THE INADEQUATE SEARCH FOR "ADEQUACY" IN CLASS ACTIONS: A BRIEF REPLY TO PROFESSORS KAHAN AND SILBERMAN

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Although Matsushita II *can be read in a way that might lead to some difficulties, Professor Morrison insists that its result is plainly correct and its basic message—that federal courts should look with considerable skepticism on state court class action settlements that release federal claims which state courts are forbidden to adjudicate—is a sound one, properly applied to the facts of that case.* Matsushita II *is a narrow case that would not, and should not, lead to the broad-scale collateral attack predicted by Professors Kahan and Silberman. Given the practicalities of litigation (including the statute of limitations for securities cases and the substantial risks of sideline sitting), the opportunities for collateral attack are quite limited and the possibility of abuses very small. At the same time, Kahan and Silberman undervalue adequacy of representation, which is an essential element of due process that must exist to bind persons not parties to a lawsuit. Their proposed solution would prevent meaningful federal review and create practical problems without effectively addressing the problems of forum shopping and plaintiff shopping. The holding of* Matsushita II, *in contrast, would encourage settlement of such actions in a single proceeding in a federal court that finally resolves the dispute.*

In their second effort to deal with the problems raised by *Epstein v. MCA, Inc.*[1] *(Matsushita II)*, Professors Kahan and Silberman recognize the potential for abuse where a state court is asked to approve a settlement of a class action involving federal claims that the court lacks jurisdiction to adjudicate.[2] Nonetheless, their solution will do virtually nothing to prevent some of the worst abuses, as evidenced by the fact that the test they propose would have resulted in upholding the adequacy of representation in the state court case involved in *Matsushita II*.

Their errors appear to stem from four separate problems more fully described below: (1) they read *Matsushita II* as creating "an un-

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1 126 F.3d 1235 (9th Cir. 1997), reh'g granted (9th Cir. 1998) [hereinafter *Matsushita*].

2 See Marcel Kahan & Linda Silberman, The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc., 73 N.Y.U. L. Rev. 765, 790 (1998).

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fettered ability to collaterally attack"[3] virtually any class action judgment, not once but repeatedly;[4] (2) they undervalue the importance of adequate representation, which is an essential element of due process that must exist in order to bind persons who are not parties to a lawsuit; (3) they substitute a state court judge for a federal court litigant as the mechanism to assure that the determination of adequacy is proper;[5] and (4) they ask the fifty state courts to adopt procedures that would be an improvement over what many now use,[6] but in the end would not decrease the likelihood that federal rights would be sold on the state court auction block to the lowest bidder.

As I argue below, although *Matsushita II* can be read in a way that might lead to some difficulties, its result is plainly correct and its basic message—that federal courts should look with considerable skepticism on state court class action settlements that release federal claims which state courts are forbidden to adjudicate—is a sound one, properly applied to the facts of that case. Contrary to the hopes of Kahan and Silberman, state courts will give federal claims proper consideration only when federal courts are able to look over the shoulders of state court judges to assure that absent class members are adequately represented.[7]

Although we differ in our analyses and our prescriptions, Kahan and Silberman and I agree on a number of points. Perhaps the most

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[3] Id. at 765.

[4] See id. at 765, 766 ("unfettered"); 769 ("unrestricted"); 766 ("unchecked"); 780 ("unlimited"); 774, 783, 784, 786, 792 ("broad"); 792 ("no inherent limitation").

[5] See id. at 782.

[6] See id. at 786-89.

[7] Professor Allen's principal criticism of my position is based on his view that it is my personal view that state courts should not be passing on settlements in which, as in *Epstein v. Matsushita*, there is a substantial federal securities law claim. See William T. Allen, Finality of Judgements in Class Actions: A Comment on *Epstein v. MCA, Inc.*, 73 N.Y.U. L. Rev. 1149, 1165 (1998). But the notion that state courts are not competent to pass on such issues did not come from me, but from Congress which has made the federal courts the exclusive forum for deciding federal securities claims, including those under the Williams Act §3(d)(7), 15 U.S.C. § 80a-51 (1994), which is at issue in this case (not the Securities Exchange Act of 1934 as Professor Allen seems to believe, see Allen, supra, at 1153). If state courts lack the power to adjudicate such claims, it is only a very short step to reach the conclusion that the federal courts should view with suspicion state court decisions which resolve those claims by a settlement process in which the state court must, as it did here, evaluate the strength of the federal claims. It is thus not the views of this writer about the proper role of state courts in federal securities cases, but those of the Congress of the United States, that produce what I have called the structural flaws that open the door to full-fledged federal court review of claims of inadequate representation when state courts approve of settlements resolving claims which they are barred from adjudicating. If Professor Allen believes that state courts are as competent to adjudicate federal securities law claims as are federal courts, he should make the argument to Congress and not to the federal courts who are powerless to alter the congressional preference.

