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# Adjudicatory Jurisdiction and Class Actions

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## INTRODUCTION

Problems of civil procedure that are daunting enough in ordinary litigation often assume nightmarish proportions when they arise in class actions. Control of the discovery process, the lawyer's obligations to the client, and the fashioning of effective relief are three such problems that come readily to mind. My subject is a fourth problem: the proper approach to adjudicatory, or "personal" jurisdiction.[1] Civil procedure scholars and conflict of laws scholars have written extensively about the proper approach to adjudicatory jurisdiction, particularly since the Supreme Court effectively reopened the question in 1977 in *Shaffer v. Heitner*.[2] The Court's 1985 decision in *Phillips Petroleum Co. v. Shutts*[3] brought into sharp focus the inadequacies of those theories for class action suits, which in turn has suggested their more general difficulties.

The propriety of personal jurisdiction over unnamed members of a defendant class obviously poses issues that cannot be solved simply by deciding that the defendant class representative is properly before the court. Similarly,

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* Assistant Professor of Law, The University of Chicago Law School. The ideas in this Article were, for the most part, inspired by my participation on a panel of the Civil Procedure Section of the American Association of Law Schools, in January 1986. My thanks go to Professor Karen Nelson Moore, for inviting me to participate. I also thank my co-panelists, John Sexton and Robert Casad, for their perceptive comments; Kevin Clermont, David Currie, Frank Easterbrook, Robert Kent, Larry Kramer, Geoffrey P. Miller, Faust Rossi, and Charles Wolfram, for their assistance; and Mary French, my Cornell research assistant, for her fine work.

1. Throughout this Article, I shall use the terms "adjudicatory jurisdiction," "judicial jurisdiction," and "personal jurisdiction" interchangeably. No part of the analysis depends on any distinction between a court's power over a person and its power over a thing. Thus, in rem and quasi in rem jurisdiction should be understood to be included within these terms.

2. 433 U.S. 186 (1977). For a representative sample of this commentary, see generally Abrams & Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction,* 69 MINN. L. REV. 75 (1984); Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction,* 1980 SUP. CT. REV. 77; Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts,* 66 CORNELL L. REV. 411 (1981); von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated,* 63 B.U. L. REV. 279 (1983); Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change,* 63 OR. L. REV. 485 (1984).

3. 105 S. Ct. 2965 (1985). For a thorough survey of the issues raised by *Shutts,* see Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1 (1986), and Kennedy, *The Supreme Court Meets the Bride of Frankenstein:* Phillips Petroleum Co. v. Shutts *and the State Multistate Class Action,* 34 U. KAN. L. REV. 255 (1985).

although it is rarely difficult to acknowledge the court's jurisdiction over an individual plaintiff who has (presumably) voluntarily brought his or her case to the forum, the court's power to resolve the claims of unnamed plaintiff class members is more problematic. Finally, when a plaintiff class sues only a named defendant or defendants, the mere fact that the defendant is confronting a class may be significant in assessing the propriety of the plaintiff's chosen forum.

The resolution of these difficulties with class action personal jurisdiction depends in significant part upon the underlying theory of adjudicatory jurisdiction to which one subscribes. There are at least two basic approaches to the issue. Under the first, the court's power to adjudicate the claims of the persons before it (including their rights in things) is constrained ultimately both by the limits on the reach of the sovereign that created the court and by the personal liberty interest of the litigants. Under the second, the court's power to adjudicate is constrained only by the personal liberty interest. If fairness and individual liberty alone measure the limits on state court jurisdiction, the propriety of any given state as a class action forum will necessarily depend on a standard balancing analysis, playing individual interests such as the interest in control of one's own litigation and the interest in securing effective relief off against factors like convenience for the litigation as a whole, avoidance of multiple court actions, and the like. If, on the other hand, state sovereignty places some limits on the reach of state courts, as I believe, then more scrupulous attention must be paid to the relationship between the state creating the court and the individual whose rights will be affected by the court, in class action cases as in others.

It has become well recognized that class actions are, for many purposes, a unique breed. It should not be surprising, then, that conventional rules for personal jurisdiction require some modification in the class context. What is often brushed over is the equally important fact that class actions themselves are not fungible. While I agree with a great deal of the criticism that has been leveled against the *Shutts* decision, it is important to ask whether any legitimate reasons have impelled the Court to reject the opposing extremes of a mandatory opt-in requirement, or a regime under which personal jurisdiction over a class representative alone sufficed for the entire class. I will suggest that there is an underlying problem in the kind of representative litigation that the courts often see in common question class actions that led to the *Shutts* result. Once that problem is recognized, it becomes possible to decide how different kinds of multistate class actions ought to be treated, taking into account both the sovereign limitations on state court jurisdiction and the differing relationships that exist between class representatives and the absentee members of classes. I conclude that a court's adjudicatory jurisdiction over the different kinds of parties in class actions—named representatives, in-state absentees, absentees with no links to the adjudicating forum—is a function of the cohesiveness of the class before the court and

of the representational nature of the particular class action. This in turn suggests a framework for deciding which class action personal jurisdiction rule should apply to the case at hand.

## I. Class Action Models

Unlike conventional litigation, in which the only likely problem with personal jurisdiction will arise in connection with specific defendants, class action personal jurisdiction problems will exist with respect to three sets of parties: absentee plaintiff class members, named defendant class representatives, and absentee defendant class members. As background for the personal jurisdiction analysis, it is useful to review briefly the two principal models of the class action and the role of personal jurisdiction in each.

Class actions can be divided conceptually into two groups: those following a joinder approach, and those following a representational approach.[4] The joinder model treats class actions as a straightforward device for bringing together similarly situated persons for the adjudication of common claims. It requires each individual member of the class, representative or absentee, to satisfy all substantive and procedural prerequisites for litigating in a given forum. The representational model, in contrast, treats the class action as a unique species of lawsuit, in which a properly qualified representative may appear in court on behalf of others, whether or not the others would have been entitled to sue on their own in the procedural sense. Personal, or adjudicatory, jurisdiction analysis is easy in the pure form of either model. In the joinder model, every member of the class—named or unnamed, plaintiff classes or defendant classes—is required to demonstrate either binding consent to the adjudicatory jurisdiction of the forum or "minimum contacts," such that the individual liberty interests of the litigants are adequately protected and the forum is not over-extending its regulatory reach. In the pure representational model, only the named representative of the class—again, whether a plaintiff or a defendant class—would have to satisfy consent or minimum contacts. The sweep of the representational model is tempered only by the absolute necessity of justifying the appropriateness of the representative who has appeared before the court. In the most comprehensive sense, the presence of the representative must be the legal equivalent of the presence of the absentees. Otherwise, serious questions about both the power of the adjudicating court to affect the absentees' legal rights and about the fairness of the proceeding would have to be answered.

In the real world, one seldom encounters "pure" representational or "pure" joinder class actions. Occasionally, however, one or the other will

4. *See* Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 Sup. Ct. Rev. 459.

appear, particularly if the focus is on only one procedural requirement. For example, some states and some federal statutes require absentee class members to "opt in" to a proposed class action, which means that absentees will not be considered part of the litigating group unless and until they affirmatively state their desire to join the class.[5] For personal jurisdiction purposes, an opt-in class action satisfies the joinder model, since the affirmative consent to join the action is consistent with general principles of jurisdiction by consent. Pure representational actions also exist. It may be easiest to see them in settings that would satisfy the class action categories found in Federal Rule of Civil Procedure 23(b)(1) and (b)(2), although I shall argue that they sometimes arise elsewhere, and that they do not always exist in the (b)(2) setting.[6] In considering the rules for personal jurisdiction in class actions, and whether the courts have properly analyzed those rules, it is important to ask why representational class actions are found where they are and not elsewhere, and what this says about the nature of the more commonly occurring class actions.

Despite the theoretical validity of representational class actions, the courts have never been willing to treat all class cases according to the representational model. The reason for this probably lies in the extreme difficulty of assuring adequacy of representation in the ex ante setting with which courts are confronted when a class action is filed. Federal Rule of Civil Procedure 23 gives as much guidance as any rule can, in requiring that the "claims or defenses of the representative parties are typical of the claims or defenses of the class,"[7] that the representative parties "will fairly and adequately protect the interests of the class,"[8] and, for the troublesome (b)(3) common question class actions, in directing the court's attention to factors such as "the interest of members of the class in individually controlling the prosecution or defense of separate actions,"[9] and "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class."[10]

Whenever a self-designated class representative appears before a court, there is a risk that the court will permit the action to proceed as a class action even though significant differences remain between the representative

5. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 216(b); PA. R. CIV. P. 1711(b) (optional opt-in classes for large claim groups or other special circumstances); Conn. Unfair Trade Practices Act, 42 CONN. GEN. STAT. § 42-110h(d) (repealed in 1984).

