin nonparties, if necessary, wherever they might be located. See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT: STATUTORY RECOMMENDATIONS AND ANALYSIS 331-32 (1994) (Reporter's Notes to Comment b to § 5.04) ("Insofar as a potential anti-suit injunction may run against persons who are not parties to any of the litigation in the transferee court, the authorization for the court to issue a binding order effectively expands the jurisdictional power of the transferee court to allow that limited authority over nonparties wherever they may be located. Similar nationwide authority is contained in the anti-suit injunction statute tied to interpleader suits. See 28 U.S.C. § 2361.").

417 The plaintiff class was certified as a common questions class under Fed. R. Civ. P. 23(b)(3) for purposes of deciding issues including general causation and the validity of a military contractor defense. See In Re Agent Orange Prods. Liab. Litig., 996 F.2d 1425, 1428 (2nd Cir. 1993). The class was certified as a Rule 23(b)(1)(B) limited fund class for purposes of deciding punitive damages. See id.

418 Actually, I have slightly modified the articulation of their views. I do not believe that either discusses the possibility of jurisdiction through personal service in the forum state, for example, but I believe each would accept that revision of the statement of his views.

419 See id. at 1429 (indicating that "notice was provided to class members by mail where feasible and by advertisements in the print and broadcast media" and that the settlement was not approved until "after extensive nationwide fairness hearings").

420 See In re Agent Orange, 996 F.2d at 1429.
New York.\footnote{See id. at 1428.} On this view, an injunction of the state court proceedings was error, even if the situation fell within one or more exceptions to the AIA. Thus, if one accepts Professor Monaghan's and Newberg's views concerning personal jurisdiction to enjoin, the state court suit should have been permitted to proceed, for lack of jurisdiction to enjoin the class members. On my view, the class members' decision not to opt out sufficed to give the court personal jurisdiction to enjoin them from bringing transactionally related litigation \textit{including} collateral attacks. Thus, once they were given proper notice of an opportunity to argue against the injunction, personal jurisdiction would not have been an obstacle to the injunction.

In the \textit{N.A.A.C.P.} case,\footnote{125 F.3d 1171 (8th Cir. 1997), \textit{vacated without op., remanded}, 522 U.S. 1145 (1998), \textit{reinstated}, 144 F.3d 1168 (8th Cir. 1998), and \textit{cert. denied}, 525 U.S. 826 (1999).} all the plaintiffs had minimum contacts with Minnesota,\footnote{See \textit{N.A.A.C.P.}, 144 F.3d at 171 (indicating that the plaintiffs included the Minneapolis branch of the N.A.A.C.P. and a class consisting of all Minneapolis public school students).} and therefore were within the jurisdictional reach of the court. There was no personal jurisdictional obstacle to the anti-suit injunction even if the requirements are higher for collateral attacks and even if this state court case fits into that category, except for any practical burdens that might have attended \textit{exercising} jurisdiction over the members of the state plaintiff class, as a predicate to enjoining their suit.\footnote{Perhaps because the plaintiffs were Minnesotans, the Eighth Circuit and the parties were not apparently concerned about personal jurisdiction. The discussion referred to in the text hereof, infra text at note 425, was not even part of the court's analysis of the propriety of All Writs removal, as the court apparently thought that the power under that Act could freely encompass persons who were not parties to the original action. See \textit{N.A.A.C.P.}, 125 F.3d at 1173 (1998) (citing with approval United States v. New York Tel. Co., 434 U.S. 159, 174 (1977), which held that a federal court may exert its power under Act upon "persons who [were] not parties to the original action"). This becomes an ironic justification in light of the court's simultaneous holding that the enjoined were in privity with the federal class. See id. at 1175.} Insofar as the membership of the classes overlapped and the state court plaintiffs, as federal plaintiffs, actually participated in the federal litigation,\footnote{See id. at 1175.} the exercise of jurisdiction would have been eased and a need for formal service obviated.