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significant are that there is a problem of class counsel selling out class claims in exchange for a generous fee, that the problem is greater in some forums and before some judges than others, and that, in general, there is a special concern when the settlement is in state court, releases federal claims that can only be litigated in the federal courts, and occurs before the case is fully developed.[8]

We also agree that state court determinations of adequacy, including those made by the highest court of the state, cannot, consistent with the Due Process Clause, be the last word on adequacy. Kahan and Silberman also do not suggest that the United States Supreme Court should routinely review state court class action decisions on adequacy of representation as an error-correcting device to deal with this problem. And, as I read their article, they do not argue that the representation in the Delaware state court in this case was in fact adequate, a view apparently shared by Judge O'Scannlain in dissent, insofar as he does not argue the contrary.[9]

I
Disagreements Over Premises

Although there are parts of Judge Norris's opinion that are not expressly limited, Kahan and Silberman's claim that *Matsushita II* is "an unnecessarily broad opinion"[10] overlooks a number of express disclaimers that the decision should be read much more narrowly.[11] While those disclaimers did not satisfy the dissent,[12] the facts on which they were based should mean that the opinion will not be given the expansive reading that Kahan and Silberman fear.

First and most significant, the Delaware court did not have before it a complaint that included the federal securities law claims that were the sole basis of the federal court action in California. Nor could it ever adjudicate those claims since Congress has conferred exclusive jurisdiction over such claims on the federal courts. As Kahan and

[8] Lawyers who resolve cases quickly have come to be known as "pilgrims" since they are the "early settlers." See Beth Duncan, Institutional Investors Not Opting to Lead Class Actions, Despite Potential Recoveries, 66 U.S.L.W. 2587, 2588 (March 31, 1998).

[9] Judge O'Scannlain dissented because he believed that the adequacy issue was decided in Delaware and could not be relitigated. See *Matsushita II*, 126 F.3d 1235, 1259 (O'Scannlain, J., dissenting). There is no disagreement among the three of us that there must be *some* further review, and the debate is over what the form and forum should be.

[10] Kahan & Silberman, supra note 2, at 769.

[11] "[T]he three factors described above . . . make this case extraordinary on its facts," *Matsushita II*, 126 F.3d at 1250; the *Matsushita II* decision "is the product of an extraordinary set of circumstances," id. at 1255; and it will be the "rare exception . . . where an absentee will have a colorable claim for inadequacy," id. at 1256.

[12] See id. at 1260-61 (O'Scannlain, J., dissenting).

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Silberman recognize, because there is exclusive federal jurisdiction over the federal claims, a state court plaintiff has no leverage over the defendant since there can be no threat to litigate them in the forum where the settlement discussions are taking place. In that sense, the state court plaintiff is like John Wayne walking into a bar filled with bad guys who know that Big John has nothing on him but an empty six gun: He is, as the Supreme Court observed in a closely related context, "disarmed."[13] And there is no opportunity for bluffing since the defendant knows that the state court plaintiff does not have the only card that matters: the one that would allow him to litigate the federal claim in state court.

Just because there is exclusive federal jurisdiction does not mean that a state court can never, consistent with due process, approve a settlement that includes the resolution of a federal claim. For instance, a federal securities claim that mirrored a state law fraud claim would present a different situation from *Matsushita II* because a victory by the plaintiff on the state claim might well estop the defendant from relitigating at least the factual issues in the federal case. But the presence of an exclusive federal claim in a state court class settlement ought at least to raise a danger signal and should shift to the settling parties the burden of showing in the federal court that the representation in state court was adequate.