6. In most of this discussion, I do not refer to the state law variations on the federal class action rules. This is because the state rules are generally patterned on the federal rules, and the differences are generally immaterial for the points I am making. Distinctions exist, nevertheless, and care must therefore be taken in generalizing from the state court class action cases.

7. FED. R. CIV. P. 23(a)(3).

8. *Id.* at (a)(4).

9. *Id.* at (b)(3)(A).

10. *Id.* at (b)(3)(B).

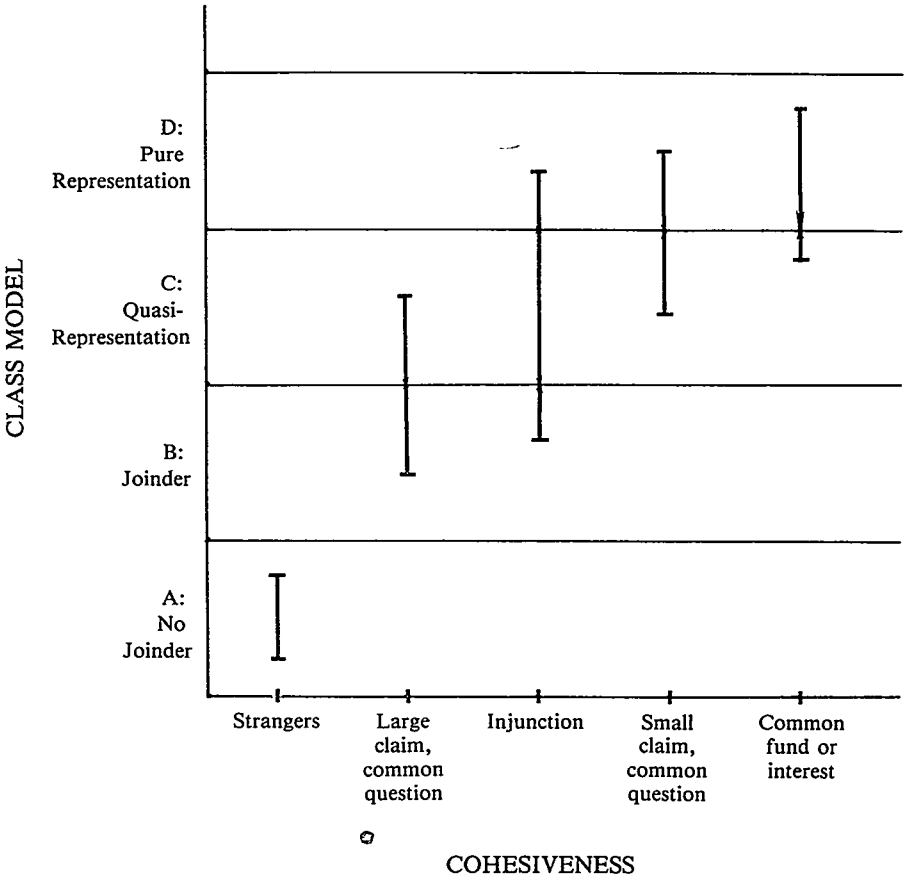
and the unnamed class members.[11] There is also a danger that the person with the greatest stake in the litigation will not be a class member at all, but will be instead the class lawyer.[12] It is true that if the intra-class differences are important enough, the court might refuse to certify the class, or the unnamed class members might avoid the effect of an unfavorable judgment by appealing on their own or by collaterally attacking the judgment. Nevertheless, this ex post possibility of correction must be recognized for the second-best solution that it is. Countless cases will incur the costs of litigating the first round before the ex post corrective measures can be implemented. Many times, a collateral attack on adequacy of representation will not succeed, since more must be shown than a lack of success during Round One. Perhaps most commonly, many unnamed class members will not be willing to undertake the burden of an appeal or collateral attack. Ex post devices are therefore inherently unable to assure adequacy of representation. The initial determination that a case is suitable for class treatment remains the most important one, flawed though it is. The courts, aware of the way in which the system inevitably works, have answered this problem by relaxing the pure representational model, where relaxation has seemed necessary to protect the due process rights of absentees.

The degree to which a court ought to move from the representational model toward the joinder approach is a function of the cohesiveness of the class before the court. The more cohesive the class, in all relevant respects, the more assured we are that any particular member who comes before the court seeking to be a class representative will in fact be capable of satisfactorily standing in for the absentees, such that their due process rights will be fully respected. In the chart on the following page, this approach is illustrated graphically. The horizontal axis represents increasing cohesiveness of the class. The vertical axis contains four possible models of group litigation, shown as different bands. The types of actions shown on the horizontal axis will not necessarily be confined, for modeling purposes, to one band of the vertical axis, but it is usually possible to eliminate some bands for any given kind of action. In the discussion that follows, I indicate what factors a court should consider in deciding where to place a particular class action.

The easiest case, of course, is the case of total strangers with nothing in common. If individuals cannot even meet the "same transaction [or] occurrence . . . and any [common] question of law or fact" requirements of Federal Rule of Civil Procedure 20, there is neither an efficiency reason to permit them to litigate unrelated claims together, nor is there any reason in

11. *See generally* Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982).

12. *See, e.g.*, Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 60-61 (1975).




fairness why they should be allowed to do so.[13] This is thus the limiting case at the joinder end, where even individual joinder would not be permitted, and certainly not class joinder. For personal jurisdiction purposes, as well as for every other purpose, each individual must meet every pertinent procedural requirement.

If the Rule 20 joinder standards (or their state equivalents) are met, named individuals would be permitted to combine their efforts in one lawsuit against

13. FED. R. CIV. P. 20(a) permits persons to join together as plaintiffs,
> if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

The rule also permits the joining of defendants, for which the standard is basically the same.

properly joined defendants.[14] In this case, a joinder-type class action, illustrated here as Band B, should also be permitted. If the differences of interest, stake, or motivation to sue among the class members are substantial—i.e., cohesion is at the minimum level necessary to sustain class treatment at all—proper regard for the rights of the absentees would not permit representational treatment. In a common question class action for substantial damages, for example, nothing less than an opt-in procedure should suffice to support the propriety of the class action. Some cases for injunctive relief might also involve such important differences among class members that opt-in procedures would also be required in order adequately to protect the interests of the absentees. From the personal jurisdiction standpoint, no problem can arise in any opt-in class action, since opting in easily satisfies the requirements for jurisdiction by consent.[15]

The more difficult personal jurisdiction problems arise in Bands C and D in the chart, which I have labelled "quasi-representational actions" and "pure representational actions." Many common question actions brought under the (b)(3) subcategory of the federal class action rule will be quasi-representational actions. The class representative should be allowed to satisfy a variety of procedural requirements on behalf of the class he or she represents, and devices such as notice to the absentees and a required opportunity for them to opt out of the class action will operate to inform the court of the actual cohesiveness of the litigating group.[16] In many of these, the class

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14. For examples of state class actions of this type, see Reardon v. Ford Motor Co., 7 Ill. App. 3d 338, 287 N.E.2d 519 (1972) (4,000,000 owners of various Ford and Mercury automobile models sue for a variety of defective product claims); Bigos v. Nationwide Mobile Home Parks, Inc., 105 Mich. App. 11, 306 N.W.2d 373 (1981) (class of lessees of mobile home park lots from defendant-owner); Klemow v. Time, Inc., 466 Pa. 189, 352 A.2d 12 (1976) (plaintiff class of persons with unexpired subscriptions to LIFE magazine sues to enjoin cessation of publication). *Cf.* Grigg v. Michigan Nat'l Bank, 405 Mich. 148, 274 N.W.2d 752 (1979) (less need for representation inquiry where opt-in procedure used).

15. *See* R. LEFLAR, AMERICAN CONFLICTS LAW § 29 (3d ed. 1977); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 100-02 (1971); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 27(1)(e), 32, 34 (1971). *See also* Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Adam v. Saenger, 303 U.S. 59 (1938).