Finally, in \textit{In re VMS Securities Litigation},\footnote{103 F. 3d 1317 (7th Cir. 1996).} on my view, the federal court would have had personal jurisdiction to enjoin the Rule 23(b)(3) plaintiffs so long as the exercise of jurisdiction over them in the federal class action was consistent with their due process rights. Because the plaintiffs had the opportunity to opt out and forewent it,\footnote{See id. at 1320.} and apparently had the requisite notice and opportunity to be heard, the court would have had personal jurisdiction to resolve their substantive claims and ancillary jurisdiction to
enjoin them.

Professor Monaghan found that there was no question that these class members were within the territorial reach of the district court in Illinois.\textsuperscript{428} However, as California investors, their minimum contacts with the forum state of Illinois is not clear to me. On the Monaghan/Newberg view, a lack of minimum contacts with Illinois would create a jurisdictional obstacle to the district court enjoining these class members.\textsuperscript{429}

II. COLLATERAL ATTACKS

A. The Right to Collaterally Attack the Class Action Judgment

Even if a class action court has personal jurisdiction to enjoin absent class members from bringing or prosecuting certain other litigation, when such class members seek to attack the validity of a class action judgment on the grounds that their due process rights were violated by a lack of adequate representation or otherwise,\textsuperscript{430} the rules concerning collateral attacks come into play. The law seems to be that absent members of a class may collaterally attack the judgment in any court with subject matter jurisdiction over their case and personal jurisdiction over the necessary parties, and which is a proper venue.\textsuperscript{431}

\textsuperscript{428} See Monaghan, supra note 97, 1191 n.201 (observing that “the state law plaintiffs also had been plaintiffs in the federal litigation, and the district court had retained personal jurisdiction to enforce the terms of the settlement”).

\textsuperscript{429} See Monaghan, supra note 97, at 1200.

\textsuperscript{430} “Otherwise” might include such matters as a lack of constitutionally adequate notice or opportunity to be heard, or denial of a right to opt out that was constitutionally required.

\textsuperscript{431} See Matsushita Elec. Indus. Co v. Epstein, 516 U.S. 367, 388-89, 395-96 (1996) (Ginsburg, J., concurring in part and dissenting in part) (observing that, in a case where class members in a state class action argued to the federal court that they could not be bound by the settlement in the Delaware action because they had not been adequately represented there, the due process check on the full faith and credit obligation remained open for consideration on remand; also observing that final judgments are vulnerable to collateral attack for failure to satisfy the adequate representation requirement). On remand, a panel of the Ninth Circuit in fact held the representation to have been inadequate and, as a result, the Delaware judgment did not preclude pursuit of certain federal securities claims. See Epstein v. MCA, Inc., 126 F.3d 1235 (9th Cir. 1997), op. withdrawn, substituted op., on recons., 179 F.3d 641 (9th Cir. 1999), cert denied Epstein v. Matsushita Elec. Indus. Co., 120 S. Ct. 497 (1999). However, on rehearing (after the resignation of Judge William Norris, who had written the panel opinion), the Ninth Circuit concluded that the Supreme Court had at least implicitly resolved the due process issue against those who had challenged the Delaware judgment because that conclusion was logically necessary to the Court’s holding that the court of appeals could not withhold full faith and credit from a Delaware state judgment releasing claims within the exclusive jurisdiction of the federal courts and binding upon the Epstein appellants, and that the Court’s resolution bound the federal court of appeals. See id. at 645. Judge Wiggins, concurring in the result, found that the Delaware court had held that absent class members had been adequately represented, that issue having been fully and fairly litigated and necessary to its decision, and opined that its ruling was
The Restatement (Second) of Judgments, § 41, Comment a, states that if the circumstances described in Restatement (Second) of Judgments § 42 exist—that is, if a class representative’s interests so diverged from those of the class that he could not fairly represent it, or “if [he] failed to prosecute or defend the action with due diligence and reasonable prudence and the opposing party was on notice of facts making that failure apparent”—then, “the represented person may avoid being bound either by appearing in the action before rendition of the judgment or by attacking the judgment by subsequent proceedings.” Arguably then, the court system that rendered the judgment under attack has no right to demand that the attack be brought there, by enjoining its prosecution elsewhere or by removing the case to itself by use of the All Writs Act. In addition, it is generally accepted that the res judicata effect of a class judgment is not for the court that enters that judgment to decide, but rather for the court to which a specific controversy is brought.