Second, *Matsushita II* did not involve class members who sat on the sidelines waiting for the class counsel in Delaware to conclude their case and then brought a new action collaterally attacking the earlier case, with the hope of obtaining at least a nice nuisance value buy-off. Here the state case was filed first but was largely inactive for two months until the federal case was filed, and then, fifteen days later, the first settlement was reached in Delaware.[14] Moreover, the federal case was vigorously litigated, with extensive discovery and eventual motions for class certification by the plaintiffs and for summary judgment by the defendants. Meanwhile, during the year and a half after the Delaware court rejected the initial settlement, the Delaware action was in a state of dormancy. It was not until after plaintiffs filed their brief in the Ninth Circuit that a new settlement was reached

[13] Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231, 2248 (1997) ("[I]f a fairness inquiry under Rule 23(e) controlled certification, . . . permitting certification despite the impossibility of litigation both class counsel and court would be disarmed.").

[14] See *Matsushita II*, 126 F.3d at 125; Marcel Kahan & Linda Silberman, *Matsushita* and Beyond: The Role of the State Courts in Class Actions Involving Exclusive Federal Claims, 1996 Sup. Ct. Rev. 219, 221-22.

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in Delaware,[15] suggesting that the federal case was the litigation dog and the state case the settlement tail.

The presence of an active federal case is significant for four independent reasons. First, there was an obvious federal forum where the federal and state claims could have been resolved, and defendants chose to go to the state court, presumably because they found class counsel in Delaware more accommodating and because they believed that the scrutiny afforded the deal there would be greatly diminished—precisely the kind of "plaintiff shopping" and "forum shopping" that Kahan and Silberman recognize create adequacy of representation problems. Second, the absence from Delaware of the very persons—the *Matsushita II* plaintiffs and their counsel—who could shed the most light on the settlement should have caused the state court to question its fairness. Third, the existence of an active federal case should also have negated any inference that the *Matsushita II* plaintiffs were simply lying in wait until the Delaware case was concluded to see what happened. From this perspective, there was no reason to go to a forum where the federal claims could not be litigated when the *Matsushita II* plaintiffs were already in a court where they were vigorously pursuing them.

Fourth, the overlap between the state and federal cases was rather modest. To be sure, they both focused on the same basic transaction, but the Delaware action raised a state law challenge to the conduct of the directors and officers of the acquired company (MCA),[16] whereas the federal action contended that the actions of the acquiring company (Matsushita) violated federal law.[17] Matsushita was not initially a defendant in the state case, but was added only at the time of the first proposed settlement,[18] solely so that it too could obtain res judicata. Even then there were no significant state law claims against Matsushita, and, of course, no federal claims were included at all. In fact, despite the almost frivolous nature of the state claims against Matsushita (especially after the Vice Chancellor had opined that even the basic state claims against the MCA principals were very weak), Matsushita never lifted a finger to have the claims against it dismissed from the Delaware action.

In these four respects—and arguably others—*Matsushita II* is a narrow, if not unique, case that would not, and should not, lead to the

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15 See Kahan & Silberman, supra note 14, at 223.

16 See In re MCA Shareholders Litig., 598 A.2d 687, 690 (Del. Ch. 1991).

17 See Epstein v. MCA, Inc., 50 F.3d 644, 648 (9th Cir. 1995).

18 See In re MCA Shareholders Litig., 598 A.2d at 690 (noting that Matsushita was added as defendant on December 14, 1990, just four days before settlement agreement was filed).

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kind of broad-scale use of collateral attacks on class action settlements that Kahan and Silberman predict. To be sure, the language in parts of *Matsushita II* is sweeping, but the facts of the case are much narrower and, therefore, so is its holding. "Statements in judicial opinions cannot be wrested free of their factual moorings."[19]

But even if these four elements were not present, there is one factor the authors omit that significantly diminishes the impact that *Matsushita II* is likely to have, particularly in the securities area: The statute of limitations is one year for many securities cases, which is the principal area that *Matsushita II* affects. It is well established that, once a class action is filed, the statute of limitations for the entire class is tolled during the pendency of the class action, including any appeals.[20]

But that rule applies only to claims made as part of the class action, and since the federal claim cannot be included in the state court class complaint, the tolling rule does not help the plaintiff with a federal claim. Thus, the notion that a potential federal plaintiff can safely wait until the state case is concluded and then mount a collateral attack overlooks the limitations defense, which is a far easier means for obtaining a dismissal than battling over adequacy of representation. And even if one class member might bring a timely collateral attack, it is virtually inconceivable that the multiple collateral attack scenario suggested by Kahan and Silberman would ever occur, let alone be a common problem.