16. The majority of state court class action cases fall into this broad category. In some cases, usually when the class itself has been weakly defined, the courts have refused to include nonresidents of the state in the class. *E.g.*, Spirek v. State Farm Mutual Auto Ins. Co., 65 Ill. App. 3d 440, 382 N.E.2d 111 (1978); Feldman v. Bates Mfg. Co., 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976). Using the excuse that it would be impossible to notify all class members, courts have rejected some class actions. *E.g.*, Cooper v. American Sav. & Loan Ass'n, 55 Cal. App. 3d 274, 127 Cal. Rptr. 579 (1976); Metropolitan New Orleans Chapter of the La. Consumers' League, Inc. v. Council of New Orlean, 391 So. 2d 878 (La. App. 1980). In at least one case, a court felt compelled to find minimum contacts between all class members and the forum, despite a rather strong showing of cohesiveness. Katz v. NVF Co., 119 Misc. 2d 48, 462 N.Y.S.2d 975 (Sup. Ct. 1983). Finally, one Illinois decision specifically recognized the relationship between cohesiveness and the way in which the interests of the absentees had to be protected. Frank v. Teachers Ins. & Annuity Ass'n of Am., 71 Ill. 2d 583, 376 N.E.2d 1377 (1978).

representative's satisfaction of the personal jurisdiction requirement will be enough to show adjudicatory jurisdiction over class members as well, not because of the watered-down consent indicated by failure to opt out, but because the interests of the representative coincide so perfectly with those of the class that it is appropriate to treat the absentees as present through their representative. If this coincidence of interests is lacking, then some other ground must exist to support the court's adjudication of the absentees' rights. Without a satisfactory alternate ground, two potentially fatal flaws would exist: either the due process rights of the absentees would be violated, or the court would have overreached the proper limits of its power, thereby offending the sovereignty of other states.[17]

In the pure representational cases, shown as Band D, the substantive interests of all the class members are identical (either by virtue of a legal relationship tying together each member of the class, or as a practical matter). This kind of identity, or cohesiveness among the class, justifies relying on the representative for all procedural requirements.[18] Having the representative before the court is exactly the same, in legal effect, as having each and every class member present. By definition, there can be no position that is not fully and fairly litigated before the court. So, for example, in the old equity class actions where a class of tenants sued their lord over onerous feudal incidents, or in the nineteenth century creditors' bill class actions where the creditor class sued the debtor company, or in the case where a

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17. At least since the Supreme Court's decision in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), there has been a debate over the degree to which the class action rule's requirements for notice and opt-out rights for absentees was required by the due process clause itself. *See, e.g.*, J. COUND, J. FRIEDENTHAL, A. MILLER & J. SEXTON, CIVIL PROCEDURE, CASES AND MATERIALS 644 (4th ed. 1985); R. FIELD, B. KAPLAN & K. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 1155 (5th ed. 1984). *Cf.* C. WRIGHT, THE LAW OF FEDERAL COURTS § 72, at 481-82 (4th ed. 1983) (expressing the opinion that "the better view is that there is no constitutional requirement of notice to members of the class in (b)(1) or (b)(2) actions"). The drafters of the 1966 amendment to FED. R. CIV. P. 23 explained that "[t]his mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject." FED. R. CIV. P. 23 advisory committee's notes (printed at 39 F.R.D. 73, 107 (1966)). In the text below, I argue that the need for individualized attention to absentees depends on the degree to which any given class is a monolithic litigating group, with perfect cohesion of interest.

18. The best examples of this kind of class action come from the old equity cases, such as Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915), Richmond v. Irons, 121 U.S. 27 (1887), and Beatty v. Kurtz, 2 Pet. 566 (1829). Again, the drafters of amended FED. R. CIV. P. 23 expressly called attention to the relationship between the cohesiveness of the particular class and the need for individualized protection for class members, in their comment on subsection (d)(2):

> Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum.

FED. R. CIV. P. 23(d)(2) advisory committee's note (printed at 39 F.R.D. at 106 (1966)).

group assigns its rights to enforce a legal obligation to a selected representative, such a close identity of interest between absentees and representative exists that adequacy of representation alone is enough, both in theory and in fact, to protect the absentees.[19] The adjudicatory jurisdiction of the forum court to affect the right of absentees is a function of the court's power to affect the representative before it. In all the pure representational cases, it is functionally impossible for the court to decide the representative's claim without at the same time deciding the claims of the absentees.

There should be nothing shocking about suggesting that the way in which the due process rights of the absentees will be protected will vary from case to case, and from class type to class type. The court's judicial jurisdiction will also vary, depending on the relationship between the adjudicating state and the class that the representative is proposing to bring before the court. In general, however, only in the purely representational actions should the court's judicial jurisdiction over the absentees be assumed, once jurisdiction is established over the parties before the court. Otherwise, the court's right to adjudicate the claims of the absentees (or other unwilling parties) must be assessed directly.

Adjudicatory jurisdiction contains a due process component, of course, even if one takes the power plus fairness approach instead of collapsing everything into "fairness" or individual liberty. However, care is necessary in describing the content of this variety of due process. The Supreme Court's decisions, and particularly the language of *Shutts,* imply that it is impossible to protect the due process rights of any class member without "notice and an opportunity to be heard." Taken to the limit, this language implies that individual notice satisfying the standards of *Mullane,*[20] plus an offered individual opportunity to be heard, must be available in every class action, whether it is a common question action for damages, or a group action for injunctive relief, or a common fund or other joint interest action. Rule 23, and its state counterparts, do not go this far;[21] thus, this extreme reading of the Court's decision would also imply that these rules are unconstitutional to that extent. It seems quite likely, however, that the Court had no intention of jettisoning the entire notion of representational litigation. Wholly apart from the fact that it expressly reserved decision on other types of cases, a

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19. *See generally* Yeazell, *From Group Litigation to Class Action,* 27 UCLA L. REV. 514, 1067 (1980); Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action,* 77 COLUM. L. REV. 866 (1977).

20. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950).

21. Notice is mandatory only in (b)(3) actions, and there the rule requires only "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23(c)(2). Although the matter is not free from doubt, this implied, at least prior to *Shutts,* that some unnotified members of a (b)(3) class may be bound by a judgment. For the post-*Shutts* state of affairs, see Miller & Crump, *supra* note 3, at 19-22.

more comprehensive application of the procedural due process rulings shows that the extreme reading of *Shutts* is not in fact the correct one, and that the Court would not so hold if a purely representational case were presented to it.

The Court has frequently noted that the precise content of procedural due process will depend on the nature of the private and governmental interests at hand.[22] Thus, though it may sound blasphemous to say, even notice and an opportunity to be heard may not be required by due process. A moment's consideration will show that the blasphemy is true. Neither notice nor an opportunity to be heard exists for its own sake. The basic right to procedural due process is a right to fair procedures, under all the circumstances.[23] In ordinary litigation, procedural due process also may serve both participatory and dignitary values.[24] Participatory values, however, are antithetical to the idea of representative litigation, if participation is taken to mean literal presence before the court. Ancient devices like the equitable bill of peace, and more modern class actions in which people could litigate as a group or not at all (such as the common fund type of action), appear to represent instances in which the chance to get relief through a representative is preferable to the impossibility of personal participation for all. On the other hand, the importance of participatory and dignitary values adds force to the argument that individualized treatment is dispensible only with the most cohesive litigating groups.

The principal way in which the formal right to fair procedures is protected is by affording interested parties a meaningful opportunity to be heard personally, usually prior to the challenged deprivation of life, liberty, or property. The function of notice in this scheme is to ensure that the opportunity to be heard is a meaningful one, and the function of the hearing itself is to protect the basic right against arbitrary deprivations. Notice here serves no independent purpose, as is readily apparent if one considers how quickly an argument that due process was satisfied simply because the government gave notice of a deprivation unaccompanied by an opportunity to be heard would be dismissed as frivolous. When a purported notice does not adequately inform the recipient of what is at stake, or when it does not reach the recipient sufficiently in advance of the hearing, it cannot serve its

22. *E.g.*, Cafeteria Workers v. McElroy, 367 U.S. 886, 894-95 (1961); Mathews v. Eldridge, 424 U.S. 319, 333-34 (1976).

23. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161-65 (1951) (Frankfurter, J., concurring).

24. For a discussion of participatory and dignitary values, as they relate to due process, see Michelman, *Formal and Associational Aims in Procedural Due Process,* NOMOS XVIII 126 (J. Pennock & J. Chapman, eds., 1977); J. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985).

intended function of making the opportunity to be heard count.[25] The fact, therefore, that notice is usually necessary in order to make an opportunity to be heard meaningful does not mean that notice is inevitably part of the due process equation. This point is essential to understanding when and where notice and a chance to participate in a class action are part of an absentee's procedural due process rights, and when they are not.