entitled to full faith and credit. See id. at 651 (Wiggins, J., concurring). In dissent, Judge Thomas argued that unresolved conflicts among class members and the Delaware representatives’ lack of incentive to obtain fair value for those of the class’s claims within exclusive federal subject matter jurisdiction made the representation constitutionally infirm. See id. at 652-53 (Thomas, J., dissenting). In addition, he did not believe that the Delaware court actually had decided whether the absent class members had been adequately represented. See id. at 655. Thus, there would be no inappropriate second-guessing were this court to hold, on the bases urged by the Epstein appellants, that representation was inadequate. See id. at 655-56. See also Hansberry v. Lee, 311 U.S. 32, 44-46 (1940) (adjudicating a collateral attack on a class action judgment based on a conflict of interest between those who were purportedly represented and those who purported to represent them, where both suits were brought in Illinois state court); In re Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760, 767 (3d Cir.), cert. denied sub nom. Chicago Title Ins. Co. v. Tucson Unified Sch. Dist., 493 U.S. 821 (1989) (recognizing class members’ right to attack a class action judgment collaterally, “presumably in the forum of their choice”) and commenting that, “Congress has never evinced a desire as to whether a party lacking minimum contacts with the class action forum in a hybrid suit involving substantial damage claims should nonetheless be forced to bring its collateral challenge in that forum.”); Monaghan, supra note 97, at 1149-50 & n.4, 1173, 1201-02 (emphasizing the right of class members to collaterally challenge the adequacy of representation they have received, in a forum of their choosing, subject to the statutes and rules governing jurisdiction, venue, and forum non conveniens); see generally Note, Collateral Attack on the Binding Effect of Class Action Judgments, 87 HARV. L. REV. 589 (1974) (surveying the grounds for collateral attack).


433 RESTATEMENT (SECOND) OF JUDGMENTS, § 41, at 394, cmt. a (1982) (emphasis added); see also id. § 12, at 115 (prescribing the circumstances in which the subject matter jurisdiction of the judgment rendering court may be questioned in subsequent litigation).

434 The situation of a collateral attack on a default judgment, outside the class action context comes to mind, by analogy. See id. § 10, at 105, cmt. f (providing that an “objection to notice or to territorial jurisdiction may be raised for the first time in a proceeding subsequent to the rendition of the judgment”).

435 See generally 3 NEWBERG ON CLASS ACTIONS, supra note 376, § 16.24, at 16-342-49, § 16.29, at 16-357-60; 7B WRIGHT, ET AL., supra note 303, § 1789, at 245-46 (noting that the
That principle too suggests the impropriety of extinguishment by injunction, or appropriation by All Writs removal, of collateral attacks on class action judgments.\textsuperscript{436} If the attack is successful, it will "undo" the class judgment's binding effect upon the absent class members.

B. The Virtues and Vices of Collateral Attacks

Professor Monaghan has explored at length the issue of anti-suit injunctions against absent class members. He has argued that freely allowing collateral attacks is both consistent with the intentions of the framers of the Federal Rules and is an important protection against abuse of class members in a world of multistate and nationwide damage class actions often characterized by distant forums,\textsuperscript{437} certification of classes for settlement purposes only,\textsuperscript{438} "races to judgment and reverse auctions,"\textsuperscript{439} and abusive manipulation of class suits by defendants.\textsuperscript{440} He further argues, I think incontrovertibly, that a class action court may not bar non-resident class members from litigating their substantive

\textsuperscript{436} Arguments that the system ought not to work this way, particularly when the court asked to review the validity of a federal class action judgment is a state court, are considered below. But, for the moment, the Article accepts the description sketched above as accurately reflecting the legal landscape.

\textsuperscript{437} Absent the alternative of a conveniently located collateral attack, class members or their attorneys may have to travel to a distant and unfamiliar class action forum, and incur the consequent expenses, to protect their interests. See Monaghan, supra note 97, at 1160 (suggesting this risk). The distance and expense may deter class members from taking steps to protect themselves, and this in turn may increase the risk of abuse. See id. at 1160-61.