There are two likely scenarios when a state court settlement proposes to release federal claims, but neither mirrors what Kahan and Silberman fear. First, as happened here, the federal action will be proceeding separately from the state action, and the defendant will try to settle the state court case and the federal claim with it, in the belief that such a path is cheapest and quickest (for the defendant) though not necessarily in the best interests of the class members. If a single settlement were the goal, both sets of claims could be pled in the federal court, with supplemental jurisdiction over the state claim under 28 U.S.C. § 1367.[21] To allow the state court to "settle" the federal

[19] Liberty Mut. Ins. Co. v. Commercial Union Ins. Co., 978 F.2d 750, 752 (1st Cir. 1992).

[20] See, e.g., United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977).

[21] This assumes that the two cases involve the same transaction, without which it is difficult to understand how a state claim could be used to settle federal claims in state court when the federal claim cannot be litigated there. (Surely, if the Delaware plaintiffs had purported to release federal antitrust claims for price-fixing Matsushita products as part of the settlement in a stockholders class action, that would not have been permitted.) Kahan and Silberman describe the cases as "two parallel class actions," Kahan & Silberman, supra note 2, at 767, and as "transactionally linked," id. at 776 n.53. However, given the

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claim would enable the defendant to engage in unilateral forum shopping and to do so in precisely those situations in which the danger of a sellout by state class counsel is greatest: where there is a pending federal action that is being vigorously litigated by other counsel, and the settlement will be submitted for approval in the forum where only the state claims can be tried.

The other scenario involves cases where there is a pending state case and the statute of limitations has not yet run on a parallel federal claim. A class member receives notice of the settlement and concludes that the state court counsel has agreed to release the valuable federal claims for little or no consideration (generally accompanied by a large fee for class counsel). It seems highly improbable that an absentee class member and her counsel in that situation would decide not to file objections in the state court proceeding and then, if the settlement is nonetheless approved, bring a new action in federal court and hope to prevail on a claim that there was constitutionally inadequate representation in the state court. Part of the rationale for that assessment is that a collateral attack is generally more difficult to win because it is limited to constitutional issues, whereas a state court objection can be based on anything from a rule of procedure, to a statute, to a claim of unfairness as to some or all of the proposed settlement.

Aside from the very high risk to the client in adopting a wait-and-see strategy, no economically rational attorney, without a pending case of his own, would choose that path in view of the likely costs and minimal chances of overcoming the res judicata defense, not to mention eventually winning on the merits or obtaining a favorable settlement. For far less of an investment of time and money, an objector's counsel can make the same points (and more) in the state court proceeding, and if, as happens in a fair number of cases, changes are made in response to those objections, the client is better off and the objecting lawyer may well earn a fee.

There is a further concern expressed by Kahan and Silberman that bears mention because it too relates to the potential impact of *Matsushita II*. At various points they suggest that, after *Matsushita II*, inadequate representation can be found whenever the federal court

different real defendants in the state and federal actions in *Epstein*, and the focus in the state case on the decisions of the MCA directors and in the federal case on the propriety of the tender offer to MCA made by the outsider (Matsushita), the overlap may be more apparent than real. See *Matsushita II*, 126 F.3d at 1238 n.4 ("no overlapping issues of fact whatsoever"); id. at 1249 ("Delaware plaintiffs probably were *unable* to conduct any discovery on the federal claims because the facts relevant to those claims had no apparent relevance to the subject matter of the state law claim.").

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concludes that the state court seriously undervalued the federal claim.[22] That argument has merit insofar as it recognizes that no one could prevail in such a collateral attack unless the second court reached the conclusion that valuable federal claims had been surrendered for little or no consideration, since otherwise there would be no harm from the inadequate representation, no matter how poor it may have been.

But there is nothing in *Matsushita II* that suggests that simply alleging a bad result in a prior action is enough to allow the collateral attack to go forward. Instead, what is needed before the inadequacy allegation will even be considered is the kind of structural deficiency, principally the absence of any power of the state court to litigate the federal issue, that was so prominent in *Matsushita II*. To the extent that objections to collateral attacks are based on the concern over retrying issues that were litigated in the prior action, that concern is answered by refusing to entertain a collateral attack unless some such structural impediment is found. It is only after that threshold is satisfied that there is any need to examine the record closely and decide whether, despite any structural impediment, the state court plaintiffs and their counsel adequately, even if not perfectly, represented the class.