It is harder to deny an independent role for notice and an opportunity to be heard if the focus shifts to informal participatory and dignitary values. Taken to the logical extreme, however, even the purest of representational actions would be impossible if participatory values must always take precedence. This result seems unnecessary to a proper recognition of the absentee's interest in affecting his own fate. At the point where the quasi-representational action becomes a true representational action, the absentee's interest in vindication of functionally identical rights simply rises in importance above any interest in personal participation he may have had. Indeed, a raison d'etre of the pure representational action was the impossibility of bringing all concerned parties together into one action. Participatory values may well lie behind the lines I have indicated between a simple joinder-style class action and the quasi-representational action, on the one side, and between quasi-representational actions and true representational actions, on the other. The first-class mail notice and opt-out procedures are the middle line on a spectrum bounded by full-blown procedural formality for the absentees, on the one side, and exclusive reliance on adequate representation, on the other. In (b)(3)-type actions, tacit recognition of the participatory interests of the absentees may also lie behind the refusal to go all the way into the representational model.

With these basic points about class actions and due process in mind, we can turn to the requirements for personal jurisdiction in the specific kinds of class actions. I begin with the case of defendants, either as members of defendant classes or as named individuals facing a plaintiff class. Then I look at plaintiff class members. I conclude by suggesting how personal jurisdiction in class actions generally should be assessed, and what consequences I believe this approach would have for the maintenance of state court class actions in particular.

## II. ADJUDICATORY JURISDICTION OVER DEFENDANTS

### *A. Defendant Classes*

The fact that an action might be brought against a defendant class has been well established throughout the history of class actions. There has been

25. *See, e.g.*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14-15 (1978); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Gray Panthers v. Schweiker, 652 F.2d 146, 168-69 (D.C. Cir. 1981). *See also* Olim v. Wakinekona, 461 U.S. 238, 250 (1983) ("process is not an end in itself").

a sense, however, that special solicitude is necessary toward the members of defendant classes.[26] Any defendant, after all, hardly welcomes the idea of involvement in litigation. To be told either that one represents many other defendants in addition to oneself, or to be told or to learn somehow that one is a defendant, but someone else is in charge of the lawsuit, seems even worse. The Supreme Court's opinion in *Shutts*[27] made much of the difference between absentee class action plaintiffs and ordinary defendants, and the Court was careful to leave open the question of personal jurisdiction in a case against a defendant class. Disclaimers notwithstanding, the Court left the strong impression that nothing less than a full "minimum contacts" showing (or unambiguous consent) plus notice would be required to support a valid exercise of adjudicatory jurisdiction over defendant class members.

If this impression is correct, then there could never be a defendant class action binding the entire class where some members were unknown, since notice might not reach some of the unknown members. Similarly, even if notice reached every member of the class, if some class members lived beyond the adjudicatory reach of the forum's courts, their rights could not be affected by a decision in those courts. In short, the Court implied that there can never be such a thing as a purely representational defendant class action. This proposition goes too far. While joinder-style individual jurisdiction over defendant class members and individualized notice to them will often be necessary, it will not inevitably be required. The treatment of the defendant class members as individuals (joinder model) or as persons represented through the named defendant (representational model) will depend on the extent to which the class meets the requirements of the pure representational model. A look at the way this approach operates for different kinds of defendant class actions will illustrate in which cases a court need not have individual adjudicatory jurisdiction over each member of the defendant class.

Common question class actions for damages against defendant classes are exceedingly rare, for obvious reasons. Rule 23 and the state rules patterned after it contain no exceptions for defendant classes; thus, when a defendant class member receives notice of a (b)(3)-style class action, she should also be given the usual form allowing her to opt out.[28] When plaintiffs opt out

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26. Some courts have commented on this point. *See* McBirney v. Autrey, 106 F.R.D. 240, 244 (N.D. Tex. 1985); Marchwinski v. Oliver Tyrone Corp., 81 F.R.D. 487 (W.D. Pa. 1979). *See generally* Note, *Defendant Class Actions*, 91 HARV. L. REV. 630 (1978); Note, *Personal Jurisdiction and Rule 23 Defendant Class Actions*, 53 IND. L.J. 841 (1978).

27. Phillips Petroleum Co. v. Shutts, 105 S. Ct. 2965 (1985).

28. *See generally* 1 H. NEWBERG, CLASS ACTIONS § 4.60 (2d ed. 1985), noting that "[t]he most important special circumstances from a practical standpoint to discourage opt-outs from a Rule 23(b)(3) defendant class are those that furnish economic and litigational incentives for remaining as part of the class." The statement in text seems clear on the face of the rule, but there has been surprisingly little attention paid to the point. In Osborn v. Pennsylvania-Del. Serv. Station, 94 F.R.D. 23 (D. Del. 1981), the court certified a defendant class under (b)(3), but made no mention of the (c)(2) rights that go along with such certification. *See also* Miller & Crump, *supra* note 3, at 29 & n.200.

of a class action, they are out altogether. They are not joined as individual participants in the suit unless they take the further step of telling the court that they wish to intervene. The same is true of defendants. Thus, the potential defendant (b)(3) class member need only decide to opt out to be entirely free of the litigation, unless and until the plaintiffs choose to pursue him individually. Few defendants would decline to avail themselves of such an option.

Considering for a moment the occasional defendant who decides not to opt out, the personal jurisdiction question is twofold: first, does the court have jurisdiction to adjudicate the claim against the class defendant, just because it has jurisdiction over the defendant class representative; and second, must the defendant receive personal notice of the suit. These questions are distinct, although only the former goes to the court's sovereign power to affect the defendant's rights, and the latter is solely a function of due process concerns. We must reach the personal notice question only if we decide that basic adjudicatory competence is satisfied, since it is clear that perfect notice will not cure a lack of competence in the court.

For common question, (b)(3)-type actions against defendant classes, the better answer is that jurisdiction to adjudicate the defendant representative's claim should never be enough to establish the court's jurisdiction to adjudicate with respect to the absentees as well. Even if it is safe to assume that a plaintiff group would always rather receive $100 than nothing (the classic argument for a pure representational small claim plaintiff class action), it is not safe to assume that a defendant is indifferent as between the two options of losing $100 or losing nothing. Thus, in terms of the chart, no defendant (b)(3) class action, whether for large or for small stakes, would ever get into Band D. The next question is thus whether Band C provides enough, in the way of establishing the court's adjudicatory jurisdiction over the absentees and in respecting their due process rights to notice.

The theory under which the Court proceeded in *Shutts* was that the combination of individual notice and an opportunity to opt out of a class action was enough to support an inference of consent of the absentee class member to the court's adjudicatory jurisdiction.[29] The Court was therefore able to avoid the problem of the clear lack of contacts between most of the plaintiffs and the Kansas forum, as well as the staggering administrative burden a requirement of proof of contacts would have imposed in the context of that particular plaintiff (b)(3)-type action. I discuss below whether the consent theory of *Shutts* makes any sense for plaintiff class actions. It seems beyond dispute, however, that it is absolutely unacceptable for defendant class actions. An inference of consent to be sued from a failure to return an opt-out form is so far from the knowing, voluntary type of consent that

29. *Shutts*, 105 S. Ct. at 2975.

the Court usually requires to support adjudicatory jurisdiction, and so contrary to normal assumptions about human nature in lawsuits, that an argument to the contrary is close to absurd.[30] With consent unavailable, the other way in which a court might have jurisdiction to adjudicate claims against members of a defendant class is minimum contacts with the forum. The class might be limited, for example, to domiciliaries of the forum state, which would justify the state's general jurisdiction over them,[31] or the class and the action might be carefully defined so that specific jurisdiction would exist over each member.[32] From a strict competence standpoint, there is no reason why the court should not proceed to adjudicate such a case, and its power most definitely does not depend on any right to opt out of the suit.

This does not answer the analytically separate question of the type of notice, if any, to which the defendant class members would be entitled. The most that can be said is that the adequacy of notice would have to be assessed with respect to the absentee members themselves. One cannot rely solely on notice to the representative, once the pure representational model has been abandoned. The general standards of *Mullane* suggest that individualized notice may not be necessary in order to bind the entire defendant class, but these standards would have to be applied on a case-by-case basis.[33] If minimum contacts were lacking for some or all members of the defendant class, nothing short of jurisdiction by affirmative consent (illustrated in Band B of the chart) would suffice.