\textsuperscript{438} Several of the special dangers of such limited purpose certifications are discussed in Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619-21, (1997). They include class counsel's weakened bargaining position, see John C. Coffee, Jr., Class Wars: the Dilemma of Mass Tort Class Action, 95 COLUM. L. REV. 1343, 1379 (1995) (discussing plaintiff counsel's bargaining position), the special dangers of collusion and a "race to the bottom" that attend negotiation of a settlement prior to class certification, see id. at 1354, the judge's lack of opportunity to adjust the class definition as the proceedings unfold, see Amchem, 521 U.S. at 620, and the judge's lessened ability to guard against collusion and unfair settlements. See id. at 621-22.

\textsuperscript{439} That is, of situations in which there may be a "race to the bottom" in the representation of the interests of the class members by counsel who seek to personally benefit by representing the class. See Monaghan, supra note 97, at 1156 n.32 (citing the problem, described by Professor Coffee, supra at 1354, as "the low bidder among the plaintiffs' attorneys winning the right to settle with the defendant").

\textsuperscript{440} Monaghan, supra note 97, at 1155-58.
claims in another forum if the latter finds that the class judgment violated the absent members’ due process rights.\footnote{441}{Monaghan, supra note 97, at 1153.}

There is tension, however, between the policy of allowing collateral attacks on class judgments and the second and third exceptions to the AIA.\footnote{442}{These are the exceptions authorizing stays of state court proceedings where necessary in aid of a federal court’s jurisdiction or to protect or effectuate its judgments. See 28 U.S.C. § 2283 (1999).} Professor Monaghan argues that the tension should be resolved in favor of collateral attacks, so that they should not be enjoinable.\footnote{443}{Monaghan, supra note 97, at 1200-02.} However, there are opposing arguments.

First, collateral attacks on class action judgments, particularly if they are multiple and brought in a variety of courts, could be exceedingly inefficient. The attacks may require each court to which they are brought to undertake the time-consuming and difficult task of mastering a lengthy and complex record and making multiple judgments that involve the application of due process doctrine to that record. Different courts could come out differently in determining whether a class action afforded to the absent class members, either specific members or all members collectively, all that due process requires. Alternatively, collateral estoppel or res judicata could require a court hearing a collateral attack to follow the prior determination of another court that had adjudicated such an attack on the same judgment.\footnote{444}{This would be the situation if the absent class member in the second attack were a party or in privity with a party to the first attack. However, if the attacks were brought only on behalf of individual class members and privity was lacking, an adverse decision could not bind the second collateral attacker. See Epstein v. MCA, Inc., 126 F.3d 1235, 1241-42 (9th Cir. 1997), op. withdrawn, substituted op. on recons., 179 F.3d 641 (1999) (observing that even though, in the course of a settlement approval process, other class members had objected to collusion and to inadequate representation, a conclusion by the class action court that representation had been adequate would not have bound the Epstein plaintiffs because due process would not permit them to be bound by the litigation activities of uncertified, random, volunteer objectors); Epstein, 179 F.3d at 655 (Thomas, J., dissenting) (reiterating that because the individual objectors who appeared at the Delaware fairness hearing “were not authorized by the absent class members to represent their interests, nor . . . certified to do so, . . . [their] appearance could not . . . bind other [absent class members] with respect to the issue of adequacy of representation”).}

Second, there is the questionable propriety of a court of stature equal to that which entered a judgment second-guessing the latter’s conclusions as to the adequacy of representation and/or of notice and opportunity to be heard and/or of the need to have afforded a right to opt out. These are matters that normally we would expect to have reviewed on appeal, and only on appeal. Collateral attacks on class action judgments are inconsistent with the way in which issues usually are reviewed, and its seems to me that this is uniquely so. It is true that collateral attacks also are permitted on non-class judgments, most often for
lack of personal jurisdiction over the defendants. In those situations, however, the issue necessarily must not have been raised before the judgment-rendering court. A defendant has a choice of the forum in which he makes the objection, but he can not both directly attack the court's jurisdiction and collaterally attack the judgment. 445 By contrast, the class action court will have addressed, perhaps more than once (both early and late in the litigation), the adequacy of representation, the adequacy of the notice and the opportunity to be heard, and the existence of a right to opt out—although not necessarily at the instance of a particular class member. The system has sought to give absent class members, like defendants, a choice: come in (i.e. intervene in the proceedings) or stay out and collaterally attack later. But because the class action court almost inevitably will have addressed the issues, and perhaps even the specific arguments, that the collaterally attacking absentee wants to make, the court hearing a collateral attack operates more like a reviewing court than like a court addressing issues for the first time. 446