II
Undervaluing Adequacy of Representation

Although they do not say so directly, Kahan and Silberman suggest that adequacy of representation is a desirable, but not terribly important aspect of class actions. However, they do not question that, as a general matter, every person has a right to a day in court, no matter how many others have already litigated and lost the same claim. This principle is central to both the common law doctrine of res judicata, which applies only to parties and those in privity with them, and the federal constitutional law principle, which forbids the state from taking property, including legal claims, without due process of law.

In *Hansberry v. Lee*,[23] a case which is cited only in a single footnote in the Kahan-Silberman article,[24] the Supreme Court recognized an exception to the general rule precluding judgments from binding persons who are not named parties in the litigation, for members of a

[22] See, e.g., Kahan & Silberman, supra note 2, at 774 (arguing that decision in *Matsushita II* allows for collateral attack on grounds of "substantive fairness," among others).
[23] 311 U.S. 32 (1940).
[24] See Kahan & Silberman, supra note 2, at 772 n.42.

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valid class action. In the first case in *Hansberry* there had been a class action in Illinois state court that purported to bind the person who was the defendant in the second Illinois state court action. However, the Supreme Court ruled as a matter of federal due process that the class action was invalid because the interests of the defendant in the second case were not adequately represented in the first action.[25] Although the Illinois courts did not have the equivalent of Federal and Delaware Rules 23 to guide their assessments of the claims of class representatives, it was the substance of the representation (and not simply the lack of good procedures for determining it) that was missing in the first case. Indeed, the interests of the class representative were actually antagonistic to at least some of those he was supposed to represent.[26] As a result, the Due Process Clause gave those who were not parties to the first action the right to collaterally attack the first judgment in the very court system in which it was rendered.

The importance of adequate representation was expressed by the Court in *Phillips Petroleum Co. v. Shutts*,[27] although there was no claim of inadequacy there, and in *Amchem Products, Inc. v. Windsor*,[28] where inadequacy under Rule 23 was one of the reasons why class certification was denied. The basis of the claim of inadequate representation varies from case to case, but the importance of assuring adequacy never wavers. The reason is clear: Only through the device of adequate representation can there be reasonable assurances that absent class members are not being deprived of their claims without a day in court. Thus, under *Hansberry*, class representatives can serve as surrogate plaintiffs for the absentees, but only if they adequately represent them. Far from being a nice addition if it is available, adequate representation, along with notice and an opportunity to participate (and in some cases the right to opt out), are the essential elements that legitimize the class action and entitle the defendant to use a prior class judgment or settlement as a bar to future litigation by everyone who is part of the certified class.[29]

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[25] See *Hansberry*, 311 U.S. at 44, 46.

[26] See id. at 44.

[27] 472 U.S. 797, 808-10 (1985).

[28] 117 S. Ct. 2231, 2250-51 (1997).

[29] Martin v. Wilks, 490 U.S. 755 (1989), which allowed nonclass members to attack the legality of a prior class action consent decree, involves the same basic principle, that no person is bound by a judgment unless she was a party to the prior action or is adequately represented by someone who was a party. There was no claim of prior adequate representation in *Martin* because the nonparties were white firefighters whose interests were directly at odds with the class members who were black firefighters in the same fire department where the alleged racial discrimination took place. Surprisingly, Kahan and Silberman neither mention *Martin* nor discuss its impact on their solution of mandatory

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III
Determining Adequacy Is Not a Job that Belongs Almost Exclusively to State Court Judges

The primary solution that Kahan and Silberman offer is a series of steps that state courts should undertake to assure themselves and everyone else that class counsel are adequately representing the class.[30] They would also require anyone who questioned the adequacy of representation (and presumably other due process elements such as notice and a right to opt out) to make those objections known in state court as a precondition to making a collateral attack. Furthermore, even those collateral attacks that they would permit could only be based on a "flawed" process for making the adequacy determination.[31] There are real questions as to how such procedures would become law in all fifty states, a matter I discuss in the next section. In this Part, I will focus on the flaws in this proposal and assume it could be uniformly and perfectly adopted.