Actions seeking injunctive relief against a defendant class are more common, since no opt-out right exists under the procedural rules of most American jurisdictions for this kind of action. For example, a class of prisoners in a state might sue a class of all sheriffs and wardens for injunctive relief in a jail or prison reform case,[34] or a class of female teachers might sue a class of all school boards and school board members in a state, on a civil rights theory.[35] In this setting, it is again hard to imagine when personal

30. Traditionally, the standards for finding consent to be sued have been strict. *Compare* D.H. Overmeyer Co. v. Frick, 405 U.S. 174 (1972), *with* Swarb v. Lennox, 405 U.S. 191 (1972) (standards for valid *cognovit* clause) *and* County of Ventura v. Castro, 444 U.S. 1098 (1980) (Blackmun, J., dissenting from denial of certiorari). *See also* Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704 (1982). Even National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964), which upheld an advance contractual consent to be sued in a particular jurisdiction, offers no support for an inference of consent from silence.

31. *See* Thillens, Inc. v. Community Currency Exch. Ass'n, 97 F.R.D. 668 (N.D. Ill. 1983).

32. *Cf.* Lynch Corp. v. MII Liquidating Co., 82 F.R.D. 478 (D.S.D. 1979).

33. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-18 (1950).

34. *See, e.g.*, Marcera v. Chinlund, 595 F.2d 1231 (2d Cir. 1979), *vacated on other grounds sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968).

35. *See* Thompson v. Board of Educ. of Romeo Community Schools, 709 F.2d 1200 (6th Cir. 1983). *See generally* Note, *Certification of Defendant Classes under Rule 23(b)(2)*, 84 COLUM. L. REV. 1371 (1984).

jurisdiction over the absentees could ever be established by demonstrating jurisdiction over their representative. It is one thing to require persons properly brought into a lawsuit to channel their participation through one designated representative, but quite another to drag them in without either their consent or the establishment of their duty to respond to the court in question. Some joinder model type of direct reference to the absentees will be necessary, unless the plaintiff can prove on the facts of the case that the defendants are so monolithically joined in interest that the absentees must be legally viewed as present through their representative.

In these injunction cases, like the common question cases, it is quite unlikely that the defendant class members will wish to consent to the jurisdiction of the court, and so minimum contacts must again be shown. Many (b)(2) defendant class actions will involve defendant class members with inevitable ties to the state, since (b)(2) actions tend to be "public law litigation," but this simply means that the requirement will often be met, not that it does not exist. The separate question of notice to the absentee defendant class members will also arise in the injunction cases, but with more force than in the common question style cases, since the class action rules modeled on Federal Rule 23 do not require notice in a (b)(2) action. If the court has determined that the defendant class before it does not qualify for pure representational treatment, then it seems that the only way the due process rights of the absentees can be protected is again through application of the *Mullane* standards to them—that is, furnishing the best notice practicable under the circumstances, using a method that one truly desirous of notifying the absentees would adopt. If the injunction action contained aspects of jurisdiction by necessity, there is nothing in this analysis that would prevent some absentees from being bound by notice by publication, or another good faith, unsuccessful, effort to reach them.

Finally, we come to the question of personal jurisdiction over defendant class members involved in a (b)(1) type of class action. Many of the nineteenth century equitable class actions fit this pattern. Here, a purely representational defendant class action should be recognized, for the same reasons of necessity and practicality as the courts originally used in developing the procedural device of the class action. In a case like *Smith v. Swormstedt*,[36] for example, where a plaintiff class of Southern preachers sued a defendant class of Northern preachers over ownership of the proceeds of a fund that had been held jointly prior to the Civil War, no one court could have obtained personal jurisdiction over all the defendant class members, even under modern, expansive notions. The fund, however, was jointly claimed by all the Northern preachers. Defense by the representative defendants necessarily entailed defending the claims of the absentees. Furthermore, given the actuarial nature

36. 16 How. 288 (1853).

of the fund, and the insurance purposes for which it existed, partition was not an option. Under these circumstances, the Court found class treatment proper, cautioning only that "care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried."[37]

While cases of this type are not encountered frequently today, given the modern tendency to use the corporate form, and given modern regulation of common funds, in principle it is critical to recognize that conditions exist under which a forum might affect the interests of absentee defendants without establishing conventional adjudicatory jurisdiction over each and every one. The practical nature of the interest linking the absentees to those who are properly before the court suffices to legitimize the court's decision on the entire case. In a sense, the mistake of the 1938 drafters of original Rule 23 was not in perceiving that interest relationships had something to do with class actions; it was in using rigid and formalistic categories.[38] The analysis here is flexible enough to justify a representational defendant class action when the facts warrant, without forcing one or erroneously permitting one when they do not.

### *B. Named Defendants Facing Plaintiff Classes*

This section considers difficulties with class action personal jurisdiction that are more indirect in nature: problems with the application of the usual rules about general and specific jurisdiction over named defendants when the opposing party is a class. The usual rules lead to an unintentional and undesirable generosity in the number of possible fora available for the lawsuit, which naturally leads to irresistable pressures for forum-shopping. For either procedural or substantive strategic purposes, the class will often choose a forum with no real contacts with the claims.[39] This can happen whether the type of judicial jurisdiction being asserted over the defendant is specific or general.

In the discussion that follows, I take the facts of *Shutts* as the paradigm of the problems with personal jurisdiction over named defendants facing classes.[40] In the actual case, the Supreme Court was acutely aware of the

37. *Id.* at 303.

38. *See* Hutchinson, *supra* note 4, at 469-70; FED. R. CIV. P. 23 advisory committee's notes (printed at 39 F.R.D. 73, 98-99 (1966)).

39. Miller & Crump, *supra* note 3, at 57-59, refer to this as the "magnet forum" problem, and imply that after *Shutts* it must be solved through intelligent choice of law rules rather than through control of adjudicatory jurisdiction. While it is clear that constitutional limitations on the power of "magnet" states to apply their own law to cases with no ties to the forum will diminish the pull of the "magnet," and will also make class certifications more difficult (by destroying the common questions of law), I would not give up so easily on the search for sensible rules of adjudicatory jurisdiction as well.

40. *See supra* text accompanying note 5.

problems of the Kansas forum, although the Court solved the problem by forbidding Kansas from applying its own law, rather than by closing off the forum altogether.[41] This solution was inadequate. If Phillips actually had a right not to be sued in Kansas, subject to rules like the Kansas statute of limitations, it should not even have needed to submit to the Kansas court's understanding of other applicable laws. If, on the other hand, Kansas was a proper forum, then Justice Stevens' defense of the actual rules applied by the Kansas court should have been taken more seriously by the majority.[42] If the Court had approached *Shutts* principally as a jurisdictional problem, it could have paid more attention to the reasons why Kansas intuitively seemed like the wrong forum. The *Shutts* problem, as I shall call it, demonstrates the need for further refinement of the concepts of general and specific jurisdiction.

The facts of *Shutts* can be summarized easily.[43] The case was brought by Shutts, as representative for a plaintiff class of persons having royalty interests in Phillips leases. Shutts, on behalf of the class, claimed that Phillips had wrongfully failed to pay interest to the class on accrued royalty payments (known as "suspense royalties") that were withheld from the royalty owners pending regulatory approval of the increased gas rates on which the additional royalties were computed. The average claim of each royalty owner for interest on the suspended royalties was $100, making this the "small claim, common question, damages" type of class action. Although Shutts himself was a Kansas resident, approximately ninety-seven percent of the class members "had no apparent connection to the State of Kansas except for this lawsuit." Even fewer of the leases were in Kansas. In the three rate proceedings at issue in the case, the Kansas lease connection was as follows: for Opinion 699, three leases out of 7,389 were in Kansas; for Opinion 749, the ratio was fifteen out of 6,109; and for Opinion 770, the ratio was four out of 6,232. According to the Supreme Court's opinion, Shutts' own leases were in Oklahoma and Texas. Phillips' connections with Kansas, aside from its dealings with the Kansas royalty owners and the few Kansas leases, were unrelated to the case. Phillips is a prominent petroleum products company, with gas stations and other business throughout Kansas. It is a Delaware corporation with its principal place of business in Oklahoma.