This in turn raises questions concerning the respect that the collateral court owes to the determinations of the class action court. The Court of Appeals for the Ninth Circuit in its rehearing, after remand from the Supreme Court, of Epstein v. MCA, Inc., rejected the argument that Shuttos v. Kremer v. Chemical Construction Corp. 447 created a largely unfettered right to collaterally attack the adequacy of representation in class actions. 448 Making an argument similar to one later sketched in this Article, the Ninth Circuit stated that,

[T]he absent class members’ due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the . . . system and by direct review in the United States Supreme Court . . . . Due Process requires that an absent class member’s right to adequate representation be protected by the adoption of the appropriate procedures by [those courts]; [it] does not require collateral second-guessing of [the class court’s] determinations

445 Friedenthal, et al., supra note 56, §3.26, at 190 (discussing defendant’s choice of making a special appearance or collaterally attacking a judgment for invalid service or improper jurisdiction).

446 Cf. Kate Stith, The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal, 57 U. Chi. L. REV. 1, 4 n.7 (1990) (noting that the state and federal collateral review available to a criminal defendant operate similarly to direct appeal).

447 Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) (holding district court to be required by 28 U.S.C. § 1738 to give preclusive effect to a state court decision upholding a state administrative agency’s rejection of plaintiff’s employment discrimination claim, where the state court would do so; stating, in passing, that a state may not grant preclusive effect to a constitutionally infirm judgment, and that other state and federal courts are not required to accord full faith and credit to such a judgment). The Court did review the procedure afforded by the state and found it constitutionally sufficient. See Kremer, 456 U.S. at 483-85. There seem not to have been any findings of the trial court concerning whether its procedures satisfied due process for the Court to second-guess or decline to second-guess.

448 179 F.3d 641, 648-59 (9th Cir. 1999).
and that [appellate] review . . . . Limited collateral review would be appropriate, therefore, to consider whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue. This review would not, however, include reconsideration of the merits of the claim or issue . . . . 449

If this is correct, collateral attacks will be that much more difficult to win, and there may well be fewer of them, leading to fewer occasions on which courts are tempted to enjoin them. The Ninth Circuit's view may imply that collateral attacks will be far less of a choice than they have been, however. That is, if merely being given the opportunity to come into the class action to object to the adequacy of representation (or to argue that other due process requirements have not been satisfied) translates into having enjoyed a 'full and fair opportunity' to litigate those matters, then (on the Ninth Circuit's analysis) one had better take that opportunity because, having had it, a court to which a collateral attack is brought will not "reconsider" the merits of one's arguments. The fact that neither the class representative, who, in this context, is one's adversary, nor other objecting parties, who do not act in a representative capacity, will have represented an absent class member in the hearings concerning satisfaction of the due process requirements seems not to matter, on the Ninth Circuit's view.

If we are going to allow collateral attacks, we should afford them broader scope. For instance, the collateral court should adjudicate on their merits the arguments of a class member who did not intervene in the class proceedings and was not represented in a manner that ordinarily carries res judicata/collateral estoppel implications. He or she is not bound by the determinations on these issues made by the class action court. Thus, despite my discomfort with a court's second-guessing of a peer court's conclusions as to whether a federal class action afforded due process to the class members, I would not attempt to alleviate that discomfort with an aggressive use of preclusion principles.

A third and related argument in support of the enjoinability of state court collateral attacks by absent class members is the particular impropriety of a state court second-guessing a federal court on issues of federal constitutional law. In theory, only the federal courts of appeals and the U.S. Supreme Court may review federal court rulings.450

449 Id. at 648. See also Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988) (stating that a court should loathe to revisit a decision of a coordinate court absent extraordinary circumstances such as a clearly erroneous decision that would work a manifest injustice); Hill v. Henderson, 195 F.3d 671, 678 (D.C. 1999) (stating that a decision of a court of coordinate status is entitled to be considered the "law of the case").