The first problem is that this solution turns state court judges into advocates, since they would have to carefully examine the entire background of the settlement and, without knowledge of what is transpiring in other pending cases, attempt to determine all the relevant facts. The judge might even have to take discovery if the parties were not forthcoming and then would have to make an independent examination of the federal law (about which the state judge is likely to know very little since the jurisdiction over such claims is exclusively federal). It is one thing to make a determination about unfamiliar law based on submissions by opposing counsel, but quite another for a judge to shift roles and become an investigator and perhaps an advocate, yet that is what will be required, especially where there is no one opposing the settlement. And even if there is a formal objector, the court cannot accept the adequacy of that opposition if the judge's role as assurer of adequacy of representation is to be fulfilled.

Second, Kahan and Silberman ask, "Why should class members not be forced to raise their objections to the adequacy of representation in F1 [the initial forum] . . . or lose their objections if they do not?"[32] But that approach turns the usual presumptions of due process and res judicata on their heads. Instead of asking why an outsider

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intervention in state courts by class members who claim inadequate representation. See infra text accompanying notes 32-33.

[30] See Kahan & Silberman, supra note 2, at 786-89.

[31] See id. at 789.

[32] Id. at 779.

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should be bound, the new question would be: Why did the outsider not enter the fray at the time of settlement, the exact inquiry rejected by *Martin v. Wilks* on the ground that there is no such doctrine as mandatory intervention.[33] The answer, I suggest, is just the same as in *Martin*: If you want to bind nonparties, it is your burden to bring them in, either by making them parties or by establishing some exception, such as a valid class action that meets the standards imposed by due process. And when it does not, as in *Hansberry*, the party seeking the exception loses the benefit of the prior judgment.

Third, the proposal would create a state court exhaustion doctrine, much like the one applicable in habeas corpus cases, with the result that anyone not satisfied with the state court decision (perhaps even including an attempt at certiorari review in the Supreme Court) would then start all over again in the federal court on the same issue (to the extent allowed). Instead of having the issue of adequacy litigated once (albeit in the federal court), two sets of courts would consider it, and the primary court would be the state court, which is less familiar with the federal law issues and more susceptible to approving inadequate settlements for federal claims—the very reason that a defendant would choose to settle a federal claim there rather than in a federal court where the claim is actually pending.

Lastly, as a partial response to the relitigation argument, the proposal would severely limit the issues that could be raised in federal court to those going to the process by which adequacy was decided. This would almost certainly not permit the federal court to take into account the inherent structural flaw in allowing state courts to pass on the fairness of settlements of federal claims that they have no jurisdiction to adjudicate, which is a major reason why collateral attacks are necessary. Presumably, so long as the state court dotted the procedural i's and crossed the procedural t's, that would be the end of the federal inquiry.

In effect, the result would be no meaningful federal review. The lower federal courts could not entertain collateral attacks, and the Supreme Court cannot be expected to review the substantive "fairness" of a settlement of a federal claim by a state court more than once every decade, if then. After all, the High Court is not ordinarily an error-correcting court, and there is no reason to think that it would (or should) make an exception for state court class actions in which federal claims are also resolved. Thus, although formally rejecting the notion that state courts should have the final say, the real-world im-

33 See *Martin*, 490 U.S. at 763-65.

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pact of this proposal would be to allow precisely that result, so long as all the proper procedures were followed.[34]

IV
THE UNLIKELIHOOD OF CREATING UNIFORM AND FAIR PROCEDURES

Kahan and Silberman set forth a lengthy list of things that state courts "should" do,[35] all of which are sensible and, if the judicial will were there, could be implemented at minimal cost to most court systems. As I understand their proposal, it is that state court class action approvals of the settlement of federal claims would be immune from collateral attack only if the state courts followed all of these "shoulds." Even if one were inclined to accept that result as a policy matter (which I am not), their proposal creates enormous practical problems that provide further reasons for rejecting it.