Because no one had raised the point, the Supreme Court's decision in *Shutts* paid no attention to the question why Phillips had to answer in Kansas for its policy about interest on suspense royalties. The answer to that question is important, however, because it reveals that some states will be proper fora in multistate class actions of this kind and others will not—

41. *Shutts*, 105 S. Ct. at 2977-81.
42. *Id.* at 2981 (Stevens, J., dissenting in part).
43. This account is taken from the Supreme Court's opinion, *id.* at 2968-69, 2977.

a subtlety that the Court's analysis did not capture. Let us suppose, for example, that none of the plaintiffs had Kansas contacts: none was a resident of Kansas, none of the leases was there, and no other litigation-related contact existed. The Kansas court's jurisdiction over Phillips, we know from *Keeton v. Hustler Magazine, Inc.*,[44] is not defeated by the lack of plaintiff contacts. On these facts we would have a simple problem of ascertaining whether Kansas has general jurisdiction over Phillips. The Second Restatement of Conflicts suggests that jurisdiction would be proper if Phillips' Kansas business is "so continuous and substantial as to make it reasonable for the state to exercise such jurisdiction."[45] Use of the word "reasonable," however, does not shed any light on how much business is enough in any given case. In *Helicopteros Nacionales de Colombia, S.A. v. Hall,* the Court required "continuous and systematic" contacts between the defendant and the forum for suit on an unrelated claim, and it found that the standard was not met.[46] Phillips' contacts, on the assumed facts, would fall somewhere between those found insufficient in *Helicopteros* and those approved in *Perkins v. Benguet Consolidated Mining Co.*[47]

The question is therefore whether general jurisdiction to adjudicate the class claim against Phillips ought to exist in the Kansas courts. The answer depends on one's basic theory of personal jurisdiction. If the adjudicatory reach of a state's courts is a function of the proper reach of their sovereign regulatory powers, stricter requirements for suits on matters unrelated to in-state business may be necessary. If, on the other hand, the only interest served by personal jurisdiction is the protection of the individual liberty of the litigants—a "fairness" concern only—then the broad-based approach to general jurisdiction suggested by the Restatement and implicitly used in *Shutts* follows logically. No one would object to general jurisdiction in either Delaware or Oklahoma, for a class action or anything else, since it would certainly be fair to sue Phillips in either forum, and regulation of Phillips by either is clearly within its valid regulatory reach. In the constant accommodation among states of conflicting regulatory goals, there would be no sense in which either Oklahoma or Delaware would be perceived by other sovereigns to be overreaching, in the same way Kansas seemed to be.

The point of general jurisdiction theory is to permit suit in the defendant's "home"—the one or two places where a person or entity has settled. There is no need to worry about "purposefully availing" oneself of the domicile's benefits and protections, since the association with that place or those places is complete. General jurisdiction, in short, should not be found in every state where a defendant has a significant amount of business. If general

44. 465 U.S. 770. *See supra* note 11.
45. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 11, at § 35.
46. 466 U.S. 408, 416 (1984).
47. 342 U.S. 437 (1952).

jurisdiction were confined to those few places that can legitimately be viewed as an individual's or corporation's base of operations, the allocation of judicial business among the states would be accomplished more efficiently and more fairly, both to the states in question and, ultimately, to the litigants.[48] Stricter general jurisdiction standards, along these lines, would not hamper any state from providing as generous a specific jurisdiction test as the Constitution would tolerate. Such standards would mean, however, that Kansas could not exercise general jurisdiction over Phillips on the facts assumed here (absent a binding consent).

Given the importance of the forum, it seems certain that more stringent general jurisdiction standards would be a deterrent to forum-shopping. This is particularly true for any case that fits the *Shutts* pattern, where a nationwide class sues a company that does extensive business in many states. No class lawyer worth her salt would choose a state with hostile conflicts rules or unfavorable procedural rules, yet the chosen state might, like Kansas in *Shutts,* have no real interest in the litigation. We can grant that the choice of law holding of *Shutts,* which precluded the application of Kansas law on constitutional grounds, would keep disinterested states in line for choice of law purposes. Nevertheless, so-called procedural rules have thus far escaped the constitutionalization of choice of law. The forum will therefore control matters like the statute of limitations, discovery rules, judicial control or lack of it during the pretrial phase, and the nature of the local jury. These factors provide ample incentives and offer ample rewards for any potential forum-shopper.

While it is true that stricter general jurisdiction rules would create some inconvenience for some plaintiffs, even this "cost" of change may not be as great as it appears. For a multistate class action, it should not be difficult to find a named plaintiff from a state with valid general jurisdiction over the defendant. In *Shutts* itself, the other named plaintiffs were from Oklahoma, and Oklahoma was Phillips' principal place of business. A resident plaintiff class representative would not suffer any avoidable inconvenience, and the nonresident unnamed class members need do little or nothing during the pendency of the suit. The class device itself protects them from inconvenience. In non-class litigation, stricter general jurisdiction would mean the elimination of a few potential fora for plaintiffs. On the other hand, with the valid general jurisdiction places still available, as well as every specific

48. The only losers under this scheme would be plaintiffs who want to sue close to home. In class actions, of course, the way around this problem is to choose a named representative from the forum state. In non-class litigation, one has to ask why dispute resolution through litigation is such an unambiguous public good that we wish to facilitate plaintiffs' actions at the expense of an efficient allocation of business throughout the system. Within the United States, forcing a plaintiff occasionally to travel to another state to litigate does not seem like a high price to pay. In contrast, issues arise in transnational litigation that make allocations of business sensitive to the claims of competing sovereigns even more important.

jurisdiction forum, not much is lost. This seems a small price to pay for a reform that would help to solve a problem of the magnitude that forum-shopping is today in the United States.

Although most people have assumed that *Shutts* involved general jurisdiction over Phillips, might the actual case have proceeded on specific jurisdiction grounds? Shutts himself was a Kansas resident, and we can hypothesize another named representative, Doe, with one of those rare Kansas leases. If Doe, holding a Kansas lease, had sued Phillips individually on the suspense royalty interest claim, he undoubtedly could have brought the suit in Kansas. Specific jurisdiction is harder to assume if Shutts had brought an individual suit in Kansas, with respect to his Oklahoma and Texas leases, but if Phillips had engaged in enough voluntary and purposeful contacts with Shutts in Kansas, the case might fit the *McGee* pattern,[49] and Kansas again might be a permissible specific jurisdiction forum. The question, in both Doe's and Shutts' case, is whether the specific jurisdiction that exists with respect to the individual's claim against Phillips can be parlayed into jurisdiction for an entire class's identical claims.

The answer will depend on two variables, either of which could suffice to make the individual case of specific jurisdiction work for the class. The variables are (1) the kind of class action involved—representational or joinder—and (2) the relationship between the specific jurisdiction contacts for the individual claim and the contacts for the rest of the class's claims. If a small-stakes money damage class action is properly treated as a pure representational action, which the theory of public law litigation suggests it is,[50] then the contacts supporting the individual's claim against the defendants should support the entire class's claims. In this case, clearly the most difficult for this variety of pendent personal jurisdiction, the notion of practical identity of interest between the named plaintiff and the absentees is stretched to the limit. The defendant might not be enthusiastic about defending a claim for hundreds of thousands of dollars, rather than hundreds of dollars, but this is basically a convenience argument as long as one is satisfied that the forum is proper for the principal suit. If, on the other hand, the public law character of small claim class actions is disregarded or rejected, and

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49. McGee v. International Life Ins. Co., 355 U.S. 220 (1957). In *McGee,* the only contact between the defendant insurance company and the State of California was the one insurance policy held by the plaintiff's decedent. The Court found this was enough to sustain California's personal jurisdiction over the defendant, however, because the defendant had serviced the man's policy for years in California, and the case concerned the interpretation of the policy.

50. *See generally* Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281 (1976). Thus, for example, the Doe claim hypothesized would be less about the recovery of the $100 related to the Kansas lease than about private attorney general enforcement of the oil and gas regulatory scheme. The absentees all share the same interest in Phillips' adherence to proper legal standards of behavior, and they are all aggrieved by deviations from that standard, wherever they occur.

they are viewed as a simple aggregation of claims, specific jurisdiction with respect to the named plaintiff's claim probably should not support specific jurisdiction for the absentees' claims. Pure representational actions for injunctive relief would be analyzed in the same way, with the propriety of resting the entire suit on the specific jurisdictional links with the named plaintiff alone depending on the extent to which the public law litigation model is accepted.