450 See U.S. CONST. art. III, § 1, cl. 1 ("The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of
Finally, there is the question whether collateral attacks are necessary to accord fairness to absent class members. At least in class actions that afford a right to opt out, if the reasons to doubt adequacy of representation or the adequacy of other matters guaranteed by due process, have surfaced before the time to opt out has expired, one might say that a class member fairly could be limited to opting out or bringing her concerns to the class action court. Recognizing that sometimes, perhaps often, the reasons to doubt the adequacy of representation or other fundamental requirements will not have surfaced before the time to opt out has expired, one still might say that (1) a class member fairly could be limited to bringing her concerns to the class action court if the action still is pending or if it has retained jurisdiction over the case post-judgment;\textsuperscript{451} and (2), if she is rebuffed, appeal is the only proper venue for making a further challenge.

The system apparently has not worked this way, and this alternative approach has disadvantages. It might impose an inconvenient forum on, and therefore deter challenges by, absent class members. There also are dangers that absent class members would not "get a fair shake" because of the class action court's investment in its resolution of the case and because its court of appeals also will have incentives to let the resolution stand. That way, the litigation will be off the docket and neither the district court, nor the appellate court, nor the parties, will have to spend more time on the merits; the litigation, with its uncertainties and costs, will not be sent back to square one; and any relief awarded can continue to be distributed or otherwise effectuated. On the other hand, the class action court may not be an unduly inconvenient forum. It is not clear that other courts would evaluate the merits of the collateral attack any differently than the class action court, or its court of appeals, would do—even if they approach the issues de novo rather than as the Ninth Circuit proposes is appropriate for a court of equal stature. And there would be efficiencies in channeling all attacks to the class action court, which already

\textsuperscript{451} See Marcel Kahan and Linda Silberman, \textit{Matsushita And Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims}, 1996 The Supreme Court Review 219, 264, 273 (making arguments that suggest that, so long as the class action court affords members the opportunity to question the adequacy of representation, courts should not permit adequacy to be challenged collaterally, but recognizing dangers with this position until state courts adopt more exacting standards and procedures when evaluating global settlements encompassing claims within exclusive federal jurisdiction); \textit{cf.} Feder. R. Civ. P. 60(b) (authorizing relief from judgment, \textit{inter alia}, when a judgment is void or for any reason not specifically listed in the Rule that justifies relief from the operation of the judgment).
knows the record.452

These arguments (of the inefficiency of collateral attacks, the impropriety of courts of equal stature “reviewing” one another’s judgments and particularly of state courts “reviewing” federal judgments, and of the presumptively equivalent outcomes from the class action court and its court of appeals as compared with other courts) would support anti-suit injunctions of state court-based collateral attacks, assuming the requisite personal jurisdiction over the attackers and that an exception to the AIA applies.

III. DISTINGUISHING COLLATERAL ATTACKS FROM OTHER LITIGATION

In my view, litigation that would interfere with federal jurisdiction or federal judgments that are not challenged on due process grounds should be subject to injunction. In those circumstances, an anti-suit injunction entered by the class action court will be proper if the situation falls within one or more of the exceptions to the AIA and if the class members have been given notice and an opportunity to be heard concerning the injunction, after having foregone an opportunity to opt out of the class action, if such an opportunity was afforded.453 At that point, there is jurisdiction and perhaps a judgment, both of which are worthy of being protected. The class action court is in the best position to determine whether the plaintiff was a member of the class and other questions that entail interpretation of its judgment.454

If, on policy grounds,455 collateral attacks are to be insulated from anti-suit injunctions, it will become necessary to distinguish collateral attacks from other litigation. I therefore preliminarily explore here whether difficulties attend making this distinction and whether the lawsuits that have been the targets of All Writs removal—and which I propose be targets of anti-suit

452 But see In re Real Estate Title and Settlement Serv. Antitrust Litig., 869 F.2d 760, 770 (3d Cir. 1989) (questioning the efficiency of channeling all collateral attacks to the class action court, given the burden potentially entailed).