One question that deserves attention is who should promulgate the law that establishes the acceptable criteria that must be adopted? Is it envisioned that, in a judicial opinion, presumably one allowing a collateral attack, the United States Supreme Court should include lengthy dicta saying, in effect, if the state trial court had done all of these other things, approval of a class settlement could not be collaterally challenged? Or would Congress pass such a law, and if so, what are the realistic prospects for enactment, let alone passage in the form that the authors would recommend?[36]

Next it is necessary to know who would judge each state's laws to assure compliance with the standard. What would the lower federal courts do in the course of entertaining collateral attacks? Surely, the Supreme Court could not be expected to pass on these various laws, either as an administrative matter (because of Article III's limitation to cases and controversies, among other reasons) or in actual adjudications, except in the rarest of cases. One analogy comes to mind:

[34] In addition, under 28 U.S.C. § 1257 (1994), the Supreme Court may only review decisions of state courts on the basis of an allegedly incorrect interpretation of federal law. Thus, the Court would lack the power to review compliance with a state's own rules of procedure. Moreover, unless a state court's approval, under its equivalent of Rule 23, of a settlement in a case in which federal claims are released raises a question of federal law, which is by no means certain, the Supreme Court would lack the power even to hear such a challenge, should it desire to do so.

[35] See Kahan & Silberman, supra note 2, at 786-87.

[36] The Tenth Amendment would almost certainly bar Congress from enacting procedural rules that states would have to follow. But Congress might be able to achieve that goal indirectly by creating immunity from collateral attack in the federal courts if a state had procedures that met a congressional standard.

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Under the Civil Rights of Institutionalized Persons Act of 1980,[37] a court may require exhaustion of internal prison remedies for a period of 180 days before a suit under 42 U.S.C. § 1983 can proceed, but only if those remedies have been approved by the Attorney General of the United States.[38] That approach might work if the proper person could be found to do the approving, but even in the prison context, very few states have submitted their programs, in part because approval only postpones, but does not eliminate, litigation in most situations. However, under the Kahan-Silberman proposal, satisfactory procedures preclude any examination of the substance of what the state court did, thereby making some form of federal approval a necessity to guard against the very failures that led to their suggested changes.

It is not that these problems can never be solved. Rather, attempting to control the relatively modest number of collateral attacks that are likely to arise by insisting that every state create and then obtain approval of federally mandated standards would, even if successful, require an enormous amount of time and energy to solve a not very great problem.

V
LEAVE *MATSUSHITA II* ALONE

Read reasonably, which means taking into account not only the stated basis for the decision, but also the undisputed facts relating to the structural flaws inherent in state court approval of a resolution of federal claims over which it has no jurisdiction, *Matsushita II* lacks the "far-reaching implications for the conduct of class actions"[39] that Kahan and Silberman suggest. Particularly when the statute of limitations and the practicalities of litigation (including the enormous risk of sideline sitting) are considered, the opportunities for collateral attacks are quite limited and the possibility of abuses very small, if not nonexistent. On the other side are what Kahan and Silberman, and others they cite, recognize to be serious problems of plaintiff shopping and forum shopping that would go largely unremedied under their proposal because there is no real likelihood that the state courts will perform the role that the Ninth Circuit did in *Matsushita II.*

One other aspect of *Matsushita II* should not be overlooked before overreacting to it. Assuming that it is not overturned, the most likely result of *Matsushita II* would not be massive increases in collateral attacks but a recognition by defendants that the easiest way to

[37] 42 U.S.C. § 1997 et seq. (1994 & Supp. 1998).

[38] See id. § 1997e (Supp. 1998).

[39] Kahan & Silberman, supra note 2, at 765.

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settle controversies of this kind, and to be sure that they stay settled, is to have them settled in the federal courts, which have jurisdiction over all these claims. Of course, to the extent that the state claims have value, the federal court must properly assess those claims. And the federal court must also assure that the work done by state court counsel is properly compensated in the federal action, after consultation with the state court judge, if that is appropriate. Assuming that the settlement is substantively fair, and provided that all counsel in pending cases are on board, defendants have no reason to fear a federal court and every reason to seek one.

There will continue to be objectors, as there are in many class actions where there is no multijurisdictional problem, but the use of a federal forum for concluding the settlement of federal claims will remove the principal basis for undertaking collateral attacks. In short, leaving *Matsushita II* alone is far more likely to produce the result that Kahan and Silberman seem to want—a single proceeding that finally resolves an entire dispute—than is the far more complicated system that they propose. Furthermore, *Matsushita II* is far more likely to assure that the forum is a federal one rather than what Kahan and Silberman appear to agree is the less desirable state forum.

In essence, the natural forces of the market, as well as good sense, will cause defendants to change their practices in order to secure the peace that they claim to want, even if it will come at slightly increased prices. Only if *Matsushita II* turns out not to be the strong inducement to self-correction that it now seems will there be a need to consider other alternatives.

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