The second case is far easier. Here, the specific jurisdiction over the defendant for the individual's case is not so much parlayed into jurisdiction for an entire class as it reveals that the rest of the class members have minimum contacts with the forum. The contacts that define the defendant's relationship to the forum also simultaneously define a class. Thus, in the case of the collapse of the skywalk in the Kansas City Hyatt Regency Hotel, Hyatt's contacts with Missouri for suits arising out of the collapse extend to every injured person's suit.[51] Assuming other requirements for class treatment could be met, everyone in the class has claims arising out of the same forum contacts of the defendant. Where a class of Los Angeles taxi cab users sued a taxi company for meter-rigging, the class definition assured California litigation-related contacts for all class members.[52] In another case, a class of veterans who had resided in North Dakota for a specified number of years sued to obtain a veteran's bonus that had been promised under state law.[53] No plaintiff could be a member of that class without the required North Dakota contacts. In these cases, the question whether the specific jurisdiction created by the defendant's contacts related to the named representative's suit can be extended to cover the rest of the class is academic. Just as in common fund actions, where the representative and the absentees all have an interest in the fund, and the state where the fund is located is a permissible specific jurisdiction forum, in many of these class actions, the same practical result will obtain.

In litigation against a class, it will often not be enough to find specific jurisdictional contacts between a defendant and the forum, if those contacts relate only to the claims of some class members. The application of general jurisdiction rules is also problematic, at least if those rules are taken to establish general jurisdiction over a defendant who does any significant business in the particular state, rather than requiring a more enduring relationship. In the case of the general jurisdiction rules, the solution I propose is to restrict general jurisdiction in all cases, which will have the incidental effect of curing the abuses found in class litigation. If specific jurisdiction is being asserted over a defendant, then it should either exist by definition

51. *See In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982).
52. Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).
53. Horst v. Guy, 211 N.W.2d 723 (N.D. 1973).

between the defendant and all class members, or the class itself should be of the purely representational variety. In the former case, even a joinder type of class action could be sustained; in the latter, the cohesiveness of the class, the practical difficulties posed by piecemeal litigation, and the frequent public law character of the claim could justify what would otherwise be an impermissible expansion of one specific jurisdiction claim to many other unrelated claims.

## III. PLAINTIFF CLASSES

The final problem for class action personal jurisdiction may well be the most pervasive one: what is the required relationship between a forum and absentee plaintiff class members, such that the forum has legitimate authority to resolve their claims?[54] Plaintiffs are obviously entitled to the protections of the due process clauses, just as defendants are. A class action in which representation is adequate will bind absentees just as effectively as named representatives, and thus plaintiffs have just as much to lose in theory as defendants. I hope to show in this section both that there is no mysterious exemption from the fundamental need for adjudicatory jurisdiction of a court, when the people at issue are plaintiff class members, and that this fact does not mean the death of multistate plaintiff class actions in the state courts.

The starting point must again be the Supreme Court's decision in *Shutts*,[55] since this was the precise issue put to the Court. There, the Court concluded that Kansas had adjudicatory jurisdiction over the claims of the absentee plaintiff class members, even though the record showed that most class members had no contacts with Kansas. In lieu of contacts, the Court was willing to rely on the failure of the absentees to return an "opt-out" form, when they received notice of the lawsuit and an opportunity to decide not to participate. This rationale, however, does not hold up under scrutiny, and it unnecessarily muddles the status of class action types that were not before the Court.

The Court began well enough, recognizing both that plaintiffs deserve due process protections and that absentee class action plaintiffs are not terribly

54. In the discussion that follows, I focus on the nature of the class, rather than on factors external to the class. The problem that I see with the four-factor test for mandatory class actions proposed by Miller & Crump, *supra* note 3, at 55, is that it appears to assume that the class before the court constitutes a proper litigating group. The four factors are (1) efficiency, (2) equity both for the class members inter se and for the defendant opposing the class, (3) the concern about distant forum abuse, and (4) the interest in individualized control. Under my scheme, class members would have to be treated as individuals unless the class qualified under the representational model. This would have the effect of addressing the four factors in a slightly different way.

55. Phillips Petroleum Co. v. Shutts, 105 S. Ct. 2965 (1985).

inconvenienced by litigation. Because of the lesser inconvenience, however, it concluded that a lesser showing of consent would suffice to support the Kansas court's adjudicatory jurisdiction over the absentees' claims. "Any plaintiff," the Court commented, "may consent to jurisdiction. . . . The essential question, then, is how stringent the requirement for a showing of consent will be."[56] The Kansas procedure, whereby absentees received notice by first-class mail which informed them of the suit and gave them a form enabling them to opt out of the litigation, was stringent enough for the Court. Opting out was not *pro forma,* the Court emphasized, since over 3,400 persons chose to opt out of the *Shutts* litigation itself. In reaching this conclusion, the Court relied heavily on two factors: first, small claim class actions would be practically impossible if an opt-in form of consent were required; and second, the due process protections of notice and an opportunity to be heard somehow reinforce the weaker opt-out variety of consent.

This reasoning commits the fundamental error of confusing the type of notice received with the basic adjudicatory competence of the court. Service of process and personal jurisdiction have been separate concepts for more than a century. The best notice in the world, and the most generous offer to participate, would not suffice to establish a court's jurisdiction to adjudicate an individual's claims, if the individual was not willing to submit to the court's power or was not within the sphere of that power. Thus, the much-discussed passage in *Shutts* that sets forth the procedural due process minima for plaintiff class actions is wide of the mark, as a look at it reveals:

> In this case we hold that a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant. If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calcuated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane,* 399 U.S., at 314-315. . . . The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.[57]

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56. *Id.* at 2975-76.
57. *Id.* at 2975 (footnote and citations omitted).

Only the last two sentences of that passage, dealing with opt-out rights and adequacy of representation, have anything to do with the judicial jurisdiction of the court. The remainder assume adjudicatory competence, and have to do with how the court must go about exercising it.

A court can establish its adjudicatory jurisdiction only through consent or minimum contacts.[58] In representational class actions, jurisdiction over the plaintiff (on either ground) suffices to establish jurisdiction over the rest of the class; in class actions that do not satisfy the prerequisites of the representational model, jurisdiction to adjudicate each plaintiff class member's claim must be established conventionally. The *Shutts* consent finesse, whereby consent can be inferred from a failure to opt out, does violence to the general theory of consent. First, as Miller and Crump point out, a court with no power over an individual should have no power to attach adverse legal consequences to the individual's refusal or neglect to answer a communication from that court.[59] Second, silence is a notoriously weak expression of consent. A putative customer's failure to object, after all, is not even sufficient to support a mail order merchandiser's claim to be paid for unordered goods.[60] Although the Court technically did not reach the counterclaim issue, it seems clear that it would not treat the absentees' failure to opt out as "real" consent, if the tables were turned and the defendant tried to file a counterclaim against the plaintiff class. In short, under normal standards for showing consent, the failure to opt out cannot pass muster. The Court's only expressed justifications for allowing it to do so here—that many states have been allowing opt-out multistate class actions, and that this form of litigation seems desirable—do not seem strong enough to override a right as fundamental as the right not to be deprived of property by a forum lacking jurisdiction.

There is an important difference between the threshhold act of being brought into a lawsuit, in which rights can be lost or vindicated, and playing by the rules of the game once the suit is validly underway. Many privileges afforded by the rules of the game, such as venue rules, the right to a jury as the trier of fact, and the right to complain about the manner or content of process, may be waived if not raised within the time prescribed by the rules.[61] If the Court in *Shutts* had required full-blown service of process on every absentee plaintiff class member, pursuant to the Kansas equivalent of Federal Rule 4, then an appearance plus a failure to object to personal jurisdiction would likewise have amounted to an unobjectionable waiver of the defense. The standards for service under Rule 4 and its state counterparts

58. *See* sources cited, *supra* note 11.

59. Miller & Crump, *supra* note 3, at 17.

60. Postal Reorganization Act, 39 U.S.C. § 3009 (1983).

61. *See* FED. R. CIV. P. 12(h)(1) (venue, invalid process, defective service of process); 38(d) (trial by jury).

are signficantly different from the notices required by the class action rules. Although service by first-class mail is an option under Rule 4(c)(2)(C)(ii), if no acknowledgement of service is returned, personal service or service at the individual's dwelling house (for an individual) is then required.[62] This initial safeguard of the absentee's interest is precisely what justifies a finding of waiver with respect to personal jurisdiction objections (the equivalent of jurisdiction by consent) when the defendant appears and is silent, and it is lacking in Rule 23(c)(2). Furthermore, had the opinion in *Shutts* relied on the functional equivalence of class action notice and service of process, class actions with unidentifiable absentees would have become even more problematic than the actual opinion made them.