453 As previously noted, it is less clear whether in mandatory class actions something other than an opt out right, such as minimum contacts with the forum, as well as notice and an opportunity to be heard regarding the contemplated injunction, is required to satisfy due process when applied to anti-suit injunctions against absent class members. See supra note 407 and accompanying text.

454 Although Professor Monaghan argues strenuously against injunctions of suits by absent class members, it is important to observe that his argument opposes giving the class action court the authority to bar due process challenges in another forum. See Monaghan, supra note 97, at 1150, 1152-53, 1155, 1159, 1179, 1183, 1186, 1200. Professor Monaghan’s position is consistent with permitting a class action court to preclude class members from relitigating their substantive claims in another forum if the class members do not make a due process challenge to the class action judgment.

455 One might add, “or if the requirements for personal jurisdiction to enjoin a class member from making a collateral attack are to be more demanding than the personal jurisdiction requirements to enjoin a class member from bringing merely related litigation . . . .” See supra Part II, section I.
injunctions—generally have been collateral attacks.

In *Agent Orange*, it does not initially appear that the removed state court actions were collateral attacks on the federal class action. The plaintiffs alleged injury attributable to exposure to Agent Orange and not manifest until after the *Agent Orange* settlement date, and sought relief.\(^{456}\) Although the state court would have had to address the scope of the *Agent Orange* class action and settlement, including whether persons who had not yet manifested injury were class members,\(^{457}\) that does not render the state suit a collateral attack. On the other hand, the Second Circuit said that plaintiffs' "attack" was founded on their due process rights.\(^{458}\) That court's discussion of whether they were class members indicates that the contest over that issue included, *inter alia*, whether the district court had subject matter jurisdiction over their claims, whether it had personal jurisdiction over them, whether the notice given was Constitutionally adequate, whether due process required them to have been afforded an opportunity to opt out, and whether they were adequately represented by the representative parties in the federal suit.\(^{459}\) Based upon this description, the state court actions clearly were collateral attacks on the federal class action.

It is less clear that the state court suit involved in the *N.A.A.C.P.* case was a collateral attack on a prior federal class action consent decree, entered in what was apparently a (b)(2) class action. The second suit did not purport to be a collateral attack. In fact, the plaintiffs in the second action contended that the two suits raised different causes of action and involved different plaintiff classes.\(^{460}\) The Eighth Circuit rejected those contentions. In the course of doing so, it decided, *inter alia*, that the state court plaintiffs were in privity with the plaintiff class in the federal suit because they were adequately represented there by parties whose interests were so closely aligned with theirs as to make the federal plaintiffs their virtual representatives. To the degree the state court plaintiffs argued to the contrary, one could view the second suit as a collateral attack on the former, although that seems like a stretch to me.\(^{461}\)

In the *VMS Securities Litigation*, as described in the appellate opinion, members of a federal settlement class sued in state court, alleging that they had

\(^{456}\) See *In re Agent Orange Prods. Liab. Litig.*, 996 F.2d 1425, 1430 (2d Cir. 1993).

\(^{457}\) See id. at 1431-32.

\(^{458}\) See id. at 1432.

\(^{459}\) See id. at 1434-36.


\(^{461}\) Viewing the suit as a collateral attack for this reason is also in some tension with the court's mention that no one challenged the jurisdiction of the class action court. This mention was made by the court in connection with considering the propriety of the *res judicata* dismissal of the state plaintiffs' claims. See id. at 1174.
been fraudulently induced not to opt out of the federal class action. While, on its face, this sounds like it might amount to an allegation of a due process violation, the court re-characterized plaintiffs’ claims as an effort to circumvent the class settlement agreement by contending that a defendant should be estopped from acting inconsistently with its representations concerning the scope of the federal class action. As so re-characterized, this state suit appears perhaps not to be a due process-based collateral attack on the federal judgment.

These cases seem to illustrate that it is not entirely clear what constitutes a collateral attack. If others share my difficulty in making this distinction, it is difficult to determine whether the lawsuits that are the targets of All Writs removal and/or of anti-suit injunctions generally are collateral attacks, in whole or in part. This Article has considered the view that such attacks might be immune from anti-suit injunctions while other transactionally related litigations are not. However, it will be difficult to implement that policy if the line between collateral attacks and other transactionally related litigation is unclear.