Whether the result with respect to the *Shutts* class was nevertheless correct turns on one's view of small claim class actions for damages. If these actions belong in the pure representational category, then the decision of the plaintiff representative to bring the action in a particular state is enough to support the jurisdiction of the forum to rule on the claims of the remainder of the class as well. This is so as long as the plaintiff adequately represents the class, as the Court pointed out long ago in *Swormstedt*.[63] In the purely representational action, the rest of the requirements described in the excerpt above as mandated by the due process clause are no longer constitutionally compelled. This has, in fact, been the widespread assumption about class actions brought under rules like Federal Rule of Civil Procedure 23(b)(1) and 23(b)(2).[64] No one has ever thought that every kind of class action required the individual attention described in the *Shutts* opinion. Often the identity of many class members is not even known. Their opportunity to be heard is satisfied by the presence of their adequate representative, which is fully sufficient to protect their basic due process right to a fair hearing.

Public law small claim class actions for damages are probably best viewed as purely representational, at least as long as the absentee class members suffer none of the inconveniences and burdens of litigation, such as discovery, vulnerability to counterclaims, liability for costs and attorneys' fees, and the like, and as long as choice of law rules reasonably protect the parties' expectations. If one can literally sit at home in comfort, and maybe receive a check for $100 in the mail some day, and maybe not, the inference that her interests are wholly congruent with the class representative's interests is exceptionally strong. To the extent that passive participation in the litigation

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62. *See id.* at 4(c)(2)(C)(ii) - (D); 4(d)(1), 4(d)(3). Unless good cause can be shown for not returning the acknowledgement forms, the person served must pay the cost of personal service.

63. Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853).

64. *See, e.g.,* C. WRIGHT, *supra* note 13, at 482. *Compare id. with* Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691 (1982) (binding out-of-state persons to results of adjudication with respect to common insurance funds).

exposes class members to any or all of these burdens, the inference is weakened, and the pure representational model must be modified.

As a practical matter, the Supreme Court's decision in *Shutts* has probably foreclosed for the time being the possibility of classifying either state or federal court small claim damage actions as purely representational, no matter what can be said for this approach in principle. Nevertheless, the Court carefully limited its holding, and other representational actions may still be treated as such. Neither minimum contacts nor consent need be shown for the absentees in those cases, and the kinds of notice and other opportunities for the absentees to participate should remain where they are, in the discretion of the court. In cases where the court is not sure whether the action should be treated as purely representational, it should look to the practical cohesiveness of the litigating group.

In joinder model class actions, there is no escaping the need properly to justify the court's adjudicatory jurisdiction over the unnamed members of the class, either by showing the same kind of consent as is required in general litigation or by proving minimum contacts. If *Shutts* had involved large claims, for example, each absentee plaintiff class member should have had minimum contacts with the adjudicating forum, Kansas. If that could not be shown, a defense motion to dismiss should have been granted.[65] It is true that a minimum contacts requirement for absentee plaintiffs would cut off some potential fora, but not as many as one might think at first blush. Most state courts that have faced the question in multistate class actions have either explicitly or implicitly found minimum contacts between the plaintiff class members and the forum state. A minimum contacts requirement would mean the demise of a certain amount of forum-shopping, but that is not such a bad thing. In *Shutts,* a minimum contacts requirement would have forced suit in a jurisdiction with which all the plaintiffs had links, probably Oklahoma or Delaware, or, if there was such a place, a third state where all leasing policy was coordinated. In the old common fund cases, all members of a plaintiff class had contacts with the place from which the fund was managed.[66] The legitimate alternative to minimum con-

65. It may seem anomalous to allow the defendant to raise the rights of absentee plaintiff class members before the Court. The Supreme Court briefly addressed this problem in *Shutts,* and concluded that the defendant's interest in knowing the likely extent of a judgment against him was enough to support his personal stake in the litigation for article III standing purposes. The Court expressly refused to rely on the third-party standing cases. *Shutts,* 105 S. Ct. at 2971-72. Those who follow the Court's standing decisions may detect some tension between the liberal standards used in *Shutts* and the approach in, for example, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976), particularly since the eventual res judicata effect of a judgment is something that the adjudicating court may not predetermine, and it is of necessity speculative. On the other hand, defendants can complain about other plaintiff class failures to meet the Rule 23 criteria, on essentially similar grounds, and there is no good reason to bar a vigorously contended dispute on such technical grounds.

66. Hartford Life Ins. Co. v. Barber, 245 U.S. 146 (1917); Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915); Smith v. Swormstedt, 57 U.S. (16 How.) 288.

tacts would be an opt-in kind of class action, which some states have also used.[67] Either way, in the absence of a purely representational class action, the sovereignty-based concept of adjudicatory jurisdiction leaves a court with no choice but to establish judicial jurisdiction over all the parties whose rights will be concluded by the action.

## CONCLUSION

A sound theory of class action adjudicatory jurisdiction must rest in the first instance on a proper appreciation of the elements of the court's power to render a binding decision. That power flows from the relationship between the party before the court and the sovereign that created the court, whether the party is a plaintiff, a defendant, or a class member of either kind. The relationship is usually established by assessing the contacts between the party and the state or nation that created the court, although a knowing and voluntary consent to the court's jurisdiction also suffices. In the absence of this kind of consent, either general or litigation-specific contacts with the forum must exist.

Because class actions differ in the extent to which they satisfy the representational model, one cannot say a priori either that all class actions should proceed as long as the court has established its adjudicatory authority over the class representative, or that none may do so. Whether any given class action should be placed in the "pure representational" category should be viewed as a question of fact, since experience under the original version of Rule 23 of the Federal Rules of Civil Procedure showed the problems with attempts to generalize on the basis of legal interests. On the other hand, as the chart reproduced above illustrates, some kinds of class actions will almost always be purely representational, and others almost never. In addition to the common legal interests being asserted, the cohesiveness of the class as a practical matter will determine the propriety of using the representational approach. Once the conclusion has been reached that the class is representational in nature, further concerns with notifying absentee class members and allowing them to participate should be recognized as nonconstitutional. The only constitutional due process requirement that remains is that of adequacy of representation.

Where the interests of class members are likely to differ at too many points, so that the determination of adequacy of representation is subject to substantial error, a joinder model is preferable. There is no escape, for adjudicatory jurisdiction purposes, from carefully establishing the forum

67. Grigg v. Michigan Nat'l Bank, 405 Mich. 148, 274 N.W.2d 752 (1979); Klemow v. Time, Inc., 466 Pa. 189, 352 A.2d 12, *cert. denied*, 429 U.S. 828 (1976).

court's power to adjudicate the claims of each and every member of the class. This is often easily done, where the subject matter of the litigation practically defines a forum-associated class. Where it is more difficult, however, as it was in *Shutts,* the court should take whatever corrective measures are necessary to confine the litigation to appropriate limits: defining a class of in-state residents only; dismissing the class allegations; requiring the representatives to demonstrate minimum contacts; or seeking affirmative consents. Under the joinder model, even after power to adjudicate the class claims has been established, the absentees will often also be entitled to the ancillary due process protections of notice and a chance to participate.

In several respects, the analysis that I suggest would have the effect of limiting the number of potential courts in which litigation might proceed. This can be viewed as a desirable result, to the extent that choice among courts is branded as "forum-shopping," or as a retrograde imposition of out-dated state lines on worthy plaintiffs. I prefer the former characterization, since I view forum-shopping for the longest possible statute of limitations, or for the most sweeping constitutionally permitted choice of law rules, as undesirable. There is nothing wrong with selecting a court that is likely to favor one's case, as long as the state has a reasonable relationship to the parties who will be compelled to appear in its courts, but forum-shopping is not such an unambiguous "good" that it needs to be encouraged to its logical extreme.

Multistate class actions can play a useful role in achieving litigation efficiencies, both from the plaintiffs' side and from the defendants'. This should not be accomplished, however, either by sacrificing the rights of unnamed members of the class or by inflicting upon a defendant a class action in a forum where its activities did not make predictable the likelihood that it would have to answer to the entire class. Neither of these evils is present in the approach I have outlined here. It may not always be easy to decide whether the class before the court fits the representational model, but the fairness and the legitimacy of the adjudicating court's decision will hinge in the end on whether the class is a representational one, and if not, whether the rights of the absentees have properly been protected.