Overall, doubt and disagreement cloud 1) what is a collateral attack; 2) when unnamed class members may collaterally attack class action judgments in other fora and when the class members may properly be required to bring their arguments to the class action court, such that an anti-suit injunction against the collateral attack would be appropriate; 3) what is necessary for a court to assert personal jurisdiction to enjoin transactionally related litigation even when no collateral attack is involved, and whether the personal jurisdiction requirements for enjoining collateral attacks should be any different; and 4) what arguments are available to absent members who are permitted to proceed with a collateral attack, and which will be precluded by determinations of the class action court. The time for more good minds to reconsider and weigh in on these issues seems to have arrived.

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462 This allegation was made in one case initially and in another (where they sued on different state law causes of action) apparently in response to an asserted or anticipated defense. See In re VMS Ltd. Partnership Sec. Litig., 103 F.3d 1317, 1319 (7th Cir. 1996); Restatement (Second) of Judgments § 76, at 216-17 (1982) (subject to § 74 equitable considerations in determining relief, “a person who is not bound by a judgment . . . may obtain a determination that the judgment is ineffective as to him through an action to restrain enforcement of the judgment, for a declaration that the judgment is ineffective as to him, or similar relief, when: (1) The existence of the judgment jeopardizes a protectible interest of his; and (2) The character of his interest warrants his being given relief forthwith rather than on a future occasion.”).

463 If the right to opt out is constitutionally mandated, fraud that vitiates that right may well be a due process violation.

464 In re VMS, 103 F.3d at 1325.

465 This is perhaps yet another argument against the “insulation” position.
IV. IMPLICATIONS FOR ANTI-SUIT INJUNCTIONS AND CONCLUSION

Part I of this Article argued that All Writs removal is both unauthorized and unnecessary because courts have more legitimate means of inducing into federal court the cases that the parties and the federal judicial system have a strong interest in having there. But if an injunction is not an available alternative, it cannot make All Writs removal unnecessary. If injunctions against collateral attacks on class action judgments should be disallowed as a matter of policy, and if (or when) class action courts lack personal jurisdiction to enjoin class members from making such collateral attacks, is the consequence that courts are correct to instead remove such state suits under the All Writs Act? I think not. For all the reasons presented in Part I of this Article, All Writs removal is not an option. Moreover, the same policies that argue to disallow federal courts from enjoining collateral attacks and disallow them from channeling those attacks back to the class action court argue with equal efficacy against allowing the All Writs removal of those collateral cases: All Writs removal has precisely the same effect of denying class members a new and impartial perspective, in a convenient forum of their choosing. On the other hand, if we decide to allow class action courts to enjoin collateral attacks, and view those courts as typically having the requisite personal jurisdiction over the parties, then All Writs removal remains unnecessary.

This Article’s tracing of the injunction as an alternative to All Writs removal led to the discovery that we need clarification of the law concerning personal jurisdiction to enter injunctions against absent members of court certified classes and, also, renewed thinking about the need for and the breadth of collateral attacks on class action judgments. But none of the law’s murkiness on the issues of personal jurisdiction or collateral attack blurs the thesis of this Article that All Writs removal is not authorized and is not necessary. Although some expansion of the federal courts’ powers to exercise personal jurisdiction and to enjoin state court litigation would be convenient, the tools the courts have in existing personal jurisdiction doctrines, the independent bases of federal jurisdiction, ordinary removal, injunctions of state proceedings, and ancillary jurisdiction are adequate to protect the interests of the federal court system and litigants.

If, in the class action context, policy reasons argue against anti-suit injunctions of collateral attacks or even of other transactionally related litigation, the same reasons argue with equal force against All Writs removal. And if the reasons favoring anti-suit injunctions of collateral attacks upon class action judgments or of other transactionally related state court litigation prevail over the policies against such injunctions, once again All Writs removal is not only not authorized; it is also not needed.

466 See supra text at notes 437-41 (referring to the kinds of policy arguments made by Professor Monaghan).